



Amendment No. 2  
of  
Contract No. NA150000056  
for  
Managed Concessions Agreement  
between  
Hat Creek Burger Company II, LLC  
and  
Levy Premium Foodservice, LLC  
and the  
City of Austin

1.0 The City hereby exercises the extension option for the above-referenced contract. Effective March 1, 2017, to February 28, 2018. No remaining options.

2.0 The total Contract authorization is recapped below:

Basic Term: 3/01/15 -- 02/29/16
Amendment No 1: Option 1 3/01/16 -- 2/28/17
Amendment No 2: Option 2 3/01/17 -- 2/28/18

3.0 MBE/WBE goals were not established for this contract.

4.0 By signing this Amendment the Contractor certifies that the Contractor and its principals are not currently suspended or debarred from doing business with the Federal Government, as indicated by the General Services Administration (GSA) List of Parties Excluded from Federal Procurement and Non-Procurement Programs, the State of Texas, or the City of Austin.

5.0 All other terms and conditions remain the same.

BY THE SIGNATURES affixed below, this Amendment is hereby incorporated into and made a part of the above-referenced contract.

Signature & Date: Lucas Lee 2-13-2017  
Printed Name: Lucas Lee  
Authorized Representative

Signature & Date: Beatrice Washington 2-13-17  
Beatrice Washington, Contract Compliance Specialist Senior  
City of Austin  
Purchasing Office

Hat Creek Burger Company II, LLC  
4407 Bee Cave Road, Suite 212  
Austin, TX 78746

Signature & Date: Katharine Putnam 2.13.17  
Printed Name: Katharine Putnam  
Authorized Representative

Levy Premium Foodservice, LLC, (Levy),



Amendment No. 1  
of  
Contract No. NA150000056  
for  
Managed Concessions Agreement  
between  
Hat Creek Burger Company II, LLC  
and the  
City of Austin

- 1.0 The City hereby exercises the extension option for the above-referenced contract. Effective March 1, 2016, the term for the extension option will be March 1, 2016 to February 28, 2017 and there is one remaining option.
- 2.0 The total Contract authorization is recapped below:

Basic Term: 3/01/15 – 02/29/16
Amendment No 1: Option 1 3/01/16 – 2/28/17

- 3.0 MBE/WBE goals were not established for this contract.
- 4.0 By signing this Amendment the Contractor certifies that the Contractor and its principals are not currently suspended or debarred from doing business with the Federal Government, as indicated by the General Services Administration (GSA) List of Parties Excluded from Federal Procurement and Non-Procurement Programs, the State of Texas, or the City of Austin.
- 5.0 All other terms and conditions remain the same.

BY THE SIGNATURES affixed below, this Amendment is hereby incorporated into and made a part of the above-referenced contract.

Signature & Date:

*Lucas Lee*

Printed Name:

*Lucas Lee*

Authorized Representative

Signature & Date:

*Beatrice Washington 2-23-16*

Beatrice Washington, Contract Compliance Specialist Sr  
City of Austin  
Purchasing Office

Hat Creek Burger Company II, LLC  
4407 Bee Cave Road, Suite 212  
Austin, TX 78746

Signature & Date:

*Kathleen Putnam 2/19/16*

Printed Name:

*Kathleen Putnam*

Authorized Representative

Levy Premium Foodservice, LLC, (Levy),



## **M E M O R A N D U M**

**City of Austin  
Financial & Administrative Services Department  
Purchasing Office**

**DATE:** February 25, 2015  
**TO:** Memo to File  
**FROM:** Sai Xoomsai Purcell, Senior Buyer Specialist  
**RE:** NA150000056

At the recommendation of Teresa Reddy, this MA has been raised for visibility/transparency purposes and serves as a means to track the time associated with the Agreement between Levy, its Subcontractor, and the City of Austin. There is no procurement function other than the creation of the MA to track time.

Hat Creek is a Subcontractor of Levy - this MA is not meant to be used by other City Departments.

## MANAGED CONCESSION AGREEMENT

Contract NA150000056

This Managed Concession Agreement is made by and between the City of Austin, a Texas home-rule municipality (City), Levy Premium Foodservice, LLC, (Levy), a Texas limited liability company, and Hat Creek Burger Company, ~~LLC~~, (Concessionaire),

II,

x AS

The City has a Catering and Concession Services Agreement with Levy to operate and manage the concessions and all food and beverage services at Austin Convention Center and Palmer Events Center (together, the "Center").

The Concession Services Agreement provides in part that Levy shall, on behalf of the City and subject to the City's written approval which may be withheld at the City's discretion, solicit, select, and manage the performance of concessionaires that provide services at the Center.

The Concessionaire wishes to provide certain goods and services at the Center.

The City, Levy, and Concessionaire therefore hereby agree as follows:

### ARTICLE 1: CONCESSIONAIRE RIGHTS AND RESPONSIBILITIES

1.1 **Grant of Concession and Catering Rights.** Concessionaire shall perform all of its obligations under this agreement in a manner that is consistent with the City's goal of providing superior customer service for the public. If the City, or Levy, on behalf of the City, notifies Concessionaire of any unacceptable levels of service or practices, Concessionaire shall immediately remedy those service deficiencies.

1.2 **Term.** Concessionaire's concession and catering rights as provided for under this agreement shall begin on March 1, 2015 and terminate on February 29, 2016. The Contract will be in effect for an initial term of twelve (12) months and may be extended in writing thereafter for up to two (2) twelve (12) month extension options, subject to the approval of the Contractor and the City Purchasing Officer or his designee.

1.3 **Sale of Products; Concession Locations.** The City grants to Concessionaire the right to conduct the sale of only those of Concessionaire's products identified on Exhibit A to this agreement. The products shall be of the price, packaging and size specified in Exhibit A. Levy, on behalf of the City, and Concessionaire may amend in writing Exhibit A during the term of this agreement. Concessionaire may not sell or provide for free or for charge any food, beverage, or other item or merchandise other than the products. The City has authorized Levy, in consultation with and subject to the ultimate approval of the City, to designate the locations from which the Concessionaire may sell the products (Concession Locations). Levy shall inform Concessionaire of Concession Locations and Concessionaire may sell products only from those Concession Locations. Concessionaire shall locate and re-locate to different Concession Locations as directed by the City or by Levy.

1.4 **Equipment; Signage.** Concessionaire shall provide, at its own cost, all equipment, serving pieces, utensils, storage containers, point of sale terminals, and all other supplies and equipment necessary for Concessionaire's sale of the products. The style, size, form, content, materials and location of all signs and advertising used by Concessionaire at the Center shall be subject to Levy's prior written approval.

1.5 **Oversight of Concessionaire's Activities.** Any and all approvals made by Levy to Concessionaire under this agreement shall be made on behalf of the City and are subject to the City's ultimate discretion. Levy, on behalf of the City, shall administer this agreement with respect to the oversight of Concessionaire's day-to-day performance under this agreement.

## **ARTICLE 2: EQUIPMENT, SUPPLIES; COMPLIANCE WITH LAWS**

2.1 Concessionaire shall be solely responsible for the maintenance and repair of all equipment, supplies, vehicles and improvements, if any, in the Concession Locations used by Concessionaire. Concessionaire shall be responsible for compliance with all Federal, State and local safety and health laws and regulations with respect to its operations. Concessionaire shall, at its expense, obtain all permits and licenses required for the conduct of its operations. Concessionaire agrees to comply, at Concessionaire's own expense, with the provisions of all city, local, state, and federal laws, statutes, codes, ordinances, regulations and other requirements that are applicable to Concessionaire and its employees performance of services under the Agreement. Concessionaire's employees shall at all times while operating a Concession Location at the Center pursuant to this Agreement comply with all applicable federal, state, and local laws, regulations, ordinances, and City and Levy policies. Concessionaire shall, at its sole expense, be responsible for complying with all menu labeling requirements applicable to the Concession Locations.

2.2 Concessionaire shall assure that all facilities and equipment are used in an appropriate manner consistent with industry standards and compliant with the Department of Health, City of Austin Health Department, or any other applicable entities or regulations.

## **ARTICLE 3: CLEANING RESPONSIBILITIES**

Concessionaire shall be responsible for maintaining a high standard of service, hygiene, cleanliness and sanitation in each of the Concession Locations and the surrounding areas within a twenty-five (25) foot radius from each Concession Location. Concessionaire shall be responsible for trash and garbage removal to a designated point of central pickup. Levy utilizes a third party agent to monitor sanitation and cleanliness within the Center and has the right to inspect all Concession Locations and to close down operations they deem unsanitary or in violation of basic food handling requirements.

## **ARTICLE 4: INVENTORY**

Concessionaire shall be responsible for maintaining sufficient inventory of the products to meet anticipated demand for the products. Concessionaire shall be solely responsible for ordering and transporting the products to and from the Concession Locations.

## **ARTICLE 5: SECURITY; INDEPENDENT CONCESSIONAIRE; PERSONNEL**

5.1 Security. Concessionaire is solely responsible for security for its fixtures, furnishings, equipment inventory and other personal property located in the Designated Areas.

5.1.1 Security for Designated Areas. Except as specifically set forth in this Article 5.1 of this agreement, Concessionaire is solely responsible for ensuring the security of all Concession Locations that Concessionaire uses. Concessionaire shall not alter, make any additions to, or interfere with any security system, electronic alarm system, fire system, or video system without prior consultation and written approval of the City. Concessionaire will not install or alter any physical doorways, rooms, or other areas of ingress and egress that would in any way limit the City's access.

5.1.2 Security staffing in support of any event is the exclusive authority and responsibility of the City. Concessionaire will not hire any security staff, without prior consultation and written approval of the City.

5.1.3 Access to the Center. Concessionaire shall exercise extreme caution and care with respect to the handling and use of access to the Center and access control devices provided by the City for entry to the Center. Concessionaire will immediately report any lost or missing control devices (including access cards, identification cards, temporary passes) to the City and will pay the City such fees and charges as are requested by the City for replacement of lost or destroyed control devices. Concessionaire shall be responsible for turning off all appropriate equipment and lights and locking all appropriate doors at the close of operations within the Center.

5.1.4 Security Policy. Concessionaire shall require its personnel to comply with the City's security policies. Concessionaire shall furnish a list of the names of Concessionaire's Personnel and Concessionaire's Employees and provide updates to said list of names to Levy monthly as changes occur.

### **5.1.5 Workforce Security Clearance and Identification**

5.1.5.1 Concessionaire acknowledges that its personnel will be interacting with the public, including from time to time, children, persons with disabilities, and the elderly, and that some of its employees will be responsible for handling cash transactions. Concessionaire warrants that it will take all reasonable steps to verify that its employees do not pose any unreasonable security risks with respect to the routine cash transactions involved in the operations of the Center and with the City's customer service goals.

5.1.5.2 Concessionaire, at its sole expense, shall obtain a certified criminal background report for each member of its personnel that works at the Center. The report may be obtained by reporting to one of the below governmental entities,

requesting the report (requestors may anticipate a two-week delay for State reports and up to a four to six week delay for receipt of a Federal report):

5.1.5.2.1 Texas Department of Public Safety for any person currently residing in the State of Texas and having a valid Texas driver's license or photo ID card.

5.1.5.2.2 The appropriate governmental agency from either the U.S. state or foreign nation in which the person resides and holds either a valid U.S. state-issued or foreign national driver's license or photo ID card;

5.1.5.2.3 A Federal Agency. A current Federal security clearance obtained from and certified by a Federal agency may be substituted.

5.1.5.3 Concessionaire shall obtain the reports for the employees prior to any onsite work commencement. Concessionaire shall not be required to provide actual background results with such reports for such Concessionaire's Personnel.

5.1.5.4 Concessionaire shall provide Levy a Criminal Background Report affirming that Concessionaire has conducted required security screening of Concessionaire's personnel to determine those appropriate for execution of the work and for presence on the City's property, provided that Concessionaire shall not be required to provide actual background results with such reports for such Concessionaire's Personnel. A list of all Concessionaire Personnel requiring access to the City's site shall be attached to the report.

5.1.5.5 Concessionaire shall provide the report described in Section 5.1.5.4 above with the list of the Concessionaire's Personnel, to the City (through the Center's Security Offices). The City will provide each of Concessionaire's Personnel a Concessionaire ID badge that is required for access to City property that shall be worn at all times by Concessionaire's Personnel during the execution of the work.

5.1.5.6 The Concessionaire shall retain the reports for 3 years and make them available for audit by the City during regular business hours. Notwithstanding any provision to the contrary in this Article, it is understood and agreed that Concessionaire shall only be required to provide evidence (as opposed to actual background results) that it has performed the required background checks to the City for compliance with the requirements set forth in this Article 5.

5.1.5.7 The City reserves the right to deny an ID badge to any Concessionaire Personnel for reasonable cause, including failure of a Criminal Background Check. Levy will notify the Concessionaire of any such denial no more than ten (10) days after receipt of the Concessionaire's reports. Where denial of access by a particular person may cause the Concessionaire to be

unable to perform any portion of the work of the Agreement, the Concessionaire shall so notify the City's Contract Manager, in writing, within five (5) calendar days of the receipt of notification of denial.

5.1.5.8 Concessionaire's Personnel will be required to wear the ID badge at all times while on the work site. Failure to wear or produce the ID badge may be cause for removal of an individual from the work site, without regard to Concessionaire's schedule. Lost ID badges shall be reported to the Levy (via the Center's Security Offices). Concessionaire shall reimburse the City for all costs incurred in providing additional ID badges to Concessionaire Personnel.

5.1.5.9 ID badges to enter and/or work on the City property may be revoked by the City at any time. ID badges must be returned to the City at the time of project completion and acceptance or upon removal of an individual from the work site.

5.1.5.10 Concessionaire is not required to obtain Criminal Background Check reports for delivery personnel, including but not limited to FedEx, UPS, Roadway, or other materials delivery persons, however all delivery personnel must present company/employer-issued photo ID and be accompanied by at least one of Concessionaire's Personnel at all times while at the work site. The City reserves the right to deny entrance to anyone whose identification card or control device is determined to be under restriction or invalid.

5.2 Independent Concessionaires. Concessionaire shall be an independent contractor of Levy. Concessionaire shall indemnify the City, its officials and employees, and Levy and its respective shareholders, officers, directors, partners, members, employees, agents and representatives, against any and all liability which may be asserted against them in connection with this Agreement and Concessionaire's performance hereunder.

5.3 Personnel. Concessionaire shall comply with all federal, state and wage and hour law requirements and obligations. Concessionaire shall be solely responsible for the following: (i) paying Concessionaire's employees at least the applicable living wage for all hours worked; (ii) paying Concessionaire's employees required premiums for overtime hours, spread of hours, and split shifts where required; (iii) paying Concessionaire's employees within the time period required by applicable law; (iv) providing Concessionaire's employees with meal and rest breaks as required by applicable law; (v) withholding all applicable taxes for Concessionaire's employees; (vi) providing unemployment and workers' compensation coverage for Concessionaire's employees; (vii) keeping all required recordkeeping documents pertaining to Concessionaire's employees; and (viii) properly completing all appropriate paperwork for the employment of such individuals, including, but not limited to, the I-9 form and applicable tax forms; and (ix) ensuring that no improper deductions are taken from the wages from Concessionaire's employees.

5.3.1 Concessionaire will maintain a staff of its employees on duty at the Concession Locations at a level and in a manner consistent with the operating standards



required by Levy and the City. Neither Concessionaire nor its employees are Levy or City employees. Neither Concessionaire nor its employees shall represent directly or indirectly that they are employees, agents, or legal representatives of Levy or the City. Concessionaire agrees its employees shall not be considered Levy or City employees under any circumstances, including, but not limited to, under the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Employee Retirement Income Security Act of 1974 and the Worker Adjustment and Retraining Notification Act, or any other city, local, state or federal laws, statutes, codes, ordinances, regulations or constitutions or common law. Although Concessionaire's employees are not Levy or City employees, all applicable policies and procedures set by Levy and the City must be communicated by Concessionaire to its employees and must be strictly followed. Concessionaire and its management, supervisors and employees must behave in a professional manner at all times while in or around the Center. Levy's and the City's rules with regard to employee ingress and egress and parking must be strictly followed. No alcoholic beverages, drugs, obscene or vulgar language or disruptive behavior is permitted anywhere in the Center including the parking lot. No smoking, eating or gum chewing is permitted in the Concession Locations or in the Center. The Concessionaire, its employees, subConcessionaires, and subConcessionaire's employees may not while on the City's premises use or possess a firearm, including a concealed handgun that is licensed under state law and use or possess alcoholic or other intoxicating beverages, illegal drugs, or controlled substances, nor may such workers be intoxicated or under the influence of alcohol or drugs, on the job. Levy may ban any Concessionaire's employee(s) from the Center, provided that the decision is based on Levy's established, written policies. Concessionaire hereby agrees that it will inform its employees that they must abide by Levy's policies and procedures. In the event that the Concessionaire's employees fail to follow Levy's policies and procedures, the Concessionaire's employee(s) will be subject to disciplinary action, up to and including permanent removal from the Center.

### 5.3.2 Staff.

5.3.2.1 Concessionaire shall employ a Manager/Supervisor (also known as Single Point of Contact (SPOC)) to oversee its operations at the Center. Should the City or Levy determine that the SPOC is not satisfactorily performing the duties of the SPOC, subject to compliance with all laws and this Agreement, Concessionaire shall, within thirty (30) days of receipt of written notice of such dissatisfaction, replace the SPOC with one who is satisfactory to the City. The SPOC must have a minimum of two (2) years of consecutive employment in a similar operation with comparable responsibilities. The SPOC must have experience in food and beverage service with particular emphasis upon effective marketing techniques. The SPOC must have a high degree of management expertise, as evidenced by prior food and beverage service management, high quality food production and service, and effective financial controls. The SPOC shall coordinate all Catering and Concession Services with subConcessionaires,

vendors, and/or Concessionaire's Personnel. The SPOC shall be responsible for all Catering and Concession Services provided by the Concessionaire and shall seek to avoid any disruption in service to Users of the Center.

5.3.2.2 Additional Concessionaire Personnel Obligations. Concessionaire shall:

5.3.2.2.1 require that the SPOC or his designee be on the Center premises during all operating hours.

5.3.2.2.2 recruit, employ, and train all employees necessary for the successful operation of Concessions and Catering Services; training of the employees must include safety training and dealing with customer complaints, or any other training appropriate for the job function, including but not limited to cash handling.

5.3.2.2.3 design and prepare specifications for uniforms for Catering and Concession employees to wear at all events, including visible name tag, and obtain the City's written approval of uniform design.

5.3.2.2.4 employ competent and orderly employees who are neat, clean, and professional in appearance, who act in a courteous and competent manner, and who treat all patrons in a respectful manner.

5.3.2.2.5 ensure that its employees, subConcessionaires, and subConcessionaire's employees do not use or possess a firearm on any City premise in accordance with City policy, and State Law, including but not limited to persons holding a State concealed handgun license permit.

5.3.2.2.6 ensure that its employees, subConcessionaires, and subConcessionaire's employees do not use or possess alcoholic or other intoxicating beverages, illegal drugs or controlled substances, nor may such workers be intoxicated, or under the influence of alcohol or drugs on the job.

5.3.3. If any employee of the Concessionaire, or any subConcessionaire or employee of a subConcessionaire is alleged to be incompetent, disorderly, to have violated any applicable City policy or procedure, civil or criminal laws, or is under the influence of alcohol or drugs, Concessionaire shall immediately conduct a due diligence to investigate the allegations. While the due diligence is being conducted Concessionaire shall remove such worker from the Center and from providing services pursuant to this Agreement, and may not employ such worker again at the Center without the Director's prior written consent and documentation from the Concessionaire demonstrating that the allegations are unfounded. The City shall not be liable for Concessionaire's relationship with its employees or subConcessionaires.

5.3.4 Equal Employment Opportunity. Concessionaire or Concessionaire's agent shall not engage in any discriminatory employment practice as defined in Chapter 5-4 of the City Code.

5.3.5 Americans With Disabilities Act (ADA) Compliance. Concessionaire, or Concessionaire's agent shall not engage in any discriminatory employment practice against individuals with disabilities as defined in the ADA.

## **ARTICLE 6: EVENT; HOURS OF OPERATION**

Levy shall determine, on behalf of the City and subject to the City's discretion, the events and the hours at which the products will be sold at the Center. Levy shall submit to the City for approval a schedule showing the events, hours, and products that have been approved for sale.

## **ARTICLE 7: FINANCIAL ARRANGEMENTS**

7.1 Commissions. Levy shall issue Concessionaire a check for commissions equivalent to Sixty percent ( 60 %) of the total product inventory Net Sales, less (A) inventory shortages, which shortages shall be charged at retail prices, and less (B) the cost of inventoried Products issued or sold by Levy and accepted by Concessionaire on net sales (the "Commissions"). "Net Sales" shall mean all receipts received by Concessionaire from sales of the products at the Center, less only retail sales taxes and other direct taxes imposed upon receipts collected from consumers by Concessionaire at the Center.

7.2 Method of Payment. All sums received by Concessionaire from sales of the products, together with cash register tapes substantiating such sales, will be delivered to Levy on the same day as received. A settlement sheet will be completed immediately following each event indicating Net Sales and the sales amount due to Concessionaire. Both Levy and Concessionaire will sign the settlement sheet. Levy shall pay, to the appropriate taxing authority, all retail sales taxes and other direct taxes imposed upon receipts collected from consumers or imposed on the Commissions. Levy shall withhold from Concessionaire the amount of any cash shortage determined to have occurred in the course of Concessionaire's operations. Levy will make Commission payments to Concessionaire within 20 days of the event date. Levy will deposit the remaining funds into the City's Catering & Concessions account.

### 7.3 Accounting and Control Procedures.

7.3.1 To ensure that all sums received by Concessionaire are delivered to Levy as required under this Agreement, Concessionaire shall utilize in its operations at the Center such cash and inventory controls as are required by Levy or the City and any such other procedures established by Levy or the City from time-to-time. Concessionaire shall maintain accurate books and records in connection with its operations hereunder and shall maintain such records for a period of at least three (3) years, which books and records shall be available for Levy's or City's inspection during regular business hours.

7.3.2 Concessionaire is responsible for full payment of all shortages as determined by physical inventory, cash register readings, cash receipts, spot audits, shopping service or any combination of the above or other control measures. If Levy identifies any discrepancies, then Levy will report the discrepancy to the City. The City's decision will be final and binding.

7.3.3 Levy shall inventory all products supplied by Concessionaire to assist in accurately determining the gross revenue earned by Concessionaire. Levy must verify all opening and closing inventory levels for each Concession Location, including all storage locations, on a daily basis with no exceptions permitted. Concessionaire must supply enough product to maximize revenue and Net Sales for each event. Concessionaire is responsible for maintaining a secure and sanitary storage location, if necessary.

7.3.4 Once inventory levels have been counted and agreed upon by Levy and Concessionaire, Concessionaire shall not add inventory to its stock, without Levy's prior written permission. All deliveries and transfers of product must be verified in writing by Levy prior to delivery to each Concession Location.

7.3.5 Inventory and control procedures are maintained by packaging and/or item counts. Packaging must be consistent with this process and allow inventory counts of packaging or product.

## **ARTICLE 8: REIMBURSEMENT OF ADDITIONAL SUMS**

8.1 If Levy has paid any sums or has incurred any expense for which Concessionaire agreed to pay or reimburse the City, or if the City is required to pay any sums or incurs any expense arising from this Agreement or arising from the failure or neglect of Concessionaire to perform or fulfill any of the terms or conditions of this Agreement, such amounts shall be deemed additional payments due hereunder; and Concessionaire shall reimburse the City for, or Levy may retain, the amount(s) thereof within ten (10) days following such demand(s).

8.2 Right To Audit. The Concessionaire agrees that the representatives of the Office of the City Auditor or other authorized representatives of the City shall have access to, and the right to audit, examine, or reproduce, any and all records of the Concessionaire related to the performance under this Contract. The Concessionaire shall retain all such records for a period of three (3) years after final payment on this Contract or until all audit and litigation matters that the City has brought to the attention of the Concessionaire are resolved, whichever is longer. The Concessionaire agrees to refund to the City any overpayments disclosed by any such audit.

## **ARTICLE 9: INSURANCE; INDEMNIFICATION**

9.1 Insurance: The following insurance requirements apply.

9.1.1 General Requirements.

9.1.2 The Concessionaire shall at a minimum carry insurance in the types and amounts indicated herein for the duration of the Contract and during any warranty period.

9.1.3 Concessionaire shall provide a Certificate of Insurance as verification of coverages required below to the City and Levy at the below addresses prior to Contract execution and within fourteen (14) calendar days after written request from the City.

9.1.4 The Concessionaire must also forward a Certificate of Insurance to the City and Levy whenever a previously identified policy period has expired, or an extension option or holdover period is exercised, as verification of continuing coverage.

9.1.5 The Concessionaire shall not commence work until the required insurance is obtained and has been reviewed by City and Levy. Approval of insurance by the City and Levy shall not relieve or decrease the liability of the Concessionaire hereunder and shall not be construed to be a limitation of liability on the part of the Concessionaire.

9.1.6 The City and Levy may request that the Concessionaire submit certificates of insurance to the City and Levy for all subConcessionaires prior to the subConcessionaires commencing work on the project.

9.1.7 The Concessionaire's and all subConcessionaires' insurance coverage shall be written by companies licensed to do business in the State of Texas at the time the policies are issued and shall be written by companies with A.M. Best ratings of B+VII or better.

9.1.8 All endorsements naming the City and Levy as additional insured, waivers, and notices of cancellation endorsements as well as the Certificate of Insurance shall be mailed to the following addresses:

City of Austin  
**Purchasing Office**  
P. O. Box 1088  
Austin, Texas 78767

Levy Restaurants at Austin Convention Center  
**Director of Operations**  
500 E. Cesar Chavez Street  
Austin, TX 78701

9.1.1.8 The "other" insurance clause shall not apply to the City and Levy where the City and Levy is an additional insured shown on any policy. It is intended that policies required in the Contract, covering the City, Levy and the Concessionaire, shall be considered primary coverage as applicable.

9.1.1.9 If insurance policies are not written for amounts specified in Paragraph 9.1.2, Specific Coverage Requirements, the Concessionaire shall carry

Umbrella or Excess Liability Insurance for any differences in amounts specified. If Excess Liability Insurance is provided, it shall follow the form of the primary coverage.

9.1.1.10 The City and Levy shall be entitled, upon request, at an agreed upon location, and without expense, to review certified copies of policies and endorsements thereto and may make any reasonable requests for deletion or revision or modification of particular policy terms, conditions, limitations, or exclusions except where policy provisions are established by law or regulations binding upon either of the parties hereto or the underwriter on any such policies.

9.1.1.11 The City and Levy reserves the right to review the insurance requirements set forth during the effective period of the Contract and to make reasonable adjustments to insurance coverage, limits, and exclusions when deemed necessary and prudent by the City and Levy based upon changes in statutory law, court decisions, the claims history of the industry or financial condition of the insurance company as well as the Concessionaire.

9.1.1.12 The Concessionaire shall not cause any insurance to be canceled nor permit any insurance to lapse during the term of the Contract or as required in the Contract.

9.1.1.13 The Concessionaire shall be responsible for premiums, deductibles and self-insured retentions, if any, stated in policies. All deductibles or self-insured retentions shall be disclosed on the Certificate of Insurance.

9.1.1.14 The Concessionaire shall provide the City and Levy thirty (30) calendar days written notice of erosion of the aggregate limits below occurrence limits for all applicable coverages indicated within the Contract.

9.1 **Specific Coverage Requirements.** The Concessionaire shall at a minimum carry insurance in the types and amounts indicated below for the duration of the Contract, including extension options and hold over periods, and during any warranty period. These insurance coverages are required minimums and are not intended to limit the responsibility or liability of the Concessionaire.

9.2 **Commercial General Liability Insurance.** The minimum bodily injury and property damage per occurrence are \$500,000 for coverages A (Bodily Injury and Property Damage) and B (Personal and Advertising Injuries). The policy shall contain the following provisions and endorsements.

9.2.1 Contractual liability coverage for liability assumed under the Contract and all other Contracts related to the project.

9.2.2 Concessionaire/Subcontracted Work.

9.2.3 Products/Completed Operations Liability for the duration of the warranty period.

9.2.4 Waiver of Subrogation, Endorsement CG 2404, or equivalent coverage in favor of The City of Austin and Levy Premium Foodservice, LLC.

9.2.5 Thirty (30) calendar days' Notice of Cancellation, Endorsement CG 0205, or equivalent coverage in favor of The City of Austin and Levy Premium Foodservice, LLC.

9.2.6 The City of Austin and Levy Premium Foodservice, LLC listed as an additional insured, Endorsement CG 2010, or equivalent coverage.

9.3 **Business Automobile Liability Insurance.** The Concessionaire shall provide coverage for all owned, non-owned and hired vehicles with a minimum combined single limit of \$500,000 per occurrence for bodily injury and property damage. Alternate acceptable limits are \$250,000 bodily injury per person, \$500,000 bodily injury per occurrence and at least \$100,000 property damage liability per accident. The policy shall contain the following endorsements:

9.3.1 Waiver of Subrogation, Endorsement CA0444, or equivalent coverage in favor of The City of Austin and Levy Premium Foodservice, LLC.

9.3.2 Thirty (30) calendar days' Notice of Cancellation, Endorsement CA0244, or equivalent coverage in favor of The City of Austin and Levy Premium Foodservice, LLC.

9.3.3 The City of Austin and Levy Premium Foodservice, LLC listed as an additional insured, Endorsement CA2048, or equivalent coverage.

9.4 **Worker's Compensation and Employers' Liability Insurance.** Coverage shall be consistent with statutory benefits outlined in the Texas Worker's Compensation Act (Section 401). The minimum policy limits for Employer's Liability are \$100,000 bodily injury each accident, \$500,000 bodily injury by disease policy limit and \$100,000 bodily injury by disease each employee. The policy shall contain the following provisions and endorsements:

9.4.1 The Concessionaire's policy shall apply to the State of Texas.

9.4.2 Waiver of Subrogation, Form WC420304, or equivalent coverage in favor of The City of Austin and Levy Premium Foodservice, LLC.

9.4.3 Thirty (30) calendar days' Notice of Cancellation, Form WC420601, or equivalent coverage in favor of The City of Austin and Levy Premium Foodservice, LLC.

9.5 **Endorsements.** The specific insurance coverage endorsements specified above, or their equivalents must be provided. In the event that endorsements, which are the equivalent of the required coverage, are proposed to be substituted for the required coverage, copies of the equivalent endorsements must be provided for the City's and Levy's review and approval.

## 9.6 Indemnity.

### 9.6.1 Definitions:

9.6.2 "Indemnified Claims" shall include any and all claims, demands, suits, causes of action, judgments and liability of every character, type or description, including all reasonable costs and expenses of litigation, mediation or other alternate dispute resolution mechanism, including attorney and other professional fees for:

9.6.2.1 damage to or loss of the property of any person (including, but not limited to the City, the Concessionaire, their respective agents, officers, employees and subConcessionaires; the officers, agents, and employees of such subConcessionaires; and third parties); and/or;

9.6.2.2 death, bodily injury, illness, disease, worker's compensation, loss of services, or loss of income or wages to any person (including but not limited to the agents, officers and employees of the City, the Concessionaire, the Concessionaire's subConcessionaires, and third parties),

9.6.2.3 "Fault" shall include the sale of defective or non-conforming deliverables, negligence, willful misconduct, or a breach of any legally imposed strict liability standard.

**9.6.3 THE CONCESSIONAIRE SHALL DEFEND (AT THE OPTION OF THE CITY), INDEMNIFY, AND HOLD THE CITY, LEVY, AND EACH OF THEIR RESPECTIVE SUCCESSORS, ASSIGNS, OFFICERS, EMPLOYEES AND ELECTED OFFICIALS HARMLESS FROM AND AGAINST ALL INDEMNIFIED CLAIMS DIRECTLY ARISING OUT OF, INCIDENT TO, CONCERNING OR RESULTING FROM THE FAULT OF THE CONCESSIONAIRE, OR THE CONCESSIONAIRE'S AGENTS, EMPLOYEES OR SUBCONCESSIONAIRES, IN THE PERFORMANCE OF THE CONCESSIONAIRE'S OBLIGATIONS UNDER THE CONTRACT. NOTHING HEREIN SHALL BE DEEMED TO LIMIT THE RIGHT OF THE CITY, LEVY, OR THE CONCESSIONAIRE (INCLUDING, BUT NOT LIMITED TO, THE RIGHT TO SEEK CONTRIBUTION) AGAINST ANY THIRD PARTY WHO MAY BE LIABLE FOR AN INDEMNIFIED CLAIM.**

## **ARTICLE 10: APPLICABILITY OF CONCESSION SERVICES AGREEMENT**

That Catering and Concessions Services Agreement between Levy and the City (Exhibit C) except as expressly modified by the terms and conditions set forth in this Agreement, shall apply to the City and Concessionaire such that: (i) Concessionaire hereby agrees to comply with all of Levy's requirements and will conform its operation and management of the Concession Locations to said requirements; (ii) Concessionaire shall have no rights in the Catering and Concessions Services Agreement, such document being incorporated herein solely for the purpose of establishing the respective obligations of Concessionaire and Levy with respect to the operation and management of the Concession. hereunder; and (iii) in the event the Catering and Concessions Services Agreement is terminated or expires, the Term of this Agreement shall similarly terminate or expire upon the effective date thereof, without any liability on the part



of Levy or the City, even if any such termination was alleged to have been the result of Levy's performance thereunder.

#### **ARTICLE 11: TERMINATION**

Early Termination. The City may, in its sole discretion, terminate this Agreement prior to the expiration of the Term by giving thirty (30) days' advance written notice to Concessionaire. The City may terminate this Agreement for no reason or any reason, which may include, but shall not be limited to, selling of unauthorized items, incorrect prices being charged, refilling of chargeable inventoried Products, Products being sold without their agreed upon chargeable inventoried item, selling from unauthorized locations, failure to record up sales in register, delivering Product to Concession Locations without Levy's verification, inadequate staffing levels, poor customer service, unacceptable behavior of staff, lack of clean uniforms, poor hygiene, cleanliness and sanitation, failure to provide or maintain attractive and functional equipment, poor product handling, failure to serve and/or store all Products at the appropriate temperature, general customer or Client dissatisfaction, failure to comply with Levy and/or Center rules and regulations, Center requirements and the overall Product quality and service provided. Concessionaire shall permit Levy to monitor the quality and control level of services provided by Concessionaire. If Levy determines that any aspect of Concessionaire's services do not meet required quality or service standards, Levy may recommend to the City termination of this Agreement.

#### **ARTICLE 12: ASSIGNMENT**

This Agreement shall not be assigned by Concessionaire without the written consent of the City, which consent may be withheld in the City's sole discretion.

#### **ARTICLE 13: NO GUARANTEES**

No Guarantees. Concessionaire acknowledges that Levy or the City have not made any guarantees with respect to the number of events or the level of revenue or profitability of the events at which Concessionaire shall provide its services. In no event shall Levy or the City have any liability to Concessionaire for the cancellation of any event at the Center.

#### **ARTICLE 14: PLACE AND CONDITION OF WORK**

14.1 The City shall provide the Concessionaire access to the sites where the Concessionaire is to perform the services as required in order for the Concessionaire to perform the services in a timely and efficient manner in accordance with and subject to the applicable security laws, rules, and regulations. The Concessionaire acknowledges that it has satisfied itself as to the nature of the City's service requirements and specifications, the location and essential characteristics of the work sites, the quality and quantity of materials, equipment, labor and facilities necessary to perform the services, and any other condition or state of fact which could in any way affect performance of the Concessionaire's obligations under the Contract. **The Concessionaire hereby releases and holds the City and Levy harmless from and against**

**any liability or claim for damages of any kind or nature if the actual site or service conditions differ from expected conditions.**

14.2 **Emergencies.** In the event of fire, disturbance, actual or threat of violence, or any other emergency, Concessionaire will immediately notify the proper public safety authority or emergency service. Additionally, Concessionaire shall immediately notify Levy of such emergency by calling the Center's 24 hour security dispatcher at the number supplied by the City. Concessionaire shall ensure that all Concessionaire's Personnel are trained to respond to fire, civil defense, bomb threats, evacuations, and other emergencies based on procedures established by City. If Concessionaire becomes aware of any condition in the Catering and Concession Service facilities that is unsafe or unhealthy, Concessionaire shall immediately notify Levy in writing. Concessionaire shall also advise City, in writing, of whatever action Concessionaire has taken to remedy any safety hazard. Concessionaire, Concessionaire's Personnel, Concessionaire's agents or subConcessionaires agree to abide by and practice all state and local safety standards and regulations. Concessionaire shall take all reasonably necessary and proper precautions to protect the safety of Concessionaire's Personnel and other persons and to protect all property from any damages from whatever cause.

14.3 **Fire Damage.** Concessionaire shall give City prompt notice followed by formal written notice of any fire damage occurring to the Center and a copy of all notices received by Concessionaire of any claim for bodily injury occurring at the Center.

## **ARTICLE 15: COMPLIANCE WITH HEALTH, SAFETY, AND ENVIRONMENTAL REGULATIONS AND STOP WORK NOTICE**

15.1 **Compliance with Health, Safety, and Environmental Regulations.** The Concessionaire, its SubConcessionaires, and their respective employees, shall comply fully with all applicable federal, state, and local health, safety, and environmental laws, ordinances, rules and regulations in the performance of the services, including but not limited to those promulgated by the City and by the Occupational Safety and Health Administration (OSHA). In case of conflict, the most stringent safety requirement shall govern. **The Concessionaire shall indemnify and hold the City and Levy harmless from and against all claims, demands, suits, actions, judgments, fines, penalties and liability of every kind arising from the breach of the Concessionaire's obligations under this paragraph.**

15.2 **Stop Work Notice.** Levy may issue an immediate Stop Work Notice in the event the Concessionaire is observed performing in a manner that is in violation of Federal, State, or local guidelines, or in a manner that is determined by the City to be unsafe to either life or property. Upon notification, the Concessionaire will cease all work until notified by Levy that the violation or unsafe condition has been corrected. The Concessionaire shall be liable for all costs incurred by the City as a result of the issuance of such Stop Work Notice.

## **ARTICLE 16: DISPUTE RESOLUTION**

16.1 If a dispute arises out of or relates to the Contract, or the breach thereof, the parties agree to negotiate prior to prosecuting a suit for damages. However, this section does

not prohibit the filing of a lawsuit to toll the running of a statute of limitations or to seek injunctive relief. Either party may make a written request for a meeting between representatives of each party within fourteen (14) calendar days after receipt of the request or such later period as agreed by the parties. Each party shall include, at a minimum, one (1) senior level individual with decision-making authority regarding the dispute. The purpose of this and any subsequent meeting is to attempt in good faith to negotiate a resolution of the dispute. If, within thirty (30) calendar days after such meeting, the parties have not succeeded in negotiating a resolution of the dispute, they will proceed directly to mediation as described below. Negotiation may be waived by a written agreement signed by both parties, in which event the parties may proceed directly to mediation as described below.

16.2 If the efforts to resolve the dispute through negotiation fail, or the parties waive the negotiation process, the parties may select, within thirty (30) calendar days, a mediator trained in mediation skills to assist with resolution of the dispute. Should they choose this option; the City and the Concessionaire agree to act in good faith in the selection of the mediator and to give consideration to qualified individuals nominated to act as mediator. Nothing in the Contract prevents the parties from relying on the skills of a person who is trained in the subject matter of the dispute or a contract interpretation expert. If the parties fail to agree on a mediator within thirty (30) calendar days of initiation of the mediation process, the mediator shall be selected by the Travis County Dispute Resolution Center (DRC). The parties agree to participate in mediation in good faith for up to thirty (30) calendar days from the date of the first mediation session. The City and the Concessionaire will share the mediator's fees equally and the parties will bear their own costs of participation such as fees for any consultants or attorneys they may utilize to represent them or otherwise assist them in the mediation.

16.3 Notwithstanding anything in this Agreement to the contrary, Concessionaire shall not be entitled to seek, claim or collect damages in excess of the actual and direct damages actually incurred or sustained as a result of a breach or violation of this Agreement. Accordingly, Concessionaire hereby expressly waives any right to seek, claim or collect any punitive, indirect, special, speculative or consequential damages in connection with, or related to, a breach or violation of this or any other agreement entered into between the parties (or their respective affiliated or related entities) to this Agreement.

#### **ARTICLE 17: NON-SUSPENSION OR DEBARMENT CERTIFICATION**

17.1 The City of Austin is prohibited from contracting with or making prime or sub-awards to parties that are suspended or debarred or whose principals are suspended or debarred from Federal, State, or City of Austin Contracts. By accepting a Contract with the City, the Vendor certifies that its firm and its principals are not currently suspended or debarred from doing business with the Federal Government, as indicated by the General Services Administration List of Parties Excluded from Federal Procurement and Non-Procurement Programs, the State of Texas, or the City of Austin.

#### **ARTICLE 18: ENTIRE AGREEMENT**

This Agreement represents the entire agreement between the City and Concessionaire. The terms and conditions of this Agreement supersede all prior negotiations, representations, or agreements, either written or oral. Business conditions may occasionally dictate modifications to the specific terms of this Agreement; however, no changes shall be binding on the parties unless reduced to writing and signed by the City and Concessionaire.

#### ARTICLE 19: GOVERNING LAW AND FORUM

**Jurisdiction And Venue.** The Contract is made under and shall be governed by the laws of the State of Texas. All issues arising from this Contract shall be resolved in the courts of Travis County, Texas and the parties agree to submit to the exclusive personal jurisdiction of such courts. The foregoing, however, shall not be construed or interpreted to limit or restrict the right or ability of the City to seek and secure injunctive relief from any competent authority as contemplated herein.

In witness whereof, the parties have caused duly authorized representatives to execute this Contract on the dates set forth below.

LEVY

By: Katherine Putnam  
Signature

Name: Katherine Putnam  
Printed Name

Title: General Manager

Date: 2/12/15

CITY

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

Name: \_\_\_\_\_  
Printed Name

Title: \_\_\_\_\_

Date: \_\_\_\_\_

CONTRACTOR'S NAME

By: Andrew Somers  
Signature

Name: Andrew Somers  
Printed Name

Title: COO

Date: 2/12/15

## **Exhibits**

**Exhibit A – Concessionaire's Products**

**Exhibit B – Non-Discrimination Certification**

**Exhibit C – Catering and Concession Agreement between Levy and the City of Austin**

INVOICE # 9150301

## Hot Creek Burgers

0.00 0.00

Net Hat Creek Burgers	\$0.00
Total Cost	\$0.00

## EXHIBIT B

City of Austin, Texas

### EQUAL EMPLOYMENT/FAIR HOUSING OFFICE

#### NON-DISCRIMINATION CERTIFICATION

City of Austin, Texas

Human Rights Commission

To: City of Austin, Texas, ("OWNER")

I hereby certify that our firm conforms to the Code of the City of Austin, Section 5-4-2 as reiterated below:

Chapter 5-4. Discrimination in Employment by City Concessionaires.

**Sec. 4-2 Discriminatory Employment Practices Prohibited.** As an Equal Employment Opportunity (EEO) employer, the Concessionaire will conduct its personnel activities in accordance with established federal, state and local EEO laws and regulations and agrees:

- (B) (1) Not to engage in any discriminatory employment practice defined in this chapter.
- (2) To take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without discrimination being practiced against them as defined in this chapter. Such affirmative action shall include, but not be limited to: all aspects of employment, including hiring, placement, upgrading, transfer, demotion, recruitment, recruitment advertising; selection for training and apprenticeship, rates of pay or other form of compensation, and layoff or termination.
  - (3) To post in conspicuous places, available to employees and applicants for employment, notices to be provided by OWNER setting forth the provisions of this chapter.
  - (4) To state in all solicitations or advertisements for employees placed by or on behalf of the Concessionaire, that all qualified applicants will receive consideration for employment without regard to race, creed, color, religion, national origin, sexual orientation, gender identity, disability, veteran status, sex or age.
  - (5) To obtain a written statement from any labor union or labor organization furnishing labor or service to Concessionaires in which said union or organization has agreed not to engage in any discriminatory employment practices as defined in this chapter and to take affirmative action to implement policies and provisions of this chapter.
  - (6) To cooperate fully with OWNER's Human Rights Commission in connection with any investigation or conciliation effort of said Human Rights Commission to ensure that the

purpose of the provisions against discriminatory employment practices are being carried out.

- (7) To require compliance with provisions of this chapter by all subConcessionaires having fifteen or more employees who hold any subcontract providing for the expenditure of \$2,000 or more in connection with any contract with OWNER subject to the terms of this chapter.

For the purposes of this Offer and any resulting Contract, Concessionaire adopts the provisions of the City's Minimum Standard Nondiscrimination Policy set forth below.

### **City of Austin**

#### **Minimum Standard Non-Discrimination in Employment Policy:**

*As an Equal Employment Opportunity (EEO) employer, the Concessionaire will conduct its personnel activities in accordance with established federal, state and local EEO laws and regulations.*

*The Concessionaire will not discriminate against any applicant or employee based on race, creed, color, national origin, sex, age, religion, veteran status, gender identity, disability, or sexual orientation. This policy covers all aspects of employment, including hiring, placement, upgrading, transfer, demotion, recruitment, recruitment advertising, selection for training and apprenticeship, rates of pay or other forms of compensation, and layoff or termination.*

*Further, employees who experience discrimination, sexual harassment, or another form of harassment should immediately report it to their supervisor. If this is not a suitable avenue for addressing their complaint, employees are advised to contact another member of management or their human resources representative. No employee shall be discriminated against, harassed, intimidated, nor suffer any reprisal as a result of reporting a violation of this policy. Furthermore, any employee, supervisor, or manager who becomes aware of any such discrimination or harassment should immediately report it to executive management or the human resources office to ensure that such conduct does not continue.*

*Concessionaire agrees that to the extent of any inconsistency, omission, or conflict with its current non-discrimination employment policy, the Concessionaire has expressly adopted the provisions of the City's Minimum Non-Discrimination Policy contained in Section 5-4-2 of the City Code and set forth above, as the Concessionaire's Non-Discrimination Policy or as an amendment to such Policy and such provisions are intended to not only supplement the Concessionaire's policy, but will also supersede the Concessionaire's policy to the extent of any conflict.*

UPON CONTRACT AWARD, THE CONCESSIONAIRE SHALL PROVIDE A COPY TO THE CITY OF THE CONCESSIONAIRE'S NON-DISCRIMINATION POLICY ON COMPANY



LETTERHEAD, WHICH CONFORMS IN FORM, SCOPE, AND CONTENT TO THE CITY'S MINIMUM NON-DISCRIMINATION POLICY, AS SET FORTH HEREIN, OR THIS NON-DISCRIMINATION POLICY, WHICH HAS BEEN ADOPTED BY THE CONCESSIONAIRE FOR ALL PURPOSES (THE FORM OF WHICH HAS BEEN APPROVED BY THE CITY'S EQUAL EMPLOYMENT/FAIR HOUSING OFFICE), WILL BE CONSIDERED THE CONCESSIONAIRE'S NON-DISCRIMINATION POLICY WITHOUT THE REQUIREMENT OF A SEPARATE SUBMITTAL.

**Sanctions:**

Our firm understands that non-compliance with Chapter 5-4 may result in sanctions, including termination of the contract and suspension or debarment from participation in future City contracts until deemed compliant with the requirements of Chapter 5-4.

**Term:**

The Concessionaire agrees that this Section 0800 Non-Discrimination Certificate or the Concessionaire's separate conforming policy, which the Concessionaire has executed and filed with the Owner, will remain in force and effect for one year from the date of filing. The Concessionaire further agrees that, in consideration of the receipt of continued Contract payments, the Concessionaire's Non-Discrimination Policy will automatically renew from year-to-year for the term of the underlying Contract.

Dated this 12th day of February, 2015

CONCESSIONAIRE

Authorized Signature

Title

Hart Creek Burger Co.  
[Signature]  
Coa

Exhibit C- Catering and Concession Services Agreement between City of Austin and Levy  
Premium Food Service, L.L.C.



Amendment No. 1  
to  
Contract No. MA 8200 NA120000154  
for  
Catering and Concession Services  
Between  
Levy Premium Foodservice, L.L.C. ("Contractor")  
and the  
City of Austin

- 1.0 The above referenced Contract (hereinafter "Contract" or "Agreement") is hereby amended as follows. These changes are effective for the contract period of October 1, 2012 through September 30, 2022 (the "Term"):
- 1.1 Insert Section 1.28: **Supplier** means any person or entity engaged, directly or indirectly, in the business of making a product or service available to Contractor.
  - 1.2 Section 4.1.1 is deleted in its entirety and replaced as follows: Contractor shall have the exclusive right to provide the Catering Sales and Concession Sales at the ACC in its own capacity or through a Subconcessionaire. Contractor shall have a non-exclusive right to provide the Catering Sales and Concession Sales at the PEC in its own capacity or through a Subconcessionaire. The Contractor's provision of Catering Sales and Concession Sales at the ACC and the PEC, in its own capacity or through a Subconcessionaire, shall be subject to and in accordance with Sections 4.1.2 and 4.1.3 of this agreement. Contractor and Subconcessionaires must receive the Director's written approval of each gift and novelty item prior to sale. The Director's approval of the sale of items bearing the Center's logo shall be based on the design, quality, and workmanship of each item and the approval shall not be unreasonably withheld. Gifts and novelties for special events are not within the exclusive right of Contractor under this agreement. Contractor, on behalf of the City, shall solicit and select concessionaires (Subconcessionaires) to provide the Catering Sales and Concession Sales at the ACC and the PEC. Contractor shall manage the activities of each Subconcessionaire on behalf of the City in accordance with a Managed Concessionaire agreement that shall be by and between the City, Contractor, and Subconcessionaire.
  - 1.3 Section 4.8 is deleted in its entirety and replaced as follows: Section 4.8 is deleted in its entirety and replaced as follows: During the Accounting Year, Catering and Concessions services are available to the City in the Center for up to twenty four (24) City sponsored events at forty percent (40%) of the retail cost, which shall be treated as

Gross Revenues. All City sponsored events require prior written approval of the Director or Assistant City Manager. Notwithstanding the provisions of this Article IV, the exclusive rights granted to the Contractor hereunder shall not be construed so as to prevent or prohibit the City from engaging in or contracting for, outside catering services for Center sponsored events, special events or events at the discretion of the City. City sponsored events shall not be subject to any surcharge for billed labor or any administrative fee subject to the prior written approval and discretion of the Director. Any discounted City events in excess of the amount allowed in this Section shall be treated as sales at the full retail cost for purposes of the Incentive Fee

- 1.4 Section 7.3 is deleted in its entirety and replaced as follows: Section 7.3 is deleted in its entirety and replaced as follows: The City shall provide up to thirty (30) complimentary parking spaces for Contractor's full-time employees assigned to this Agreement. The number of spaces may be adjusted on an annual basis upon the written mutual agreement of the City and Contractor. The City will charge Contractor a discounted rate of \$5.00 per parking space per daily usage for additional spaces.
- 1.5 Section 9.9.1 is deleted in its entirety and replaced as follows: By November 1, 2012, Contractor shall deposit One Million Five Hundred Thousand Dollars (\$1,500,000) into one or more restricted bank accounts (collectively, the "Restricted Capital Investment Accounts"), separate from the Catering and Concession Account. Contractor agrees that by December 31, 2012, there shall not be an account balance above the FDIC insured limit of \$250,000 in any account. The costs of maintaining such separate accounts shall be considered a Direct Operating Cost. The Restricted Capital Investment Account must be reported on Contractor's balance sheet. All Contractor purchases for expenditures from this Restricted Capital Investment Account shall be amortized on a straight line basis. The amortization expense shall be a Direct Operating Cost, as defined in Section 10.3 of the Contract. No expenditures from the Restricted Capital Investment Account are authorized without the prior written mutual agreement of the City and the Contractor. The expenditures from this account are subject to the procurement guidelines as outlined in Section 16.2.
- 1.6 Section 10.2.2, bullet point one which specifies: monthly bank statements of the Catering and Concessions account and the Restricted Capital Investment Account and the Contractor's bank statements related to sales of alcoholic beverages at Center; is amended to: monthly bank statements of the Catering and Concessions account and the Restricted Capital Investment Account.
- 1.7 Section 10.2.3 is deleted in its entirety and replaced as follows: The Contractor shall also provide a detailed schedule of all expenditures from the Restricted Capital Investment Account within thirty (30) days after the end of each quarter in the Accounting Year.

- 1.8 Section 10.3.18 is deleted in its entirety and replaced as follows: The travel costs of General Manager, or other staff from other Corporate facilities, who assist with workloads at the Center during peak demand period is subject to the City's travel policy with the exception of government hotel lodging rate for which Contractor shall obtain three (3) written quotes for lodging to be submitted, along with corresponding invoice, to the Director for review and approval of reimbursement. Unless approved by the Director in advance, all other travel and per diem expenses in connection with the Agreement for which reimbursement may be claimed by the Contractor under the terms of the Agreement must comply with the City's Travel Policy and the current United States General Services Administration Domestic Per Diem Rates (the "Rates") as published and maintained on the internet at:

<http://www.gsa.gov/portal/category/21287>

No amounts in excess of the Travel Policy or Rates for per diem expenses shall be authorized. The Director must approve in advance any such travel.

- 1.9 Section 10.3.19 is deleted in its entirety and replaced as follows: Subject to the prior written approval and discretion of the Director, the pro-rata salaries of Contractor personnel brought from other Corporate facilities who will assist with workloads at the Center during peak demand periods;
- 1.10 Section 10.9 the date is revised to December 17, 2012. The following sentence is added at the end of Section 10.9: Notwithstanding anything else in this Agreement, Contractor is permitted to supplement registers that are not part of the integrated POS system based upon event needs and with prior written approval of the Director.
- 1.11 Section 11.1 is deleted in its entirety and replaced as follows: Subject to the order of priority set forth in Section 9.8 herein and to the extent of available Gross Revenues, Contractor shall transfer to the City for deposit into Center's Repair and Replacement Fund and into Center's Marketing and Promotion Fund, a percentage of each Accounting Period's Gross Revenues. As of the Effective Date of the Agreement, the percentages are three percent (3%) of Gross Revenue for the Center Repair and Replacement Fund, and two percent (2%) of Gross Revenue for the Marketing and Promotion Fund. At the discretion of the Director, the actual percentage transfers shall be determined by the City on an annual basis based on forecasted needs and assessment. Written notice of the required percentage deposits shall be provided to the Contractor no less than thirty (30) days prior to the date upon which Contractor is required to submit its annual budget for the next applicable Accounting Year. All Contractor purchases for expenditures reimbursable from this fund shall be subject to applicable state law and City requirements for the procurement of goods and services as outlined in Article XVI. At the end of each Accounting Year, any unexpended funds in these accounts shall remain in the applicable fund for the next Accounting Year and

shall remain the property of the City. Federal excise taxes, State taxes or City sales taxes must not be included in the invoices amount. The City will furnish a tax exemption certificate upon request. With respect to both the Equipment Repair and Replacement Fund and the Marketing and Promotion Fund, within sixty (60) days of receipt of the goods and/or service with corresponding invoice, Contractor must submit a reimbursement request to the Director with such reasonable documentation (invoice, proof of payment, purchasing procedure used, etc.) as may be required by the City for the fund expenditure. For any Contractor reimbursement request for a fund expenditure that is not submitted to the Director within sixty (60) days of Contractor's receipt of the goods and/or service and corresponding invoice, the Contractor must submit documentation, including but not limited to due cause for failure to obtain prior permission, proof of attempt to contact the Director, and relevant reason for the purchase to the City for the late submittal. The Director shall determine in his/her sole discretion whether good cause exists and will consider factors such as the original reason for the purchase, the reason for the late submittal or failure to obtain initial approval (i.e. Contractor attempted to contact Director but Director was unavailable), and any other factors the Director deems relevant. In the event Contractor fails to provide a justification to the reasonable satisfaction of the Director, the Director may deny the reimbursement request and the applicable expenditure shall be borne by the Contractor. The City shall not be liable for any fund expenditure not authorized in writing by the Director.

- 1.12 Section 12.7 is deleted in its entirety and replaced as follows: Contractor shall cause audits of its accounting procedures related to its operations at the Center under this Agreement to be performed by a Regional Controller of Contractor. These audits shall be performed at least quarterly, at Contractor's expense, and submitted with the following month's financial packet during each year of the Agreement. Upon completion of each such audit, the auditor shall file with the Department a written statement in a format approved by the Department, stating when the audit was performed, the time period covered by the audit, the scope of the audit, and audit findings, conclusions and recommendations. The Contractor's home office shall file a written response to the auditor and to the Department, within thirty (30) days, for actions to be taken by Contractor, and when, to correct any deficiencies or implement any necessary improvements. As Contractor performs periodic audits of equipment and smallwares, Contractor agrees to share such audit information with the City.
- 1.13 Section 15.6 is deleted in its entirety and replaced as follows: Contractor and Director shall prepare a Quarterly Marketing and Promotional Plan for the City Manager's or designee's review and approval. Contractor must submit the initial Plan to the Director no later than thirty (30) days prior to the first quarter in the Accounting Year. Thereafter, Contractor must submit the Plan no later than thirty (30) days before the

beginning of each quarter of the Accounting Year. The Plan must itemize proposed expenditures from the Marketing and Promotional Fund.

- 1.14 Section 17.1.1 is deleted in its entirety and replaced as follows: Contractor shall have purchased and installed at the Center and have operational, to the reasonable satisfaction of the Director, an automated inventory control management system and an integrated point of sale system. Failure to provide the systems shall be considered a material breach of this Agreement.
- 1.15 Insert Section 17.1.1.1 which specifies: The City desires and expects to have a fully integrated point of sale system and, in that regard, will take steps to install a data line connecting the Austin Convention Center and Palmer Events Center at a cost funded solely by the City. Within thirty (30) days of installation of the data line and written notification from the City, Contractor shall provide equipment and training necessary to support connectivity and reporting between Austin Convention Center and Palmer Events Center. The cost of the necessary equipment and training will be considered a Direct Operating Cost.
- 1.16 Section 17.2 is deleted in its entirety and replaced as follows: The Contractor shall complete and submit to the Director an annual physical inventory of the equipment and smallwares, reconciled to system inventory by November 30th of each year. Contractor shall identify differences in addition to any pertinent information related to the reconciliation differences. The inventory report must be delivered to the Contract Manager on or before November 30<sup>th</sup> annually and upon termination or expiration of this Agreement. If any equipment or more than 1% of all smallwares are unaccounted for after such inventory, Contractor has sixty (60) days from finalization of the inventory to produce missing equipment or unaccounted smallwares or provide a written explanation and plan for replacement. The Director will determine the funding source based on written explanation and plan provided by the Contractor. If the missing equipment and/or unaccounted smallwares are due to the negligence or willful misconduct of Contractor; the cost of such replacement shall be borne solely by the Contractor. The City shall own all title, right and interest in the equipment and smallwares purchased by Contractor. During the year, as Contractor conducts cycle counts on the equipment and smallwares; the results of such cycle counts shall be shared with the Director.
- 1.17 Section 19.4.3 is deleted in its entirety and replaced as follows: Contractor shall obtain a Certified Criminal Background Report for all Essential Management Employees prior to such employee commencing work on City premises.
- 1.18 Section 19.4.4 is deleted in its entirety and replaced as follows: Contractor shall provide the City a monthly summary report of all Criminal Background Reports conducted in that month affirming that Contractor has conducted required security screening of

Contractor's personnel to determine those appropriate for execution of the work and for presence on the City's property, provided Contractor is not required to provide actual background results with such reports for such Contractor Personnel. A list of all Contractor Personnel requiring access to the City's site shall be attached to the report.

- 1.19 Section 19.4.5 is deleted in its entirety and replaced as follows: Upon receipt by the City of Contractor's report described in Section 19.4.4 above and the list of the Contractor Personnel, the City (through the Center's Security Offices) will provide each of Contractor's personnel a contractor ID badge that is required for access to City property that shall be worn at all times by Contractor's Personnel during the execution of work.
- 1.20 Section 20.2.2 is deleted in its entirety.
- 1.21 Section 20.2.3 is deleted in its entirety.
- 1.22 Section 21.1 is deleted in its entirety and replaced as follows: A performance bond executed by Contractor as principal issued by a surety company acceptable to the City in the sum of two hundred thousand dollar (\$200,000.00) must be tendered on or before the execution of the Agreement and must remain in force until such time that the final audit has been completed by Contractor in compliance with Section 12.5 of this Agreement and such audit accepted in writing by the City. City shall have the right to approve the terms of the performance bond prior to issuance. The performance bond shall be conditioned upon the prompt payment by Contractor of all sums due the City during the term of the Agreement as well as faithful performance by Contractor of all other obligations, conditions and covenants of this Agreement. Failure to obtain or maintain performance bond as required by this Agreement is a material breach and is grounds for terminating this Agreement.
- 1.23 Insert Section 21.2.1.5.1 as follows: Contractor accepts all responsibility and indemnifies the City from any and all losses caused by Suppliers either upon the premises of the City or in the course and scope of the Supplier's duties provided on behalf of Contractor.
- 1.24 Section 23.2.2.4 is deleted in its entirety and replaced as follows: Require that all Subcontractors obtain and maintain, throughout the term of their contract, insurance applicable to a Subcontractor's services in the type and amount specified for Contractor, with the City being an additional insured as its interest shall appear. All subcontractors are granted an exception with regard to providing evidence of excess liability coverage and all-risk property insurance. Property insurance required of a subcontractor shall be required if deemed necessary by the City's Risk Management Department.
- 2.0 All other terms and conditions remain the same.

BY THE SIGNATURES affixed below, Amendment No. 1 is hereby incorporated into and made a part of the above-referenced contract.



Signature: Cynthia Gonzales

Cynthia Gonzales  
Corporate Contract Compliance Manager  
City of Austin  
Purchasing Office

9/19/13  
Date

Signature: mmk

Michael T. Perlberg  
Secretary and Manager  
Levy Premium Foodservice, L.L.C.  
980 Michigan Avenue, Suite 400  
Chicago, IL 60611

7/19/2013  
Date

## CATERING AND CONCESSION SERVICES AGREEMENT

This Catering and Concession Services Agreement (this "Agreement") is entered into by and between the City of Austin, Texas, a municipal corporation and political subdivision of the State of Texas, ("City") and Levy Premium Foodservice, L.L.C., a Texas limited liability company authorized to do business in the State of Texas, ("Contractor").

### Article I Definitions

- 1.1 **Accounting Period** shall refer to each calendar month of a year. The first Accounting Period shall begin on October 1<sup>st</sup>, and the last accounting period shall end on September 30<sup>th</sup> so that the sum of all of the accounting periods in an Agreement year matches the Accounting Year.
- 1.2 **Accounting Year** means the fiscal accounting year of the City, which begins on October 1 and ends the following September 30. The initial Accounting year shall begin on October 1, 2012 and end on September 30, 2013.
- 1.3 **Agreement** means this Agreement and all exhibits attached hereto, together with the City's Request for Proposals #PAX0105 with addenda, and Contractor's Response to the City's Request for Proposals subject in all respects to the order of precedence set forth in Section 27.19 and its respective subsections.
- 1.4 **Center** means collectively the Austin Convention Center (ACC) and Palmer Events Center (PEC).
- 1.5 **City** means the City of Austin, Texas.
- 1.6 **Catering and Concession Services** means the privileges granted to and duties imposed upon Contractor by this Agreement.
- 1.7 **Catering and Concession Account** means the bank account described in Section 9.7.
- 1.8 **Catering Sales and Events. Catering Sales** means any pre-arranged food or beverage function of multiple Users, where payment for the entire event rests with one individual or company. Catering Events are those where Contractor's fees are billed to a single User, rather than to consumers at large patronizing Concession Services. Catering Events vary in size and include, but are not limited to marketing the services, food and beverage service to banquets, meetings, and backstage service. Catering Sales include planning of menus; purchasing, preparation, set-up and service of all food, beverages, linens, plates and flatware; provision and management of all food servers and bartenders; and food event clean-up and trash removal. Contractor shall have the exclusive right and obligation to provide catering for all events that are not specifically exempted under this Agreement.
- 1.9 **Concession Sales and Services. Concession Sales** means all sales of food and beverages sold from permanent or portable food and beverage stands, carts, and kiosks to individual customers except from those concessions specifically exempted under this Agreement. Concession Services are those in which consumers are charged separately for items of food and beverages. Contractor shall have the exclusive right and obligation to provide standard concession services for all Center events for which food or beverage concessions are required.
- 1.10 **Department** means the Austin Convention Center Department.
- 1.11 **Direct Operating Costs** means all costs and expenses incurred by Contractor in the operation of the Catering and Concession Services including those items as described in particular detail in Section 10.3.

- 1.12 **Director** means the Director of the Department, or his/her designee.
- 1.13 **Effective Date** means October 1, 2012.
- 1.14 **Financial Statements** means balance sheet, income statement, and statement of cash flows prepared in accordance with Generally Accepted Accounting Principles of the United States of America and any other financial reports or statements reasonably deemed necessary by the Director in a format reasonably acceptable to the Director pertaining in each instance to the Catering and Concession Services or a portion thereof.
- 1.15 **General Manager** means the individual retained by Contractor to oversee the performance of Contractor's obligations under this Agreement and to manage the day-to-day Catering and Concession Services at the Center. The General Manager shall be located at the Austin Convention Center and, except in instances in which the Director provides prior written approval, shall be assigned exclusively to Contractor's obligations under this Agreement.
- 1.16 **Gross Revenues** means the total revenue (cash or credit) including interest earned from the deposits in the Catering and Concession Account and any administrative fee, which is not intended to be a tip or gratuity for the benefit of service employees, charged by the Contractor, at the Center from the operation of the Catering and Concession Services, whether collected or uncollected, accruing from or realized by the Contractor less (a) sales taxes, gross receipts tax, or similar tax, the amount of which is determined by the amount of sales made, and which is directly payable to the taxing authority by Contractor, (b) service or discount charges on credit card sales, (c) tips and gratuities which are disbursed to employees, and (d) such other exclusions (including mutually agreed discounted sales) which may be agreed to in writing by Contractor and the Director.
- 1.17 **Incentive Fee** is the fee payable to Contractor as set forth in Section 9.5, the maximum amount of such fee being payable to Contractor contingent upon Contractor meeting established performance measures as set forth in such Section 9.5.
- 1.18 **Master Billing** means a billing process where the Department bills the Users for the combined costs of the facilities, and the Catering and Concession Services.
- 1.19 **Net Profit** means for each Accounting Period, the amount by which Gross Revenues exceed the sum of (a) all Direct Operating Costs and other expenses of Contractor, and (b) the contribution required under this Agreement to the Center Equipment and Repair Fund and the Center Marketing and Promotion Fund, , items (a) and (b) hereinafter the "Gross Expenses"). **Net Losses** means for any Accounting Period, the amount by which the sum of Gross Expenses exceeds Gross Revenues.
- 1.20 **Novelty Services** shall include but not be limited to vending machines in the Center, coat check services, shoe shining services, and sales in connection with the Center's retail store.
- 1.21 **Offer** means Contractor's proposal, dated November 22, 2011, submitted to the City in response to the City's Request for Proposal #PAX0105.
- 1.22 **Outside Caterer** means a business entity (other than Contractor) engaged by a User or the City to provide food and non-alcoholic beverages for a function or event at the Center to the extent a User or the City is permitted to obtain such engagement in accordance with the terms of this Agreement.
- 1.23 **Periodic Fixed Fee** means the fee payable to Contractor for the Catering and Concessions Services as described in Section 9.2.
- 1.24 **Pre-Operating Expense** is the amount of money Contractor needs to prepare for the Effective Date. The not to exceed amount of the Pre-Operating Expense is \$224,053. This amount will be divided equally in twelve (12) monthly amounts over the first year of the Term and shall be deducted as a Direct Operating

Cost. City may request acceleration of reimbursement of the Pre-Operating Expense. The Pre-Operating Expenses are subject to provisions in Section 10.3, including but not limited to, the City's travel policy. Any travel costs in excess of City policy will not be considered a Direct Operating Cost, the cost of which shall be borne by the Contractor. For Pre-Operating costs only, salaries, costs, and expenses of non-resident or Contractor's Corporate staff will be considered a Direct Operating Cost, if approved by the Director.

- 1.25 **Repair and Replacement Fund, and Marketing and Promotion Fund** means the two separate funds established in the City Budget for the Department for the expenditures described in Article XI.
- 1.26 **Subcontracts and Subcontractors** means any person or any entity, other than Outside Caterers, who contracts with Contractor to provide goods or services to patrons at the Center.
- 1.27 **User** means any person or entity renting space in the Center for exhibitions, conventions, or trade shows, or for other uses authorized by the City.

## Article II Term of Agreement

- 2.1 This Agreement shall begin on the Effective Date and expire on September 30, 2022 (the "Term"), subject to any rights or early termination set forth in this Agreement.

## Article III Contract Administration

- 3.1 Contract Administration. Contractor shall communicate all Catering and Concession Services matters to the Director. All matters requiring approval by the Director must be approved in writing. Within thirty (30) calendar days of the Effective Date of this Agreement, the City shall provide Contractor with a contract monitoring spread sheet for use in ensuring that Contractor meets all of its obligations pursuant to this Agreement.
- 3.2 Designation of Key Personnel. The Contractor's Contract Manager for this engagement shall be the General Manager. The City's Contract Manager for the engagement shall be the Guest Services Manager/Purchasing Manager of the Center. The City and the Contractor shall endeavor to keep the same Contract Managers assigned to this Agreement throughout its term, provided that the foregoing shall not be construed as a prohibition against replacing any Contract Manager if a party elects to do so in its reasonable business judgment or is otherwise required to do so under applicable circumstances. In the event that the Contractor replaces their Contract Manager, the replacement will be an individual having equivalent experience and competence in executing projects such as the one described herein. Additionally, the Contractor will promptly notify the City Contract Manager and obtain approval for the replacement. Such approval shall not be unreasonably withheld, conditioned or delayed and will not require a formal amendment to this Agreement. The Director may be changed at the option of the City by written notice to Contractor without a formal amendment to this Agreement.

## Article IV Rights and Obligations of Contractor

- 4.1 Grant of Concession and Catering Rights. Contractor understands that customer service is of utmost importance to the City. All services provided under this Agreement shall be performed by Contractor in a manner that supports City's goal to provide superior customer service. Contractor shall constantly endeavor to improve the Catering and Concession Services with a view toward developing maximum sales and service and to promote the marketing of the Center to Users of the Center, potential Users of the Center and their patrons. The Director shall notify Contractor of any unacceptable levels of service and undesirable practices and Contractor shall immediately remedy service deficiencies and/or

discontinue the undesirable practices promptly. Subject to the terms of this Agreement, the City hereby grants to Contractor the rights, and Contractor hereby accepts the obligations and duties, set forth below:

- 4.1.1 Contractor shall have the exclusive right to provide the Catering Sales and Concession Sales at the ACC and non-exclusive rights to provide the Catering Sales and Concession Sales at PEC, subject to the terms set forth in Sections 4.1.2 and 4.1.3. The Director must approve in writing any gift or novelty item sold by Contractor. Any gift or novelty items featuring the Center's logo shall be subject to the approval of the Director as to design, quality and workmanship, which approval shall not be unreasonably withheld. Gifts and novelties for special events are not within the exclusive right of Contractor under this Agreement.
- 4.1.2 Contractor shall have the exclusive right to provide, either directly or through contract with another entity, alcoholic beverages at any event held at ACC, at any location within ACC subject to the terms set forth in Section 4.2 Contractor's right to sell Novelty Services through concession stands or otherwise shall be non-exclusive.
- 4.1.3 Subject to the terms herein in this Section 4.1.3, the City reserves the right to allow User(s) to employ an Outside Caterer at the PEC, on the condition that the Outside Caterer (a) shall, without relying on the use of the Center's kitchen facilities or equipment, provide all prepared food, non-alcoholic beverages, equipment and small wares necessary to perform and complete its catering function at the Center and (b) the Outside Caterer shall not provide any alcoholic beverage services for the event (such rights being exclusively retained by Contractor) unless the City and Contractor otherwise expressly agree in writing. Any agreement between Contractor or the City and an Outside Caterer for an event at the PEC must include the payment of Contractor's costs associated with provision of alcoholic beverages for the event. A Subcontractor may not also be an Outside Caterer during the term of its subcontract.
- 4.1.4 Contractor shall have the right to market Contractor's Catering and Concession Services in concert with the marketing efforts of the Department and the Director.
- 4.1.5 Contractor shall pay Direct Operating Costs promptly and in all respects in accordance with Section 10.3.
- 4.1.6 Contractor may not provide Catering and Concession Services to any event located outside of the Center without the prior written approval of the Director. All revenues generated for such outside events shall be considered part of the Gross Revenues under this Agreement.

4.2 Alcoholic Beverages; Agreement Not to Compete.

- 4.2.1 Contractor, as a Direct Operating Cost, shall sell and serve alcoholic beverages under a license issued by the State of Texas and City of Austin in strict accordance with Texas state law and Article XXII of this Agreement. Contractor's privilege to provide alcoholic beverages shall be subject to the provisions of applicable Texas law and regulations of the Texas Alcoholic Beverage Commission, or its successor. The decision as to which events alcoholic beverages may be sold, rests with the Director.
- 4.2.2 No competing vendors or sales representatives of merchandise normally sold by Contractor will be allowed to operate within the confines of the Center at any time during the term of this Agreement, except with the written consent of the Director. Nothing in this Agreement shall be construed to prohibit a User from engaging in Permitted Sampling (as defined herein) to the extent permitted by applicable law in connection with the exhibit or other type of event at the Center when such User is in the business of manufacturing or distributing such food and beverage items. As used herein, "Permitted Sampling" shall mean the distribution of food and/or non-alcoholic beverage promotional products in sample-sized portions ("Sample Items"), provided that (a) the portion size of the Sample Items is reasonable and of less than a saleable quantity,

(b) Contractor is provided reasonable prior written notice of such distribution, (c) such distribution is made at no charge to the public, and (d) Contractor shall ensure that their contract with the User(s) provides for the User to indemnify Contractor and the City for any damages arising from and/or in connection with the distribution of such Sample Items.

- 4.3 Changes to Scope of Catering and Concession Operations. If, during the term of this Agreement, a Material Change, as defined below, in the scope of Catering and Concession Services required at the Center, or any part of the Center, is planned or occurs, the Director shall notify Contractor in writing of such material change. Within ten (10) calendar days of such notice, the parties shall meet and make good faith efforts to re-negotiate the compensation and, if necessary, staffing terms of this Agreement to address such material change. The parties shall have sixty (60) days or such other period of time as the parties may mutually agree following the notification of the Material Change to reach agreement on amended compensation, a revised budget, and, if appropriate, staffing provisions pertaining to the Material Change. If the parties fail to reach such agreement within the stated time period, either party shall have the right to terminate this Agreement upon providing the other party with at least twelve (12) months written notice. The transition provisions of the approved transition plan submitted pursuant to Article XV shall apply in the event of such termination.

*Material Changes shall mean:*

- \* Expansion of the Center if such expansion requires a material increase in food and beverage services in the reasonable judgment of the parties
  - \* Closure of the Center
  - \* Closure of the Center, if such closure materially reduces capacity or need for food and beverage services in the reasonable judgment of the parties
  - \* Sale or other transfer of a Department facility to a party not controlled by City
  - \* Such other proposed changes to the scope of the Catering and Concession Services which Contractor and Director agree are Material Changes
- 4.4 Independent Catering. Without the prior written approval of the Director, the Contractor may not use the kitchen(s) areas or facilities to provide catering or other food and beverage services for events that are not sponsored by the City or held at the Center.
- 4.5 Kitchen Management. Contractor shall serve as the kitchen manager to assure that all facilities and equipment are used in an appropriate manner consistent with industry standards and compliant with the Department of Health, City of Austin Health Department, or any other applicable entities or regulations.
- 4.6 Public Events. Contractor shall serve as the Department's exclusive caterer for food and beverage sales at all public events, other than those events for which City does not require food or beverage services to be provided. For all events, Contractor shall maintain an open concession stand from the time the Center's doors open for the scheduled event until Center's approved concession stand closing time. For other events, Contractor shall coordinate concession sales hours with the Director or his/her designee. Contractor shall operate multiple concession locations within the Center when appropriate in an effort to efficiently maximize concessions sales. Contractor shall maintain concession preparation and service areas in a clean and attractive state.
- 4.7 Specific Religious or Special Event Needs. The exclusive rights granted under this Agreement shall not be construed so as to prevent or prohibit either the City, or a licensee or lessee of the Center, with the Director's approval, from engaging or contracting for an outside catering service to meet specific religious or special event needs. However, the City shall recommend Contractor as first choice for all catered events, provided Contractor demonstrates the required ability to meet the specific needs. Use of the Center by an outside catering service shall not include the use of any of Contractor's occupied areas or equipment other than the service corridors unless otherwise agreed by Contractor and the City in writing.
- 4.8 City Sponsored Events. During the Accounting Year, Catering and Concession services are available to

the City in the Center for up to twelve (12) City management events, up to six (6) City sponsored events, and up to six (6) Center sponsored events at forty percent (40%) of the retail cost, which shall be treated as Gross Revenues. City management events and sponsored events require prior written approval of the Director and Assistant City Manager. Notwithstanding the provisions of this Article IV, the exclusive rights granted to the Contractor hereunder shall not be construed so as to prevent or prohibit the City from engaging in or contracting for, outside catering services for Center sponsored events, special events or events at the discretion of the City. City sponsored events shall not be subject to any surcharge for billed labor or any administrative fee.

- 4.9 Excluded Areas. The City shall retain the right to designate specific areas of the Center at which food and beverages may not be served, it being understood that neither the Contractor nor any third party shall be permitted to serve food and beverages in such areas.
- 4.10 Inclement Weather; Disaster. In the event the City declares the Center a mega shelter due to a natural disaster or other act of God, Contractor will be prepared to feed up to five thousand (5,000) people continuously four (4) times per day. The City shall endeavor to provide at least twelve (12) hours notice. Contractor will follow FEMA requirements with respect to dietary needs. Any services provided by Contractor in connection with this Section 4.10 shall be subject to reimbursement by the City (after the City receives reimbursement from FEMA) of all of Contractor's Direct Operating Costs as well as payment by the City of any management fees payable to Contractor (including the Periodic Fixed Fee) set forth in this Agreement during the applicable period.
- 4.11 Significant Event. The Contractor shall immediately notify the City Contract Manager of any current or prospective "Significant Event" on an ongoing basis. All notifications shall be submitted in writing to the City Contract Manager. As used in this provision, a "Significant Event" is any occurrence or expected occurrence which is reasonably expected to have a material effect upon the Contractor's ability to meet its contractual obligations under this Agreement. Significant Events may include but not be limited to the following:
- 4.11.1 disposal of major assets by Contractor;
  - 4.11.2 failure by Contractor to perform annual inventory of equipment as specified in section 18.2;
  - 4.11.3 failure by Contractor to produce financial statements as defined in section 10.2;
  - 4.11.4 a major computer software conversion, enhancement or modification to the operating systems, security systems, and application software, engaged by Contractor and material to performance by Contractor of its duties pursuant to this Agreement;
  - 4.11.5a significant termination of a supplier of Contractor without adequate replacement;
  - 4.11.6 Contractor's insolvency or the imposition of, or notice of the intent to impose, a receivership, conservatorship or special regulatory monitoring, or any bankruptcy proceedings, voluntary or involuntary, or reorganization proceedings;
  - 4.11.7 strikes, slow-downs or substantial impairment of the Contractor's facilities by labor used in the performance of this Agreement;
  - 4.11.8 reorganization, reduction and/or relocation in key personnel of Contractor material to Contractor's performance of this Agreement;
  - 4.11.9s ale or merger of substantially all of Contractor's assets;
  - 4.11.10 non-appropriation of funds from the City needed to pay the Periodic Fixed Fee or the Incentive Fee;

- 4.11.11 litigation filed against Contractor to the extent actually known to and served upon Contractor with damages alleged in excess of \$1,000,000 and not covered by Contractor's insurance;
- 4.11.12 onsite (at the Center) or external (but pertaining to the Center) contact by any governmental agency (Federal, State, County, or City) having regulatory or law enforcement authority over Contractor or Contractor's Personnel in an official capacity regarding any criminal violations, official inquiries, actual or potential enforcement action or investigation in all instances relating solely to Contractor's activities at the Center.
- 4.12 Notice of Events and Cancellations. The City shall assume no liability for cancellation of scheduled events.
- 4.13 Location of Stands. The use, number, or location of all portable concession stands and the space required by Contractor must be approved in writing, in advance by the Director. The Director must approve any change in the design, layout, and location of all physical facilities and equipment for the Catering and Concession operations.
- 4.14 Except as stated to the contrary herein, Contractor also agrees to perform the following duties (the costs and expenses of which incurred by Contractor, as applicable, shall all be considered Direct Operating Costs):
  - 4.14.1 comply with all policies and procedures for the Catering and Concession Services at the Center to the extent Contractor is provided reasonable prior written notice of the same;
  - 4.14.2 provide for the retail sale of food, beverages, candy and similar products at all appropriate Catering and Concession Services in the Center;
  - 4.14.3 provide and maintain vending machines in the Center for use by patrons of the Center. All vending machines need to be equipped with Watt Mizers. The style, location and level of maintenance of the machines must be approved in advance by the Director. Any vending machines located in the Center for the exclusive use of City employees are not within the scope of this Agreement;
  - 4.14.4 order, purchase, receive delivery of, and store all consumable supplies and products necessary for the Catering and Concession Services;
  - 4.14.5 acquire, prepare or cause to be prepared all concession products for sale or distribution;
  - 4.14.6 advise and make recommendations to the Director pertaining to the operational aspects of the Catering and Concession Services, including but not limited to the choosing of type, quality, brand, and price of products; the use of portable concession stands; the sale of products; and the preparation of the catering menu;
  - 4.14.7 comply with all applicable laws and regulations governing the handling, sale and disposal of Catering and Concession products, including but not limited to the procurement and uninterrupted maintenance of all necessary permits, licenses, and insurance required by government agencies having jurisdiction over operations of the Center; failure to maintain any required permit, license, or insurance may be considered grounds for termination of this Agreement;
  - 4.14.8 arrange for, or submit work order requests, for any required repairs or maintenance to the Catering and Concession Service equipment and locations, and comply with all warranty and service requirements related thereto; and



4.14.9 monitor, report to the Director and, upon written approval of the Director, arrange and pay for replacement or modification of the Catering and Concession equipment and facilities;

- 4.15 Event Summary. Contractor shall provide to City, in a format acceptable to City, a monthly written summary of each event within thirty (30) days after each Accounting Period or as requested by the City, indicating where appropriate, customer pricing, guarantees, sales by area, total inventory sales, total register sales, and cash overages and shortages. If requested in writing by the Director, Contractor shall attach the corresponding deposit ticket and credit card transmission reports to all daily sales reports.

## **Article V**

### **Contractor's Management of Center Facilities and Equipment**

- 5.1 General. City will provide Contractor with reasonable access to all parts of the Center necessary to enable Contractor to prepare for and operate the Catering and Concession Services. Contractor shall keep the operations open during the hours as may be reasonably required to adequately meet public demand as determined by the City.
- 5.2 Kitchen Areas. Contractor has the exclusive right to manage the kitchen areas including the associated office and storage spaces located at the Center, as applicable.
- 5.3 Concession Areas. Fixed concession areas are located in pre-function areas of the Center. Contractor has the exclusive right to control the management of the fixed concession areas. With the exception of special events approved in advance by the City, Contractor shall hold the fixed concession areas open to the public. The parties may agree on other areas for use by Contractor on a permanent or event basis, including but not limited to space in the PEC.
- 5.4 Designated Areas. Contractor has an exclusive right to manage all designated areas located in the Center necessary for provision of the Catering and Concession Services or other areas as determined by the City for use by Contractor. City will provide Contractor with a key to the designated areas and Contractor may fence, lock and secure a portion of the designated areas necessary for use by Contractor. Contractor may not lease out any part of a designated area, kitchen facility or retail area to a third party. The parties may agree on other areas for use by Contractor on a permanent or event basis, including but not limited to space in the PEC.
- 5.5 Inconvenience During Construction. Contractor recognizes that from time to time it will be necessary for the City to initiate and carry forward programs of construction, reconstruction, expansion, relocation, maintenance and repair in order that the Center may be suitable to serve the community, and that such construction, reconstruction, expansion, relocation, maintenance and repair may inconvenience or temporarily interrupt Contractor's operations at the Center. Contractor agrees that the City and its officers, agents, employees, concessionaires and representatives are not liable for such inconveniences or interruptions. Subject to any rights expressly reserved in this Agreement, Contractor waives any right to claim damages or other consideration due to such inconveniences or interruptions.
- 5.6 Furnishings. Contractor is responsible for maintaining the furnishings used in the provision of the Catering and Concession Services, including but not limited to tables, chairs and other furnishings, portable bars, stands and concession areas used by Contractor; the costs of all such maintenance included as Direct Operating Costs except to the extent paid from the Center Repair and Replacement Fund. No equipment/furnishings should be stored, post-event, without prior cleaning of all surfaces, including, but not limited to, counter tops, shelves, where food or product comes in contact.
- 5.7 Improvements/Additions to Center by Contractor. Contractor shall not alter, nor make improvements or additions to any Center facilities or change the decor of any part of the Center without Director's prior written approval, and all designs for capital improvements to City property is subject to review and written

approval by the Director. Contractor shall not install any fixture, sign, device or appurtenance on any exterior or semi-enclosed surface of any building without the written permission of the Director. City may specify conditions for installation of such fixtures, signs, devices or appurtenances, including, but not limited to, painting to match surrounding building colors. Director's approval for a sign or advertising device may include the location, type, size, and design of the proposed sign or advertising device.

- 5.8 Property Taxes. Contractor shall pay, before delinquency, all real and personal property taxes and assessments levied upon the City for any of Contractor's improvements or personal property located at the Center as a result of the Catering and Concession Services; the costs of which shall be treated as Direct Operating Costs. Contractor covenants that it will pay to the extent required by applicable law, before they become past due or delinquent and before any fine, penalty, interest or cost may be added thereto, all taxes, assessments, excises, levies, license and permit fees or other governmental charges, general and special, ordinary and extraordinary, of any kind and nature whatsoever, which at any time during the term of the Agreement may be assessed, levied, imposed upon, or become due and payable out of, or in respect of, the kitchen, fixed concession and storage areas, any improvements thereon, to the extent the same is purchased by Contractor or otherwise funded by the Capital Investment (as defined In Article IX herein), the costs of which shall be treated as Direct Operating Costs. Notwithstanding any provision herein to the contrary, the foregoing shall not require Contractor to pay any taxes, assessments, fees or any other costs relating to equipment or other property owned by the City.

## **Article VI**

### **City's Right to Access**

- 6.1 City Right of Access. City shall have 24-hour access to all parts of the Center and other areas in which Contractor may be working. To the fullest extent possible, City shall provide reasonable prior notice to Contractor prior to accessing any secured areas of the Center in which Contractor is operating (including, without limitation, any money room at the Center). City may inspect any area controlled or occupied by Contractor to determine compliance with health, fire, security, safety, maintenance and sanitation standards and may immediately enter any area if required to assess or respond to an event or condition that, in the City's sole opinion, creates an imminent danger of injury or damage to persons or property. Nothing herein shall be held to limit or qualify the right of the City to a free and unobstructed use, occupation, and control of the Center, or of the City's right of ingress and egress to the Center for itself, its caterers and the public.
- 6.2 City's Right to Use. City shall have the right to use, upon reasonable prior written notice to Contractor, any spaces in the Center, for non-food service events at any time, including spaces that have been previously committed by the Director for use in connection with the Catering and Concession Services under this Agreement.
- 6.3 Waiver of Responsibility. City shall not be responsible under any circumstances for loss or damage to Contractor's supplies, materials, or to any improvements made to Contractor's Designated Areas or any other areas where Contractor performs the Catering and Concession Services, or to any personal belongings of Contractor or Contractor's Personnel brought into the Center except to the extent allowed by law.

## **Article VII**

### **Obligations of the City**

- 7.1 Contractor's Office and Storage Space. In addition to the space to be designated pursuant to Article V, the City shall make available to Contractor (a) office space, adequate in all respects for Contractor's accounting, record keeping, sales, office operations, and money counting functions; and (b) reasonable

storage and commissary space for stock and equipment; provided however that City shall not be responsible for any office support, office equipment or office supplies. Contractor may not use the City's equipment or office supplies. The City will provide space in each data wiring closet for Contractor's network equipment in order to enable delivery of Contractor network connectivity to its employees.

- 7.2 Services. The City shall pay for the usage of HVAC, electricity, gas and water service for Contractor's operation. Contractor will utilize prudent energy management. The cost to repair or replace any utility service or lines due to damages caused by Contractor's negligence and willful misconduct, its subcontractors or personnel shall be at Contractor's expense and not as a Direct Operating Cost. Neither the City nor Contractor shall be liable or responsible for any failure to furnish any services including electricity, gas, water, or drainage service, which failure is caused or brought about in any manner by an event of Force Majeure, the breakdown or failure of apparatus, equipment, or machinery employed in its supply of said services, any temporary stoppage for the repair, improvement, or enlargement thereof, or any act or condition beyond its reasonable control. Further, neither the City nor Contractor shall be liable or responsible for any consequential, economic or property loss or damage caused or brought about by any such occurrence. The City shall:
- 7.2.1 provide adequate ingress and egress, including reasonable use of the corridors, passageways, and designated loading platforms;
  - 7.2.2 maintain and repair the building structures in the Center such as the maintenance of water, sewer (except for blockage caused by Contractor) and electrical lines, ventilation and air conditioning lines and systems, repair of electrical lighting fixtures, (including relamping); heating systems; floor coverings, wall and ceilings;
  - 7.2.3 provide sanitary toilet facilities for Contractor's Personnel;
  - 7.2.4 provide cleaning services in all areas of the Center, excluding the cleaning services expressly set forth herein to be performed by Contractor in connection with Contractor's provision of the Catering and Concession Services Contract;
  - 7.2.5 provide repair of floors, carpets, ceilings, walls, windows, light fixtures, draperies, blinds and vents in the Center;
  - 7.2.6 provide cabling infrastructure to be used by the Contractor to build a network for its employees that office at ACC. One network data jack per full time employee will be provided by the City and patched back to a central network location;
  - 7.2.7 provide basic telephone service/cabling (dial tone) and one telephone instrument per full time employee in Contractor's administrative/management office; and
  - 7.2.8 provide basic access to its booking and scheduling system for up to five (5) employees in Contractor's sales/administrative/management office staff.
- 7.3 Parking. The City shall provide up to thirty (30) parking spaces for Contractor's full-time employees assigned to this Agreement. The number of spaces may be adjusted on an annual basis upon the mutual agreement of the City and Contractor.
- 7.4 Changes to City Policies. In the event changes to any of the City's policies referenced in this Agreement occur during the term of this Agreement, it shall be the City's responsibility to inform Contractor of any such changes.

#### Article VIII

### **Contractor's Employees/Personnel and Training**

#### **8.1     Staff.**

8.1.1 The Contractor shall employ a highly skilled professional full-time, on-site management staff possessing the necessary experience and expertise to provide the overall management of a catering and concession operation. For purposes of determining allowable Direct Operating Costs, during each annual budget process throughout the term of the Agreement, the Contractor will present, for approval by the City and the Director, a management organizational chart detailing each position and the salary and benefits. The Contractor shall propose the number, function, qualifications, and compensation, including salary and benefits, of its employees and shall control the terms and conditions of employment relating to such employees. The City has the right to approve staffing levels and proposed staffing plan. Full time management expense that has not received prior written approval to the extent expressly required herein will not be a Direct Operating Cost.

8.1.2 Contractor shall employ a General Manager (GM) at the Center. Should the Director determine that the GM is not satisfactorily performing the duties of the GM, subject to compliance with all laws and this Agreement, Contractor shall, within thirty (30) days of receipt of written notice of such dissatisfaction, replace the GM with one who is satisfactory to the Director. To the extent Director requests such dismissal of the GM, all costs associated with the hiring of a replacement GM, shall be deemed Direct Operating Costs. Unless the Director agrees to a severance package in writing, any severance package Contractor gives the GM under these circumstances shall be paid by Contractor and not as a Direct Operating Cost. In the event the Director approves a severance package, such severance package shall be a Direct Operating Cost. The GM must have a minimum of two (2) years of consecutive employment in a similar operation with comparable responsibilities. The GM must have education and/or experience in food and beverage service with particular emphasis upon effective marketing techniques. The GM must have a high degree of management expertise, as evidenced by prior food and beverage service management duties involving convention center food and beverages service operations, high quality food production and service, and effective financial controls. The GM shall coordinate all Catering and Concession Services with subcontractors, vendors, and/or Contractor's Personnel. The GM shall be responsible for all Catering and Concession Services provided by the Contractor and shall seek to avoid any disruption in service to Users of the Center.

8.1.3 The following positions shall be deemed "Essential Management Positions". General Manager responsible for all Catering and Concession Services at the Center, Assistant General Manager, Executive Chef, Chef de Cuisine, Executive Sous Chef, Sous Chef, Director of Catering, Director of Sales, Sales Managers, Public Foods Manager, Controller, and designated Contract Manager. The City, through its Director, shall have the right to disapprove within thirty (30) days of the Effective Date of this Agreement, or within thirty (30) days of a new hire, the employees selected by Contractor to fulfill each of the Essential Management Positions (such employees, the "Essential Management Employees"), otherwise City shall be deemed to approve of such Essential Management Employees. In the event Contractor seeks to replace any of the Essential Management Employees with different personnel, such replacement shall be subject to the approval of the Director, which shall not be unreasonably withheld, conditioned or delayed.

#### **8.2     Additional Contractor Personnel Obligations. Contractor shall:**

8.2.1 require that the GM or his designee be on the Center premises during all operating hours.

8.2.2 recruit, employ, and train all employees necessary for the successful operation of Concessions and Catering Services; training of the employees must include safety training and dealing with customer complaints, or any other training appropriate for the job function, including but not

limited to cash handling, and TABC certification; the costs of all such training being deemed Direct Operating Costs.

- 8.2.3 design and prepare specifications for uniforms for Catering and Concession employees to wear at all events, including visible name tag, and obtain Director's approval of uniform design; the costs relating to such uniforms being deemed Direct Operating Costs.

### 8.3 Workforce.

- 8.3.1 Contractor is responsible for employing competent and orderly employees who are neat, clean, and professional in appearance, who act in a courteous and competent manner, and who treat all patrons in a respectful manner.

- 8.3.2 The Contractor, its employees, subcontractors, and subcontractor's employees may not while on any premises of the City of Austin in accordance with City policy:

- 8.3.2.1 The Contractor, its employees, subcontractors, subcontractor's employees shall not use or possess a firearm on any premises of the City of Austin in accordance with City policy, and State Law, including but not limited to persons holding a State concealed handgun license permit.

- 8.3.2.2 use or possess alcoholic or other intoxicating beverages, illegal drugs or controlled substances, nor may such workers be intoxicated, or under the influence of alcohol or drugs, on the job.

- 8.3.3 If any employee, subcontractor or subcontractor's employee is alleged to be incompetent, disorderly, violated any applicable City policy or procedure, civil or criminal laws, or is under the influence of alcohol or drugs, Contractor shall immediately conduct a due diligence to investigate the allegations. While the due diligence is being conducted Contractor shall remove such worker from the Center and from providing services pursuant to this Agreement, and may not employ such worker again at the Center without the Director's prior written consent and documentation from the Contractor demonstrating that the allegations are unfounded. The City shall not be liable for Contractor's relationship with its employees or subcontractors.

### 8.4 Equal Opportunity and ADA Compliance.

- 8.4.1 Equal Employment Opportunity. Contractor or Contractor's agent shall not engage in any discriminatory employment practice as defined in Chapter 5-4 of the City Code. No Bid submitted to the City shall be considered, nor any Purchase Order issued, or any contract awarded by the City unless the contractor has executed and filed with the City Purchasing Office a current Non-Discrimination Certification. Contractor shall sign and return the Non-Discrimination Certification attached hereto as Exhibit A. Non-compliance with Chapter 5-4 of the City Code may result in sanctions, including termination of the Agreement and Contractor's suspension or debarment from participation on future City contracts until deemed compliant with Chapter 5-4.

- 8.4.2 Americans With Disabilities Act (ADA) Compliance. Contractor, or Contractor's agent shall not engage in any discriminatory employment practice against individuals with disabilities as defined in the ADA.

### 8.5 Living Wages and Benefits.

- 8.5.1 In order to help assure low employee turnover, quality services, and to reduce costs for health care provided to uninsured citizens, the Austin City Council is committed to ensuring fair compensation for City employees and those persons employed elsewhere in Austin. This commitment has been supported by actions to establish a "living wage" and affordable health care protection. Currently,

the minimum wage for City employees is \$11.00 per hour. This minimum wage is required for any Contractor employee directly assigned to this Agreement. In addition, the City may stipulate higher wage rates in certain contracts in order to assure quality and continuity of service.

- 8.5.2 Additionally, the City provides health insurance for its employees, and for a nominal rate, employees may obtain coverage for their family members. Contractor must offer health insurance with optional family coverage for all Contractor employees directly assigned to this Agreement. Written proof of the health care plan shall be provided within thirty (30) days of the Effective Date. In addition, an insurance certificate for Workers' Compensation Insurance Coverage must be provided.
- 8.5.3 The City requires Contractor to provide a signed certification within five (5) calendar days of the Effective Date certifying that all employees directly assigned to this Agreement will be paid the minimum living wage and are offered a health care plan (see Exhibit B, Living Wages and Benefits Contractor Certification). The certification shall include a list of all employees directly assigned to providing services under the Agreement including their name and job title. The list shall be updated and provided to the City as requested by the City Contract Manager throughout the term of the Agreement.
- 8.5.4 Contractor shall maintain throughout the term of the Agreement basic employment and wage information for each employee as required by the Fair Labor Standards Act (FLSA). Basic employment records shall at a minimum include:
  - 8.5.4.1 employee's full name, as used for social security purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records;
  - 8.5.4.2 time and date of week when employee's workweek begins;
  - 8.5.4.3 hours worked each day and total hours worked each workweek;
  - 8.5.4.4 basis on which employee's wages are paid;
  - 8.5.4.5 regular hourly pay rate;
  - 8.5.4.6 total daily or weekly straight-time earnings;
  - 8.5.4.7 total overtime earnings for the workweek;
  - 8.5.4.8 all additions to or deductions from the employee's wages;
  - 8.5.4.9 total wages paid each pay period; and
  - 8.5.4.10 date of payment and the pay period covered by the payment.
- 8.5.5 Contractor shall provide with the first invoice and as reasonably requested by the City Contract Manager, individual Employee Certifications for all employees directly assigned to the Agreement (see Exhibit C, Living Wages and Benefits Employee Certification) containing:
  - 8.5.5.1 the employee's name and job title;
  - 8.5.5.2 a statement certifying that the employee is paid at a rate equal to or greater than the Living Wage;
  - 8.5.5.3 a statement certifying that the employee is offered a health care plan with optional family coverage.

- 8.5.6 The employee certifications required under Section 8.5.5 herein shall be signed by each employee directly assigned to the Agreement.
- 8.5.7 Contractor shall submit employee certifications quarterly with the respective invoice to verify that employees are paid the Living Wage throughout the term of the Agreement.
- 8.5.8 The City Contract Manager will periodically review the employee data submitted by Contractor to verify compliance with this Living Wage provision. The City retains the right to review employee records identified above in this paragraph to the extent necessary to verify compliance with this provision.
- 8.6 Temporary Employees. Contractor shall advise temporary employees to enter and remain on the Center's premises only during events at the Center and for a reasonable time prior to and subsequent to events, and only for the purpose of exercising, during events, the rights and privileges herein mentioned.
- 8.7 Personnel Policy. Upon request, Contractor shall provide the City with a copy of Contractor's "Personnel Policy" which shall require all Contractor's Personnel under this Agreement to comply with all instructions, regulations and codes of conduct as specified by the Personnel Policy and any additional policies promulgated from time to time in writing by the Director, which will be provided on an ongoing basis. All temporary agencies who provide personnel to Contractor (personnel not employed, but used by Contractor) shall be provided with a copy of Contractor's Personnel Policy as it relates to instructions, regulations, policies and codes of conduct of Contractor Personnel within the Center. The temporary agencies shall be instructed to educate any such personnel as to the applicable instructions, regulations, policies and code of conduct.
- 8.8 Personnel Substitutions. Contractor shall ensure that only trained staff shall substitute for regular employees during their absence. Contractor shall furnish names to the Director of such substitute management employees to be used at the Center and ensure appropriate identification badges are issued by the Center.
- 8.9 Labor Relations.
- 8.9.1 Subject to an event of Force Majeure or a Significant Event, as defined in this Agreement, Contractor agrees to provide undisturbed Catering and Concession Services under this Agreement regardless of strikes and other labor shortages and disputes to the extent allowed by law.
- 8.9.2 Contractor shall be responsible for its own labor relations with any trade or union represented among Contractor's Personnel and shall negotiate and be responsible for adjusting all disputes between itself and Contractor's Personnel or any union representing such employees. Contractor shall ensure that in any agreement that Contractor has with any of its subcontractors that there be a similar provision whereby the subcontractors will indemnify and hold City harmless for any damages or losses including attorney's fees resulting from labor relation disputes.
- 8.10 Employee Acts. Subject to applicable laws (including any applicable privacy laws), Contractor shall report to the City any known criminal acts or violations of the law (including theft, embezzlement), or any crimes of moral turpitude or crimes against persons, or any serious violations of the applicable City or Contractor's policies or procedures by any employees of Contractor or its subcontractors. Upon knowledge of any such suspected criminal acts or violation of the law, Contractor shall immediately investigate and notify the Director in writing if any such criminal acts or violation of the law have occurred and immediately take appropriate remedial action in accordance with the law. Upon written notification, the Director may, in his sole discretion, ask that any such Contractor Personnel be immediately removed from providing services under this Agreement.

**Article IX  
Compensation**

- 9.1 Compensation. Beginning October 1, 2012, Contractor shall be entitled, as sole compensation for services under this Agreement, to the Periodic Fixed Fee and the Incentive Fee, if any.
- 9.2 Periodic Fixed Fee. The Periodic Fixed Fee payable to Contractor during the first Accounting Year shall be \$200,000; payable at the rate of \$16,666.67 per Accounting Period. The City shall pay Contractor the Periodic Fixed Fee after the City receives the profit check, if any, (including the contribution to the Center Repair and Replacement Fund and the Center Marketing and Promotion Fund) and Financial Statements which must be submitted within thirty (30) days after the end of each Accounting Period. Subject to Contractor meeting the foregoing requirements, the City shall pay the Contractor the Periodic Fixed Fee no later than sixty (60) days in arrears after the respective Accounting Period. The Periodic Fixed Fee payable to Contractor during each successive Accounting Year during the Term shall be adjusted pursuant to Section 9.4 herein.
- 9.3 Withholding. Provided Contractor is in default of this Agreement, has received written notice of the same and has failed to cure such default within the allotted time described in Section 25.2 City may withhold payment of all or a portion of the Periodic Fixed Fee and/or Incentive Fee otherwise due the Contractor to such extent and for so long as may be necessary to reasonably protect the interest of the City on account of:
- 9.3.1 third party claims, not subject to appeal or not being contested by Contractor, which are not covered by the insurance which the Contractor is required to provide and the City is obligated by law or legal order to pay;
- 9.3.2 failure of the Contractor to pay Subcontractors any undisputed sums owed;
- 9.3.3 damage to the property of the City or the City's agents, employees or contractors, which is not covered by insurance required to be provided by the Contractor otherwise not paid for by Contractor and arises as the direct result of Contractor's negligence or willful misconduct;
- 9.3.4 failure of Contractor to comply with procurement procedures as required by this Agreement;
- 9.3.5 failure of the Contractor to submit the required reports with all required attachments and supporting documentation; or
- 9.3.6 failure of the Contractor to comply with any material provision of the Agreement.

In the event the amount of money the Contractor owes the City is greater than the outstanding amount in the Periodic Fixed Fee and/or Incentive Fee due to a default or unauthorized cost, the City shall withhold the balance in the Periodic Fixed Fee and/or Incentive Fee and invoice Contractor for the difference. Failure of Contractor to pay such invoice within thirty (30) days of receipt shall be considered a material breach of this Agreement.

- 9.4 Economic Price Adjustment. The Periodic Fixed Fee shall remain firm for the first twelve (12) month period of the Agreement.
- 9.4.1 Price Increases. The price increase, as computed by the City, shall be based on the following:
- 9.4.1.1 The Periodic Fixed Fee shall be increased, by the same percentage as the percentage change, if any, in the CPI (as defined in Section 9.4.1.2) (hereinafter, a "CPI Adjustment").
- 9.4.1.2 For purposes of clarity, the CPI to be used for each price increase shall be August 2012 ("Base Month"). For each subsequent year, the CPI Adjustment shall be



calculated by comparing the difference between CPI in the Base Month and the CPI in August of the then-current Accounting Year. Such CPI Adjustment will be effective on the Periodic Fixed Fee from the Effective Date of the Contract (Original Periodic Fixed Fee). Any change to the Periodic Fixed Fee shall be based solely on information obtained from the following:

Bureau of Labor Statistics Data at [www.bls.gov/data](http://www.bls.gov/data)

The Consumer Price Index for All Urban Consumers (Current Series)  
Series ID: CUUSA316SAO, Not Seasonally Adjusted  
Area: Dallas-Fort Worth, TX

9.4.1.3 The following illustrates the computation of percent change:

A = Index from the Base Month

B = Index from the August of the then Current Accounting Year

C = Original Periodic Fixed Fee

$\frac{B-A}{A} \times 100\% = \text{Percent of allowable price change}$  x C = Change to Original Periodic Fixed Fee

9.4.1.4 During the term of the Agreement, the requested price increase shall not exceed twenty-five percent (25%) of the Periodic Fixed Fee as of the Effective Date of the Agreement; a maximum of \$50,000 per Agreement Term.

9.5 Incentive Fee. To encourage the Contractor to strive for superior performance under this Agreement, Contractor shall be entitled to receive, as additional compensation, an annual Incentive Fee. The City encourages the Contractor to use all or part of the Incentive Fee for employee bonuses and other employee appreciation, however Contractor shall be entitled to use any Incentive Fee received in its sole discretion. The maximum amount of the Incentive Fee for any Accounting Year shall be \$50,000. The Incentive Fee will be calculated at the end of each Accounting Year based on a 100 point scale as described below. If 100 points are awarded, the maximum incentive will be paid. If less than 100 points are awarded, the Incentive Fee shall be reduced proportionately (i.e. 1 point equaling 1%).

9.5.1 The Incentive Fee shall be calculated based upon: (a) results of the User survey, (b) performance measures, and (c) submission of documents and reports each as detailed below.

9.5.1.1 User Survey. The total number of points possible for the User survey is 40 points. If less than a 60% return rate, Contractor is required to submit documentation on the efforts taken to maximize the number of survey's returned. The Director has the sole (but reasonable) discretion to determine if the efforts taken were sufficient. The number of points awarded will be based upon the User survey responses about Center services delivered for the Accounting Year. The Director and Contractor must agree on the particular survey questions and format. The Contractor agrees to engage a qualified third party to conduct monthly surveys of all Center Users, and the costs of which shall be a Direct Operating Cost. The City reserves the right to conduct due diligence to verify the results and any customer/User comments. The survey will rate Contractor's services in these categories: planning process, food and beverage, and management level staff areas. No points will be awarded for the survey unless the aggregated survey results and calculations are provided to the City within thirty (30) days of the end of the Accounting Year unless the parties otherwise mutually agree and subject to reasonable delay upon the occurrence of a Force Majeure event or a Significant Event. Contractor and Director shall annually reevaluate the above stated final category evaluation score targets. For the initial year of the Agreement, the points will be

allocated as follows. The average of the scores from the User survey will determine the number of points awarded for the survey portion of the Incentive Fee based upon the following:

91 – 100%	40 Points
81 – 90%	30 Points
70 – 80%	20 Points
<70%	0 Points

**9.5.1.2 Performance Measures.** The total number of points possible for Performance Measures is 40 points. The Contractor and Director shall meet annually no later than the 90th day before the end of each Accounting Year to determine the performance measures and associated point value of each for the following Accounting Year. The performance measures and their respective point values shall be in writing, and when signed by both parties, shall be incorporated into and made a part of this Agreement. If the Contractor and Director are unable to agree upon performance measures and their associated point values by the 60th day before the end of an Accounting Year, the Director may unilaterally develop and implement performance measures for the following Accounting Year. Depending on the degree to which Contractor achieves the performance measures in any Accounting Year, Contractor may be awarded all, none, or any part of the Incentive Fee. Contractor shall be responsible to document its achievement of the performance measures and eligibility for Incentive Fees for each Accounting Year. Within sixty (60) days after the end of each Accounting Year, Contractor and the Director shall meet to review Contractor's performance and consider the amount of incentives, if any, earned for such Accounting Year. If Contractor and the Department are unable to agree upon whether Contractor has met the applicable performance measures, or the amount of the Incentive Fee earned for such Accounting Year, the decision of the Director shall be final.

**9.5.1.3 Submission of Documents and Reports.** The total number of points possible for submission of documents and reports is 20 points. Within thirty (30) days of the Effective Date of this Agreement (or such other time as the Contractor and Director may mutually agree), the Contractor and Director shall set forth a list of critical reports and documents required for submittal by Contractor pursuant to this Agreement, such list being identified solely for purposes of calculation of the Incentive Fee herein (hereinafter, the "Critical Documents and Reports"). For every one of the Critical Documents and Reports which Contractor is required to submit to the City that is submitted more than two (2) days late, the City will deduct one (1) point per day for each late Critical Document and Report from the total of 20 possible points. Contractor shall also provide a written explanation of why the report is late, and if deemed acceptable to the Director (e.g. events beyond the control of Contractor or other excusable delay), the Director, at his/her sole discretion, may reinstate the deducted points for purposes of calculation of the Incentive Fee herein. Notwithstanding any provision to the contrary in this Agreement, in the event delivery of any required document or report (including the Critical Documents and Reports) would occur on a weekday or holiday, the required delivery date for such document or report shall automatically be deemed to be the next available business day (as commonly recognized by FDIC insured banks in the City of Austin).

**9.6 Non-Appropriation.** The awarding or continuation of this Agreement is dependent upon the availability of funding. The City's payment obligations are payable only and solely from funds appropriated and available for this Agreement. The absence of appropriated or other lawfully available funds shall render the Agreement null and void to the extent funds are not appropriated or available. The City shall provide the Contractor written notice of the failure of the City to make an adequate appropriation for any fiscal year to pay the amounts due under the Agreement, or the reduction of any appropriation to an amount insufficient to permit the City to pay its obligations under the Agreement. In the event of non or inadequate appropriation of funds, there will be no penalty nor removal fees charged to the City.

- 9.7 Catering and Concession Account. Contractor shall establish a Catering and Concession Account, on behalf of the City, at a financial institution agreeable to the Director, separate from all other accounts, and shall deposit therein all monies and revenues of any type generated pursuant to this Agreement. The Catering and Concession Account shall be used exclusively for deposit of Gross Revenues, disbursements to the City's Repair and Replacement Fund and the Center Marketing and Promotions Fund payment of all Direct Operating Costs and disbursement of Net Profits, if any, to City. The above may be accomplished by Contractor managing disbursements and lock box transactions with Contractor's controlled accounts, with full accounting transactions provided to the City. The Periodic Fixed Fee and any Incentive Fee due Contractor, if any, shall not be passed through the Catering and Concession Account but shall be paid by the City pursuant to Sections 9.2 and 9.5.
- 9.8 Disbursement of Net Profits. Upon delivery of each monthly Financial Statement to the Director, which shall be due no later than thirty (30) days after the end of each Accounting Period. Contractor shall disburse to the City (a) one hundred percent (100%) of the Net Profits for the Accounting Period, and (b) the amount due the City under Article XI for the Center Repair and Replacement Fund and the Center Marketing and Promotion Fund. Any net losses in any Accounting Period will be off set against the next month's Accounting Period net profits, if any, and thereafter paid by the City.
- 9.9 Capital Investment.
- 9.9.1 By November 1, 2012, Contractor shall deposit One Million Five Hundred Thousand Dollars (\$1,500,000) into a restricted bank account ("Restricted Capital Investment Account"), separate from the Catering and Concession Account.
- No expenditures from the Restricted Capital Investment Account shall be authorized without the prior written mutual agreement of the City and Contractor. Contractor shall be required to maintain a sufficient collateral agreement for an account balance above the FDIC insured limit of \$250,000 with respect to the Restricted Capital Investment Account, provided that the costs of such collateral agreement shall be considered Direct Operating Costs. The Restricted Capital Investment Account must be reported on Contractor's balance sheet. All Contractor purchases for expenditures from this Restricted Capital Investment Account shall be amortized on a straight line basis. The amortization expense shall be a Direct Operating Cost, as defined in Section 10.3 of this Agreement. No expenditures from the restricted Capital Investment account are authorized without the prior written mutual agreement of the City and the Contractor subject to the procurement guidelines as outlined in Section 16.2.
- 9.9.2 Title. Title to any non-fixture equipment purchased with Capital Investment funds shall remain with Contractor until the expiration of the Term of this Agreement or City's payment to Contractor of the unamortized amount of the Capital Investment in the event this Agreement is terminated prior to the expiration of the Term, at which point title to such equipment shall vest in the City. Contractor shall complete and submit to the City all paperwork necessary to transfer title to the City within thirty (30) days.
- 9.9.3 Capital Investment Amortization. The Capital Investment shall be amortized on a straight-line basis over the Term of the Agreement, commencing on the date(s) the Capital Investment is disbursed to the Restricted Capital Investment Account and ending upon the scheduled expiration of the Term of the Agreement (September 30, 2022). The amortization expense of the Capital Investment shall be a Direct Operating Cost, as defined in Section 10.3 of this Agreement.

## **Article X Accounting**

- 10.1 Change Fund. Contractor shall establish, with its own funds, and shall maintain throughout the term of the Agreement a "Change Fund" to be used for cash bank and petty cash purposes. The funds in the Change Fund shall be and remain the property of the Contractor's Corporate office. Contractor shall not permit any of its employees to make change from open cash drawers, boxes or containers, or from pockets of clothing.

10.2 Financial Statements. Contractor shall deliver the following documents to the Director within the time periods stated, together with any documents or reports required by this Agreement. The first page of each Financial Statement shall be signed and dated by an executive officer of Contractor, or their designee, certifying the accuracy and completeness of the document.

10.2.1 The profit check (including the contribution to the Center Repair and Replacement Fund and the Center Marketing and Promotion Fund) and Financial Statements must be submitted within thirty (30) days after the end of each Accounting Period. The income statement should include current Accounting Year budgeted and actual, month, and year-to-date amounts, with a comparison to the corresponding Accounting Period from the preceding Accounting Year. Written explanations must be provided for any line items in which the difference between the current Accounting Year actual costs vary by more than ten percent (10%) from the current Accounting Year budgeted amounts. The same categories of personnel and operating costs used in the annual budget shall be itemized in the monthly income statement. Any interest earned on amounts deposited in the Catering and Concession Account shall be included as Net Profits.

10.2.2 The Financial Statements which are due thirty (30) days after the end of each Accounting Period, shall include, but not be limited to:

- monthly bank statements of the Catering and Concessions account and the Restricted Capital Investment Account and the Contractor's bank statements related to sales of alcoholic beverages at Center;
- cash bank account reconciliations;
- accounts receivable detail listing (subsidiary ledger) and aging reports;
- accounts payable detail listing (subsidiary ledger) and aging report;
- A statement setting forth the amount of Repair and Replacement Fund, and Marketing and Promotion Fund payments made or due to the City;
- A financial forecast, by month, estimating revenue, expenses, and profit, for the current Accounting Year. Explanations must be provided for any line items in which the estimated cost for the Accounting Year are projected to exceed the budgeted cost for the Accounting Year;
- A projection of the following three (3) months' revenue by event; and
- A statement listing Contractor's proposed expenditures for purchases from the Repair and Replacement Fund for the remainder of the current Accounting Year

10.2.3 The Contractor shall also provide a detailed schedule of all expenditures from the Restricted Capital Investment Account, within thirty (30) days after the end of each Accounting Year.

10.3 Direct Operating Costs. Subject to all of the terms and conditions of this Agreement, the Contractor shall be allowed to deduct the Direct Operating Costs from the Gross Revenues for the following costs as actually incurred and paid by Contractor in the management and operation of the Catering and Concessions Services at the Center. These costs shall be limited to the actual expenses incurred and paid by the Contractor, without any mark up. Contractor will submit to the Director a written request for any cost not listed below, but for which the Contractor believes to be a Direct Operating Cost. Upon written approval by the Director, the cost will be considered a Direct Operating Cost. All Contractor Direct Operating purchases must be made in accordance with Section 16.1. Direct Operating Costs shall include, but not be limited to, the following items:

10.3.1 Food, beverages, and products and supplies necessary to perform the Catering and Concession Services;

10.3.2 On-site base payroll costs, including regular salaries and wages (including sick days; vacations and holiday pay), and overtime;

- 10.3.3 The cost of employee benefits, FICA and State Unemployment, Federal Unemployment, other payroll taxes, 401-K expenses, retirement benefits, health, dental and life insurance, and worker's compensation insurance incurred and paid by Contractor on behalf of employees employed by Contractor at the Center and other payroll costs (including all employee bonuses and the costs of fringe benefits of the type customarily provided by Contractor to its employees if pre-approved in writing by the Director annually at the time the list of Essential Management Employees is submitted to the Director for approval);
- 10.3.4 Employee relocation costs, subject to Director approval. Costs in this category may be capped at such level as determined by the City;
- 10.3.5 The cost of temporary contract labor and subcontractors necessary to carry out the Catering and Concessions Services at the Center;
- 10.3.6 The cost of licenses, insurance, permits and fees associated therewith, pre-employment testing, criminal background checks, local personnel recruiting expenses to include advertising for recruits, cellular telephone service. Cellular telephone costs may be capped at such level as determined by the City. Contractor must submit to the Director for approval, a list of employees and the business case justification for all employees for which cell phones are requested;
- 10.3.7 Laundry and linen services, cleaning and maintenance costs (including, without limitation, all costs in performance of the obligations set forth in Article XVIII;
- 10.3.8 The reasonable cost of necessary and appropriate training for Contractor employees working at the Center;
- 10.3.9 Office supply costs, including the cost of point of sale supplies, copier supplies, postage and printing costs;
- 10.3.10 Cost of annual maintenance and support agreements associated with enterprise systems as defined in Article XX ( Technology and Telecommunications);
- 10.3.11 The cost of uniforms;
- 10.3.12 Disposable decor;
- 10.3.13 All sales, use and/or excise taxes (including, without limitation, any liquor taxes) arising from the Catering and Concession Services;
- 10.3.14 Credit Card Processing Fees;
- 10.3.15 The cost of third party armored car, security, and revenue depository service;
- 10.3.16 Equipment rental;
- 10.3.17 Dues and subscriptions;
- 10.3.18 The travel costs of General Manager or other staff from other Corporate facilities, who will assist with workloads at the Center during peak demand periods is subject to the City's travel policy. All travel, lodging, and per diem expenses in connection with the Agreement for which reimbursement may be claimed by the Contractor under the terms of the Agreement must comply with the City's Travel Policy and the current United States General Services Administration Domestic Per Diem Rates (the "Rates") as published and maintained on the Internet at:  
<http://www.gsa.gov/portal/category/21287>

No amounts in excess of the Travel Policy or Rates shall be authorized. The Director must approve in advance of any such travel;

- 10.3.19 The pro-rata salaries of Contractor personnel brought from other Corporate facilities who will assist with workloads at the Center during peak demand periods;
- 10.3.20 Amortization expense for the Capital Investment;
- 10.3.21 Replacement costs of items not meeting eligibility requirements under Article XI (Equipment Repair & replacement);
- 10.3.22 Cash shortages below one-half percent (1/2 %) of Concession Sales;
- 10.3.23 Office and computer equipment as defined in Section 20.1.1 and high-speed internet service as defined in Section 20.1.3. All purchases of office and computer equipment must have prior written approval by the Director;
- 10.3.24 Allocated insurance costs (including liquor liability insurance);
- 10.3.25 The cost of obtaining and maintaining the change fund required pursuant to Section 10.1;
- 10.3.26 Costs of alcohol awareness training (TIPS/TABC), costs of training of staff and management.
- 10.3.27 Any maintenance costs on furnishings provided by Contractor pursuant to Section 5.6;
- 10.3.28 Property taxes on items purchased with The Capital Investment;
- 10.3.29 Costs associated with the User Survey described in Section 9.5.1.1;
- 10.3.30 The Pre-Operating Expenses defined in Section 1.25; and
- 10.3.31 Legal expenses incurred solely with respect to matters at the Center unless Contractor is found to be guilty by a Court of competent jurisdiction.

10.4 Non-Allowable Expenses. The following expenses shall not be included as Direct Operating Costs. Non-allowable expenses are to be paid by Contractor at its sole cost and expense.

- 10.4.1 Salaries, costs and expenses of non-resident or Contractor's Corporate office legal, internal audit, administrative, financial, and executive personnel or other general Corporate overhead costs;
- 10.4.2 The costs or expenses of legal representation and administration if the Contractor is found to be guilty by a court of competent jurisdiction. If legal fees are incurred due to matters arising specifically with respect to a matter involving the Center (i.e. liquor licensing matters) such fees shall be deemed Direct Operating Costs;
- 10.4.3 Contractor's income taxes, gross receipts taxes and other taxes not included as Direct Operating Costs;
- 10.4.4 Any or all liquidated damages, penalties, late charges, and fines paid by Contractor or owed to the City or any third party, and its employees. This includes, but is not limited to, penalties and interest charges on any payments due, including but not limited to payment of taxes;
- 10.4.5 Amounts payable by Contractor to City under the indemnification provisions hereof;
- 10.4.6 The cost of the Performance Bond which Contractor is required to obtain in accordance with this

Agreement;

- 10.4.7 The cost of repairs for damages to the Center or its improvements or equipment to the extent caused by the negligence or willful misconduct of Contractor or its employees, vendors, agents, or subcontractors;
- 10.4.8 All travel costs and salary expenses of Contractor's General Manager or other staff working at Center, who travel to assist any facility other than the Center, during their peak demand periods except to the extent approved by the Director in writing prior to travel;
- 10.4.9 Cash shortages over one-half percent (1/2 %) of Concession Sales;
- 10.4.10 Costs specifically not allowable pursuant to the terms in Article XI (Center Equipment Repair and Replacement Fund);
- 10.4.11 Costs specifically not allowable pursuant to the terms of in Article XI (Center Marketing and Promotion Fund);
- 10.4.12 Administrative charges not intended to be a tip or gratuity for the benefit of service employees collected from Catering Sales; such charges are included in Gross Revenues;
- 10.4.13 Costs of lost or missing City security control devices, such as access cards;
- 10.4.14 Any other costs identified in the Agreement as costs to be borne solely by the Contractor, or from the Contractor's own funds;
- 10.4.15 Cost associated with the initial purchase or installation of enterprise systems as defined in Article XX ( Technology and Telecommunications); such costs are included in the amortization expense of the Capital Investment which are Direct Operating Costs; and
- 10.4.16 Severance pay to any Contractor's personnel specifically asked to be removed by the Director from providing services under this Agreement unless the Director approves a severance package in writing at the time the Director asks for the removal of such employee. If the Director approves a severance package, such severance package will be deemed a Direct Operating Cost.

- 10.5 Cash Processing. Contractors shall take all precautions to ensure that all cash income received from any source and non-cash vouchers are immediately recorded, income is deposited in a timely manner, and that designated reports are submitted as required under this Agreement. Contractor shall ensure that all expenditures are supported by appropriate vendor invoices. Contractor shall pay all proper bills and other expenses (other than those paid for by City) incurred in the normal course of providing Catering and Concession Services at the Center.
- 10.6 Transporting Funds. Transport of funds between ACC and PEC and any other City or non-City facilities should be performed under appropriate security. Cash deposits or transports in excess of one thousand dollars (\$1,000) shall be transported in contracted armored car or by security as approved by the City. All transport of cash between locations must be made in locked transport bags or tamper-evident bags. Couriers will not have keys to locked transport bags; only the sending and receiving units will have keys.
- 10.7 Losses. If Gross Revenues are lost or stolen from the custody and control of Contractor, Contractor shall continue to be responsible therefore, and shall deposit in the bank designated by the City, from Contractor's own funds, a like sum of monies within two (2) business days of discovery of the loss or theft. If the loss or theft, is insured or otherwise secured by Contractor, any payments made to the City by such insurance company, bonding company, or other, shall be reimbursed to Contractor to the extent of such insurance proceeds or security deposit. Any suspected criminal activity, including embezzlement or theft shall be reported to the Department and proper law enforcement authorities.

- 10.8 Master Billing. If requested by a User and the City, Contractor may, in its sole discretion, but without obligation to do so, participate in the Master Billing process. For services rendered by Contractor pursuant to this Master Billing process, Contractor would be required to submit to the City the following documentation:
- 10.8.1 User shall execute and deliver to Contractor its standard form Catering Agreement, with only such changes as are acceptable to Contractor in its discretion;
  - 10.8.2 Contractor shall complete the Credit Control Form provided by the Center;
  - 10.8.3 Contractor shall bill the User by forwarding Contractor's invoice to the City, for services provided to the User; and
  - 10.8.4 The Department shall forward payment to Contractor once sufficient payment is received from the User. To the extent that payment from a User is delayed, uncollected, or uncollectible, such amount together with any costs of collection, settlement, or write off shall be considered a Direct Operating Cost.
- 10.9 Automated Financial Systems. As of the October 1, 2012, Contractor shall have installed and have operational, to the satisfaction of the Director, certain financial systems (including corresponding software) which produces financial statements as required in section 1.1.4, conforms to GAAP and includes annual line item budgeting for expenditures and revenue accounts, segregating and identifying assets, liabilities and net worth. Such systems shall include processes to bill, collect and record all catering and concession revenues in a format acceptable to the City. Failure to provide such automated financial systems shall be considered a material breach of this Agreement.
- 10.10 Credit Cards. Contractor must accept at a minimum MasterCard, Visa, and American Express from Users in payment for Contractor's services. Contractor is responsible for processing any credit card charges through its system and bank. Contractor shall provide credit card processing services, and the costs of such credit card processing services are a Direct Operating Cost.
- 10.11 Budgets. Contractor shall provide the Director with all budgets related to the Catering and Concession Services at the Center in formats acceptable to the Director.
- 10.11.1 Operational Budget. The Operational Budget shall include, at a minimum, a projected income and expense statement including all income and line item expense items spread by Accounting Period, and by facility. Contractor shall provide the Director, for approval, with an operational budget for the forthcoming Accounting Year, no later than thirty (30) days after the Effective Date of this Agreement. Thereafter, operational budgets must be submitted by Contractor in each subsequent year during the term of the Agreement according to the following schedule:
    - 10.11.1.1 Preliminary operational budget for the forthcoming Accounting Year is due no later than January 15.
    - 10.11.1.2 Proposed operational budget for the forthcoming Accounting Year, is due no later than May 1. This operating budget should be included as part of the Annual Sales and Marketing Plan submission.
    - 10.11.1.3 A summary of forecasted operational budgets for the four (4) years following the forthcoming Accounting Year is due no later than January 15, in a format acceptable to the City.
  - 10.11.2 Financial Forecast. Contractor must submit a financial forecast, within thirty (30) days after each Accounting Period, estimating revenue, expenses, and profit, for the current Accounting Year. In the event that it appears reasonably likely, in any budget year hereunder, that the actual Net Profit will be



smaller than projected in the Operational Budget for such Accounting Year, the City may request from the Contractor a plan for reduction of Direct Operating Costs to a level consistent with the budgeted net operating profit, provided that such plan does not materially interfere with the provision of the Catering and Concessions Services as provided for under this Agreement. The Contractor shall forthwith comply with any such expense reduction requested by the City set forth in Contractor's plan for reduction of Direct Operating Costs, provided that such plan does not materially interfere with the provision of the Catering and Concessions Services as provided for under this Agreement.

10.11.3 Equipment Repair and Replacement Budgets. Contractor shall provide the Director with a three (3) year budget for the replacement or modification of the catering and concession equipment at all Center facilities no later than November 1, 2012. Thereafter, the three (3) year equipment repair and replacement budget must be submitted each subsequent year during the term of the Agreement; no later than May 1.

## **Article XI**

### **Equipment Repair and Replacement and Marketing Promotions**

- 11.1 Subject to the order of priority set forth in Section 9.8 herein and to the extent of available Gross Revenues, Contractor shall transfer to the City for deposit into Center's Repair and Replacement Fund and into Center's Marketing and Promotion fund, a percentage of each Accounting Period's Gross Revenues. As of the Effective Date of the Agreement, the percentages are three percent (3%) of Gross Revenue for the Center Repair and Replacement Fund, and two percent (2%) of Gross Revenue for the Marketing and Promotion Fund. The actual percentage transfers shall be determined by the City on an annual basis based on forecasted needs and assessment. Notice of the required percentage deposits shall be provided to the Contractor no less than thirty (30) days prior to the date upon which Contractor is required to submit its annual budget for the next applicable Accounting Year. All Contractor purchases for expenditures reimbursable from this fund shall be subject to applicable state law and City requirements for the procurement of goods and services as outlined in Article XVI. At the end of each Accounting Year, any unexpended funds in these accounts shall remain in the applicable fund for the next Accounting Year and shall remain the property of the City. Federal excise taxes, State taxes, or City sales taxes must not be included in the invoiced amount. The City will furnish a tax exemption certificate upon request. With respect to both the Equipment Repair and Replacement Fund and the Marketing and Promotion Fund, within sixty (60) days of the purchase, Contractor must submit a reimbursement request to the Director with such reasonable documentation (invoice, proof of payment, purchasing procedure used, etc.) as may be required by the City for the fund expenditure. For any Contractor reimbursement request for a fund expenditure that is not submitted to the Director within sixty (60) days of Contractor's purchase, the Contractor must submit documentation, including but not limited to due cause for failure to obtain prior permission, proof of attempt to contact the Director, and relevant reason for the purchase) to the City for the late submittal. The Director shall determine in his/her sole discretion whether good cause exists and will consider factors such as the original reason for the purchase, the reason for the late submittal or failure to obtain initial approval (i.e., Contractor attempted to contact Director but Director was unavailable), and any other factors the Director deems relevant. In the event Contractor fails to provide a justification to the reasonable satisfaction of the Director, the Director may deny the reimbursement request and the applicable expenditure shall be borne solely by the Contractor. The City shall not be liable for any fund expenditure not authorized in writing by the Director.

11.1.1 Repair and Replacement Fund. Assets in this fund shall be used solely for acquisition, replacement, repair, and maintenance of equipment and small wares for the Catering and Concession Services. Expenditures from this fund include but are not limited to cooking equipment, glassware, silverware, china, shelving racks, drink dispensers and non-disposable decor. Also includable are expenditures for equipment directly supporting the operations necessary to deliver catering and concessions products to the User, such as display cases, cash registers, coin counters, security equipment for the cash office, and security equipment for Contractor's Designated Areas. Any operational supplies related to such equipment are considered a Direct Operating Cost and are

excludable from expenditure from the Equipment Repair and Replacement Fund. Contractor must receive prior written approval from the Director before each proposed expenditure and include the basis for the particular acquisition, replacement, maintenance, or repair. All small wares and equipment purchased by Contractor must be new and of modern design, purchased in sufficient quantities to provide proper service to Users. Contractor shall provide the City samples of china, glassware, flatware, etc., for approval, prior to purchase. All purchases from this fund shall be as outlined in Section 16.2.

**11.1.2 Marketing and Promotion Fund.** This fund shall be used exclusively for costs associated with the promotion and marketing of 1) Center facilities and 2) Catering and Concession Services at Center scheduled events to increase brand awareness. Typical expenditures from this fund include sales collateral, promotional products, User welcome gifts/baskets, and any on-site User sponsored food and beverage. In addition, pre-planned User events such as User dinner at national meeting planner industry convention are also eligible. The proposed expenditures must be included in the Quarterly Marketing and Promotional Plan and have written approval from the Director and Assistant City Manager prior to expenditure. Any qualifying expenses that exceeded the anticipated amount, or were not included in the quarterly marketing and promotions plan, must be approved in writing, post-event, by the Director and Assistant City Manager in order to be reimbursed. All purchases from this fund shall be as outlined in Section 16.2.

## **Article XII**

### **Records, Inspections, and Audit**

- 12.1 **Right To Audit.** The Contractor agrees that the representatives of the Office of the City Auditor or other authorized representatives of the City shall have access to, and the right to audit, examine, or reproduce, any and all records of the Contractor related to the performance under this Agreement. The Contractor shall retain all such records for a period of three (3) years after final payment on this Agreement or until all audit and litigation matters that the City has brought to the attention of the Contractor are resolved, whichever is longer. The Contractor agrees to refund to the City any overpayments disclosed by any such audit. The Contractor shall include this provision in all subcontractor agreements entered into in connection with this Agreement.
- 12.2 **Inspection.** Contractor shall perform, on a regularly scheduled basis, routine inspections of all kitchen equipment to determine whether such equipment is in need of repair or replacement. Contractor shall immediately report to the City any required repair or replacement of Center fixtures or furnishings. It is anticipated that on or about July 1 of each year, City will perform an annual maintenance inspection of the kitchen facilities and other areas occupied by Contractor and its subcontractors. Contractor shall promptly cure any deficiencies that are identified in the inspection. Nothing in this provision requires an annual inspection or limits City's rights to inspect the kitchens at any time during the term of the Agreement. City's failure to inspect or identify deficiencies does not release Contractor of its maintenance obligations.
- 12.3 **Record Keeping and Reporting.** Contractor shall maintain a separate set of books and records for its operations at the Center, including alcohol operations, in accordance with Generally Accepted Accounting Principles. Contractor shall pay all costs and expenses connected with its operations when due. Penalties and interest charges paid resulting from Contractor's payments to the vendor after the due date are non-reimbursable costs. Contractor is to maintain itemized records of all Direct Operating Costs incurred and paid, including original invoices. Contractor shall also maintain all personnel files, payroll summaries, Catering and Concession Account deposit receipts and bank statements. Contractor shall maintain full and accurate records of all operations and receipts; which records shall be in a form satisfactory to the Director. The City or its authorized agents shall have the right to inspect such books or original entries and other related books, records or receipts, wherever located, at such reasonable times and as often as may be requested during the term of this Agreement and, following the term of this Agreement, for a period of three (3) years, or such further time as necessary to complete an audit should an audit last beyond three (3) years after the termination of this Agreement for any reason. Records must

be kept on City facilities or at some other location mutually agreeable to the parties.

- 12.4 Sales and Inventory Documentation. Contractor shall keep complete and accurate inventory control records.
- 12.5 Annual Certified Audit. Independent, certified audits of Contractor's operations, performed by a Certified Public Accountant or firm, shall be submitted to the Director by January 31st following each Accounting Year. The first audit shall be due January 31, 2014, and the final audit due January 31, 2023. The City shall engage and pay the auditor. Prior to the City's review and approval of a selected auditor, the auditor must provide the firm's latest peer review and agree to allow the City to conduct a follow-up peer review (upon completion of an audit) at the request of the City Auditor. In the event an audit reveals a shortage in Profits due the City of more than three percent (3%) of the total profit paid to the City for that Accounting Year, interest on the underpaid balance shall be due the City at the lesser of the rate specified in Texas Government Code Section 2251.025 or the maximum lawful rate. Contractor shall address any findings in the Annual Certified Audit and provide to the Director a written response to the findings and an action plan on how and when the findings will be remedied within thirty (30) days of the release of the findings.
- 12.6 Procedures Manual. Contractor, within sixty (60) days of the Effective Date of the Agreement, will have a Procedures Manual for its Catering and Concessions Services at the Center, and make it available to the Director upon request. Contractor shall operate The Catering and Concessions Services at the Center in accordance with the Procedures Manual. The Procedures Manual shall, at a minimum, address the following topics:
- General operating procedures
  - Personnel policies
  - Employee job descriptions and guidelines
  - Procedures for alerting the City to maintenance problems
  - Emergency procedures
  - Cleaning and Maintenance Schedules
  - Employee financial responsibilities
  - Cash handling, credit card handling, reconciliation and refund procedures
  - Handling of non-standard transactions
  - Internal financial controls; the internal control structure shall be supported by a) the selection, training, and development of qualified personnel; b) an appropriate segregation of duties; c) appropriate Contractor management review and oversight; and d) the creation and dissemination of appropriate written policies and procedures.
  - Audit procedures, including procedures for auditing each cashier at the end of each shift
  - Security and safety procedures
  - Inventory Procedures
  - Acceptable computer and internet use policy
- 12.7 Other Audits. Contractor shall cause audits of its accounting procedures related to its operations at the Center under this Agreement to be performed by an internal auditor from Contractor's home office. These audits shall be performed at least quarterly, at Contractor's expense, during each year of this Agreement. Upon completion of each such audit, the auditor shall file with the Department a written statement in a format approved by the Department, stating when the audit was performed, the time period covered by the audit, the scope of the audit, and audit findings, conclusions and recommendations. The Contractor's home office shall file a written response to the auditor and to the Department, within thirty (30) days, for all audit reports containing one or more findings or recommendations for improvement, stating what actions will be taken by Contractor, and when, to correct any deficiencies or implement necessary improvements. As Contractor performs periodic audits of equipment and smallwares, Contractor agrees to share such audit information with the City.
- 12.8 Compliance Reviews. Contractor shall also be subject to periodic, unannounced compliance reviews of

the Catering and Concessions Services at the Center by the Director or the Director's designee. After completion of such operating reviews, the Contractor shall be notified by the Director of conditions needing correction or improvement. Contractor shall promptly correct deficiencies in any such notice. Contractor shall provide written response to City within thirty (30) days of completion of audit or audit report, including any corrective action plan and timelines to address any findings or deficiencies.

### **XIII Menus**

- 13.1 **Food Quality and Value Standards.** Contractor will maintain the highest level of excellence in its menu and in the quality and freshness of its supplies and food preparation. Contractor will keep informed of current trends in consumer food preferences and products and will have a formal written program for quality control and improvement. Food quality and price must be at least consistent with the quality and price offered by concessionaires providing similar services within Texas. Contractor agrees to use local products whenever reasonable. Contractor shall provide a variety of high quality and nutritious food. The following parameters shall be observed by Contractor in regard to the menus developed for the Center:
- 13.1.1 Develop innovative menus which emphasize variety, nutrition, quality, and use fresh foods and seasonal foods whenever possible;
  - 13.1.2 Utilize creative food displays and merchandising techniques to ensure customer satisfaction;
  - 13.1.3 Provide healthful menu choices that include and identify foods that are low in calories, sodium, fats and other information that would satisfy special needs customers; and
  - 13.1.4 Be able to produce the menu using the appropriate staffing plans with the equipment available at the Center.
- 13.2 **Purchasing Specifications.** Contractor must comply with the minimum purchase specifications, as listed below. Contractor's own purchasing specifications must equal or exceed these minimums:
- 13.2.1 All meats, meat products, poultry, poultry products, and fish must be Government inspected
  - 13.2.2 Beef, lamb, and veal shall be USDA Grade Choice or better
  - 13.2.3 Pork shall be U.S. No. "1"
  - 13.2.4 Poultry shall be U.S. Government Grade "A"
  - 13.2.5 Fresh fish and seafoods shall be top grade, frozen fish and seafoods shall be a nationally distributed brand, packed under continuous inspection by the USDA
  - 13.2.6 Dairy products: Eggs -fresh USDA or state graded "A" Butter -USDA Grade "A" (92) score Cheese -USDA Grade "A" for all graded cheese Milk and milk products -USDA Grade "A"
  - 13.2.7 Fresh fruit and vegetables -USDA fancy to USDA Number "A" shall be used for all graded fresh vegetables and fruit as a minimum specification
  - 13.2.8 Dry stored items and canned goods -Grade "A" fancy

13.2.9 Frozen fruits and vegetables -USDA Grade "A"

- 13.3 Printed Menus. All printed menus must be approved by the Director. Contractor agrees to provide menus to City for promotional purposes.

**XIV  
Pricing/Portions**

- 14.1 Prices. Contractor shall post in a conspicuous place at each bar and concession stand a complete list of prices of all articles offered for sale. The content and manner of posting of each list, including the style and size of the signs, shall be subject to the written approval of the Director, which approval shall not be unreasonably withheld. Prior to implementing any price change, Contractor shall notify and obtain written approval from the Director. This approval requirement shall apply to all items offered to patrons or tenants of the Center, whether provided through concessions or vending operations or the catering menus. In the event that the Director and Contractor cannot agree on the size of annual price increases, it is agreed that Contractor's prices may be increased or decreased per item per Accounting Year, by the amount of increase in the annual Consumer Price Index All Urban Consumers (CPI-U) as announced by the Federal government for the calendar year immediately preceding the year in question. Notwithstanding the foregoing, the provisions of this Section 14.1 shall not apply to the prices to be charged by Contractor for alcoholic beverages it may offer for sale at the Center. Prior to implementing any price change for any alcoholic beverages, Contractor agrees to consult with the Director to obtain his or her input thereto. Nonetheless, the determination of the prices to be charged for alcoholic beverages for sale at the Center shall rest solely with Contractor.
- 14.2 Competitive Prices. Contractor shall ensure the City that its prices are competitive with similar facilities. An annual pricing study will be conducted on each anniversary date of this Agreement by Contractor with a competitive set of local hotels (at least three), and like competitive convention centers around the country (at least three). The competitive set for the survey will be approved in writing in advance by the Director.
- 14.3 Portions. Contractor shall submit for approval the proposed portion sizes of all items available for sale in the Center to the Director. Contractor shall coordinate with the Director to establish and control portion sizes of all items available for sale on the premises.

**XV  
Branding, Marketing and Advertising**

- 15.1 Contractor's Obligation to Market Center. Contractor shall use its best efforts to market the Center and generate Gross Revenues for the benefit of the City consistent with the representations contained in Contractor's Offer and this Agreement.
- 15.2 Logos. Contractors shall not display any identifying logos and/or graphics within the Center except (a) as may be on its employee identification badges or uniforms or (b) as may be utilized in connection with the concession stands, carts, kiosks or other portable concessions or (c) as may be affixed to equipment, smallwares or other products identifying the manufacturer of the product used by Contractor or (d) as may be requested by a User of the Center. Signs and other graphic materials that are used by Contractor shall be conservative and must be approved in advance by the Director. Contractor shall not place signage printed with commercial brand name identification at the Center or use such signage when providing Catering and Concession Services to Users off the Center.
- 15.3 City's Logo. Contractor shall not in any manner use City's logo, or the Catering and Concession Services, or the Center for advertising, publicity, marketing, or public relations purposes without the Director's prior written approval.

- 15.4 Marketing. The Contractor is responsible for the development and execution of an acceptable sales and marketing program for the Catering and Concessions Services at the Center. All advertising and promotional material requires the prior approval of the City before it is printed, published, or broadcast. The Contractor shall not use its corporate name or logo on any Center sales brochures, menus or uniforms, business cards, letterhead or other materials. The marketing program shall include participation in the web site maintained by the Center.
- 15.5 Annual Sales and Marketing Plan. For each Accounting Year, Contractor shall submit a draft Annual Sales and Marketing Plan on or before May 1 of each year preceding the beginning of the next Accounting Year for review, comment, and approval by the Director. The final plan shall be submitted to the Director no later than the July preceding the beginning of the next Accounting Year. The initial Annual Sales and Marketing Plan is due by November 1, 2012. The Annual Sales and Marketing Plan shall, at a minimum, include:
- the proposed operating budget for the forthcoming year;
  - marketing plans;
  - proposed changes in any policies promulgated by Contractor;
  - proposed changes in MBE/WBE Subcontractors; and
  - forecasts of income and expenses for each Accounting Period during the Accounting Year.
- 15.6 Quarterly Marketing and Promotional Plan. Contractor and the Director shall prepare a Quarterly Marketing and Promotional Plan for the City Manager's or designee's review and approval. Contractor must submit the initial Plan to the Director no later than thirty (30) days prior to the first quarter in the Accounting Year. Thereafter, Contractor must submit the Plan no later than fifteen (15) days before the beginning of each quarter in the Accounting Year. The Plan must itemize proposed expenditures from the Marketing and Promotion Fund.

## **Article XVI**

### **Procurement**

- 16.1 Direct Operating Purchases. Except as otherwise provided in this Agreement, Contractor is responsible for and has sole discretion as to the purchase of all food, consumable items, and related supplies. It is the Contractor's responsibility to contain costs and maximize profit. Contractor must have its own written procurement/cost containment policy in effect for items covered as Direct Operating Costs. Upon request by the City, the Contractor must submit a copy of its procurement/cost containment policy as well as written justification showing that purchases were made in compliance with the policy.
- 16.2 Purchasing Rules. This Section shall apply to all purchases from the Restricted Capital Investment Account, the Repair and Replacement Fund, and the Marketing and Promotion Fund. Contractor agrees to procure goods, services, and equipment necessary or appropriate for the Catering and Concession Services. In procuring such goods, services, and equipment, Contractor shall comply with all applicable laws governing City procurements. Without limiting the general applicability of the foregoing sentence, all procurements over \$50,000 must be solicited through competitive sealed bids or proposals in accordance with the requirements of Texas Local Government Code Chapters 252 or 271, as applicable. Notice of the solicitation must be given as provided in Texas Local Government Code Chapter 252. Unless Contractor is advised in writing that a procurement is exempt by law from the requirements of a competitive solicitation, or the requirement for competitive solicitation is waived by the Director, Contractor shall obtain at least three (3) bids or proposals, and make a written recommendation to the Director as to which offer is the low responsive bid, or the best proposal, as applicable. The City shall make the final determination as to all contract awards. Contractor's purchasing policy shall include detailed procedures for procuring common types of goods, services and equipment required in the Catering and Concession Services.

**Article XVII  
Inventory**

**17.1 Inventory Systems**

17.1.1 On October 1, 2012 Contractor shall have installed at the Center and have operational, to the reasonable satisfaction of the Director, an automated inventory control management system and a point of sale system. Failure to provide the systems shall be considered a material breach of this Agreement.

17.1.2 An inventory for Concession Services shall be performed at each service location before and after each event including an actual cash count of each event's sales receipts, and a sales report shall be prepared for each event held at the Center.

17.1.3 Inventory Management System. A monthly inventory of all food and beverage items shall also be performed. Upon request Contractor shall provide the City with a current inventory listing. Contractor shall be responsible for retail inventory accounting for all concession and catering operations operated by Contractor. Contractor is responsible for producing reports that segregate between smallware type items and equipment items to ensure completeness of asset tracking that reconcile to the annual inventory. The reports must be delivered to the Director upon request.

17.2 Annual Inventory of Equipment and Smallwares. The Contractor shall complete and submit to the Director an annual physical inventory of the equipment and smallwares, reconciled to system inventory by November 30th of each year. Contractor shall identify differences in addition to any pertinent information related to reconciliation differences. The inventory report must be delivered to the Contract Manager on or before the annual anniversary date of this Agreement and upon termination or expiration of this Agreement. If any equipment and smallwares is unaccounted for after such inventory, Contractor has sixty (60) days from finalization of the inventory to produce missing equipment or provide a written explanation and plan for replacement. The Director will determine the funding source based on written explanation and plan provided by Contractor. If missing equipment is due to the negligence or willful misconduct of Contractor; the cost of such replacement shall be borne solely by Contractor. The City shall own all title, right, and interest in the equipment and smallwares purchased by Contractor. During the year, as Contractor conducts cycle counts on the equipment and smallwares; the results of such cycle counts shall be shared with the Director.

17.3 End of Life Equipment. The Contractor shall identify any equipment that has met the end of its useful life and request written approval from the City to scrap such equipment subject to City's recycling policies.

17.4 Asset Tagging. Contractor shall immediately make available upon receipt all assets with a life expectancy of one (1) or more years, purchased with funds from the Center Equipment Repair and Replacement Fund or the Center Marketing and Promotion Fund. Equipment with purchase price of five thousand dollars (\$5,000) or more will be asset tagged according to City policy. The City shall be responsible for the actual asset tagging. The Department will internally track equipment with a purchase price of less than five thousand dollars (\$5,000).

**Article XVIII  
Sanitation/Sustainability**

18.1 General. Contractor shall maintain at all times all Catering and Concession Service areas, business offices, kitchen dock areas, and retail sales areas in a neat, professional, and sanitary condition; arrange for the cleaning and waste removal from all Catering and Concession areas to a central collection point.

18.2 Cleaning and Maintenance. Contractor shall keep all areas of the Center, except seating areas, within a

radius of ten (10) feet of each stand, commissary, concession, and Catering and Concession work area, clean and free from all rubbish. Contractor shall employ the necessary personnel before, during and after hours of any event to ensure compliance with this Article.

- 18.3 Health Department Requirements. Contractor shall maintain proper sanitary cleaning procedures in the kitchen and comply with all state, city, county or City sanitation regulations.
- 18.4 City Inspection. City reserves the right to notify Contractor at any time when conditions, in City management's sole opinion, are unacceptable. Contractor will have twenty-four (24) hours from written notification to remedy the situation. Should Contractor fail to remedy the situation within the prescribed twenty-four (24) hours, City will remedy the situation at Contractor's sole expense. Failure to meet this obligation shall be considered a material breach of this Agreement.
- 18.5 Kitchens and Food Preparation/Service Areas. Contractor is solely responsible for maintaining the kitchen areas, food service areas (including all concession stands), and all equipment and supplies. Contractor must maintain impeccable cleanliness and sanitation of all food service equipment and facilities, with the latter maintained in a clean and sanitary condition at all times before, during and after all services (including, but not limited to, sweeping and mopping of floors of all concessions/catering areas post-event, regularly scheduled sweeping and mopping of kitchen floors, and grease, dirt, etc.; "film" cannot be allowed to accumulate.
- 18.6 Furnishings. Contractor is responsible for cleaning of all tables, chairs and other furnishings, portable bars, stands and concession areas used by Contractor. No equipment/furnishings should be stored, post-event, without prior cleaning of all surfaces, including, but not limited to, counter tops, shelves, where food or product comes in contact. All cleaning supplies shall conform to the City's sustainability requirements.
- 18.7 Other Areas. Contractor is responsible for maintaining in clean condition all other areas under Contractor's control.
- 18.8 Supplies. Contractor will supply all necessary equipment, soap and chemicals for cleaning. In order to comply with the City's sustainability requirements, Contractor may request that City purchasing assist them in choosing and ordering cleaning supplies. All cleaning supplies shall conform to the City's sustainability requirements. In order to ensure Contractor's compliance with the Center's sustainability requirements, the Contractor will follow the Center's Green Cleaning Policy attached hereto as Exhibit D.
- 18.9 Tallow Services. Contractor shall contract with a tallow service for disposal of any tallow waste such as oil and grease. The tallow services shall comply with all governmental laws and regulations concerning the disposal of tallow. Contractor shall take all precautionary measures necessary to assure that grease is not discharged into the sewers.
- 18.10 Clean As You Go Policy. Contractor shall train all of Contractors' Personnel to follow a "clean-as-you-go" policy.
- 18.11 Inspections. Contractor shall immediately notify the Director, in writing, of any notices of violations which are received during or in connection with inspections. A copy of any such report received by Contractor shall be immediately sent to the Director. Contractor shall include action plans to correct conditions causing the violations. City shall have the option to be present at all inspections and shall be given prior notice of inspections whenever possible within two (2) business days of inspection date.
- 18.12 Recycling. Unless otherwise directed by the City, Contractor shall implement a recycling program by November 1, 2012 and Contractor shall continue said program throughout the term of this Agreement. A copy of Contractor's recycling program shall be provided to the Director by November 1, 2012



## XIX Security

- 19.1 Security for Designated Areas. Except as specifically set forth in this Article XIX, Contractor is solely responsible for ensuring the security of all areas for which Contractor has exclusive rights and for all property within those areas. Contractor shall not alter, make any additions to, or interfere with any security system, electronic alarm system, fire system, or video system without prior consultation and written approval of the City. Contractor will not install or alter any physical doorways, rooms, or other areas of ingress and egress that would in any way limit the City's access.
- 19.1.1 Security staffing in support of any event is the exclusive authority and responsibility of the City and the Department. Contractor will not hire any security staff, including but not limited to uniformed security, or licensed police officers without prior consultation and written approval of the City.
- 19.1.2 Security and safety of all persons, facilities and assets is a priority for the City. The City reserves the right to mandate minimum security staffing at any event or in any circumstances that the Director determines is necessary in his sole discretion.
- 19.2 Access to Center. Contractor shall exercise extreme caution and care with respect to the handling and use of access to the Center and access control devices provided by the City for entry to the Center. Contractor will immediately report any lost or missing control devices (including access cards, identification cards, temporary passes) to the City and will pay the City such fees and charges as are requested by the City for replacement of lost or destroyed control devices. Contractor shall be responsible for turning off all appropriate equipment and lights and locking all appropriate doors at the close of operations within the Center.
- 19.3 Security Policy. Contractor shall submit a written Security Policy by November 1, 2012 or any amendments hereto for approval by the Director. Said policy shall require all Contractor's Personnel to comply with all instructions, regulations, rules and codes of conduct as specified by the Director which will be provided on an ongoing basis. Contractor shall require all such personnel to utilize approved entrances and exits designated by the Director or his/her designee. Contractor shall furnish a list of the names of Contractor's Personnel and Contractor's Employees and provide updates to said list of names to the Director monthly as changes occur.
- 19.4 Workforce Security Clearance and Identification (ID)
- 19.4.1 19.4.1.1 Contractor is required to obtain a certified criminal background report with fingerprinting for all Essential Management Employees as identified in Section 8.1.3.
- 19.4.1.2 Subcontractors are responsible for obtaining and paying for background checks for all Subcontractors prior to any employee providing services under this Agreement. Such expense shall not be passed through as a Direct Operating Cost but shall be borne solely by the respective Subcontractor or supplier.
- 19.4.2 The report may be obtained by reporting to one of the below governmental entities, submitting to fingerprinting and requesting the report [requestors may anticipate a two-week delay for State reports and up to a four to six week delay for receipt of a Federal report].
- 19.4.2.1 Texas Department of Public Safety for any person currently residing in the State of Texas and having a valid Texas driver's license or photo ID card;

- 19.4.2.2 The appropriate governmental agency from either the U.S. state or foreign nation in which the person resides and holds either a valid U.S. state-issued or foreign national driver's license or photo ID card; or
- 19.4.2.3 A Federal Agency. A current Federal security clearance obtained from and certified by a Federal agency may be substituted.
- 19.4.3 Contractor shall obtain the reports for the Essential Management Employees at least thirty (30) days prior to any onsite work commencement. Contractor also shall attach to each report the project name, Contractor's Personnel name(s), current address(es), and a copy of the U.S. state-issued or foreign national driver's license or photo ID card, provided that Contractor shall not be required to provide actual background results with such reports for such Contractor's Personnel.
- 19.4.4 Contractor shall provide the City a Certified Criminal Background Report affirming that Contractor has conducted required security screening of Contractor's Personnel to determine those appropriate for execution of the work and for presence on the City's property, provided that Contractor shall not be required to provide actual background results with such reports for such Contractor's Personnel. A list of all Contractor Personnel requiring access to the City's site shall be attached to the affidavit.
- 19.4.5 Upon receipt by the City of Contractor's affidavit described in Section 19.4.4 above and the list of the Contractor's Personnel, the City (through the Center's Security Offices) will provide each of Contractor's Personnel a contractor ID badge that is required for access to City property that shall be worn at all times by Contractor's Personnel during the execution of the work.
- 19.4.6 The City reserves the right to deny an ID badge to any Contractor Personnel for reasonable cause, including failure of a Criminal History background check. The City will notify the Contractor of any such denial no more than twenty (20) days after receipt of the Contractor's reports. Where denial of access by a particular person may cause the Contractor to be unable to perform any portion of the work of the Agreement, the Contractor shall so notify the City's Contract Manager, in writing, within ten (10) calendar days of the receipt of notification of denial.
- 19.4.7 Contractor's Personnel will be required to wear the ID badge at all times while on the work site. Failure to wear or produce the ID badge may be cause for removal of an individual from the work site, without regard to Contractor's schedule. Lost ID badges shall be reported to the City's Contract Manager (via the Center's Security Offices). Contractor shall reimburse the City for all costs incurred in providing additional ID badges to Contractor Personnel.
- 19.4.8 ID badges to enter and/or work on the City property may be revoked by the City at any time. ID badges must be returned to the City at the time of project completion and acceptance or upon removal of an individual from the work site.
- 19.4.9 Contractor is not required to obtain reports for delivery personnel, including but not limited to FedEx, UPS, Roadway, or other materials delivery persons, however all delivery personnel must present company/employer-issued photo ID and be accompanied by at least one of Contractor's Personnel at all times while at the work site. The City reserves the right to deny entrance to anyone whose identification card or control device is determined to be under restriction or invalid.
- 19.4.10 The Contractor shall retain the reports and make them available for audit by the City during regular business hours. Notwithstanding any provision to the contrary in this Article XIX, it is understood and agreed that Contractor shall only be required to provide evidence (as opposed

to actual background results) that it has performed the required background checks to the City for compliance with the requirements set forth in this Article XIX.

- 19.5 Contractor's Property. Contractor is solely responsible for security for its fixtures, furnishings, equipment inventory and other personal property located in the Designated Areas.
- 19.6 Emergencies. In the event of fire, disturbance, actual or threat of violence, or any other emergency, Contractor will immediately notify the proper public safety authority or emergency service. Additionally, Contractor shall immediately notify the Director of such emergency by calling the Center's 24 hour security dispatcher at the number supplied by the City. Contractor shall ensure that all Contractor's Personnel are trained to respond to fire, civil defense, bomb threats, evacuations, and other emergencies based on procedures established by City. If Contractor becomes aware of any condition in the Catering and Concession Service facilities that is unsafe or unhealthy, Contractor shall immediately notify the Director in writing. Contractor shall also advise City, in writing, of whatever action Contractor has taken to remedy any safety hazard. Contractor, Contractor's Personnel, Contractor's agents or subcontractors agree to abide by and practice all state and local safety standards and regulations. Contractor shall take all reasonably necessary and proper precautions to protect the safety of Contractor's Personnel and other persons and to protect all property from any damages from whatever cause.
- 19.7 Fire Damage. Contractor shall give City prompt notice followed by formal written notice of any fire damage occurring to the Center and a copy of all notices received by Contractor of any claim for bodily injury occurring at the Center.

## XX

### Technology and Telecommunications

#### 20.1 Contractor Responsibilities.

20.1.1 The Contractor shall provide and support the following: office equipment, cell phones, computers and computer-related equipment, desktop software licenses and maintenance (Microsoft Word, Excel, PowerPoint, etc), laptops, tablets, mobile devices, printers, network equipment, and network servers necessary for the performance of Catering and Concession Services and Contractor's other duties and obligations pursuant to the terms of this Agreement; the costs of which shall be deemed Direct Operating Costs.

20.1.2 The Contractor shall during the term of this Agreement, purchase, administer, maintain, and support enterprise systems such as, but not limited to, inventory systems, financial system, time and attendance system and other enterprise software solutions necessary for the performance of Catering and Concession Services and Contractor's other duties and obligations pursuant to the terms of this Agreement. The initial purchase of such systems and software shall be part of the Capital Investment. The cost of on-going maintenance and support of the systems and software shall be deemed Direct Operating Costs.

20.1.3 The Contractor shall during the term of this Agreement, obtain high-speed internet service from a provider of their choice; the costs of which shall be deemed Direct Operating Costs. The internet service should be sufficient to support the requirements of Contractor's office staff.

20.1.4 The Contractor is responsible for developing, implementing and monitoring acceptable use standards for computers and internet use that are consistent with City of Austin Acceptable Use Policies.

20.1.5 The City recognizes changes and advancements exist in the technology and telecommunications industry. If Contractor wishes to upgrade or change their technology not previously identified in this Agreement, Contractor may request such change or upgrade in writing with the Director.

20.2 City Responsibilities.

20.2.1 The City will provide, at no cost to Contractor, basic telephone service/cabling (dial tone) as needed during an event on the show floor/exhibit space/meeting space for exclusive use to support point-of-sale equipment and credit card terminals.

20.2.2 The City will provide, at no cost to Contractor, internet service (a shared, standard internet drop) as needed during an event for exclusive use on the show floor/exhibit space/meeting space at an amount equal to fifty percent (50%) of the rate published in the official City fee schedule in effect at the time of the event.

20.2.3 The City will provide, at no cost to Contractor, a TV and cable service for the Concession Sports Bars as needed during an event on the show floor/exhibit space/meeting space at an amount equal to fifty percent (50%) of the rate published in the official City fee schedule in effect at the time of the event.

20.3 Information Technology Systems. In connection with the services being provided hereunder, Contractor may need to operate certain information technology systems not owned by the City ("Non-City Systems"), which may need to interface with or connect to City's networks, internet access, or information technology systems ("City Systems"). Contractor shall be responsible for all Non-City Systems, and City shall be solely responsible for City Systems, including taking the necessary security and privacy protections as are reasonable under the circumstances. If Contractor serves as the merchant-of-record for any credit or debit card transactions in connection with any of the services provided hereunder, then Contractor will be responsible for complying with all applicable laws, regulations and payment card industry data security standards related to the protection of cardholder data ("Data Protection Rules"). If Non-City Systems interface with or connect to City Systems, then City agrees to implement forthwith upon request from Contractor, at City's own expense, the changes to the City Systems that Contractor reasonably requests and believes are necessary or prudent to ensure Contractor's compliance with the Data Protection Rules.

**Article XXI**  
**Bonds and Insurance**

21.1 Performance Bond. A performance bond executed by Contractor as principal issued by a surety company acceptable to the City in the sum of two hundred thousand dollars (\$200,000.00) must be tendered on or before the execution of this Agreement, and must remain in force throughout the term of this Agreement. City shall have the right to approve the terms of the performance bond prior to issuance. The performance bond shall be conditioned upon the prompt payment by Contractor of all sums due the City during the term of this Agreement as well as faithful performance by Contractor of all other obligations, conditions and covenants of this Agreement. Failure to obtain or maintain the performance bond as required by this Agreement is a material breach and is grounds for terminating this Agreement.

21.2 Insurance. The following insurance requirements apply. Failure to obtain or maintain any of the following insurance requirements is a material breach and is grounds for terminating this Agreement.

21.2.1 General Requirements

21.2.1.1 The Contractor shall at a minimum carry insurance in the types and amounts indicated herein for the duration of the Agreement; the costs of which shall be deemed Direct Operating Costs.

- 21.2.1.2 The Contractor shall provide a Certificate of Insurance as verification of coverages required below to the City at the below address prior to Agreement execution and within fourteen (14) calendar days after written request from the City.
- 21.2.1.3 The Contractor must also forward a Certificate of Insurance to the City whenever a previously identified policy period has expired, or an extension option or holdover period is exercised, as verification of continuing coverage.
- 21.2.1.4 The Contractor shall not commence work until the required insurance is obtained and has been reviewed by City. Approval of insurance by the City shall not relieve or decrease the liability of the Contractor hereunder and shall not be construed to be a limitation of liability on the part of the Contractor.
- 21.2.1.5 The Contractor must submit certificates of insurance to the City for all subcontractors prior to the subcontractors commencing work on the project.
- 21.2.1.6 The Contractor's and all subcontractors' insurance coverage shall be written by companies licensed to do business in the State of Texas at the time the policies are issued and shall be written by companies with A.M. Best ratings of B+VII or better. The City will accept workers' compensation coverage written by the Texas Workers' Compensation Insurance Fund.
- 21.2.1.7 All endorsements naming the City as additional insured, and waivers as well as the Certificate of Insurance shall contain the Contractor's email address, and shall be mailed to the following address:

City of Austin  
Purchasing Office  
P. O. Box 1088  
Austin, Texas 78767

- 21.2.1.8 The "other" insurance clause shall not apply to the City where the City is an additional insured shown on any policy. It is intended that policies required in the Agreement, covering both the City and the Contractor, shall be considered primary coverage as applicable. Any insurance coverage (additional insured or otherwise) that Contractor provides for the City shall only cover insured liability assumed by Contractor in this Agreement; such insurance coverage shall not otherwise cover liability in connection with or arising out of the wrongful or negligent acts or omissions of the City.
- 21.2.1.9 If insurance policies are not written for amounts specified, the Contractor shall carry Umbrella or Excess Liability Insurance for any differences in amounts specified. If Excess Liability Insurance is provided, it shall follow the form of the primary coverage.
- 21.2.1.10 The City shall be entitled, upon request, at an agreed upon location, and without expense, to review certified copies of policies and endorsements thereto and may make any reasonable requests for deletion or revision or modification of particular policy terms, conditions, limitations, or exclusions except where policy provisions are established by law or regulations binding upon either of the parties hereto or the underwriter on any such policies.
- 21.2.1.11 The City reserves the right to review the insurance requirements set forth during the effective period of the Agreement and to make reasonable adjustments to insurance coverage, limits, and exclusions when deemed necessary and prudent by the City based upon changes in statutory law, court decisions, the claims history of the industry or financial condition of the insurance company as well as the Contractor.

- 21.2.1.12 The Contractor shall not cause any insurance to be canceled nor permit any insurance to lapse during the term of the Agreement or as required in the Agreement.
- 21.2.1.13 The Contractor shall be responsible for premiums, deductibles and self-insured retentions, if any, stated in policies. All deductibles or self-insured retentions shall be disclosed on the Certificate of Insurance.
- 21.2.1.14 The Contractor shall provide the City thirty (30) calendar days written notice of erosion of the aggregate limits below occurrence limits for all applicable coverages indicated within the Agreement.

21.2.2 Specific Coverage Requirements. The Contractor shall at a minimum carry insurance in the types and amounts indicated below for the duration of the Agreement, including extension options and hold over periods. These insurance coverages are required minimums and are not intended to limit the responsibility or liability of the Contractor.

21.2.2.1 Commercial General Liability Insurance. The minimum bodily injury and property damage per occurrence are \$500,000 for coverages A (Bodily Injury and Property Damage) and B (Personal and Advertising Injuries). The policy shall contain the following provisions and endorsements.

21.2.2.1.1 Contractual liability coverage for liability assumed under the Agreement and all other Contracts related to the project

21.2.2.1.2 Contractors/Subcontracted Work

21.2.2.1.3 Products/Completed Operations Liability for the duration of the warranty period

21.2.2.1.4 Waiver of Subrogation, Endorsement CG 2404, or equivalent coverage

21.2.2.1.5 Thirty (30) calendar days Notice of Cancellation, Endorsement CG 0205, or equivalent coverage.

21.2.2.1.6 The City of Austin listed as an additional insured, Endorsement CG 2010, or equivalent coverage

21.2.2.2 Business Automobile Liability Insurance. The Contractor shall provide coverage for all owned, non-owned and hired vehicles with a minimum combined single limit of \$500,000 per occurrence for bodily injury and property damage. Alternate acceptable limits are \$250,000 bodily injury per person, \$500,000 bodily injury per occurrence and at least \$100,000 property damage liability per accident. The policy shall contain the following endorsements:

21.2.2.2.1 Waiver of Subrogation, Endorsement TE 2046A, or equivalent coverage

21.2.2.2.2 Thirty (30) calendar days Notice of Cancellation, Endorsement TE 0202A, or equivalent coverage.

21.2.2.2.3 The City of Austin listed as an additional insured, Endorsement TE 9901B, or equivalent coverage

21.2.2.3 Worker's Compensation and Employers' Liability Insurance. Coverage shall be consistent with statutory benefits outlined in the Texas Worker's Compensation Act (Section 401). The minimum policy limits for Employer's Liability are \$100,000 bodily injury each accident, \$500,000 bodily injury by disease policy limit and \$100,000 bodily injury by disease each employee. The policy shall contain the following provisions and endorsements:

21.2.2.3.1 The Contractor's policy shall apply to the State of Texas

21.2.2.3.2 Waiver of Subrogation, Form WC 420304, or equivalent coverage

21.2.2.3.3 Thirty (30) calendar days Notice of Cancellation, Form WC 420601, or equivalent coverage.

21.2.2.4 Excess Liability. The minimum bodily injury and property damage per occurrence are \$5,000,000 each occurrence and \$5,000,000 aggregate.

21.2.2.5 All Risk. Covering Contractor improvements, trade fixtures and equipment (including fire, lighting, vandalism, and extended coverage perils) shall be at replacement value.

21.2.2.6 Liquor Liability Policy. Limit of \$1,000,000 per occurrence and \$2,000,000 aggregate.

Aggregate Limits are twelve (12) month policy period unless otherwise indicated.

21.2.2.7 Endorsements. The specific insurance coverage endorsements specified above, or their equivalents must be provided. In the event that endorsements, which are the equivalent of the required coverage, are proposed to be substituted for the required coverage, copies of the equivalent endorsements must be provided for the City's review and approval.

21.2.3 Cash Handling Personnel. Contractor shall ensure that its cash handling personnel are insured or bonded for a minimum of \$15,000.00. Contractor shall provide proof of such insurance or bond to the Director. In addition, Contractor, upon written request by the Director, will provide a copy of its internal control procedures implemented to protect the City from financial loss resulting from any aspect of administering this Agreement.

## XXII Licenses and Permits

22.1 Liquor Licenses. Contractor or an affiliated entity shall acquire all licenses required for Contractor to legally sell and serve alcoholic beverages at the Center, as contemplated by this Agreement, by no later than October 1, 2012. Contractor is solely responsible for all costs related to the creation of the license, to all costs of license reporting, maintenance and renewal, for full compliance with Texas Alcoholic Beverage Commission (TABC) rules and regulations and all operational aspects of the license, including without limitation, those costs associated with the Liquor Transition (as described in Section 22.1.3 below) shall be deemed Direct Operating Costs. Contractor covenants that it will defend and hold harmless the City from and against any and all costs, losses, or liability, including without limitation payment of any fine or penalty or any cost of investigation or defense, resulting from Contractor's purchase, handling sale or other disposition of alcoholic beverages at the Center or from Contractor's failure to comply with any TABC requirements pertaining to the Center. Contractor agrees that following termination of the Agreement for any reason, Contractor will surrender its liquor licenses to the TABC for either voluntary suspension or cancellation, at Contractor's discretion, and shall cooperate with its successor as liquor licensee at the Center to effect a timely transfer of Contractor's remaining inventory of alcoholic beverages at the Center to such successor licensee at Contractor's cost therefor.

22.1.1 Contractor is responsible for paying for, obtaining and maintaining all appropriate licenses and permits, including, but not limited to the TABC license, required for the operation of its food and beverage services, for the construction and installation of all improvements, furnishings and fixtures, and for all other activities undertaken pursuant to the Agreement, the costs of which shall in all events be considered Direct Operating Costs. Copies of all operating licenses and license renewals shall be filed with the City.

22.1.2 If at any time Contractor is not permitted to sell alcoholic beverages at the Center due to a suspended or revoked TABC sale license, City shall have the right to suspend Contractor's rights hereunder only with respect to the sale of alcoholic beverages which otherwise would be allowed under the suspended or revoked license, so that Contractor shall continue to provide its Catering and Concession Services in all other respects. Contractor shall, within thirty (30) days and at its sole cost and expense, retain a third party which is reasonably acceptable to City and which possesses all necessary alcoholic beverage licenses to operate pursuant to the terms of this Agreement any area requiring alcoholic beverage service until Contractor shall have reinstated or obtained substitute liquor licenses.

22.1.3 City agrees to provide, in a timely fashion, information in its possession that Contractor needs in order to complete its application for the new liquor licenses and also agrees to cooperate with Contractor in its efforts to obtain said licenses. City shall ask the current liquor license holder at the Center to cooperate with Contractor and/or its designated affiliate in the transition of alcoholic beverage sales operations at the Center including, but not limited to, the submission of its liquor license to the TABC for voluntary cancellation or suspension in sufficient time to allow TABC to issue new liquor licenses to Contractor or its designated affiliate by no later than October 1, 2012. By agreeing to provide information and to cooperate with Contractor, City in no way assumes liability for Contractor's failure to comply with the requirements of Section 22.1, it being at all times the responsibility of Contractor to obtain the necessary licenses.

22.2 Retention of Liquor License. In the event Contractor, or another entity that has contracted with Contractor to hold the alcoholic beverage license for sales at the Center is found to manage the Catering and Concession Services in a manner in violation of the State law or applicable regulations concerning alcoholic beverages, as determined by the TABC. Contractor shall do all things necessary to retain or regain such license or status, or to ensure that the other entity it has contracted with, if applicable, retains or regains such license or status at no cost to the City.

22.3 Compliance with Industry Public Entertainment Facilities Act. The parties hereto acknowledge that (a) the Center qualifies as a "public entertainment facility" under the Industry Public Entertainment Facilities Act (Subchapter C of Chapter 108 of the Texas Alcoholic Beverage Code) (the "Act"), (b) Contractor will qualify as an "independent concessionaire" as defined in Sec. 108.73(1) of the Act, and (c) City intends to solicit, either directly or through its designated agent(s), sponsorships of the Center, venues within the Center, and/or events to be held at the Center from members of the manufacturer, distributor, or wholesaler tiers of the alcoholic beverage industry ("Upper Tier Members"). In accordance with the Act, City and Contractor affirmatively disavow the right of any party to engage in conduct prohibited by the Act. Specifically, but without limitation, the parties acknowledge that Contractor (a) shall have no right to receive direct or indirect monetary benefit from advertising or sponsorship revenues obtained from Upper Tier Members, and (b) shall not be subject to the direction or control, either directly or indirectly, of City, any event producer, or any Upper Tier Member as to the quantities or brands of alcoholic beverages Contractor may buy or sell at the Center. City agrees to include such a disavowal on the part of any Upper Tier Member with which City may enter into any advertising, promotional or sponsorship agreement related to operations at the Center in all such agreements.

22.4 Other Permits and Licenses. Contractor and any subcontractor involved in the Catering and Concession Service operations, shall procure and keep in force during the term of this Agreement, all permits and licenses required by law to conduct Catering and Concession Services at the Center and provide copies of such permits and licenses to City within ten (10) business days off receipt.

22.4.1 Nothing contained herein shall be construed as binding the City to the issuance of any license or permit needed by Contractor or any subcontractor to enable anyone to provide Catering and Concession Services hereunder.



- 22.4.2 In the event of termination or expiration of this Agreement by either party, and upon expiration hereof, it is mutually understood and specifically agreed that any and all permits or licenses issued by City for Catering and Concession Service operations at the Center shall be canceled without further notice or hearing.

**Article XXIII**  
**MBE/WBE, Subcontractors**

**23.1 Minority And Women Owned Business Enterprise (MBE/WBE) Procurement Program.**

- 23.1.1 All City procurements are subject to the City's Minority-Owned and Women-Owned Business Enterprise Procurement Program found at Chapters 2-9A, 2-9B, 2-9C and 2-9D of the City Code. The Program provides Minority-Owned and Women-Owned Business Enterprises (MBEs/WBEs) full opportunity to participate in all City contracts.
- 23.1.2 The City has established goals of 12.8% MBE and 13.8% WBE for this Agreement. **Contractor is required to make good faith efforts to comply with the City's MBE/WBE Procurement Program, with respect to the foregoing MBE and WBE participation goals, in accordance with Chapters 2-9A, 2-9B, 2-9C and 2-9D, of the City Code, as applicable, to the extent areas of subcontracting are identified. As used herein, the percentages referred to above with respect to MBE and WBE participation shall refer to the amount of controllable spend by Contractor (non-fixed operating expenses) in performing the services under this Agreement (as opposed to Gross Revenues).**
- 23.1.3 In furtherance of the foregoing, to the extent a contracted service is needed to perform the Agreement and Contractor does not perform the service with its own workforce or if supplies or materials are required and Contractor does not have the supplies or materials in its inventory, Contractor shall contact the Small and Minority Business Resources Department (SMBR) at (512) 974-7600 to obtain a list of MBE and WBE firms available to perform the service or provide the supplies or materials. The Contractor must also make a Good Faith Effort to use available MBE and WBE firms. Good Faith Efforts include but are not limited to contacting the listed MBE and WBE firms to solicit their interest in performing on the Agreement; using MBE and WBE firms that have shown an interest, meet qualifications, and are competitive in the market; and documenting the results of the contacts.

**23.2 Subcontractors.**

- 23.2.1 If Contractor identified Subcontractors in an MBE/WBE Program Compliance Plan or a No Goals Utilization Plan, Contractor shall comply with the provisions of Chapters 2-9A, 2-9B, 2-9C, and 2-9D, as applicable, of the Austin City Code and the terms of the Compliance Plan or Utilization Plan as approved by the City (the "Plan"). Contractor shall not initially employ any Subcontractor except as provided in Contractor's Plan. Contractor shall not substitute any Subcontractor identified in the Plan, unless the substitute has been accepted by the City in writing in accordance with the provisions of Chapters 2-9A, 2-9B, 2-9C and 2-9D, as applicable. No acceptance by the City of any Subcontractor shall constitute a waiver of any rights or remedies of the City with respect to defective services provided by a Subcontractor. If a Plan has been approved, Contractor is additionally required to submit a monthly Subcontract Awards and Expenditures Report to the Director and the Purchasing Office Contract Compliance Manager no later than the tenth calendar day of each month.
- 23.2.2 Work performed for Contractor by a Subcontractor shall be pursuant to a written contract between Contractor and Subcontractor. Any subcontracts entered into after the Effective Date must be

approved in writing by the Director (which approval shall not be unreasonably withheld, conditioned or delayed). The terms of the subcontract may not conflict with the terms of the Agreement, and shall contain provisions that:

- 23.2.2.1 require that all services to be provided by the Subcontractor be provided in strict accordance with the provisions, specifications and terms of the Agreement.
  - 23.2.2.2 prohibit the Subcontractor from further subcontracting any portion of the Agreement without the prior written consent of the City and Contractor. The City may require, as a condition to such further subcontracting, that the Subcontractor post a payment bond in form, substance and amount acceptable to the City;
  - 23.2.2.3 require Subcontractors to submit all invoices and applications for payments, including any claims for additional payments, damages or otherwise, to Contractor in sufficient time to enable Contractor to include same with its invoice or application for payment to the City in accordance with the terms of the Agreement;
  - 23.2.2.4 require that all Subcontractors obtain and maintain, throughout the term of their contract, insurance in the type and amounts specified for Contractor, with the City being a named insured as its interest shall appear; and
  - 23.2.2.5 require that the Subcontractor indemnify and hold the City harmless to the same extent as Contractor is required to indemnify the City.
- 23.2.3 Contractor shall be fully responsible to the City for all acts and omissions of the Subcontractors just as Contractor is responsible for Contractor's own acts and omissions. Nothing in the Agreement shall create for the benefit of any such Subcontractor any contractual relationship between the City and any such Subcontractor, nor shall it create any obligation on the part of the City to pay or to see to the payment of any moneys due any such Subcontractor except as may otherwise be required by law.

## XXIV

### Compliance with Laws and Regulations, Jurisdiction and Venue

- 24.1 Laws, Statutes and other Governmental Regulations. Contractor agrees to comply with all applicable laws statutes, ordinances and other governmental regulations prevailing during the term of this Agreement, and Contractor will not suffer or permit to be done anything on the premises of the Center in violation of any such laws, ordinances, rules or regulations.
- 24.2 Jurisdiction and Venue. The Agreement is made under and shall be governed by the laws of the State of Texas, including, when applicable, the Uniform Commercial Code as adopted in Texas, V.T.C.A., Bus. & Comm. Code, Chapter 1, excluding any rule or principle that would refer to and apply the substantive law of another state or jurisdiction. All issues arising from this Agreement shall be resolved in the courts of Travis County, Texas and the parties agree to submit to the exclusive personal jurisdiction of such courts. The foregoing, however, shall not be construed or interpreted to limit or restrict the right or ability of the City to seek and secure injunctive relief from any competent authority as contemplated herein.
- 24.3 Compliance with Health, Safety, and Environmental Regulations. The Contractor, its Subcontractors, and their respective employees, shall comply fully with all applicable federal, state, and local health, safety, and environmental laws, ordinances, rules and regulations in the performance of the services, including but not limited to those promulgated by the City and by the Occupational Safety and Health Administration (OSHA). In case of conflict, the most stringent safety requirement shall govern. The Contractor shall indemnify and hold the City harmless from and against all claims, demands, suits,

actions, judgments, fines, penalties and liability of every kind arising from the breach of the Contractor's obligations under this paragraph.

## **Article XXV**

### **Termination/Transition**

- 25.1 Right To Assurance. Whenever one party to the Agreement in good faith has reason to question the other party's intent to perform, demand may be made to the other party for written assurance of the intent to perform. In the event that no assurance is given within the time specified after demand is made, the demanding party may treat this failure as an anticipatory repudiation of the Agreement.
- 25.2 Default. The Contractor shall be in default under the Agreement if the Contractor (a) commits a material breach (material breaches to include those specifically designated as such in this Agreement or those not designated but proved to be material), (b) fails to provide adequate assurance of performance under the "Right to Assurance paragraph herein, (c) becomes insolvent or seeks relief under the bankruptcy laws of the United States or (d) knowingly makes a material misrepresentation in Contractor's Offer, or in any report or deliverable required to be submitted by Contractor to the City.
- 25.3 Termination For Contractor's Default. In the event of a default by the Contractor, the City shall have the right to terminate the Agreement for cause, by written notice effective thirty (30) calendar days, unless otherwise specified, after the date of such notice, unless the Contractor, within such thirty (30) day period (or such longer period of time as provided in the notice of default), cures such default, or provides evidence sufficient to prove to the City's reasonable satisfaction that such default does not, in fact, exist. The City may place Contractor on probation for a specified period of time within which the Contractor must correct any non-compliance issues. Probation shall not normally be for a period of more than nine (9) months, however, it may be for a longer period, not to exceed one (1) year depending on the circumstances. If the City determines the Contractor has failed to perform satisfactorily during the probation period, the City may proceed with suspension. In the event of a default by the Contractor, the City may suspend or debar the Contractor in accordance with the "City of Austin Purchasing Office Probation, Suspension and Debarment Rules for Vendors" and remove the Contractor from the City's vendor list for up to five (5) years and any Offer submitted by the Contractor may be disqualified for up to five (5) years. In addition to any other remedy available under law or in equity, the City shall be entitled to recover all actual damages, costs, losses and expenses, incurred by the City as a result of the Contractor's default, including, without limitation, cost of cover, reasonable attorneys' fees, court costs, and prejudgment and post-judgment interest at the maximum lawful rate. All rights and remedies under the Agreement are cumulative and are not exclusive of any other right or remedy provided by law.
- 25.4 Termination For City's Default. In the event of a default by the City, the Contractor shall have the right to terminate the Agreement for cause, by written notice effective thirty (30) calendar days, unless otherwise specified, after the date of such notice, unless the City, within such thirty (30) day period (or such longer period of time as provided in the notice of default), cures such default, or provides evidence sufficient to prove to the Contractor's reasonable satisfaction that such default does not, in fact, exist.
- 25.5 Termination Without Cause. Effective no earlier than October 1, 2017, the City shall have the right to terminate the Agreement, in whole or in part, without cause any time upon one hundred eighty (180) calendar days prior written notice. Upon receipt of a notice of termination, the Contractor shall promptly cease all further work pursuant to the Agreement, with such exceptions, if any, specified in the notice of termination. The City shall pay the Contractor, to the extent of funds appropriated or otherwise legally available for such purposes, all amounts due and owing to the Contractor under the terms of this Agreement including the unamortized portion of the Capital Investment as of the date of termination.
- 25.6 Holdover. In the event of termination or expiration of the Agreement for any reason, at City's written request, Contractor shall continue to provide Catering and Concession Services in order to allow City to transition to a new contractor. In furtherance of the foregoing, Contractor agrees to hold over under the

terms and conditions of the Agreement that existed immediately prior to the expiration or termination (including payment of the Periodic Fixed Fee) for a period not to exceed twelve (12) months unless a longer period of time is mutually agreed to in writing by the parties.

25.7 Fraud. Fraudulent statements by the Contractor on any Offer or in any report or deliverable required to be submitted by the Contractor to the City shall be grounds for the termination of the Agreement for cause by the City and may result in legal action.

25.8 Rights and Duties Upon Termination. The following provisions shall apply in the event of a termination of this Agreement for any reason whatsoever.

25.8.1 Delivery of Premises. Contractor shall remove its property from the Center and shall deliver to the City the premises and good title to all property for which full repayment to the Contractor has occurred or which otherwise belongs to the City, free and clear of all liens and encumbrances and in such condition as at the beginning of the Agreement, excepting (i) ordinary wear and tear; (ii) loss or damage occurring without the primary negligence or fault of Contractor; or (iii) damage occurring as a result of fire, flood, or other unavoidable casualty or occurrence occurring without primary negligence of the Contractor.

25.8.2 Final Accounting. Contractor shall deliver to the City, within sixty (60) days of the date of termination, a final accounting and all amounts owed to the City as of the date of termination.

25.8.3 Catering and Concessions Products and Supplies, Novelties. Contractor shall submit to the City, within twenty (20) days of the date of termination, a schedule of all usable food and beverage products and supplies and novelties held by the Contractor on the date of termination for use or sale in it Catering and Concession Services.

25.8.4 Surrender of Liquor License. Contractor shall surrender its alcoholic beverage license at the time this Agreement is terminated in accordance with the terms and conditions set forth in Section 22.1.

25.8.5 Capital Investment. City shall pay Contractor the unamortized portion of the Capital Investment within thirty (30) days of the date of termination.

## **Article XXVI Indemnification and Limitation of Damages**

26.1 Indemnity.

26.1.1 Definitions:

26.1.1.1 "Indemnified Claims" shall include any and all claims, demands, suits, causes of action, judgments and liability of every character, type or description, including all reasonable costs and expenses of litigation, mediation or other alternate dispute resolution mechanism, including attorney and other professional fees for:

26.1.1.1.1 damage to or loss of the property of any person (including, but not limited to the City, the Contractor, their respective agents, officers, employees and subcontractors; the officers, agents, and employees of such subcontractors; and third parties); and/or;

26.1.1.1.2 death, bodily injury, illness, disease, worker's compensation, loss of services, or loss of income or wages to any person (including but not limited to the agents, officers and employees of the City, the Contractor, the Contractor's subcontractors, and third parties),

26.1.1.2 "Fault" shall include the sale of defective or non-conforming deliverables, negligence, willful misconduct, or a breach of any legally imposed strict liability standard.

26.1.2 **THE CONTRACTOR SHALL DEFEND (AT THE OPTION OF THE CITY), INDEMNIFY, AND HOLD THE CITY, ITS SUCCESSORS, ASSIGNS, OFFICERS, EMPLOYEES AND ELECTED OFFICIALS HARMLESS FROM AND AGAINST ALL INDEMNIFIED CLAIMS DIRECTLY ARISING OUT OF, INCIDENT TO, CONCERNING OR RESULTING FROM THE FAULT OF THE CONTRACTOR, OR THE CONTRACTOR'S AGENTS, EMPLOYEES OR SUBCONTRACTORS, IN THE PERFORMANCE OF THE CONTRACTOR'S OBLIGATIONS UNDER THE AGREEMENT EXCEPT TO THE EXTENT DIRECTLY ARISING OUT OF, INCIDENT TO, CONCERNING OR RESULTING FROM THE FAULT OF THE CITY OR CITY'S AGENTS, EMPLOYEES OR SUBCONTRACTORS. NOTHING HEREIN SHALL BE DEEMED TO LIMIT THE RIGHTS OF THE CITY OR THE CONTRACTOR (INCLUDING, BUT NOT LIMITED TO, THE RIGHT TO SEEK CONTRIBUTION) AGAINST ANY THIRD PARTY WHO MAY BE LIABLE FOR AN INDEMNIFIED CLAIM.**

26.2 Claims. If any claim, demand, suit, or other action is asserted against the Contractor which arises under or concerns the Agreement, and which could have a material adverse effect on the Contractor's ability to perform hereunder, the Contractor shall give written notice thereof to the City within ten (10) calendar days after receipt of notice by the Contractor. Such notice to the City shall state the date of notification of any such claim, demand, suit, or other action; the names and addresses of the claimant(s); the basis thereof; and the name of each person against whom such claim is being asserted. Such notice shall be delivered personally or by mail and shall be sent to the City and to the Austin City Attorney. Personal delivery to the City Attorney shall be to City Hall, 301 West 2<sup>nd</sup> Street, 4<sup>th</sup> Floor, Austin, Texas 78701, and mail delivery shall be to P.O. Box 1088, Austin, Texas 78767.

#### **Article XXVII Miscellaneous**

27.1 Notices. Unless otherwise specified, all notices, requests, or other communications required or appropriate to be given under the Agreement shall be in writing and shall be deemed delivered three (3) business days after postmarked if sent by U.S. Postal Service Certified or Registered Mail, Return Receipt Requested. Notices delivered by other means shall be deemed delivered upon receipt by the addressee. Routine communications may be made by first class mail, telefax, or other commercially accepted means. Notices to the City and the Contractor shall be addressed as follows:

To the City:	To the Contractor:
City of Austin, Purchasing Office	Levy Premium Foodservice, L.L.C.
ATTN: Contract Administrator	ATTN: Jeffry S. Wineman, Jr., EVP Business Development
P O Box 1088	980 North Michigan Avenue
Austin, TX 78767	Chicago, IL 60611

27.2 Confidentiality. In order to provide the deliverables pursuant to this Agreement, each party may require access to certain of the other party's and/or its licensors' confidential information (including inventions, employee information, trade secrets, confidential know-how, confidential business information, and other information which the disclosing party or its licensors consider confidential) (collectively, "Confidential Information"). Both parties acknowledge and agree that the Confidential Information is the valuable property of the disclosing party and/or its licensors and any unauthorized use, disclosure, dissemination, or other release of the Confidential Information will substantially injure the disclosing party and/or its licensors. Each party (including its employees, subcontractors, agents, or representatives) agrees that it will maintain the Confidential Information in strict confidence and shall not disclose, disseminate, copy, divulge, recreate, or otherwise use the Confidential Information without the prior written consent of the other party or in a manner not expressly permitted under this Agreement, unless the Confidential Information is required to be disclosed by law or an order of any court or other governmental authority with proper jurisdiction, provided

the receiving party promptly notifies the disclosing party before disclosing such information so as to permit the disclosing party reasonable time to seek an appropriate protective order. Each party agrees to use protective measures no less stringent than a party uses within its own business to protect its own most valuable information, which protective measures shall under all circumstances be at least reasonable measures to ensure the continued confidentiality of the Confidential Information.

- 27.3 Advertising. The Contractor shall not advertise or publish, without the City's prior consent, the fact that the City has entered into the Agreement, except to the extent required by law, provided, however, Contractor may state on its website and in marketing materials that it is the concessionaire at the Center.
- 27.4 No Contingent Fees. The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure the Agreement upon any agreement or understanding for commission, percentage, brokerage, or contingent fee, excepting bona fide employees of bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty, the City shall have the right, in addition to any other remedy available, to cancel the Agreement without liability and to deduct from any amounts owed to the Contractor, or otherwise recover, the full amount of such commission, percentage, brokerage or contingent fee.
- 27.5 Gratuities. The City may, by written notice to the Contractor, cancel the Agreement without liability if it is determined by the City that gratuities were offered or given by the Contractor or any agent or representative of the Contractor to any officer or employee of the City with a view toward securing the Agreement or securing favorable treatment with respect to the awarding or amending or the making of any determinations with respect to the performing of such Agreement. In the event the Agreement is canceled by the City pursuant to this provision, the City shall be entitled, in addition to any other rights and remedies, to recover or withhold the amount of the cost incurred by the Contractor in providing such gratuities.
- 27.6 Prohibition Against Personal Interest in Contracts. No officer, employee, independent consultant, or elected official of the City who is involved in the development, evaluation, or decision-making process of the performance of any solicitation shall have a financial interest, direct or indirect, in the Agreement resulting from that solicitation. Any willful violation of this section shall constitute impropriety in office, and any officer or employee guilty thereof shall be subject to disciplinary action up to and including dismissal. Any violation of this provision, with the knowledge, expressed or implied, of the Contractor shall render the Agreement voidable by the City.
- 27.7 Independent Contractor. The Agreement shall not be construed as creating an employer/employee relationship, a partnership, or a joint venture. The Contractor's services shall be those of an independent contractor. The Contractor agrees and understands that the Agreement does not grant any rights or privileges established for employees of the City.
- 27.8 Assignment-Delegation. The Agreement shall be binding upon and enure to the benefit of the City and the Contractor and their respective successors and assigns, provided however, that no right or interest in the Agreement shall be assigned and no obligation shall be delegated by the Contractor without the prior written consent of the City; such consent not to be unreasonably withheld, conditioned or delayed. Any attempted assignment or delegation by the Contractor shall be void unless made in conformity with this paragraph. The Agreement is not intended to confer rights or benefits on any person, firm or entity not a party hereto; it being the intention of the parties that there be no third party beneficiaries to the Agreement.
- 27.9 Waiver. No claim or right arising out of a breach of the Agreement can be discharged in whole or in part by a waiver or renunciation of the claim or right unless the waiver or renunciation is supported by consideration and is in writing signed by the aggrieved party. No waiver by either the Contractor or the City of any one or more events of default by the other party shall operate as, or be construed to be, a permanent waiver of any rights or obligations under the Agreement, or an express or implied acceptance of any other existing or future default or defaults, whether of a similar or different character.

- 27.10 Modifications. The Agreement can be modified or amended only by a writing signed by both parties. No pre-printed or similar terms on any the Contractor invoice, order or other document shall have any force or effect to change the terms, covenants, and conditions of the Agreement.
- 27.11 Interpretation. The Agreement is intended by the parties as a final, complete and exclusive statement of the terms of their agreement. No course of prior dealing between the parties or course of performance or usage of the trade shall be relevant to supplement or explain any term used in the Agreement. Although the Agreement may have been substantially drafted by one party, it is the intent of the parties that all provisions be construed in a manner to be fair to both parties, reading no provisions more strictly against one party or the other. Whenever a term defined by the Uniform Commercial Code, as enacted by the State of Texas, is used in the Agreement, the UCC definition shall control, unless otherwise defined in the Agreement.
- 27.12 Dispute Resolution.
- 27.12.1 If a dispute arises out of or relates to the Agreement, or the breach thereof, the parties agree to negotiate prior to prosecuting a suit for damages. However, this section does not prohibit the filing of a lawsuit to toll the running of a statute of limitations or to seek injunctive relief. Either party may make a written request for a meeting between representatives of each party within fourteen (14) calendar days after receipt of the request or such later period as agreed by the parties. Each party shall include, at a minimum, one (1) senior level individual with decision-making authority regarding the dispute. The purpose of this and any subsequent meeting is to attempt in good faith to negotiate a resolution of the dispute. If, within thirty (30) calendar days after such meeting, the parties have not succeeded in negotiating a resolution of the dispute, they will proceed directly to mediation as described below. Negotiation may be waived by a written agreement signed by both parties, in which event the parties may proceed directly to mediation as described below.
- 27.12.2 If the efforts to resolve the dispute through negotiation fail, or the parties waive the negotiation process, the parties may select, within thirty (30) calendar days, a mediator trained in mediation skills to assist with resolution of the dispute. Should they choose this option, the City and the Contractor agree to act in good faith in the selection of the mediator and to give consideration to qualified individuals nominated to act as mediator. Nothing in the Agreement prevents the parties from relying on the skills of a person who is trained in the subject matter of the dispute or a contract interpretation expert. If the parties fail to agree on a mediator within thirty (30) calendar days of initiation of the mediation process, the mediator shall be selected by the Travis County Dispute Resolution Center (DRC). The parties agree to participate in mediation in good faith for up to thirty (30) calendar days from the date of the first mediation session. The City and the Contractor will share the mediator's fees equally and the parties will bear their own costs of participation such as fees for any consultants or attorneys they may utilize to represent them or otherwise assist them in the mediation.
- 27.13 Force Majeure.
- 27.13.1 Each party to this Agreement shall excuse the failure of the other party to perform its obligations under this Agreement if that failure is caused by an event of Force Majeure. Force Majeure means acts and events not within the control of the party, and which the party could not use due diligence to avoid or prevent. Events of Force Majeure include acts of God, riots, sabotage, civil disturbances, epidemics, acts of domestic or foreign terrorism, lightning, earthquakes, fires, storms, floods and landslides. Force Majeure does not include economic or market conditions which affect a party's cost, but not its ability to perform. Additionally, Force Majeure does not include strikes or labor disputes or shortages involving Contractor's employees that affect Contractor's ability to provide products or services required under this Agreement.
- 27.13.2 The party invoking Force Majeure shall give timely written notice to the other party of the event by facsimile transmission, telephone, or electronic mail. The party shall then promptly provide

written notice of Force Majeure in the manner required by this Agreement. The party shall use due diligence to remedy the effects of Force Majeure as soon as reasonably possible. If a party's performance is delayed by the event of Force Majeure, the parties will mutually agree to extend the time for the completion of obligations by a period of time reasonably necessary to overcome the effect of the Force Majeure event.

27.14 Non-Solicitation.

27.14.1 During the term of the Agreement, and for a period of six (6) months following termination of the Agreement, the Contractor, its affiliate, or its agent shall not hire, employ, or solicit for employment or consulting services, a City employee employed in a technical job classification in a City department that engages or uses the services of a Contractor employee.

27.14.2 In the event that a breach of Section 27.14.1 occurs the Contractor shall pay liquidated damages to the City in an amount equal to the greater of: (i) one (1) year of the employee's annual compensation; or (ii) one hundred percent (100%) of the employee's annual compensation while employed by the City. The Contractor shall reimburse the City for any fees and expenses incurred in the enforcement of this provision.

27.14.3 During the term of the Agreement, and for a period of six (6) months following termination of the Agreement, a department that engages the services of the Contractor or uses the services of a Contractor employee will not hire a Contractor employee while the employee is performing work under a contract with the City unless the City first obtains the Contractor's written approval.

27.14.4 In the event that a breach of Section 27.14.3 occurs, the City shall pay liquidated damages to the Contractor in an amount equal to the greater of: (i) one (1) year of the employee's annual compensation or (ii) one hundred percent (100%) of the employee's annual compensation while employed by the Contractor.

27.15 Invalidity. The invalidity, illegality, or unenforceability of any provision of the Agreement shall in no way affect the validity or enforceability of any other portion or provision of the Agreement. Any void provision shall be deemed severed from the Agreement and the balance of the Agreement shall be construed and enforced as if the Agreement did not contain the particular portion or provision held to be void. The parties further agree to reform the Agreement to replace any stricken provision with a valid provision that comes as close as possible to the intent of the stricken provision. The provisions of this section shall not prevent this entire Agreement from being void should a provision which is the essence of the Agreement be determined to be void.

27.16 Survivability of Obligations. All provisions of the Agreement that impose continuing obligations on the parties, including but not limited to the warranty, indemnity, and confidentiality obligations of the parties, shall survive the expiration or termination of the Agreement.

27.17 Non-Suspension or Debarment Certification. The City is prohibited from contracting with or making prime or sub-awards to parties that are suspended or debarred or whose principals are suspended or debarred from Federal, State, or City of Austin contracts. By accepting a contract with the City, the Contractor certifies that its firm and its principals are not currently suspended or debarred from doing business with the Federal Government, as indicated by the General Services Administration List of Parties Excluded from Federal Procurement and Non-Procurement Programs, the State of Texas, or the City of Austin.

27.18 Incorporation of Documents. Section 0100, Standard Purchase Definitions, is hereby incorporated into this Agreement by reference, with the same force and effect as if they were incorporated in full text except to the extent such terms are already defined in this Agreement. The full text versions of this Section 0100 are available, on the Internet at the following online address: <http://www.austintexas.gov/sites/default/files/files/Finance/Purchasing/standard-purchase-definitions.pdf>



27.19 Order of Precedence. The Agreement includes, without limitation, the Solicitation, the Offer submitted in response to the Solicitation, the Agreement award, the Standard Purchase Terms and Conditions, Supplemental Terms and Conditions if any, Specifications, and any addenda and amendments thereto. Any inconsistency or conflict in the Agreement documents shall be resolved by giving precedence in the following order.

27.19.1 this Agreement and its exhibits and any duly executed amendments thereto, but not any of the other documents or definitions incorporated by reference into the Agreement unless;

27.19.2 any exceptions to the Offer accepted in writing by the City;

27.19.3 the Offer and exhibits; within the Offer, drawings (figured dimensions shall govern over scaled dimensions) will take precedence over specifications or scope of work;

27.19.4 any other documents or definitions incorporated by reference into the Agreement not expressly specified in the subsections of Section 27.19;

27.19.5 the request for proposal, solicitation #PAX0105.

In witness whereof, the parties have caused duly authorized representatives to execute this Agreement on the dates set forth below.

**CITY OF AUSTIN**  
**A Home Rule Municipality**  
**P.O. Box 1088**  
**Austin, Texas 78767**

By: *Alvin Lucas*  
Title: *Deputy Purchasing Officer*  
Date: *7/30/2012*

**LEVY PREMIUM FOODSERVICE, L.L.C.**

By: *M. J. R.*  
Title: *Secretary and Manager*  
Date: *July 30, 2012*