

ARTICLE I. PREAMBLE

1.1 ADDRESS

1.1.1 **THIS RETAIL CONCESSION AGREEMENT** (“Agreement”) at _____ (“Airport”) is made and entered into on the Effective Date by and between the **CITY OF HOUSTON, TEXAS**, a home rule city (“City”) and _____, a _____ corporation authorized to do business in the State of Texas (“Concessionaire”).

1.1.2 The initial addresses of the parties, which one party may change by giving written notice of its changed address to the other party, are as follows:

City

Concessionaire

Director of Aviation
City of Houston
P.O. Box 60106
Houston, TX 77205-0106

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1.2.1. The City and the Concessionaire hereby agree to the terms and conditions of this Agreement. This Agreement consists of the following sections:

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1.3 PARTS INCORPORATED

1.3.1 The “HA Quality Assurance/Physical Plant Standards Observation”, the “Houston Airports Safety/Sanitation Standards Observation”, and the “Houston Airports Concession Management Guide” together with all of the above described articles and exhibits are hereby incorporated into this Agreement by this reference for all purposes.

1.3.2 CONTROLLING PARTS

1.3.3 In the event of any conflict or inconsistency between or among the provisions of such articles or exhibits, it is agreed that the provisions of the articles shall control over the provisions of the exhibits.

1.5 SIGNATURES

IN WITNESS HEREOF, the City and the Concessionaire have made and executed this Agreement in multiple copies, each of which shall be deemed an equal.

ATTEST/SEAL:

"Concessionaire"

By: _____
Name:
Title:

By: _____
Name:
Title:
Tax ID Number: _____

ATTEST/SEAL:

CITY OF HOUSTON, TEXAS
"City"

City Secretary

Mayor

APPROVED:

COUNTERSIGNED:

Mario C. Diaz
Director, Houston Airport System

City Controller

APPROVED AS TO FORM:

DATE COUNTERSIGNED:

Sr. Assistant City Attorney
L.D. File No.

ARTICLE II. RECITALS

WHEREAS, City is the owner and operator of the Airport; and

WHEREAS, City has been granted the authority by the State of Texas under Section 22.011 of the Transportation Code to provide for the comfort and accommodation of air travelers; and

WHEREAS, City objectives include but are not limited to:

- (i) provide first-class service and a broad variety of quality merchandise at reasonable prices to travelers and Airport users;
- (ii) provide innovative facility designs that complement the design of the terminal;
- (iii) provide business opportunities for Airport Concession Disadvantaged Business Enterprises (“ACDBE”);
- (iv) optimize concession sales and Airport revenues; and
- (v) provide uninterrupted service to the traveling public during all phases of renovation and expansion programs at the Airport;

WHEREAS, City and Concessionaire desire to enter into this Agreement to set forth the terms and conditions under which Concessionaire shall conduct its Concession at the Airport;

NOW, THEREFORE, for and in consideration of the mutual promises, covenants, agreements, and benefits contained herein, City and Concessionaire agree as follows.

ARTICLE III. DEFINITIONS

3.1 As used in this Agreement, the following words and phrases shall have the meanings set out below.

3.1.1 "Build-out Costs" means costs incurred by Concessionaire for the design, demolition, construction, and build out of the Facilities (inclusive of the common seating areas associated with such Facilities) set forth in Exhibit “A”.

3.1.2 "City Attorney" means the City Attorney of the City or any person designated by the City Attorney to perform one or more of the duties of the City Attorney under this Agreement.

- 3.1.3 "Concession" is defined in Subsection 4.1.1 herein.
- 3.1.4 "Director" means the Director of the Houston Airport System of the City or any person designated by the Director to perform one or more of the Director's duties under this Agreement.
- 3.1.5 "Duty Free" means [to be inserted].
- 3.1.6 "Effective Date" means the date of countersignature by the City Controller.
- 3.1.7 "Facility" or "Facilities" means (i) a location or locations at the Airport that are identified in Exhibit "A" for the sale of a varied range of retail products by Concessionaire or Subcontractors, (ii) any temporary or permanent space added to this Agreement by Director during the Term pursuant to Subsection 4.1.3 and (iii) office or storage space identified in Exhibit "B," as may be modified from time to time throughout the Term.
- 3.1.8 "Gross Sales" means the aggregate dollar amount of all sales, including Concessionaire's receipts from all sales made at or from the Facilities, regardless of where the order is received or delivered, and any other revenues of any type arising out of or in connection with the Concessionaire's operations in the Facilities, whether performed by the Concessionaire, its Subcontractors, subsidiaries, associated companies, or any other entity corporate or otherwise, for cash or credit or otherwise, of every kind, name and nature, regardless of where or whether collected, as if the same had been sold for cash. The following may be excluded or deducted, as the case may be, from the computation of Gross Sales:
- .1 Any and all retail sales taxes, and any related direct taxes upon the consumer and collected by the Concessionaire on such sales;
 - .2 The value of any merchandise, supplies or equipment exchanged or transferred from or to other locations of business of the Concessionaire and/or its Subcontractors where such exchanges or transfers are not made for the purpose of avoiding a sale which would be made at or from a Facility;
 - .3 Receipts in the form of refunds from or the value of merchandise, supplies, or equipment returned to shippers, suppliers, or manufacturers;
 - .4 Receipts with respect to any sale where the subject of such sale, or some part thereof, is thereafter returned by the purchaser to and accepted by the Concessionaire to the extent of any refund actually granted or adjustment actually made, either in the form of cash or credit;

- .5 Receipts from the sale or trade-in value of the furnishings, fixtures or equipment approved for removal from the Airport by the Director and Removable Fixtures used in the Facilities and owned by the Concessionaire and/or its Subcontractors ;
- .6 Receipts from the sales at cost of uniforms or clothing to the Concessionaire's employees where such uniforms or clothing are to be required to be worn by such employees;
- .7 Amount of discounts set forth in Subsection 6.1.9 only;
- .8 Any discounts, rebates, promotional allowances, however denominated, to Concessionaire pertaining to merchandise, supplies or equipment from manufacturers, suppliers or shippers;
- .9 Gratuities or service charges given or paid to Concessionaire's employees by customers that are distributed as tips;
- .10 The value of shift meals given to Concessionaire's employees; and
- .11 Fees, charges and other payments paid to Concessionaire by its Subcontractors under a subcontract or other agreement.

The Concessionaire shall not, and shall not allow any Subcontractor to credit or allow any reduction in the amount of Gross Sales, which results from any arrangement for a rebate, kickback, or hidden credit given or allowed to any customer; provided, however, that the Concessionaire or its Subcontractors may provide customary employee discounts on sales of products or services as provided in Subsection 6.1.9 hereof.

- 3.1.8 “Locally Branded” means a retail concept that has a significant presence in, but little to no presence outside of, the City of Houston and its surrounding suburbs, as determined by the Director in his sole judgment.
- 3.1.9 "Minimum Guarantee Fee" means the guaranteed minimum amount of money due the City from Concessionaire each month (or portion of a month) of the Term as specified in Section 8.3 of this Agreement.
- 3.1.10 “Nationally Branded” (inclusive of internationally branded) means, as determined by the Director in his sole judgment, retail products, nationally or internationally recognized, sold by Concessionaire or Subcontractors where a royalty or franchise fee is charged by a franchisor and paid by Concessionaire or Subcontractor for the privilege of selling such products from the Facilities. Concessionaire, its Subcontractors, affiliates, parent, sister companies, and subsidiaries cannot be a franchisor for purposes of qualifying a particular retail business as “nationally branded”.

- 3.1.11 "Percentage Fee" means the product of (i) the Gross Sales for each category of product sold multiplied by (ii) the percentages set out in Section 8.4 hereof for each product category.
- 3.1.12 "Removable Fixtures" means all furnishings, fixtures and equipment that are not permanently affixed to any wall, floor or ceiling in the Facilities and which may be removed without any damage to the Facilities.
- 3.1.13 "Term" is defined in Section 7.1 of this Agreement.

ARTICLE IV. SCOPE OF SERVICES

4.1 IN GENERAL

- 4.1.1 Subject to all obligations, terms and conditions of this Agreement, beginning on the Effective Date, Concessionaire is hereby granted the non-exclusive right, license and privilege to operate a retail concession the Airport. However, Concessionaire is granted the exclusive right, license and privilege to operate a retail concession in the designated Facilities set forth in Exhibit "A" ("Concession"), consistent with the approved Facility concepts also set forth in Exhibit "A", subject to Section 6.9 herein. City agrees that subject to Section 6.9, for so long as Concessionaire performs its obligations and makes all payments provided herein throughout the Term, Concessionaire shall peacefully have and enjoy the use of such Facilities and all the rights, licenses, and privileges granted herein during the Term. The foregoing shall not be construed as giving Concessionaire the right to use or occupy any interim or temporary location for a period beyond that specified by the Director in his sole discretion.
- 4.1.2 Concessionaire shall have the corresponding right to directly operate Facilities and the right to subcontract operation of Facilities to unrelated third parties ("Subcontractors"), as it determines most beneficial to the traveling public in respect of the objectives set forth in Article II hereof. The right to subcontract or assign to another entity, however, is made expressly subject to the Director's prior written approval, as set forth in Subsections 15.8.2 and 17.2.1 herein.
- 4.1.3 The Director and Concessionaire will cooperate throughout the Term to identify other retail opportunities in the Airport. However, the Director shall have the right, upon the mutual agreement of the parties, to grant Concessionaire the right to occupy and use as Facilities hereunder other locations in the Airport from time to time for the purposes described in this Agreement, on either a permanent or temporary basis, as the Director may determine and to condition the use of such space on such terms as he, in his sole discretion, may determine appropriate (including but not limited to capital investment requirements).

4.1.4 As necessary to deliver uninterrupted Concession services throughout the Airport, Concessionaire may use portable carts and/or temporary kiosks from time to time throughout the Term, but only after securing the discretionary prior written consent of the Director as to placement within the Airport, design and type (cart or kiosk).

4.2 RIGHTS OF ACCESS

4.2.1 Concessionaire and its Subcontractors, as well as its agents, employees, contractors, suppliers and invitees are hereby granted, subject to the other terms and conditions of this Agreement, the right of ingress and egress over and across walkways, passageways and other public areas of the Airport for the purposes contemplated under this Agreement. This right of access shall be limited to the Facilities and shall not include a right of access to other areas of the Airport unless approved in writing in advance by Director.

4.3 LIMITATION OF RIGHTS

4.3.1 This Agreement does not grant Concessionaire the right to perform any services, sell any merchandise, or engage in any other business or commercial activity on the Airport. However, Concessionaire shall have the right to sell merchandise that has a direct tie-in to the retail concept of a particular Facility but such right shall only exist after obtaining the prior written approval of the Director as to each type of item to be sold, which he may agree to or may not agree to in his sole discretion.

4.3.2 Concessionaire has no right to install public address speakers in or about the Facilities, that right expressly reserved unto the City.

4.4 OFFICE AND STORAGE SPACE

4.4.1 As part of the consideration for the fees payable by Concessionaire herein, City will allow Concessionaire to use the Facilities designated in Exhibit “B” (beginning as indicated in such Exhibit) solely for administrative purposes and the storing of equipment, supplies and merchandise used in connection with or necessary to support the Concession hereunder. Concessionaire takes such Facilities in an “as is” condition. The Director shall have the right from time to time and upon reasonable notice to the Concessionaire, to designate other Facilities at the Airport for use by the Concessionaire as office and storage space in lieu of the space designated in Exhibit “B”. Additional office and storage space may be available to Concessionaire at the then existing rental rates being charged for such space.

ARTICLE V. FACILITY IMPROVEMENTS

5.1 OBLIGATION TO DEMOLISH, DESIGN, CONSTRUCT AND REFURBISH

5.1.1 Concessionaire takes the Facilities set forth in Exhibits "A" and "B" in their "as is" condition. City makes no representation as to the capacity of the Facilities to meet the retail service requirements of Concessionaire nor of the Facilities' capacity to meet the performance requirements of this Agreement. Concessionaire agrees that at its sole cost and expense, it shall demolish, design, and build out the Facilities set forth in Exhibit "A" (including but not limited to all infrastructure associated with each Facility such as plumbing and electrical) in phases in accordance with demolition and build out schedules which have been approved in writing and in advance by the Director but which do not exceed the deadlines set forth below. **[Any special conditions/circumstances relating to design/construction to be set forth here]** Concessionaire shall demolish, design and build out so that each Facility is fully operational by the following dates:

Identity of Facilities and deadlines placed here

5.1.2 In addition to the termination rights in Section 15.1, Director shall have the right to assess liquidated damages in an amount of \$7000.00 per day for Concessionaire's failure to meet each of the deadlines set forth in Section 5.1.1, provided the failure to meet any such deadline is not due to a Force Majeure event or any action, omission, or material delay caused by the City, as any such Force Majeure event, action, omission, or material delay is determined to apply to this Subsection 5.1.2 by the Director in his sole discretion. Concessionaire and City stipulate that any such assessment shall not be construed as a penalty; rather, Concessionaire and City stipulate that the damages resulting from any such violation will be difficult to measure and ascertain and that \$7000.00 per day is a reasonable estimation of the damages suffered by the City. Any assessment of liquidated damages by the Director shall be paid to City by Concessionaire within ten (10) days of receipt of an invoice for such damages.

5.1.3 Concessionaire shall submit to the Director fully complete and ready to bid plans and specifications (which will include design for replacement of all existing plumbing and drainage elements, together with fully developed demolition and build out schedules (inclusive of start dates for demolition and construction), the sequencing of work by trade, milestones, dates of substantial completion, and the date Concessionaire will begin operating its Concession in each Facility) for all the Facilities set forth in Exhibit "A" in a timely manner to ensure that the deadlines set forth in Section 5.1.1 are met, taking into account time for permitting and the Director's review and authority to require modifications (and rejection set forth in Subsection 5.1.4) to such plans, specifications and build out schedules as set forth herein and in Subsections 5.1.4. Within thirty days of the date Director receives the complete plans and ready to bid plans and specifications and build out schedules, he shall notify Concessionaire in writing of either his approval or required modifications to the plans and specifications and build out schedules. Concessionaire agrees to comply with any modifications reasonably required by the Director.

- 5.1.4 Any subsequent modifications by Concessionaire to the Director approved plans, specifications or build out schedules described in Section 5.1.3 either prior to or during construction of a Facility (i.e., change orders) must first be approved in writing by the Director. Such approval shall be granted unless the Director, in his reasonable and sole discretion, determines that any such modification would negatively impact the Facility, build out schedule, or Concessionaire's obligation to meet the deadlines set forth in Section 5.1.1. Any such submission to the Director must be made in a timely manner (taking into account time for Director's review) so that deadlines set forth in Section 5.1.1 are not adversely impacted. Director shall notify Concessionaire, in writing, within a period not to exceed 60 days from the date of receipt by Director of such change order, of either his approval, rejection, or required modifications of the revised plans, specifications or build out schedule (which all must be submitted to the Director in writing by Concessionaire). Concessionaire agrees to comply with any modifications required by the Director and shall comply with any such rejection of the proposed modifications.
- 5.1.5 Concessionaire agrees, at its sole cost and in accordance with the approved plans, specifications and build out schedule, the City's Construction Code, Fire Code, and Airport Tenant Design Manual to build out the Facilities set forth in Exhibit "A" (and "B" as necessary). Concessionaire, at its sole cost, shall completely furnish and equip the Facilities in accordance with the approved plans and specifications. Concessionaire shall obtain all necessary permits and licenses at its sole cost.
- 5.1.7 All build-out shall be subject to inspection and approval of the City and the Director. Within 120 days following completion of build-out of each phase of construction, Concessionaire shall furnish the Director with two complete sets of detailed as-built documents, including those of its Subcontractors. Additionally, Concessionaire shall furnish the Director a copy of detailed as-built documents, including those of its Subcontractors, written in AUTOCAD II (or the most current release of AUTOCAD) on CD, or other acceptable electronic means. Prior to either the initial build out, any subsequent alteration, or the re-concepting or refurbishment described in Subsection 5.1.9. Concessionaire shall notify the Director thereof in writing at least ten (10) days in advance thereto, and the Director shall have the right to enter upon the areas of build out to post and maintain notices of non-responsibility of the City.
- 5.1.8 Concessionaire shall serve as the Director's sole point of contact for all aspects of the design and build-out activities of Concessionaire and its Subcontractors. Concessionaire shall ensure contractually that its Subcontractors work directly with Concessionaire rather than the Director. Notwithstanding the foregoing, Concessionaire shall contractually ensure that its Subcontractors are responsive to any requests or demands of the Director.
- 5.1.9 In accordance with approved plans, specifications and build-out schedules, Concessionaire agrees to expend no less than \$300.00 per square foot on Build-out costs for each Facility set forth on Exhibit "A in accordance with approved build-out schedules

(consistent with the build-out deadlines) developed under Section 5.1.1. If all Facilities are completed to the full satisfaction of the Director in accordance with this Agreement but less than \$300.00 per square foot has been expended for Build-out Costs (after Concessionaire has provided the Director the evidence described in Subsection 5.1.10 herein), Concessionaire shall pay the difference to the City as additional fees under Section 8.7.1 within ten days of receipt of an invoice from the City.

- 5.1.10 Between the first day of Agreement year 4 and the last day of Agreement year 6, Concessionaire shall expend no less than \$40.00 per square foot on the Facilities for upgrades, renovations, cosmetic improvements and/or concept changes as approved in writing and in advance by the Director.
- 5.1.11 Concessionaire shall provide evidence satisfactory to the Director that the minimum expenditures set forth in Subsections 5.1.9, and 5.1.10 have been made. The difference, if any, between the required minimum expenditures and the actual expenditures made by Concessionaire shall be paid to the City as additional fees under Subsection 8.7.1 within ten (10) days of receipt of an invoice for such fees from the City.
- 5.1.12 All improvements constructed or placed in the Airport by Concessionaire that are not Removable Fixtures and all alterations, modifications and enlargements thereof shall become part of the Airport, with unencumbered title thereto vesting in the City immediately upon the expiration or early termination of this Agreement; subject, however, to Concessionaire's obligation to operate, repair, maintain and replace, and its right of possession, use and occupancy during the Term in accordance with the terms and conditions hereof. All Removable Fixtures shall remain the property of the Concessionaire, and shall be removed by the Concessionaire within ten (10) days of termination or expiration of this Agreement unless City exercises its rights set forth in Section 15.7. Within 180 days of the date of the issuance of a certificate of occupancy for each Facility, Concessionaire shall submit to the Director in writing a list of the Removable Fixtures and a summary report (in form and content acceptable to the Director) of related Build out Costs in each such Facility. The list of Removable Fixtures shall be updated periodically by Concessionaire upon written request of the Director.
- 5.1.13 Concessionaire shall meet all requirements of the Americans with Disabilities Act of 1990, as may be amended from time to time in the design, construction, renovation and installation of the improvements described in this Article V.
- 5.1.14 Concessionaire shall not, without the prior written approval of the Director, construct, erect, or place any signs anywhere on Airport property. The terms "sign" or "signs" as used herein shall mean advertising materials, billboards, notices, identification symbols, posters, displays, information racks, decals, logos, or any similar devices. Subject to the foregoing, Concessionaire shall have the obligation to install such advertising and identification signs as may be necessary for the proper conduct of its Concession.

- 5.1.15 Prior to the construction, erection or placement of any sign anywhere at the Airport, Concessionaire shall submit to the Director, for his approval, drawings, sketches, electrical details, designs, elevations, dimensions, type, number, message and proposed location of such sign. Any restrictions, conditions or limitations with respect to any such sign as set forth in writing by the Director shall become conditions of this Agreement. The Director shall have the absolute right to reject any sign proposed by Concessionaire.

ARTICLE VI. RETAIL SERVICES

6.1 IN GENERAL

- 6.1.1 Concessionaire covenants and agrees to meet the City's objectives in the delivery of retail services as set forth in Article II hereof.
- 6.1.2 Concessionaire shall ensure that all requirements of the City, County and State Board of Health, and health and sanitary regulations adopted by the City, County, State or any governmental legal authority, and the rules, regulations, and performance standards promulgated by the Director, are fully complied with in all Facilities.
- 6.1.3 Concessionaire shall not install or operate any coin, card, token or otherwise activated vending machines or devices of any kind or type without the prior written approval of the Director. Concessionaire shall accept credit cards for payment in all Concession Facilities, accepting at a minimum, both Visa and MasterCard. Additionally, Concessionaire shall accept airline vouchers given to passengers due to delays or cancellations.
- 6.1.4 Concessionaire's business shall be conducted in a manner so as to meet the needs of the Airport patrons and in a manner that will reflect positively upon the Concessionaire, and its Subcontractors, the City, and the Houston Airport System. The Concessionaire and its Subcontractors shall offer quality products and shall equip, organize and efficiently manage the Facilities in accordance with the Quality Assurance Program which is incorporated and made a part hereof by this reference, as it may be amended from time to time by the Director.
- 6.1.5. Concessionaire shall permit no defacing of walls, floors and fixtures; permit no loitering; keep the floors of all Facilities free from rodents and insects; and maintain and service all equipment at a high level of efficiency and appearance.
- 6.1.6 Concessionaire shall neither commit nor allow any nuisance, noise or waste in the Facilities or annoy, disturb or be offensive to other Airport users. Concessionaire shall use all reasonable commercial efforts to prevent or eliminate unusual, nauseating or objectionable smoke, gases, vapors, or cooking odors from escaping from the Facilities. Concessionaire shall use all reasonable commercial efforts to eliminate vibrations and to maintain the lowest possible sound level in the operation of its Concession.

Concessionaire shall not use any space outside the Facilities, but within the Airport, for sale, storage or any other undertaking, other than in connection with deliveries made in a prompt, timely and efficient manner.

- 6.1.7 Concessionaire acknowledges that the City is a leader in environmentally preferable best practices and agrees to incorporate those practices in all its Concession activities at the Airport. In that regard, and not by way of limitation, Concessionaire shall encourage its customers to recycle through written/pictorial media in its Concession Facilities.
- 6.1.8 Concessionaire and its Subcontractors shall make change for the public regardless of whether a purchase is made and shall give directions when asked by any Airport user.
- 6.1.9 In addition to shift meals described in Subsection 3.1.11.10 above, Concessionaire shall offer a discount to its employees or those of its Subcontractors or any of the City's tenants at the Airport, and to volume purchasers. Said discounts shall not exceed fifteen percent (15%) except to employees of Concessionaire which shall not exceed thirty percent (30%). Discounts to employees of tenants at the Airport (other than Concessionaire's employees) must be offered on an equal and nondiscriminatory basis.
- 6.1.10 In addition to the termination rights in Subsection 15.1, Director shall have the right to assess liquidated damages in an amount of \$500.00 per day for Concessionaire's failure to meet any of the requirements of Section 6.1, inclusive of all subsections therein. Concessionaire and City stipulate that any such assessment shall not be construed as a penalty; rather, Concessionaire and City stipulate that the damages resulting from any such violation will be difficult to measure and ascertain and that \$500.00 per day is a reasonable estimation of the damages suffered by the City. Any assessment of liquidated damages by the Director shall be paid to City by Concessionaire within ten (10) days of receipt of an invoice for such damages.

6.2 PRICING AND PRODUCTS

- 6.2.1 Concessionaire shall provide a first class level of Concession services to all passengers and other Airport users that consistently demonstrate a high standard of quality, quantity, service and reasonableness of price that is consistent with the pricing requirements as further described below in Subsection 6.2.2 and in the Quality Assurance Program. The determination of a first class level of service shall be determined by the Director in his sole discretion.
- 6.2.2 All products sold by Concessionaire and its Subcontractors shall be equal in price to no more than ten percent (10%) more than those products sold in comparable off-Airport locations (excluding special promotional items within the greater Houston metropolitan area of the City) ("Comparable Locations"). Comparable Locations will be determined by the Director, in consultation with Concessionaire, and may change throughout the Term as determined necessary by the Director. Comparable locations shall not include

concessions located in stadiums, arenas, amusement and entertainment venues, and hotel gift shops. Pricing shall be consistent with the City's objectives set forth in Article II herein.

- 6.2.3 At least sixty (60) days prior to the date of beneficial occupancy of each Facility, Concessionaire shall submit to the Director for his written approval, an initial proposed menu for each Facility together with proposed prices for each item based upon prices of similar items at the Comparable Locations. Descriptions of each proposed menu item must be specific. By way of example, if Concessionaire or its Subcontractors propose to sell hamburgers in a Facility, Concessionaire must describe, not by way of limitation, the method of preparation, the weight prior to cooking and the weight after cooking, the quality of the meat, e.g., ground round, ground chuck, and the percentage of fat per patty; the bun size and type (whole wheat, white, sesame seed etc.); and condiments offered. Within thirty (30) days of receipt of initial proposed products list and corresponding prices for each Facility, the Director, in his sole discretion, shall either approve or disapprove all or some of the proposed products and/or corresponding prices by notifying the Concessionaire in writing. However, absent reasonable cause, the Director will not disapprove of products that meet the specifications of the franchisors of Nationally Branded foods and beverages. Should the Director disapprove some or all of the proposed products and/or corresponding prices, Concessionaire and Director shall make a good faith effort to reach agreement regarding sale of those disapproved products and/or corresponding prices in the Facilities. Failing agreement, the disapproved product (due to price or otherwise) shall not be sold by Concessionaire or its Subcontractors at the Airport. Agreed to initial products and corresponding prices shall be incorporated into this Agreement by this reference at the time of written approval by the Director and shall not be adjusted except as set forth below in Subsection 6.2.4.
- 6.2.4. From time to time throughout the Term, but not more often than every six (6) months, or as the Director and Concessionaire may otherwise agree upon from time to time, Concessionaire may petition the Director (by providing economic justification) to adjust products and/or prices incorporated herein. After reviewing products and/or prices of Comparable Locations, the economic justification provided by Concessionaire, and any other information Concessionaire desires to disclose, the Director shall, in his sole discretion, determine which adjustments are acceptable to the City consistent with the standard established in this Agreement. The Director shall notify Concessionaire in writing as to his decision regarding each proposed adjustment. Concessionaire shall have ten (10) days from receipt of any such notice to agree in writing to all or a portion of the Director's determinations regarding products and/or pricing. Those adjustments agreed to by Concessionaire in writing shall automatically become a part of this Agreement by this reference.
- 6.2.5 In addition to the termination rights in Section 15.1, Director shall have the right to assess liquidated damages in an amount of \$1,000.00 per occurrence (measured on a daily basis) for any violation of Section 6.2, inclusive of all subsections therein. Concessionaire and

City stipulate that any such assessment shall not be construed as a penalty; rather, Concessionaire and City stipulate that the damages resulting from any such violation will be difficult to measure and ascertain and that \$1000.00 per occurrence is a reasonable estimation of the damages suffered by the City. Any assessment of liquidated damages by the Director shall be paid to City by Concessionaire within ten (10) days of receipt of an invoice for such damages.

6.3 PERSONNEL

- 6.3.1 Concessionaire and its Subcontractors shall provide an adequate number of trained employees, supervisors and managers necessary to perform the duties required herein. It is the intent of the parties hereto that Concessionaire's employees and Subcontractors maintain a high degree of professionalism. Concessionaire shall require each Facility worker to wear appropriate uniforms and badges that will reflect positively on each Facility and the Airport. The Director shall have the right to approve the uniforms prior to usage in each Facility. Concessionaire shall require that all Facility workers are properly trained and proficient in his/her responsibilities in the particular Facility and shall continuously train employees throughout the Term of this Agreement. Concessionaire shall ensure that each employee working in a Facility shall be initially trained and continually trained throughout his/her employment with emphasis on customer service. Initial training shall include familiarization with the Airport so that employees will be able to assist travelers who ask for directions.
- 6.3.2 Concessionaire shall establish written standards within the subcontracts with respect to the responsible sale of alcoholic beverages that provide at a minimum (as required by State law) that employees who sell liquor must attend training conducted by Concessionaire or its agents or TABC on methods of responsible sale of alcoholic beverages.
- 6.3.3 All Facility workers shall be neat in appearance and courteous in manner. Concessionaire agrees that it will be responsible for ensuring that these workers abide by all laws, rules, and regulations applicable to the Facility. Concessionaire shall re-assign to off-Airport locations any of its employees and employees of its Subcontractors who, in the opinion of the Director, are not adequately performing their assigned responsibilities in accordance with HAS standards or the objectives of this Agreement.
- 6.3.4 Concessionaire shall at all times during the Term of this Agreement retain a qualified, competent manager with experience at managing similar sized operations and concepts. The manager shall serve as the primary spokesperson for Concessionaire (and its Subcontractors) and point of contact for the Director. This manager shall maintain offices at the Airport, shall have no other managerial responsibilities assigned to him by Concessionaire, shall reside in the Houston area, and shall be on-site at the Airport during regular business hours excluding holidays, vacations and sickness. A responsible subordinate shall have the authority to act on behalf of Concessionaire in the manager's

absence. Concessionaire shall provide the Director with written notice within ten days of the Effective Date indicating the name, telephone number and business address of such manager. If at any time the Director is not satisfied with Concessionaire's manager (or a replacement manager), he shall notify Concessionaire in writing setting forth his complaints. Within twenty (20) days of receipt of any such notice, Concessionaire shall respond in writing detailing the corrective action taken to resolve the Director's concerns. If still not satisfied, the Director shall have the right to require, by notifying Concessionaire in writing, that the manager (or a replacement manager) be removed from performance under this Agreement. Concessionaire shall comply with any such demand but only after securing the services of a replacement manager who has been approved in writing and in advance by the Director. In no event shall more than sixty (60) days elapse from the time Concessionaire receives notice of Director's demand to remove and the time a new manager is performing under this If during the Term, Concessionaire desires to change managers, it may do so only after having notified the Director in writing with the name, telephone number and business address of the new manager, the effective date of the appointment, and received the Director's prior written approval of such manager.

- 6.3.5 Each employee of Concessionaire and its Subcontractors must wear a badge issued by the Houston Airport System at all times while on the Airport. Concessionaire shall be responsible for the cost of the initial badges and any replacements thereof.
- 6.3.6 Concessionaire shall be responsible for any requirements (and costs associated therewith) of the Federal Aviation Administration, Department of Homeland Security, and the Houston Airport System (as applicable) regarding employee background checks and badging.
- 6.3.7 Employees of Concessionaire and its Subcontractors shall park vehicles in spaces as directed by the Director and at Concessionaire's expense. City makes no representation that there will be available parking spaces for employees of Concessionaire and its Subcontractors on Airport property.
- 6.3.8 In addition to the termination rights in Section 15.1, Director shall have the right to assess liquidated damages in an amount of \$500.00 per occurrence (measured on a daily basis) for any violation of Section 6.3. Concessionaire and City stipulate that any such assessment shall not be construed as a penalty; rather, Concessionaire and City stipulate that the damages resulting from any such violation will be difficult to measure and ascertain and that \$500.00 per occurrence is a reasonable estimation of the damages suffered by the City. Any assessment of liquidated damages by the Director shall be paid to City by Concessionaire within ten (10) days of receipt of an invoice for such damages.

6.4 PERIODIC MEETINGS

6.4.1 Concessionaire (and its Subcontractors on an as-needed basis) shall attend all meetings requested by the Director throughout the Term of this Agreement. The Director shall designate which officers and employees of Concessionaire shall attend each meeting and those officers and employees shall attend.

6.5 DELIVERIES

6.5.1 Concessionaire shall monitor the movement of deliveries of retail products to avoid conflict with other Airport functions and shall coordinate its use of the receiving docks with the use by other tenants or licensees of the City. Any containers moving through the public areas or common areas must be covered or otherwise protected and all carts used to move supplies and equipment must be approved by the Director. Concessionaire shall maintain that portion of the receiving dock designated for the delivery of retail products in a safe and sanitary condition. Concessionaire shall be responsible for the return of all pallets, storage containers and other equipment belonging to its suppliers. All trash and garbage receptacles shall be maintained in a sanitary condition by Concessionaire.

6.5.2 In addition to the termination rights in Subsection 15.1, Director shall have the right to assess liquidated damages in an amount of \$500.00 per day for Concessionaire's failure to meet any of the requirements of Section 6.5, inclusive of all subsections therein. Concessionaire and City stipulate that any such assessment shall not be construed as a penalty; rather, Concessionaire and City stipulate that the damages resulting from any such violation will be difficult to measure and ascertain and that \$500.00 per day is a reasonable estimation of the damages suffered by the City. Any assessment of liquidated damages by the Director shall be paid to City by Concessionaire within ten (10) days of receipt of an invoice for such damages.

6.5.3 The City may procure a third-party contractor to provide all receiving, handling and transfer/delivery services for all or any portion of the concessionaires operating at the Airport in accordance with policies the Director believes in his discretion to be in the best interests of the City.

6.5.4 If the City chooses this option, it may direct that Concessionaire to exclusively utilize the services of such third-party contractor for all receiving, handling and transfer/delivery services required by Concessionaire concerning its Concession. Concessionaire shall promptly pay all invoices for services provided to Concessionaire by such third-party contractor for receiving, handling and transfer/delivery services.

6.6 RECORDKEEPING

6.6.1 Concessionaire agrees to provide for the collection of all monies and provide an accounting, audit and report of all Gross Sales to the Director in a timely manner and as required under Article VIII of this Agreement. In addition, Concessionaire shall ensure that a point of sale system is provided in all Facilities which is capable of providing

comprehensive records, in a format acceptable to the Director, of daily, monthly and annual sales for each Facility set forth in Exhibit “A”. All cash registers shall be equipped with sales totalizer counters for all sales categories in which the counters are locked-in, constantly accumulating, and which cannot be reset. Cash registers shall also contain tapes upon which sales details are imprinted.

6.7 MAINTENANCE AND REPAIR

- 6.7.1 Except for the maintenance to be performed by the City hereunder, Concessionaire shall be obligated, without cost to City, to maintain and keep the Facilities and every part thereof, including the common seating areas which support the Facilities set forth in Exhibit “A”, in good order and repair and in safe condition. To accomplish the foregoing, Concessionaire shall establish a written preventive maintenance program, subject to the initial written approval and periodic review by the Director. All repairs and replacements shall be of a quality substantially equal to the original in materials and workmanship.
- 6.7.2 Concessionaire shall be obligated, without cost to City, for all janitorial services for the Facilities, including the common seating areas which support the Facilities set forth in Exhibit “A”. Concessionaire shall ensure that each Facility, and that area within a twenty-five foot radius of each Facility, shall be kept free from all rubbish, filth and refuse, and Concessionaire must employ sufficient personnel to place such rubbish and refuse in sealed disposable containers approved by the Director, transported to and placed within designated waste containers in areas selected by the Director.
- 6.7.3 Concessionaire shall, at no cost to City, on an as-needed basis and consistent with the objectives set forth in Article II, clean all restaurant and bar equipment including walls, floors, ceilings, empty waste receptacles and perform other sanitation-related functions in the various Facilities.
- 6.7.4 Concessionaire shall connect to, maintain and clean all sewer drain cleaning systems and/or programs appropriate for the size and volume of each Facility set forth in Exhibit “A”. In that regard, Concessionaire shall install Ecolab systems (or approved equal) to monitor grease build-up in each Facility. Any damage done to grease traps or sewer lines as a result of such installation, maintenance or cleaning shall be repaired by Concessionaire in a timely basis, at its sole cost and to the Director’s satisfaction.
- 6.7.5 In addition to the remedy set forth in Subsection 9.3.2 and the termination rights in Section 15.1, Director shall have the right to assess liquidated damages in an amount of \$500.00 per occurrence (measured on a daily basis) for failure to comply with Section 6.7. Concessionaire and City stipulate that any such assessment shall not be construed as a penalty; rather, Concessionaire and City stipulate that the damages resulting from any such violation will be difficult to measure and ascertain and that \$500.00 per occurrence is a reasonable estimation of the damages suffered by City. Any assessment of liquidated

damages by the Director shall be paid to City by Concessionaire within ten (10) days of receipt of an invoice for such damages.

6.8 HOURS OF OPERATION

- 6.8.1 The hours of Concession operations shall be such that passengers of all flights arriving at, or departing from any section of the Airport in which Facilities are located will be accommodated unless otherwise permitted by written consent of the Director. The Director reserves the continuing right to modify the hours that Concessionaire's operation at the Facilities are open to ensure that Concessionaire's services are available to serve the needs of the traveling public; and Concessionaire agrees to comply with the Director's requirement to modify hours. Concessionaire shall ensure that Facilities set forth in Exhibit "A" are open consistent with the departure of all flights including delayed flights in each section of the Airport in which the Facilities are located, as mutually agreed to by Concessionaire and Director. To meet this requirement, the parties agree to the rebuttable presumption that compliance means operating Facilities to serve daily the first through the last scheduled flight (taking into account any delays) departing in a particular section of the Airport.
- 6.8.2 If the Director deems it necessary, on an emergency basis, to serve the public during time other than the hours of operation required in Subsection 6.8.1, Concessionaire shall open such Facilities required by Director during the emergency period.
- 6.8.3 Concessionaire shall provide the Director a listing of the standard hours of operation of each Facility set forth in Exhibit "A" every six (6) months throughout the Term. Concessionaire shall post hours of operation at each Facility in a manner approved in advance and in writing by the Director. Notwithstanding, Concessionaire shall continually monitor flight schedules so that adjustments to each Facilities hours of operation are made as needed to meet the requirements set forth in Section 6.8.1.
- 6.8.4 In addition to the termination rights in Section 15.1, Director shall have the right to assess liquidated damages in an amount of \$750.00 per occurrence (measured on a daily basis) for any violation of Section 6.8, inclusive of all subsections therein. Concessionaire and City stipulate that any such assessment shall not be construed as a penalty; rather, Concessionaire and City stipulate that the damages resulting from any such violation will be difficult to measure and ascertain and that \$750.00 per occurrence is a reasonable estimation of the damages suffered by the City. Any assessment of liquidated damages by the Director shall be paid to City by Concessionaire within ten (10) days of receipt of an invoice for such damages.

6.9 CLOSURE OR CONTRACTION

- 6.9.1 If at any time during the Term of this Agreement, the Director, in his sole discretion, determines that it is necessary for the efficient operation of the Airport or to

accommodate any construction, he may (i) require Concessionaire to close a Concession Facility or Facilities and/or (ii) require Concessionaire to reduce the square footage of a Concession Facility or Facilities. This shall be a continuing right of the Director throughout the Term. If the Director requires Concessionaire to close a Concession Facility or Facilities, Concessionaire shall vacate the Concession Facility or Facilities within ninety (90) days after receipt of a closure notice from the Director unless circumstances require an earlier closure. If the Director requires a contraction of a Concession Facility or Facilities in excess of fifty percent (50%) of the gross square footage, Concessionaire may elect to close that Concession Facility or continue operating it in the reduced space.

- 6.9.2 If any event described in Subsection 6.9.1(i) or (ii) occurs in excess of fifty percent (50%) of the gross square footage of an affected Concession Facility, the Minimum Guarantee Fee may be adjusted accordingly by the Director to reflect the percentage of lost revenues the closure or contraction causes.
- 6.9.3 Subject to an appropriation by City Council, if a closure under Subsection 6.9.1(i) occurs or if Concessionaire elects to close a Concession Facility that has been contracted by more than 50% under Subsection 6.9.1, City will: (a) reimburse Concessionaire for the reasonable and proper unamortized Build-out Costs (based on the current book value of the improvements using the straight-line method over ___ years from date placed in service); or (b) failing an appropriation by City Council, Concessionaire shall be given rent credits by HAS equal to the reasonable and proper unamortized Build-out Costs (based on the current book value of the improvements using the straight-line method over ___ years from date placed in service).

6.10 MARKETING

6.10.1 Within sixty (60) days following the Effective Date, Concessionaire shall submit a marketing plan to the Director for his review and written approval. The purpose of the marketing plan is to publicize and promote the Facilities set forth in Exhibit "A". It shall include, but not be limited to, seasonal, themed and general promotions; special promotions for the opening of each newly built out Facility; and a budget. Upon the written approval of the plan by the Director, which may be modified or enhanced prior to approval by the Director as he in his sole discretion deems appropriate, Concessionaire shall implement the marketing plan in accordance with its approved provisions and time schedules.

6.10.2 On or before the anniversary of the date of submission of the marketing plan described in Subsection 6.10.1 and every anniversary thereafter throughout the Term, Concessionaire shall submit updates to the marketing plan for the Director's review and approval. Such updates shall include the same information as set forth in Subsection 6.10.1 and will be subject to the same discretionary changes vested in the Director described in that Subsection.

6.10.3 Concessionaire agrees to expend a minimum of .50% of Gross Sales per Agreement year beginning on the Effective Date and continuing through expiration or early termination of this Agreement for the implementation of its marketing plan and updates. Additionally, Concessionaire shall pay the City each month during the Term of this Agreement, .50% of its Gross Sales to be expended by the Director for the marketing of this Concession.

ARTICLE VII. TERM

7.1 EFFECTIVE DATE AND DURATION

7.1.1 The Term of this Agreement shall commence on the Effective Date and unless sooner terminated in accordance with Article XV, shall expire ten consecutive years thereafter.

ARTICLE VIII. RENTALS

8.1 FEES

8.1.1 Concessionaire, for and in consideration of the rights and privileges granted herein, agrees to pay City monthly, without demand, the greater of the Minimum Annual Guarantee or the Percentage Fee for each month during the existence of this Agreement beginning on the Effective Date.

8.1.2 Within thirty (30) days after the conclusion of each twelve (12) month period, beginning with the twelve (12) month period starting on the one year anniversary of the Effective Date, a reconciliation of the fees paid hereunder shall occur comparing the Percentage Fees paid each month of the twelve (12) month period to the Minimum Guarantee Fee that would have been paid in the corresponding month during the twelve (12) month period. Should it be determined by the Director that the Minimum Guarantee Fees, in the aggregate, for the particular twelve (12) month period were greater than that paid as Percentage Fees by Concessionaire for that same period, Concessionaire shall pay the difference to the City within ten (10) days of receipt of an invoice therefore. The Director shall verify that the reconciliation statement is accurate. Failing verification, Concessionaire shall resubmit its statement reflecting the Director's findings. If, through the foregoing, it is established that additional fees or charges are due City, the Concessionaire shall pay such additional fees or charges to City not later than ten (10) days after completion of such statement and receipt of written notice from the Director.

8.1.3 The annual reconciliation described above is subject to Section 9.4 herein and is in addition to the requirements of Section 8.6.

8.2 DUE DATE AND DELINQUENCY

8.2.1 Payment for a preceding month is due within ten (10) days of the first day of the following month. In the event that Concessionaire is delinquent in paying the City

(beyond the ten (10) days) the Percentage Fee, without waiving any other right of action available to the City, Director may require by written notice that Concessionaire pay the City interest on such delinquent payment(s) at the highest rate allowed by law from the date such payment(s) was due and payable until paid. Concessionaire agrees to pay City interest that may be required under this Subsection.

8.2.2 Together with each monthly payment, Concessionaire shall provide a detailed report of all Gross Sales showing any deductions therefrom derived for the previous month by the categories set forth in Section 8.4. Such report shall be submitted in a format acceptable to the Director and shall also include any other information required by the Director, including, but not limited to, the information required in Section 8.5.

8.3 MINIMUM GUARANTEE FEE

8.3.1 The Minimum Guarantee Fee for each year of the Term of the Agreement after the first Agreement year shall be 85% of the total amount of Percentage Fee due from Concessionaire to the City during the preceding twelve month period.

8.4 PERCENTAGE FEE

8.4.1 The following Percentage Fee by category of product sold at the Facilities shall be applied to Gross Sales per month beginning on the Effective Date.

8.4.2	.1	Retail products	___%
	.2	Duty Free products	___%
	.3	Automated Retail products	___%

8.5 REPORTS

8.5.1 Throughout the Term, within ninety (90) days following the conclusion of each twelve (12) month period, (or portion of a twelve (12) month period, as may be necessary), beginning with the twelve (12) month period starting on the Effective Date, Concessionaire shall submit to the Director the following:

- .1 a statement of Gross Sales for each Facility (or portion of a Facility) operated by Concessionaire, separated into the applicable categories set forth in Section 8.4; a calculation of the amount due City under Section 8.4 based upon such Gross Sales; and a schedule showing the total actual payments to City for any reason during the subject year (or portion of year), all of which are certified by an independent third-party Certified Public Accountant who is licensed in accordance with the laws and regulations of the State of Texas.

- .2 a statement of Gross Sales for each non-ACDBE Facility (or portion of a Facility) operated by a Subcontractor of Concessionaire, separated into the applicable categories set forth in Section 8.4; a calculation of the amount due City under Section 8.4 based upon such Gross Sales; and a schedule showing the total actual payments to City for any reason during the subject year (or portion of year), all of which are certified by an independent third-party Certified Public Accountant who is licensed in accordance with the laws and regulations of the State of Texas.
- .3 a statement of Gross Sales for each ACDBE Facility (or portion of a Facility) operated by a ACDBE Subcontractor of Concessionaire, separated into the applicable categories set forth in Section 8.4; a calculation of the amount due City under Section 8.4 based upon such Gross Sales; and a schedule showing the total actual payments to City for any reason during the subject year (or portion of year), all of which are certified by an independent third-party Certified Public Accountant who is licensed in accordance with the laws and regulations of the State of Texas.
- .4 a summarization of all the above described certified statements, certified as to the completeness by the Chief Financial Officer of Concessionaire.

8.5.2 The above certified statements and summary shall be made to determine the correctness of the computation of Gross Sales and that fees have been properly paid to City. If through the foregoing, it is established that additional fees or charges are due City, the Concessionaire shall pay such additional fees or charges to City not later than fifteen (15) days after completion of such statement and receipt of written notice from the Director. If it is established that Concessionaire has overpaid City, then such overpayment shall be credited to the fees and charges next thereafter due from the Concessionaire. If any overpayment is due for the last year of the Term hereof, City shall refund such overpayment to Concessionaire within thirty (30) days following receipt by the Director of the certified statements and summaries.

8.6 RETENTION OF RECORDS

Concessionaire shall keep in Houston, Texas, for a period of six (6) years after each year of this Agreement, the books and records of account of the Concessionaire and its Subcontractors for such year evidencing, at a minimum, Gross Sales and itemized deductions therefrom (including the deductions, by account described in Subsection 4.1.5), collateral papers and forms such as sales checks or slips, cash register and adding machine tapes and analogous supporting data, and other pertinent information and data required or reasonably implied by the provisions of this Agreement, including but not limited to the minimum expenditure requirements in Subsections 5.1.8 and 5.1.9. Such books and records of account shall be accessible, during usual business hours, for the purpose of verifying compliance by the Concessionaire with the terms of this Agreement.

8.7 ADDITIONAL FEES AND CHARGES

- 8.7.1 Notwithstanding Concessionaire's obligation to pay City any underpayment described elsewhere in this Agreement, Concessionaire shall pay City as additional fees and charges: (i) where City has paid any sum or sums, or has incurred any obligations or expenses for which the Concessionaire has agreed, either expressly or by implication, to pay or reimburse City; (ii) if City is required or elects to pay any sum or sums or incurs any obligations or expenses because of the failure, neglect or refusal of Concessionaire to perform or fulfill any of its obligations under this Agreement or (iii) if Concessionaire fails to meet the minimum expenditures required in Subsections 5.1.8 and 5.1.9.
- 8.7.2 Such payments shall include all interest, costs, damages, and expenses reasonably related to such sums so paid or expenses so incurred and may be added to any installment of the fees and charges thereafter due hereunder. Each and every part of such payment shall be recoverable by the City in the same manner and with like remedies as if it were originally a part of the basic fees and charges required to be paid herein.
- 8.7.3 Concessionaire shall also pay to City within ten (10) days after the last day of each month this Agreement exists, all other fees, charges and sums as a result of any utility and service charges, and any other expenses incurred by the City on account of Concessionaire for which City is entitled to reimbursement, and such other fees, charges, levies as are prescribed or contemplated hereunder.
- 8.7.4 City shall have a lien upon all Removable Fixtures and other trade fixtures of the Concessionaire and its joint venture partners placed in each Facility, the Facility common seating support areas and the office and storage space Facilities, to the extent permitted by law, for the purpose of securing the payment of all sums of money which may due to City from Concessionaire under this Agreement.

ARTICLE IX. RIGHTS AND DUTIES OF CITY

9.1 UTILITIES

- 9.1.1 City shall provide and maintain all utilities, including but not limited to heating, ventilation and air conditioning services and ambient light, to the outer boundary of the footprint of the Facilities. Utilities will be available to the Facilities as described herein and in the construction detail drawings which will be delivered to Concessionaire within sixty (60) days following the Execution Date and which are incorporated herein by this reference. Concessionaire shall be responsible for the cost of the use of all such services. Concessionaire shall be responsible for installing, maintaining and connecting to submeters for electrical service. Any boosting of water temperature beyond that furnished to the Facilities shall be at the sole cost of Concessionaire. To the extent that

utilities are needed over and above that which is provided by the City as described herein or needs to be extended beyond points installed by City, such shall be accomplished at the sole cost of Concessionaire after first obtaining the written approval of the Director.

- 9.1.2 Concessionaire shall be responsible for all other utility costs, including but not limited to, deposits, installation costs, connection charges, meter deposits and all service charges for other utility services including telephone services metered directly to a Facility, regardless whether such utility services are furnished by City or by another utility service company.
- 9.1.3 City shall not be liable to Concessionaire in damages or otherwise for delay or failure to supply or furnish, or for any delay in the supplying or furnishing of any utility service which City is obligated to supply or furnish, when such failure or delay is caused by necessary repairs or improvements, by any labor controversy, by an inability to secure water, gas or electricity or other utilities at a Facility, by any accident or casualty, by any act or omission of Concessionaire, or by any other cause or causes beyond the control of City.

9.2 MAINTENANCE

- 9.2.1 Except as otherwise provided in this Agreement, City shall throughout the Term hereof, maintain all public areas and facilities such as restrooms, passageways (except for those passageways designated in writing by the Director as passageways to be used for the transportation of food from the receiving dock to and from storage areas or other portions of the Facilities), access areas, stairs, escalators, and elevators and shall maintain access to the Facilities. Provided, however, City may, at any time, temporarily or permanently close, consent to or request the closing of any roadway or other right-of-way for such access, ingress or egress, whether inside or outside the Facilities, so long as a means of access, ingress or egress reasonably equivalent to that formerly provided, and not adverse to the Concessionaire's continued use and enjoyment of the Facilities is substituted therefor and is concurrently made available therefor. Concessionaire understands and agrees that there shall be inconvenience caused by construction or renovations of the Facilities and roadways, and Concessionaire hereby releases and discharges City from any and all claims, demands or causes of action which Concessionaire now or at any time hereafter may have against City arising or alleged to arise out of the closing of any right of way or other area used as such whether within or without the Facilities, so long as City makes available a means of free access, ingress or egress reasonably equivalent to that existing prior to each such modification, if any.

9.3 RIGHT TO INSPECT

- 9.3.1 The Director shall have the right at all reasonable times to enter upon and inspect the Facilities (including common seating areas and office and storage space Facilities), to observe the performance by Concessionaire of its obligations hereunder and to do any act

which City may be obligated or have the right to do under this Agreement, the City's Code of Ordinances or Airport regulations.

- 9.3.2 If upon entry it is determined that maintenance, repair or janitorial obligations are not being performed adequately, the Director shall so notify Concessionaire in writing. If maintenance, repair or janitorial services are not commenced promptly as circumstances reasonably require after receipt of such notice, City, or its agents, contractors or employees, shall have the right to enter upon the particular area and perform the maintenance, repair or janitorial services. City's cost for the performance of such maintenance, repair or janitorial services plus an amount equal to fifteen percent (15%) of cost to cover administrative costs, shall be charged to and paid by Concessionaire as additional fees.

9.4 AUDITS AND ENFORCEMENT

- 9.4.1 Throughout the Term of this Agreement and within six (6) years after the end of any year of the Term of this Agreement, the Director or the City Controller may upon fourteen (14) days' written notice, without cost to Concessionaire, cause an inspection and audit to be made of the books and records described in Section 8.6 and the certified statements and summaries described in Section 8.5 of Concessionaire, and Subcontractors relating to all operations conducted pursuant to this Agreement. Such audits shall be made to determine the correctness of the computation of Gross Sales or the calculation of the applicable portion of the Minimum Guarantee Fee or Percentage Fee. If, as a result of such inspection and audit, it is established that additional compensation is due the City, Concessionaire shall pay such additional compensation to the City within fifteen (15) days of receipt of written notice from the Director. If the inspection and audit establishes that Concessionaire has overpaid the City, then such overpayment shall be credited to Concessionaire; however, in no event shall the City be liable for interest if there has been an overpayment by Concessionaire.
- 9.4.2 The City Attorney or his or her designee shall have the right, after consultation with the Director, to enforce all legal rights and obligations under this Agreement without further authorization. Concessionaire covenants to provide the City Attorney all documents and records that the City Attorney deems necessary to assist in determining Concessionaire's compliance with this Agreement, with the exception of those documents made confidential by federal or State law or regulation.

ARTICLE X. RELEASE AND INDEMNIFICATION

10.1 RELEASE

- 10.1.1 **CONCESSIONAIRE AGREES TO AND SHALL RELEASE THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") FROM ALL LIABILITY FOR INJURY,**

DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THIS AGREEMENT, EVEN IF THE INJURY, DEATH, DAMAGE, OR LOSS IS CAUSED BY THE CITY'S SOLE OR CONCURRENT NEGLIGENCE AND/OR THE CITY'S STRICT PRODUCTS LIABILITY OR STRICT STATUTORY LIABILITY.

10.2 INDEMNIFICATION

10.2.1 CONCESSIONAIRE AGREES TO AND SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY, ITS AGENTS, EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY THE "CITY") HARMLESS FOR ALL CLAIMS, CAUSES OF ACTION, LIABILITIES, FINES, AND EXPENSES (INCLUDING, WITHOUT LIMITATION, ATTORNEYS' FEES, COURT COSTS, AND ALL OTHER DEFENSE COSTS AND INTEREST) FOR INJURY, DEATH, DAMAGE, OR LOSS TO PERSONS OR PROPERTY SUSTAINED IN CONNECTION WITH OR INCIDENTAL TO PERFORMANCE UNDER THIS AGREEMENT INCLUDING, WITHOUT LIMITATION, THOSE CAUSED BY:

- .1 CONCESSIONAIRE'S AND/OR ITS AGENTS', EMPLOYEES', OFFICERS', DIRECTORS', CONTRACTORS', OR SUBCONTRACTORS', (COLLECTIVELY IN NUMBERED PARAGRAPHS 1-3, "CONCESSIONAIRE") ACTUAL OR ALLEGED NEGLIGENCE OR INTENTIONAL ACTS OR OMISSIONS;**
- .2 THE CITY'S ACTUAL OR ALLEGED SOLE OR CONCURRENT NEGLIGENCE, WHETHER CONCESSIONAIRE IS IMMUNE FROM LIABILITY OR NOT; AND**
- .3 THE CITY'S AND CONCESSIONAIRE'S ACTUAL OR ALLEGED STRICT PRODUCTS LIABILITY OR STRICT STATUTORY LIABILITY, WHETHER CONCESSIONAIRE IS IMMUNE FROM LIABILITY OR NOT.**

10.2.2 CONCESSIONAIRE SHALL DEFEND, INDEMNIFY, AND HOLD THE CITY HARMLESS DURING THE TERM OF THIS AGREEMENT AND FOR FOUR YEARS AFTER THE AGREEMENT TERMINATES.

10.2.3 THE FOREGOING INDEMNIFICATION SHALL NOT BE INTERPRETED AS REQUIRING CONCESSIONAIRE TO INDEMNIFY THE CITY FROM ANY LIABILITY ARISING OUT OF ITS INTENTIONAL ACTS, GROSS NEGLIGENCE OR OMISSIONS UNDER THIS AGREEMENT.

.1 Notice of Claims. If the City or Concessionaire receives notice of any claim or circumstances which could give rise to an indemnified loss, the receiving party shall give written notice to the other party within 10 days. The notice must include the following:

- (a) a description of the indemnification event in reasonable detail,
- (b) the basis on which indemnification may be due, and
- (c) the anticipated amount of the indemnified loss.

This notice does not stop or prevent the City from later asserting a different basis for indemnification or a different amount of indemnified loss than that indicated in the initial notice. If the City does not provide this notice within the 10 day period, it does not waive any right to indemnification except to the extent that Concessionaire is prejudiced, suffers loss, or incurs expense because of the delay.

.2 Defense of Claims

(a) Assumption of Defense. Concessionaire may assume the defense of the claim at its own expense with counsel chosen by it that is reasonably satisfactory to the City. Concessionaire shall then control the defense and any negotiations to settle the claim. Within 10 days after receiving written notice of the indemnification request, Concessionaire must advise the City as to whether or not it will defend the claim. If Concessionaire does not assume the defense, the City shall assume and control the defense, and all defense expenses constitute an indemnification loss.

(b) Continued Participation. If Concessionaire elects to defend the claim, the City may retain separate counsel to participate in (but not control) the defense and to participate in (but not control) any settlement negotiations. Concessionaire may settle the claim without the consent or agreement of the City, unless it (i) would result in injunctive relief or other equitable remedies or otherwise require the City to comply with restrictions or limitations that adversely affect the City, (ii) would require the City to pay amounts that Concessionaire does not fund in full, (iii) would not result in the City's full and complete release from all liability to the plaintiffs or claimants who are parties to or otherwise bound by the settlement.

ARTICLE XI. INSURANCE AND PERFORMANCE SECURITY

11.1 INSURANCE

11.1.1 With no intent to limit Concessionaire's liability or the indemnification provisions set forth herein, Concessionaire shall provide on or before the Effective Date and thereafter maintain certain insurance in full force and effect at all times during the Term of this Agreement. Such insurance is described as follows:

11.1.2 Risks and Limits of Liability. The insurance, at a minimum, must include the following coverages and limits of liability:

<u>(Coverage)</u>	<u>(Limit of Liability)</u>
Workers' Compensation	Statutory for Worker's Compensation.
Employer's Liability	Bodily Injury by accident \$500,000 (each accident) Bodily Injury by Disease \$500,000 (policy limit) Bodily Injury by Disease \$500,000 (each employee)
Commercial General Liability: Including Broad Form Coverage, Contractual Liability, Bodily and Personal Injury, and Completed Operations	Bodily Injury and Property Damage, Combined Limits of \$1,000,000 each Occurrence and \$2,000,000 aggregate
Excess Liability	Bodily Injury and Property Damage, Combined Limits of 2,000,000 each Occurrence and 4,000,000 aggregate
ALL RISK covering Concessionaire Improvements, Fixtures, Removable Fixtures, and Equipment (including fire, lighting, vandalism, and extended coverage perils)	[Replacement Value]
Automobile Liability Insurance (for vehicles used by the Concessionaire in the course of its performance under this Agreement, including Employer's Non-Ownership and Hired Auto Coverage)	\$500,000 combined single limit

Defense costs are excluded from the face amount of the policy.
Aggregate Limits are 12-month per policy period
unless otherwise indicated.

11.1.3 Form of Policies. The insurance may be in one or more policies of insurance, the form of which must be approved by the Director. It is agreed, however, that nothing the Director does or fails to do shall relieve the Concessionaire from its duties to provide the required

coverage hereunder, and Director's actions or inactions will never be construed as waiving City's rights hereunder.

- 11.1.4 Issuers of Policies. The issuer of any policy shall have a Certificate of Authority to transact insurance business in the State of Texas or have a Best's rating of at least B+ and a Best's Financial Size Category of Class VI or better, according to the most current edition Best's Key Rating Guide, Property-Casualty United States.
- 11.1.5 Insured Parties. Each policy, except those for Workers Compensation and Employer's Liability, must name the City (and its officers, agents and employees) as Additional Insured parties on the original policy and all renewals or replacements.
- 11.1.6 Deductibles. Concessionaire shall be responsible and pay any claims or losses to the extent of any deductible amounts and waives any claim it may ever have for the same against the City, its officers, agents or employees.
- 11.1.7 Cancellation. Concessionaire shall notify the Director in writing 30 days prior to any cancellation or material change to Concessionaire's insurance coverage. Within the 30 day period, Concessionaire shall provide other suitable policies in lieu of those about to be canceled or non-renewed so as to maintain in effect the required coverage. If Concessionaire does not comply with this requirement, the Director, at his discretion, may: (i) immediately stop Concessionaire's performance herein or (ii) purchase the required insurance with City funds and invoice Concessionaire for such costs.
- 11.1.8 Subrogation. Each policy must contain an endorsement to the effect that the issuer waives any claim or right in the nature of subrogation to recover against the City, its officers, agents or employees.
- 11.1.9 Endorsement of Primary Insurance. Each policy hereunder except Worker's Compensation shall be primary insurance to any other insurance available to the Additional Insured with respect to claims arising hereunder.
- 11.1.10 Liability for Premium. The Concessionaire shall be solely responsible for payment of all insurance premium requirements hereunder, and the City shall not be obligated to pay any premiums.
- 11.1.11 Subcontractors. Concessionaire shall require all Subcontractors carry insurance naming the City as an additional insured and meeting all of the above requirements except amount. The amount shall be commensurate with the amount of the subcontract, but in no case shall it be less than \$2,000,000 per occurrence. All Subcontractors selling alcoholic beverages shall carry liquor liability insurance coverage of at least \$2,000,000 per occurrence, \$3,000,000 aggregate. Concessionaire shall provide copies of such insurance certificates to the Director.

11.2 PROOF OF INSURANCE

- 11.2.1 Prior to commencing any performance hereunder and at any time during the Term, Concessionaire shall furnish Director with Certificates of Insurance, along with an Affidavit from the Concessionaire and Subcontractors, as applicable, confirming that the Certificate accurately reflects the insurance coverage required herein. If requested in writing by the Director, the Concessionaire shall furnish the City with certified copies of Concessionaire's actual insurance policies. Failure of Concessionaire to provide certified copies, as requested, may be deemed, in the Director's and/or City Attorney's discretion, to constitute a breach of this Agreement.
- 11.2.2 Notwithstanding the proof of insurance requirements set forth above, it is the intention of the parties hereto that Concessionaire, continuously and without interruption, maintain in force the required insurance coverages set forth above. Failure of the Concessionaire to comply with this requirement shall constitute a default of Concessionaire allowing the City, at its option, to immediately terminate this Agreement. Concessionaire agrees that the City shall never be argued to have waived or be estopped to assert its right to terminate this Agreement hereunder because of any acts or omissions by the City regarding its review of insurance documents provided by Concessionaire, its agents, employees or assigns.

11.3 OTHER INSURANCE

- 11.3.1 The Concessionaire will, upon request, furnish to the City adequate evidence or provisions for Social Security and Unemployment Compensation Insurance, to the extent such provisions are applicable to the Concessionaire's operations hereunder.

11.4 PERFORMANCE SECURITY

- 11.4.1 Concessionaire, without expense to the City, shall cause to be made, executed and delivered to the City on or before the Effective Date:
- .1 a surety bond in an amount equal to \$_____ conditioned on the faithful performance of all terms, conditions and covenants of this Agreement. That performance bond shall be substantially in the form attached as Exhibit "C," and executed by Concessionaire and a corporate surety company authorized to do business in Texas having an "underwriting limitation" of at least the amount of the penal sum of the bond. Said surety bond shall be renewable annually and shall be kept in full force for the complete Term; or
 - .2 an irrevocable letter of credit, substantially in the form attached as Exhibit "D," payable upon presentation to a solvent bank or savings and loan in the initial principal amount equal to \$_____ which shall be kept in full force and effect for the complete Term.

11.4.2 If Concessionaire is found to be in default by the City, the City shall have the right to enforce the performance bond or the letter of credit and apply the proceeds thereof to cover payments owed to the City by Concessionaire and to pay such costs as may be incurred by the City as a result of Concessionaire's breach of contract. However, in no event shall enforcement of the bond or letter of credit be deemed an exclusive remedy to the City.

ARTICLE XII. EQUAL EMPLOYMENT, ACDBE, AND DRUG POLICY

12.1 COMPLIANCE WITH EQUAL OPPORTUNITY ORDINANCE

12.1.1 Concessionaire agrees to comply with all provisions set forth in Exhibit "E." Concessionaire will be considered the "Contractor" for purposes of this Exhibit.

12.2 AIRPORT CONCESSION DISADVANTAGED BUSINESS ENTERPRISES

Policy. The City has established an Airport Concession Disadvantaged Business Enterprise (ACDBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Parts 23 and 26. The City has received Federal financial assistance from the Department of Transportation and as a condition of receiving this assistance, the City has signed an assurance that it shall comply with 49 CFR Parts 23 and 26. It is the policy of the Department of Transportation and the City to ensure that DBEs as defined in Part 26, have an equal opportunity to receive and participate in Houston Airport System Concession activities and agreements.

The Director of the Office of Business Opportunities of the Mayor's office is the ACDBE Liaison Officer. In that capacity, the Director is responsible for implementing all aspects of the ACDBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by the City in its financial assistance agreements with the Department of Transportation.

ACDBE Obligation. The City shall never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Parts 23 and 26 on the basis of race, color, sex, or national origin.

In administering its ACDBE program, the City shall not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the ACDBE program with respect to individuals of a particular race, color, sex, or national origin.

Contract Goal. Concessionaire shall make Good Faith Efforts, as defined in City of Houston Ordinance No. 99-893, as amended and 49 CFR Parts 23 and 26, to ensure that at least

___% of the Gross Sales earned under this Agreement are attributable to small business concerns at least 51% owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51% of each class of voting stock outstanding and 51% of the aggregate of all stock outstanding is owned by one or more such individuals, and whose management and daily business operations are controlled by the socially and economically disadvantaged individuals who own it. In the event that the operation of some Facilities are subcontracted to a joint venture that is partially owned by a certified ACDBE, credit towards the Contract Goal will be granted for a percentage of the joint venture's Gross Sales equal to the percentage of the joint venture owned by ACDBEs, if consistent with all relevant FAA regulations, City ordinances, and City of Houston Office of Business Opportunities' policies. "Socially and economically disadvantaged individual" means a U.S. citizen (or a lawfully admitted permanent resident of the United States) who is:

- (a) Any individual who the City finds to be socially and economically disadvantaged on a case-by-case basis.
- (b) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - (1) "Black Americans,"
 - (2) "Hispanic Americans,"
 - (3) "Native Americans,"
 - (4) "Asian-Pacific Americans,"
 - (5) "Subcontinent Asian Americans,"
 - (6) "Women," or
 - (7) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

The Concessionaire shall submit information concerning the ACDBEs that shall participate in this Agreement. The information shall include the name and address of each ACDBE, a description of the work to be performed by each named firm, the dollar value of the contract or subcontract, Concessionaire's written commitment to use such ACDBEs; and written confirmation from the ACDBEs that they are participants in the contract. If the Concessionaire fails to achieve the contract goal stated therein, it shall be required to provide documentation demonstrating that it made Good Faith efforts.

The Concessionaire shall establish and maintain records and submit regular reports, as required by the Director and the Director of the Office of Business Opportunities, which shall identify and assess progress in achieving ACDBE subcontract goals and other ACDBE affirmative action efforts.

Compliance. Concessionaire is hereby notified that failure to carry out the DOT policy and the ACDBE obligation, as set forth herein, shall constitute a breach of contract which may result in termination of Agreement or such other remedy as deemed appropriate by the City.

Contract Assurance. This Agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR Part 23, subpart F. Concessionaire agrees that it shall not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any concession agreement covered by 49 CFR Part 23, Subpart F.

Subcontract Clauses. The Concessionaire agrees to include the above statements in any subsequent subcontracts that it enters and cause those businesses to similarly include the statements in further agreements.

Termination of ACDBE Subcontractor. Concessionaire must not terminate for convenience an ACDBE Subcontractor and then perform the work of the terminated subcontract with its own forces or those of an affiliate without the Director of the Office of Business Opportunities prior written consent.

When a ACDBE Subcontractor is terminated or fails to complete its work on Agreement for any reason, Concessionaire must notify the Director of the Office of Business Opportunities in writing prior to any such termination and must make good faith efforts to find another ACDBE Subcontractor to substitute for the original ACDBE. These good faith efforts shall be directed at finding another ACDBE to perform at least the same amount of work under Agreement as the ACDBE that was terminated, to the extent needed to meet the contract goal.

12.2.1 It is the policy of the Federal Department of Transportation ("DOT") and the City that Disadvantaged Business Enterprises as defined in 49 CFR Part 23 shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds and in concession agreements on the Airports. Consequently, the DBE requirements of 49 CFR Part 23, are hereby included in this Agreement.

12.2.2 Concessionaire agrees to ensure that Disadvantaged Business Enterprises, as defined in 49 CFR Part 23, have the maximum opportunity to participate in the performance of contracts and subcontracts under this Agreement. In this regard, the City and its contractors shall take all necessary and reasonable steps in accordance with 49 CFR Part 23 to ensure that Disadvantaged Business Enterprises have the maximum opportunity to compete for and perform contracts hereunder. The City, Concessionaire and its Subcontractors shall not discriminate on the basis of race, color, national origin, or sex in the award of performance of this Agreement.

12.2.3 Concessionaire shall as a condition hereunder make Good Faith Efforts to provide participation (through subcontracts and/or joint ventures) in performance hereunder for small business concerns Owned, Controlled and Managed (as defined by the Ordinance) by socially and economically disadvantaged individuals ("DBE") (as defined by the Ordinance) equal to __% of the Gross Sales hereunder. Individuals who are rebuttably presumed to be socially and economically disadvantaged include women, Blacks,

Hispanics, Native Americans, Asian-Pacific Americans, and Asian-Indian Americans. Concessionaire will be required to submit information concerning the ACDBE's that will participate in this Agreement. The information will include the name and address of each DBE, a description of the work to be performed by each named firm, and the dollar value of the contract or subcontract.

- 12.2.4 Failure of Concessionaire to carry-out the Federal DOT policy and the ACDBE obligation, as set forth above, shall constitute a breach of contract which may result in termination of this Agreement or such other remedy as deemed appropriate by the City.
- 12.2.5 This Agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR, Part 23, Subpart F. The Concessionaire agrees that it will not discriminate against any business owner because of the owner's race, color, national origin or sex in connection with the award or performance of any concession agreement covered by 49 CFR, Part 23, Subpart F.
- 12.2.6 Concessionaire agrees to include the above statements, as necessary, to meet the overall goal of __%, in any subsequent concession agreements that it enters and causes those businesses to similarly include the statements in further agreements.

12.3 DRUG DETECTION AND DETERRENCE

- 12.3.1 It is the policy of the City to achieve a drug-free workforce and workplace. The manufacture, distribution, dispensation, possession, sale, or use of illegal drugs or alcohol by contractors while on City Premises is prohibited. Concessionaire shall comply with all the requirements and procedures set forth in the Mayor's Drug Abuse Detection and Deterrence Procedures for Contractors, Executive Order No. 1-31 ("Executive Order"), which is incorporated into this Agreement and is on file in the City Secretary's Office.
- 12.3.2 Before the City signs this Agreement, Concessionaire shall file with the Contract Compliance Officer for Drug Testing ("CCODT"):
- (a) a copy of its drug-free workplace policy,
 - (b) the Drug Policy Compliance Agreement substantially in the form set forth in Exhibit "F", together with a written designation of all safety impact positions and,
 - (c) if applicable (e.g., no safety impact positions), the Certification of No Safety Impact Positions, substantially in the form set forth in Exhibit "G".

If Concessionaire files a written designation of safety impact positions with its Drug Policy Compliance Agreement, it also shall file every 6 months during the performance of this Agreement, a Drug Policy Compliance Declaration in a form substantially similar to Exhibit "H". Concessionaire shall submit the Drug Policy Compliance Declaration to

the CCODT within 30 days of the expiration of each 6-month period of performance and within 30 days of completion of this Agreement. The first 6-month period begins to run on the date the City issues its Notice to Proceed or if no Notice to Proceed is issued, on the first day Concessionaire begins work under this Agreement.

12.3.3 Concessionaire also shall file updated designations of safety impact positions with the CCODT if additional safety impact positions are added to Concessionaire's employee work force.

12.3.4 Concessionaire shall require that its Subcontractors comply with the Executive Order, and Concessionaire shall secure and maintain the required documents for City inspection.

ARTICLE XIII. ENVIRONMENTAL LAWS

13.1 GENERAL

13.1.1 .1 Concessionaire shall comply with all federal, state, and local statutes, ordinances, regulations, rules, policies, codes, or guidelines now or hereafter in effect, as they may be amended from time to time, that govern Hazardous Materials or relate to the protection of human health, safety, or the environment, including but not be limited to:

- (a) the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. Section 136 et seq.;
- (b) the Safe Drinking Water Act, 44 U.S.C. Section 300(f) et seq.;
- (c) the Oil Pollution Control Act of 1990, 33 U.S.C. Section 270 et seq.;
- (d) the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C., Section 9601 et seq., and as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. Law No. 99-499, 100 Stat. 1613;
- (e) the Toxic Substances Control Act, 15 U.S.C., Section 2601 et seq.;
- (f) the Clean Air Act as amended, 42 U.S.C. 7401 et seq.;
- (g) the Clean Water Act, 33 U.S.C., Section 1251, et seq.;
- (h) the Hazardous Materials Transportation Act, 49 U.S.C., Section 1801 et seq.;
- (i) the Resources Conservation and Recovery Act, 42 U.S.C., Section 6901 et seq.;

and those substances defined as hazardous waste or as hazardous substances under the laws of Texas and/or the United States or in regulations promulgated under these laws (collectively, "Environmental Laws").

.2 Within 10 days of receipt of an invoice, Concessionaire shall reimburse the City for any fines or penalties that may be levied against the City by the Environmental Protection Agency, the Texas Commission on Environmental Quality or any

successor agency, or any other governmental agency for Concessionaire's (or its agents' and employees') failure to comply with the Environmental Laws.

- .3 Concessionaire shall not possess, use, generate, release, discharge, store, dispose of, or transport any Hazardous Materials on, under, in, above, to or from the Airport, or any other areas or facilities subject to this Agreement, except in strict compliance with the Environmental Laws. "Hazardous Materials" include:
 - (a) all substances, materials, wastes, pollutants, oils, or governmentally regulated substances or contaminants defined or designated as hazardous, toxic, radioactive, dangerous, or any other similar term in or under any of the Environmental Laws,
 - (b) asbestos and asbestos-containing materials, petroleum products including crude oil or any fraction thereof, gasoline, aviation fuel, jet fuel, diesel fuel, lubricating oils and solvents, urea formaldehyde, flammable explosives, PCBs, radioactive materials or waste, or
 - (c) any other substance that, because of its quantity, concentration, physical, chemical, or infectious characteristics may cause or threaten a present or potential hazard to human health or the environment when improperly generated, used, stored, handled, treated, discharged, distributed, disposed of, or released.
- .4 The Airport is subject to the National Pollution Discharge Elimination System Program ("NPDES"), and the regulations, 40 CFR Part 122, relating to storm water discharges, for operations at the Airport. Concessionaire is familiar with these NPDES storm water regulations, and shall conduct operations in accordance with 40 CFR Part 122, as amended from time to time. Concessionaire understands that there are significant penalties for submitting false information, including fines and imprisonment for knowing violations.
- .5 Close cooperation is necessary to ensure compliance with any NPDES storm water discharge permit terms and conditions, as well as to ensure safety and to minimize costs. Concessionaire shall implement "Best Management Practices" as defined in 40 CFR, Part 122.2, as amended from time to time, if necessary to minimize the exposure of storm water to significant materials generated, stored, handled, or otherwise used by Concessionaire as defined in the federal storm water regulations.
- .6 The City's NPDES storm water discharge permit and any subsequent amendments, extensions, or renewals are incorporated into this Amendment No.2. Concessionaire shall be bound by all applicable portions of the permit.
- .7 Concessionaire shall implement the NPDES requirements at its sole expense, unless otherwise agreed to in writing between the City and Concessionaire.

Concessionaire shall meet all deadlines that may be imposed or agreed to by the City and Concessionaire. Time is of the essence.

- .8 If either party asks, the other party shall provide any non-privileged information submitted to a government entity(ies) under applicable NPDES storm water regulations.
- .9 Concessionaire appoints the City as its agent to negotiate with the appropriate governmental entity(ies) any modifications to the City's permit.
- .10 Concessionaire shall participate in any City organized task force or other work group established to coordinate stormwater activities at the Airport.
- .11 The City may enter upon Concessionaire's Facilities at any time for purposes of inspection to ensure that Concessionaire is complying with this Section and any other provisions in this Agreement without committing a trespass.
- .12 The City's remedies with regard to Environmental Requirements are cumulative and survive termination of this Agreement.
- .13 **WITH NO INTENT TO LIMIT CONCESSIONAIRE'S INDEMNIFICATION TO THE CITY SET FORTH IN SECTION 10.2, CONCESSIONAIRE SHALL PROTECT, DEFEND AND INDEMNIFY THE CITY AND ITS OFFICERS, AGENTS, AND EMPLOYEES AGAINST ANY LOSS, COST, CLAIM, DEMAND, PENALTY, FINE, SETTLEMENT, LIABILITY, OR EXPENSE (INCLUDING BUT NOT LIMITED TO ATTORNEYS' AND CONSULTANTS' FEES, COURT COSTS, AND LITIGATION EXPENSES) RELATED TO:**
 - (a) **ANY INVESTIGATION, MONITORING, CLEANUP, CONTAINMENT, REMOVAL, STORAGE, OR RESTORATION WORK PERFORMED BY THE CITY OR A THIRD PARTY DUE TO CONCESSIONAIRE'S , ITS EMPLOYEES', OR AGENTS' USE OR PLACEMENT OF HAZARDOUS MATERIALS (OF WHATEVER KIND OR NATURE, KNOWN OR UNKNOWN) ON THE AIRPORT PREMISES, OR ANY OTHER AREAS IMPACTED BY THIS AGREEMENT;**
 - (b) **ANY ACTUAL, THREATENED, OR ALLEGED HAZARDOUS MATERIALS CONTAMINATION OF THE AIRPORT PREMISES BY CONCESSIONAIRE, ITS EMPLOYEES, SUBCONTRACTORS, JOINT VENTURE PARTNERS OR AGENTS;**

- (c) **THE DISPOSAL, RELEASE, OR THREATENED RELEASE OF HAZARDOUS MATERIALS BY CONCESSIONAIRE, ITS EMPLOYEES, SUBCONTRACTORS, OR AGENTS AT THE AIRPORT THAT AFFECTS THE SOIL, AIR, WATER, VEGETATION, BUILDINGS, PERSONAL PROPERTY, OR PERSONS;**
- (d) **ANY PERSONAL INJURY, DEATH, OR PROPERTY DAMAGE (REAL OR PERSONAL) ARISING OUT OF OR RELATED TO HAZARDOUS MATERIALS USE BY CONCESSIONAIRE, ITS EMPLOYEES, SUBCONTRACTORS, OR AGENTS AT THE AIRPORT; OR**
- (e) **ANY VIOLATION BY CONCESSIONAIRE, ITS EMPLOYEES, SUBCONTRACTORS OR AGENTS OF ANY ENVIRONMENTAL LAWS.**

THIS INDEMNITY IS NOT APPLICABLE TO LOSSES, CLAIMS, PENALTIES, FINES, SETTLEMENTS, LIABILITIES, AND EXPENSES THAT RESULT FROM CONDITIONS EXISTING ON THE EFFECTIVE DATE OF THIS AGREEMENT.

ARTICLE XIV. DAMAGE TO OR DESTRUCTION OF TERMINAL

14.1 GENERAL

- 14.1.1 If a particular Concession Facility is damaged or destroyed, whether in whole or in part, so as to render it unusable for the purpose of which it was intended, the Director shall have the option whether or not to repair or restore the Concession Facility. Any such election shall be made by the Director within thirty (30) days following the damage or destruction by serving written notice of the Director's decision upon the Concessionaire. In the event the Director does not elect to repair or restore the Facility, the Concessionaire shall be entitled to cancel this Agreement. In the alternative, and in the sole discretion of the Director, Concessionaire may continue to operate hereunder. The Director and Concessionaire shall discuss potential equitable adjustments should Director grant operation rights to concessionaire under this Subsection.

14.2 PARTIAL DAMAGE

- 14.2.1 If a Concession Facility is partially damaged by fire, explosion, the elements, the public enemy, or other casualty, but not rendered unusable, and the Director elects to repair the Facility, the City shall proceed with due diligence to do so at its own cost and expense and the Concessionaire, notwithstanding Section 17.26, shall continue to make payments hereunder during such period of repair; provided that if the Director determines that the

revenue-producing capability of the Facility has been impaired, then the Minimum Guarantee Fee with respect to such Facility shall be reduced in proportion to the degree of impairment as determined by the Director until repair of the Facility has been completed. Notwithstanding the foregoing, if the damage is caused by an act or omission of the Concessionaire, its agents, employees, suppliers, Subcontractors, or contractors, the Concessionaire shall be responsible for the cost of repairing said Facility and shall pay the costs therefor. During any period where Concessionaire repairs said Facility at its own cost under the terms of the immediately preceding sentence, the full Minimum Guarantee Fee with respect to the Facility shall be payable.

14.3 EXTENSIVE DAMAGE

14.3.1 If the damage shall be so extensive as to render the Concession Facility unusable, but capable of being repaired in thirty (30) days, and the Director elects to repair the Facility, the City shall proceed with due diligence to do so at its own cost and expense, and, notwithstanding Section 17.26, the fees payable herein as to such Facility shall be paid to the time of such damage and thereafter cease until such time as the Facility is fully repaired or restored; provided, however, that if the damage is caused by an act or omission of the Concessionaire, its agents, employees, suppliers, Subcontractors or contractors, the Concessionaire shall be responsible for the cost of repairing said Facility and shall pay the costs therefor. During any such period where the Concessionaire repairs said Facility at its own cost under the terms of the immediately preceding sentence, the Minimum Guarantee Fee with respect to the Facility shall be payable.

14.4 COMPLETE DESTRUCTION

14.4.1 In the event a Concession Facility is completely destroyed by fire, explosion, the elements, the public enemy or other casualty, or so damaged that it will remain unusable for more than thirty (30) days, and the Director elects to repair the Facility, notwithstanding Section 17.26, fees payable hereunder shall be paid to the time of such damage or destruction and shall thenceforth cease as to such Facility until such time as the Facility may be fully restored. If within twelve (12) months after the time of such damage or destruction said Facility shall not have been repaired or reconstructed, Concessionaire may give the City written notice of its intention to cancel the Agreement in its entirety as of the date of such damage or destruction. Notwithstanding the foregoing, if the Facility is completely destroyed as a result of any act or omission by Concessionaire, its agents, employees, suppliers, Subcontractors, or contractors, the Director may, in his discretion, require Concessionaire to bear the cost of the repair and reconstruction of the Facility, pay the costs therefor and pay the Minimum Guarantee Fee with respect to the Facility during the reconstruction or repair.

14.5 LIMIT OF CITY OBLIGATIONS

14.5.1 It is understood that, in the application of the foregoing Sections 14.1 through 14.4, the City's obligations shall be limited to repairing or reconstructing the structural portions of a Facility as required, to the same extent and of equal quality as existed immediately prior to the damage but only to the extent that insurance proceeds are available therefore. Redecoration and replacement of Concessionaire's improvements, furniture, equipment, and supplies shall be the responsibility of Concessionaire and any such redecoration, refurbishing, and re-equipping shall be of equivalent quality to that originally installed hereunder.

14.6 LIABILITY OF CONCESSIONAIRE

14.6.1 The provisions of this Article shall not relieve Concessionaire of its responsibility for damage to any part of a Facility caused by any act or omission, whether intentional or negligent, of Concessionaire, its agents, employees, suppliers, Subcontractors, or contractors.

ARTICLE XV. TERMINATION AND ASSIGNMENT

15.1 TERMINATION BY CITY

15.1.1 The City may terminate its performance and Concessionaire's rights under this Agreement in the event of default by Concessionaire and a failure by Concessionaire to cure such default after receiving notice thereof, all as provided in this Section. Default by Concessionaire shall occur if Concessionaire fails to observe or perform any of its duties under this Agreement or if Concessionaire shall become insolvent, or if all or a substantial part of Concessionaire's assets shall be seized for the benefit of Concessionaire's creditors or if a receiver or trustee shall be appointed for Concessionaire. Should such a default occur, the Director will deliver a written notice to Concessionaire describing such default and the proposed date of termination. Such date may not be sooner than the 30th day following receipt of the notice. Director, in his reasonable judgment, may extend the proposed date of termination to a later date if the nature of the default requires more than thirty (30) days to cure. If prior to the proposed date of termination, Concessionaire cures such default to the Director's reasonable satisfaction, then the proposed termination shall be ineffective. If Concessionaire fails to cure such default prior to the proposed date of termination, then City may terminate its performance and Concessionaire's rights under this Agreement as of such date, at no further obligation of the City.

15.1.2 Final termination for cause by the City shall be effected by a written notice from the Director to Concessionaire.

15.2 TERMINATION BY CONCESSIONAIRE

15.2.1 Concessionaire may terminate its performance under this Agreement only in the event of default by the City and a failure by the City to cure such default after receiving notice thereof, all as provided in this Section. Default by the City shall occur if the City fails to observe or perform any of its material duties under this Agreement. Should such a default occur, Concessionaire may deliver a written notice to the Director describing such default and the proposed date of termination. Such date may not be sooner than the 30th day following receipt of the notice. Concessionaire, in its reasonable judgment, may extend the proposed date of termination to a later date if the nature of the default requires more than thirty (30) days to cure. If prior to the proposed date of termination, the City cures such default, then the proposed termination shall be ineffective. If the City fails to cure such default prior to the proposed date of termination, then Concessionaire may terminate its performance under this Agreement as of such date.

15.2.2 In addition, this Agreement may be canceled or terminated by Concessionaire by giving a thirty (30) day written notice to Director upon the occurrence of one or more of the following events specified below:

- .1 The lawful assumption by the United States government, or any authorized agency thereof, of the operation, control or use of the Airport, or any substantial part thereof, in such manner as to materially restrict Concessionaire from operating thereon for a period of at least ninety (90) consecutive days;
- .2 The complete destruction of one-third (1/3) or more of the Concession Facilities from a cause other than the negligence or omission-to-act of Concessionaire, its Subcontractors, agents or employees, and the subsequent failure of City to repair or reconstruct said Facilities within twelve (12) months after such destruction; or
- .3 Any exercise of authority by the federal government which shall so interfere with Concessionaire's use and enjoyment of the Concession Facilities as to constitute a termination, in whole or in part, of this Agreement by operation of law in accordance with the laws of the United States.

15.3 EFFECTS OF CITY'S TERMINATION

15.3.1 Without diminishing other remedies available to it, if the City terminates Concessionaire's rights and the City's duties under Subsection 15.1.1, above, and if the City provides, or causes to be provided, substitute service for Concessionaire's Concession, it is agreed that Concessionaire shall be liable to the City for at least: the total cost of such substitute service borne by the City (including overhead and administrative expenses); plus all compensation which is due the City by Concessionaire but is unpaid; plus all sums accruing under the other provisions of this Amendment No.2;

but less any revenues received by the City from such substitute services. Such substitute service may be less than or equal to the services required to be provided by Concessionaire.

15.4 REMOVAL OF FIXTURES UPON TERMINATION

15.4.1 Upon termination of this Agreement, Concessionaire shall remove or cause to be removed all Removable Fixtures, unless City exercises its purchase right set forth in Section 15.7, which are owned by Concessionaire without damage to the Facilities within seven (7) days of the termination hereof; provided, however, if Concessionaire fails to remove its property within this time the City may remove same at Concessionaire's expense without any liability for damage by reason of such removal.

15.5 NO WAIVER OF DEFAULT

15.5.1 A party's election to waive a default shall not constitute a waiver of a subsequent default of the same or similar nature. A party's failure to insist on strict performance or failure to exercise a right upon default (i) shall not constitute a waiver of the right to insist on and to enforce strict compliance of other obligations or of future performance, and (ii) shall not constitute a waiver of the right to exercise any right or remedy arising out of any future default or failure to perform.

15.6 REMEDIES CUMULATIVE

15.6.1 The rights and remedies contained in this Agreement shall not be exclusive, but shall be cumulative of all rights and remedies now or hereafter existing whether by statute, at law, or in equity; provided, however, that neither party may terminate its duties under this Agreement except in accordance with the provisions hereof.

15.7 PURCHASE OF REMOVABLE FIXTURES

15.7.1 Upon expiration or early termination of this Agreement, the City shall have the right to purchase from Concessionaire any or all Removable Fixtures by paying to the Concessionaire the fair market value of all such items as of the date of expiration or early termination. If the parties hereto are unable to agree upon fair market value, Concessionaire shall remove all such Removable Fixtures without delay and without damage to the Facilities.

15.8 ASSIGNMENT

15.8.1 Upon the termination or cancellation of this Agreement for any reason and upon the request of the Director, the Concessionaire covenants and agrees to promptly assign all of its rights, title and interest to its contracts with its Subcontractors to the City without further demand by the City but only to the extent that such contracts are consistent with

the terms and conditions of this Agreement. The City shall not be liable for the debts, obligations or liabilities of the Concessionaire that accrued prior to the date of assignment.

15.8.2 Except as otherwise provided herein or upon the prior written consent thereto by the Director, the Concessionaire shall not transfer or assign this Agreement or any part hereof or any of its rights hereunder. Nothing herein, however, prevents the assignment of accounts receivable or the creation of a security interest as described in the Texas Business and Commerce Code. In the case of such an assignment, Concessionaire shall immediately furnish the Director with proof of the assignment and the name, telephone number, and address of the assignee and a clear identification of the fees to be paid to the assignee. Any such transfer or assignment without the consent of the Director shall constitute a default on the part of the Concessionaire under this Agreement. No action or failure to act on the part of any officer, agent, or employee of the City shall constitute a waiver by the City of this provision of this Agreement. The acceptance of consideration, no matter how many times accepted, by any officer, agent or employee or department of the City after any such assignment, shall not constitute a waiver hereof nor any estoppel to so terminate an account thereof unless as aforesaid, the same be consented to by the Director. Notwithstanding the foregoing, City approves the assignment set forth in Exhibit "I".

15.8.3 In the event there is an assignment of this Agreement by operation of law, the City shall be entitled within 90 days after notice thereof given in writing to the Director to end the Term of this Agreement on a date which shall not be sooner than sixty (60) days after the date of such determination by the City, which determination shall be by motion, ordinance or resolution of the City Council. An assignment by operation of law, as the term is here used, shall include but not be limited to the vesting of the Concessionaire's right, title and interest in the Concessionaire's furnishings, fixtures, equipment, or the Concessionaire's interest in this Agreement, in a trustee in bankruptcy or in an assignee for the benefit of creditors or in a purchaser thereof at a judicial sale or other involuntary or forced sale. It is the purpose of the foregoing provision to prevent the vesting in any such purchaser, referee, trustee, or assignee any rights, title or interest in the City premises or any of the fixtures, equipment or furnishings thereof. If the Concessionaire is a natural person or partnership, vesting of the Concessionaire's estate's interest in this Agreement or the Concessionaire's estate's right, title or interest in any of the Concessionaire's equipment, furnishings or fixtures thereof in an executor, administrator or guardian of his estate or in his heir or heirs-at-law or in his devisee shall not be considered an assignment by operation of law, but any transfer by an executor, administrator or guardian of his estate, his heir or his heirs-at-law or devisees shall be deemed a transfer by operation of law so as to grant the City the right to terminate as hereinabove provided.

ARTICLE XVI. LIENS AND ENCUMBRANCES

16.1 OTHER LIENS AND ENCUMBRANCES

- 16.1.1 If any mechanics' liens or other liens or orders for the payment of money shall be filed against the Facilities, or any portion thereof, by reason of or arising out of any labor or material furnished or alleged to have been furnished or to be furnished to or for the Concessionaire, or for or by reason of any change, alteration or addition or the cost or expense thereof, or any contract relating thereto, or against the City as owner thereof, the Concessionaire shall within thirty (30) days cause the same to be canceled and discharged of record, by bond or otherwise at the election and expense of the Concessionaire, and shall also defend on behalf of the City, at the Concessionaire's sole cost and expense, any action, suit or proceeding which may be brought thereon or for the enforcement of such lien, liens, or orders.
- 16.1.2 The Concessionaire further covenants and agrees that it will not make any contract or agreement, either oral or written, for the construction, alteration or repair of the Facilities without providing in such contract or agreement that no lien or claim shall thereby be created or arise or be filed or maintained by anyone thereunder upon or against the Facilities or any of the appurtenances, equipment, machinery or fixtures thereon or therein, and without procuring from the architect, engineer, contractor or contractors, materialmen, mechanics, persons, firms or corporations named in any such contract or agreement, a written waiver of all right of lien which said architect, engineer, contractors, materialmen, mechanics, persons, firms or corporations might otherwise have or claim upon the estate or interest of the City in the Facilities or the items furnished by the Concessionaire, and the Concessionaire hereby agree that before any work shall begin or material be furnished it will exhibit and cause to be delivered to the Director said original waiver or waivers of lien, and the Concessionaire shall, upon written demand from the Director, stop any and all work and delivery of materials therefor if such waivers of lien are not delivered as herein provided, and it is expressly understood and agreed, and notice is hereby given, that no persons, firms or corporations furnishing labor, material or service for the construction, repairing, reconstruction or the making of the alterations or additions to any of the Facilities shall have any lien upon the Facilities or any part or portion thereof.

16.2 NO AUTHORITY TO BIND CITY

- 16.2.1 It is further covenanted and agreed that no authority is given by this Agreement to the Concessionaire, expressly or impliedly, to bind the City for the payment of any money in connection with the construction/renovation, repairs, alterations, additions or reconstruction work relating to the Facilities, nor is there any authority given the Concessionaire hereby directly or indirectly to permit any mechanic's, materialmen's or contractors' liens to arise against the Facilities, and the Concessionaire expressly agrees that it will keep and save the Facilities and the City harmless from all costs and damages resulting from any such liens or lien of any character created through any act or thing done by the Concessionaire.

ARTICLE XVII. MISCELLANEOUS

17.1 RULES AND REGULATIONS

- 17.1.1 In conducting its Concession operation hereunder, Concessionaire shall comply with all applicable laws of the United States of America and the State of Texas, and all applicable rules, regulations and ordinances of the City of Houston, Harris County, any and all applicable rules, regulations, and standards promulgated by the Director or by law.
- 17.1.2 Concessionaire understands and agrees that fines and/or penalties may be assessed by the TSA for Concessionaire's noncompliance with the provisions of 49 CFR 1540 and 1542 (or successor regulations) or by other agencies for noncompliance with regulations applicable to Concessionaire's operations. Concessionaire shall promptly reimburse the City for any fines or penalties assessed against the City because of Concessionaire's noncompliance with 49 CFR 1540 and 1542 (or successor regulations), as may be amended from time to time, or other applicable laws or regulations.

17.2 SUBCONTRACTING

- 17.2.1 Any subcontract for granting of rights acquired under this Agreement shall be void unless the Director has given his prior written consent thereto. All subcontracts must require at a minimum strict compliance with the provisions of this Agreement and a provision providing for the assignment of the subcontract to the City in the event of Concessionaire's default hereunder and the termination of this Agreement prior to its expiration date, without consent of the subcontractor upon request of the City. Concessionaire assumes ultimate responsibility for all work, acts or omissions of any subcontractor made in connection with this Agreement. The above provision shall apply with equal force to any assignment proposed by Concessionaire.

17.3 SUBCONTRACTOR'S FAILURE TO COMPLY

- 17.3.1 Concessionaire agrees that it is responsible for the performance of its Subcontractors under this Agreement. Concessionaire agrees to initiate and take all corrective action should a Subcontractor fail to comply with its contract with Concessionaire or any provision of this Agreement. The failure of a Subcontractor to comply with the provisions of this Agreement shall constitute a default by Concessionaire under this Agreement entitling City to terminate in accordance with Section 15.1.
- 17.3.2 City agrees not to terminate this Agreement under Subsection 17.3.1 only if, (i) Concessionaire has taken all corrective action including (if necessary) termination of its agreement with the defaulting Subcontractor, and (ii) Concessionaire has in all respects made the City financially whole, as determined by the Director in his sole discretion. Failing the Director's determination that Concessionaire has complied with (i) and (ii)

above, City shall have the on-going right to terminate this Agreement under Subsection 17.3.1.

17.4 AIRPORT SYMBOLS

17.4.1 Concessionaire shall have no right to use the trademarks, symbols, trade names or name of the Airport, either directly or indirectly, in connection with any production, promotion service or publication without the prior written discretionary consent of the Director.

17.5 TAXES AND LICENSES

17.5.1 Concessionaire shall pay all taxes of whatever character that may be levied or charged upon Concessionaire's operations hereunder and upon Concessionaire's rights to use the Facilities set forth in Exhibits "A" and "B". Concessionaire shall obtain and pay for all licenses or permits necessary or required by law for the construction of improvements, the installation of equipment and furnishings, and any other licenses necessary for the conduct of its operations hereunder.

17.6 RIGHT TO CONTEST TAXES

17.6.1 Concessionaire shall have the right to contest in good faith and by all appropriate proceedings the amount, applicability or validity of any tax assessment pertaining to the Facilities set forth in Exhibits "A" and "B," at its own cost or expense. In the event Concessionaire contests the assessment, the City shall cooperate whenever possible with Concessionaire, provided that such contest will not subject any part of the Facilities set forth in Exhibits "A" and "B" to forfeiture or loss. If, at any time, payment of any tax or assessment becomes necessary to prevent any forfeiture or loss, Concessionaire shall pay the tax or assessment in time to prevent the forfeiture or loss.

17.7 REDELIVERY

17.7.1 Concessionaire shall, upon termination or expiration of this Agreement, quit and deliver up all Facilities and common seating areas which it then currently occupies to the City peaceably, quietly and in as good order and condition as the same now are or may hereafter be improved by Concessionaire or the City, reasonable wear and tear excepted.

17.8 HOLDING OVER

17.8.1 Any continuation by Concessionaire of the Concession services after this Agreement has been terminated or has expired, shall not work as a renewal of this Agreement, but only as a month-to-month extension of this Agreement completely at the sufferance of the City. During any such period of sufferance, Concessionaire shall continue to pay at the rate of the greater of the Minimum Guarantee Fee of the last year of the Term or the Percentage Fee, in accordance with Section 8.1 hereof, no matter which party, City,

through its Director, or Concessionaire, request the holdover. The Director, may during such period of sufferance, terminate Concessionaire's operations on sixty (60) days advance written notice and cause removal of all officers, agents or employees of Concessionaire from the Airport.

17.9 CONFLICTS BETWEEN OCCUPANTS

17.9.1 In the event of a conflict between Concessionaire and any other lessee, licensee or concessionaire as to the rights of the respective lessees, licensee, or concessionaires, the Director shall review the applicable agreements and by reasonable interpretation thereof determine the rights of each lessee, licensee, or concessionaire and Concessionaire agrees to be bound by such decision.

17.10 APPLICABLE LAWS

17.10.1 This Agreement is subject to all laws of the State of Texas, the City Charter and Ordinances of the City of Houston, the laws of the federal government of the United States of America and all rules and regulations of any regulatory body or officer having jurisdiction, including the City's Charter, Code of Ordinances and Airport regulations. Venue for any litigation relating to this Agreement shall be Harris County, Texas.

17.11 ATTORNEY'S FEES

17.11.1 In the event that the City brings any action, suit or proceeding to collect all or a portion of the fees due under this Agreement, to take possession of the Facilities set forth in Exhibits "A" or "B", or to ensure compliance with this Agreement, Concessionaire shall pay the City reasonable attorney's fees, in an amount allowed by the Court in said suit, action or proceedings.

17.12 PAYMENTS, NOTICES AND CONSENTS

17.12.1 All payments, notices and consents shall be sent to the address listed in the Preamble hereof. All notices required or permitted hereunder shall be in writing and shall be deemed delivered when actually received or, if earlier, on the third day following deposit in a United States Postal Service post office or receptacle with proper postage affixed (certified mail, return receipt requested) addressed to the respective other party at the address prescribed in the Preamble of this Agreement or at such other address as the receiving party may have theretofore prescribed by notice to the sending party.

17.13 NO THIRD PARTY BENEFICIARY

17.13.1 This Agreement is made for the benefit of the parties hereto, and nothing herein shall be construed to create any right or benefit enforceable by any third party.

17.14 ENTIRE AGREEMENT

17.14.1 This Agreement contains the entire, integrated, full and final agreement between the parties relating to the subject matter hereof, and there are no other enforceable agreements between the parties, whether written or oral, relating to the subject matter.

17.15 SURVIVAL OF CERTAIN PROVISIONS

17.15.1 Concessionaire shall remain obligated to the City under all clauses of this Agreement that expressly or by their nature extend beyond and survive the expiration or termination of this Agreement, including but not limited to the indemnity provisions hereof.

17.16 CAPTIONS AND HEADINGS

17.16.1 Captions contained in this Agreement are for reference purposes only, and therefore will be given no effect in construing this Agreement and are not restrictive of the subject matter of any section of this Agreement. Any reference to gender shall include the masculine, feminine and neutral.

17.17 RELATIONSHIP OF THE PARTIES

17.17.1 This Agreement is not and is not to be construed as a lease. The right to use the Facilities is entirely dependent upon and is nothing more than incident to, the existence of the rights and privileges granted by this Agreement. Concessionaire will in no instance be deemed to have acquired any possessory rights against the City in or to the Facilities set forth in Exhibits "A" or "B" and Concessionaire shall not be deemed to be a tenant of the City.

17.17.2 The City and Concessionaire agree that no partnership relationship between the parties hereto or joint venture between City and Concessionaire is created by this Agreement, and Concessionaire is not made the agent or representative of the City for any purpose or in any manner whatsoever. Concessionaire shall be an independent contractor at all times.

17.18 NO WAIVER OF GOVERNMENTAL AUTHORITY

17.18.1 Nothing in this Agreement shall be construed to abrogate or impair any governmental power and authority to regulate the prices, terms of service and other operations of Concessionaire to the full extent allowed by law, regardless of whether such regulation is imposed by the City or by other governmental authority. Concessionaire understands that such governmental power and authority may not lawfully be bartered for or contracted away, anything in this Agreement to the contrary notwithstanding.

17.19 NO WAIVER IMPLIED

17.19.1 The failure of either party to insist, in any one or more instances, upon performance of any of the terms, covenants or conditions of this Agreement, shall not be construed as a waiver or relinquishment of the future performance of any such term, covenant or condition by the other party, but the obligation of such party with respect to the future performance of such term, covenant or condition shall continue in full force and effect.

17.20 SEVERABILITY

17.20.1 In the event any term, covenant or condition herein contained shall be held to be invalid by any court of competent jurisdiction, such invalidity shall not affect any other term, covenant or condition herein contained, provided that such invalidity does not materially prejudice either Concessionaire or the City in their respective rights and obligations contained in the valid terms, covenants or conditions hereof.

17.21 WRITTEN AMENDMENT

17.21.1 Unless otherwise provided herein, this Agreement may be amended only by written instrument duly executed on behalf of the City (by authority of an ordinance duly adopted by the City Council) and Concessionaire. The Director is only authorized to perform the functions specifically delegated to him or her in this Agreement.

17.22 ACCEPTANCE AND APPROVAL

17.22.1 An approval by the Director, or by any other instrumentality of the City, of any part of Concessionaire's performance shall not be construed to waive compliance with this Agreement or to establish a standard of performance other than required by this Agreement or by law. The Director is not authorized to vary the terms of this Agreement.

17.23 AMBIGUITIES

17.23.1 In the event of any ambiguity in any of the terms of this Agreement, it shall not be construed for or against any party hereto on the basis that such party did or did not author the same.

17.24 NO CITY EXPENDITURE

17.24.1 Nothing in this Agreement shall be construed to require that the City make any expenditure of its funds by, through or under this Agreement. All statements or representations found anywhere in this Agreement that imply or expressly state the City has an obligation(s) to expend City funds shall be interpreted by city and Concessionaire to mean that such obligation(s) is (i) subject to an appropriation being made by City Council; (ii) shall be met under a separate contract(s) between City and a third party(s);

(iii) shall not be construed in any manner to be a third party beneficiary contract(s) benefiting Concessionaire; and (iv) shall not give any enforcement rights, in law or equity, vested in Concessionaire or any other person or entity, vested in Concessionaire or any other person or entity, either under separate contract(s) or this Agreement.

17.25 SUCCESSORS

17.25.1 This Agreement shall bind and benefit the parties and their legal successors. This Agreement does not create any personal liability on the part of any officer or agent of the City.

17.26 FORCE MAJEURE

17.26.1 Timely performance by both parties is essential to this Agreement. However, neither party is liable to the other for damages resulting from delays or other failures to perform its obligations under this Agreement to the extent the delay or failure is caused by Force Majeure. Force Majeure means fires, floods, explosions, and other acts of God, war, terrorist acts, riots, court orders, and the acts of superior governmental or military authority occurring on the Airport.

17.26.2 This relief is not applicable unless the affected party does the following:

- .1 uses due diligence to remove the Force Majeure as quickly as possible;
- .2 provides the other party with prompt written notice of the cause and its anticipated effect; and
- .3 provides the other party with written notice describing the actual delay or non-performance incurred within 7 days after the Force Majeure ceases.

17.26.3 The City may perform contract functions itself or contract them out during periods of Force Majeure. Such performance does not constitute a default or breach of this Agreement by the City.

17.26.4 If the Force Majeure is of such a nature that it requires closure of the Airport or Terminals A, C or D for an extended period of time, the Director or Concessionaire may terminate this Agreement by giving 7 days' written notice to the other party. This termination is not a default or breach of this Agreement. CONCESSIONAIRE WAIVES ANY CLAIM IT MAY HAVE FOR FINANCIAL LOSSES OR OTHER DAMAGES RESULTING FROM THE TERMINATION EXCEPT FOR AMOUNTS DUE UNDER THIS AGREEMENT AT THE TIME OF THE TERMINATION.

17.26.5 Concessionaire is not relieved from performing its obligations under this Agreement due to a strike or work slowdown of its employees or employees of its Subcontractors. Concessionaire shall employ only fully trained and qualified personnel during a strike.

17.27 ESTOPPEL CERTIFICATE

17.27.1 City agrees, that, from time to time upon not less than ten days prior request by Concessionaire, Director having knowledge of the following facts, will deliver (if true) to the Concessionaire a statement in writing certifying:

- .1 that this Agreement is unmodified and in full force and effect (or if there have been modifications, a description of such modifications and that the Agreement as modified is in full force and effect);
- .2 the dates to which fees and other charges have been paid;
- .3 that the Concessionaire is not in default under any provision of this Agreement, or, if in default, the nature thereof in detail; and
- .4 such further matters as may be requested by Concessionaire and which are simply reflective of the terms of this Agreement.

17.28 ASBESTOS

17.28.1 Concessionaire shall notify the City of any Asbestos-Containing Materials (ACM) found in the Facilities and Concessionaire shall not disturb such material. If necessary, the City shall be responsible for abatement or removal of ACM in the Facilities.

17.29 NONDISCRIMINATION

17.29.1 Concessionaire, for itself, its personal representatives, successors in interest, Subcontractors, and assigns, as a part of the consideration hereof, does hereby covenant and agree that, (1) no person on the grounds of race, color, or national origin shall be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of said Facilities, (2) that in the construction of any improvements and the furnishing of Concession services in the Facilities, no person on the ground of race, color, or national origin shall be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination, (3) that Concessionaire shall use the Facilities in compliance with all other requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation Subtitle A, Office of the Secretary, Part 21, Nondiscrimination in Federally-Assisted Programs of the Department of Transportation-Effectuation of Title of the Civil Rights Act of 1964, and as said Regulations may be amended. That in the event of breach of any of the above non-discrimination covenants, City shall have the right to terminate this

Agreement and hold the same as if this Agreement had never been made or issued.

17.30 CONCESSIONAIRE'S DEBT

17.30.1 If Concessionaire, at any time during the term of this Agreement, incurs a debt, as the word is defined in Section 15-122 of the Houston City Code of Ordinances, it shall immediately notify City Controller in writing. If City Controller becomes aware that Concessionaire has incurred a debt, it shall immediately notify Concessionaire in writing. If Concessionaire does not pay the debt within 30 days of either such notification, City Controller may deduct funds in an amount equal to the debt from any payments owed to Concessionaire under this Agreement, and Concessionaire waives any recourse therefor.

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EXHIBIT “A”
FACILITIES AND APPROVED CONCEPTS

1.0 **APPROVED CONCEPTS**

- 1.1 **Accessories:** Products sold could include fashion accessories for men and women.
- 1.2 **Apparel:** Products sold should include popular clothing or apparel items. Regional products or brands preferred.
- 1.3 **Automated Retail:** Popular retail merchandise should be sold through self-contained automated retail units.
- 1.4 **Candy:** Products sold should include bulk and/or boxed candy/chocolates.
- 1.5 **Duty Free/Duty Paid:** Products sold should include, but not be limited to, the typical duty free categories of fragrances and cosmetics, tobacco products, liquor products, leather goods, jewelry, confectionary, electronics and accessories. This shop should offer products as duty free to international passengers and duty paid to domestic passengers.
- 1.6 **Electronics:** Products sold may include a variety of electronic products and gadgets or a targeted line of products and gadgets, such as computers and computer-related accessories, cell phones/smart phones and accessories, mp3 players and accessories, noise-cancelling headphones, digital cameras and accessories, or related items.
- 1.7 **Jewelry:** Products sold should include jewelry such as watches, fashion jewelry, or other similar items.
- 1.8 **Regional Theme:** Products sold should be unique to the region and should currently be sold in a store in the greater Houston metropolitan area.
- 1.9 **Newsstand w/coffee:** Products sold to include newspapers, magazines, books, sundries, health and beauty aids, limited regional souvenirs, travel and business accessories, single-serving packaged snacks and candy, cold bottled water. Concept should also include a freshly-brewed branded gourmet coffee.
- 1.10 **News and Sundries:** Products sold to include newspapers, magazines, books, sundries, health and beauty aids, limited regional souvenirs, travel and business accessories, single-serving packaged snacks and candy, and cold bottled water.
- 1.11 **Spa:** Services offered could include manicures, pedicures, facials, massages, shaves, hair styling/blowouts, and eyebrow threading along with related spa retail merchandise.

EXHIBIT “B”
OFFICE AND STORAGE SPACE
FACILITIES

DRAFT - SUBJECT TO CHANGE BY CITY ATTORNEY

modifications in the Contract, and in the work to be done thereunder, as provided in the Contract, and in the terms and conditions thereof, or to make any changes in, addition to, or deduction from the work to be done thereunder; and that such changes, if made, shall not in any way vitiate the obligation in this bond and undertaking, or release the Surety therefrom. The Surety hereby expressly waives notice of all changes, extensions and modifications to the Contract.

IT IS EXPRESSLY AGREED THAT SURETY AND CONCESSIONAIRE WILL FULLY AND COMPLETELY INDEMNIFY AND HOLD HARMLESS THE CITY OF HOUSTON FROM AND AGAINST ANY LIABILITY, LOSS, COST, EXPENSE AND DAMAGE ARISING OUT OF OR RESULTING FROM ANY FAILURE ON THE PART OF CONCESSIONAIRE, ITS AGENTS, EMPLOYEES AND REPRESENTATIVES, TO FAITHFULLY AND FULLY PERFORM UNDER THE CONTRACT, AS THE SAME MAY BE CHANGED, EXTENDED OR MODIFIED. THE SURETY'S OBLIGATION SHALL NOT EXCEED THE AMOUNT OF THIS BOND.

If the City brings any suit or other proceeding at law on this bond, or the Contract or both, Concessionaire and Surety agree to pay to the City the additional sum of 10% of whatever amount may be recovered by the City, which sum of 10% is agreed by all parties to be indemnity to the City for the expense of or time consumed by its City Attorney, his or her assistants, and other costs and damage to the City. The amount of 10% is fixed and liquidated by the parties, it being agreed by them that the exact damage to the City would be difficult to ascertain.

This bond and all obligations created hereunder shall be performable in Harris County, Texas, and shall be non-cancelable.

This bond is renewable annually at the option of the Surety upon each anniversary of the effective date of the Contract Term, as stated in the Contract (the "renewal date"); provided that this bond shall be automatically renewed unless the Surety gives Concessionaire and the City written notice 30 days prior to the renewal date that Surety elects not to renew this bond. Notice shall be given to the City and to Concessionaire at the addresses specified in the Contract.

THIS PERFORMANCE BOND shall be binding on the Principal and Surety executing the same, jointly and severally, their legal representatives, successors and assigns.

DRAFT - SUBJECT TO CHANGE BY CITY ATTORNEY

EXECUTED in triplicate originals this ____ day of _____, A.D. 19____.

ATTEST/WITNESS (Corporate Seal):

(Principal)

By: _____
Name:
Title:

By:
Name:
Title:

ATTEST/WITNESS: (Corporate Seal)

Surety (Full Legal Name of Surety)

By: _____
Name:
Title:

By:
Name:
Title:

The foregoing bond is approved as to form this ____ day of _____, A.D. 19____.

REVIEWED:

Assistant City Attorney

EXHIBIT "D"
IRREVOCABLE LETTER OF CREDIT

EXHIBIT "E"

EQUAL EMPLOYMENT OPPORTUNITY

1. The contractor, subcontractor, vendor, supplier, or lessee will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, or age. The contractor, subcontractor, vendor, supplier, or lessee will take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, religion, color, sex, national origin, or age. Such action will include, but not be limited to, the following: employment; upgrading; demotion or transfer; recruitment advertising; layoff or termination; rates of pay or other forms of compensation and selection for training, including apprenticeship. The contractor, subcontractor, vendor, supplier or lessee agrees to post in conspicuous places available to employees, and applicants for employment, notices to be provided by the City setting forth the provisions of this Equal Employment Opportunity Clause.

2. The contractor, subcontractor, vendor, supplier, or lessee states that all qualified applicants will receive consideration for employment without regard to race, religion, color, sex, national origin or age.

3. The contractor, subcontractor, vendor, supplier, or lessee will send to each labor union or representatives of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer advising the said labor union or worker's representative of the contractor's and subcontractor's commitments under Section 202 of Executive Order No. 11246, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

4. The contractor, subcontractor, vendor, supplier, or lessee will comply with all provisions of Executive Order No. 11246 and the rules, regulations, and relevant orders of the Secretary of Labor or other Federal Agency responsible for enforcement of the equal employment opportunity and affirmative action provisions applicable and will likewise furnish all information and reports required by the Mayor and/or Contractor Compliance Officer(s) for purposes of investigation to ascertain and effect compliance with this program.

5. The contractor, subcontractor, vendor, supplier, or lessee will furnish all information and reports required by Executive Order No. 11246, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to all books, records, and accounts by the appropriate City and Federal Officials for purposes of investigations to ascertain compliance with such rules, regulations, and orders. Compliance reports filed at such times as directed shall contain information as to the employment practice policies, program, and work force statistics of the contractor, subcontractor, vendor, supplier, or lessee.

6. In the event of the contractor's, subcontractor's, vendor's, supplier's, or lessee's non-compliance with the non-discrimination clause of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part, and the contractor, subcontractor, vendor, supplier, or lessee may be declared ineligible for further City contracts in accordance with procedures provided in Executive Order No. 11246, and such other sanctions may be imposed and remedies invoked as provided in the said Executive Order, or by rule, regulation, or order of the Secretary of Labor, or as may otherwise be provided by law.

7. The contractor shall include the provisions of paragraphs 1-8 of this Equal Employment Opportunity Clause in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontractor or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance; provided, however, that in the event the contractor becomes involved in, or is threatened with litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

8. The contractor shall file and shall cause his or her subcontractors, if any, to file compliance reports with the City in the form and to the extent as may be prescribed by the Mayor. Compliance reports filed at such times as directed shall contain information as to the practices, policies, programs, and employment policies and employment statistics of the contractor and each subcontractor.

EXHIBIT "F"

DRUG POLICY COMPLIANCE AGREEMENT

I, _____ as an owner or officer of
(Name) (Print/Type) (Title)

_____ (Contractor is
Concessionaire for all purposes (Name of Company)

have authority to bind Contractor with respect to its bid, offer or performance of any and all contracts it may enter into with the City of Houston; and that by making this Agreement, I affirm that the Contractor is aware of and by the time the contract is awarded will be bound by and agree to designate appropriate safety impact positions for company employee positions, and to comply with the following requirements before the City issues a notice to proceed:

1. Develop and implement a written Drug Free Workplace Policy and related drug testing procedures for the Contractor that meet the criteria and requirements established by the Mayor's Amended Policy on Drug Detection and Deterrence (Mayor's Drug Policy) and the Mayor's Drug Detection and Deterrence Procedures for Contractors (Executive Order No. 1-31).
2. Obtain a facility to collect urine samples consistent with Health and Human Services (HHS) guidelines and a HHS certified drug testing laboratory to perform the drug tests.
3. Monitor and keep records of drug tests given and the results; and upon request from the City of Houston, provide confirmation of such testing and results.
4. Submit semi-annual Drug Policy Compliance Declarations.

I affirm on behalf of the Contractor that full compliance with the Mayor's Drug Policy and Executive Order No. 1-31 is a material condition of the contract with the City of Houston.

I further acknowledge that falsification, failure to comply with or failure to timely submit declarations and/or documentation in compliance with the Mayor's Drug Policy and/or Executive Order No. 1-31 will be considered a breach of the contract with the City and may result in non-award or termination of the contract by the City of Houston.

Date

Contractor Name

Signature

Title

EXHIBIT "G"

**CONTRACTOR'S CERTIFICATION
OF NO SAFETY IMPACT POSITIONS
IN PERFORMANCE OF A CITY CONTRACT**

I, _____, _____,
(Name) (Title)

as an owner or officer of _____ (Contractor is
Concessionaire for all purposes) (Name of Company)

have authority to bind the Contractor with respect to its bid, and hereby certify that Contractor has no
employee safety impact positions, as defined in ' 5.17 of Executive Order No. 1-31, that will be involved

in performing _____.
(Project)

Contractor agrees and covenants that it shall immediately notify the City of Houston Director of Personnel
if any safety impact positions are established to provide services in performing this City Contract.

(Date)

(Typed or Printed Name)

(Signature)

(Title)

EXHIBIT "H"
DRUG POLICY COMPLIANCE DECLARATION

I, _____ as an owner or officer of
(Name) (Print/Type) (Title)
_____ (Contractor is
Concessionaire for all purposes) _____
(Name of Company)

have personal knowledge and full authority to make the following declarations:

This reporting period covers the preceding 6 months from _____ to _____, 20____.

_____ A written Drug Free Workplace Policy has been implemented and employees notified.
Initials The policy meets the criteria established by the Mayor's Amended Policy on
Drug Detection and Deterrence (Mayor's Policy).

_____ Written drug testing procedures have been implemented in conformity with the Mayor's
Initials Drug Detection and Deterrence Procedures for Contractors, Executive Order No.
1-31. Employees have been notified of such procedures.

_____ Collection/testing has been conducted in compliance with federal Health and Human
Initials Services (HHS) guidelines.

_____ Appropriate safety impact positions have been designated for employee positions
Initials performing on the City of Houston contract. The number of employees in safety
impact positions during this reporting period is _____.

_____ From _____ to _____ the following test has occurred
Initials (Start date) (End date)

	<u>Random</u>	<u>Reasonable Suspicion</u>	<u>Post Accident</u>	<u>Total</u>
Number Employees Tested				
Number Employees Positive				
Percent Employees Positive				

_____ Any employee who tested positive was immediately removed from the City worksite
Initials consistent with the Mayor's Policy and Executive Order No. 1-31.

_____ I affirm that falsification or failure to submit this declaration timely in accordance with
Initials established guidelines will be considered a breach of contract.

I declare under penalty of perjury that the affirmations made herein and all information contained in this
declaration are within my personal knowledge and are true and correct.

(Date)

(Typed or Printed Name)

(Signature)

(Title)

