

THIS IS A DRAFT CONTRACT FOR REFERENCE PURPOSES ONLY. A CONTRACT WILL BE NEGOTIATED BETWEEN THE CITY AND SELECTED RESPONDING PARTY PRIOR TO AWARD.

FOOD SERVICE AGREEMENT FOR THE HENRY B. GONZALEZ CONVENTION CENTER

STATE OF TEXAS §
 §
COUNTY OF BEXAR §

This Agreement is entered into by and between the City of San Antonio, a Texas Municipal Corporation (hereinafter referred to as “City”), acting by and through its City Manager pursuant to Ordinance No. 201__-__-__, dated _____, 201_, and _____, by and through its _____ (hereinafter referred to as “Concessionaire”), both of which may be referred to herein collectively as the “Parties”.

The Parties hereto severally and collectively agree, and by the execution hereof are bound, to the mutual obligations herein contained and to the performance and accomplishments of the tasks hereinafter described.

RECITALS

WHEREAS, the City owns and operates, through its Convention and Sports Facilities Department, the Henry B. Gonzalez Convention Center, which includes the Lila Cockrell Theatre (hereafter “Facility”); and

WHEREAS, the Facility is made available to the public through short-term license agreements for a variety of events, to include conventions, exhibitions and meetings; and

WHEREAS, such events may require catering and concession services and therefore, the City sought, through a Request for Qualifications (RFQ), to contract for the provision of such services for events held at the Facility; and

WHEREAS, Concessionaire submitted a proposal to the City to provide such services, which included a financial compensation component; and

WHEREAS, the City, through a duly authorized city ordinance, accepted Concessionaire’s proposal and the Parties hereto severally and collectively agree, and by the execution hereof are bound, to the mutual obligations herein contained and to the performance and accomplishment of the tasks hereinafter described; **NOW THEREFORE:**

DEFINITIONS

“Accounting Period” shall refer to the Concessionaire’s four or five week fiscal periods of which there must be twelve within each calendar year.

“Agreement Year” shall refer to the period October 1, 2015, through September 30, 2016, and every October 1st through September 30th for every year thereafter until September 30, 2025, or until the Agreement terminates, whichever is earlier.

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“Alcoholic Beverages” shall refer to all alcoholic drinks, beers and wines, regardless of where they are provided, in what packaging or format, or to whom they are provided.

“Ancillary Services” shall refer to other services customarily provided with Catering including, but not limited to, floral decorations, event equipment rentals, and entertainment, except meeting planning services (destination management), and transportation services to and from the Facility.

“Branded Products” shall refer to those food or beverage items which are advertised, marketed and sold as part of a franchise or license agreement and with respect to which Concessionaire is required to pay royalty fees and/or shared advertising costs to the franchiser in consideration of the right to sell such items in the Facility.

“Catering Sales” shall refer to any pre-arranged food and beverage function of multiple customers, such as dinners, banquets and buffets, where payment for the entire function rests with one individual or company including cash bars associated with the function.

“City” shall refer to the City of San Antonio, Texas, the owner of the Henry B. Gonzalez Convention Center or its Designee. All correspondence should be addressed to Director, Convention and Sports Facilities, P.O. Box 1809, San Antonio, TX 78296-1809.

“City’s Director” shall refer to the Director of the City’s Convention and Sports Facilities Department or his designee, as applicable.

“Commission” shall refer to the percentage of Gross Receipts that the Concessionaire pays the City each Accounting Period.

“Concession Sales” shall refer to all sales of non-licensed food and beverages sold to individual customers from permanent or portable concession stands, roving vendors and in-seat attendants, except cash-bar sales at private events (i.e. not open to the general public), which are considering Catering.

“Direct Operating Costs” are the actual out-of-pocket costs of the Food Service operation incurred at the Facility, as approved by the City. These costs include the actual expense of the product, including corporate rebates, on-site payroll, payroll taxes, fringe benefits and other operating expenses, such as repairs and maintenance, cleaning and office supplies. Direct Operating Costs do not include any corporate overhead, corporate administrative expenses or Late Fees.

“Employee Cafeteria Services” shall refer to a cafeteria open for all employees and contract staff from mid-morning to mid-afternoon, Monday – Sunday, with pricing at cost.

“Equipment” shall refer to all Food Service furniture and machinery, except Smallwares and Leasehold Improvements, used for the receiving, storing, transportation, preparation, merchandising, selling and accounting of product. Equipment shall not be affixed to the building, except by electrical or gas connections.

“Facility” shall refer to the Henry B. Gonzalez Convention Center, including the Lila Cockrell Theatre, located at 200 E. Market St., San Antonio, TX 78205-2637 in Bexar County.

“Food Service” shall refer to the food and beverage sales, service and operations at the Facility, including Alcoholic Beverages, Branded Products, Catering Sales, Concession Sales, Restaurant Sales, Employee

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Cafeteria Services, and Ancillary Services.

“Gross Receipts” shall refer to the total amount of money, gratuities, and rental charges received or charged by the Concessionaire or any agent, employee or subcontractor of the Concessionaire for all sales, cash or credit (whether collected or not), made as a result of the service rights granted under the Agreement, excluding only applicable sales taxes. Neither the TABC Alcoholic Beverage tax nor any Gratuities and/or Service Charges paid out to employees, nor cash shortages, nor uncollected debts, may be deducted from Gross Receipts. In case of a discrepancy in determining Gross Receipts for Concession Sales, it shall be the greater of Inventory, Cash Register readings or actual Cash and Charges received.

“Late Fee” is the charge assessed to any payments due the City from the Concessionaire after the specified date in the Agreement. Late Fees shall be pro-rated daily based on an annual rate of 18%. Late Fees are payable by the Concessionaire and not allowed as a Direct Operating Cost.

“Leasehold Improvements” shall refer to all equipment, fixtures, furnishing, finishes and construction affixed to the building, by more than an electrical or gas connection.

“Licensee” shall refer to any person or entity that may, from time to time, enter into any agreement for the use of the Facility for a particular purpose.

“Merchandise Sales” shall refer to sales of all non-edible souvenirs, novelties and publications at the Facility, provided by a short-term licensee, promoter or other licensee for a commercial event.

“Restaurant Sales” shall refer to all sales of food and beverages from café areas sold by wait staff to individual customers who eat meals prepared and served at the Facility.

“Smallwares” shall refer to the service ware, utensils, crockery, glassware, dishware and cutlery used in the Food Service operation. Concessionaire is responsible for having service for 10,000 in a design and pattern approved by the City, throughout the Agreement term.

“Sundry Sales” refers to all sales from a storefront and coat check in the lobby of the Facility and sales of miscellaneous dry good and toiletry items.

I. TERM

1.1 Unless sooner terminated in accordance with the provisions herein, the Initial Term of this Agreement shall be 10 years and shall commence on _____ (“Commencement Date”), and expire on _____ (“Expiration Date”).

1.2 The City may renew the term of this Agreement for one consecutive five year term (“Renewal Term”), subject to the approval of the City Council indicated by the passage of a City ordinance. The City reserves the right to modify all terms and conditions herein upon renewal, including the License Fee.

II. SCOPE SERVICES (See RFQ)

III. COMPENSATION TO CITY (To Be Negotiated)

IV. USE OF FACILITY AND EQUIPMENT

4.1 Concessionaire shall use the City’s Facility and Equipment made available to Concessionaire

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under this Agreement solely for the purpose of providing services to customers and clients of City that are at the Facility as set forth herein, except as authorized in writing by the City's Director. The use of the City's Facility and Equipment shall comply with City's standards of quality and service mentioned in this Agreement.

4.2 Any visitors to the Facility (other than vendors, suppliers, representatives of Customers of the Center, Licensees, invitees or potential Customers of the Center or Licensees) must have permission by the City's Director before access will be granted to the Facility.

V. FOOD SERVICE OPERATIONS (Reserved)

VI. EMPLOYEES AND PERSONNEL

6.1 Concessionaire shall employ the necessary personnel to conduct the operations at the Facility in accordance with the terms and conditions of this Agreement.

6.2 Concessionaire will be required to conduct City-approved background checks on all full and part-time staff and contract staff, and to utilize staffing agencies that do so as well for all temporary labor. This extends to all subcontractors that may have personnel entering the Facility.

6.3 All Food Service employees are employees of the Concessionaire and not the City. The Concessionaire shall at all times be an independent contractor, and the Agreement shall not in any way create or form a partnership or joint venture with the City. No agent, servant, or employee of the Concessionaire shall under any circumstances be deemed an agent, servant, or employee of the City.

6.4 Accurate records must be kept of the names, addresses and other legal identification of those to whom badges are issued to assure proper identification and legal working status of employees at any time required by the City or any other proper agency. Upon request by the City, the Concessionaire shall immediately remove, from the Facility, any employee deemed unsuitable for any reason by the City. Any employee so removed shall never again be employed at the Facility without the prior written consent of the City.

6.5 Concessionaire shall not change General Managers, unless requested by the City, for a minimum of three years, from the time the General Manager is approved by the City.

6.6 The City shall approve Concessionaire's proposed on-site management throughout the term of the Agreement. Concessionaire's on-site management shall have no job-related responsibilities at other venues and must have a full-time office at the Facility. If the City requests a replacement for the on-site management or any of the staff, Concessionaire shall have five days to provide a temporary replacement approved by the City, and 15 days to provide the City with at least three resumes of suitable candidates for such purpose. At no time however, shall Concessionaire leave the Facility without Management staff suitable to the service required for any scheduled event.

6.7 Concessionaire must conduct regularly scheduled training sessions, as approved by the City, throughout the year, for all personnel. At a minimum, the training will consist of customer service; alcohol awareness (i.e. "TIPS"); skills training for each position, including proper banquet service, buffet set up and merchandising and wine service for all Catering personnel; POS training; safety; cash handling; food preparation; and recycling.

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6.8 Concessionaire's employees shall be at all times neatly and cleanly uniformed in City-approved uniforms and must meet grooming guidelines and appearance standards prescribed for such employees.

VII. ASSIGNED AREAS

7.1 City shall provide Concessionaire access to and control over the Facility throughout the term of this Agreement. City may inspect the Facility whenever, in its sole discretion, it deems appropriate.

7.2 City shall not be responsible under any circumstances for loss or damage to Concessionaire's supplies, materials, or equipment at the Facility, or to any improvements made to the Facility by Concessionaire, or to any personal belongings of Concessionaire or Concessionaire's Personnel brought into the Facility unless such loss or damage is directly caused by City, its officers, agencies, employees, officials or contractors.

VIII. INSURANCE (See RFQ)

IX. INDEMNIFICATION (See RFQ)

X. QUALITY OF SERVICES AND PRODUCTS

10.1 Concessionaire shall conduct all of their operations in a first-class, professional, businesslike, and efficient manner consistent with a premier convention center such as this Facility.

10.2 The City shall have the final approval on what suppliers, portions and brands are used by the Concessionaire, and at no time will Concessionaire offer an exclusive to any supplier without the prior written approval of the City.

10.3 The City shall decide any and all questions which may arise as to the acceptability of services rendered, number of service areas required, levels of staffing by area, prices, portions, products, manner of performance, questions which arise as to the interpretation of the terms and conditions of these Specifications, and all questions as to the acceptable fulfillment of the Agreement.

10.4 All foods, drinks, beverages, confectionery, refreshments, and the like sold or kept for sale, shall be of first quality, wholesome, and pure and shall conform in all respects to the federal, state, and municipal food and other laws, ordinances, and regulations. No imitation, adulterated, or misbranded article shall be sold or kept for sale, and all product kept on hand shall be stored and handled with due regard for sanitation. Leftover perishable product shall not be sold at any time.

10.5 All products kept for sale shall be subject to inspection and approved by the City. Rejected product shall be immediately removed from the Facility and shall not be returned for sale.

10.6 The City requires the Concessionaire to identify and utilize local products and subcontractors to utilize throughout the Facility, whenever appropriate.

10.7 It is the intent of the City to utilize Branded Products whenever it is in the best interest of the City.

10.8 All Concessions will generally utilize disposable plates, cutlery and cups.

10.9 All Catering will utilize permanent Smallwares, dishes, glassware and place settings.

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XI. ALCOHOLIC BEVERAGES

11.1 Alcoholic Beverages are to be offered for sale by the Concessionaire to the extent permitted by applicable state and local laws, and subject to regulations established by the City. The final decision, as to whether or not Alcoholic Beverages may be sold at an event, or in any designated area of the Facility, shall be the sole responsibility of the City. The decision to serve or refuse service of Alcoholic Beverages to any individual shall be the sole responsibility of the Concessionaire.

11.2 All licenses and permits required for the sale of Alcoholic Beverages at the Facility shall be held by the Concessionaire. Neither party shall take any action which would impair the Concessionaire's ability to hold the permits. The Concessionaire shall prepare and process all applications for renewals of the permits. The Concessionaire shall file all applications for permits and licenses.

11.3 Concessionaire will obtain and keep in force a mixed beverage permit for the Facility.

XII. SANITATION AND EQUIPMENT MAINTENANCE

12.1 Concessionaire must, in accordance with all applicable laws, ordinances, rules, and regulations, maintain, as a Direct Operating Cost, all assigned areas of the Facility, including the space within a 25 foot radius of each area, including, but not limited to, kitchens, concession stands, buffets, pantries, vending areas (if applicable), condiment stands, storage and prep areas in a clean, sanitary, and orderly fashion. If specialty food service areas are set up for trade shows, conventions, or public events, Concessionaire's maintenance responsibility shall be expanded to take in all service and seating within the specialty food service area.

12.2 Concessionaire is responsible for the cost to clean and maintain the vent hoods, exhaust, and fire suppression systems (i.e. "Ansul") in all kitchen and food preparation areas. The City is responsible for ensuring the cleaning and maintenance is performed using City's vendors, but the Concessionaire is responsible for the cost.

12.3 Concessionaire is required to utilize City's pest control vendor, program and intervals, as a Direct Operating Cost.

12.4 Concessionaire shall maintain City-approved par levels of all Equipment, Leasehold Improvements, uniforms and Smallwares. The Concessionaire or the City shall provide, and the Concessionaire shall maintain and replace, a minimum par stock of 10,000 high-quality City-approved place settings and service ware.

12.5 Concessionaire shall maintain, as a Direct Operating Cost, all Equipment, Leasehold Improvements, uniforms and Smallwares used in performance of its duties, including rolling stock, in a good state of repair, including maintenance, replacement or repair necessitated by ordinary wear and tear.

12.6 The City may require the use of their in-house maintenance staff for the repairs and maintenance, if it is in the City's best interest.

XIII. UTILITIES

13.1 The City shall pay for the usage of HVAC, electricity, gas, and water service for the Concessionaire's operation. Concessionaire will utilize prudent energy management.

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13.2 The cost of telephone and data service shall be a Direct Operating Cost of the Concessionaire.

13.3 The Concessionaire is required to dispose of trash, recyclables, compostables, etc. (as applicable) in their own designated containers at the loading dock area, and those receptacles must be contracted through the City's approved vendor as a Direct Operating Cost. The Concessionaire will be responsible for bringing their trash and garbage from all Food Service areas to the designated dumpster or recycling areas in the Facility. The City will designate locations where the Concessionaire may deposit their trash. The removal of the dumpster and recyclables from the Facility will be paid for by the Concessionaire as a Direct Operating Cost.

13.4 The cost to repair or replace any utility service or lines due to Concessionaire's negligence shall be the Concessionaire's expense and not a Direct Operating Cost **and City will invoice caterer for repairs at market rates.** Concessionaire's sewer lines shall be self-maintained by the Concessionaire and shall be maintained to the satisfaction of the City. Concessionaire shall take all precautionary measures necessary to ensure that grease is not discharged into the sewers.

13.5 The Concessionaire is responsible for complying with all recycling rules, regulations and laws of the City and/or appropriate governmental bodies.

13.6 The City shall not be liable or responsible for any failure to furnish services, such as electricity, gas, water, or drainage service, which failure is caused or brought about in any manner by strike, act of God or other work stoppage, federal, state, or local government action, 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, the City shall not be liable or responsible for any consequential economic or property loss or damage caused or brought about by any such occurrence.

13.7 The City shall not be responsible for any goods, merchandise or equipment stored at the Facility nor will it be responsible for damage resulting from a power failure, flood, fire, explosion and/or other causes.

XIV. MENUS/PORCTIONS/PRICING (To Be Negotiated)

XV. FIRE AND OTHER EMERGENCIES

15.1 Concessionaire shall immediately notify the proper authorities in the event of fire or other emergency. Concessionaire shall immediately notify the City's Director in the event of fire or other emergency by calling the emergency telephone number supplied by City. Concessionaire shall ensure that all Concessionaire's employees are trained to respond to fire, civil defense, bomb threats, evacuations, and other emergencies based on procedures established by City.

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

XVI. SECURITY

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16.1 Concessionaire shall submit a Security Policy within 30 days of the effective date of this Agreement, or any amendments hereto, for approval by the City's Director. Said policy shall require all Concessionaire's Personnel to comply with all instructions, regulations, rules and codes of conduct, as specified by the City's Director, which will be provided on an ongoing basis. Concessionaire shall require all such personnel to utilize approved entrances and exits designated by the City's Director. Concessionaire shall furnish City with a list of the names of Concessionaire's Employees and provide updates to said list of names to the City's Director monthly as changes occur.

16.2 Concessionaire shall issue identification badges for security purposes and require all Concessionaire Employees, Concessionaire Members, and subcontractors to display said badges at all times. Concessionaire's logo may appear on the issued identification badges. Concessionaire shall recover all inactive identification badges from Concessionaire Employees, Concessionaire Members, and subcontractors. Concessionaire shall notify City immediately of any and all Concessionaire's Members and Concessionaire's Employees no longer working at the Facility. All part-time and/or event workers used at any time by Concessionaire shall be identified by badge, uniform, ribbon, pin, or other identifying symbol acceptable to the City's Director.

16.3 Concessionaire shall be responsible for turning off all appropriate equipment and lights and locking all appropriate doors at the close of Food Service operations within the Food Service Areas.

XVII. OPERATING REQUIREMENTS

17.1 All purchases will be made using competitive pricing of national pricing and local Vendor preference. Concessionaire will be expected to maintain records of quotation on an agreed upon basis confirming that Concessionaire is achieving the best available balance of price/quality of product to serve at the Facility

17.2 The City shall issue reasonable rules and regulations for the operation of the Food Service, and the Concessionaire shall operate the Food Service in accordance with such rules and regulations.

17.3 The City shall decide any and all questions which may arise as to the acceptability of services rendered, levels of staffing, and manner of performance, questions which arise as to the interpretation of the conditions and specifications, and all questions as to acceptable fulfillment of Agreement.

17.4 No off-site or subcontracted sales are permitted from the Facility unless approved by the City. To the extent, however, that Concessionaire can book outside catering functions and produce additional net revenue for the City without adversely affecting service to clients of the Facility, such activities would be favorably viewed by City.

17.5 On an annual basis, the Concessionaire must provide the City with a written Marketing Program. The Concessionaire needs to coordinate efforts closely with the Facility's booking and services' staff.

17.6 At the termination of Concessionaire's Agreement, Concessionaire will assign all Food Service contracts for events that are scheduled to occur after the effective date of termination, to the succeeding Concessionaire.

17.7 The Concessionaire shall not interfere with the free distribution of food or drinks or any other items of any nature whatsoever, where such distribution has been authorized by the City. Free samples of non-competitive products less than 4 ounces may be given away by, or on behalf of, or with permission of

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any person or organization which has properly engaged the Facility at trade shows, cooking schools, exhibitions, and conventions at the discretion of the City.

17.8 The Concessionaire will be required to provide or modify operations upon the request of any Licensee, when it has been approved by the City, as in the best interest of the Facility or is necessary to comply with the terms of the contract between the Facility and said Licensee, provided that none of Concessionaire's equipment is utilized when Concessionaire is excluded from selling. The selling of specialty ethnic foods sold by local charitable organizations at community festivals are excluded from this Agreement.

17.9 In the event that the City shall seek to bring a major political convention, NCAA tournament or other similar national or international events, Concessionaire shall make such modifications to the Agreement that are required for the City to obtain any such event.

17.10 City shall have the final approval on what suppliers, prices, portions and brands are used, and at no time will Concessionaire offer an exclusive to any supplier.

17.11 The City may sell advertising and sponsorship packages for the Facility. Therefore, the City reserves the final right of approval of Concessionaire's sources of product supply. This includes but is not limited to items such as food and beverage products, printing companies, exterminators, florists, cleaners, laundries, insurance vendors, business machine and office supply vendors. The Concessionaire, however, will not be required to purchase from suppliers, whose level of quality, service, and/or prices are not competitive with the marketplace. Concessionaire retains no advertising rights in this Agreement. Currently the only Sponsored Product is Pepsi which is sold at national pricing.

17.12 The Concessionaire must keep in force during the entire period of the contract all permits and licenses required, including the Alcoholic Beverage License, by all laws and regulations of the State of Texas, County of Bexar and City of San Antonio.

17.13 Concessionaire shall collect and promptly disburse all taxes required by federal, state and local authorities, and shall pay as a Direct Operating Cost any applicable taxes relating to Food Service, operations, Equipment, or inventory.

17.14 Concessionaire shall use computerized cash or point-of-sale (POS) registers at all sales locations. This includes portable and permanent concession stands, bars, cafeterias, lounges, and for all Catering billing. The Facility has fiber and Wi-Fi throughout the facility. It is important to the City that the Concessionaire be state-of-the-art for attendees and patrons throughout the term of the contract. This includes providing dynamic, robust and appealing ordering systems and POS utilizing the latest in wireless, handheld devices and technology while ensuring data security, PCI compliance and transaction speed. All sales locations must accept all major credit and debit cards. This includes providing for in-seat ordering and service in the Lila Cockrell Theatre. This also includes providing for technological efficiencies for reducing concession stand wait times and improving customer satisfaction through mobile apps, text alerts and social media offering ordering and pickup, coupons and offers, etc.

17.15 Concessionaire shall at all times comply with all applicable laws, rules, regulations and orders of the Federal State and Local Governments, and also shall abide by all rules, regulations and directives prescribed by the City.

17.16 Nothing herein contained shall be held to limit or qualify the right of the City to a free and

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unobstructed use, occupation and control of the Facility and ingress and egress for itself, its Licensees, and the public.

17.17 Representatives of the City shall have the right to enter upon and have access to all spaces occupied by the Concessionaire during the time events are in operation and all times when Concessionaire employees are present.

17.18 Concessionaire must provide written menus approved by City, utilizing the Facility's logos, used exclusively for the Facility, in sufficient quantities for use by City's and the Concessionaire's marketing staffs.

17.19 Concessionaire must provide website menus and ordering capability for all menus and services and must integrate their website into the City's website.

17.20 City will set rooms with sufficient tables and chairs for each Food Service function. Concessionaire must provide and set linen, skirting and place settings on a timely basis, as well as removing same immediately following each Food Service event.

17.21 The Concessionaire shall set up Equipment and Smallwares for all Food Service events. Concessionaire shall be responsible for setting up and tearing down all portable Equipment, including any work tables, if any, supplied by the City.

17.22 The use of table coverings other than cloth must be approved in advance by the City.

17.23 The areas of all Food Service and Merchandise areas, whether temporary, portable or permanent shall be designated by the City. The Concessionaire shall acquire no right to any location once assigned and the City reserves the right to require the Concessionaire to move such operations and equipment to facilitate the needs of events.

17.24 Concessionaire shall provide water service for all meeting rooms and charge reasonable amounts as approved by the City.

17.25 Concessionaire will be required to comply with all of City's current and future sustainability programs and requirements. This includes recycling, donation of excess foodstuffs, composting, using utilities efficiently, using recycled materials, and using LEED-certified or "green" equipment, methods and applications.

XVIII. GENERAL FINANCIAL TERMS

18.1 At the termination of this Agreement, for any reason, City will purchase or cause to be purchased the Concessionaire's approved investment at then book value. The Concessionaire will amortize their investment as follows and will ensure that there is no book value of any initial investment at the natural end of the initial term of the Agreement:

Pre-opening Expenses –	36 months, straight line method
Equipment –	120 months, straight line method
Uniforms and Smallwares -	60 months, straight line method
Signing Fee -	120 months, straight line method

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18.2 The Concessionaire will provide all working capital and inventory necessary to effectively manage the Food Service operations.

18.3 Concessionaire will provide new furniture, fixtures and equipment to City's specifications in Concessionaire's office areas in expansion areas at the Facility.

18.4 The Concessionaire will prepare a sales and commission statement, in a format directed by City, for each Accounting Period and submit same with the commission payment no later than 20 days following the close of the preceding Accounting Period.

18.5 The Concessionaire shall establish and maintain a reserve account for equipment maintenance and replacement in an amount equal to 2% of Gross Receipts as a Direct Operating Cost. All expenditures from the reserve account shall only occur with the prior written approval of City. Any money left in the account at the end of the Agreement will belong to City. All repairs of Equipment and replacements of Smallwares and uniforms will be a Direct Operating Cost.

18.6 Concessionaire shall provide an annual marketing fund of \$100,000 which shall include without limitation, all food and beverages at cost to the City for their marketing functions of the Center as directed by the City. Any costs in excess of the \$100,000 will be billed at cost.

18.7 For the Convention Center and CVB sponsored functions the Concessionaire will provide all Catering at Cost.

18.8 Concessionaire shall provide Food Service at a 15% discount to other City entities (other than CSF and CVB).

XVIX. RECORD KEEPING AND ACCOUNTABILITY

19.1 Concessionaire shall maintain all accounting records for the Facility in a format approved by the City at the on-site office. The accounting records shall be available for audit by the City at any time throughout the term of the Agreement at the on-site office, and for three years following the term of the Agreement at the Concessionaire's main office.

19.2 Concessionaire shall use City-approved hardware, software and accounting software, for all Food Service proposals, contracts, invoices, and all accounting functions. Concessionaire shall use compatible financial software that integrates with City's SAP accounting software.

19.3 Concessionaire shall submit, for City approval, in a format approved by the City, a budget for their operation, four months prior to the beginning of each Agreement Year, for every year during the term of the Agreement.

19.4 Concessionaire shall provide the City with a preliminary sales report by 10 a.m. on the day following each event. Concessionaire shall provide to the City, in a format directed by the City, a written summary of each event within 72 hours of that event, indicating where appropriate, customer pricing, guarantees, sales by location, total inventory sales, total register sales, and cash overages and shortages. Concessionaire shall attach the corresponding deposit ticket and credit card transmission reports to all daily sales reports.

19.5 Concessionaire shall maintain a separate commercial account in the City of San Antonio for all

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sales deposits.

19.6 Concessionaire must use computerized PCI compliant POS. The City shall have access to all such sales and management reports. The City requires the ability of customers to use credit and debit cards for sales at all sales locations within the Facility.

19.7 Automatic Teller Machines (ATM) may be placed in the Facility at the discretion of the City.

19.8 An independent audit of the Concessionaire's gross receipts operation, by an accounting contractor approved by the City, must be submitted no later than 90 days after the end of each Agreement Year as a Direct Operating Cost.

19.9 In the event the City is not satisfied with the statements submitted by the Concessionaire, as provided for herein, the City shall have the right to make a special audit by auditors selected by the City, of the books and records required to be made and preserved, including all sales and expenses, by the Concessionaire. If such audit shall show a deficiency in payments by the Concessionaire for any Accounting Period covered, in excess of 1% of the amount thereof, the amount owed and the Late Fees from the date the error took place and the cost of the audit, shall be paid promptly by Concessionaire to the City as a Direct Operating Cost.

19.10 Concessionaire and the City shall inventory all Equipment, Leasehold Improvements, uniforms and Smallwares on an annual basis to determine what replacements and repairs are required, and to adjust the depreciation schedule accordingly.

19.11 Concessionaire shall maintain all sales tax licenses and operating permits necessary for the Food Service.

19.12 Concessionaire shall collect and promptly disburse all taxes required by federal, state, and local authorities, and shall pay any and all applicable taxes relating to their operations, employees, equipment, inventory or permits.

XX. DELINQUENT TAXES

In the event that Concessionaire is or subsequently becomes delinquent in the payment of taxes owed to the City of San Antonio, the City reserves the right to deduct any delinquent taxes from payments that the City may owe to the delinquent Concessionaire as a result of this contract.

XXI. PERFORMANCE BOND (See RFQ)

XXII. OWNERSHIP OF DOCUMENTS

22.01 Pursuant to Texas Local Government Code Chapter 201, any and all Records produced by Concessionaire pursuant to the provisions of this contract are the exclusive property of City; and no such Record shall be the subject of any copyright or proprietary claim by Concessionaire. The term "Record" as used herein shall mean any document, paper, letter, book, map, photograph, sound or video recording, microfilm, magnetic tape, electronic medium, or other information recording medium, regardless of physical form or characteristic.

22.02 Concessionaire understands and acknowledges that as the exclusive owner of any and all such Records, City has the right to use all such Records as City desires, without restriction.

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XXIII. RECORDS RETENTION

23.01 Concessionaire and its subcontractors, if any, shall properly, accurately and completely maintain all documents, papers, and records, and other evidence pertaining to the services rendered hereunder (“Documents”), and shall make such Documents available to the City at their respective offices, at all reasonable times and as often as City may deem necessary during the contract period, including any extension or renewal hereof, and the record retention period established herein, for purposes of audit, inspection, examination, and making excerpts or copies of same by City and any of its authorized representatives.

23.02 Concessionaire shall retain any and all Documents produced as a result of services provided hereunder for a period of four years (“Retention Period”) from the date of termination of the contract. If, at the end of the Retention Period, there is litigation or other questions arising from, involving or concerning these Documents or the services provided hereunder, Concessionaire shall retain the records until the resolution of such litigation or other such questions. Concessionaire acknowledges and agrees that City shall have access to any and all such Documents at any and all times, as deemed necessary by City, during said Retention Period. City may, at its election, require Concessionaire to return the documents to City at Concessionaire’s expense prior to or at the conclusion of the Retention Period. In such event, Concessionaire may retain a copy of the documents.

23.03 Concessionaire shall notify City, immediately, in the event Concessionaire receives any requests for information from a third party, which pertain to the Documents referenced herein. Concessionaire understands and agrees that City will process and handle all such requests.

23.04 City reserves the right to conduct examinations, during regular business hours and following notice to Concessionaire by City, of the books and records related to the Agreement with City (including such items as contracts, paper, correspondence, copy, books, accounts, billings and other information related to the performance of Concessionaire’s services hereunder), no matter where books and records are located, but not including individual salary or non-billable expenses. City also reserves the right to perform any and all additional audits relating to Concessionaire’s services, provided that such audits are related to those services performed by the Concessionaire for City. These examinations shall be conducted at the offices maintained by Concessionaire, if Concessionaire maintains an office in Bexar, County Texas; however, if Concessionaire does not maintain an office in Bexar County, then Concessionaire shall be responsible for delivering all such books and records related to this Agreement to the City, or a place reasonably identified by its Director.

23.05 During the retention period, City may require that any or all of such records and accounts be submitted for audit to City or to a Certified Public Accountant selected by City. City shall use its best business efforts to require any Certified Public Accountant selected by City to sign a non-disclosure agreement provided by Concessionaire. In the event Concessionaire fails to furnish City any documentation required hereunder within 10 days following the written request for same, then Concessionaire shall be in default of this Agreement.

23.06 Should City discover errors in internal controls or in record keeping associated with the scope of work covered by this Agreement, Concessionaire shall correct such discrepancies either upon discovery or within a reasonable period of time, not to exceed 60 days after discovery and notification by City to Concessionaire of such discrepancies. Concessionaire shall inform City in writing of the action taken to correct such audit discrepancies.

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XXIV. AUDITS

24.1 Concessionaire shall provide to the City's Director all reports relating to the performance of services under this Agreement requested by City including, but not limited to, reviewed financial statements and reports, reports and accounting of services rendered, and any such reports or related documents requested by City. Concessionaire shall provide financial and service reports in a reasonable time frame as determined by City. Concessionaire shall also provide any other reports or documents to City within five business days after Concessionaire receives City's written requests, unless the parties agree in writing on a longer period of time. Sales expense (Food Service, labor, supplies, and operating expenses) records and any other documents relating to (i) the performance of services under 20.4 of this Agreement or (ii) testing of Gross Revenue calculations shall be retained by Concessionaire for a period of four years after the termination of the Initial Term of this Agreement and any applicable Option Term, in order to be available for audit by City or its designee.

24.1.1 City may require Concessionaire to submit reports in a format that is reasonably requested by the City and/or City's designated Auditor. Concessionaire may seek approval of the City's Director by proposing a format in which information shall be provided to City.

24.1.2 Reports shall be completed and submitted in accordance with the Comprehensive Report Schedule (Addendum IV).

24.2 Periodical audits, described further in 24.2.1 and 24.2.3, will be required during the terms of this Agreement.

24.2.1 City's Audit: City or its authorized representative shall at all reasonable times without prior notice have the right to examine, inspect, and audit all books, papers, and bank records of Concessionaire as necessary to determine the accuracy of reports relative to the Gross Receipts of Concessionaire's operations under this Agreement. The cost and expenses incurred by City incident thereto shall be the sole responsibility of and borne by City. Such records shall without limitation include the records of all daily receipts and deposits, and all books, accounts, memoranda, and all or any other documents of Concessionaire and/or any of Concessionaire's Members and subcontractors performing under this Agreement indicating and substantiating the amount of any expenditures and receipts related to 20.4 of this Agreement, including all deposit slips, bills, vouchers, payroll records, purchase orders, and other pertinent records that, under recognized accounting and industry practices, contain information bearing upon or relating to cost, income, gross sales, or subsidy. Such records shall be maintained by Concessionaire for a period of four years after the termination of the Initial Term of this Agreement and any applicable Option Term and shall be made available for inspection and/or audit by City or its agents at the Facility or at Concessionaire's facility.

24.2.2 Report of Agreed Upon Procedures: Concessionaire agrees to work in conjunction with an independent CPA firm to develop a Report of Agreed upon Procedures to be submitted to City within 60 days of the effective date of this Agreement. The Report of Agreed upon Procedures shall be performed in accordance with Statements on Standards for Attestation Engagements No.'s 10 and 11, or such standards as are effective as of the period of time covered by the report. City must accept the Report of Agreed Upon Procedures within 30 days of receipt. If City deems the Report of Agreed Upon Procedures to be unacceptable, City may consult an independent CPA firm to assist

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Concessionaire in revising said Report of Agreed Upon Procedures so that they are acceptable to City. In no case shall the Report of Agreed Upon Procedures be accepted after 120 days after the effective date of this Agreement due to the fault of Concessionaire.

24.2.3 Concessionaire's Audit: In addition to the Report of Agreed Upon Procedures, City may require Concessionaire to perform an audit by an independent auditing firm approved by City. The cost of the audits will be shared equally by City and Concessionaire unless the Auditor finds that the Concessionaire underpaid the City by more than a 2% variance from what sums were paid to the City by Concessionaire as previously reported to the City, in which case Concessionaire will pay for all costs associated with the Audit. A copy of all Audit Reports and Management Letters prepared as a result of such audit shall be provided to City. If such audit reveals an error in the calculation of the payments made by Concessionaire to City under this Agreement, then the auditor's report shall be furnished to both Concessionaire and City within 30 days of the conclusion of the Audit. If a corrected payment required by the auditor's report is due City, Concessionaire shall pay City the amount due within 15 business days of Concessionaire's receipt of such report together with interest at the rate of 18% per annum on commissions due on unreported Gross Receipts (but in no event greater than the maximum legal rate allowed under applicable law) from the date payment should have been made until payment is received by City. If the auditor's report indicates a refund is due Concessionaire, Concessionaire shall notify City in writing and include a copy of the auditor's report within 30 days. City shall pay Concessionaire the amount due within 30 days of City's receipt of such report but it is expressly agreed that City shall pay no interest on such refund.

24.3 Either Concessionaire or City may dispute the findings of audits performed under 24.2.1 or 24.2.3 within 30 days of receiving the results of said audit. The Party electing to dispute the audit results shall within 30 days following receipt of the auditor's report submit such additional information as may be required to correct the auditor's report. If upon examination of additional information by the designated auditor:

- a) such report reflects that a refund is owed to Concessionaire, then City shall refund such monies to Concessionaire within 30 days thereafter; or
- b) such report reflects that monies are owed to City by Concessionaire from unreported Gross Receipts, then Concessionaire shall pay such monies to City, together with interest at the rate of 18% per annum from the date when said payment should have been made until the date payment is received by City, within 30 days thereafter.

24.4 Any changes to audit intervals and record retention will be determined by the City in its sole discretion.

24.5 Concessionaire shall take all precautions to ensure that all cash income received from any source and non-cash vouchers are immediately recorded and that designated reports are submitted as required under this Agreement. Concessionaire shall ensure that all expenditures are supported by appropriate vendor invoices. Concessionaire shall pay all proper bills and other expenses (other than those paid for by City) incurred in the normal course of providing Food Service at the Facility.

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24.6 Concessionaire shall also be subject to periodic, unannounced operating audits of the Food Service Areas by the City's Director and his/her staff. Such audits may include, but not be limited to, a comprehensive review of:

- a) Service quality, attentiveness, courteousness, etc.
- b) Food quality, presentation, and merchandising
- c) Sanitation practices and conditions
- d) Personnel appearance
- e) Training program techniques, schedules, and records
- f) Safety conditions
- g) Operational performance from a financial perspective
- h) Other related operational conditions and/or practices

After the completion of such operating audit, Concessionaire shall be notified by the City's Director of conditions needing correction or improvement. Concessionaire shall promptly comply with any such notice.

XXV. ADVERTISING AND GRAPHICS

25.1 Concessionaire shall not display any identifying logos and/or graphics within the Food Service Areas 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 Concessionaire or (d) as may be requested by a Customer of the Center. Signs and other graphic materials that are used by Concessionaire shall be conservative and must be approved in advance by City's Director or his/her designee. Concessionaire shall not place signage printed with commercial brand name identification at the Facility or use such signage when providing Food Service to Customers of the Facility or Licensees except as otherwise provided in this Section.

25.2 Any use of logos and/or graphics of companies other than Concessionaire or Concessionaire's Members in connection with the performance of this Agreement and not allowed by 25.1 is strictly prohibited.

XXVI. LABOR RELATIONS

Concessionaire shall be responsible for their own labor relations with any trade or union represented among Concessionaire's Employees and shall negotiate and be responsible for adjusting all disputes described above between itself and Concessionaire's Personnel, Concessionaire's Employees, or any union representing such employees. Concessionaire shall ensure that in any agreement that Concessionaire 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.

XXVII. SMALL BUSINESS ECONOMIC DEVELOPMENT ADVOCACY PROGRAM (see RFQ)

XXVIII. NON-DISCRIMINATION

Non-Discrimination. As a party to this Agreement, Concessionaire understands and agrees to comply with the Non-Discrimination Policy of the City of San Antonio contained in Chapter 2, Article X of the City

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Code and further, shall not discriminate on the basis of race, color, religion, national origin, sex, sexual orientation, gender identity, veteran status, age or disability, unless exempted by state or federal law , or as otherwise established herein.

XIX. LICENSES AND PERMITS

29.1 Concessionaire and any subcontractor involved in the Food Service operations, shall, at its own expense and cost, procure and keep in force during the term of this Agreement, all permits and licenses required by law to conduct Food Service at the Facility, and provide copies of such permits and licenses to City within 10 business days of receipt.

29.2 It is understood that this Agreement is conditioned upon acquisition and maintenance of valid licenses to sell beer, wine, and liquor by Concessionaire and each subcontractor providing alcoholic beverages in connection with Food Service.

29.3 Nothing contained herein shall be construed as binding the City to the issuance of any license or permit needed by Concessionaire or any subcontractor to enable anyone to provide Food Service hereunder.

29.4 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 Food Service operations at the Facility shall be canceled without further notice or hearing.

XXX. CERTIFICATIONS

Concessionaire warrants and certifies that Concessionaire and any other person designated to provide services hereunder has the requisite training, license and/or certification to provide said services, and meets all competence standards promulgated by all other authoritative bodies, as applicable to the services provided herein.

XXXI. CONTRACT ADMINISTRATION

City hereby engages Concessionaire to operate the Food Service as specified herein. Concessionaire's GM shall cooperate at the Facility with the City's Director. The City's Director may be changed at the option of City by written notice to Concessionaire without a formal amendment. All Food Service rendered under this Agreement are subject to the final approval of the City's Director.

XXXII. RENOVATIONS AND SPATIAL MODIFICATIONS

If the City determines that planned major renovations or remodeling are necessary to increase Food and Beverage Service and/or concession opportunities at the Center and/or Lila Cockrell Theater, City will notify Concessionaire to such renovations or remodeling plans prior to implementing such renovations or remodeling.

XXXIII. EQUIPMENT

33.1 City shall provide, install, and permit Concessionaire to use the major Food Service Equipment as specified in Addendum I. If it is determined by Concessionaire that such equipment is no longer needed for Food Service operations, Concessionaire will notify City, and with City's consent, not to be unreasonably withheld, Concessionaire may direct City to remove such equipment. Ownership of all

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equipment provided by City under this Agreement shall be vested in City with the exception of any equipment provided by Concessionaire and brought on-site by Concessionaire with City's approval, for which all costs have been borne by Concessionaire, with the exception of any equipment leased by City. On or before January 31 of each calendar year, Concessionaire shall provide a list of all Concessionaire-owned and leased equipment brought on site to the City's Director. Concessionaire shall replace equipment, which it has provided, as City deems necessary.

33.2 Concessionaire shall provide an initial complement of smallwares of sufficient quantity and quality to conduct Food Service operations in a first-class manner and be responsible for all necessary replacement of such smallwares. Title to all such smallwares shall rest solely with City.

33.3 Food Service Equipment initially furnished by City is set forth in Addendum I. Subsequent changes, additions, or deletions to Addendum I shall be in writing and approved by both City and Concessionaire. On the annual anniversary date of this Agreement and upon termination or expiration of this Agreement, a joint inventory shall be taken by City and Concessionaire to verify the correctness of the equipment listed in Addendum I. If any equipment is unaccounted for after such inventory, Concessionaire has 60 days from finalization of the inventory to produce missing equipment or provide a written plan for replacement.

33.4 City reserves the exclusive right, privilege and responsibility of installing vending machines at the Facility. City shall receive all commissions resulting from the sale of vending machine items and shall hold all concession rights to said machines. However, City agrees to limit the number and character of installed vending machines so that they do not directly compete with Concessionaire's rights under this Agreement. In no case shall Concessionaire install, rent or otherwise profit from sale of vending machine items without the written consent of City.

33.5 The cost of repairing Food Service Equipment damaged as a result of the acts or omissions of Concessionaire shall be paid by Concessionaire, and if such equipment is unable to be repaired, Concessionaire will replace equipment with equipment of equal value and quality at Concessionaire's expense.

33.6 Concessionaire is responsible for all maintenance and service agreements for the Food Service Equipment. Equipment which is supplied in good condition by City shall be maintained by Concessionaire in the same condition, other than normal wear and tear, at Concessionaire's expense. Concessionaire shall immediately notify the City's Director of any equipment failure that will adversely affect the Food Service operations or result in the spoilage of food, etc. Concessionaire shall send a follow-up notice to the City's Director when repairs and/or services are completed.

33.6.1 Concessionaire shall not be required to repair or replace "obsolete equipment." "Obsolete equipment" is defined as equipment whose repair cost exceeds 85% of its fair market value.

33.7 Concessionaire shall not remove any Food Service equipment from the Facility.

XXXIV. FACILITY

34.1 City shall be responsible for the following services with respect to the Facility:

- a) Provide adequate ingress and egress, including reasonable use of the corridors, passageways, and loading platforms.

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- b) Make such improvements and/or alterations to the Food Service Areas as it may deem necessary in its sole discretion.
- c) Maintain and repair the building structures in the Food Service Areas, such as the maintenance of water, sewer (except for blockage caused by the Concessionaire) and electrical lines, ventilation and air conditioning lines and systems, repair of electrical lighting fixtures, (including re-lamping); heating systems; floor coverings, wall and ceilings. Concessionaire, however, shall bear the expense of repairs resulting from the acts or omissions of Concessionaire, vendors, agents, subcontractor's or as otherwise provided herein.
- d) Provide, at no charge to Concessionaire, such heat, light, power, water sources, and air conditioning that may be reasonably required for the efficient operation of the Food Service Areas.
- e) Provide sanitary toilet facilities for Concessionaire's Personnel.
- f) Provide cleaning services in all areas of the Center, excluding the Food Service Areas.
- g) Provide office space for the GM and for administrative activities such as purchasing, invoice reconciliation, storage and payroll as set forth in Addendum II. Concessionaire shall supply office equipment as needed. Concessionaire shall provide a list of all Concessionaire-owned and leased office equipment brought on site to the City's Director on the annual anniversary date of this Agreement for the term of this Agreement.
- h) Provide periodic major repair of floors, carpets, ceilings, walls, windows, light fixtures, draperies, blinds and vents in the Food and Beverage Service Areas.

34.2 Concessionaire shall be responsible for clearing all blockages to sewer lines at the Facility caused by Concessionaire.

XXXV. CITY'S ACCESS TO AND USE OF FACILITY

City shall have the right to use the dining areas and meeting spaces in the Center and Lila Cockrell Theater for non-food service events at any time, unless such spaces have been previously committed for use in connection with Food Service under this Agreement.

XXXVI. TERMINATION OF CONTRACT

36.1 In the event that Concessionaire defaults or fails to observe any of the terms and conditions of this Agreement, City shall have the right to do the following:

- a) Give Concessionaire notice of the default, specifying the corrective action and providing a 30 day time period within which corrective action must be taken to avoid termination of this Agreement by City (if such default cannot be reasonably cured within 30 days, such longer period of time as is reasonably needed to accomplish such corrective action may be requested of the City's Director); and

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- b) If the Concessionaire has failed to complete such corrective action within the stated time period, and if City intends to terminate this Agreement for cause, then City must give Concessionaire at least 30 day's prior written notice of such intention. Thirty days thereafter, this Agreement and City's obligations and duties hereunder will end, regardless of any corrective action by the Concessionaire.

Termination of this Agreement shall not relieve any Party of any responsibility for losses and damages to the other resulting from a default.

36.2 Upon the effective date of termination of this Agreement, Concessionaire shall relinquish occupancy of the Food Service Areas to City except, however, if a transition period is directed by City as stated in Section 2.2 of this Agreement. Concessionaire shall return all areas, equipment, and other items furnished by City in the condition in which received by Concessionaire, reasonable wear and tear excepted.

36.2.1 A joint inventory shall be immediately undertaken to establish the existence and condition of all Food Service Equipment.

36.2.2 A walk-through of the Food Service Areas shall also be taken to inventory its condition at that time.

36.3 Upon expiration or termination of this Agreement, City shall have the option, to be exercised in its sole discretion, of buying at fair market value, [based on amortization schedule](#), some or all equipment and smallwares owned and used by Concessionaire in operating the Center and which are maintained at the Facility.

36.4 If, within 30 days of termination of this Agreement, City determines that any part of the Food Service Areas and/or Food Service Equipment are damaged by Concessionaire, and that such condition was not evident in the final inventory or walk-through as described in Sections 36.2.1 and 36.2.2, City reserves the right to have Concessionaire pay for repairs to said damaged areas and/or equipment caused by Concessionaire. This clause shall survive the expiration of this Agreement.

36.5 Concessionaire shall be responsible for all direct losses and damages to City including but not limited to the Food Service Areas, resulting directly from Concessionaire's default, failure to observe the terms and conditions of this Agreement, or from Concessionaire's negligence.

XXXVII. INDEPENDENT CONTRACTOR

Concessionaire covenants and agrees that it is an independent contractor and not an officer, agent, servant or employee of City. City shall not be liable for any claims which may be asserted by any third party occurring in connection with the services to be performed by Concessionaire under this contract and that Concessionaire has no authority to bind City. The doctrine of respondeat superior shall not apply as between City and Concessionaire.

XXXVIII. CONFLICT OF INTEREST

38.1 Concessionaire acknowledges that it is informed that the Charter of the City of San Antonio and its Ethics Code prohibit a City officer or employee, as those terms are defined in Part B, Section 10 of the Ethics Code, from having a financial interest in any contract with the City or any City agency such as city

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owned utilities. An officer or employee has a “prohibited financial interest” in a contract with the City or in the sale to the City of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale: a City officer or employee; his parent, child or spouse; a business entity in which the officer or employee, or his parent, child or spouse owns 10% or more of the voting stock or shares of the business entity, or 10% or more of the fair market value of the business entity; a business entity in which any individual or entity above listed is a subcontractor on a City contract, a partner or a parent or subsidiary business entity.

38.2 Pursuant to the subsection above, Concessionaire warrants and certifies, and this Agreement is made in reliance thereon, that it, its officers, employees and agents are neither officers nor employees of City. Concessionaire further warrants and certifies that it has tendered to City a Discretionary Contracts Disclosure Statement in compliance with City’s Ethics Code.

XXXIX. ASSIGNMENT AND SUBCONTRACTING

39.1 Concessionaire shall supply all qualified personnel as may be necessary to complete the work to be performed under this Agreement. Persons retained to perform work pursuant to this Agreement shall be the employees or subcontractors of Concessionaire. Concessionaire, its employees or its subcontractors shall perform all necessary work.

39.2 Concessionaire may not sell, assign, pledge, transfer or convey any interest in this Agreement, nor delegate the performance of any duties hereunder, by transfer or any other means, without the prior written consent of City. As a condition of such consent, if such consent is granted, Concessionaire shall remain liable for completion of the services outlined in this Agreement in the event of default by the successor Concessionaire, assignee, transferee or subcontractor.

39.3 Any attempt to transfer, pledge or otherwise assign this Agreement without said approval, shall be void ab initio and shall confer no rights upon any third person. Should Concessionaire assign, transfer, convey, delegate, or otherwise dispose of any part of all or any part of its right, title or interest in this Agreement, City may, at its option, cancel this Agreement and all rights, titles and interest of Concessionaire shall thereupon cease and terminate, in accordance with Article VII Termination, notwithstanding any other remedy available to City under this Agreement. The violation of this provision by Concessionaire shall in no event release Concessionaire from any obligation under the terms of this Agreement, nor shall it relieve or release Concessionaire from the payment of any damages to City, which City sustains as a result of such violation.

39.4 Any work or services provided by Concessionaire’s subcontractors shall be subcontracted only by written contract and, unless specific waiver is granted in writing by the City, shall be subject by its terms to each and every provision of this Agreement. Compliance by subcontractors with this Agreement shall be the responsibility of Concessionaire. City shall in no event be obligated to any third party, including any subcontractor of Concessionaire, for performance of services or payment of fees.

XL. LAW APPLICABLE

THIS AGREEMENT SHALL BE CONSTRUED UNDER AND IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS AND ALL OBLIGATIONS OF THE PARTIES CREATED HEREUNDER ARE PERFORMABLE IN BEXAR COUNTY, TEXAS.

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XLI. VENUE

Any legal action or proceeding brought or maintained, directly or indirectly, as a result of this Agreement shall be heard and determined in the City of San Antonio, Bexar County, Texas.

XLII. AMENDMENTS

Except where the terms of this Agreement expressly provide otherwise, any amendment to this Agreement shall not be binding on the Parties unless such amendment be in writing, executed by both City and Concessionaire and dated subsequent to the date hereof, and subject to City Council approval, if required.

XLIII. SEVERABILITY

If any clause or provision of this contract is held invalid, illegal or unenforceable under present or future federal, state or local laws, including but not limited to the City Charter, City Code, or ordinances of the City of San Antonio, Texas, then and in that event it is the intention of the parties hereto that such invalidity, illegality or unenforceability shall not affect any other clause or provision hereof and that the remainder of this contract shall be construed as if such invalid, illegal or unenforceable clause or provision was never contained herein. It is also the intention of the parties hereto that in lieu of each clause or provision of this contract that is invalid, illegal, or unenforceable, there be added as a part of the contract a clause or provision as similar in terms to such invalid, illegal or unenforceable clause or provision as may be possible, legal, valid and enforceable.

XLIV. COMPLIANCE

Concessionaire shall provide and perform all services under this Agreement in compliance with all applicable federal, state, local laws, rules and regulations, including City permitting requirements.

XLV. ACTS OF GOD

If the Facility or any portion thereof is destroyed or damaged by fire or other calamity so as to prevent the use of the Facility for the purposes and during the periods specified in this Agreement, or if the use of the Facility by Concessionaire shall be prevented by an act of God, strike lockout, material or labor shortage, restrictions by any governmental authority, civil riot, flood or any other cause beyond the control of the City, then, notwithstanding any other remedies available to City under this Agreement, this Agreement shall terminate. City shall not be liable or responsible to Concessionaire for any damages caused thereby and Concessionaire hereby waives any claims against City for damages by reason of such termination.

XLVI. NON-WAIVER OF PERFORMANCE

Unless otherwise specifically provided for in this Agreement, a waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this Agreement shall not be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall in no event be construed as a waiver or relinquishment for the future of such covenant or option. In fact, no waiver, change, modification or discharge by either party hereto of any provision of this Agreement shall be deemed to have been made or shall be effective unless expressed in writing and signed by the party to be charged. No act or omission by a Party shall in any manner impair or prejudice

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any right, power, privilege, or remedy available to that Party hereunder or by law or in equity, such rights, powers, privileges, or remedies to be always specifically preserved hereby.

XLVII. NOTICE

Except where the terms of this Agreement expressly provide otherwise, any election, notice or communication required or permitted to be given under this Agreement shall be in writing and deemed to have been duly given if and when delivered personally (with receipt acknowledged), or three days after depositing same in the U.S. mail, first class, with proper postage prepaid, or upon receipt if sending the same by certified mail, return receipt requested, or upon receipt when sent by a commercial courier service (such as Federal Express or UPS) for expedited delivery to be confirmed in writing by such courier, at the addresses set forth below or to such other address as either party may from time to time designate in writing.

If intended for City, to:

City of San Antonio
Attn: Director
Convention and Sports Facilities Department
P.O. Box 1809
San Antonio, TX 78296-1809

If intended for Concessionaire, to:

XLVIII. INTELLECTUAL PROPERTY

48.1 Concessionaire agrees to obtain all necessary licenses and take all other necessary steps to insure that all use of trademarked or copyrighted materials used during the term of the Agreement complies with United States and any other applicable trademark and copyright law.

48.2 Concessionaire agrees to **INDEMNIFY and DEFEND at its own expense City, its officials, agents and employees from any and all liability arising from trademark or copyright infringement and/or consequential damages that others may suffer as a result of the use by Concessionaire or its designee of copyrighted materials during the term of this Agreement.**

XLIX. LEGAL AUTHORITY

The signer of this Agreement for Concessionaire represents, warrants, assures and guarantees that he has full legal authority to execute this Agreement on behalf of Concessionaire and to bind Concessionaire to all of the terms, conditions, provisions and obligations herein contained.

L. PARTIES BOUND

This Agreement shall be binding on and inure to the benefit of the Parties hereto and their respective heirs, executors, administrators, legal representatives, and successors and assigns, except as otherwise expressly provided for herein.

THIS IS A DRAFT CONTRACT FOR REFERENCE PURPOSES ONLY. A CONTRACT WILL BE NEGOTIATED BETWEEN THE CITY AND SELECTED RESPONDING PARTY PRIOR TO AWARD.

LI. CAPTIONS

The captions contained in this Agreement are for convenience of reference only, and in no way limit or enlarge the terms and/or conditions of this Agreement.

LII. EXHIBITS

The Exhibits listed below are an essential part of the Agreement and it governs the rights and duties of the parties. Any conflict between this Agreement and the Exhibit shall be resolved in favor of this Agreement.

LIII. ENTIRE AGREEMENT

This Agreement, including City's final electronically posted online version together with its authorizing ordinance and its price schedule(s), attachments, purchase orders, and exhibits, if any, and Concessionaire's proposal, constitutes the final and entire agreement between the parties hereto and contains all of the terms and conditions agreed upon. City's solicitation documents shall control over Concessionaire's proposal in the event of a conflict. No other agreements, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind the parties hereto, unless same be in writing, dated subsequent to the date hereof, and be duly executed by the parties, in accordance with Section XLVII. Notices. **The Parties agree that City's final electronically posted online version of this solicitation contains the agreed upon specifications, scope of services, and terms and conditions of this Agreement, and shall control in the event of a conflict with any printed version signed and submitted by Concessionaire.**