

**NORMAN Y. MINETA SAN JOSE INTERNATIONAL AIRPORT**

**SHARED USE LOUNGE CONCESSION AGREEMENT**

**BY AND BETWEEN**

**THE CITY OF SAN JOSE**

**AND**

**ALD DEVELOPMENT CORP dba THE CLUB AT SJC**

**2077 AIRPORT BLVD. #A2480**

**DATED: \_\_\_\_\_**

**(DOCUMENT NO. 10612-CA-17)**

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**NORMAN Y. MINETA SAN JOSE INTERNATIONAL AIRPORT  
CITY OF SAN JOSE  
SHARED USE LOUNGE CONCESSION AGREEMENT**

THIS SHARED USE LOUNGE CONCESSION AGREEMENT ("Agreement") is dated for convenience this \_\_\_\_ day of \_\_\_\_\_, 2017, by and between the City of San José, a municipal corporation of the State of California ("City") and ALD DEVELOPMENT CORP., a Delaware corporation authorized to do business in the State of California as ALD DEVELOPMENT CORP., WHICH WILL DO BUSINESS IN CALIFORNIA AS THE CLUB AT SJC ("Concessionaire"). All capitalized terms in this Agreement shall have the meanings set forth in **SECTION 1** unless otherwise specifically defined in this Agreement.

**RECITALS**

- A. City is empowered to grant the right and privilege to operate certain concessions at the Norman Y. Mineta San José International Airport ("Airport"); and
- B. Concessionaire has warranted to City that it possesses the necessary experience and qualifications to conduct a Concession Operation at the Airport; and
- C. Concessionaire desires to receive the non-exclusive privilege of conducting a Concession Operation at the Airport, with exclusive rights to conduct such operation in the locations designated in **EXHIBIT A** and **EXHIBIT B** (attached hereto) by entering into an Agreement with City, under mutually acceptable terms, conditions and covenants; and
- D. Concessionaire currently conducts concession operations at the Airport under a separate Airport Concession Agreement, dated October 22, 2012, as amended, and

- E. City and Concessionaire desire to contract for additional services at the Airport and rather than further amending the existing agreement, agree to provide the new services under this Agreement; and
- F. The San José City Council has determined that the award of concession privileges to, and the execution of a concession agreement with, Concessionaire will enhance the quality of concession operations at the Airport;

Now, therefore, in consideration of the terms, conditions, covenants, and other provisions of this Agreement, the parties agree:

## **AGREEMENT**

### **SECTION 1 SUMMARY OF TERMS AND DEFINITIONS**

Each reference in the body of this Agreement to specific terms or phrases set forth in this **SECTION 1** shall have the specific meanings and/or contain the respective express information set forth below. To the extent there is a conflict between the information in this **SECTION 1** and any more specific provision of this Agreement, such more specific provision shall control.

**“Airport Living Wage Ordinance”** means Chapter 25.11 of the Municipal Code.

**“Alcoholic Beverage”** includes alcohol, spirits, liquor, wine, beer, and every liquid or solid containing alcohol, spirits, wine, or beer, and which contains one-half of one percent (0.5%) or more of alcohol by volume and which is fit for beverage purposes either alone or when diluted, mixed, or combined with other substances.

**“Commencement Date”** (**SECTION 2.1 - Term**) means the date the Concession Operations are open for business.

**"Concession Area"** (SECTION 3 - Authorized Activities) means those areas designated as a Lounge on **EXHIBIT B**.

**"Concession Fee"** (SECTION 6.1 - Concession Fee) means the Minimum Annual Guarantee ("MAG") of One Hundred Thirty Six Thousand Six Hundred Dollars (\$136,600.00) or the Percentage Fee of Thirteen percent (13%) of Concessionaire's Gross Revenues, whichever is greater.

**"Concession Improvements"** (SECTION 22 - Alterations and Improvements) means those fixtures and other permanent improvements, if any, as set forth in Concessionaire's final construction plans approved by the City, as well as areas that have been subsequently added or modified as described in **EXHIBIT B**, which Concessionaire is permitted to construct in, on or about the Concession Area, subject to the requirements of this Agreement, and such other fixtures and other improvements authorized by Director in writing.

**"Concession Location"** means the location as described in **EXHIBIT B** providing a full-service Shared Use Lounge serving all passengers in Terminals A and B and the International Arrivals Building, pursuant to the terms of this Agreement.

**"Concession Operations"** (SECTION 3 - Authorized Activities) means a full-service Shared Use Lounge serving all passengers in Terminals A and B and the International Arrivals Building as described in **SECTION 3**, at the locations designated on the attached **EXHIBIT B**.

**"Concessionaire's Address"** (SECTION 30 - Notices) means the following information for notice to Concessionaire:

<b>Name:</b>	Graham Richards
<b>Title:</b>	Director of Operations

<b>Mail Address:</b>	ALD Development 5217 Tennyson Parkway, Suite 100 Plano, Texas, 75024 USA
<b>Telephone:</b>	972-535-0285
<b>FAX No.:</b>	972-535-0284
<b>Email address: (email notices cannot be used in lieu of Notice required under SECTION 30 of this Agreement.)</b>	grichards@airportloungedev.com

**“Concessionaire's Allowable Improvement Costs”** are defined in **SECTION 22.6** of this Agreement.

**“Concessionaire's Furnishings, Trade Fixtures and Equipment”** (**SECTION 22 - Alterations and Improvements**) means all proprietary items of Concessionaire displaying distinctive features associated with Concessionaire's operations and all personal property (exclusive of “Concession Improvements”) which Concessionaire is permitted to install or locate within the Concession Area, subject to the requirements of this Agreement, and such other personal property or equipment authorized by Director in writing.

**“Concessionaire's Plans”** (**SECTION 22 - Alterations and Improvements**) means those working drawings, plans, and specifications for the construction and/or fabrication of Concession Improvements.

**“Concessionaire's Property”** (**SECTION 22 - Alterations and Improvements**) means all Concession Improvements and Concessionaire's Furnishings, Trade Fixtures, and Equipment.

**“Day”** means any calendar day. For purposes of this Agreement, the number of days in which any act is to be performed shall be computed by excluding the first day and

including the last.

**“Director”** means the person designated Director of Aviation by City, or such other person, division, department, bureau or agency, as may be designated by the City Council or the City Manager from time to time to exercise functions equivalent or similar to those now exercised by the Director of Aviation; the term also includes any person expressly designated by the Director of Aviation to exercise rights/and or obligations empowered in the “Director” under this Agreement.

**“Effective Date”** means the date this Agreement is executed by the City.

**“Environmental Laws”** (SECTION 4 - Restrictions on Operations; SECTION 28 - Hazardous Materials - Prohibitions and Restrictions) shall mean and include all federal, state, and local laws, statutes, ordinances, regulations, resolutions, decrees, and/or rules now or hereinafter in effect, as may be amended from time to time, and all implementing regulations, directives, orders, guidelines, and federal or state court decisions, interpreting, relating to, regulating or imposing liability (including, but not limited to, response, removal, remediation and damage costs) or standards of conduct or performance relating to industrial hygiene, occupational health, and/or safety conditions, environmental conditions, or exposure to, contamination by, or clean-up of, any and all Hazardous Materials, including without limitation, all federal or state superlien or environmental clean-up statutes.

**“Expiration Date”** (SECTION 2.1): shall mean January 31, 2025, subject to earlier termination as provided in this Agreement.

**“FAA”** (SECTION 19 - Grant Agreement Covenants; SECTION 20 - Modifications for Granting FAA Funds) means the Federal Aviation Administration, created by the United States Government under the Federal Aviation Act of 1958, as amended, or such other successor agency or agencies of the United States Government.

**“Federal Inspection Building”** or **“FIS”** means that certain airline terminal building and related parking facilities at 2065 Airport Boulevard, San José, California 95110.

**“Gross Revenues”** (**SECTION 6.1- Concession Fee**) includes, but is not limited to, all moneys and other consideration generated or received by Concessionaire (including all Gross Revenues generated or received by Concessionaires’ subcontractors, subtenants, agents, employees, representatives, Subconcessionaires or other customers, subtenant(s), joint venturer(s), and/or equity partner(s), (if any)) for the conduct of its business pursuant to this Agreement or for any other use of the Concession Area or the Airport by any person or entity, unless specifically excluded below. Such moneys or other consideration shall include, without limitation:

- (i) all transactions entered into or finalized at the Airport, whether or not the Concession Area was used at any point in the transaction; and
- (ii) transactions made at an off-Airport location, if the Concession Area was used for any aspect of such transaction.

Such moneys or other consideration are considered Gross Revenues even though payment and/or delivery of the food or merchandise/products or other items occur or the service is performed off-Airport. Gross Revenues shall include all such transactions, whether for cash or for credit, regardless of whether a final collection is made in credit transaction, and shall also include orders taken at the Concession Area by mail, telephone, facsimile transmission, electronic mail, or other methods of communication, regardless of whether actual delivery of the food or merchandise/products or other items is made or the service is performed at the Airport. Gross Revenues equal the total money or other consideration arising from the final transaction and are not limited to the value directly attributable to on-Airport operations. All money or other consideration shall be deemed received at the time of the transaction, whether for cash or credit. Rebates given after the close of the transaction shall not be subtracted from Gross Revenues. For the purposes of this definition of Gross Revenues, “Concessionaire” shall include Subconcessionaires and:

- (i) Any entity or person that, directly or indirectly, controls, is controlled by or is



- under common control with Concessionaire; and
- (ii) Any successor to Concessionaire's rights and obligations hereunder, whether through merger or consolidation or sale or purchase of stock; and
- (iii) Any assignee or transferee of all or any portion of Concessionaire's rights and obligations under this Agreement.

For illustration purposes, Gross Revenues specifically shall include, without limitation: Amounts generated by the sale, rental, storage, delivery, shipping, preparation of or provision of merchandise, goods, products, services, food, beverages, dishware, glassware, utensils, and/or linens and/or all other personal property of any kind or provision of any service:

- (i) For any Airport passenger, customer, or user, whether or not the sale, storage, delivery, shipping, preparation of or provision of such items or services occurs on-Airport;
- (ii) If any aspect of the sale, storage, delivery, shipping, preparation of or provision of such items or provision of such service occurs on-Airport;
- (iii) If by vending machine or other mechanical device, where the vending machine or mechanical device is located on-Airport or, without regard to the location of the vending machine or other mechanical device, if any aspect of the sale, storage, delivery, shipping, preparation of or provision of such items or provision of such occurs on-Airport;
- (iv) Amounts generated from pick-up and/or delivery of any item at the Airport, done directly by Concessionaire or its agents or indirectly through any third person or entity and from any services performed in relation to such pick-up or delivery, whether or not such items are

prepared or made partially or entirely off-Airport;

- (v) Amounts generated from any pick-up of any item at the Airport by any person or entity or delivery of any item from the Airport to any person or entity for the purpose of (directly or indirectly) delivering such item to any off-Airport location and from any services performed in relation to such pick-up or delivery, whether or not such items are prepared or made entirely on-Airport or are made or prepared partially on-Airport and receive further preparation elsewhere;
- (vi) Amounts generated from other contracted services with other Airport tenants and users, or other third parties;
- (vii) Other amounts and rentals arising from the Concession Area or Concessionaire's rights under this Agreement, including, but not limited to, amounts generated by allowing use of space, fixtures, improvements or equipment on the Concession Area by any person or entity; or
- (viii) With respect to any loss of Gross Revenues, the full amount of any and all insurance proceeds that are paid on any gross earnings or gross revenues business interruption insurance policy to Concessionaire or any Subconcessionaire.

Such moneys or other consideration expressly shall not include:

- (i) The amount of any federal, state, or local sales tax separately stated and collected from customers;
- (ii) The sale of uniforms or clothing, at Concessionaire's cost, when

such uniforms or clothing are required to be worn by Concessionaire's employees;

- (iii) Amounts received by Concessionaire to provide meals to Concessionaire's employees;
- (iv) Amounts which Concessionaire is entitled due to the sale or trade-in of any furniture, fixtures or equipment used on the Concession Area;
- (v) Amounts allocated to the value of furniture, fixtures or equipment transferred to or from the Concession Area;
- (vi) Any and all gratuities given by any customer to any employee of Concessionaire or any Subconcessionaire for any services rendered at or from the Concession Area;
- (vii) Any and all receipts of Concessionaire or any Subconcessionaire that arise solely from its or their operations under any other agreement with City at the Airport;
- (viii) Amounts and credits received for Product returned to shippers, wholesalers or manufacturers;
- (ix) Amounts received by Concessionaire from Subconcessionaires for participation in the Joint Marketing Fund (if any).

**"Hazardous Materials"** (SECTION 4 - Restrictions on Activities; SECTION 28 - Hazardous Materials- Prohibitions and Restrictions) shall mean any and all: (a) substances, products, by-products, waste or other materials of any nature or kind whatsoever which is or becomes listed, regulated or addressed under any

Environmental Laws; and (b) any materials, substances, products, by-products, waste or other materials of any nature or kind whatsoever whose presence in and of itself or in combination with other materials, substances, products, by-products or waste may give rise to liability under any Environmental Law or any statutory or common law theory based on negligence, trespass, intentional tort, nuisance, strict or absolute liability or under any reported decisions of any state or federal court; and (c) any substance, product, by-product, waste or any other material which may be hazardous or harmful to the air, water, soil, environment or affect industrial hygiene, occupational health, safety and/or general welfare conditions, including without limitation, petroleum and/or asbestos materials, products, by-products or waste.

**"Hours of Operation"** are set out in **SECTION 4.20.1** of this Agreement.

**"Laws"** means all present and future applicable judicial decisions, statutes, laws, ordinances, regulations, building codes, Airport rules and regulations adopted from time to time, regulations, orders and requirements and policies of all governmental authorities, including without limitation, city, state, municipal, county, federal agencies or the federal government, the FAA or the TSA, and their departments, boards, bureaus, commissions and officials and such other authority as may have jurisdiction including, without limitation, any regulation or order of a quasi-official entity or body.

**"Like New"** means the condition of the Concessionaire's Property to appear in perfect condition, intact and pristine with no signs of wear on the Concession Property.

**"Lounge" or "Shared Use Lounge"** means a full-service shared use lounge serving all passengers in Terminals A and B and the International Arrivals Building.

**"Marketing Plan"** (**SECTION 3 - Authorized Activities**) means the comprehensive plan of marketing that are acceptable to and approved by the City thirty (30) days prior to the Commencement Date; any revisions to the Marketing Plan may be effected from time to time by Concessionaire only after the Director has given prior written approval.

The Marketing Plan shall be revised jointly by Concessionaire and City.

**“Minimum Annual Guarantee (MAG)”** (SECTION 6- Fees and Deposits) means the dollar amount that the Concessionaire will guarantee to the City as a minimum Concession Fee each year during the Term of the Agreement.

**“Municipal Code”** means the San José Municipal Code, as amended from time to time.

**“Percentage Fee”** is defined in SECTION 6 of this Agreement.

**“Person”** means an individual, a corporation, a partnership, a joint venture or any other form of business association.

**“Product”** (SECTION 4.11.2 - Product Quality; SECTION 4.13 - Director's Approval of Product and Services) means any and all services, products, goods, food or beverages, required or permitted under this Agreement to be made available for sale or sold by Concessionaire or any Subconcessionaire in the regular course of Concessionaire's or Subconcessionaire's business at or from the Concession Area.

**“Security Deposit”** means the initial amount of SIXTY EIGHT THOUSAND THREE HUNDRED DOLLARS (\$68,300.00), which may be adjusted from time to time in accordance with SECTION 6.3.

**“Subconcessionaire”** means any person who operates a business in the Concession Area under an agreement with Concessionaire, including, but not limited to, any franchise, joint venture, management, sublease or subconcessionaire agreement, for which the Director has given prior written approval.

**“Summary”** means SECTION 1 of this Agreement.

**"Tax"** shall mean and include any assessment, license, charge, fee, imposition, or levy imposed by any governmental body.

**"Term"** is defined in **SECTION 2.1** of this Agreement.

**"Terminal A"** means that certain airline terminal building and related parking facilities at 2077 Airport Boulevard, San José, California, 95110.

**"Terminal B"** means that certain airline terminal building and related parking facilities at 1701 Airport Boulevard, San José, California, 95110, including the North Concourse.

**"TSA"** means the Transportation Security Administration, part of the Department of Homeland Security, created by the United States Government under the Aviation and Transportation Security Act ("ATSA") of 2001, as amended, or such other successor agency or agencies of the United States Government.

**"Unavoidable Delay"** (**SECTION 29.6 - Force Majeure**) means any strike, boycott, labor dispute, riot or embargo (any of which is directly related to Concession Operations as referenced in **SECTION 3.1**), shortage of building materials or other acceptable substitute not reasonably contemplated by the party responsible for procuring the same, Acts of God (such as earthquake, to the extent not insured against), act of a public enemy, act of a superior governmental authority, major weather disturbance, rebellion, sabotage and any other circumstance of a magnitude a reasonable person would believe is beyond the reasonable control of either party to this Agreement.

## **SECTION 2 TERM OF AGREEMENT**

### **2.1 Term**

This Agreement shall be binding on both parties from the Effective Date set forth in the Summary and shall continue through the Expiration Date, unless and until sooner terminated in accordance with the terms of this Agreement.

#### **2.1.1 Commencement of Operations.**

**2.1.1.1** Following the Effective Date, Concessionaire, if it has not already done so, shall prepare architectural plans and specifications for the Concession Improvements, as provided in **SECTION 22** of this Agreement. Provided Concessionaire has received a Notice to Proceed (NTP) in accordance with **SECTION 22** herein, Concessionaire shall be prepared to commence construction of the Concession Improvements.

## **2.2 Holdover**

It is not the intent of this Agreement to create any rights of Concessionaire beyond the Expiration Date or earlier termination of this Agreement. Any holding over after the Expiration Date or earlier termination of this Agreement shall be subject to and conditioned on the approval of the City Council and on terms and conditions approved by the City Council.

## **SECTION 3 AUTHORIZED ACTIVITIES**

### **3.1 Concession Operations**

The Concessionaire shall have the non-exclusive right, privilege, and obligation to finance, design, construct, install, maintain and operate a Shared Use Lounge for the purpose of establishing a high quality concession operation as approved by the City. This Agreement is non-exclusive in character with regard to any location at the Airport other than the Concession Area and in no way prevents the City from entering into an Agreement with any other parties for the sale or offering of competitive services, products or items by other concessionaires and/or concessionaires or others in other premises at the Airport during the Term of this Agreement. Concessionaire shall use the Concession Area for the Concession Operations and for no other purpose.

### **3.2 General Approvals**

#### **3.2.1 Approved Services**

Concessionaire shall provide the following services in the Concession Area:

- a. Pricing for daily use customers;
- b. Negotiated pricing and billing for airlines for use by their premium

passengers and, if applicable, for reciprocal users from other airport lounges;

- c. Liquor license for on premise serving of alcohol and any other business licenses or permits required to operate the Lounge;
- d. All staffing and management needed to operate the Lounge;
- e. All point of sale and other electronic equipment required to operate the Lounge;
- f. 4K Ultra-High-Definition flat-screen televisions;
- g. Cable or satellite feeds for 4K Ultra-High-Definition Television(s);
- h. Electronic equipment for customer use (computer(s), printer, fax machine, and other business equipment deemed required);
- i. Current selection of local, national and international magazines and newspapers;
- j. A selection of complimentary alcoholic and non-alcoholic beverages;
- k. A selection of "premium" alcoholic beverages available for sale as customer demand so requires;
- l. A selection of complimentary snacks appropriate to the time of day, passenger base, price of access paid, and based on similar comparable offering at Concessionaire's lounges located within San Francisco Bay Area airports or similar size airports in the United States where price or access charges is similar or the same;
- m. A selection of cold and hot food items available for sale as customer demand so requires;
- n. Any equipment and utensils required for food and bar preparation;
- o. Any equipment, utensils, dinnerware, glassware and paper products required for food and beverage service;
- p. Maintenance and replacement of any utensils, equipment and supplies required to operate the Lounge;
- q. Janitorial service on a daily basis and to maintain the cleanliness of the Concession Area during all hours of operation;



- r. Refuse removal to Airport supplied receptacles;
- s. All goods, materials and supplies required to operate the Lounge;
- t. Concessionaire shall purchase all prepared foods from the Airport's food and beverage concessionaires, unless an exemption is granted by the Director; and
- u. A Marketing Plan to promote the Lounge;

**3.2.2** In consideration of Concessionaire's payment of the Concession Fee and all other fees and charges and the performance of all provisions of this Agreement and any amendment thereto, City grants to Concessionaire, and Concessionaire accepts from City, the right to install, operate and maintain the Concession Improvements and the Concessionaire's Furnishings, Trade Fixtures and Equipment. Concessionaire shall conduct the Concession Operations in the Concession Area located on **EXHIBIT B**, and in accordance with Concessionaire's Marketing Plan..

**3.2.3** Furthermore, the Concessionaire shall have the right, privilege and obligation to finance, design, develop, construct, install, maintain and operate and to cause Subconcessionaires to operate and maintain the Concession Location depicted in **EXHIBIT B**.

**3.2.4** The Concession Operations shall be limited to the sale of food and beverages at the Airport, as approved by the Director. Concessionaire shall obtain Director's prior approval, as provided in **SECTION 4.13** of this Agreement, before offering for sale to the general public at the Airport any Product or merchandise other than food and beverages products that have not been previously approved by the Director. Concessionaire shall purchase all prepared foods from the Airport's food and beverage concessionaires, unless an exemption is granted by the Director of Aviation.

**3.2.5** Intentionally Omitted

**3.2.6** Concessionaire shall develop, design, fund and construct, lease, operate, and manage a Shared Use Lounge at the Airport as detailed in **EXHIBIT B**, encompassing a total of **4,030** square feet.

### **3.3 Ingress and Egress**

Concessionaire and its Subconcessionaires, and their respective officers,

employees, customers, patrons, invitees, contractors, subcontractors, suppliers of materials and furnishers of services shall have the right of ingress to and egress from the Concession Area, as reasonably required to carry on permitted activities as described herein, subject to City, governmental and regulatory (e.g., security) approval, and subject to conditions and restrictions pursuant to this Agreement. The manner and means of receipt of shipments of inventory and supplies shall also be subject to the approvals, conditions and restrictions described herein.

#### **SECTION 4 RESTRICTIONS ON ACTIVITIES**

The commercial activities authorized in **SECTION 3** shall be subject to the following conditions and restrictions:

##### **4.1 Use**

Concessionaire shall not be permitted any use of the Concession Area, the Terminals or the Airport except for the Concession Operations as provided in this Agreement. Notwithstanding Concessionaire's privilege and concession rights in the initially approved site, the City reserves the right to award agreements for additional concession operations similar to Concessionaire's to any other person for other areas of the Airport, including, without limitation, any expanded or new terminal areas. Further, the Airport shall not be restricted in any manner from granting exclusive or nonexclusive uses of Airport facilities to others, with the exception of the Concession Area.

##### **4.2 Compliance with Laws**

This Agreement is made subject and subordinate to all existing and future agreements between the City and the United States of America, and Concessionaire shall act in compliance therewith. Concessionaire shall comply with and conform to all Laws applicable to or affecting, directly or indirectly, the Concessionaire, the Concession Area, or Concessionaire's operations and activities under this Agreement. Further, Concessionaire shall not do or permit anything to be done in, on or about the Concession Area, the Terminals or the Airport, nor bring or keep, or permit to be brought or kept therein, anything which is prohibited by a standard form of fire insurance policy or in any way increase or affect the then existing rate of fire or other insurance required to be carried upon the Concession Area, the Airport or the Terminals or any

part thereof, or any of their contents, or which will cause a cancellation of any insurance policy covering the Concession Area, the Airport or the Terminals or any part thereof or any of their contents.

#### **4.3 Limitation on Operations**

Concessionaire shall not conduct or permit operations in the Concession Area that in the reasonable judgment of the City would:

- a. Interfere or might interfere with the reasonable use by others of common facilities at the Airport;
- b. Hinders or might hinder police, firefighters or other emergency personnel in the discharge of their duties; or
- c. Would or would be likely to constitute a hazardous condition at the Airport.

#### **4.4 Limitation on Uses**

Concessionaire shall not engage either directly or indirectly in any form of business on the Airport or the Concession Area except as expressly authorized pursuant to this Agreement. Concessionaire understands and agrees that the following products or services are not permitted to be sold under this Agreement in or from the Concessionaire Area:

- a. Insurance of any kind;
- b. Commercial advertising services, signage, and displays;
- c. Ground transportation and parking services;
- d. Foreign currency exchange (although foreign currencies may be accepted for payment for items purchased in the Concessionaire's/Subconcessionaire's Location, at Concessionaire/Subconcessionaire's option);
- e. Automatic Teller Machines;
- f. In-flight catering;
- g. Baggage carts;

- h. Airline tickets;
- i. Vending Machines of any kind;
- j. Lottery tickets;
- k. Travel agency activities;
- l. Sale of bottled Alcoholic Beverages for consumption at the Airport
- m. Check-cashing services;
- n. Prepaid telephone cards from vending machines
- o. Money orders; or
- p. Other items that may conflict with the current products sold by other concessionaires at the Airport, as determined by the Director.

#### **4.5 Environmentally Preferable Procurement Policy**

Concessionaire shall perform its obligations under this Agreement in conformance with City Council Policy 4-6, entitled "Environmentally Preferable Procurement Policy." Concessionaire shall procure environmentally preferable products and services that meet environmental product standards established by governmental or other widely recognized authorities. Examples include the Green Seal 37 standard for janitorial products ([www.greenseal.org](http://www.greenseal.org)), EPEAT for IT equipment, and GreenGuard for furniture.

##### **4.5.1 Recycling Requirements**

Concessionaire shall integrate environmental factors into Concessionaire's buying decisions, when practicable. At a minimum:

- a. Concessionaire shall replace disposable with re-usable, recyclable or compostable goods, i.e., cutlery, plates, cups etc.
- b. Concessionaire shall appoint a liaison to participate in in-house coordination meetings for solid waste and recycling programs.
- c. Concessionaire shall comply with all current and future City recycling programs and standards. The recycling program will include: recycling bins

for paper (mixed or separate, depending on the existing stream); recycling bins for all beverage containers (glass, plastic, aluminum cans) that are being used by Concessionaire; and other materials that can be handled locally in the existing system, such as cardboard. Bins will be provided by City if not already provided by the Concessionaire. Concessionaire agrees to let City place containers and related signage in administrative, meeting, and public spaces.

d. Concessionaire shall instruct staff to use appropriate recycling containers.

e. Concessionaire shall use City solid waste and recyclables storage bins appropriately to avoid contamination.

f. Concessionaire shall provide sufficient solid waste and recyclables storage space in Concession Areas.

g. Concessionaire shall establish detailed environmental policies and a strategy to implement them. Concessionaire shall consistently communicate the policies in various ways to engage all employees, vendors and patrons.

h. Concessionaire will encourage the use of low-impact transportation (i.e., walking, biking, mass transit) which reduces energy consumption and emissions.

i. When printing is required, Concessionaire will use double-sided copies and at minimum 30% post-consumer recycled content paper with soy-based ink.

j. Concessionaire will shift written communications to e-mail whenever possible.

k. Concessionaire will focus on cost-saving, energy-efficient efforts. These may include:

- i. purchasing ENERGY STAR® products when replacing equipment.
- ii. using laptops when possible (on average they use 10% less energy than desktop computers).
- iii. using LCD rather than CRT monitors.
- iv. Encouraging employees to turn off equipment and lighting, and turn down thermostats when leaving for extended periods of time.
- v. using inkjet printers rather than laser printers as they use less energy.
- vi. considering equipment that can print on both sides of paper.
- vii. considering multi-purpose office equipment (i.e., all-in-one fax, printer, scanner, copier). These generally require less energy and space than their individual counterparts.

#### **4.6 Disposal, Use and Storage of Hazardous Materials**

Disposal of Hazardous Materials on the Airport is strictly prohibited. Storage and use of Hazardous Materials on the Airport is prohibited, except:

**4.6.1** Concessionaire may store and use Hazardous Materials in the Concession Area in a safe and prudent manner and in accordance with the requirements of all applicable Environmental Laws those kinds and quantities of Hazardous Materials that are normally used in conducting the activities permitted under this Agreement. Concessionaire shall provide Director with a copy of any application for a permit for use or storage of Hazardous Materials in the Concession Area from any regulatory agency responsible for enforcement of Environmental Laws, and shall also provide a copy of any permit received from such agency; and

**4.6.2** Concessionaire may use Hazardous Materials on the Airport other than the Concession Area, only in a safe and prudent manner and in accordance with the requirements of all applicable Environmental Laws those kinds and quantities of Hazardous Materials which are commonly used in conducting the activities permitted

under this Agreement, and for which no permit is required to be obtained from any regulatory agency under any Environmental Law.

#### **4.7 Relocation, Expansion or Contraction of Operations**

##### **4.7.1 Modification of Concession Area**

**4.7.1.1** In the event that implementation of the City's requirements for the Airport, changes in airlines or flight schedules, or other changes in business conditions necessitate the relocation, expansion or contraction of the Concession Area, or any part thereof, Concessionaire shall relocate all or part of its operations or the Concession Area, or any part thereof, or contract or expand the size of the Concession Area in an expeditious manner only as may be permitted, directed or required by the Director.

**4.7.1.2** In the event that City requires Concessionaire to relocate all or part of the Concession Operations, City shall reimburse Concessionaire for Concessionaire's reasonable relocation costs as calculated in accordance with this Section (the "Relocation Reimbursement"). The following shall be considered guidelines for calculating the Relocation Reimbursement:

**4.7.1.3** Concessionaire's Allowable Improvement Costs for the Concession Improvements in the Concession Area shall be depreciated by Concessionaire on a straight line basis over the Term of the Agreement with no residual value, starting from the date that Concessionaire commenced Concession Operations. If Concessionaire is relocated solely at City's request and not due in whole or in part to any act or omission of Concessionaire, City agrees to pay Concessionaire for the unamortized portion of Concessionaire's Allowable Improvement Costs (calculated as of the time that Concessionaire is required to vacate the Concession Area).

**4.7.1.4** City shall reimburse Concessionaire for the unamortized net book value of Concessionaire's Allowable Improvement Costs, provided that: (a) the Concessionaire has obtained all necessary written approvals for its construction, (b) the Concessionaire has reported each improvement and its costs, (c) architectural and design fees do not exceed ten percent (10%) of the costs of the improvement, and (d) all said costs are properly supported and made available for audit. All said costs must

be direct costs paid by Concessionaire to independent contractors and suppliers for work actually performed on said Concession Area, materials furnished or professional services rendered. Costs associated with Concessionaire's employees shall not be included in the calculation of these costs. To become reimbursable, the Concessionaire shall, at its expense provide City with 'as-built' drawings and paid invoices, showing material and labor costs involved in the construction of the approved structural improvement within ninety (90) days of the date that the improvement was placed in service.

**4.7.1.5** If the Director determines that the removal of Concessionaire's Property from the existing Concession Area and its installation at Concessionaire's new Concession Area is possible and not unreasonably burdensome to Concessionaire, Concessionaire shall be entitled to reimbursement only for its costs to relocate such Property.

**4.7.1.6** Concessionaire agrees to bear, at its sole cost and expense, the costs of relocation of any portion of the Concession Area that is not requested by Director or that is necessitated by Concessionaire's operations, and that is approved in writing by the Director.

#### **4.7.2 New Airport Terminal Development**

The City may identify space for future concession development in locations not part of this Agreement. The City may request a proposal from Concessionaire to develop and lease these spaces, subject to the City's approval of the proposed use and negotiation and execution of a written amendment to this Agreement. Concessionaire shall have no exclusive right to lease future concession space. In accordance with **SECTION 4.7.1** above, the City will also retain the right to reclaim, contract, expand or relocate the Concession Area during the Term of this Agreement as needed for Airport development, security issues or other City needs.

#### **4.7.3 Director's Authority**

**4.7.3.1** Amendments to this Agreement that change or modify the description of the Concession Area set forth in **EXHIBIT B** to specify in writing increases, decreases, or relocation of space and which include only such Concession Fees as are specified or authorized in accordance with **SECTION 6**, may be executed



on behalf of the City by the Director.

**4.7.3.2** The relocation, expansion or contraction of the Concession Area conducted pursuant to this Section, or the relocation of any airlines or any airlines' gate or any other concession, shall not affect Concessionaire's obligation to pay the Concession Fee.

**4.8 Intentionally Omitted**

**4.9 Covenant of Continuous Operation**

As a material inducement to City to enter into this Agreement, Concessionaire covenants to continuously operate or cause the continuous operation of its Concession Operations during the Term. The failure of Concessionaire to continuously operate and market, or cause the operation and marketing of its Concession Operations, or any part thereof, for any period of time, except as may otherwise be permitted under this Agreement, shall constitute an Event of Default. City does not make, and has not made, any representation, warranty, assurance or guaranty that the uses to which Concessionaire will put its Concession Operation will generate any minimum, maximum or optimum volume of business, or that any minimum, maximum or optimum volume of business will occur. The failure to comply with this covenant of continuous operation shall not be excused or waived by reason of Concessionaire's failure to realize or achieve targeted revenue forecasts or goals for any period of time during the Term.

**4.10 Standards of Operations**

**4.10.1 Covenant of Continuous Operation**

During the term of this Agreement, Concessionaire agrees, by appropriate and acceptable means to the Airport, and at its sole cost and expense, to maintain, operate and keep the Concession Operations and Concession Area safe, clean, sanitary and in a Like New condition at all times, in accordance with the provisions of the Agreement, and in full compliance with any and all applicable Laws, rules and regulations, and applicable standards, to the satisfaction of the Director.

Concessionaire covenants to sell or cause the sale of Products of the highest quality as required by all applicable laws and to insure that every item, Product or service offered to the public is available at all times of the day

that such items, Products or services are posted as available. Concessionaire covenants not to misrepresent the quality or quantity of any item, Product or service offered through its Concession Operations, and covenants not to allow the use of any false, misleading or deceptive advertising in the promotion of the Concession Operations.

#### **4.10.2 Emergency Use by Airport**

In the event of an emergency at the Airport, City reserves the right to make the Concession Area available as a "friends and family" gathering space to persons designated by the City. In such event, Concessionaire shall be entitled to a prorated reduction in the Concession Fee for the period that the Concessionaire is precluded from conducting its normal Concession Operations in the Concession Area.

### **4.11 Concession Management**

#### **4.11.1 Operating Procedures**

Concessionaire covenants to provide, or cause the provision of, prompt, courteous, and efficient Products and Services of the highest quality on a nondiscriminatory basis. Concessionaire shall submit for City approval, at least sixty (60) days prior to the commencement of operations, written operating procedures for the day-to-day management of its operations as they pertain to customer service (the "Operating Procedures"). City shall have, at a minimum, thirty (30) days to review and comment on the Operating Procedures. Within five (5) days of receipt of the written request of Director, Concessionaire shall meet with Director to discuss product or menu selection, the quantity offered, the quality of service rendered; and such other matters which are directly related to the Concession Operations.

#### **4.11.2 Product Quality**

Any Products sold or kept for sale shall be of high quality and comparable to first class facilities of similar type in the metropolitan San José area. No misbranded article shall be sold or kept for sale.

#### **4.11.3 Intentionally Omitted**

#### **4.11.4 Trash Receptacles**

Concessionaire, whether stationary or moving throughout the

Airport, shall have leak-proof baskets and containers for carrying Product or trash. Such baskets and containers shall have wheels on them such that when they are moved through the Airport they do not make noise or leave marks on the Airport flooring. Such baskets and containers shall be subject to the Director's approval. Concessionaire shall use reasonable efforts to prevent the littering and scattering of cups, wrappers, napkins and other items by Concessionaire or Subconcessionaire's employees or customers and shall direct its employees and Subconcessionaire's employees to clean spills and dispose of any such litter from Concessionaire's or Subconcessionaire's operations that is visible to any such employees, regardless of whether such spills or litter are in the Concession Area or other public areas of the Airport. Such baskets and containers shall not be overfilled and trash shall not be visible to the public.

#### **4.11.5 Trash Disposal**

Concessionaire shall maintain its Concession Area in a clean, neat, businesslike and orderly manner at all times, and provide for timely disposal of trash and debris.

#### **4.11.6 Intentionally Omitted**

#### **4.11.7 Intentionally Omitted**

#### **4.11.8 Intentionally Omitted**

#### **4.11.9 Delivery of Supplies**

**4.11.9.1** Delivery of supplies to the Concession Area shall be made at such times, by such route/modes, as not to conflict with airport passenger traffic and patrons. Such routes/modes and times of delivery are subject to the approval of the Director. Current hours of checkpoint security coverage are 4:30 a.m. to closing, which is dependent upon flight schedule. Concessionaire shall, however, schedule deliveries through the checkpoints at times that are not disruptive to the general public. Checkpoint hours are subject to change and approval of deliveries and delivery times are subject to Director approval.

**4.11.9.2** Concessionaire and Subconcessionaire(s) may be required at some point in the future, as the Airport develops, to provide at least 24 hours advance notice to Director regarding any expected deliveries. Notice must include:

- a. The name of the company or individual ordering the delivery, including a phone number;
- b. The name of the company/individual making the delivery;
- c. Location of delivery;
- d. The date and time of delivery, whether a single event or a regular schedule to be followed;
- e. Duration of time needed for delivery;
- f. Content of delivery;
- g. The delivery vehicle plate number and state; and
- h. Description of delivery vehicle

**4.11.9.3** All companies making deliveries are required to comply with all provisions set forth by Director. Director must be notified at least 24 hours in advance of all deliveries of physically large items. Airport staff will specify appropriate conditions and procedures for the delivery, including the time and route.

**4.11.10 Intentionally Omitted**

**4.11.11 Plans**

Concessionaire shall prepare all plans as required under this Agreement. These plans are subject to prior written approval by the City.

**4.11.12 Revision of Marketing Plan**

In the event that the Concession Area operated by the Concessionaire experiences a consistent decline in revenues per enplaned passenger of ten percent (10%) or more for six (6) consecutive months, the Director may require the Concessionaire to revise or provide a new Marketing Plan for the Director's approval. Concessionaire agrees to faithfully abide by and perform the provisions of any Marketing Plan that is so developed and approved.

**4.11.13 Subconcession Agreements**

**4.11.13.1** If Concessionaire subcontracts, Concessionaire shall enter into Subconcession agreements for operations as designated based on approval of the Marketing Plan with the approval of the City. Concessionaire shall coordinate its

Subconcession activities with the Airport. All Subconcession agreements shall be subject and subordinate to the terms and conditions of this Agreement.

**4.11.13.2** Any and all Subconcession agreements shall immediately terminate upon termination of this Agreement for any reason, without direct recourse of any kind against the City.

**4.11.14 Subconcession Work Force**

Subject to the City's "Airport Living Wage Regulations" and "Airport Living Wage Determination," as further described <http://www.flysanjose.com/living-wage>, Concessionaire shall cause each Subconcessionaire to maintain an adequate sales and work force at all times, including, without limitation, sales, cashiers, management and supervisory personnel, on-site to fully meet customer needs at all times. Concessionaire and Subconcessionaires shall use skill and diligence in the conduct of business and shall cause their respective employees to be courteous and helpful to the public at all times.

**4.11.15 Concession Area Payments and Expenses**

Concessionaire shall bill and collect all amounts payable by Subconcessionaires under Subconcession agreements, and pay all operating expenses required under this Agreement.

**4.11.16 Intentionally Omitted**

**4.11.17 Concession Monitoring**

Concessionaire shall monitor the sales activity, pricing, customer service, Hours of Operation, merchandise and sales reporting of all Subconcessionaires.

**4.11.18 Customer Surveys**

Concessionaire shall monitor the Airport customer market through periodic consumer surveys, the content of which shall be approved by the City in advance.

**4.11.19 Customer Complaints**

Concessionaire shall answer, or cause Subconcessionaires to answer, all written customer complaints within seventy-two (72) hours after receipt of such complaints and resolve all issues within two (2) weeks. Concessionaire shall

provide, or cause Subconcessionaires to provide, copies of the complaints and answers to Airport Customer Services by the last day of each calendar month.

**4.11.20 Concession Area Signage**

Concessionaire shall be responsible for ensuring that all Concession Area signage standards are enforced in accordance with **SECTION 4.22** below.

**4.11.21 Annual Reporting**

Concessionaire shall be required to submit, by March 1st of each year a report that shall contain the following:

**4.11.21.1** A review of the prior year's performance, including, without limitation, achievement of sales projections, financial results and other goals and objectives;

**4.11.21.2** The establishment of new operational goals and objectives for the forthcoming year of the Concession Program, including projections, for each location, of sales and payments to the City for the forthcoming year;

**4.11.21.3** Concessionaire's program to support its Subconcessionaires;

**4.11.21.4** Identification of Concessionaire's and/or Subconcessionaires' current preferred vendors;

**4.11.21.5** Identification of Subconcessions that either will or might be replaced during the subsequent year;

**4.11.21.6** A discussion of Concessionaire's and its Subconcessionaires' customer service improvements, initiatives and activities, including information on surveys, secret shopper programs, incentives, etc.;

**4.11.21.7** Identification of scheduled maintenance to be performed in the Concession Area. Concessionaire to provide a record of such maintenance, such as log books, etc.;

**4.11.21.8** Any planned capital and/or refurbishment expenditures, investments or improvements in the Concession Area;

**4.11.21.9** Any changes or improvements in operations anticipated in the following year, such as marketing efforts, training or services at the

Concession Area by Subconcessionaires;

**4.11.21.10** Customer Service Marketing Promotion Plans and budget for the Concession Area, including the annual Marketing Plan for use of the Joint Marketing Fund;

**4.11.21.11** Copies of any consumer surveys and other industry trend studies;

**4.11.21.12** A review of customer service issues, a complaint summary and how complaints were handled during the previous year;

**4.11.21.13** Intentionally Omitted

**4.11.21.14** A listing of any problems encountered during the previous year and/or improvements to operations to enhance customer service, sales, or other aspects of the operation, that might reasonably be completed by the City, in concert with Concessionaire;

**4.11.21.15** Concessionaire's latest organization chart and contact information; and

**4.11.21.16** Any other information reasonably requested by the City.

#### **4.12 Specific Services Provided by Concessionaire**

Concessionaire covenants to render the following services: (a) provide, without charge, change-making service at each cashier's location in the Concession Area; (b) provide knowledgeable directions about locations at the Airport; and (c) provide such other reasonable assistance as requested by the general public. In addition, Concessionaire and its Subconcessionaires shall be responsible for ensuring the conduct, demeanor and appearance (properly attired and identified) of its officers, agents, employees and representatives as may be established and/or approved from time to time by Director. In effecting any sale, Concessionaire and all Subconcessionaires shall cause a receipt to be issued to each and every customer. Concessionaire and its Subconcessionaires shall assure that its officers, agents, employees and representatives do not engage in the solicitation or pressure sales tactics for Product offered on or about the Airport.

#### **4.13 Director's Approval of Product and Services**

Director has approved Concessionaire Performance Standards for Subconcessionaires. No Product may be sold at the Airport without the prior written approval of the Director. Director reserves the right at all times to reasonably object to or approve Product offered for sale, the quality of Product offered for sale, the character of services offered to the general public, the methods of service of Product within the Concession Area, the prices charged, and the appearance and condition of the Concession Area. Upon receipt of notice, Concessionaire agrees to immediately discontinue the sale of any Product and remedy any such services found by the Director to be unsatisfactory. The failure of Concessionaire to promptly cease marketing any disapproved Product or service shall constitute a Performance Standards Breach pursuant to **SECTION 24.3.1** of this Agreement. The initial Products and Product Price List by Concession Location approved by the Director is attached to this Agreement as **EXHIBIT D**.

#### **4.14 Consideration**

Concessionaire shall accept payment from customers in the form of cash, travelers checks and a minimum of Visa and MasterCard debit/credit cards and American Express credit cards, which shall be subject to Director approval. Concessionaire shall display in a prominent manner the trademarks or servicemarks of the credit cards accepted at its designated points of sale, menu boards or menus.

#### **4.15 Packaging**

If Concessionaire sells loose or bulk product, Concessionaire shall make packaging/wrapping suitable for transport for travel available to its customers. Concessionaire shall provide the option to transport purchased items via shipping services such as UPS, FedEx and USPS.

#### **4.16 Pricing**

**4.16.1** Concessionaire shall adhere to the pricing methodology as presented in **EXHIBIT L**, entitled "**Pricing Policy**". Should any of the provisions in **EXHIBIT L** conflict with the pricing methodology as presented in the Concessionaire's Proposal, the provisions of **EXHIBIT L** shall prevail. Noncompliance with **EXHIBIT L** will subject Concessionaire to Liquidated Damages as stated in **SECTION 24.3.1.8**.

**4.16.2** Intentionally omitted.



**4.16.3** Prices shall be posted or displayed prominently at all locations where Product is sold. Concessionaire covenants and agrees to offer for sale items at prices in accordance with the attached Product and/or menu and price list as set forth in **EXHIBIT D**, as such list may be amended from time to time, with written approval of Director.

**4.16.4** Concessionaire is required to submit, prior to the opening of any concession, a complete list of items to be offered by each Concession Location, including Subconcession Locations, and the prices suggested to be charged. The Director shall have the right to request adjustments to these charges based on the pricing objectives outlined in this Agreement. No Concession Location shall open without a City approved price list.

**4.16.5** Concessionaire shall be required to give the Director at minimum thirty (30) days' written notice of proposed price or menu adjustments, including documentation substantiating and explaining the proposed price and menu adjustment. The Director shall have the reasonable discretion and authority to disapprove the selection and pricing of Products and any other aspect of Concession Operations concerning Products. Concessionaire shall promptly adjust the price and/or menu adjustment to the Director's satisfaction.

**4.16.6** Concessionaire may be permitted to sell Product not included in the approved price schedule or menu by first obtaining the written approval of the Director. The maximum price at which such Product may be offered for sale shall also be subject to the prior written approval of the Director. Concessionaire may be permitted to substitute other Product for Product listed in the schedules, menus or lists, provided that the Director first approves such substitution and the quality, amount and maximum price of the substitute Product.

**4.16.7** Concessionaire agrees to perform price surveys once each year, at the reasonable request of the Director. If less than three (3) concessions carry identical Product, the maximum price which may be charged for an item shall not exceed the average of the prices for similar Product. The Director may select three (3) local or national concessions deemed similar to Concessionaire's Operations for comparison. Concessionaire shall survey all of Concessionaire's Products and Services, excluding

promotional items and shall provide a written report of the results of its pricing survey to the Director using the method for maximum price calculation described in **EXHIBIT L**, on a form provided by or in a manner prescribed by the Director.

**4.16.8** Concessionaire shall submit results to the Director for review within thirty (30) days of Director's request that Concessionaire conduct said price survey. If such results reflect that Concessionaire's prices have not been in compliance with the terms of this Agreement, Concessionaire shall adjust its prices accordingly within one week. Noncompliance with this Section will subject Concessionaire to Liquidated Damages as stated in **SECTION 24.3.1.8**.

#### **4.17 Sanitary Condition of Concession Area and Equipment**

Concessionaire covenants that the Concession Area and every portion thereof and all equipment and utensils used to prepare, serve or consume foods or beverages shall be in a hygienic, sanitary and clean condition at all times during the Term of this Agreement. Concessionaire covenants that it shall comply with all health and sanitation laws regulating the preparation, handling or service of foods and beverages. Upon receipt of notice of any violation of this Section from Director, or any health agency authorized or empowered to issue such notice, Concessionaire shall remedy or cause the remedy of the violation within the time prescribed in the notice, or, if none is stated, within three (3) days, and a failure by Concessionaire to do so shall constitute a Performance Standards Breach pursuant to **SECTION 24.3.1** of this Agreement.

#### **4.18 Pest Control**

Concessionaire shall be solely responsible for a pest free environment within the Concession Area by maintaining its own pest control services, in accordance with the most modern and effective control procedures. All materials used in pest control shall conform to Federal, State and Local laws and ordinances. All pest control substances utilized shall be used with precautions to obviate the possibility of accidents to humans and domestic animals. Pests referenced above include, but are not limited to, cockroaches, ants, rodents, silverfish, earwigs, spiders, weevils and crickets. Whenever the Airport deems that pest control services must be provided to a building or area that includes the Concession Area under this Agreement, Concessionaire shall pay for the costs of such services provided for the Concession Area under this Agreement.

#### **4.19 Notification of Violations**

Concessionaire shall immediately provide the Director with a copy of all citations received by Concessionaire related to Concessionaire's Operations at the Airport. Such citations include, but are not limited to, citations issued by the County Weights and Measures and the Health Department. Noncompliance with any cure requirements from the citing authority will subject Concessionaire to Liquidated Damages in accordance with **SECTION 24.3.1.4** of this Agreement.

#### **4.20 Hours of Operation**

**4.20.1** The Concessionaire must be open for business at the designated operating hours, unless otherwise authorized in writing by Director. The minimum Hours of Operation shall be 365 days a year, with Concession Areas open to the public during standard operating hours as directed by the Airport, subject to Director approval. Standard operating hours shall be a minimum of seventeen (17) hours per day from 5:00 a.m. to 10:00 p.m. or other hours, as approved by the Director. Concession Operations must be flexible enough to provide extended hours to accommodate the additional business and customer service opportunities generated as a direct result of flight delays or airline schedule changes. Concessionaire shall provide for full and complete service at all times during the Hours of Operation. Any reduced service shall be requested in writing to the Director, and must be approved in writing by the Director prior to such reduction.

**4.20.2** Specific requests for exceptions to these operating hours for holidays and other reasons (e.g., refurbishments) must be submitted to the Director at least sixty (60) days before the proposed change, and the Director shall provide his or her approval or disapproval of the request, in part or total, within thirty (30) days of receipt of such request. The Director reserves the right to modify Hours of Operation based on flight schedule and/or customer demand. Concessionaire and its Subconcessionaires shall not unilaterally modify operating hours. Due to unusual circumstances (e.g., delayed flights, weather), the Director reserves the right to direct the Concessionaire to direct select Concession Locations to remain open beyond the designated operating hours. The Concessionaire shall work with its Subconcessionaires to establish reasonable procedures for adjusting concession opening and closing times based on daily flight schedules, and incorporating those schedules into shift schedules for Subconcessionaires' staff, as well as for receiving and disseminating schedule changes, weather or maintenance delays or other flight information that will require adjustments in Subconcessionaires' operations. Such requirements for operating hours and flexibility shall be included in all Concessionaire subconcession agreements.

**4.20.3** Concessionaire will work with its Subconcessionaires to ensure that they are aware of what the peak hours are and that they will staff the facility appropriately to provide excellent customer service and avoid lengthy service lines. Concession staffing levels must reflect both the hourly and seasonal fluctuations in passenger traffic.

#### **4.21 Personnel**

Concessionaire shall select, engage, employ, pay, supervise, direct and discharge all employees or independent contractors reasonably necessary or appropriate for the proper and safe operation and maintenance of the Concession Area. Concessionaire shall comply with all Laws and regulations affecting such employment.

##### **4.21.1 Manager**

A qualified, competent, and experienced manager representing Concessionaire shall supervise, manage and maintain the Concession Operations and act for the Concessionaire in all matters pertaining to its operations at the Airport. At all times during regular business hours, the manager, who shall be subject at all times to

the direction and control of Concessionaire, shall be assigned to a location of general availability on the Concession Area, and, during the manager's absence, a qualified subordinate shall be appointed to act in the Manager's absence. The Director reserves the right to approve any manager working in the Concession Operations. Should the Director deem that a manager is not providing high quality customer service or not performing in accordance with the terms and conditions of this Agreement, the Director shall notify Concessionaire in writing and Concessionaire shall replace the existing manager at the Airport within thirty (30) days of such notice.

#### **4.21.2 Adequate and Competent Staff**

**4.21.2.1** Concessionaire shall employ a sufficient number of properly trained personnel to manage and operate the Concessionaire Area at its maximum capacity and efficiency at all times that the Concession Area is open for business. Sufficient number is a number, which consistently provides customers with no unreasonable delay or inconvenience, as determined by the City through the development of standards, in moving through point of sale or selecting products or service. All personnel shall be clean, neat in appearance and attired in proper uniform, with name tag clearly visible.

**4.21.2.2** Concessionaire shall have a specific uniform that distinguishes the employees from other Concession concepts at the Airport.

**4.21.2.3** Concessionaire shall ensure that all employees of Concessionaire conform to personal hygiene and food handling requirements established by the Airport Rules and Regulations and the applicable Laws, whichever is most stringent. Concessionaire must ensure that all employees can adequately communicate with customers and are professional and courteous in interactions with customers.

#### **4.21.3 English Language**

Concessionaire understands and agrees that its operation at the Airport necessitates contact with the public, both in the course of normal business operations and in rendering public services such as making reasonable change, giving directions, and providing general assistance to the public. Employees in positions that involve contact with the public must be capable of speaking and understanding the

English language at a level consistent with the effective and efficient performance of the duties of the position.

#### **4.21.4 City Not Liable for Employment Issues**

This Agreement is not one of agency by Concessionaire for the City, but one with Concessionaire engaged independently in the business of managing the Concession Area on its own behalf. All employment arrangements and labor agreements are, therefore, solely Concessionaire's rights, obligations and liabilities, and the City shall have no obligations or liability with respect thereto.

#### **4.22 Signs and Advertising**

Except with the prior written approval of the Director, Concessionaire and Subconcessionaire shall not erect, maintain or display any signs or any advertising at or on the exterior parts of the Concession Area or in the interior of the Concession Area outside of Subconcessionaire's Locations. This prohibition specifically includes the placement of stanchion signs, floor-standing sandwich boards, or other such moveable signage. No handwritten signs shall be permitted, except such menu boards that reflect daily specials and that change on a daily basis. The Director may require the removal of any signs or advertising in the interior of the Location (whether or not in the interior of the space occupied by a Subconcessionaire or visible from any other portion of the Airport), which, in the City's reasonable judgment, is considered unacceptable or improper.

#### **4.23 No Smoking Areas**

The inside of the entire Airport is designated as a "No Smoking" area. Concessionaire shall post "NO SMOKING" signs in its Concession Area if requested and approved in writing by the Director.

#### **4.24 Cash and Record Handling Requirements**

Concessionaire shall prepare a description of its cash handling and sales recording systems and equipment which shall be submitted to the Director for approval. When approved by the Director, such systems and equipment, including any revisions approved by the Director, shall be utilized by the Concessionaire in its operations at the Airport.

#### **4.25 Cash Registers**

**4.25.1** Concessionaire shall accurately record each sale on a point of sale register acceptable to the Director. Such register or computer system shall be non-resettable and sufficient to supply an accurate record of all sales on tape or otherwise as directed by the Director.

**4.25.2** In order to provide an accurate record of concessions transactions and to provide a high level of service to the customers, all cash registers or other Point of Sale ("POS") terminal used in the Concessions must have, as a minimum, the features listed below.

- a. A reasonable number of segregated category addresses to allow for the analysis of sales trends and sales by types of products.
- b. The input devices may either be a keyboard, scanner, or both.
- c. The patron fee display shall be of sufficient size and legibility to be readily observed by the patron during the processing of a transaction.
- d. The register or terminal device shall:
  1. Record transactions by sequential control number to the audit tape or computer files.
  2. Be capable of printing a transaction history to tape or file by hour (time of day), day, month and year.
  3. Provide a customer receipt showing the amount due, amount tendered, and the change due to the customer together with the time and date, as well as the customer service phone number and website address for Concessionaire and/or the Subconcessionaire.

#### **4.26 Gratuities**

While Concessionaire's and Subconcessionaire's employees may accept

gratuities, Concessionaire and Subconcessionaire shall not place or affix any gratuity-type containers, tip signs or "tip jars" in any part of the Concession Area.

#### **4.27 Nondiscrimination**

**4.27.1** Concessionaire certifies that, in dealing with Subconcessionaires under this Agreement, it has not discriminated or given any preference to any firm based on race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity or national origin. Concessionaire shall fully comply with all Federal and State of California laws pertaining to nondiscrimination, and Chapter 4.08 of the San José Municipal Code, and shall not discriminate or grant preferential treatment on the basis of age, sex, race, religion, color, creed, disability, ethnicity, sexual orientation, actual or perceived gender identity or national origin in connection with or related to the performance of this Agreement. Concessionaire understands that any such discrimination or preference is in violation of Chapter 4.08 of the San José Municipal Code. Concessionaire shall make efforts to include participation from all segments of the community in connection with or related to the performance of this Agreement.

**4.27.2** This agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR Part 23. The Concessionaire or contractor 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, management contract, or subcontract, purchase or lease agreement, or other agreement covered by 49 CFR Part 23.

**4.27.3** The Concessionaire or contractor agrees to include the above statements in any subsequent concession agreement or contract covered by 49 CFR Part 23, that it enters and cause those businesses to similarly include the statements in further agreements.

#### **4.28 Airport Customer Service Training Program**

In order to promote and maintain the highest standards of customer service and satisfaction at the Airport, the Airport will implement an Airport-wide customer service training program. This program will require that all Concessionaire and Subconcessionaire employees attend Airport orientation and customer service



training classes. These classes will occur on an annual or bi-annual basis and be no more than eight (8) hours per year. Concessionaire and Subconcessionaires will be required to make their employees available, at their sole cost and expense, for such classes.

**4.29 Intentionally Omitted**

**4.30 Official Products/Sponsorships**

**4.30.1.** The City reserves the right to enter into contracts with one or more manufacturers or suppliers granting to these companies certain exclusive rights pertaining to the sale of Products at the Airport. Concessionaire agrees to include Products of said exclusive supplier or manufacturer in Concessionaire's menu or merchandise list, as applicable. If the City grants such an exclusive right during the Term of this Agreement, Concessionaire shall have sixty (60) days from receipt of written notice to comply with the exclusive right. Concessionaire agrees not to sell, display, advertise, or promote similar Products of or from other manufacturers or suppliers unless Concessionaire has first received written approval from the Director, which approval may be withheld at the Director's sole discretion.

**4.30.2.** If similar agreements are reached with credit card companies or if the City licenses its name, Subconcessionaires will be required to carry those credit cards or City licensed merchandise, as appropriate for the type of concession under each Subconcession agreement.

**4.30.3.** Concessionaire shall ensure that Concessionaire's agreements with Subconcessionaires include language requiring Subconcessionaire to exclusively inventory and display any such Products.

**SECTION 5 AIRPORT LIVING WAGE ORDINANCE/ JOBS CREATION AND REPORTING REQUIREMENT**

**5.1** Concessionaire acknowledges and agrees that the work performed pursuant to the Agreement is subject to all applicable provisions of the Airport Living Wage Ordinance set forth in the San José Municipal Code Chapter 25.11.. Consistent with the Airport Living Wage Ordinance, Concessionaire's Labor Peace Assurances/Employee Work Environment Representations are attached to this

Agreement and incorporated as **EXHIBIT H1**.

## **5.2 Jobs Creation and Reporting Requirement**

**5.2.1** The City is the recipient of a loan from the United States Department of Housing and Urban Development (HUD), the proceeds of which the City used to partially fund the acquisition of certain property located in the vicinity of the Airport (the "Airport West Property"). This HUD Loan is commonly referred to as a "Section 108 Loan," because these loans are administered through the HUD Section 108 Loan Guarantee Program. The Section 108 Loan Guarantee Program is a source of financing allotted by HUD for the economic development activities that include benefit to low and moderate income persons. Regulations governing the Section 108 program may be found at 24 CFR §570, Subpart M, "Loan Guarantees." The City has identified the creation of new low and moderate-income jobs at the Airport as a benefit that will result from the acquisition and development of the Airport West Property.

**5.2.2** Concessionaire shall make at least fifty-one percent (51%) of its jobs at the Airport available to low and moderate income persons. Concessionaire shall provide training for any of its jobs at the Airport available to low and moderate income persons that require special skills or education. Concessionaire's listing by job title of the permanent jobs to be created by Concessionaire at the Airport, indicating which jobs will be available to low and moderate income persons, which jobs require special skills or education, and which jobs are part-time, if any, (the "Jobs Listing"). The Jobs Listing is attached to this Agreement as **EXHIBIT N**.

**5.2.3** Subject to the City's Employee Retention Requirements under San José Municipal Code Chapter 25.11, and as further described in the "Airport's Living Wage and Labor Standards" (**EXHIBIT H**), Concessionaire shall undertake the efforts set out in Concessionaire's "Hiring Plan for Low and Moderate Income Jobs," which is attached to this Agreement as **EXHIBIT O**, to ensure that low and moderate income persons receive first consideration for the jobs listed by Concessionaire in the Jobs Listing.

**5.2.4** Concessionaire shall submit a Jobs Report to the City on a bi-annual basis due on January 15<sup>th</sup> and July 15<sup>th</sup>, in a form subject to the Director's

approval, listing by job title the permanent jobs filled, which jobs of those were available to low and moderate income persons, and a description of how first consideration was given to such persons for those jobs. Each Jobs Report shall also include a description of the hiring process used, a listing of low and moderate income persons who were interviewed for a particular job, and a listing of the low and moderate income persons who were hired.

## **SECTION 6 FEES & DEPOSITS**

### **6.1 Concession Fee**

Commencing upon the Commencement Date, Concessionaire agrees to pay to City a monthly Concession Fee, as defined herein. The Concession Fee is an amount equal to the amount set forth in the Summary as the Concession Fee, for each month during the Term of this Agreement.

#### **6.1.1 Monthly Fee.**

##### **6.1.1.1 Concession Fee Calculation.**

a. From the Commencement Date, Concessionaire shall pay to the City on a monthly basis the Concession Fee consisting of the greater of: (a) one twelfth (1/12) of the MAG of One Hundred Thirty Six Thousand Six Hundred Dollars (\$136,600.00), or (b) a Percentage Fee of Thirteen percent (13%) of Concessionaire's Gross Revenues.

##### **6.1.1.2 Annual MAG Adjustment**

**6.1.1.2.1** The MAG shall be adjusted on an annual basis on the Annual Adjustment Date as defined below. To make the MAG adjustment easier for accounting purposes, the annual MAG adjustment shall be effective on the first day of a calendar month.

**6.1.2.2.** The first Annual Adjustment Date for each MAG shall occur 12 months after the first day of the first full calendar month occurring after the MAG Commencement Date. Thereafter, this date shall serve as the Annual Adjustment Date. On each Annual Adjustment Date, the MAG shall be adjusted to equal eighty-five percent (85%) of the Concession Fee actually due to the City during the previous twelve (12) months. However, the MAG for any year shall not be less than the

previous year's MAG. An Annual MAG Adjustment shall be made at the end of each and every Annual Adjustment Date with respect to any underpayment or overpayment of the Concession Fee. If Concessionaire has overpaid the Concession Fee, City shall apply the overpayment to any monthly installment then due and payable to City.

**6.1.1.3 MAG Adjustment Due to New Space resulting from Airport Terminal Development**

**6.1.1.3.1** The MAG shall be adjusted if the Concession Area is increased as a result of City's acceptance of Concessionaire's proposal for any new Terminal facilities that become operational during the Term of this Agreement, in accordance with **SECTION 4.7.2**.

**6.1.1.3.2** The MAG shall be adjusted if the Concession Area is decreased as a result of City's contraction of the Concession Area due to Airport Terminal Development, in accordance with **SECTION 4.7.1**. The MAG shall be reduced by the proportion of the Concession Fee due to the City for the Concession Location being affected by City's terminal development over the total Concession Fee due to the City for the entire Concession Area.

**6.1.1.4 MAG Abatement due to decline in Passenger Activity**

**6.1.1.4.1** Among other passenger related statistics, the City calculates the number of enplaned passengers at the Airport. If the number of enplaned passengers from January 1 through December 31 of any given year, as calculated by the Airport, falls below seventy-five percent (75%) of the number of enplaned passengers during the corresponding baseline period of January 1, 2016 through December 31, 2016, upon the next Annual MAG Adjustment Date, the MAG shall be reduced as described in this Section.

**6.1.1.4.2** There shall be no reduction in the MAG pursuant to this provision unless the number of enplaned passengers decreases by more than twenty-five percent (25%) from the corresponding baseline period during the applicable year. If the MAG is reduced, the MAG reduction shall continue until the enplaned passenger levels increase to equal or exceed eighty percent (80%) of the number of enplaned passengers during the period January 1, 2016 through December 31, 2016, as applicable.

**6.1.1.4.3** The Airport shall calculate the number of enplaned passenger no later than sixty (60) days after the end of each applicable year during the Term of this Agreement.

**6.1.1.4.4** The amount of the MAG reduction shall be determined by taking the number of enplaned passengers during the applicable year, divided by the number of enplaned passengers during January 1 through December 31, 2016. This fraction shall be multiplied by the MAG in effect immediately preceding the MAG reduction.

**6.1.1.4.5** If the MAG is reduced pursuant to this Section, the City thereafter will calculate the number of enplaned passengers every year for the preceding year. On each Annual MAG Adjustment Date, the MAG shall be adjusted pursuant to the formula above.

**6.1.1.4.6** Should the number of enplaned passengers thereafter increase so that the number of enplaned passengers exceeds eighty percent (80%) of enplaned passengers during January 1, 2016 through December 31, 2016, then effective on the next Annual MAG Adjustment Date, the MAG will no longer be subject to the reduction described in this Section. The MAG shall then be set pursuant to **SECTION 6.1.1.2** above.

**6.1.1.4.7** Concessionaire shall not be entitled to any MAG reduction or other monetary compensation as a result of terminal evacuations ordered by the City or any other governmental authority.

#### **6.1.2 MAG Payment Due Date**

Beginning on the MAG Commencement Date, Concessionaire shall pay the MAG payments in advance, without notice from City, on or before the first day of each calendar month during the Term of this Agreement. Such payment shall be deemed delinquent if not received by City on or before the fifteenth (15<sup>th</sup>) day of the month. Concessionaire's obligation to pay each month's MAG shall be independent of any amounts paid in prior months.

##### **6.1.2.1 Percentage Fee and Monthly Concession Report**

**6.1.2.1.1** No later than twenty (20) days after the end of each month, or portion thereof occurring after the MAG Commencement Date,

Concessionaire shall deliver to the City as rent a sum of money which represents the amount by which the Percentage Fee in the preceding month exceeds the MAG and a Monthly Concession Report, in the form as attached as **EXHIBIT I**, for the preceding month's activity, even if no money is due. If fees are due for any period less than a full calendar month, Concessionaire shall deliver the amount by which the applicable Percentage Fee exceeds the prorated MAG for such period.

**6.1.2.1.2** If the Percentage Fee applicable to any month does not exceed the MAG payment for any month, no additional percentage of Gross Revenues shall be due and payable for such month. The amount due and payable for such month shall be the applicable MAG. The Monthly Concession Report remains due no later than the twentieth (20th) day of each month for the preceding month's activity regardless of whether a percentage fee is due for any such month.

**6.1.2.1.3** If the Monthly Concession Report is not provided on or before the twentieth (20th) day of each month as required herein, Concessionaire shall pay for administrative expenses incurred by City, a fee of Twenty-Five Dollars (\$25.00) per day for each day that the Monthly Concession Report is late until such date as the Monthly Concession Report is submitted to the Director. This fee is established by City Council Resolution and may be adjusted from time to time in accordance with City Council Resolution.

#### **6.1.3 Annual Concession Fee Reconciliation (True Up)**

An Annual Adjustment shall be made no later than sixty (60) days after the Annual Adjustment Date with respect to any underpayment or overpayment of the Concession Fee as a result of calculating the annual Percentage Fee due. If Concessionaire has overpaid the Concession Fee, City shall apply the overpayment to any monthly installment then due and payable to City.

#### **6.1.4 Joint Marketing Fund Fee**

Concessionaire shall pay City a concession marketing fee of one half of one percent (.05%) of Gross Revenues, which will be assessed monthly to be paid to the City monthly, on the twentieth (20<sup>th</sup>) of each month, beginning the month following the first Location opening, to be used for marketing the concessions at the Airport. Concessionaire shall deliver to the City the Joint Marketing Fund Fee in

accordance with the payment schedule for payment of the Percentage Fee in **SECTION 6.1.2.1** above.

#### **6.1.5 Payment of Rent, Fees or Charges**

All rent, fees or charges required to be paid in advance on or before the first (1st) day of each month pursuant to the terms of this Agreement shall be paid on or before the first (1st) day of each month without any requirement of notice from City, deduction, credit or offset. Such fees shall be deemed delinquent if not received by City on or before the fifteenth (15<sup>th</sup>) day of the month. Any fees or charges which are payable by Concessionaire in arrears for the preceding month's activity are due and payable within thirty (30) days from the date of City's invoice. Concessionaire hereby acknowledges that late payment to City of any rent, fee, charge or other sum due hereunder will cause City to incur costs not contemplated by this Agreement, the exact amount of which will be extremely difficult to ascertain. If any such rent, fee, charge or other sum due from Concessionaire is not received by City on or before the due date, then Concessionaire shall pay to City a late payment fee equal to one and a half percent (1 1/2%) per month of the amount not paid, calculated for each day, from the due date until the date that payment is received by City. City reserves the right to require that any late payments be made only in the form to be specified by the Director, and City further reserves the right to reject any late payment that is not in a form approved by the Director. The parties hereby agree that such late fee represents a fair and reasonable estimate of the cost that City will incur by reason of Concessionaire's late payment. City's acceptance of such late fees shall not constitute a waiver of Concessionaire's default with respect to such overdue amount or stop City from exercising any of the other rights and remedies granted hereunder either at law or in equity.

#### **6.1.6 Taxes and Assessments**

Concessionaire shall pay, or cause the payment of, any and all other fees and charges, including, without limitation, all taxes, charges and assessments, interest payments, public agency fees and charges, insurance premiums and bond payments that are due and payable by Concessionaire under the provisions of this Agreement or under any laws.

### **6.1.7 Other Fees and Charges**

In addition to any other fees, general charges or other amounts set forth elsewhere in this Agreement, Concessionaire shall pay any other general fees and charges as established by City when due.

### **6.2 Payment Location**

The Concession Fee payable by Concessionaire shall be paid in lawful money of the United States, free from all credits, claims, demands, off-sets or counterclaims of any kind against City, to: City of San José – Finance, Payment Processing – Airport, 200 East Santa Clara Street, 13<sup>th</sup> Floor Tower, San José, CA 95113-1905, or to such person or at such place as City may designate from time to time in writing.

### **6.3 Security Deposit**

**6.3.1** Concessionaire shall deposit and maintain with City upon execution of this Agreement a Security Deposit in an amount and form as determined by Director. The Security Deposit shall be payable to the “City of San José” in the form of: an irrevocable standby letter of credit in substantially the same form as the sample attached to this Agreement as **EXHIBIT E**. The Director may adjust such deposit requirement from time to time, upon determination that such additional amount is warranted to protect the City and the Airport.

**6.3.2** The Security Deposit shall be held by City and may be applied against any unpaid fees, rates or charges due and owing to City under this Agreement. If City makes such deduction, Concessionaire shall restore the Security Deposit to the full amount required by Director within thirty (30) days of a written demand by Director. A failure to do so shall entitle City to terminate this Agreement on thirty (30) days notice. City shall not be required to keep the Security Deposit separate from its funds, and Concessionaire shall not be entitled to interest on the Security Deposit. Any amounts remaining from the Security Deposit (after deductions for delinquent or unpaid fees, costs, or charges as specified above) at the expiration or earlier termination of this Agreement shall be returned to Concessionaire, without interest, after a determination by the Director that all amounts owed to City under this Agreement have either been paid in full or have been deducted from the Security Deposit.



## **SECTION 7 BOOKS AND RECORDS**

### **7.1 Audit of Books and Records**

**7.1.1** Concessionaire shall maintain and make available for City's inspection and/or audit at Concessionaire's address specified in the Summary, for a period of not less than four (4) years, separate and accurate daily, monthly and annual records of Gross Revenues using a form and method approved by Director, and in accordance with generally accepted accounting principles ("GAAP"), showing in detail all business done or transacted. Concessionaire shall furnish City with such other financial or statistical reports as Director from time to time may reasonably require.

**7.1.2** Concessionaire shall also maintain, or cause to be maintained by Subconcessionaire, separate and accurate records of construction on Fixed Improvements and Refurbishments in the Concession Area in accordance with GAAP.

### **7.2 Records Available for Inspection**

Any records or documents required to be maintained pursuant to this Agreement shall be made available for inspection or audit at no cost to City at any time during regular business hours upon written request by the Director, City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such documents shall be provided for inspection at a location designated by City when it is practical to do so. Unless an alternative location is mutually agreed upon, the records shall be available at Concessionaire's address indicated for receipt of notices in this Agreement.

### **7.3 Lost or Discarded Records**

If City has reason to believe that such records or documents may be lost or discarded due to dissolution, disbandment or termination of Concessionaire's business, City may, by written request by any of the above-named officers, require that custody of records be given to City and that the records and documents be maintained at a location designated by the Director, City Attorney, City Auditor or City Manager. Access to such records and documents shall be granted to any party authorized by Concessionaire, its representatives or its successor-in-interest.

### **7.4 Underpayment by Concessionaire**

If any examination, inspection, and/or audit of Concessionaire's books and records by City discloses an underpayment by Concessionaire, Concessionaire promptly shall pay City the amount of such underpayment and, if such underpayment is in excess of one percent (1%) of the fees and charges due, the Concessionaire promptly shall reimburse City for all costs incurred in the conduct of such examination, inspection or audit, including interest from the time such underpayment was due, at the rate of one and a half percent (1 1/2%) per month. Concessionaire shall furnish City with such other financial or statistical reports as Director, from time to time, may reasonably require.

#### **7.5 Statement of Gross Receipts**

No later than ninety (90) days after the Annual Adjustment Date (see **SECTION 6.1.2.1.2**), Concessionaire shall provide to the City an annual statement for the Concession Area showing, in reasonable detail, consolidated Gross Receipts and the amount of Concession Fees paid to the City for the preceding year ending June 30 (the "Annual Concession Report"). The Annual Concession Report shall be certified, at the Concessionaire's sole expense, by a Certified Public Accountant.

No later than ninety (90) days after the Annual Adjustment Date (see **SECTION 6.1.2.1.2**), Concessionaire shall provide to the City for each Subconcessionaire a separate annual statement of Gross Receipts arising out of the operations of each Subconcessionaire for the preceding year ending June 30. Such statement shall be certified, at the Concessionaire's sole expense, by a Certified Public Accountant.

#### **7.6 Preparation of Concession Reports**

**7.6.1** Each Monthly Concession Report (see **SECTION 6.1.2.1.1**) and Annual Concession Report shall be prepared on a cash accounting basis and certified by the chief financial officer or other principal accounting officer of Concessionaire as being true and correct in all material respects. Each Annual Concession Fee Statement shall also be certified by a Certified Public Accountant affiliated with an accounting firm selected by Concessionaire and approved by the City, with the City's approval not to be unreasonably withheld, conditioned, or delayed.

**7.6.2** If the certified Monthly Concession Report or Annual Concession

Report provided under this Section demonstrates a shortfall in comparison with the actual Concession Fee paid under **SECTION 6**, Concessionaire shall pay the amount of such shortfall with the next Concession Fee payment due, plus Interest calculated from the date full payment should have been received.

#### **7.7 Delinquent Concession Reports**

If Concessionaire is delinquent for fifteen (15) days or more in furnishing the City with any Annual Concession Report required to be delivered under this Agreement, Concessionaire shall pay the City Twenty-Five Dollars (\$25) per day thereafter per delinquency as liquidated damages for the City's additional costs incurred in monitoring and enforcing Concessionaire's compliance with this reporting requirement..

#### **7.8 Quality Control Reports**

Concessionaire shall provide to the City quality control audits and reports covering cleanliness of the Concession Area, timeliness of service and quality of the Products. Also, Concessionaire shall furnish to the City such other financial or statistical reports as the City may reasonably require from time to time verifying compliance by Concessionaire with the terms of this Agreement.

#### **7.9 Other Financial and Statistical Reports**

No later than thirty (30) days after receipt of a request from the Director, Concessionaire shall furnish the City with such other financial or statistical reports as the Director, from time to time, may reasonably require, including but not limited to the purpose of determining the accuracy of the Gross Revenues, labor compliance, and FAA requirements. Unless Concessionaire has requested additional time to produce any such reports and the Director has approved any such request, a delinquent report fee in the amount of \$25.00 will be assessed for each day any such additional records are not timely received by the City.

### **SECTION 8 INSURANCE**

#### **8.1 Required Insurance Coverage**

**8.1.1** Prior to commencing any work or operations under this Agreement, Concessionaire at its sole cost and expense and for the Term of this Agreement and all

extensions thereof, shall obtain and maintain or shall cause to be obtained and maintained insurance against claims for injuries to persons or damages to property which may arise from or in connection with the activities of Concessionaire and its agents, employees and contractors, meeting at least the minimum insurance requirements set forth in **EXHIBIT F** on terms and conditions and in amounts as required by City from time to time and with insurers acceptable to City. City shall not be obligated to take out insurance on Concessionaire's property. Concessionaire shall provide City with certificates of insurance or copies of all policies and such endorsements as may be required by City. These requirements are subject to amendment or waiver if so approved in writing by the Risk Manager of the City of San José ("Risk Manager").

**8.1.2** From time to time at the request of the Risk Manager, Concessionaire shall provide a written statement of the replacement cost of the Concession Improvements, with a copy to the Director.

## **8.2 Waiver of Subrogation**

City and Concessionaire hereby mutually agree that so long as their respective insurance carriers concur, any fire and extended coverage insurance policies carried on properties which are the subject of this Agreement shall include a waiver of subrogation against the other party hereto, provided that such agreement applies only to subsequent loss.

## **SECTION 9 BAILEE DISCLAIMER**

The parties understand and agree that City in no way purports to be a bailee, and is therefore not responsible in any way for any damage to Concessionaire's property or the property of Concessionaire's contractors, agents, employees and invitees.

## **SECTION 10 INDEMNITY**

### **10.1 Indemnification**

Concessionaire, for and on behalf of its directors, officers, employees and agents, covenants and hereby agrees to indemnify, defend, protect and hold harmless

City, its officers, employees, contractors and agents from and against any and all claims, demands, damages, obligations, liabilities, losses, costs, expenses, penalties, suits or judgments at any time received, incurred or accrued by City, its officers, agents, employees, contractors or members of the public using Airport facilities, arising out of or resulting in whole or in part from any act (or failure to act) of Concessionaire, its officers, employees, contractors, agents, permittees or invitees, or which results from their noncompliance with any Laws respecting the condition, use, occupation or safety of the Airport or the Terminals, or any part thereof, or which arises from the Concession Operations or which arises from Concessionaire's failure to do anything required under this Agreement, except as may arise from the sole active negligence or the willful misconduct of City, its officers, employees or agents. City's right to full indemnity hereunder shall arise notwithstanding that principles of joint, several or concurrent liability or comparative negligence, might otherwise impose liability on City pursuant to statutes, ordinances, regulations or other Laws. All of Concessionaire's obligations under this Section are intended to apply to the fullest extent permitted by law and shall survive the expiration or sooner termination of this Agreement. In an action or claim against City in which Concessionaire is defending City, City shall have the right to approve legal counsel providing City's defense. The provisions of **SECTION 16** regarding the Americans with Disabilities Act of 1990 ("ADA") shall not limit Concessionaire's indemnification under this provision.

#### **10.2 Assumption of Risk**

Concessionaire agrees to and covenants that it shall voluntarily assume any and all risk of loss, damage or injury to the person or property of Concessionaire, its directors, officers, employees, agents, and contractors which may occur in, on or about the Terminals or the Airport at any time and in any manner, except such loss, injury or damage as may be caused by the sole active negligence or the sole willful misconduct of City, its officers, employees or agents. The indemnification obligations of Concessionaire shall include the obligation of Concessionaire to defend, indemnify, protect and hold harmless City, its officers, agents or employees, from and against fines, costs, claims, damages, obligations, suits, judgments, penalties, proceedings, causes of action, losses, liabilities or costs arising under the ADA, which arise from

Concessionaire's activities under this Agreement.

## **SECTION 11 WAIVER OF CLAIM**

**11.1** Concessionaire, as a material part of the consideration to be rendered to City under this Agreement, hereby waives all claims or causes of action which it may now or hereafter have against City, its officers, employees, contractors or agents for damages to its operations (including without limitation any interruption thereof), or to goods, wares, Product, equipment or other property on or about the Airport, and for injuries to or death of any persons on or about the Airport, from any cause or condition arising at any time, except as may arise from the sole active negligence or willful misconduct of City, its officers, employees or agents.

**11.2** By way of example and not limitation, save and except as arises out of the sole active negligence or the willful misconduct of City, its officers, agents, contractors or employees, Concessionaire hereby waives any and all claims or causes of action which it may now or hereafter have against City, its officers, agents, contractors or employees (a) for loss, injury or damage sustained by reason of any deficiency, impairment and interruption of any water, electrical, gas, plumbing, air conditioning or sewer service or system serving any portion of the Airport; (b) for any loss, injury or damage arising or resulting from any negligent act or omission of any other tenant, subtenant, contractor, airline, concessionaire or occupant of the Airport, or any person who uses the Airport with or without the authorization or permission of City; (c) from the flight of any aircraft of any kind and all kinds in, through, across, or about any portion of the airspace above the Airport; (d) from noise, vibration, currents and other effects of air, illumination, and fuel consumption, or fear thereof, arising or occurring from or during the flight of any aircraft or from or during the use by aircraft of the Airport, including but not limited to, landing, storage, repair, maintenance, operation, run-up, and take-off of such aircraft and the approach and departure of aircraft to or from the Airport; and (e) for any loss or damage to the property of, or injury or damage to Concessionaire, its officers, agents, employees, contractors, Subconcessionaires or any other person whomsoever, from any cause or causes arising at any time because of Concessionaire's uses or occupancy of such building or of the Airport, or its operations

thereon.

## **SECTION 12 SECURITY MEASURES**

**12.1** Concessionaire agrees to abide by all provisions of the Airport's Master Security Plan approved by the FAA and/or TSA, and agrees to institute and carry out all security measures as provided in the plan. Any violations of the security plan which result in fines to the City by the FAA and/or TSA, and which are caused by Concessionaire, its officers, agents, or employees, will be assessable to Concessionaire by City and will be deemed to be additional fees and charges payable by Concessionaire to City following invoice thereof by City to Concessionaire pursuant to **SECTION 6** of this Agreement.

**12.2** Concessionaire shall be solely responsible for instituting and carrying out specific security measures in the areas where it is authorized to operate to prevent vandalism or damage to persons or property. City shall be responsible only for general security throughout the Airport and shall not be liable for any vandalism or damage to persons or property that may occur in the areas of Concessionaire's Operation.

**12.3** Concessionaire understands and acknowledges that City reserves the right to implement or change security measures that may limit public access to the Airport or the Terminals. In such event, Concessionaire waives all rights against City for such limitation, and City shall not be liable to Concessionaire for any amount, including compensation, in the form of reduction of the Concession Fee.

**12.4** Concessionaire recognizes that the Airport is required to comply with the security mandates of the Department of Transportation, the FAA, the TSA, the Department of Homeland Security, and with other governmental and administrative rules and regulations relating to airports. Any procedures determined by the City to be applicable to Concessionaire in order for the City to comply with the foregoing will be furnished to Concessionaire in writing and delivered by email and/or facsimile transmission, confirmed by mail, to Concessionaire at its notice address provided in this Agreement. Such procedures are subject to change without notice other than delivery thereof to Concessionaire, as provided in this **SECTION 12**.

**12.5** Concessionaire further agrees that all or a portion of its operations

hereunder may be temporarily or permanently reduced or terminated if the FAA and/or TSA requires that all or a portion of the Concession Improvements or Concessionaire's Furnishings, Trade Fixtures and Equipment must be removed from the Airport and that City may terminate this Agreement immediately to comply with the FAA's and/or TSA's directive. In such event, the Director is authorized, on behalf of City, to take all action necessary to comply with such requirement, including without limitation, terminating this Agreement.

**12.6** The Concessionaire shall ensure that its employees participate in such safety, security and other training and instructional programs, as the City or appropriate Federal agencies may from time to time require.

**12.7** To the extent any of Concession personnel require identification badges or security clearance for access at the Terminal, the Concessionaire is responsible at its expense for securing such badges or clearance. The Concessionaire will cause Subconcessionaires to be similarly responsible for their personnel under the Subconcession Agreement, and will monitor compliance by Subconcessionaires with required badging and security clearances and the screening of Subconcessionaires' goods, products, equipment, materials and supplies. Concessionaire will apply default remedies under Subconcession agreements as required to remedy violations or other deficiencies by Subconcessionaires.

### **SECTION 13 WASTE OR NUISANCE**

**13.1** Concessionaire shall not commit, cause, maintain, permit or suffer, or allow to be committed, caused, maintained or permitted, any legal waste upon the Concession Area, the Terminals or the Airport, or any public or private nuisance, or injury or any improper or unlawful use on the Airport or surrounding areas of the Airport, or any other act or thing, or omission to act, which may in any way disturb the quiet enjoyment of or obstruct or interfere with the rights of any other concessionaire, tenant, licensee, invitee or Subconcessionaire of any portion of the Concession Area, the Terminals or the Airport or any portion thereof. Concessionaire shall maintain in safe, good and clean condition all areas of the Airport where Concessionaire conducts its operations.



**13.2** Without limitation of the foregoing, Concessionaire shall conduct its operations in accordance with all applicable United States Department of Transportation authorizations and Federal Aviation Administration Operating Certificates. Concessionaire shall obtain any and all permits and licenses required by City or other governmental entity as are necessary to conduct the activities authorized under this Agreement.

## **SECTION 14 SERVICES AND UTILITIES**

### **14.1 City's Obligation**

Concessionaire has inspected and accepts the utility hookups in the Concession Area. Unless and except to the extent otherwise specifically provided by other provisions of this Agreement, Concessionaire shall secure any electrical, gas, water, sewer and telephone services to the Concession Area utilized by the Concessionaire as it may require, upon prior approval of Director. Any additional utility connections beyond those in the Concession Area at the time of Concessionaire's inspection are Concessionaire's responsibility. Installation of such additional utility connections shall be at Concessionaire's sole cost and expense and are subject to the provisions of **SECTION 22** regarding Concession Improvements. Any utilities provided by City shall be paid by Concessionaire on a pro-rated basis as established by City. The location, relocation and coordination of all utilities and telephone facilities to service the Concessionaire Area shall be subject to the prior written approval of the Director. Concessionaire shall, upon request by the Director, cap off all utility connections installed by Concessionaire and restore the affected areas to their original condition upon expiration or earlier termination of this Agreement. Notwithstanding the foregoing, the pro-rata payment provisions of this paragraph shall not apply in the event Concessionaire directly pays utility providers for utility services.

### **14.2 Concessionaire's Obligation**

During the Term, Concessionaire shall pay or cause to be paid at its sole cost and expense to City, within thirty (30) days after Concessionaire receives an invoice therefor, and protect, defend, indemnify and hold harmless City and the property of City, including the Concession Area, the Terminals and the Airport, from and against any

charge for the installation, connection, maintenance and furnishing of all necessary utility services to the Concession Area which are not expressly supplied by City. Concessionaire shall be required to provide at its sole cost and expense for the provision of service distribution lines or connections, or installation thereof for utility service, as may be required to serve the Concession Operations. Concessionaire shall comply with all City, county, state or federal government-mandated energy conservation programs in fulfilling its obligations hereunder.

**14.2.1** Concessionaire agrees that it shall take reasonable steps and any such other action which it deems necessary to protect Concessionaire's Furnishings, Trade Fixtures and Equipment from any damage that may be caused to such equipment in the event of any deficiency, impairment and/or interruption of utility services. As more fully set forth in **SECTION 11**, Concessionaire waives any and all claims and/or causes of action against City for any such damages.

**14.2.2** Concessionaire shall use the Airport's data/telecommunications network for Concessionaire's transfer of data, voice or video at the Airport pursuant to the terms of a separate agreement with City. City shall not be responsible for ensuring the security of Concessionaire's confidential and/or personal data transferred through the Airport's data/telecommunications network associated with Concessionaire's credit card processing or payment systems. Concessionaire shall be solely responsible for employing and installing measures to secure transfer of confidential and/or personal data associated with Concessionaire's credit card processing/payment systems, as Concessionaire deems appropriate.

## **SECTION 15 MAINTENANCE AND REPAIRS**

### **15.1 Limitation on City's Liability**

Except as otherwise provided or permitted by Law, City shall not be liable for, and Concessionaire waives all claims or causes of action for, any injury or damage resulting in whole or in part, directly or indirectly, from, nor shall the Concession Fee or any other fee or charge reserved herein be abated by reason of, the installation of any City equipment, or the use or interruption of use of the Concession Operations in connection with the furnishing of any of the services to the Concession Area and/or the

Terminals, or by the making of necessary repairs or improvements to the Concession Area and/or the Terminals.

## **15.2 Concessionaire's Obligations**

**15.2.1** During the Term of this Agreement, Concessionaire shall keep, at its sole cost and expense, the Concession Improvements and the Concessionaire's Furnishings, Trade Fixtures and Equipment, and every part thereof, in good and clean Like New condition, perform all custodial services, make all necessary repairs, and make all repairs or modifications required by Law.

**15.2.2** Concessionaire shall, at its cost and expense, keep or cause its Subconcessionaires to keep the Concessionaire Locations clean, neat, orderly, sanitary and presentable at all times.

**15.2.3** Concessionaire shall be subject to Liquidated Damages as provided in **SECTION 24.3** for non-compliance with the above provisions.

**15.2.4** Concessionaire shall maintain and repair or cause to be maintained and repaired the interiors and exterior storefronts of the Concession Locations, including but not limited to the ceiling, walls, floors, doors, windows, equipment, furnishings, fixtures and appurtenances. Such maintenance and repairs shall include, but not be limited to, painting, laminating doors, replacement of light fixtures (including bulbs, tubes, ballasts, transformers and diffusers), and the replacement of all broken glass, which repairs shall be in quality and class equal to or better than the original work to preserve the same in good order and condition. Maintenance for all equipment furnished by Concessionaire or its Subconcessionaires for their operation shall remain the obligation of the Concessionaire or its Subconcessionaires. Concessionaire shall repair or cause to be repaired, at or before the end of the Term or Extension, if applicable, of this Agreement, all injury or damage done by the installation or removal of furniture and personal property so as to restore the Concession Locations to the state they were in at the commencement of this Agreement, reasonable wear and tear excluded. When used in this Agreement, the Term "maintenance" shall include all repairs, alteration, maintenance and/or removals deemed necessary by Director.

**15.2.5** The Director shall be the sole judge of the quality of the repairs or maintenance or custodial services required of Concessionaire under this Agreement.

City's employees and agents may enter upon the Concession Area to determine if maintenance satisfactory to Director is being performed. If Concessionaire fails to perform the maintenance or the maintenance is not being performed in a manner satisfactory to Director, Director will notify Concessionaire in writing. If the maintenance is not so performed by Concessionaire within fifteen (15) calendar days after receipt of written notice, City shall have the right (but not the obligation) to enter upon the Concession Area and perform the necessary maintenance and, upon receipt of the notice of maintenance cost, Concessionaire agrees to promptly reimburse City for the maintenance cost incurred, plus an additional amount equal to ten percent (10%) thereof for administrative overhead. The demand for any payment by City shall be prima facie evidence that the expense incurred was necessary and reasonable and that such expense was incurred by City on behalf of Concessionaire.

**15.2.6** Concessionaire shall arrange at Concessionaire's sole cost and expense for the adequate sanitary and safe handling of all trash and other refuse resulting from Concessionaire's operations. Concessionaire shall provide and use suitable covered fireproof receptacles for all trash and other refuse generated in connection with the Concession Operations in locations specified by Director. Piling of refuse or other similar items in view of a public area is prohibited. Concessionaire shall participate in or comply with City's recycling program(s), as requested by Director.

## **SECTION 16 AMERICANS WITH DISABILITIES ACT**

**16.1** Concessionaire shall be solely and fully responsible for complying with the Americans with Disabilities Act of 1990 ("ADA") in connection with: (a) the Concession Area or any portion thereof and its operations thereon, the Concessionaire's Furnishings, Trade Fixtures and Equipment and the Concession Improvements; (b) removing physical barriers from the Concession Area; (c) providing auxiliary aids and services for use of the Concession Improvements and Concessionaire's Furnishings, Trade Fixtures and Equipment, where necessary or required; and (d) modifying its policies, practices, and procedures to comply with the ADA. Concessionaire shall develop a work plan to correct or avoid any violations or non-compliance with the ADA. Concessionaire shall deliver to the City, upon City's request, a copy of each report and

work plan. City's approval of or acceptance of any aspect of Concessionaire's activities under this Agreement shall not be deemed or construed in any way as a representation that such item, activity or practice complies with the ADA. Concessionaire agrees to indemnify, defend, and hold the City harmless from and against any and all costs incurred by City with respect to Concessionaire's failure to comply with the ADA.

**16.2** Nothing herein shall relieve Concessionaire from the obligation to seek and obtain City's consent prior to commencing any construction, alteration or renovation pursuant to **SECTION 22** hereof.

## **SECTION 17 TAXES AND ASSESSMENTS**

### **17.1 Payment by Concessionaire**

Concessionaire shall pay before delinquency and without notice or demand, any and all taxes (including, without limitation, any gross receipts income tax or excise tax), assessments, licenses, fees, possessory interest taxes, other public charges or penalties which may be levied, imposed or assessed against any of Concessionaire's leasehold interest, upon Concessionaire's equipment, business, operation, Gross Revenue or upon Concessionaire for the privilege of conducting business within the Concession Area, or upon any other property of Concessionaire within the Airport. Any such payment made under this Section shall not reduce the amount of the Concession Fee or any other fee that is required to be paid by Concessionaire to City under the provisions of this Agreement.

### **17.2 Possessory Interest Subject to Taxation**

Concessionaire recognizes and understands that this Agreement is not intended to, but may create a real property possessory interest in the Concession Area, and that such interest may give rise to a real estate or possessory interest tax. In that event, Concessionaire agrees to pay such tax if and when it is due without any credit or offset to the Concession Fee or such other Concession Fees, rentals, or charges that are due and payable to City hereunder. City shall have no obligation to pay any possessory interest tax.

### **17.3 No Liens or Encumbrances**

Concessionaire shall not permit or suffer any liens or encumbrances to be

imposed upon the Concession Area, the Airport, or any building or structure thereon as a result of its activities without promptly discharging the same; provided, however, that Concessionaire may, if it so desires, contest the legality of same following prior written notice to City. In the event of a contest, Concessionaire shall provide a bond in an amount and in a form reasonably acceptable to City immediately following request therefor by City.

#### **17.4 Tax - Hold Harmless**

Concessionaire shall protect, defend, indemnify and hold City, including the Airport, and any improvements now or hereafter in the Concession Area, free and harmless from any liability, loss, or damage resulting from any taxes, assessments or other charges required by this Agreement to be paid by Concessionaire and from all interests, penalties and other sums imposed thereon and from any proceedings to enforce collection of any such taxes, assessments or other charges.

#### **17.5 Payment by City**

If Concessionaire fails to pay any tax or charge required by this Section to be paid by Concessionaire, City may, but is not obligated to, on thirty (30) days prior written notice to Concessionaire, pay, discharge or adjust such tax or charge for Concessionaire's benefit. In such event, Concessionaire, on receipt of written demand of City, shall reimburse City promptly for the full amount paid by City in paying, discharging, or adjusting such tax or charge together with interest thereon from its due date at the maximum interest rate then allowed by law until paid, plus pay any penalties.

#### **17.6 Contest of Tax or Charge**

##### **17.6.1 Notice of Contest**

In the event that Concessionaire desires, in good faith, to contest or review by appropriate legal or administrative proceedings any tax or charge specified hereunder, Concessionaire, at least ten (10) days prior to the delinquency of any such tax or charge or within the applicable period of time allowed by law, shall give City written notice of its intention to contest such tax or charge.

##### **17.6.2 Procedure for Contest**

Concessionaire may withhold payment of the tax or charge being contested if, but only if, nonpayment is permitted during the pendency of such

proceedings without the foreclosure of any tax lien or the imposition of any fine or penalty. The contest shall be prosecuted to completion (whether or not this Agreement has expired or terminated) without delay at Concessionaire's sole cost and expense.

#### **17.6.3 Payment upon Final Determination**

Within the applicable period of time allowed by law after the final determination of the amount of tax due, Concessionaire shall pay the amount determined to be due, together with all costs, expenses and interest (whether or not this Agreement has then expired or terminated).

#### **17.6.4 Failure to Pay Constitutes Event of Default**

The failure to pay any tax or charge hereunder shall constitute an Event of Default, and the obligation to pay the same shall survive the termination of this Agreement.

### **SECTION 18 ASSIGNMENT**

#### **18.1 No Encumbrance**

Concessionaire shall not mortgage, pledge, encumber, or otherwise hypothecate this Agreement, the Concession Operations or any interest of Concessionaire therein, voluntarily or involuntarily, or by operation of law.

#### **18.2 Prohibition on Assignments, Transfers or Sublease**

**18.2.1** Concessionaire shall not assign, sublease, transfer or convey the rights of Concessionaire under this Agreement, the Concession Improvements, Concessionaire's Furnishings, Trade Fixtures and Equipment or the Concession Operations without the prior written consent of City, which City will not unreasonably withhold.

**18.2.2** A transfer within the meaning of this Section shall include, but is not limited to, the following: the incorporation of an individual Concessionaire and the transfer of Concessionaire's rights hereunder to the corporation which is not wholly owned by Concessionaire; in the event that Concessionaire is a partnership, incorporation of Concessionaire and transfer of Concessionaire's rights hereunder to the corporation, or the withdrawal or addition of any partner to Concessionaire's partnership; in the event that Concessionaire consists of co-Concessionaires, the

incorporation of Concessionaire and transfer of its rights hereunder to the corporation, or the voluntary or involuntary transfer by any one or more co-Concessionaires of his, her or its rights hereunder to his, her or its co-Concessionaire or to a third person; in the event that Concessionaire is a corporation, the change in the ownership of fifty percent (50%) or more of the capital stock of Concessionaire; and, in the event that Concessionaire is an unincorporated association, the incorporation of Concessionaire and the transfer of its rights hereunder to the corporation, or the change in fifty percent (50%) or more of the membership of the association.

**18.2.3** Reasonable grounds for denying consent shall include any of the following: (i) the proposed transferee's intended use of the premises is not for an aviation-related purpose or will materially and adversely affect the City's interests at the Airport; (ii) The proposed transferee's financial condition is or may be inadequate to support its obligations under the lease; or (iii) The proposed transferee has failed to meet any legal or contractual obligations to the City or is adverse to the City in any pending litigation; (iv) The proposed transferee has failed to meet the minimum qualifications set forth in City's Request For Proposals For Operation Of Shared Use Lounge For Mineta San José International Airport, dated April 05, 2012

**18.2.4** In addition, City's consent to any proposed transfer under this Agreement may be conditioned upon, among other things, the express written assumption by the proposed transferee of Concessionaire's obligations under this Agreement and/or performance of required or necessary repairs or maintenance to the Concession Area.

**18.2.5** City may require payment by Concessionaire of any processing fee established by City pursuant to a resolution or ordinance for reviewing the proposed transfer and for preparing any documents in connection therewith. Concessionaire's failure to provide City with full, complete and necessary information, or to pay the processing fee, shall be sufficient cause for City to deny consent to, or to refuse to review, the proposed transfer.

**18.2.6** The consent of City to any transfer described in this Section shall not relieve Concessionaire of its obligation to obtain the further consent of City for any subsequent transfer. Any attempt to transfer without the consent of City shall be void,



and shall constitute an Event of Default under this Agreement.

## **SECTION 19 GRANT AGREEMENT COVENANTS**

**19.1** Concessionaire acknowledges that City is subject to Federal Grant Agreement obligations as a condition precedent to the grant and receipt of federal funds for improvements to the Airport, and, accordingly, Concessionaire, for and on behalf of its representatives, successors and assigns, as part of the consideration hereof, covenants and agrees to be bound by the following covenants provided by the Federal Aviation Administration, as they may apply to Concessionaire:

**19.2** Concessionaire for itself, its personal representatives, successors in interest and assigns, as a part of the consideration hereof, does hereby covenant and agree that in the event facilities are constructed, maintained, or otherwise operated on any areas occupied or utilized by Concessionaire and described in this Agreement for a purpose for which a Department of Transportation (DOT) program or activity is extended or for another purpose involving the provision of similar services or benefits, Concessionaire shall maintain and operate such facilities and services in compliance with all other requirements imposed pursuant to Title 49, Code of Federal Regulations (CFR), DOT, Subtitle A, Office of the Secretary, Part 21 Nondiscrimination in Federally Assisted Programs of the Department of Transportation-Effectuation of Title VI of the Civil Rights Act of 1964, and as said Regulations may be amended.

**19.3** Concessionaire for itself, its personal representatives, successors in interest 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 the facilities; (2) that in the construction of any improvements on, over, or under any areas occupied by Concessionaire and the furnishing of services thereon, no person on the grounds of race, color, or national origin shall be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination; and (3) that Concessionaire shall use any areas occupied by Concessionaire 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 VI of the Civil Rights Act of 1964, and as the Regulations may be amended.

**19.4** That in the event of breach of any of the above nondiscrimination covenants, City shall have the right to terminate this Agreement and to reenter and repossess any areas occupied or utilized by Concessionaire and the facilities thereon, and hold the same as if said Agreement had never been made or issued. This provision does not become effective until the procedures of 49 CFR Part 21 are followed and completed including expiration of appeal rights.

**19.5** Concessionaire shall furnish its accommodations and/or services on a fair, equal and not unjustly discriminatory basis to all users thereof and it shall charge fair, reasonable and not unjustly discriminatory prices for each unit or service; provided that Concessionaire may be allowed to make reasonable and nondiscriminatory discounts, rebates or other similar type of price reductions to volume purchasers.

**19.6** Without limiting the generality of any other terms or provisions of this Agreement, non-compliance with **SECTION 19.5**, above, shall constitute a material breach thereof, and in the event of such non-compliance, City shall have the right to terminate this Agreement without liability therefor or, at the election of the City or the United States, either or both the Governments shall have the right to judicially enforce **SECTION 19.2, 19.3, 19.4 and 19.5** above.

**19.7** Concessionaire agrees that it shall insert the above five (5) provisions of this Section in any agreement by which Concessionaire grants a right or privilege to any person, firm or corporation to render accommodations and/or services to the public in the Concession Area herein authorized.

**19.8** Concessionaire assures that it will comply with pertinent statutes, executive orders and such rules as are promulgated to assure that no person shall, on the grounds of race, creed, color, national origin, sex, age, or handicap be excluded from participating in any activity conducted with or benefiting from federal assistance. This **SECTION 19.8** obligates Concessionaire or its transferee for the period during which federal assistance is extended to the Airport, except where federal assistance is to provide, or is in the form of personal property or real property or interest therein or

structures or improvements thereon. In these cases, this **SECTION 19.8** obligates Concessionaire or any transferee for the longer of the following periods: (a) the period during which the property is used by City or any transferee for a purpose for which federal assistance is extended, or for any purpose involving the provision of similar services or benefits; or (b) the period during which City or any transferee retains ownership or possession of the property. In the case of contractors, this **SECTION 19.8** binds the contractors from the bid solicitation period through the completion of the contract.

**19.9** City reserves the right to further develop or improve the landing area of the Airport as it sees fit, regardless of the desires or view of Concessionaire, and without interference or hindrance.

**19.10** City reserves the right, but shall not be obligated to Concessionaire, to maintain and keep in repair the landing area of the Airport and all publicly-owned facilities of the Airport, together with the right to direct and control all activities of Concessionaire in this regard.

**19.11** This Agreement shall be subordinate to the provisions and requirements of any existing or future Agreement between City and the United States, relative to the development, operation or maintenance of the Airport.

**19.12** There is hereby reserved to City, its successors and assigns, for the use and benefit of the public, a right of flight for the passage of aircraft in the airspace above the surface of the Airport. This public right of flight shall include the right to cause in the airspace any noise inherent in the operation of any aircraft used for navigation or flight through the airspace or landing at, taking off from, or operation on the Airport.

**19.13** Concessionaire agrees to comply with the notification and review requirements covered in Part 77 of the Federal Aviation Regulations in the event future construction of a building is planned for the Airport, or in the event of any planned modification or alteration of any present or future building or structure situated at the Airport.

**19.14** Concessionaire, by accepting this Agreement expressly agrees for itself, its successors and assigns, that it will not erect nor permit the erection of any structure or object, nor permit the growth of any tree on any areas occupied or utilized by

Concessionaire to a height above the mean sea level that would exceed FAR Part 77 standards or elevations affecting the Airport navigable airspace. In the event the aforesaid covenants are breached, City reserves the right to enter upon any area utilized by Concessionaire and to remove the offending structure or object and cut the offending tree, all of which shall be at the expense of Concessionaire.

**19.15** Concessionaire, by accepting this Agreement, agrees for itself, its successors and assigns that it will not make use of the Airport in any manner which might interfere with the landing and taking off of aircraft from the Norman Y. Mineta San Jose International Airport or otherwise constitute a hazard. In the event this covenant is breached, City reserves the right to enter upon any areas used or occupied by Concessionaire and cause the abatement of such interference at the expense of Concessionaire.

**19.16** It is understood and agreed that nothing herein contained shall be construed to grant or authorize the granting of an exclusive right within the meaning of Section 308(a) of the Federal Aviation Act of 1958 (49 U.S.C. Section 1349[a]).

**19.17** This Agreement and its provisions shall be subject to whatever right the United States Government now has or in the future may have or acquire, affecting the control, operation, regulation and taking over of Airport or the exclusive or non-exclusive use of Airport by the United States during the time of war or national emergency.

## **SECTION 20 MODIFICATIONS FOR GRANTING FAA FUNDS**

In the event that the Federal Aviation Administration requires, as a condition precedent to granting of funds for the improvement of the Airport, modifications or changes to this Agreement, Concessionaire agrees to consent in writing upon the request of City to such amendments, modifications, revisions, supplements or deletions of any of the terms, conditions or requirements of this Agreement as may be reasonably required to enable City to obtain FAA funds, provided that in no event shall such changes materially impair the rights of Concessionaire hereunder. A failure by Concessionaire to so consent shall constitute a breach of this Agreement.

## **20.1 ACDBE Participation Reporting Requirement**

Concessionaire shall report the level of Airport Concession Disadvantaged Business Enterprise ("ACDBE") Program participation in the Concession as required pursuant to the City's ACDBE requirements, which are set out in **EXHIBIT K** to this Agreement.

## **SECTION 21 PROHIBITION ON GIFTS**

**21.1** Concessionaire is familiar with City's prohibition against the acceptance of any gift by a City officer or designated employee, which prohibition is found in Chapter 12.08 of the San José Municipal Code.

**21.2** Concessionaire agrees not to offer any City officer or designated employee any gift prohibited by said Chapter.

**21.3** The offer or giving of any gift prohibited by San José Municipal Code Chapter 12.08 shall constitute a material breach of this Agreement by Concessionaire. In addition to any other remedies City may have in law or equity, City may terminate this Agreement for breach as provided in **SECTION 24** of this Agreement.

## **SECTION 22 ALTERATIONS AND IMPROVEMENTS**

### **22.1 Concessionaire's Improvements**

**22.1.1** Concessionaire agrees to install the Concession Improvements and Concessionaire's Furnishings, Trade Fixtures and Equipment at its sole cost and expense without any reimbursement from City in accordance with the provisions of the Agreement.

**22.1.2** Concessionaire shall be solely responsible for the proper installation of the Concession Improvements and Concessionaire's Furnishings, Trade Fixtures and Equipment, and shall be liable for any damage or loss to any portion of the Terminals which results from the installation or use of the Concession Improvements or any work related thereto.

**22.1.3** Concessionaire shall serve as the project manager and will provide the management, administration and coordination of all design and construction associated with the maintenance, repair and/or subleasing of the Concession Area.

This will include, without limitation, all fixed improvements and/or refurbishments to be constructed in the Concession Area, whether initial construction and alterations associated with any expansion, redevelopment or refurbishment of the Concession Area or future construction and alterations, including cleaning and maintenance of external design elements installed as directed within the Tenant Design and Construction Guidelines (see <http://www.flysanjose.com/standards-and-guidelines>).

**22.1.4** Concessionaire shall be responsible for the supervision and coordination, subject to the prior written approval of the City, of the design of all Concession Improvements, including, without limitation, the design of storefronts and the specifications of equipment. Concessionaire shall ensure that all required permits are obtained prior to the commencement of any work or proposed modifications to the Concession Areas.

## **22.2 Schedule**

**22.2.1** No later than thirty (30) days after the Effective Date, Concessionaire shall deliver to City an overall construction program for the Concession Improvements, including a time schedule for the same, which shall be subject to approval by the Director. Such schedule shall, at a minimum, include the following milestones for each Concession Area site: (1) construction time plan, which provides for continuous service at the Airport; (2) submission of plans and specifications to City; (3) approval of plans by all required authorities; (4) contractor's bid; (5) construction; and (6) completion date.

**22.2.2** Concessionaire, along with Concessionaire's architect/engineer, and others as necessary, shall attend meetings as required by the City, with City representatives for the purposes of review of plans and designs. Such meetings will discontinue upon approval of all Concession Locations.

## **22.3 Approval of Plans and Specifications**

**22.3.1** Concessionaire shall be required to follow the Retail Concession Design Guidelines **EXHIBIT M**, and CADD standards for all initial alterations or improvements. Submittals must meet all requirements before the Director shall issue a written approval.

**22.3.2** Concessionaire shall be required to follow the Airport's Tenant

Design and Construction Guidelines and CADD standards (see <http://www.sjc.org/about/tenants.html>) for all future alterations or improvements. Submittals must meet all requirements before the Director issues a written approval.

**22.3.3** Concessionaire shall not construct any Concession Improvements or make any subsequent alterations or additions to the Concession Improvements, without the prior written approval of the Director. The Director's approval shall be in the form of a Notice to Proceed ("NTP"). Full and complete plans and specifications for all work, facilities and Concession Improvements, and the time required to complete same, shall be submitted to, and must receive the written approval of Director before work or construction is commenced. First-class standards of design and construction will be required in connection with all such work, facilities and improvements. All construction must conform to the plans and specifications as approved by Director and the established architectural design scheme for the Airport.

**22.3.4** Concessionaire may enter the Concession Area to conduct pre-construction planning and preparation work that does not interfere with the Airport operations. Concessionaire must be escorted by proper Airport security or by designated Airport personnel.

**22.3.5** Original CADD files, eight (8) hard copies and one (1) soft copy in PDF format of plans for all improvements or subsequent changes or alterations shall be given to Director for review prior to commencement of construction. Submittals must meet all requirements before the Director issues a written approval. Director, after giving his final approval, shall return to Concessionaire one (1) approved copy for its records.

**22.3.6** Upon completion of all work, Concessionaire shall provide to Director accurate drawings that reflect the "as-built" conditions, if applicable or as required by the Director. Final submittal shall include the original CADD files, two (2) hard copies and one (1) soft copy in PDF format of plans. All final submittals must meet all Airport requirements. Concessionaire agrees that, upon the request of Director, Concessionaire will inspect the Concession Area jointly with Director to verify the "as-built" drawings. Concessionaire further agrees that all discrepancies will be corrected and Concessionaire shall resubmit the entire final submittal.

## **22.4 Minimum Capital Improvement Expenditure**

**22.4.1** Concessionaire shall be solely responsible to pay for the development of the Concession Location with no contribution from City and shall be subject to the Airport's Tenant Design and Construction Guidelines.

**22.4.2** There is no maximum limit to the level of investment permitted of the Concessionaire.

## **22.5 Intentionally Omitted**

### **22.6 Allowable Improvement Costs**

The following Concession Improvement Costs are subject to reimbursement pursuant to Section 4.7 of this Agreement.

**22.6.1** Costs incurred by Concessionaire for: improvements; furnishings; fixtures (both removable and non-removable); interior walls and doors; plumbing, electrical and mechanical improvements; lighting; wall finishes; ceiling finishes; flooring; removable and non-removable counters; and removable and non-removable equipment that is necessary to the operation of the Concession Area.

**22.6.2** Design and engineering costs not to exceed ten percent (10%) of the total approved cost of Concessionaire's Improvements as defined above.

**22.6.3** City's Planning, Building and Code Enforcement Department fees (as provided in **SECTION 22.9.2**).

**22.6.4** Costs and expenses which are payable by Concessionaire for City engineering and inspection fees ("E&I Fees") as provided in **SECTION 22.9.3**

**22.6.5** Directly contracted construction costs.

### **22.7 Unallowable Improvement Costs**

The following capital improvement costs shall *not* be considered as Concessionaire's Allowable Improvement Costs:

**22.7.1** Concessionaire's costs for internal design, review, management and oversight of Concession Area construction.

**22.7.2** Concessionaire's licensing or franchising costs.

**22.7.3** Any other future renovation and remodeling of Concession Improvements which Concessionaire, at its option, elects to make during the Term.

## **22.8 City's Rights**



**22.8.1** City shall have the right to renovate or remodel any portion of the Airport Terminal which is contiguous with the perimeter of the Concession Area. The provisions of **SECTION 4.7** shall govern any relocation of Concessionaire's operation due to City's renovation or remodeling of the Terminal. If possible, City shall exercise such right with a minimum amount of inconvenience to Concessionaire, and Concessionaire shall not be entitled to any payment or credit from City if City exercised such right in accordance with this Section.

**22.9 Contracting Requirements and Approvals.**

**22.9.1** All Concession Improvements, Concessionaire's Furnishings, Trade Fixtures and Equipment, including the plans and specifications therefor, constructed or installed by Concessionaire, its agents or contractors shall conform in all respects to the most current and applicable statutes, ordinances, building codes and rules and regulations adopted by the City of San José.

**22.9.2** Concessionaire shall obtain at its sole cost and expense all governmental reviews and approvals (including any approvals of the Director or any other City official), licenses and permits which are, or may be, required and are necessary to install the Concession Improvements and/or Concessionaire's Furnishings, Trade Fixtures and Equipment and to operate the Concession Operations, including, but not limited to, all plans and specification approvals, site development reviews, development permits and building permits. The costs and expenses which are payable by Concessionaire to secure these reviews and approvals may include City Planning, Building and Code Enforcement Department fees. Concessionaire shall comply with all conditions, restrictions or contingencies imposed upon, or attached to, the governmental approvals, licenses and permits described herein.

**22.9.3** The costs and expenses which are payable by Concessionaire to secure City reviews and approvals may include, but are not limited to, cost of processing concession applications, City plan check, building permit coordination, construction coordination, City inspections and as-built coordination ("E&I Fees"). For all future concession locations that may be added to this Agreement in accordance with **SECTION 4.7.2**, Concessionaire shall be liable for the payment of E&I Fees related to the development of those locations.

**22.9.4** For any Concession Improvement construction work in excess of One Thousand Dollars (\$1,000), Concessionaire shall require each contractor or subcontractor to pay Prevailing Wages as stipulated in the City's Prevailing and Living Wage Policies. A copy of the City's Prevailing and Living Wage Policy is available at <http://www.sanjoseca.gov/index.aspx?NID=768>.

**22.9.5** Prior to contracting with a third party for the construction of the Concession Improvements, Concessionaire shall notify the City of San José's Office of Equality Assurance and provide a detailed scope of work to be performed. The City of San José's Office of Equality Assurance will issue a Classification Determination for the work to be performed.

**22.9.6** All work shall be performed only by competent contractors who have proven, to the satisfaction of the Director, as: (1) having satisfactory experience in construction at an airport, or more specifically at Norman Y. Mineta San José International Airport, of a construction project equal to or greater than the construction project contemplated by this Agreement; and (2) being duly licensed under the laws of the State of California. All such work shall be performed pursuant to written contracts with such contractors.

**22.9.7** The Director's approval shall *not* be deemed to include the approval of any other City department or governmental or public entity which Concessionaire may be required to obtain.

**22.9.8** Since the Concession Area is located on the secure side (sterile area) of the terminal, Concessionaire shall, at Concessionaire's sole cost and expense, provide an Airport-approved security guard at the construction site during construction as required by the Airport.

**22.9.9** All work shall be performed during the hours as approved by the Airport Security Plan.

## **22.10 Removal**

**22.10.1** During the Term, Concessionaire shall not remove the Concession Improvements and/or Concessionaire's Furnishings, Trade Fixtures and Equipment, in whole or in part, without the Director's prior written consent. The Director may exercise his absolute discretion and condition such consent upon the obligation of

Concessionaire to replace the same with other improvements or equipment specified in such consent.

**22.10.2** Upon installation, the Concessionaire's Furnishings, Trade Fixtures and Equipment shall remain the property of Concessionaire and shall be removed from the Airport upon termination or expiration of this Agreement unless Concessionaire obtains Director's written consent to leave Concessionaire's Furnishings, Trade Fixtures, and Equipment. Concessionaire shall ascertain from the Director, at least eight (8) months prior to the Expiration Date, or as soon as possible if this Agreement is terminated earlier, whether City will require Concessionaire to remove any Concession Improvements or, if Concessionaire desires to leave Concessionaire's Furnishings, Trade Fixtures and Equipment at the Airport, whether the City will accept such Concessionaire's Furnishings, Trade Fixtures and Equipment. If the Director determines that any or all Concession Improvements shall be removed, Concessionaire shall, by no later than six (6) months prior to the Expiration Date, or as soon as possible if this Agreement is terminated earlier, provide a plan to the Director, which plan shall include a timeline for removal of the Concession Improvements.

**22.10.3** Any Concession Improvements or Concessionaire's Furnishings, Trade Fixtures and Equipment left by Concessionaire at the Airport shall be free and clear of any liens, and Concessionaire shall execute documents conveying title to City, at City's request.

**22.10.4** Removal of Concession Improvements and Concessionaire's Furnishings, Trade Fixtures and Equipment shall be at Concessionaire's sole cost and expense. In the event of an early termination of this Agreement by City for cause, the Director shall give notice of removal of Concession Improvements, if removal is required by City. Removal shall occur within thirty (30) days following Concessionaire's receipt of such notice, but in no event later than the Expiration Date or the date of earlier termination of this Agreement.

**22.10.5** In the event Concessionaire fails to remove, or expresses an intention not to remove, any Concession Improvements and/or Concessionaire's Furnishings, Trade Fixtures and Equipment required by the Director to be removed pursuant to this Section, City may enter upon the Concession Area and remove such

Concession Improvements and/or Concessionaire's Furnishings, Trade Fixtures and Equipment at the sole cost and expense of Concessionaire. Concessionaire agrees to promptly reimburse City for all costs and expenses of removal, plus ten percent (10%) thereof for administrative overhead, or such percentage as approved and established from time to time by the City Council. The obligation to reimburse City for such expenditures shall survive the termination of this Agreement. Any receipt showing payment by City of expenditures associated with the removal of Concession Improvements and/or Concessionaire's Furnishings, Trade Fixtures and Equipment shall be prima facie evidence that the amount of such payment was necessary and reasonable and made by City on Concessionaire's behalf.

**22.10.6** Concessionaire shall repair at its sole cost and expense any and all damage to the Concession Area, the Terminals or any part of the Airport occasioned by the removal of the Concession Improvements and/or Concessionaire's Furnishings, Trade Fixtures and Equipment, or Concessionaire's property from the Concession Area or any other area of the Airport, and shall leave all of the remaining improvements in good and clean condition and repair, ordinary wear and tear excepted, and shall appropriately "cap off" all utility connections. City may also require Concessionaire to remove any and all special equipment and any installations that are unique to Concessionaire, and Concessionaire shall comply with such requirement.

#### **22.11 Liens.**

Concessionaire shall keep the Concession Area, the Terminals and the Airport free of any liens arising out of the work performed, materials furnished or obligations incurred by Concessionaire in the performance of installation of Concession Improvements or Concessionaire's Furnishings, Trade Fixtures and Equipment. Concessionaire shall notify City at least ten (10) days prior to the commencement of any work to be performed or materials to be furnished on the Concession Area which could give rise to any such lien. City shall have the right to post and keep on the Concession Area any notices that may be required by law or which City may deem proper for the protection of City, the Terminals or the Concession Area from such liens.

#### **22.12 Payment Bond.**

Prior to the commencement of any construction, betterment, improvement,

alteration, addition, repair, demolition or reconstruction of the Concession Improvements or the Concession Area by Concessionaire or its contractor(s), Concessionaire or its contractor(s) shall furnish to City, and without expense to City, a payment bond pursuant to California Civil Code Sections 3247, 3248 et. seq. Such bond shall name Concessionaire or Concessionaire's contractor(s) as principals and the City as obligee. Concessionaire shall provide a payment bond equal to one hundred percent (100%) of the total amount of the contract or contracts for the construction, alteration, demolition or repair of the improvements and facilities. The bond shall guarantee the prompt payment to all persons named in California Civil Code Section 3181, amounts due under the Unemployment Insurance Code and amounts required to be deducted, withheld or paid over to the Employment Development Department from the wage of employees of the contractor and subcontractors pursuant to Section 13020 of the Unemployment Insurance Code, and reasonable attorneys' fees. Prior to commencement of any work requiring a bond, the bond must be approved by the City Attorney and filed with the City Clerk. Immediately upon completion of any work or improvements, Concessionaire shall record in the office of the Santa Clara County Recorder a notice of completion complying with the requirement of California Civil Code Section 3093.

### **SECTION 23 DEFAULT BY CONCESSIONAIRE**

In addition to the other defaults specified in this Agreement, the Director may determine in the Director's sole discretion that Concessionaire is in default under this Agreement if:

**23.1** Concessionaire fails duly and punctually to pay the Concession Fee, or to make any other payment required hereunder, when due to City; or

**23.2** Concessionaire fails to maintain any insurance required under **SECTION 8**; or

**23.3** A court makes or enters any decree or order: (i) adjudging Concessionaire to be bankrupt or insolvent; (ii) approving as properly filed a petition seeking reorganization of Concessionaire under the bankruptcy laws or any other applicable debtor's relief law or statute of the United States or any state thereof; (iii) appointing a

receiver, trustee or assignee of Concessionaire in bankruptcy or insolvency or for its property; (iv) directing the winding up or liquidation of Concessionaire and such decree or order has continued for a period of thirty (30) days; or (v) Concessionaire voluntarily submits to or filed a petition seeking any such decree or order; or

**23.4** A petition under any part of the Federal bankruptcy Laws, or an action under any present or future insolvency law or statute, is filed against Concessionaire and is not or shall not be dismissed within thirty (30) days after the filing thereof; or

**23.5** Concessionaire assigns or otherwise transfers its interest in this Agreement in violation of the provisions contained in this Agreement whether voluntarily or by operation of law; or

**23.6** Concessionaire makes a general assignment of its assets for the benefit of its creditors; or

**23.7** The sequestration or attachment of, or execution or other levy on, Concessionaire's interest in this Agreement or the Concessionaire's Furnishings, Trade Fixtures and Equipment or any improvements located thereon occurs and Concessionaire fails to obtain a return or release of such property within thirty (30) days thereafter, or prior to sale pursuant to such levy, whichever first occurs; or

**23.8** Concessionaire fails to install the Concessionaire's Furnishings, Trade Fixtures and Equipment and Concession Improvements in compliance with the Schedule as provided in **SECTION 22.2**; or

**23.9** The Concession Operations are repeatedly unavailable for use by the public, as more specifically provided in **SECTION 4**; or

**23.10** Concessionaire fails to keep, perform and observe each and every other promise, covenant and agreement set forth in this Agreement, and such failure continues for a period of more than ten (10) days after delivery by Director of a written notice of such breach or default, except where fulfillment of its obligation requires activity over a period of time, in excess of ten (10) days, and Concessionaire commences in good faith to perform whatever may be required for fulfillment within ten (10) days after receipt of notice and continues such performance without interruption, except for causes beyond its control.

**23.11** Any representation or warranty made by Concessionaire hereunder is

false or misleading in any material respect as of the date on which such representation or warranty is made; or

**23.12** The occurrence of any act or omission on the part of Concessionaire which operates to suspend, revoke or terminate any certificate, permit, franchise, approval, authorization or power necessary for Concessionaire to lawfully conduct the Operations which Concessionaire is required or permitted to conduct on the Concession Area or on the Airport; or

**23.13** Any lien is filed against the Concession Area and/or Concessionaire's Furnishings, Trade Fixtures and Equipment because of any act or omission of Concessionaire, and is not discharged or contested by Concessionaire in good faith by proper legal proceedings within twenty (20) calendar days after receipt of notice thereof.

## **SECTION 24 CITY'S REMEDIES**

### **24.1 Termination.**

Upon any default, City shall have the right at City's election to terminate this Agreement by giving Concessionaire written notice of termination in which event this Agreement shall terminate on the date set forth for termination in such notice. Any termination under this paragraph shall not relieve Concessionaire from the payment of any sums then due to City or from any claim for damages or fees previously accrued or then accruing against Concessionaire. In no event shall City have any obligation to Concessionaire, financial or otherwise, as a result of the termination of this Agreement following a default.

### **24.2 Damages**

In the event City elects to terminate this Agreement, Concessionaire shall pay to City all amounts owing at the time of termination on account of Concessionaire's breach of any term, covenant or condition of this Agreement including, but not limited to, unpaid fees plus interest thereon on all such amounts from the date due until paid at the rate of one and a half percent (1 1/2%) per month; and any other amount to compensate City fully for all detriment proximately caused by Concessionaire's failure to perform its obligations hereunder or which in the ordinary course would likely result therefrom.

### **24.3 Liquidated Damages**

Concessionaire understands and agrees that one of City's primary goals in granting the concession is to ensure that customer service provided to the traveling public using the concession services at the Airport is of the highest caliber and is consistent with the image that the City and the Airport want to project to its users and visitors. Concessionaire further agrees that City will suffer damage if Concessionaire fails to meet these standards and that, due to the nature of certain breaches, the actual damage to the City would be impractical or very difficult to remedy.

CONCESSIONAIRE AND CITY AGREE THAT THE AMOUNTS SET FORTH IN **SECTION 24.3.1** BELOW, SHALL BE PAID TO CITY AS LIQUIDATED DAMAGES IF CONCESSIONAIRE BREACHES THE PERFORMANCE STANDARDS SPECIFIED IN SUCH **SECTION 24.3.1**. CONCESSIONAIRE AND CITY ACKNOWLEDGE THAT CITY'S ACTUAL DAMAGES IN THE EVENT OF A BREACH OF SUCH PERFORMANCE STANDARDS WOULD BE IMPRACTICAL OR VERY DIFFICULT TO DETERMINE. THEREFORE, BY PLACING THEIR SIGNATURES BELOW, CITY AND CONCESSIONAIRE ACKNOWLEDGE THAT THE AMOUNTS SET FORTH IN **SECTION 24.3.1** BELOW HAVE BEEN AGREED UPON AS THE PARTIES' REASONABLE ESTIMATE OF CITY'S DAMAGES IN THE EVENT OF SUCH BREACH. CITY'S ACCEPTANCE OF ANY LIQUIDATED DAMAGES AS A RESULT OF A PERFORMANCE STANDARD BREACH SHALL NOT PREVENT CITY FROM EXERCISING ANY OTHER RIGHT OR REMEDY FOR DEFAULT AVAILABLE TO CITY UNDER THIS AGREEMENT.

CITY: \_\_\_\_\_

CONCESSIONAIRE:  \_\_\_\_\_

#### **24.3.1 Performance Standard Breaches.**

The following specified breaches shall be referred to as "Performance Standard Breaches". Concessionaire agrees to pay to City the amount specified below as liquidated damages for the applicable breach.

**24.3.1.1** Concession Locations not open during approved scheduled Hours of Operation or during such times of flight delays, as referenced in



**SECTION 4.20.1: \$200.00 per occurrence.**

**24.3.1.2** The number of verbal and written complaints from different individuals exceeds four (4) in any thirty (30) day period, provided Concessionaire has not provided an explanation or response concerning the complaint which is satisfactory to the Director: \$200.00 per complaint beginning with the fifth complaint for that month.

**24.3.1.3** Concession Location improperly or poorly stocked as specified by the Director: \$200.00 per occurrence.

**24.3.1.4** Health code citations: \$400.00 for each citation not cleared during the cure period stipulated by the Health Department; an additional \$100.00 per day past the cure period for each cited violation not corrected.

**24.3.1.5** Any reports requested by Director not received by the required date: \$25.00 per day per report, until any such reports are received by City.

**24.3.1.6** Concessionaire or Subconcessionaire personnel are not in 'designated' uniform/attire as required, when working at the Concession Location: \$200.00 per person per day until correction.

**24.3.1.7** All posted menu items not available at all times of the day that items are posted as available: \$200.00 per occurrence per day.

**24.3.1.8** Product price adjustments or Product removals not accomplished within the time frame prescribed by the Director or his designee: \$200.00 per occurrence per day.

**24.3.1.9** Concession Area not kept in a Like New, safe, clean, sanitary and good physical condition: \$600.00 per occurrence per day.

**24.3.1.10** Intentionally Omitted.

**24.3.1.11** Lack of employee attendance at Airport-sponsored orientation and customer service training classes: \$200.00 per employee who has not attended class within the first thirty (30) days of hire date or the first date that a class is offered, whichever is later.

**24.3.1.12** Intentionally Omitted.

**24.3.1.13** Intentionally Omitted.

**24.3.1.14** Delivery of supplies by other than approved

routes/modes/times: \$350.00 per occurrence.

**24.3.1.15** The continuous and uninterrupted operation of the Concession Operations is an important customer service aspect to the Airport. Concessionaire understands and agrees that City will suffer damage if Concessionaire fails to maintain continuous and uninterrupted operation of the Concession Operations and that, due to the nature of any such failure, the actual damage to the City would be impractical or very difficult to remedy. Therefore, the Concessionaire will be assessed liquidated damages in the amount of **\$200.00** for each day the Concession Location is not fully available after the Commencement Date for customer use for a continuous period or periods totaling in excess of four (4) hours on that day, unless the unavailability of the Concession Location is the result of a cause beyond Concessionaire's control. For the purpose of calculating downtime charges, one day shall be the period from 12:00 a.m. to 11:59 p.m. Assessment of this fee shall not limit City's remedies with respect to any other default of this Agreement. If the Concessionaire's Furnishings, Trade Fixtures and Equipment or Concession Improvements do not function or the Concession Operations are otherwise unavailable for more than four (4) hours in any day: (a) more than two (2) times in any calendar month during the Term of this Agreement; or (b) more than ten (10) times in any calendar year during the Term of this Agreement, any such event shall be a separate Event of Default under this Agreement.

**24.3.1.16** Failure to have a dedicated full time on-site qualified, competent, and experienced manager representing Concessionaire onsite within thirty (30) days of the previous manager's separation from the Concessionaire, at any time during the term of the Agreement: \$500.00 per day, per occurrence.

#### **24.3.2 Procedure for Declaring Performance Standard Breaches**

The determination as to whether Performance Standards have been met is at the reasonable discretion of the Director or his designee.

**24.3.2.1** Upon determining the existence of a Performance Standard Breach, the Director shall issue a written notice to Concessionaire of the occurrence of such breach and the City's claim for liquidated damages.

**24.3.2.2** The Performance Standard Breach shall become final ten

(10) calendar days after the date the notice of Performance Standard Breach is sent to Concessionaire, unless the Director receives a written statement from Concessionaire, with Concessionaire's evidence that the breach did not occur. Director shall review such evidence and determine, in his reasonable discretion, whether Concessionaire has demonstrated that the breach did not occur.

**24.3.2.3** The Director shall review the Concessionaire's evidence as soon as reasonably possible after timely receipt of such evidence.

**24.3.2.4** The Director shall render a decision sustaining or reversing the determination that a breach occurred and the claim for liquidated damages. A written notice of decision shall be delivered to the Concessionaire.

**24.3.2.5** If such written evidence is not received by the Director within ten (10) calendar days of the date of the notice of Performance Standard Breach, the Director's determination shall be final and the applicable liquidated damages shall be immediately due and payable.

**24.3.2.6** Upon expiration of the period for Concessionaire to deliver its written evidence or upon Director's determination that a breach occurred after reviewing Concessionaire's written evidence as provided above, Concessionaire agrees to immediately pay City the liquidated damages amount. Concessionaire further agrees that the Director may, at his option, deduct the amount of such liquidated damages from any deposit or performance guarantee provided by Concessionaire, without further notice to Concessionaire.

#### **24.4 No Waiver by City**

The waiver by City of any breach of any term, condition or provision herein contained shall not be deemed to be a waiver of any subsequent breach of such term, covenant or condition. The consent or approval by City to any act of Concessionaire requiring City's approval shall not be deemed to waive or render unnecessary the need for City's consent or approval to or of any subsequent similar act of Concessionaire. The subsequent acceptance of any fees or charges hereunder by City shall not be deemed to be a waiver of any preceding breach by Concessionaire of any term, covenant or condition of this Agreement other than the failure of Concessionaire to pay the particular fee or charge so accepted, regardless of City's knowledge of such preceding breach at

the time of the accepting of such fee or charge. No waiver, consent or approval by City shall be effective unless made by a duly authorized representative of City.

#### **24.5 City's Right to Cure**

Upon any default of Concessionaire, City may, at City's election, after first giving Concessionaire written notice, cure any default in the payment of money or performance of any act required under this Agreement, but without any obligation of City to make such payment or perform such act and without waiving any rights of City or relieving Concessionaire from any obligation under this Agreement. All amounts incurred by City, plus ten percent (10%) thereof for administrative overhead as such percentage is approved, established or modified from time to time by the City Council, and all penalties, interest, and costs in connection therewith shall be due and payable by Concessionaire to City on demand together with interest thereon at the rate of one and a half percent (1 1/2%) per month from the date paid by City, plus any collection costs. The receipt for any payment by City on behalf of Concessionaire shall be prima facie evidence that the expense incurred was necessary and reasonable and that such expense was incurred by City on behalf of Concessionaire.

### **SECTION 25 ACCEPTANCE OF CONCESSION AREA**

**25.1** Concessionaire has carefully examined the Concession Area and is satisfied with the current condition, subject to any improvements to be constructed by Concessionaire in accordance with **SECTION 22**. Concessionaire acknowledges that no representation or warranty has been made by City concerning the nature, quality or suitability for Concessionaire's business of the Concession Area or the Airport, or the existence of any Hazardous Materials in, on, upon, under or about the Concession Area or the Airport; and Concessionaire acknowledges that it shall have no rights against City by reason of such matters or any claimed deficiencies therein. Concessionaire accepts the Concession Area "as is", and as being in good, safe and sanitary condition satisfactory for Concessionaire's use.

**25.2** Concessionaire acknowledges that City has made no representations or warranties with respect to the Concession Area, the Airport or this Agreement except as expressly set forth in this Agreement, and no rights, easements or licenses, implied or

otherwise, are or shall be acquired by Concessionaire unless expressly set forth in this Agreement.

## **SECTION 26 RIGHT TO ENTER**

City reserves the right to enter the Concession Area at any and all times for any purpose and the right to inspect the Concession Improvements and Concessionaire's Furnishings, Trade Fixtures and Equipment.

## **SECTION 27 REPRESENTATIONS AND WARRANTIES**

Concessionaire represents, warrants and covenants with respect to this Agreement and any amendment hereto as follows:

**27.1** If Concessionaire executes this Agreement as a corporation, then Concessionaire and the persons executing this Agreement on behalf of Concessionaire represent and warrant that the individuals executing this Agreement on Concessionaire's behalf are duly authorized to do so in accordance with a duly-adopted resolution of the Board of Directors of Concessionaire, a copy of which is delivered to Director on execution hereof, and in accordance with the bylaws of Concessionaire, and that this Agreement is binding upon Concessionaire.

**27.2** Concessionaire is a partnership or joint venture, at least two (2) partners or each of the joint ventures, as the case may be, shall execute this Agreement on behalf of Concessionaire.

**27.3** That there are no unresolved claims or disputes between Concessionaire and City.

**27.4** That Concessionaire shall furnish true and accurate financial statements, records, reports, resolutions, certifications, and other information as may be requested of Concessionaire by City from time to time during the Term of this Agreement.

**27.5** That Concessionaire is in compliance with all local, state, and federal laws related to the Concession Operations.

**27.6** That Concessionaire possesses the necessary experience and qualifications to conduct the Concession Operations at the Airport.

27.7 That all information provided to City in connection with award of the Concession is true and correct in all material respects.

## **SECTION 28 HAZARDOUS MATERIALS - PROHIBITIONS AND RESTRICTIONS**

Concessionaire shall at all times comply with the provisions of this Agreement, including those provisions of **EXHIBIT G**, regarding Hazardous Materials.

## **SECTION 29 MISCELLANEOUS**

### **29.1 Consent**

Whenever in this Agreement the approval or consent of a party is required, such approval or consent shall be in writing and shall be executed by a person having the express authority to grant such approval or consent.

### **29.2 Director's Consent**

The Director shall act reasonably and in good faith in exercising any power to approve, disapprove or consent to any action of Concessionaire pursuant to this Agreement, and the Director shall not arbitrarily or capriciously exercise any such power granted to the Director under this Agreement.

### **29.3 Controlling Law**

Except as federal law may apply, the parties agree that this Agreement shall be governed and construed by and according to the laws of the State of California.

### **29.4 Counterparts**

This Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument.

### **29.5 Entire Agreement/Order of Precedence**

This instrument contains all of the agreements and conditions entered into and made by and between the parties and may not be modified orally, or in any manner, other than by an agreement in writing signed by all the parties hereto or their respective successors-in-interest.

### **29.6 Force Majeure**

Neither party shall be deemed to be in default on account of any Unavoidable

Delay or failure to perform its obligations under this Agreement which results from an act of God, acts of superior governmental authority, a strike, a boycott, a shortage of items, or any other cause beyond the reasonable control of such party. Concessionaire shall not be entitled to any reduction in the MAG or other monetary compensation as a result of terminal evacuations ordered by the Airport or any other governmental authority.

#### **29.7 Gender**

Any reference to the masculine gender shall be deemed to include references to the feminine or neuter gender.

#### **29.8 Headings**

The paragraph headings are not a part of this Agreement and shall have no effect upon the construction or interpretation of any part of the Agreement.

#### **29.9 Resolutions**

If requested by City, Concessionaire shall submit a copy of any corporate resolution that authorizes any director or officer to act on behalf of Concessionaire or that authorizes Concessionaire to enter into this Agreement.

#### **29.10 Severability**

If a court of competent jurisdiction finds or rules that any provision of this Agreement is void or unenforceable, the remaining provisions of this Agreement shall remain in effect.

#### **29.11 Successors and Assigns**

The provisions of this Agreement concerning transfer shall apply to and bind the successors and assigns of the parties hereto.

#### **29.12 Time of Essence**

Time is of the essence of this Agreement and each of its provisions.

#### **29.13 Venue**

In the event that suit shall be brought by either party hereunder, the parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara or, if federal jurisdiction is appropriate, exclusively in the United States District Court of the Northern District of California.

#### **29.14 Concessionaire not an Agent of City**

Concessionaire is not an agent, contractor or employee of City and nothing in this Agreement or any action of Concessionaire shall be construed in any way to constitute Concessionaire as an agent, contractor or employee of City for any purpose.

#### **29.15 Joint and Several**

If there be more than one Concessionaire designated in or signatory to this Agreement, the obligations hereunder imposed upon Concessionaire shall be joint and several; and the term Concessionaire as used in this Agreement shall refer to each and every of said signatory parties, severally as well as jointly.

#### **29.16 Material Considerations**

Each and every term, condition, covenant and provision of this Agreement is and shall be deemed to be a material part of the consideration for City's entry into this Agreement, and any breach hereof by Concessionaire shall be deemed to be a material breach. Each term and provision of this Agreement performable by Concessionaire shall be construed to be both a covenant and a condition.

#### **29.17 Exhibits and Addenda**

All exhibits and addenda referred to herein, and any exhibits or schedules which may from time to time be referred to in any duly executed amendment thereto, are by such reference incorporated herein and shall be deemed a part of this Agreement as if set forth fully herein.

#### **29.18 No Assumption**

The review, approval, inspection, examination or consent of City of or to any item to be reviewed, approved, inspected, examined or consented to by City shall not constitute the assumption of any responsibility by City for either accuracy or sufficiency of any item or the quality or suitability of such item for its intended use, but rather be for the sole purpose of protecting City's interests. Neither Concessionaire nor third parties, including persons claiming under Concessionaire, shall have any rights hereunder resulting therefrom or otherwise.

#### **29.19 Hold Harmless**

Concessionaire shall defend, indemnify and hold City harmless from and against claims for any broker's commissions, finder's fee or other commission or fee relating to the leasing of the Concession Area by anyone claiming by or through Concessionaire.



### **SECTION 30 NOTICES**

All notices, statements, demands, requests, consents, approvals, authorizations, offers, agreements, appointments or designations hereunder by either party to the other, shall be in writing and shall be addressed as follows:

If to City, the same shall be addressed to:

Norman Y. Mineta San José International Airport  
Director of Aviation  
1701 Airport Blvd, Suite B-1130  
San José, CA 95110

or to such other places as City may designate in writing. If to Concessionaire, the same shall be addressed to the address set forth in **SECTION 1**, or to such other place as Director or Concessionaire, respectively, may notify the other in writing, except as provided below. All notices shall be sufficiently given and served upon the other party if sent by first-class U.S. mail, postage prepaid, or by facsimile to the facsimile numbers indicated herein for either party. All termination notices shall be served in accordance with California Code of Civil Procedure Section 1162, as it may be amended or modified.

### **SECTION 31 TITLE VI CLAUSES FOR COMPLIANCE WITH NONDISCRIMINATION REQUIREMENTS**

(Source: Appendix A of Appendix 4 of FAA Order 1400.11, Nondiscrimination in Federally-Assisted Programs at the Federal Aviation Administration)

**Compliance with Nondiscrimination Requirements.** During the performance of the Agreement, the Concessionaire, for itself, its assignees, and successors in interest (hereinafter referred to in this **SECTION 31** as the "Concessionaire") agrees as follows:

1. **Compliance with Regulations:** The Concessionaire (hereinafter includes consultants) will comply with the **Title VI List of Pertinent Nondiscrimination Statutes and Authorities**, as they may be amended from time to time, which are herein incorporated by reference, set forth in **SECTION 32** of this Agreement, and made a part of the Agreement.

2. **Non-discrimination:** The Concessionaire, with regard to the work performed by it during the Agreement, will not discriminate on the grounds of race, color, or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The Concessionaire will not participate directly or indirectly in the discrimination prohibited by the Acts and the Regulations, including employment practices when the Agreement covers any activity, project, or program set forth in Appendix B of 49 CFR part 21.
3. **Solicitations for Subcontracts, Including Procurements of Materials and Equipment:** In all solicitations, either by competitive bidding, or negotiation made by the Concessionaire for work to be performed under a subcontract, including procurements of materials, or leases of equipment, each potential subcontractor or supplier will be notified by the Concessionaire of the Concessionaire's obligations under the Agreement and the Acts and the Regulations relative to Non-discrimination on the grounds of race, color, or national origin.
4. **Information and Reports:** The Concessionaire will provide all information and reports required by the Acts, the Regulations, and directives issued pursuant thereto and will permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the City or the Federal Aviation Administration to be pertinent to ascertain compliance with such Acts, Regulations, and instructions. Where any information required of the Concessionaire is in the exclusive possession of another who fails or refuses to furnish the information, the Concessionaire will so certify to the City or the Federal Aviation Administration, as appropriate, and will set forth what efforts it has made to obtain the information.
5. **Sanctions for Noncompliance:** In the event of Concessionaire noncompliance with the Non-discrimination provisions of the Agreement, the City will impose such Agreement sanctions as it or the Federal Aviation Administration may determine to

be appropriate, including, but not limited to:

- a. Withholding payments to the Concessionaire under the Agreement until the Concessionaire complies; and/or
  - b. Cancelling, terminating, or suspending the Agreement, in whole or in part.
6. **Incorporation of Provisions:** The Concessionaire will include the provisions of paragraphs one through six in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Acts, the Regulations and directives issued pursuant thereto. The Concessionaire will take action with respect to any subcontract or procurement as the City or the Federal Aviation Administration may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, that if the Concessionaire becomes involved in, or is threatened with litigation by a subcontractor, or supplier because of such direction, the Concessionaire may request the City to enter into any litigation to protect the interests of the City. In addition, the Concessionaire may request the United States to enter into the litigation to protect the interests of the United States

### **SECTION 32 TITLE VI LIST OF PERTINENT NONDISCRIMINATION AUTHORITIES**

(Source: Appendix E of Appendix 4 of FAA Order 1400.11, Nondiscrimination in Federally-Assisted Programs at the Federal Aviation Administration)

During the performance of the Agreement, the Concessionaire, for itself, its assignees, and successors in interest (hereinafter referred to in this **SECTION 32** as the "Concessionaire]") agrees to comply with the following non-discrimination statutes and authorities; including but not limited to:

- Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*, 78 stat. 252), (prohibits discrimination on the basis of race, color, national origin);

- 49 CFR part 21 (Non-discrimination In Federally-Assisted Programs of The Department of Transportation—Effectuation of Title VI of The Civil Rights Act of 1964);
- The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 U.S.C. § 4601), (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);
- Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. § 794 *et seq.*), as amended, (prohibits discrimination on the basis of disability); and 49 CFR part 27;
- The Age Discrimination Act of 1975, as amended, (42 U.S.C. § 6101 *et seq.*), (prohibits discrimination on the basis of age);
- Airport and Airway Improvement Act of 1982, (49 USC § 471, Section 47123), as amended, (prohibits discrimination based on race, creed, color, national origin, or sex);
- The Civil Rights Restoration Act of 1987, (PL 100-209), (Broadened the scope, coverage and applicability of Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms “programs or activities” to include all of the programs or activities of the Federal-aid recipients, sub-recipients and contractors, whether such programs or activities are Federally funded or not);
- Titles II and III of the Americans with Disabilities Act of 1990, which prohibit discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 U.S.C. §§ 12131 – 12189) as implemented by Department of

Transportation regulations at 49 CFR parts 37 and 38;

- The Federal Aviation Administration's Non-discrimination statute (49 U.S.C. § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex);
- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which ensures non-discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations;
- Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, and resulting agency guidance, national origin discrimination includes discrimination because of limited English proficiency (LEP). To ensure compliance with Title VI, you must take reasonable steps to ensure that LEP persons have meaningful access to your programs (70 Fed. Reg. at 74087 to 74100);
- Title IX of the Education Amendments of 1972, as amended, which prohibits you from discriminating because of sex in education programs or activities (20 U.S.C. 1681 et seq).

### **SECTION 33 FEDERAL FAIR LABOR STANDARDS ACT (FEDERAL MINIMUM WAGE)**

This Agreement incorporates by reference the provisions of 29 CFR part 201, the Federal Fair Labor Standards Act (FLSA), with the same force and effect as if given in full text. The FLSA sets minimum wage, overtime pay, recordkeeping, and child labor standards for full and part time workers.

The Concessionaire has full responsibility to monitor compliance to the referenced statute or regulation. The Concessionaire must address any claims or disputes that

arise from this requirement directly with the U.S. Department of Labor – Wage and Hour Division.

#### **SECTION 34 OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970**

This Agreement incorporates by reference the requirements of 29 CFR Part 1910 with the same force and effect as if given in full text. Concessionaire must provide a work environment that is free from recognized hazards that may cause death or serious physical harm to the employee. The Concessionaire retains full responsibility to monitor its compliance and their subcontractor's compliance with the applicable requirements of the Occupational Safety and Health Act of 1970 (29 CFR Part 1910). Concessionaire must address any claims or disputes that pertain to a referenced requirement directly with the U.S. Department of Labor – Occupational Safety and Health Administration.

#### **SECTION 35 GENERAL CIVIL RIGHTS PROVISIONS**

The tenant/concessionaire/lessee and its transferee agree to comply with pertinent statutes, Executive Orders and such rules as are promulgated to ensure that no person shall, on the grounds of race, creed, color, national origin, sex, age, or disability be excluded from participating in any activity conducted with or benefiting from Federal assistance.

This provision obligates the tenant/concessionaire/lessee or its transferee for the period during which Federal assistance is extended to the airport through the Airport Improvement Program.

In cases where Federal assistance provides, or is in the form of personal property; real property or interest therein; structures or improvements thereon, this provision obligates the party or any transferee for the longer of the following periods:

- (a) The period during which the property is used by the airport sponsor or any transferee for a purpose for which Federal assistance is extended, or for another purpose involving the provision of similar services or benefits; or

- (b) The period during which the airport sponsor or any transferee retains ownership or possession of the property.


### **SECTION 36 DISADVANTAGED BUSINESS ENTERPRISES**

**Contract Assurance (§ 26.13)** - The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy, as the recipient deems appropriate.

**Prompt Payment (§26.29)** - The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than ten (10) days from the receipt of each payment the prime contractor receives from City. The prime contractor agrees further to return retainage payments to each subcontractor within ten (10) days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the City. This clause applies to both DBE and non-DBE subcontractors.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement by their authorized officers on the dates set forth below.

APPROVED AS TO FORM:

By:   
KEVIN FISHER  
Chief Deputy City Attorney

"CITY"


CITY OF SAN JOSE, a municipal  
corporation of the State of California

By: \_\_\_\_\_  
TONI J. TABER, CMC  
City Clerk

Dated: \_\_\_\_\_

"CONCESSIONAIRE"

ALD DEVELOPMENT CORP.,  
a Delaware corporation, authorized to do  
business in the State of California as ALD  
DEVELOPMENT CORP., WHICH WILL  
DO BUSINESS IN CALIFORNIA AS THE  
CLUB AT SJC

Signature 

Print Name Nancy J. Kipp

Title SUP ALD

Date 10/30/17



## CORPORATE SECRETARY CERTIFICATE

This certificate shall be executed by the secretary or assistant secretary of the corporation.

I, D. MARION WOOD certify that I  
Name of Secretary or Assistant Secretary

am the ☒ Secretary or ☐ Assistant Secretary of the corporation named in the

attached agreement; that NANCY J. KNIPP  
Name of Person that Signed Agreement

signed the agreement on behalf of the corporation as the SENIOR VICE PRESIDENT & OFFICER  
Title of Person that Signed the Agreement

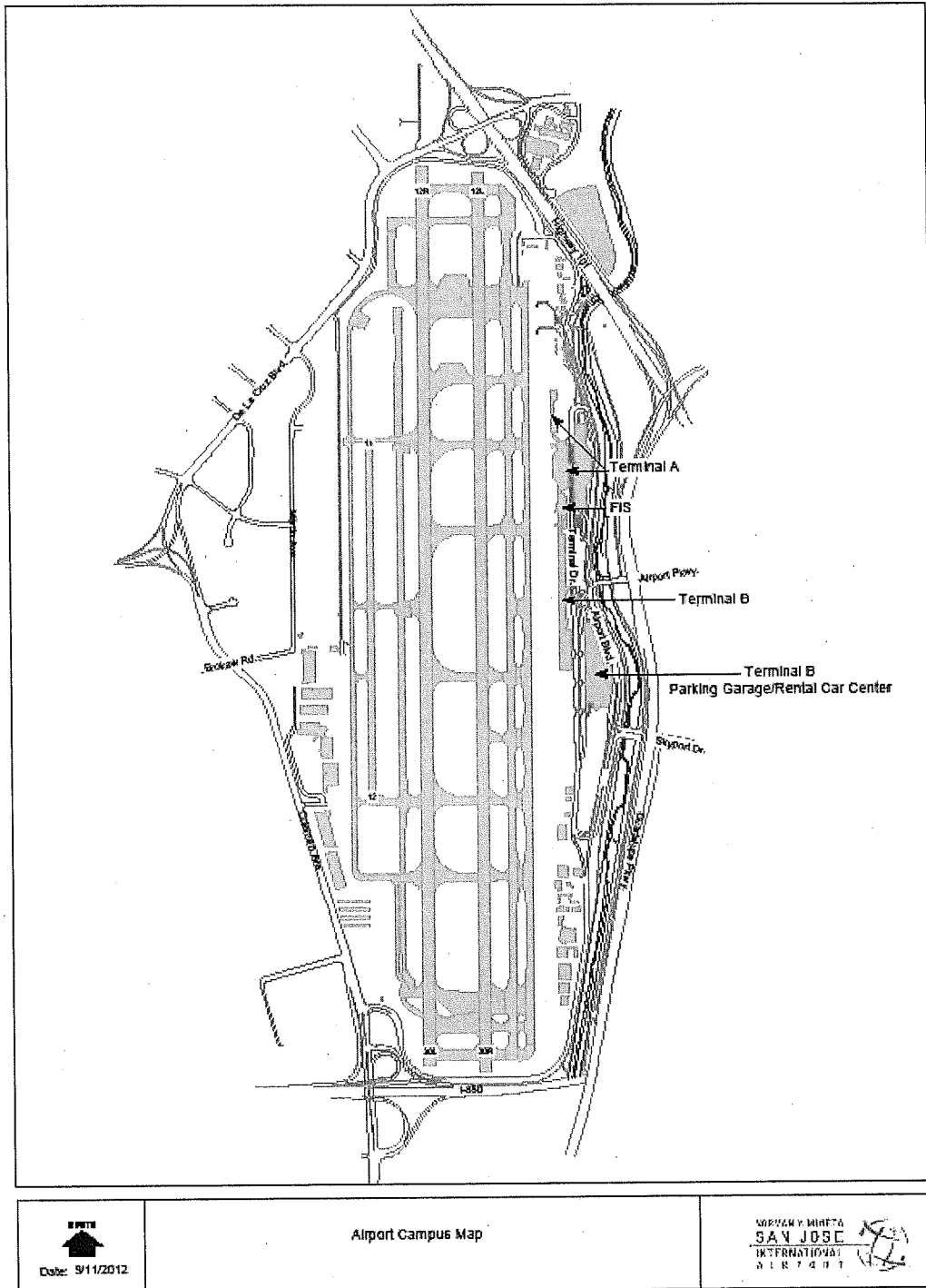
of the corporation; and that the agreement was duly signed for and on behalf of  
the corporation by authority of its Board of Directors, and is within the scope of its  
corporate powers.

D. Marion Wood  
Signature of Secretary or Assistant Secretary

\_\_\_\_\_  
Corporate Seal

October 27, 2017  
Date

## EXHIBIT A - AIRPORT CAMPUS MAP

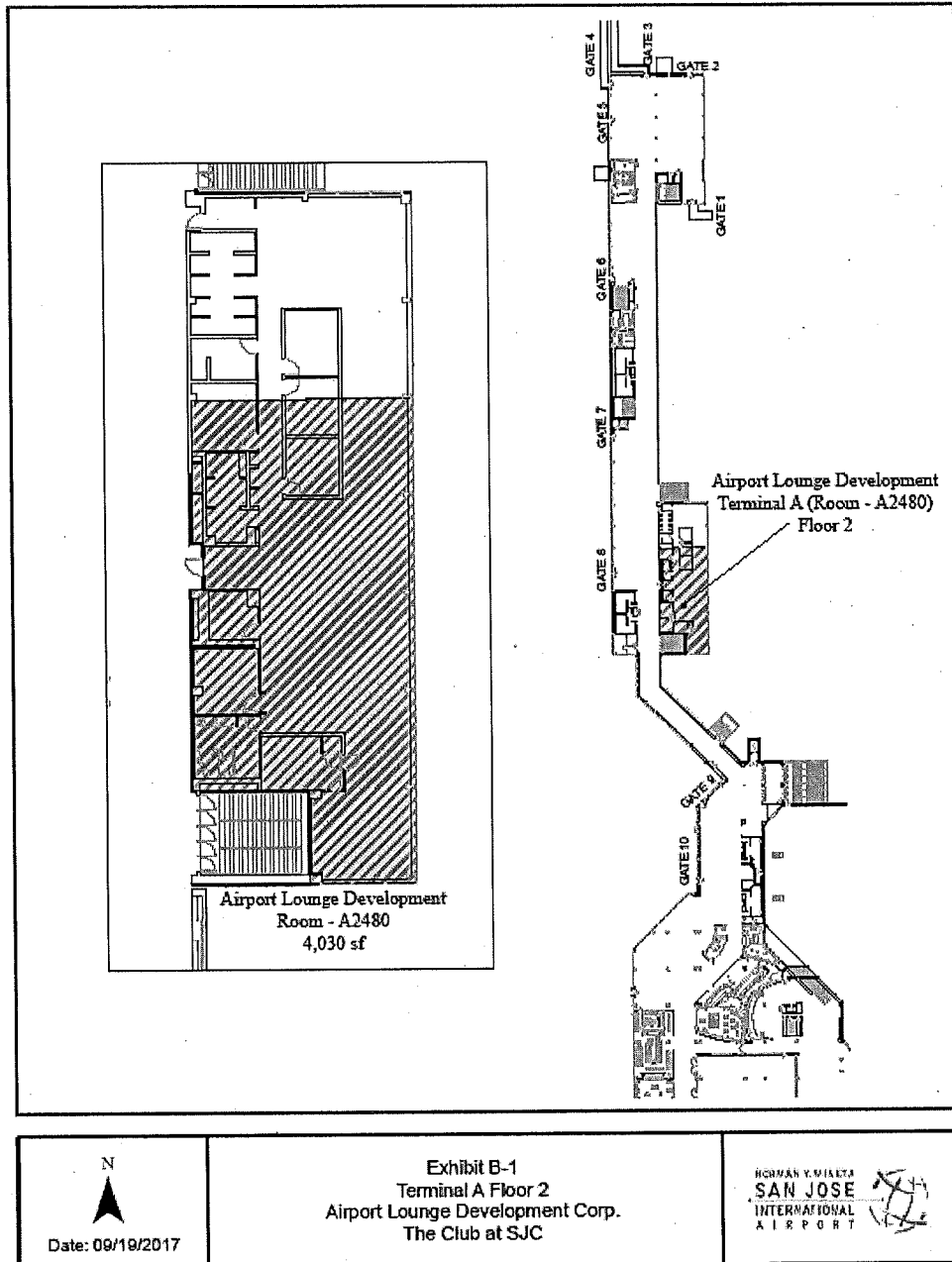


### EXHIBIT A Airport Campus Map

ALD Development Corp dba The Club at SJC  
Document No. 10612-CA-17  
T-24416.008 / ALD 10612-CA-17 FINAL 10-03-17.doc

**DRAFT--Contact the Office of the City Clerk at (408) 535-1260 or [CityClerk@sanjoseca.gov](mailto:CityClerk@sanjoseca.gov) for final document.**

## EXHIBIT B – CONCESSION AREA



### EXHIBIT B Concession Area

ALD Development Corp dba The Club at SJC  
Document No. 10612-CA-17  
T-24416.008 / ALD 10612-CA-17\_FINAL\_10-03-17.doc

RD:KF:CAG  
10/3/2017

## EXHIBIT C

**(Intentionally Omitted)**

EXHIBIT C  
Intentionally Omitted

ALD Development Corp dba The Club at SJC  
Document No. 10612-CA-17  
T-24416.008 / ALD 10612-CA-17\_FINAL\_10-03-17.doc

**EXHIBIT D**  
**LIST OF PRODUCTS AND PRODUCT PRICE LIST**

The Products and Product Prices will be reviewed and finalized by the Director at the time that the Concession Location completes construction.

EXHIBIT D  
Price List

ALD Development Corp dba The Club at SJC  
Document No. 10612-CA-17  
T-24416.008 / ALD 10612-CA-17\_FINAL \_10-03-17.doc

EXHIBIT E

SAMPLE LETTER OF CREDIT

\_\_\_\_ (Bank Name) \_\_\_\_\_<sup>1</sup>  
\_\_\_\_ (Bank Address) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

IRREVOCABLE STANDBY LETTER OF [Date] CREDIT<sup>2</sup> NO. \_\_\_\_\_

BENEFICIARY:

CITY OF SAN JOSE, CALIFORNIA  
1701 AIRPORT BLVD, SUITE B-1170  
SAN JOSE, CALIFORNIA 95110

APPLICANT:

\_\_\_\_ (Concessionaire Name) \_\_\_\_\_  
\_\_\_\_ (Concessionaire Address) \_\_\_\_\_  
\_\_\_\_\_

Sir or Madam OR To Whom It May Concern:

We hereby open our irrevocable standby letter of credit no. \_\_\_\_\_ in your favor for account of the applicant for an amount not to exceed in the aggregate U.S. dollars \_\_\_\_\_ AND 00/100 U.S. \$ \_\_\_\_\_ .00<sup>3</sup> available by your draft(s) drawn at sight<sup>4</sup> on us accompanied by:

Your written statement purportedly signed by an authorized representative of City of San Jose, California showing the name and title of the signer and reading as follows:

"The undersigned, a duly authorized representative of City of San Jose, California does hereby certify that \_\_\_\_\_ (Concessionaire Name) \_\_\_\_\_ has been in default of contractual obligations with respect to its agreement(s) with the City of San Jose, California, entitled<sup>5</sup> \_\_\_\_\_.

This letter of credit sets forth in full the terms of our undertaking and such undertaking shall not in any way be modified, amended or amplified by reason of our reference to any agreement or instrument referred to herein or in which this letter of credit is referred

EXHIBIT E  
Sample Letter of Credit

ALD Development Corp dba The Club at SJC  
Document No. 10612-CA-17  
T-24416.008 / ALD 10612-CA-17\_FINAL \_10-03-17.doc

to. Any such agreement or instrument shall not be deemed incorporated herein by reference.

Draft(s) must be marked "drawn under \_\_\_\_\_(Bank Name)\_\_\_\_\_ Letter Of Credit No. \_\_\_\_\_"

Draft(s) must be presented to \_\_\_\_\_(Bank Name)\_\_\_\_\_ located at and Address)\_\_\_\_\_ Attn: \_\_\_\_\_

\_\_\_\_\_not later than [date] (the "expiration date") or any such automatically extended expiration date as provided herein below. Partial draws are allowed.<sup>6</sup>

It is a condition of this standby letter of credit that the expiration date shall be automatically extended, without amendment, for periods of one year from each successive expiration date, unless, no less than thirty (30) days before the then current expiration date, we notify you in writing by registered mail (return receipt) that this letter of credit will not be extended beyond the then current expiration date<sup>7</sup>, in which event the City of San Jose may draw the full amount of the letter of credit. Any such notice shall be deemed received by you on the date such notice is deposited in the U.S. mails, registered (return receipt), postage prepaid.

We hereby agree with you that draft(s) drawn under and in compliance with the terms and conditions of this letter of credit shall be duly honored on due presentation to \_\_\_\_\_(Bank Name)\_\_\_\_\_.<sup>8</sup>

Except as otherwise expressly stated herein, this credit is issued subject to [either of the following is acceptable: (a) the Uniform Customs And Practice For Documentary Credits (2007 Revision), International Chamber Of Commerce Publication No. 600; or (b) the International Standby Practices ISP98, as published by the International Chamber of Commerce Publication No. 590].<sup>9</sup>

Communications to us with respect to this letter of credit must be in writing and shall be addressed to us at \_\_\_\_\_(Bank Name)\_\_\_\_\_ and Address)\_\_\_\_\_ Attn: \_\_\_\_\_, specifically referring thereon to this letter of credit by number.

Authorized signature

EXHIBIT E  
Sample Letter of Credit

**EXHIBIT F - INSURANCE**  
**CONCESSIONAIRE'S REQUIRED INSURANCE COVERAGE**

**CONCESSIONAIRE's Insurance Coverage**

At all times during this Lease CONCESSIONAIRE, at CONCESSIONAIRE 'S sole cost and expense, shall procure and maintain insurance against claims for injuries to persons or damages to property which may arise from, or in connection with the CONCESSIONAIRE'S operation in and use of the Premises.

**A. Minimum Scope and Limits of Insurance**

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence" form CG 0001) with a minimum limit of not less than \$5,000,000 combined single limit for bodily injury and property damage and coverage including premises operations, products and completed operations, personal injury (coverage for A, B, & C), blanket contractual liability, Fire Legal Liability, and liquor legal liability (if the sale of alcohol).
2. Workers' Compensation insurance as required by the California Labor Code and \$1,000,000 Employers Liability insurance.
3. The coverage provided by Commercial Automobile Insurance coverage described in Insurance Services Office Form Number CA 0001. Coverage shall be included for all owned, non-owned and hired automobiles with \$1,000,000 combined single limit per accident for bodily injury and property damage.
4. Property and casualty insurance against all risks of loss to any betterments, Concessionaire's furniture, fixtures, stock and equipment, including fixtures, improvements and betterments installed by

EXHIBIT F  
Insurance



Concessionaire, in the leased premises for a limit of full replacement cost with no coinsurance penalty provision.

5. Business Interruption and Extra Expense insurance in an amount covering the City only for loss of income and extra expense for a period up to twelve months with a minimum limit of \$1,000,000 per occurrence.
6. On or before 90 days commencement of any construction activities: CONCESSIONAIRE shall ensure its contractors, subcontractors and consultants have the same required insurance, of the same scope, limits and endorsements, as CONCESSIONAIRE is required to have as well as Builders Risk during course of construction, build outs, remodels or CONCESSIONAIRE improvements and betterments. City shall be named as a loss payee on the policy

**B. Deductibles and Self-Insured Retentions**

Any deductibles or self-insured retentions must be declared to, and approved by CITY's Risk Manager. At the option of CITY, either; the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects CITY, its officer, employees, agents and Concessionaires; or Concessionaire shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the CITY's Risk Manager.

**C. Other Insurance Provisions**

The general liability policy is to contain, or be endorsed to contain, the following provisions:

1. Commercial General Liability and Automobile Liability:
  - a. The City of San José, its officers, employees, agents and contractors are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, Concessionaire; products and completed operations of Concessionaire; premises owned, leased or used by Concessionaire; and automobiles owned, leased, hired or borrowed by Concessionaire. The coverage shall contain no special

EXHIBIT F  
Insurance

limitations on the scope of protection afforded to CITY, its officers, employees, agents and Concessionaires.

- b. Concessionaire's insurance coverage shall be primary insurance as respects CITY, its officers, employees, agents and contractors. Any insurance or self-insurance maintained by CITY, its officers, employees, agents or contractors shall be excess of Concessionaire's insurance and shall not contribute with it.
- c. Any failure to comply with reporting provisions of the policies by Concessionaire shall not affect coverage provided CITY, its officers, employees, agents, or contractors.
- d. Coverage shall state that Concessionaire's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- e. Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, agents and contractors

2. **Workers' Compensation and Employers' Liability**

Coverage shall be endorsed to state carrier waives its rights of subrogation against the City, its officials, employees, agents and contractors.

3. **All Coverages**

Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in limits except after thirty (30) days' prior written notice has been given to CITY, except for that ten (10) days' prior written notice shall apply in the event of cancellation for non-payment of premium.

**D. Acceptability of Insurers**

Insurance is to be placed with insurers acceptable to CITY's Risk Manager.

**E. Verification of Coverage**

EXHIBIT F  
Insurance

Concessionaire shall furnish CITY with certificates of insurance and with original endorsements affecting coverage required by this Agreement. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be mailed to the following address or any subsequent address as may be directed in writing by the Risk Manager:

City of San José  
Risk Management  
200 East Santa Clara Street, 14th Floor Tower  
San José, CA 95113-1905

**F. Subconcessionaires**

Concessionaire shall include all subconcessionaires as insured under its policies or shall obtain separate certificates and endorsements for each subconcessionaire with a minimum limit of not less than \$1,000,000 combined single limit or bodily injury and property damage for the commercial general liability policy.

**G. Review of Coverage**

These insurance requirements shall be subject to periodic review by City's Risk Manager. Should the Risk Manager require any change in any coverage such change shall be communicated in writing to Concessionaire and Concessionaire shall comply with the said change within thirty (30) days of the date of receipt of the notice.

EXHIBIT F  
Insurance

### **CONCESSIONAIRE's Contractor's Insurance Coverage**

Concessionaire shall require any or its contractors engaging in the construction of Concession Improvements or performing work on premises to provide all the required insurance listed herein. On or before commencement of construction, Concessionaire shall provide City's Risk Manager with written proof of such insurance and with notice of the name of each contractor providing it, and the work to be performed.

#### **B. Minimum Scope and Limits of Insurance**

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence" form CG 0001) with a minimum limit of not less than \$5,000,000 combined single limit for bodily injury and property damage and coverage including premises operations, products and completed operations, personal injury (coverage for A, B, & C), blanket contractual liability, Fire Legal Liability, and liquor legal liability (if the sale of alcohol).
2. Workers' Compensation insurance as required by the California Labor Code and \$1,000,000 Employers Liability insurance.
3. The coverage provided by Commercial Automobile Insurance coverage described in Insurance Services Office Form Number CA 0001. Coverage shall be included for all owned, non-owned and hired automobiles with \$1,000,000 combined single limit per accident for bodily injury and property damage.
4. Property and casualty insurance against all risks of loss to any betterments, Concessionaire's furniture, fixtures, stock and equipment, including fixtures, improvements and betterments installed by Concessionaire, in the leased premises for a limit of full replacement cost with no coinsurance penalty provision.

EXHIBIT F  
Insurance

5. On or before 90 days commencement of any construction activities: CONCESSIONAIRE shall ensure its contractors, subcontractors and consultants have the same required insurance, of the same scope, limits and endorsements, as CONCESSIONAIRE is required to have as well as Builders Risk during course of construction, build outs, remodels or CONCESSIONAIRE improvements and betterments. City shall be named as a loss payee on the policy.
6. Professional Liability Errors and Omissions as is appropriate to consultants profession; Architects' and engineers' coverage is to be endorsed to include contractual liability. *(For Contractors or Subcontractors performing any type of design or engineering services or other professional services including but not limited to, surveying, sampling, testing and similar activities)*

**B. Deductibles and Self-Insured Retentions**

Any deductibles or self-insured retentions must be declared to, and approved by CITY's Risk Manager. At the option of CITY, either; the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects CITY, its officer, employees, agents and Concessionaires; or Concessionaire shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the CITY's Risk Manager.

**C. Other Insurance Provisions**

The general liability policy is to contain, or be endorsed to contain, the following provisions:

1. Commercial General Liability and Automobile Liability:
  - a. The City of San José, its officers, employees, agents and contractors are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, Concessionaire; products and completed operations of Concessionaire; premises owned, leased or used by Concessionaire; and automobiles owned, leased, hired or borrowed

EXHIBIT F  
Insurance

by Concessionaire. The coverage shall contain no special limitations on the scope of protection afforded to CITY, its officers, employees, agents and Concessionaires.

- b. Concessionaire's insurance coverage shall be primary insurance as respects CITY, its officers, employees, agents and contractors. Any insurance or self-insurance maintained by CITY, its officers, employees, agents or contractors shall be excess of Concessionaire's insurance and shall not contribute with it.
- c. Any failure to comply with reporting provisions of the policies by Concessionaire shall not affect coverage provided CITY, its officers, employees, agents, or contractors.
- d. Coverage shall state that Concessionaire's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- e. Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, agents and contractors

2. Workers' Compensation and Employers' Liability

Coverage shall be endorsed to state carrier waives its rights of subrogation against the City, its officials, employees, agents and contractors.

3. All Coverages

Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in limits except after thirty (30) days' prior written notice has been given to CITY, except for that ten (10) days' prior written notice shall apply in the event of cancellation for non-payment of premium.

**D. Acceptability of Insurers**

Insurance is to be placed with insurers acceptable to CITY's Risk Manager.

EXHIBIT F  
Insurance

**E. Verification of Coverage**

Concessionaire shall furnish CITY with certificates of insurance and with original endorsements affecting coverage required by this Agreement. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be mailed to the following address or any subsequent address as may be directed in writing by the Risk Manager:

City of San José  
Risk Management  
200 East Santa Clara Street, 14th Floor Tower  
San José, CA 95113-1905

**F. Subcontractors**

Concessionaire or contractor shall include all subcontractors as insured under its policies or shall obtain separate certificates and endorsements for each subcontractor.

**G. Review of Coverage**

These insurance requirements shall be subject to periodic review by City's Risk Manager. Should the Risk Manager require any change in any coverage such change shall be communicated in writing to Concessionaire and Concessionaire shall comply with the said change within thirty (30) days of the date of receipt of the notice.

EXHIBIT F  
Insurance

## EXHIBIT G - HAZARDOUS MATERIALS

In addition to complying with the provisions set forth earlier in this Agreement, Concessionaire agrees to the following provisions:

1. Notification of Release. Concessionaire shall be solely and fully responsible for notifying the appropriate public agencies of any Hazardous Material release which occurs on the Concession Area, or is caused by or results from the activities of Concessionaire, Concessionaire's officers, agents, employees, contractors, permittees or invitees on the Airport other than the Concession Area. Concessionaire shall immediately notify City of any Hazardous Material release which occurs on the Concession Area, regardless of whether the release was caused by or results from Concessionaire's activities or is in a quantity that would otherwise be reportable to a public agency, or which occurs on the Airport other than the Concession Area and is caused by or results from the activities of Concessionaire, Concessionaire's officers, agents, employees, contractors, permittees or invitees, regardless of whether the release is in a quantity that would otherwise be reportable to a public agency.
2. Liability. Concessionaire shall be solely and fully responsible and liable for:
  - (a) storage, use or disposal of Hazardous Materials on the Airport, by Concessionaire, Concessionaire's officers, agents, employees, contractors, permittees or invitees;
  - (b) any Hazardous Material release which is caused by or results from the activities of Concessionaire, Concessionaire's officers, agents, employees, contractors, permittees or invitees on the Airport;
  - (c) any Hazardous Material release that commences during the term of the Agreement on the Concession Area, unless the release was caused by the sole negligence or willful misconduct of City, City's officers, agents, employees, contractors or permittees or solely by migration of Hazardous Materials onto the Concession Area.
3. Prevention of Release. Concessionaire shall take all necessary precautions to prevent its activities from causing any Hazardous Material release to occur on the Airport, including, but not limited to any release into soil, groundwater, or the City's sewage or storm drainage system.
4. Obligation to Investigate and Remediate. Concessionaire, at Concessionaire's sole cost and expense, shall promptly investigate and remediate, in accordance with requirements of all applicable Environmental Laws:

Exhibit G - 1  
Hazardous Materials

ALD Development Corp dba The Club at SJC  
Document No. 10612-CA-17  
T-24416.008 / ALD 10612-CA-17\_FINAL \_10-03-17.doc



(a) any release or danger of release of Hazardous Material on the Airport other than the Concession Area, including, but not limited to, into soil or groundwater, or the City's sewage or storm drainage system, which, was caused, or results, in whole or in part from the activities of Concessionaire, Concessionaire's officers, agents, employees, contractors, permittees or invitees;

(b) any release or danger of release of Hazardous Material which commenced during the term of this Agreement and which is discovered on the Concession Area, unless the release was caused by the sole negligence or willful misconduct of City, City's officers, agents, employees, contractors or permittees or solely by migration of Hazardous Materials onto the Concession Area.

In addition to all other rights and remedies of City hereunder, if Concessionaire does not promptly commence, and diligently pursue remediation of any such release, or danger of release, of Hazardous Materials, City, in its discretion, may pay, to have same remediated and Concessionaire shall reimburse City within fifteen (15) business days of City's demand for payment. The failure to commence remediation and provide City with a schedule for diligent completion of the remediation within thirty (30) days after discovery of such release, or danger of release, of Hazardous Material shall constitute prima facie evidence of failure to promptly commence remediation. The demand for payment by City shall be prima facie evidence that the expense incurred was necessary and reasonable and that such expense was incurred by City on behalf of Concessionaire.

5. Indemnification. Concessionaire shall defend, indemnify and hold City harmless from and against all loss, damage, liability (including all foreseeable and unforeseeable consequential damages) and expense (including, without limitation, the cost of any required cleanup and remediation of the Hazardous Materials) which City may sustain as a result of:

(a) storage, use or disposal of Hazardous Materials on the Airport by Concessionaire, Concessionaire's officers, agents, employees, contractors, permittees or invitees

(b) any Hazardous Material release on the Airport other than the Concession Area, including, but not limited to any release into soil or groundwater, or the City's sewage or storm drainage system, which is caused by or results from the activities of Concessionaire, Concessionaire's officers, agents, employees, contractors, permittees or invitees; or

(c) any Hazardous Material release which commenced during the term of this Agreement on the Concession Area, including, but not limited to any release into soil or groundwater, except a release caused by the sole negligence or willful misconduct of City, City's officers, agents, employees, contractors or permittees or by migration of Hazardous Materials onto the Concession Area.

Exhibit G - 2  
Hazardous Materials

6. Release of Claims Against City. Concessionaire releases, acquits and forever discharges City from any and all claims, actions, causes of action, demands, rights, damages, costs, including but not limited to loss of use, lost profits, or expenses, which Concessionaire may now have, or which may hereafter accrue on account of or in any way growing out of all known and unknown, foreseen and unforeseen bodily and personal injuries and property damage, and the consequences thereof resulting or arising out of the presence or cleanup of any Hazardous Material on the Airport. This release shall not apply to any claims for contribution that Concessionaire may have against City in the event that Concessionaire incurs any cost in undertaking any cleanup of Hazardous Material from the Airport ordered by a governmental agency, to the extent that the cleanup order and costs result from a release of Hazardous Material for which Concessionaire is not responsible and liable under this Agreement. Concessionaire understands and agrees that Concessionaire is hereby waiving all such rights under Section 1542 of the Civil Code of California and any similar law of any state or territory of the United States. Said section reads as follows:

"1542. Certain claims not affected by general release. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

7. (a) Cessation of Activities. Concessionaire shall cease its activities on the Concession Area and the Airport, to the extent requested by City, if City determines, in its sole discretion, that such cessation is necessary to investigate, cure or remediate any release of Hazardous Materials. Concessionaire shall not recommence its activities on the Concession Area or the Airport, as appropriate, until notified by City that such release or danger of release of Hazardous Material has been investigated, cured and remediated in a manner satisfactory to the City.

(b) Abatement of Fees and Charges on Concession Area. Concessionaire shall not be entitled to an abatement of any fees or charges due under this Agreement after Concessionaire has been requested to cease activities for investigation, cure or remediation of Hazardous Materials on the Concession Area, except if the presence of Hazardous Materials on the Concession Area was due to the sole negligence or willful misconduct of City, City's officers, agents, employees, contractors or permittees or by migration of Hazardous Materials onto the Concession Area.

(c) Abatement of Fees and Charges on Airport other than Concession Area. Concessionaire shall not be charged fees or charges for use of the Airport other than the Concession Area, to the extent that City requests Concessionaire to cease activities on that portion of the Airport due to City's efforts to investigate, cure or remediate contamination, unless the release is one for which Concessionaire is responsible under this Agreement.

Exhibit G - 3  
Hazardous Materials

ALD Development Corp dba The Club at SJC  
Document No. 10612-CA-17  
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8. Records and Inspections.

(a) Concessionaire shall maintain, during the term of this Agreement and for a period of not less than four (4) years after the expiration or termination of this Agreement, or for any longer period of time required by any applicable law, regulation, policy, order or decree, separate and accurate daily records pertaining to the use, handling and disposal of any Hazardous Material(s) by Concessionaire, Concessionaire's officers, agents, employees, contractors, permittees or invitees on or from the Airport.

(b) Upon request by City, Concessionaire shall furnish City with such daily records, and such other documentation or reports as Director, from time to time, and at any time during the term of this Agreement, may reasonably require pertaining to the use, handling and disposal of any Hazardous Material(s) by Concessionaire, Concessionaire's officers, agents, employees, contractors, permittees or invitees on or from the Airport.

(c) After the expiration of four (4) years following the termination of this Agreement, Concessionaire may destroy the records pertaining to the use, handling and disposal of any Hazardous Material(s) by Concessionaire, Concessionaire's officers, agents, employees, contractors, permittees or invitees on or from the Airport, provided, however, that Concessionaire shall notify City no later than sixty (60) days prior to any proposed destruction of any of said records and shall upon request by City within thirty days (30) days after such notice is received, deliver copies of said records to City.

9. No Third Party Beneficiaries.

Nothing contained in this Exhibit shall be construed as conferring any benefit on any person not a party to this Agreement, nor as creating any right in any person not a party to this Agreement to enforcement of any obligation created under this Agreement.

10. Survival of Obligations.

Concessionaire's obligations under this Agreement shall survive the expiration or earlier revocation or suspension of this Agreement.

Exhibit G - 4  
Hazardous Materials

ALD Development Corp dba The Club at SJC  
Document No. 10612-CA-17  
T-24416.008 / ALD 10612-CA-17\_FINAL\_10-03-17.doc

RD:KF:CAG  
10/3/2017

**EXHIBIT H**  
**INTENTIONALLY OMITTED**

Exhibit H  
Intentionally Omitted

ALD Development Corp dba The Club at SJC  
Document No. 10612-CA-17  
T-24416.008 / ALD 10612-CA-17\_FINAL \_10-03-17.doc

**DRAFT--Contact the Office of the City Clerk at (408) 535-1260 or [CityClerk@sanjoseca.gov](mailto:CityClerk@sanjoseca.gov) for final document.**

**EXHIBIT H1**  
**LABOR PEACE ASSURANCE/EMPLOYEE WORK ENVIRONMENT**  
**(see attached)**

**City of San José  
Airport Living Wage Ordinance  
Labor Peace Assurance/  
Employee Work Environment**

I, Alvin Brown, an authorized representative of GTMS West, LLC (Airport Business), attach a copy of the following existing or planned programs that demonstrate a good work environment that prevents the disruption in services due to disputes with employees.

- ☒ Copy of Company Employee Handbook that includes information such as: terms of employment; performance appraisals; employee responsibilities; non-discrimination and anti-harassment policy; complaint resolution procedures; working hours and conditions; breaks; assignment of responsibilities; general rules of conduct; prohibited activities; disciplinary procedure; leaves of absence; drug and alcohol use; appearance, grooming and uniform policy; health and safety.
- ☐ Joint Labor-Management Committee
- ☐ Collective Bargaining Agreement
- ☐ Labor Neutrality Provision
- ☐ Card Check Provision
- ☐ Any other information, plan, benefits or programs undertaken by Airport Business to attract and retain qualified employees and assist in providing uninterrupted service through the Airport Business's workplace conditions and practices.

The above listed benefits and complaint procedure(s) will be maintained during the period of time work is performed at the Norman Y. Mineta San Jose Municipal Airport. It is GTMS West, LLC (name of Airport Business) intent to ensure that essential services and labor for which it has been contracted will be provided efficiently and without interruption.

Signature

President

Title

GTMS West, LLC

Name of Airport Business

September 26, 2017

Date

## EMPLOYEE BASIC BENEFITS

1. Indicate the basic benefits your workers receive.

Years of Service	# of Vacation Days	# of Sick Days	# of Personal Days
After 1 year			10
After 5 years			15
After 10 years			20

Other: (Explain.)

2. Indicate the paid holidays your workers receive by placing check mark to the left of each.

<input checked="" type="checkbox"/> New Year's Day	<input checked="" type="checkbox"/> Independence Day	<input checked="" type="checkbox"/> Christmas
<input type="checkbox"/> Martin Luther King Jr. Day	<input checked="" type="checkbox"/> Labor Day	Floating Holiday
<input type="checkbox"/> Washington's Birthday	Veterans' Day	Other:
<input checked="" type="checkbox"/> Memorial Day	<input checked="" type="checkbox"/> Thanksgiving Day	Other:

3. Do you allow for unpaid leave? ☒ Yes, please briefly explain policy. ☐ No

GTMS West complies with the Family and Medical Leave Act of 1993 (FMLA). The federal Family & Medical Leave Act of 1993 as amended in 2008 requires employers with 50 or more team members to provide eligible team members with unpaid leave. There are two types of leave available; including, the basic 12-week leave entitlement (Basic FMLA Leave), as well as the military family leave entitlements (Military Family Leave) described in this policy.

In addition to FMLA leave, you may also be eligible for other leave under state law.

**COMPLIANCE WITH STATE AND FEDERAL WORKPLACE STANDARDS**

Have any of the following State or Federal Regulatory agencies obtained final orders or final judgments finding a violation by your company of State or Federal law relating to the treatment of your employees?

1. California Department of Fair Employment and Housing (DFEH).

☒ **NO**, our company has not had any final judgment or administrative order.

☐ **YES**, our company has had final judgment(s) or administrative order(s).

Date of entry of final judgment or order: \_\_\_\_\_

Agency that obtained the order: \_\_\_\_\_

☐ Attach a description of the nature of violation.

2. California Department of Industrial Relations (Cal OSHA).

☒ **NO**, our company has not had any final judgment(s) or administrative order(s).

☐ **YES**, our company has had final judgment(s) or administrative order(s).

Date of entry of final judgment or order: \_\_\_\_\_

Agency that obtained the order: \_\_\_\_\_

☐ Attach a description of the nature of violation.

3. California Department of Industrial Relations (Minimum Wage, hours or working conditions) Labor Board

☒ **NO**, our company has not had any final judgment(s) or administrative order(s).

☐ **YES**, our company has had final judgment(s) or administrative order(s).

Date of entry of final judgment or order: \_\_\_\_\_

Agency that obtained the order: \_\_\_\_\_

☐ Attach a description of the nature of violation.



## EXHIBIT I MONTHLY ACTIVITY REPORT

### NORMAN Y. MINETA INTERNATIONAL AIRPORT Monthly Revenue Report Form

Company Name ALD Development Corp.  
The Club at SJC  
Address 5204 Tennyson Pkwy, Ste 500  
Plano, TX 75024  
Contact Person \_\_\_\_\_  
Telephone 972 635 0285

#### REPORTING INFORMATION

Activity Month & Year \_\_\_\_\_

	Rent	Joint Marketing Fund	Difference in Rent to pay
Gross Revenue	333,129.00	333,129.00	0.00
x Reporting Percentage	10%	0.50%	
10% Revenue	33,312.90	1,665.65	18,852.22

Agreement Terms \_\_\_\_\_  
Location & Term \_\_\_\_\_  
Effective Dates \_\_\_\_\_ March  
Annual MAG \$ 173,528.00  
Monthly \$ 14,460.68 \$ 14,460.68

August-2017 Rent Difference	\$ 18,852.22
August-2017 Joint Marketing Fund	\$ 1,665.65
Total	\$ 20,517.87

The foregoing is certified to be true and correct to the best of our knowledge.

Signature \_\_\_\_\_

Title: Staff Accountant

Date: September 7, 2017

Prepared by:

Contact Name: Oswaldo Zurita

Contact Phone: 469 467 1508

Exhibit I  
Monthly Activity Report

ALD Development Corp dba The Club at SJC  
Document No. 10612-CA-17  
T-24416.008 / ALD 10612-CA-17\_FINAL\_10-03-17.doc

RD:KF:CAG  
10/3/2017

**EXHIBIT J**  
**INTENTIONALLY OMITTED**

Exhibit J  
Intentionally Omitted

ALD Development Corp dba The Club at SJC  
Document No. 10612-CA-17  
T-24416.008 / ALD 10612-CA-17\_FINAL \_10-03-17.doc

**DRAFT--Contact the Office of the City Clerk at (408) 535-1260 or [CityClerk@sanjoseca.gov](mailto:CityClerk@sanjoseca.gov) for final document.**

## EXHIBIT K

### AIRPORT CONCESSION DISADVANTAGED BUSINESS ENTERPRISE PROGRAM REQUIREMENTS

#### POLICY STATEMENT

The City of San José has established an Airport Concession Disadvantaged Business Enterprise (ACDBE) Program in accordance with regulations of the U. S. Department of Transportation (DOT), 49 CFR Part 23. A copy of the ACDBE Program is available from the Office of Equality Assurance, 200 East Santa Clara Street, Fifth Floor, San José, CA 95113, 408-535-8455 and on the San José Airport website. The City receives federal financial assistance from the DOT, and as a condition of receiving this assistance, the City assures that it will comply with 49 CFR Part 23.

It is the policy of the City of San José to ensure that Disadvantaged Business Enterprises (ACDBEs), as defined in Part 23, have an equal opportunity to receive and participate in Airport Concessions. It is also our Policy to:

- Ensure nondiscrimination in the award and administration of Airport Concessions;
- Create a level playing field on which ACDBEs can compete fairly for Airport Concessions;
- Ensure that the ACDBE Program is narrowly tailored in accordance with applicable law;
- Ensure that only firms that fully meet 49 CFR Part 23 eligibility standards are permitted to participate as ACDBEs;
- Help remove barriers to the participation of ACDBEs in Airport Concessions; and
- Assist the development of firms that can compete successfully in the marketplace outside the ACDBE Program.

The City's Director of the Office of Equality Assurance has been delegated as the ACDBE Liaison Officer. In that capacity, the Director is responsible for implementing all aspects of the ACDBE Program. Implementation of the ACDBE 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.

Exhibit K - 1

ACDBE Participation Reporting Requirements

ALD Development Corp dba The Club at SJC  
Document No. 10612-CA-17  
T-24416.008 / ALD 10612-CA-17\_FINAL\_10-03-17.doc

## DEFINITION OF TERMS

The terms used in the Program have the meanings defined in 49 CFR Section 23.3 and Section 26.5 and are as follows:

### Disadvantaged Business Enterprise

Means a for-profit small business concern that is:

- 1) At least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
- 2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it; and
- 3) Whose personal net worth does not exceed \$1.32 million.

### Small Business Concern

In order to qualify as an ACDBE, a firm must qualify as a small business concern. As a general rule, the ACDBE regulations treat a firm as a small business concern eligible to be certified as an ACDBE if its gross receipts, averaged over the firm's previous three fiscal years, do not exceed \$356.42 million.<sup>1</sup>

### Socially and Economically Disadvantaged Individual

Means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who meets one or more of the following conditions:

- Any individual determined to be a socially and economically disadvantaged individual on a case-by-case basis;
- Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

---

<sup>1</sup> The following types of businesses have size standards that differ from the standard set forth above:

- Banks and financial institutions: \$1 billion in assets
- Car rental companies: \$75.23 million average annual gross receipts over the firm's three previous fiscal years
- Pay telephones: 1,500 employees.
- Automobile dealers: 350 employees.

- "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
- "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
- "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
- "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
- "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
- Women;
- Any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration (SBA), at such time as the SBA designation becomes effective.

#### Personal Net Worth

Means the net value of the assets of an individual remaining after total liabilities are deducted.

An individual's personal net worth does not include:

- 1) The individual's ownership interest in an applicant or participating ACDBE firm; or
- 2) The individual's equity in his or her primary place of residence.

An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

The imposition of a personal net worth cap of \$1.32 million means that regardless of race, gender or size of their business, any individual whose personal net worth exceeds \$1.32 million is not considered economically disadvantaged and is not eligible for the ACDBE Program.

#### A. NON-DISCRIMINATION

As a recipient of DOT financial assistance, the City will meet the non-discrimination requirements provided in Part 26, §26.7, with respect to the award and performance of

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any concession agreement, management contract or subcontract, purchase or lease agreement, or other agreement covered by part 23.

The City will 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 concession agreement, management contract or other agreement covered by 49 CFR Part 23 on the basis of race, color, sex or national origin.

In administering its ACDBE Program, the City will 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.

The City acknowledges these representations are also in accordance with obligations contained in its Civil Rights, ACDBE and ACDBE Airport grant assurances.

#### QUOTAS

The City will not use quotas in any way in the administration of its ACDBE Program.

#### ACDBE LIAISON OFFICER (ACDBELO)

The City has designated the following individual as its ACDBE Liaison Officer:

Christopher Hickey  
Director, Office of Equality Assurance  
City of San José  
200 East Santa Clara Street, 5th Floor  
San José, CA 95113

Telephone: 408.535.8455  
Fax: 408.292.6270  
E-Mail: christopher.hickey@sanjoseca.gov

In this capacity, the Director is responsible for implementing all aspects of the ACDBE Program and ensuring that the City complies with all provisions of 49 CFR Part 23.

The DBELO is responsible for developing, implementing and monitoring the ACDBE Program in coordination with other appropriate officials. Duties and responsibilities include the following:

- Gathers and reports statistical data and other information as required by FAA or DOT.
- Reviews third party contracts and purchase requisitions for compliance with this program.
- Works with all departments to set overall annual goals.

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- Ensures that bid notices and requests for proposals are available to ACDBEs in a timely manner.
- Identifies contracts and procurements so that ACDBE goals are included in solicitations (both race-neutral methods and contract specific goals)
- Analyzes the City's progress toward attainment and identifies ways to improve progress.
- Participates in pre-bid meetings.
- Advises the CEO/governing body on ACDBE matters and achievement.
- Provides ACDBEs with information and assistance in preparing bids, obtaining bonding, financing, and insurance; acts as a liaison to the OSDBU-Minority Resource Center (MRC).
- Plans and participates in ACDBE training seminars.
- Acts as liaison to the Uniform Certification Process in the State of California.
- Provides outreach to ACDBEs and community organizations to advise them of opportunities.

### DIRECTORY

The directory identifying all firms eligible to participate as ACDBEs is available at [www.dot.ca.gov](http://www.dot.ca.gov) or by contacting the California Department of Transportation/Unified Certification Program at 1-916-324-1700.

### REQUIRED CONTRACT CLAUSES

#### Contract Assurance

The City will ensure that the following paragraphs are placed in every Airport Concession contract and subcontract:

This Agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR Part 23. The Concessionaire or contractor 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, management contract, or subcontract, purchase or lease agreement, or other agreement covered by 49 CFR Part 23.

The Concessionaire or contractor agrees to include the above statements in any subsequent concession agreement or contract covered by 49 CFR Part 23, that it enters and cause those businesses to similarly include the statements in further agreements.

### REPORTING, COMPLIANCE AND ENFORCEMENT PROCEDURES

Exhibit K - 5

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The City will retain sufficient basic information about its ACDBE Program implementation, ACDBE certification, and the award and performance of agreements and contracts to enable the FAA to determine our compliance with Part 23. This data will be retained for a minimum of three years following the end of the concession agreement or other covered contract.

It is the Concessionaire's or contractor's responsibility to maintain records and documents for three (3) years following the performance of the contract. These records must be made available for inspection upon request by any authorized representative of the City or DOT. This reporting requirement is also extended to any certified ACDBE.

Beginning March 1, 2006 we will submit to the FAA Regional Civil Rights Office, an annual ACDBE participation report on the form in Appendix A of Part 23.

Confidentiality: The City will safeguard from disclosure to third parties information that may reasonably be regarded as confidential business information, consistent with Federal law and the California Public Records Act, Government Code §§6250-6276.48. The California Public Records Act provides for disclosure of public documents when a request is made unless they fall within specified exceptions. There are numerous exceptions which may or may not apply depending on the type of documents.

Except as otherwise required pursuant to federal, state or local law, we will not release personal financial information submitted by an ACDBE in response to the personal net worth requirement to a third party (other than DOT) without the written consent of the submitter.

The City will take the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 23.

At the Norman Y. Mineta San José International Airport, the Airport Property Section monitors ACDBE sales. ACDBE sales are tracked as a percentage of overall concession revenue. The Airport maintains these statistics and graphs the results on a monthly basis to ensure that work committed to ACDBEs at contract award is actually performed by the ACDBEs.

On a daily basis, Airport staff monitors the ongoing operation of the concession related contracts consistent with the requirements of Part 23 and this Program. The City may impose such contract remedies as are available under the contract and under federal, state and local law and regulations for non-compliance. Failure to carry out the City's ACDBE Policy and goals and obligations set forth above shall constitute a breach of contract that may result in termination of the Concession Agreement, or such other remedy as deemed appropriate by the City.

The following monitoring and enforcement provisions are included in the City's concession agreements and management contracts:

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Compliance. Failure to carry out the ACDBE Policy and obligations set forth above shall constitute a breach of contract that may result in termination of the Agreement, or such other remedy as deemed appropriate by the City.

Audits. The City may also perform interim audits of contract payments to ACDBE management firms or subcontractors. The audit will review payments to ACDBE subcontractors and gross receipts earned by or payments for goods and services and management agreements to ACDBEs to ensure that the actual amount equals or exceeds the dollar amounts stated in the report of proposed ACDBE participation.

Replacement/Substitutions of ACDBEs. For concession contracts that include concession-specific ACDBE goals, Concessionaire will be required to have a valid arrangement with the ACDBE(s) designated by Concessionaire to fulfill the contract goal. For any such concession contracts that include concession-specific ACDBE goals, Concessionaire will be allowed to substitute the originally designated ACDBE(s) only if it is demonstrated to the City that the ACDBE(s) is unwilling or unable to perform. For any such concession contracts that include concession-specific ACDBE goals, Concessionaire's ability to negotiate a more advantageous contract with another ACDBE firm will not be considered a valid basis for substitution. For any such concession contracts that include concession-specific ACDBE goals, if an ACDBE is unwilling or unable to perform, Concessionaire shall inform the City in writing and include documentation to justify the substitution, including a statement from the ACDBE to be replaced acknowledging the substitution. In any such instance, Concessionaire will identify a replacement ACDBE or document good faith efforts to replace the ACDBE with another ACDBE. For any such concession contracts that include concession-specific ACDBE goals, if Concessionaire or a non-ACDBE firm performs the work originally committed to an ACDBE, the Concessionaire shall submit a revised ACDBE plan to the City detailing how the ACDBE goal will be met or will supply documentation detailing good faith efforts which have been made to meet the goal.

ACDBE Reports. Concessionaire shall submit, in the format required by the City, a monthly report of ACDBE utilization. The City reviews the monthly reports that are required to be submitted to the City by concessionaires to ensure that the ACDBE participation levels remain in compliance with any contract requirements and to verify that the work committed to ACDBEs is actually performed by ACDBEs. This information will also be used to provide the statistical data for the achievement reports to the FAA. If the City determines that any concessionaire is not complying with any contract requirements regarding this Program, the City will implement the contract remedies specified above.

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Notices to DOT. The City will also notify the U.S. Department of Transportation of any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 49 CFR Section 26.107.

### CONTRACT GOALS

The City will use concession specific goals to meet any portion of the overall goals the City does not project being able to meet using race-neutral means. Concession specific goals are established so that, over the period to which the overall goals apply, they will cumulatively result in meeting any portion of our overall goal that is not projected to be met through the use of race-neutral means.

The City has not established an ACDBE goal for the Concession Program.

### GOOD FAITH EFFORTS

To be eligible to be awarded a concession that has a concession specific goal; competitors must make good faith efforts to meet the goal. A competitor may do so either by obtaining enough ACDBE participation to meet the goal or by documenting that it made sufficient good faith efforts to do so. (23.25(e)(1)(iv)). Examples of good faith efforts are found in Appendix A to 49 CFR Part 26. The procedures applicable to 49 CFR Part 26.51-3, regarding contract goals apply to the City's concession specific goals. Specifically,

#### *Demonstration of good faith efforts (26.53(a) & (c))*

The Airport Managers are responsible for determining whether a concessionaire who has not met the concession specific goal has documented sufficient good faith efforts to be regarded as responsive.

We will ensure that all information is complete and accurate and adequately documents the concessionaire's good faith efforts before we commit to the concession agreement with the bidder/offeror.

#### *Information to be submitted (26.53(b))*

For concessions that have a concession specific goal, the City treats concessionaire's compliance with good faith efforts' requirements as a matter of responsiveness.

Each solicitation for which a concession specific goal has been established will require the concessionaires to submit the following information:

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1. The names and addresses of ACDBE firms or ACDBE suppliers of goods and services that will participate in the concession;
2. A description of the work that each ACDBE will perform;
3. The dollar amount of the participation of each ACDBE firm/supplier participating;
4. Written and signed documentation of commitment to use a ACDBE whose participation it submits to meet a contract goal;
5. Written and signed confirmation from the ACDBE that it is participating in the concession as provided in the prime concessionaire's commitment and
6. If the contract goal is not met, evidence of good faith efforts.

Administrative reconsideration (26.53(d))

Within three (3) days of being informed by the City that it is not responsible because it has not documented sufficient good faith efforts, a Concessionaire may request administrative reconsideration. Concessionaires should make this request in writing to the City Manager, 200 East Santa Clara Street, San José, California 95113. The reconsideration official will not have played any role in the original determination that the Concessionaire did not document sufficient good faith efforts.

As part of this reconsideration, the Concessionaire will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The Concessionaire will have the opportunity to meet in person with our reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. We will send the Concessionaire a written decision on reconsideration, explaining the basis for finding that the Concessionaire did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the DOT.

For concessions that have a concession specific goal, any business that fails to demonstrate that it achieved the concession-specific ACDBE participation goal and fails to demonstrate that it made sufficient good faith efforts to do so shall be deemed "non-responsive" and, therefore, shall be ineligible for award of the concession contract.

Good Faith Efforts when an ACDBE is replaced on a concession (26.53(f))

For concessions that have a concession specific goal, the City will require a concessionaire to make good faith efforts to replace an ACDBE that is terminated or has otherwise failed to complete its concession agreement, lease, or subcontract with another certified ACDBE, to the extent needed to meet the concession specific goal. We will require the concessionaire to notify the ACDBE Liaison officer immediately of the ACDBEs inability or unwillingness to perform and provide reasonable documentation.

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In this situation, we will require the concessionaire to obtain our prior approval of the substitute ACDBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts.

If the concessionaire fails or refuses to comply in the time specified, our contracting office will give notice and opportunity to cure until satisfactory action has been taken. If the concessionaire still fails to comply, the contracting officer may issue a termination for default proceeding.

When a concession specific goal is established pursuant to the City's ACDBE Program, the following specification will be used to notify concession firms of the requirements to make good faith efforts:

The requirements of 49 CFR Part 23, regulations of the U.S. Department of Transportation, applies to this concession. It is the policy of the City of San José to practice nondiscrimination based on race, color, sex, or national origin in the award or performance of this contract. All firms qualifying under this solicitation are encouraged to submit bids/proposals. Award of this concession will be conditioned upon satisfying the requirements of this proposal/bid specification. These requirements apply to all concessions firms and suppliers, including those who qualify as an ACDBE. An ACDBE concession specific goal of **0 percent (0%)** of annual gross receipts; value of leases and/or purchases of goods and services) has been established for this concession. The concession firm shall make good faith efforts, as defined in Appendix A, 49 CFR Part 26 to meet the concession specific goal for ACDBE participation in the performance of this concession.

The concession firm will be required to submit the following information: (1) the names and addresses of ACDBE firms and suppliers that will participate in the concession, (2) A description of the work that each ACDBE will perform; (3) The dollar amount of the participation of each ACDBE firm participating; (4) Written and signed documentation of commitment to use a ACDBE whose participation it submits to meet a contract goal; (5) Written and signed confirmation from the ACDBE that it is participating in the concession as provided in the prime concessionaire's commitment, and (6) If the contract goal is not met, evidence of good faith efforts.

#### COUNTING ACDBE PARTICIPATION FOR CAR RENTALS

The City will count ACDBE participation toward overall and contract goals for car rentals as provided in 49 CFR Part 23.5e.

#### COUNTING ACDBE PARTICIPATION FOR CONCESSIONS OTHER THAN CAR RENTALS

The City will count ACDBE participation toward overall and contract goals for concessions other than car rentals as provided in 49 CFR Part 23.55.

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## ACDBE CERTIFICATION

The City will use the procedures and standards of 49 CFR Part 26, except as provided in 49 CFR Section 23.31, for certification of ACDBEs to participate in our concessions program and such standards are incorporated herein.

For information about the certification process or to apply for certification firms should contact:

California Department of Transportation  
Civil Rights – MS 79  
1823 14<sup>th</sup> Street  
Sacramento, CA 95814  
Phone: 916-324-1700  
Fax: 916-324-1862

Website: [www.dot.ca.gov](http://www.dot.ca.gov)

The City is a member of the California UCP, which has established four Regional DBE Certification Clusters throughout the State to effectively facilitate statewide DBE certification activities. Completed certification packets are to be mailed to one of the agencies serving the county where the firm has its principal place of business.

The California UCP will not process a new application for DBE certification from a firm having its principal place of business in another state, unless the firm has already been certified in that state.

Certification decisions for ACDBEs to participate in the City's concession program are made by the California Unified Certification Program (CUCP).

All firms certified by the CUCP on behalf of the City and included in the CUCP directory will be reviewed and recertified by the CUCP based on the submittal of the information required for certification to determine their ACDBE eligibility. These reviews will be completed as soon as possible, but not later than April 21, 2006 or three years from the anniversary date of each firm's most recent certification, whichever is later. The City will insure that only firms certified as eligible ACDBEs participate as ACDBEs in its concession program.

All owners of all certified ACDBEs will be required to submit, on the anniversary date of their certification, a "no change" affidavit meeting the requirements of 26.83(i), including any change in their circumstances affecting their ability to meet size, disadvantaged status, personal net worth, ownership or control criteria or of any material changes in the information provided with the application for certification.. A copy of the renewal serves as the City's and CUCP's no change affidavit.

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The California UCP handles all decertification decisions on behalf of the City with respect to the Airport's concession program.

We will treat a firm as a small business eligible to be certified as an ACDBE if its gross receipts, averaged over the firm's previous three fiscal years do not exceed \$56.42 million. The maximum size standard for banks and other financial institutions is \$1 billion in assets, for car rental companies it is \$475.23 million, 350 employees for automobile dealers, and for pay telephone companies the standard is 1,500 employees. (23.33) The personal net worth standard used in determining eligibility for purposes of part 23 is \$1.32 million and any person who has a personal net worth exceeding this amount is not a socially and economically disadvantaged individual, even if a member of a group is otherwise presumed to be disadvantaged. (23.35).

We will presume that a firm that is certified as a DBE under part 26 is eligible to participate as an ACDBE. However, before certifying such a firm, we will ensure that the disadvantaged owners of a DBE certified under part 26 are able to control the firm with respect to its activity in our concessions program. We are not obligated to certify a part 26 DBE as an ACDBE if the firm does not do work relevant to our concessions program. (23.37).

We recognize that the provisions of part 26, sections 26.83(c) (2-6) do not apply to certifications for purposes of part 23. We will obtain resumes or work histories of the principal owners of the firm and personally interview these individuals. We will analyze the ownership of stock of the firm, if it is a corporation. We will analyze the bonding and financial capacity of the firm. We will determine the work history of the firm, including any concession contracts or other contracts it may have received. We will compile a list of the licenses of the firm and its key personnel to perform the concession contracts or other contracts it wishes to receive. We will obtain a statement from the firm of the types of concessions it prefers to operate or the type of other contracts it prefers to perform. We will ensure that the ACDBE firm meets the applicable size standard. (23.39(a)(b)).

We acknowledge that a prime contractor includes a firm holding a prime contract with an airport concessionaire to provide goods or services to the concessionaire or a firm holding a prime concession agreement with a recipient. We recognize that the eligibility of Alaska Native Corporations (ANC) owned firms for purposes of part 23 is governed by part 26 section 26.73(h). (23.39(c)(d)).

We will use the certification standards of part 23 to determine the ACDBE eligibility of firms that provide goods and services to concessionaires. (23.39(i)).

In instances when the eligibility of a concessionaire is removed after the concessionaire has entered into a concession agreement because the firm exceeded the size standard or the owner has exceeded the PNW standard, and the firm in all other respects remains an eligible DBE, we may continue to count the concessionaire's participation toward ACDBE goals during the remainder of the current concession agreement. We will not count the concessionaire's participation toward ACDBE goals beyond the

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10/3/2017

termination date for the concession agreement in effect at the time of the decertification. (23.39(e)). Attachment 7 to the ACDBE Program recites the Part 26.87 procedures for removal of an ACDBE's eligibility.

We will use the Uniform Application Form found in appendix F to part 26 with additional instruction as stated in 23.39(g). A copy of this form is included as Attachment 6 of the ACDBE Program.

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## EXHIBIT L

### PRICING POLICY

The intent of the Pricing Policy is for prices and quality of products and services at the Airport to be comparable to off-Airport (street) locations within Santa Clara County, California. Multiple concessionaires operate at the Airport and it is expected that competition for customers will ensure that prices and quality of products and services remain at a level that closely matches street comparables.

#### **Pricing Requirements and Comparables**

Concessionaire is responsible for establishing comparable locations for the purpose of instituting a pricing structure for their concessions under the following guidelines:

1. Name brand stores
  - a. If a concession has a street location within Santa Clara County, that location will be designated as a comparable store. Concessionaire may submit comparable pricing from a minimum of one (1) street location and no more than three (3) street locations.
2. Alternate comparable locations
  - a. If a concession does not have a street location in Santa Clara County, the Concessionaire and Airport will identify no more than three (3) street locations in Santa Clara County similar in concept, size, and quality.
  - b. If a product or service is not available at the selected street locations, the Concessionaire and Airport will identify no more than three (3) alternate street locations in Santa Clara County for that product or service.
  - c. If Concessionaire is unable to find a reasonable comparable location within Santa Clara County, Concessionaire shall have the right to request in writing an exemption from the local comparable requirement for approval by the Director. Such request must include reason for requested exemption and provide a detailed explanation of how Concessionaire intends to establish pricing for its products or services.
3. Pricing
  - a. Affordable pricing is an essential aspect of the passenger experience at the Airport and Concessionaire is strongly encouraged to charge prices that are no more than ten percent (10%) higher than the same product or service offered at the approved street location(s).
  - b. Concessionaire must provide a price justification, to be approved by the Airport, for any product that is different in size or quality for purposes of establishing a reasonable comparable price.
4. Protection from competition

Exhibit L - 1  
Pricing Policy

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- a. Stores that are partially or fully protected from competition, such as hotels, amusement parks or sports arenas, and locations that operate using off-price or discount pricing structures, shall not be included as comparable locations.
- b. If a branded concession has a location at either Oakland International Airport or San Francisco International Airport, that airport location can be used as a comparable location. However, prices cannot exceed the prices at the comparable airport location.

5. Product and price submittal

- a. Concessionaire is required to submit a complete product and price list to the Director for approval at least thirty (30) days prior to the initial concession opening. Such product and price list shall detail all products and services available for sale and the requested price. Differences in size or quality of a product or service shall, all other things being equal, be considered by Airport during its review.

6. Approval of comparables and pricing

- a. If the Airport and Concessionaire are unable to agree on the comparable street locations or prices, the Director will select the comparable street locations for the purpose of establishing prices.

**Pricing Display**

1. Display of pricing

- a. Concessionaire is required to prominently display pricing for all products and services offered at any location(s) at the Airport.

2. Pre-marked or pre-printed price

- a. Where prices are pre-printed on the item by the distributor or manufacturer, the price charged for the item shall not exceed the pre-printed price.

**Price Adjustments and New Products**

1. Written approvals

- a. Concessionaire must obtain Airport's written approval prior to adjusting prices and offering new products and services. Any request for price adjustments or new products and services must be submitted to the Director at least fourteen (14) days prior to the price increase effective date. Price increases shall be based on increases in prices for the same items at the comparable street locations in Santa Clara County.

2. Price adjustments

- a. Concessionaire will be allowed to submit pricing adjustments two (2) times per year unless otherwise requested by Concessionaire due to market conditions, and approved by the Director.

Exhibit L - 2  
Pricing Policy

## **Remedies for Exorbitant Prices and/or Inadequate Quality**

### **1. Review of pricing and quality**

- a. At any time, the Director may survey prices and the quality of products and services then in effect at comparable street locations in Santa Clara County. If the Director determines that any prices being charged by Concessionaire at the Airport are not in compliance with the Pricing Policy, are exorbitant, or that any product or service being offered by Concessionaire is of too low quality, the Concessionaire is required to submit, within seven (7) days, a product and price list with comparables as required in the Pricing Policy. Prices must be adjusted within seven (7) days of the Director's approval.

### **2. Remedies**

- a. Should the Director determine that the Concessionaire has not complied with the conditions above, or that prices are exorbitant, or that the quality of products or services is insufficient, or that the Concessionaire has acted in bad faith, the Director will strictly enforce street pricing plus ten percent (10%). Should the Airport and Concessionaire not agree to a maximum price for a product or service within seven (7) days, the Concessionaire may charge the Airport determined price or remove the product or service from its concession location.
- b. Should Concessionaire not comply with these requirements, liquidated damages will be assessed as identified in the Concession Agreement.

Exhibit L - 3  
Pricing Policy

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**EXHIBIT M**  
**RETAIL CONCESSION DESIGN GUIDELINES**

Retail Concession Design Guidelines are available at:

[http://www.flysanjose.com/sites/default/files/tenant\\_guidelines/Concession\\_Guidelines.p  
df](http://www.flysanjose.com/sites/default/files/tenant_guidelines/Concession_Guidelines.pdf)

Exhibit M  
Retail Concession Design Guidelines

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## EXHIBIT N

### JOBS LIST

For the Concession Operations, Concessionaire shall subcontract with GTMS West, LLC (Subconcessionaire) for all staffing of the Concession Location. Concessionaire and/or Subconcessionaire will recruit, select and direct-hire for one or more of the following positions at the Airport:

- Assistant Manager 1 (1)
- Assistant Manager 2 (1)
- Assistant Manager 3 (2)
- Floor Attendant (2)
- Cleaner (6)
- Customer Service Assistant (9)
- Food Service Assistant (1)
- Concierge (6)
- Dishwasher (1)
- Food Prep (1)

Exhibit N  
Jobs List

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## EXHIBIT O

### HIRING PLAN FOR LOW AND MODERATE INCOME JOBS

Promoting the advancement of low-income individuals is easier when employers are still hiring and retaining low-income workers. Both employers and workers, therefore, continue to need access to effective training to improve employers' productivity and competitiveness and workers' performance and future job opportunities. Developing and building close working relationships with employers will allow local institutions and businesses to focus their efforts on improving the skills and advancement potential of low-income individuals.

Concessionaire shall subcontract with GTMS West, LLC (Subconcessionaire) for all staffing of the Concession Location. Concessionaire and Subconcessionaire are an Equal Opportunity Employers that do not discriminate on the basis of actual or perceived race, creed, color, religion, alienage or national origin, ancestry, citizenship status, age, disability or handicap, sex, marital status, veteran status, sexual orientation, arrest record, or any other characteristic protected by applicable federal, state or local laws. Our management teams are dedicated to this policy with respect to recruitment, hiring, placement, promotion, transfer, training, compensation, benefits, team member activities and general treatment.

Exhibit O  
Hiring Plan for Low and Moderate Income Jobs

ALD Development Corp dba The Club at SJC  
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