

**AGREEMENT FOR FOOD AND BEVERAGE SERVICES**  
**BETWEEN THE**  
**CITY OF SANTA CLARA, CALIFORNIA,**  
**AND**  
**LEVY PREMIUM FOODSERVICE LIMITED PARTNERSHIP**

**DATED: \_\_\_\_\_, 2019**

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**PREAMBLE**

This Agreement is entered into on November 1, 2019, by and between the City of Santa Clara, California, a chartered California municipal corporation ("City") and Levy Premium Foodservice Limited Partnership, an Illinois limited partnership ("Contractor"). City and Contractor may be referred to individually as a "Party" or collectively as the "Parties" or the "Parties to this Agreement."

**RECITALS**

- A. City owns the facility known as the "Santa Clara Convention Center" located in Santa Clara, California (the "Convention Center");
- B. On May 13, 2019, City issued a Request for Proposal ("RFP") to select a qualified firm to provide Food and Beverage Operations for the Convention Center;
- C. Contractor sent City a proposal in response to the RFP, dated June 24, 2019, thereby acknowledging the City's requirements, and further acknowledging requirements communicated in related RFP documents, oral presentations, and the exchange of information leading up to this Agreement (collectively, the "RFP Proposal"); and
- D. The Parties have specified herein the terms and conditions under which such services will be provided and paid for.
- E. The Parties hereby acknowledge and agree that they are bound by the terms and conditions of this Agreement starting on the Effective Date set forth above; however, the Term of this Agreement shall begin upon the commencement date for Food and Beverage Services, as further described in Section 3.1.

The Parties agree as follows:

**AGREEMENT TERMS AND CONDITIONS**

**Section 1. Definitions**

- 1.1. **"Allowable Expense"** shall mean the cost of goods sold; direct labor paid, including applicable taxes, workers' compensation, fringe benefits for on-site management staff and employees as reasonably approved by the Convention Center's Operator; direct expenses paid for supplies; allocated insurance costs; taxes; telephone; postage; cleaning supplies; waste removal; pest control, permits; printing; decorating; repair and maintenance; uniforms; bank charges; the Management Fee; the Incentive Fee; accruals for reserves; marketing materials; and other costs associated with the operation such as supplies, credit card fees, computer software,

smallwares, equipment rental, and uniforms. The following expenses shall not be included in Allowable Expenses: Contractor's offsite supervision and support services (accounting and payroll services, facility planning and design, auditing, purchasing, personnel, etc.), Business Profit Taxes including the Possessory Interest Tax assessed by the County Assessor, other general corporate administrative and overhead expenses, and any allocation of corporate costs that are not directly attributed to the Convention Center.

- 1.2. **“Bad Debt Reserve”** shall have the meaning assigned to it in Section 12.2.3.
- 1.3. **“Capital Fund”** shall have the meaning assigned to it in Section 12.2.1.
- 1.4. **“City”** shall mean the City of Santa Clara. All references to City shall also include by reference those persons designated by the City to manage and oversee the Agreement.
- 1.5. **“Community Enrichment Investment”** shall have the meaning assigned to it in Section 14.2.
- 1.6. **“Convention Center”** shall mean the Santa Clara Convention Center.
- 1.7. **“Effective Date”** shall mean November 1, 2019.
- 1.8. **“Food and Beverage Services”** or **“Services”** or **“Foodservices”** shall mean the business of managing and providing (or causing to be provided) food, food products, candy, non-alcoholic and alcoholic beverages, novelties, souvenirs and merchandise in the concession areas, seating bowl, picnic areas, luxury boxes, restaurants, lounges, banquet rooms, catering areas, and all other areas of the Convention Center.
- 1.9. **“Force Majeure”** shall mean an act of God, riot, invasion, fire, flood, earthquake, tornado, storm, accident, strike, employee lockout or walk-out, or government interference, regulation, appropriation or rationing or any other event or condition similar to those enumerated above, that would render impossible a party's ability to perform hereunder.
- 1.10. **“Gross Receipts”** shall mean the total of all amounts received by Contractor from the operation of the Food and Beverage Services, including the net amount received by Contractor from subcontractors, any service charges and gratuities retained by Contractor, whether such amounts are evidenced by cash, check, credit, charge account, exchange or otherwise, less only retail sales taxes and other direct taxes imposed upon receipts collected from the consumer. Gross Receipts shall include amounts received from the sale of goods at the Convention Center as well as amounts received from orders taken or received at the Convention Center (regardless of where such orders are filled).
- 1.11. **“General & Administrative Costs”** shall mean the cost of all other operating expenses and reserves.
- 1.12. **“Incentive Fee”** shall have the meaning assigned to it in Section 10.

- 1.13. **“Management Fee”** shall have the meaning assigned to it in Section 10.
- 1.14. **“Monthly Accounting Period”** shall mean the last day of each calendar month during the Term.
- 1.15. **“Net Profit”** shall mean the amount by which Gross Receipts exceed Allowable Expenses for the period in question.
- 1.16. **“Net Receipts”** shall mean the Gross Receipts less (i) all Allowable Expenses, including the Management Fee, and (ii) the items specifically identified elsewhere in this Agreement as being reimbursable out of or chargeable against the Gross Receipts.
- 1.17. **“Operating Account”** shall have the meaning assigned to it in Section 12.1.
- 1.18. **“Operating Budget”** shall have the meaning assigned to it in Section 13.1.
- 1.19. **“Operating Year”** shall mean each 12-month period of time during the Term beginning on July 1 and ending on June 30 including extension periods, if any, except the initial Operating Year shall commence on January 1, 2020 and end on June 30, 2020, as shown below.

<b>Initial Term</b>	
2019-2020 Operating Year	January 1, 2020 to June 30, 2020
2020-2021 Operating Year	July 1, 2020 to June 30, 2021
2021-2022 Operating Year	July 1, 2021 to June 30, 2022
2022-2023 Operating Year	July 1, 2022 to June 30, 2023
2023-2024 Operating Year	July 1, 2023 to June 30, 2024
2024-2025 Operating Year	July 1, 2024 to June 30, 2025
<b>Option Term One</b>	
2025-2026 Operating Year	July 1, 2025 to June 30, 2026
2026-2027 Operating Year	July 1, 2026 to June 30, 2027
2027-2028 Operating Year	July 1, 2027 to June 30, 2028
2028-2029 Operating Year	July 1, 2028 to June 30, 2029
2029-2030 Operating Year	July 1, 2029 to June 30, 2030
<b>Option Term Two</b>	
2030-2031 Operating Year	July 1, 2030 to June 30, 2031
2031-2032 Operating Year	July 1, 2031 to June 30, 2032
2032-2033 Operating Year	July 1, 2032 to June 30, 2033
2033-2034 Operating Year	July 1, 2033 to June 30, 2034
2034-2035 Operating Year	July 1, 2034 to June 30, 2035

- 1.20. **“Operations Investment”** shall have the meaning assigned to it in Section 14.1.
- 1.21. **“Operator”** shall mean the vendor under contract with the City to manage and operate the Convention Center.
- 1.22. **“Performance Audit”** shall have the meaning assigned to it in Section 16.3.3
- 1.23. **“Pre-Opening Expenses”** shall have the meaning assigned to it in Section 12.3

- 1.24. **“SCCVB”** shall mean the City-designated Destination Marketing Organization or successor DMO.
- 1.25. **“Shortfall”** shall have the meaning assigned to it in Section 12.1.2.
- 1.26. **“Training Reserve”** shall have the meaning assigned to it in Section 12.2.2.
- 1.27. **“Weighted Percentage”** shall have the meaning assigned to it in Section 11.1
- 1.28. **“Weighted Achievement Percentage”** shall have the meaning assigned to it in Section 11.1.

## **Section 2. Agreement Documents**

- 2.1. The documents forming the entire Agreement between City and Contractor shall consist of these Terms and Conditions and the following Exhibits, which are hereby incorporated into this Agreement by this reference:
  - 2.1.1. Exhibit A – Proforma Budget
  - 2.1.2. Exhibit B – Pre-Opening Expense Estimate
  - 2.1.3. Exhibit C – Sample Calculation of Performance Measures
  - 2.1.4. Exhibit D – Insurance Requirements
- 2.2. To the extent each is not inconsistent with this Agreement, City’s RFP # CMO-003 (including subsequent updates), Contractor’s proposal response dated June 24, 2019, Contractor’s demonstration materials dated July 31, 2019, and Contractor’s Best and Final Offer response dated August 7, 2019 are hereby incorporated by reference herein.
- 2.3. This Agreement, including the Exhibits set forth above, contains all the agreements, representations and understandings of the Parties, and supersedes and replaces any previous agreements, representations and understandings, whether oral or written. In the event of any inconsistency between the provisions of any of the Exhibits and the Terms and Conditions, the Terms and Conditions shall govern and control.

## **Section 3. Term of Agreement**

### **3.1. Initial Term**

Except as otherwise set forth in this Agreement or unless this paragraph is subsequently modified by a written amendment, the term of this Agreement shall begin on November 1, 2019 ("Effective Date") and expire on 11:59 pm on June 30, 2025 ("Initial Term"). Notwithstanding the Effective Date, this Agreement shall be binding on the parties upon full execution hereof.

### **3.2. Option Terms**

Upon expiration of the Initial Term, City has the option and sole discretion to extend this



Agreement, according to all terms and conditions, for a subsequent term of five (5) years ("Option Term One") by serving notice to Contractor no later than 180 calendar days from the expiration of the Initial Term. Upon expiration of Option Term One, City has the option and sole discretion to extend this Agreement, according to all terms and conditions, for a subsequent term of five (5) years ("Option Term Two") by serving notice to Contractor no later than 180 calendar days from the expiration of Option Term One. The Initial Term plus any such renewal terms is sometimes referred to herein as the "Term".

### **3.3. No Automatic Renewals**

There shall be no automatic renewal of this Agreement upon the expiration of the Initial Term or either Option Terms.

## **Section 4. Representation and Warranties**

Contractor represents, warrants, and maintains the following:

- 4.1. Contractor maintains that it has the experience, expertise and resources necessary to perform the Services, and its duties and obligations, expressed and implied, contained herein, and City expressly relies upon Contractor's representations regarding its skill and knowledge.
- 4.2. There are no actions, suits or proceedings pending or, to the knowledge of Contractor, threatened against or affecting Contractor which could have a material adverse effect on the ability of Contractor to honor its obligations under this Agreement or that involve the enforceability of this Agreement, at law or in equity.
- 4.3. Contractor is not in default in violation of, operating under, or subject to, any order, writ, injunction, decree or demand of any court or any governmental authority.
- 4.4. The consummation of the transactions hereby contemplated and the performance of this Agreement will not result in any breach of, or constitute a default under, any mortgage, deed of trust, lease, bank loan or credit agreement, partnership agreement, corporate charter, bylaw, or other agreement or instrument to which Contractor is a party or by which it or any of its assets may be bound or affected.
- 4.5. Contractor is not insolvent (as such term is defined in the Bankruptcy Code of 1978, 11 U.S.C. Section 101, et seq., as amended) and will not be rendered insolvent by execution of this Agreement or the consummation of the transactions contemplated hereby.

## **Section 5. Employees**

### **5.1. General**

All employees of Contractor, or of any subcontractor, shall be employees of Contractor and/or those same subcontractor(s), and not City. Subject to the requirements in the City's Retention Ordinance and applicable requirements and obligation otherwise set forth in this Agreement, including this Section, Contractor has sole discretion to select the number, function, qualifications, and compensation, including salary and benefits, of its employees, and shall control the terms and conditions of employment relating to such employees. At all

times during the Term of the Agreement, Contractor shall make available to the City for its review Contractor's recruitment and payroll policies.

## **5.2. Local Hiring and Contracted Services**

Contractor shall make reasonable efforts to recruit, employ, and contract with qualified individuals and businesses that are part of the work force and business community within the City of Santa Clara, and to provide employment, contracting, and business participation opportunities to residents of the City of Santa Clara, including women, minorities, and economically disadvantaged individuals.

## **5.3. Labor Relations**

The Parties agree that Contractor's performance under this Agreement and the ongoing operations of the food and beverage operations at the Convention Center are sufficiently vulnerable to disputes related to organized labor, and resulting interruptions in foodservice and operations at the Convention Center, and that labor peace is essential to the Parties' common interests under this Agreement. Therefore, to avoid any interruption to the foodservice operations, Contractor hereby affirms that it will make commercially reasonable efforts in order to assure labor peace during any Term of this Agreement.

# **Section 6. Staffing**

## **6.1. General**

- 6.1.1.** Contractor shall select, employ, train, furnish and deploy in the optimum number (to match work requirements), in each work classification, employees who are proficient, productive, and courteous to patrons and shall discipline, and if necessary, discharge (subject to the terms and conditions of any then current collective bargaining agreement) of all personnel working in this operation. Contractor shall also provide adequately trained relief personnel in the event of absences.
- 6.1.2.** Contractor shall furnish all necessary qualified supervision for the performance of the food and beverage service and agrees to assign to his/her operation a highly competent, full-time resident manager who shall have no duties other than direction of this operation. The Contractor shall secure the Operator's approval in advance as to the qualification of the manager and executive chef for this assignment, and, once assigned to this operation, such manager and chef shall not be hired without the approval of the Operator.
- 6.1.3.** The City and Operator will have the right to interview and approve any candidates for general manager and executive chef.
- 6.1.4.** Contractor's management should be available at all food/beverage functions/operations and said Contractor will set up a travel fund through a reserve account to permit travel/sales of Convention Center's food/beverage sales management staff for purpose of promoting and selling future events to prospective clients of the Convention Center (classified as part of general and administrative costs). All funds deposited in the foregoing described reserve shall be charged as an Allowable Expense. A

minimum of two management level full-time equivalents shall be designated as full-time sales professionals for this Agreement. The focus of the Contractor sales team will be on direct sales for social catering business and active support of all other event types in conjunction with the Operator and SCCVB.

- 6.1.5.** If at any time the Operator reasonably determines that the Contractor's general manager, executive chef or his/her alternate is unsatisfactory, and such reasonable causes and reasons are duly reported in writing by the Operator to the Contractor, Contractor shall, within thirty (30) calendar days or such other timeframe that is mutually agreed by Operator and Contractor, replace him/her with a general manager who is satisfactory to the Convention Center. Contractor shall provide an interim general manager, executive chef or his/her alternate (as applicable) until the replacement individual has been approved. If, at any time, Contractor's general manager or executive chef desires to leave the Convention Center, Contractor shall use commercially reasonable efforts to cause the current general manager or executive chef to provide to the replacement general manager or executive chef such detailed training as necessary and required before changing his/her position.
- 6.1.6.** Contractor agrees that there shall be no discrimination by it against any person, with respect to opportunity for employment or conditions of employment, because of race, color, religion, national origin, age or sex and warrants that it will comply with all applicable local, state and federal laws relating to employment practices.
- 6.1.7.** Contractor assumes full responsibility for the actions of such personnel while performing services pursuant to this Agreement, and shall be solely responsible for their supervision, daily direction and control, payment of salary (including withholding and income taxes, Unemployment Insurance, Workers' Compensation and Social Security) and the like, as required by the law. The foregoing costs and expenses shall be charged as Allowable Expenses.
- 6.1.8.** Contractor will be responsible for requiring employees to abide by all instruction, regulation and codes specified by Operator as set forth in their Personnel Policy Manual and as may be amended from time to time. If Contractor object to updates to the Personnel Policy Manual as being inconsistent with Contractor's current operating policies and practices, Contractor shall meet with Operator to resolve the conflicts. Nothing herein modifies Contractor's obligation to comply with all applicable regulations and codes.

## **6.2. Unit Staffing, Labor and Personnel Training Practices**

Prior to commencement of work in the Convention Center, Contractor shall furnish to the Operator a written statement setting forth training practices, the names of all employees, the commencement date of the employment at the Convention Center for each such employee, and the duties to be performed by each. Contractor shall also furnish to the Operator on a quarterly basis a written statement setting forth the names of persons being hired and ceasing to be employed in the Convention Center.

In addition, prior to commencement of work in the Convention Center, Contractor shall:

- 6.2.1.** Describe outreach efforts to hire employees and contractors from Santa Clara and that reflect the diversity of the community.
- 6.2.2.** Provide the number of entry level employee hours to be devoted to formal training for the staff at the Convention Center.
- 6.2.3.** Submit a copy of the Employee Handbook. The City hereby acknowledges and agrees that Contractor's Employee Handbook is confidential information of Contractor, and therefore, the Operator shall not be permitted to disclose such Employee Handbook to any person or entity without Contractor's prior written consent. The Operator reserves the right to review the handbook and suggest any changes.
- 6.2.4.** Describe recruiting techniques and sources of non-management labor.
- 6.2.5.** Describe personnel policies and practices.
- 6.2.6.** Deliver the transition plan for all aspects of the Food and Beverage operation.

### **6.3. City's Worker Retention Ordinance**

Contractor shall comply with the City's Worker Retention Ordinance that requires that any City of Santa Clara business with more than 25 employees and/or any entertainment/convention venue with a capacity of 8,000 or more is subject to provisions of the Worker Retention Ordinance. The Ordinance requires applicable businesses who are considering changing contractors that provide food service, building service and/or security service, to require a new contractor to retain the existing employees for a period of ninety (90) days. During the transition, if at any time during the first ninety (90) days the successor Contractor determines that fewer employees are required, the successor Contractor shall retain employees based on seniority only. The complete Worker Retention Ordinance may be found at: <http://santaclaraca.gov/government/departments/city-manager/worker-retention>.

## **Section 7. Removal of Subcontractor**

To the extent permitted by applicable law, the City or Operator reserves the right to remove any subcontractor from the premises whose background, performance and/or general methodologies are deemed by the City or Operator, not in the best interests of the overall Convention Center operation.

## **Section 8. Scope of Services**

The standard for performance of services by Contractor will be in accordance with the express provisions of this Agreement and in accordance with industry standards, commitments outlined in this agreement and the RFP Proposal, and best practices. Without limiting the generality of the foregoing, Contractor agrees to perform and furnish management services, systems, and materials needed to operate, supervise, manage, and maintain the foodservice operations at the Convention Center with the highest quality and efficient manner possible, consistent with the direction outlined in the RFP Proposal and competitive with operations of other similar facilities.

## **8.1. General**

- 8.1.1.** Contractor shall have the exclusive right to operate foodservice areas, bars refreshment stands and vending operations selling food and beverages (alcoholic and non-alcoholic), except as herein otherwise provided. The rights also include wardrobe checking which may, from time to time, be subcontracted to a third-party subject to approval by the Operator. Failure to provide any service essential to the foodservice operation of the Convention Center as determined by the City and Operator will be considered a material breach of the Agreement. Contractor will be expected to subcontract specialty caterers when it is advantageous in attracting business or fulfilling the commitment to local businesses to the Convention Center.
- 8.1.2.** The exclusive rights granted herein shall not include the sale at the Convention Center premises of audio/video recordings, non-food sundry items including but not be limited to: personal care products, programs, souvenir books, or other printed matter of a like nature and copyright novelties. However, the Operator may request Contractor to sell such items or may develop a separate contract granting exclusive rights for the sales of such items.
- 8.1.3.** The Operator shall give Contractor “read only” access to the Convention Center Calendar software platform and advanced notice of the nature of scheduled events and such information as is available regarding the probable attendance at each event. Every effort will be made by the Operator to notify Contractor of cancellation of previously scheduled events to which due notice has been given the Operator. Contractor on the other hand shall be held strictly accountable for furnishing full and adequate service for the full period of time required for any event of which the Contractor has had notice. Further, nothing contained herein shall be interpreted to limit the Contractor in taking the initiative to obtain event information from the Operator in a timely manner.
- 8.1.4.** The Operator and SCCVB will also inform Contractor of the tentative business and prospects that are under consideration, and it is expected that Contractor will offer assistance and support in converting prospects and tentative business to definite business with all event types.
- 8.1.5.** Should Contractor utilize the Convention Center foodservice facilities for off-site food functions, approval of the Operator must first be obtained in writing and such off-site foodservice will be subject to restrictions imposed at that time, all such services to be considered as part of gross sales and as such be included under the management fee as per the set-out schedule, unless otherwise agreed by City and Contractor in writing. City Council approval may be required to establish conditions regarding such off site use.

## **8.2. Goals and Objectives**

- 8.2.1.** Operate a first-class, high-quality, food and beverage operation at the Convention Center servicing events ranging from conventions to consumer shows and meetings to entertainment to community events.

- 8.2.2.** Provide a level of service and quality that rivals the industry and supports the Convention Center in its overall effort to compete for business.
- 8.2.3.** Identify and implement initiatives to support the City of Santa Clara's priorities as it relates to the Convention Center's fiscal results, generating economic impact and positively impacting the local community while: 1) ensuring that the Convention Center remains competitive with other convention venues in both pricing and service levels, and 2) attracting and retaining conventions, trade shows, sporting events and other meetings to the Convention Center.
- 8.2.4.** Provide exemplary customer service to attendees and visitors regardless of event type to be measured by a third party.
- 8.2.5.** Develop a social catering direct sales and marketing strategy in collaboration with the Operator and SCCVB to promote the Convention Center to enhance usage by high value social events and increase revenues. Have sales staff that is focused with performance goals on direct sales to the local/regional social event market.
- 8.2.6.** Properly maintain and safeguard the City's capital investment in the Convention Center through the exercise of the highest standards of maintenance and preservation and, recommend strategic capital improvements.
- 8.2.7.** Achieve all objectives in a professional manner, consistent with best industry practices and all applicable laws and ordinances.
- 8.2.8.** Surface future capital needs as it relates to future planning and ongoing competitiveness of the Convention Center in conjunction with the City and the Operator.
- 8.2.9.** Coordinate and collaborate on all advertising, licensing, promotional activities, marketing, and public relations for the Convention Center and Santa Clara as a destination in coordination with relevant stakeholders.
- 8.2.10.** Work cooperatively with stakeholders in attracting social catering events to the Convention Center.
- 8.2.11.** Work with the Operator in the development of a SOP (Standard Operating Procedures) manual that includes the service commitments outlined in the RFP Proposal for all aspects of the Convention Center's food and beverage operations as it relates to and interfaces with Convention Center operations and identify how to create best in class service levels.

### **8.3. Foodservice Provision**

Contractor shall organize, put into service and manage efficiently the following Convention Center beverage, catering and concession operations to provide excellent food, beverage and related vending services within a clean, attractive and pleasant environment.

- 8.3.1. Food and beverage fixed and mobile concession facilities
- 8.3.2. Food and beverage service for meeting rooms
- 8.3.3. Main production kitchen and finishing kitchen pantry
- 8.3.4. Main ballroom and all social catering areas
- 8.3.5. Vending services/areas
- 8.3.6. Public space – Retail Operations
- 8.3.7. Employee meals where applicable

#### **8.4. Types of Services**

- 8.4.1. Contractor, to satisfy the demands of the various client needs for food services, will be required to adapt its operation to meet the challenges of various service categories.
- 8.4.2. In addition to the normal concession and catering functions the Contractor will provide in the Convention Center, there will be a need for various specialized services which the Contractor will be required to provide. These services are normally associated with convention/trade show activities. These specialized services shall include, but not be limited to, the following:

**8.4.2.1. Meeting Room/Ballroom Service** - This activity involves the distribution of various snack-type and catered meals in the meeting room areas utilized by tenants. This type of service is similar in function to the room service normally associated with hotels. Characteristics of this service are similar to the following:

- 8.4.2.1.1. Food items ordered by quantity, i.e. dozens, as opposed to number of individuals to be served.
- 8.4.2.1.2. Service usually requires constant and frequent attention by Contractor to insure food and beverage items are fresh and in adequate supply.
- 8.4.2.1.3. The Operator may impose certain transportation and storage requirements and restriction so as not to conflict with function traffic access/egress before, during and after scheduled events.
- 8.4.2.1.4. Coffee service at stations located within a show office or in meeting room, ballroom areas, normally sold in quantity amounts, i.e. per gallon, etc.
- 8.4.2.1.5. Table cloth service for all catering events.

- 8.4.2.1.6. VIP Lounge Service if needed will require specialized pre-plated and buffet meals for a small number of guests on an ongoing basis.
- 8.4.2.1.7. Service will also be provided for receptions and other special functions scheduled by the Operator and/or Contractor.

**8.4.2.2. Exhibitor Services** - This function is usually associated with convention/trade shows in which various areas within the Convention Center are utilized for display purposes. Exhibitor services, chargeable at an agreed upon established rate with the City and Operator, normally fall into the following areas:

- 8.4.2.2.1. Food/beverage items provided to exhibitors as method of entertaining clients.
- 8.4.2.2.2. Product storage and/or refrigeration and delivery of same.
- 8.4.2.2.3. Product preparation: This area would involve the preparation, i.e. cooking, assembly, etc., of exhibitor product(s) with appropriate delivery where required.
- 8.4.2.2.4. Food and beverage offerings for exhibit attendees including hosted and non-hosted concessions.

**8.4.2.3. Concessions/ Retail** - This function can be both hosted and non-hosted. Contractor will be responsible for providing high quality concession/retail operations consistent with or exceeding industry standards for all types of client and the public needs in all areas of the Convention Center.

## **8.5. Operating Conditions**

- 8.5.1. The City/Operator will furnish to the Contractor for the term of this Agreement, storage areas, kitchens, concession facilities, pantries and foodservice equipment.
- 8.5.2. The City/Operator will furnish spaces for office, money counting, and record keeping purposes of the Contractor for the duration of the term of this Agreement. The use of this office space for purposes other than the operation of this concession, without prior approval of the Operator, shall result in the revocation of this space.
- 8.5.3. Location of all mobile concession stands, certain mobile food carts and location of auxiliary storage space required by Contractor shall be approved by the Operator. Contractor shall acquire no rights to such locations once assigned, and the Operator reserves the right to require Contractor to move



temporary or permanent stands and equipment when needs of other events require the use of them.

- 8.5.4.** Contractor shall be responsible for coordinating final hookups of electricity, gas, water, or drainage on all portable (temporary) stands. Hookups will be made by the Operator's staff unless otherwise determined by the Operator. Any expense incurred is an Allowable Expense.
- 8.5.5.** The Convention Center shall furnish all electricity and gas, and the Operator may supply labor required to make temporary connections at the discretion of the duly designated City's representative of the Convention Center. Anything herein to the contrary notwithstanding, the Operator and City shall not be liable or responsible for any failure to furnish the services set forth above occasioned by strike or other work stoppage, federal, state or local government action, breakdown, or failure of apparatus, equipment or machinery employed in supplying the said service, and temporary stoppage for repair, improvement or enlargement thereof, or any act or condition beyond its reasonable control.
- 8.5.6.** Contractor is required to have its next senior level of management to the Contractor's food and beverage general manager (including Regional Director of Operations and/or Regional Vice President of Operations and Vice President of Culinary) visit the Convention Center a minimum of once every calendar quarter (four times per year) and report on their visit and review operating results with the City's Convention Center contract administrator and Operator. Such travel costs shall be an Allowable Expense provided to the extent that they comply with the City's travel policy.
- 8.5.7.** Contractor shall furnish all common and skilled labor for the setting up and dismantling or moving of temporary food/refreshment facilities in such locations as may be agreed upon between the Contractor and the Operator, the costs to provide such services shall be charged as an Allowable Expense.
- 8.5.8.** Contractor and its employees shall be entitled to enter upon and remain in the premises with access at designated areas for work purposes only during events at the Convention Center and for a reasonable time prior to and subsequent to events; and only for the purpose of exercising the rights and privileges mentioned herein. This paragraph shall not exclude the Contractor reasonable access to office areas for the conduct of normal business activities associated with this concession.
- 8.5.9.** The Operator may require Contractor to provide vending machines. Vending machines shall not be used, except with the approval of the City and Operator. Contractor shall submit its proposals concerning items to be sold, suggested prices, type and style of machines and recommended locations in writing, for the consideration and approval of the Operator.
- 8.5.10.** Contractor agrees that nothing in these specifications shall be construed as to prohibit a tenant of the Convention Center from exhibiting any

merchandise or article in connection with the exhibit or other type of event, or from dispensing free samples of merchandise. For such events, as mutually agreed, City and/or Operator shall use commercially reasonable efforts to cause the tenant to release Contractor from any and all liability, including without limitation damage to the foodservice areas, facilities and FF&E, arising out of the tenant's actions, omissions and services in connection with these events, except to the extent caused by the negligence or intentional misconduct of Contractor. Contractor shall provide Operator with an Indemnity and Release Agreement to that effect.

- 8.5.11.** Such sampling is subject to approval of the Operator but normally will be restricted to the following:
  - 8.5.11.1.** Food - 2 oz. portion
  - 8.5.11.2.** Beverage - 4 oz. portion
- 8.5.12.** Contractor shall have all facilities open and in operation during agreed upon operating hours and for a reasonable time before, during and after all events as may be requested or approved by the Operator.
- 8.5.13.** When and if a restaurant/cafe or a temporary food service (i.e. mobile "special emphasis" food service area) is in operation, food served must be cooked and prepared by the chef on the premises of the Convention Center or a pre-approved subcontractor for a designated event or activity with the exception of standard canned and packaged items. Deviation from this requirement must be approved in writing by the Operator.
- 8.5.14.** The public's right shall not be infringed upon by any activity of the Contractor or any of its employees. The activities of the Contractor shall be such as to render service to the public in a dignified manner and no pressure, coercion or persuasion shall be used by the vendor in attempt to influence the public to use the services or product of the vendor. All concession sales shall be conducted and operated under the supervision of the Operator and shall in no way interfere with the orderly operation of any event. The sales shall be conducted at such times from and at locations designated by the Operator and for such purpose, and no vendors will be permitted to circulate throughout the premises for the sale of any merchandise, except with the permission of the Operator. Neither the Contractor nor his employees shall distribute campaign or political literature or any literature of any kind at any time in or on the premises of the Convention Center.
- 8.5.15.** The Operator reserves the right to direct the Contractor to partially or completely suspend service during those events with which full Contractor operation may be incompatible in the reasonable opinion of the Operator.
- 8.5.16.** The Operator shall not be responsible for any food, merchandise or equipment used, maintained or stored at the Convention Center nor will it be responsible for damage resulting from a power failure, flood, fire, explosion, vandalism and/or other causes, unless such loss or damage was due to a negligent act or negligent omission of Operator.

- 8.5.17.** Nothing herein contained shall be held to limit or qualify the right of the Convention Center to a free and unobstructed use, occupation and control of the Convention Center and ingress and egress for itself, its tenants and the public.
- 8.5.18.** Representatives of the Operator or City shall have the right to enter upon and have access to all occupied areas of the Contractor during the time that events are in operation and at all times when Contractor's employees are present, provided that Operator or City shall not interfere with Contractor's operations, and in an emergency situation.
- 8.5.19.** Contractor shall supply, china, linens, water, glasses, candy, mints, paper and pencils for classroom style setups sold by Operator or SCCVB as standard meeting room service. The cost shall be an Allowable Expense.
- 8.5.20.** Contractor shall be responsible for ensuring regular inspections by the Santa Clara Board of Health occur each year. Contractor shall provide copies of the inspections to the Operator and City and review them with Contractor's general manager. Contractor shall also conduct an inspection of the premises annually and report on compliance with health regulations to Operator and City.
- 8.5.21.** Contractor shall develop a standard operating procedure manual (SOP) that will be reviewed and approved by Operator. The SOP will include all food handling practices that will be utilized to ensure all health standards are adhered to. The SOP will also include all of the service and product quality commitments (including in-house baking of all breads and pastries) that the Contractor committed to in its RFP Proposal. Notwithstanding the foregoing, the City and Contractor may agree to deviations from the SOP as deemed necessary to respond to the rare event of emergency situations.
- 8.5.22.** Contractor will also develop marketing materials (including the finalization of the branding direction) that will highlight how Contractor is going to differentiate its approach for Santa Clara and provide a competitive product and service to be sold by Operator and SCCVB sales teams. Properly documented costs associated with such marketing materials shall be an Allowable Expense.

## **8.6. Uniforms and Linens**

- 8.6.1.** Contractor or its agent will provide and maintain linens and uniforms for all employees. Selection type, color, style and dress code of uniforms will be at the discretion and approval of the Operator. Contractor will provide a choice of uniform styles and availability to the City for final approval. Additionally, the condition of the hygiene and appearance of employees is the Contractor's sole responsibility.

## **8.7. Menus**

- 8.7.1.** Contractor shall plan and prepare imaginative/localized menus in consultation and coordination with the Operator and City and in accordance

with the RFP Proposal and its specification. Quantities, portions, prices of banquet/meeting meals and prices of concession items from all food and beverages shall be approved by the City and Operator, in its reasonable discretion, according to Section 8.10. Only foods and beverages which are wholesome, local (when possible) and of the best quality shall be purchased and served. The menus are designed to act as a guide; however Contractor must proactively customize the options for Convention Center clients in order to meet and exceed the client's needs.

- 8.7.2.** City shall have the right to review and approve basic menus/pricing on a bi-annual basis.

## **8.8. Food Handling**

- 8.8.1.** All merchandise shall be checked upon delivery for quality and quantity compliance with the original order and shall be stored in proper areas in sanitary containers which are dated for effective rotation of stock on a first-in, first-out basis. All refreshments and food exhibited for sale shall be covered in showcases or other suitable containers. All pre-packaged sandwiches, cakes and other similar products shall be wrapped in approved eco-friendly packaging. As noted above, Contractor will submit all of the food handling practices as part of the SOP submission.
- 8.8.2.** Contractor agrees to operate the foodservice facilities and perform all work in connection here within a professional and resourceful manner, complying with all public health regulations to the satisfaction of authorized Department of Health Officers and the City.

## **8.9. Food Quality**

The Contractor shall sell only foods that comply with all applicable Federal, State and municipal laws, acts, orders, or regulation including, without limitation on the generality of the foregoing, the applicable sections of the following laws, acts and regulations.

- 8.9.1.** The Food and Drug Act.
- 8.9.2.** Applicable Meat Inspection Regulations.
- 8.9.3.** The Humane Slaughter of Animals Act and Humane Slaughter Regulations.
- 8.9.4.** The Official Methods of Analysis and Association of Official Analytical Chemists.
- 8.9.5.** The Federal Department of Agriculture - Products Regulations.
- 8.9.6.** The Fish Inspection Act and Regulations.
- 8.9.7.** Meat and Canned Foods Act.
- 8.9.8.** Fresh and Processed Fruit and Vegetable Regulations.

**8.9.9.** The U.S. Grain and Grain Regulations.

**8.9.10.** The Santa Clara Alcoholic Beverage Control Ordinance.

**8.10. Items to be Sold**

**8.10.1.** Contractor shall sell those products, commodities and articles normally found in foodservice operations of this type. The Operator may require Contractor to sell items which, in the Operator's discretion, are necessary for the operation of the foodservice facilities and may limit or require discontinuance of the sale of any products, commodities or articles which the Operator deems to be not in the best interest of the operation of the food services. In the event of any dispute, the City will make the final decision.

**8.10.2.** City and Contractor recognize the value of securing sponsorship relationships for the Convention Center. City shall have the exclusive right to enter into any sponsorship agreements with corporations with respect to food and/or beverage products that are offered in the Convention Center ("Sponsorship Agreements"). At City's request, Contractor agrees to provide City with introductions to Contractor's food and beverage vendors that may be interested in having their products exclusively served or sold at the Convention Center in exchange for marketing and/or rights fees. Notwithstanding the foregoing, City will ensure that such Sponsorship Agreements do not impair the quality of the food and beverage items served by Contractor (as compared to comparable items served at other similar venues in which Contractor or its affiliates provides food and beverage service) or increase the costs for such items (as compared to Contractor's pricing or what Contractor would normally pay through its own distributors for comparable items of similar size and quality).

**8.10.3.** As a matter of general policy, prices shall not be higher than those charged at comparable facilities and appropriate for the type of event for the same quality merchandise and services within the Bay Area and the Western region of the United States. Within thirty (30) calendar days after execution of this Agreement, Contractor shall submit a proposal for all pricing strategies and it will be subject to approval by the City, as described herein.

**8.10.4.** Contractor shall submit a detailed price schedule, including discount structures offered to clients, based on current market conditions for all items it proposes to sell showing size, weight, and amounts of items. This includes items sold in concession stands, by vendors, at any mobile food courts, catered affairs, mobile "special emphasis" food service areas, in vending machines, etc. All prices finally adopted will require the approval of the Operator and final approval of the City. Such approval shall be provided to Contractor no later than thirty (30) calendar days after the submission of its proposal.

**8.10.5.** Operator and Contractor shall, on a quarterly basis, or as deemed necessary, review the general price structure of all commodities sold and

other price points and may increase or decrease the maximum or appropriate price or size of any article or articles offered for sale.

- 8.10.6.** No product of inferior quality will be permitted and all items to be sold will require the approval of the Operator. Notwithstanding anything contained in this Agreement, Contractor shall not be required to purchase products from a particular supplier.
- 8.10.7.** All merchandise kept for sale shall be subject to inspection and approval or rejection by the Operator during all times that the concession is in operation. Rejected merchandise shall be immediately removed from the Convention Center and shall not be returned for sale.
- 8.10.8.** Contractor will be required to purchase, sell and feature locally (Northern California) produced products whenever possible so long as said wholesale prices are competitive with other products available on the open market. Contractor must purchase their overall volume as set forth in Section 9.4. This approach must be detailed by the Contractor within thirty (30) calendar days prior to the beginning of each Operating Year and reviewed by the City and Operator.
- 8.10.9.** Contractor shall develop an approach and report on donating all wholesome, leftover products which could not otherwise be utilized, to local charities and other similar agencies having as their objective the feeding of the needy.

#### **8.11. Alcoholic Beverages**

- 8.11.1.** The types of functions at which wine, beer, or other alcoholic beverages are sold shall be subject to regulations established by the Operator and approved by the City. If, in the rare event, any tenant with the prior approval of the Operator, requires that its patrons be allowed to bring alcoholic beverages upon the premises, then Contractor shall have the right to sell ice, cups, and beverages, commonly referred to as set-ups, as well as levy an appropriate corkage charge agreeable to the Operator during such functions at a price agreeable to the Contractor and the Operator; provided, however, that the right of any tenant to bring alcoholic beverages upon the premises shall be conditioned on (i) compliance with all applicable laws, rules and regulations, (ii) Contractor's employees handling and serving the alcohol product, and (iii) any such tenant indemnifying and releasing Contractor, City and Operator pursuant to an indemnification agreement acceptable to Contractor for any and all damage to Contractor's property and the areas used by Contractor in the provision of food and beverage services hereunder, or with respect to any liability resulting from such alcohol beverages.
- 8.11.2.** Contractor must provide all licenses and permits required for the legal sale of alcoholic beverages, the costs of which shall be charged as an Allowable Expense.
- 8.11.3.** Notwithstanding anything contained in this Agreement to the contrary, Contractor shall be solely responsible for the determination of brands,

quantities, shelving and display for sale of any and all alcoholic beverages that Contractor may buy or sell at the Convention Center; provided that such pricing shall be established by Contractor and applied to tenants on a fair and equitable basis to all similarly situated tenants.

- 8.11.4.** Nothing contained in this Agreement is intended in any way to diminish Contractor's discretion and responsibility relating to the service of alcoholic beverages at the Convention Center, including without limitation, Contractor's sole discretion and sole responsibility for the decision to serve or refuse service of alcoholic beverages to any individual. Contractor acknowledges and agrees that City and its affiliates require all retailers, distributors/wholesalers and distillers/brewers of alcoholic beverages (each an "Industry Member") that City and its affiliates conduct business with, including, but not limited to, Contractor, to strictly comply with all local, state and federal, laws and regulations, which may be applicable to Contractor and the purchase, marketing, promotion, advertising and sale of alcoholic beverages, including, but not limited to: Title 27 of the Federal Alcohol Administration Act (Title 27 of the United States Code) and Title 27 of the Code of Federal Regulations, and other related provisions governing "intoxicating liquors" (collectively, "Alcohol Laws"). Further, City and its affiliates shall not conduct business with any Industry Member in violation of the Alcohol Laws, and City shall indemnify and hold Contractor harmless as to any action or conduct which may be imputed to Contractor as a result of City or its affiliates' actions or conduct which may give rise to any alleged violation of the same by Contractor. City further agrees that it shall not require as a condition for the continuation of this Agreement or exercise an early termination rights or failure to renew, Contractor to engage in conduct which would be in violation of the Alcohol Laws.
- 8.11.5.** Contractor must provide an Alcohol Awareness Training Program for its staff, i.e. TIPS, TEAMS, etc. and provide Operator with complete information regarding same. The documentation of this training will be supplied to Operator and City on an annual basis. All employees who serve alcoholic beverages will be required to have a card designating they have completed the required service on them at all times while serving.
- 8.11.6.** Should the Contractor receive any fines, penalties or the like due to its failure to operate in a manner prescribed by law, code or national/local jurisdiction, all such fines will be paid solely by Contractor and not expensed as an Allowable Expense. Contractor shall promptly notify the City and Operator of any material violations of law or non-renewal issues.

## **8.12. Wardrobe Checking**

- 8.12.1.** Contractor must be prepared to furnish wardrobe checking with attendants at any event when such requested by the Operator, provided that Operator provides Contractor with sufficient advance notice. Contractor will provide all clothing racks, hangers and related equipment over and above that currently on hand, essential to the performance of the service, the costs of which shall be charged as an Allowable Expense. Operator will designate areas to be used for checking. Contractor will work in close coordination with the

Operator in determining approximate checking needs and related equipment subject to the approval of the Operator.

**8.12.2.** As an Allowable Expense, Contractor shall be required to post price signs at all checking areas as well as directional signs when needed to direct patrons to the checking areas.

**8.12.3.** In the operation of the wardrobe checking, Contractor must use consecutively numbered three-part strip tickets and submit to Operator a printer's manifest for such tickets printed in order that the circulation of compensation, due the Operator, may be based upon the difference between the printer's manifest and the used tickets (separate report).

**8.12.4.** This service may be subcontracted under the terms of this Agreement.

### **8.13. Operations Warewashing**

Contractor will wash after each use, all non-disposable serviceware, plateware, glassware and cutlery to achieve maximum cleanliness and sanitation and with respect to glassware and cutlery, produce spotless drying. The standards to confirm sanitary practices will be included and verified by Operator and City in the SOP. The standards will also be presented to the health department for review.

### **8.14. Equipment, Repair and Maintenance**

**8.14.1.** The Convention Center will provide for the use of the Contractor certain fixed preparation and serving equipment located in the foodservice areas. All equipment shall remain the property of the Convention Center.

**8.14.2.** Contractor shall be responsible for the maintenance and repair of said equipment during the term of this Agreement and any renewal thereof, the costs of which shall be charged as an Allowable Expense.

**8.14.3.** As an Allowable Expense, any other equipment such as office equipment, safe, etc., shall be provided by the Contractor.

**8.14.4.** In addition to Convention Center's normal equipment maintenance schedule, Contractor shall notify the Operator relative to the needs for repair or replacement of the Convention Center's equipment, utensils and/or fixtures used in the handling, preparation and service of all food and beverages in connection with the foodservices, for written approval before undertaking such repair or replacement (such approval not to be unreasonably withheld). Contractor will cooperate with the Operator's maintenance personnel in the development and institution of a comprehensive preventative maintenance program. In the event that an emergency repair is needed that will impact the ability of Contractor to operate within a 12-hour period from the time the repair is identified, Contractor is authorized to make the repair if the dollar amount needed is under \$1,000. Contractor is required to communicate this need to the Operator. If the timeframe needed to make the repair is greater than 12 hours, the process for gaining approval will remain. Operator will inform City of this request and repair as soon as reasonably possible.



- 8.14.5.** Contractor hereby agrees to accept the food/beverage concession equipment, in the condition in which it is found by Contractor upon the commencement of operations; provided that such equipment is in working order and is sufficient for Contractor to immediately begin foodservice operations upon the commencement of the Term and satisfy its obligations hereunder. Contractor has inspected the premises to be used for Food and Beverage Service at the Convention Center and all of the FF&E, design and layout is satisfactory to Contractor. City acknowledges and agrees that except for the Operations Investment and Community Enrichment Investment, City shall pay all costs, fees and expenses incurred in connection with the development, design, construction, fixturing, equipping and finishing the Convention Center, including but not limited to, the foodservice facilities. Contractor shall keep the foodservice facilities in first-class condition and shall maintain the said foodservice equipment (except ordinary wear and tear) and conduct the business generally at a high level of cleanliness and neat appearance (the Operator shall be final judge as to the sufficiency of the cleanliness and neatness of appearance of the said premises and of any equipment at any phase of the said business with the power to order any changes or alterations thereto that it may deem desirable) and to leave the said facilities and equipment in a neat and tidy condition and in good operating order at the expiration or other termination of this Agreement.
- 8.14.6.** As an Allowable Expense, Contractor shall, from time to time and with the prior written, approval of Operator, furnish additional supplies as required for the proper operation of the foodservices, including but not limited to the replacement per exact specifications of the existing stock of china, glassware, cutlery, utensils and so forth damaged or lost by use in the conduct of the operations. Contractor will, at all times, take proper care of these supplies and strive to minimize losses and shall provide the initial par stock inventory of smallwares if termination takes place.
- 8.14.7.** Notwithstanding anything contained herein to the contrary, Contractor shall not be responsible for the provision, purchase or replacement of any of the food and beverage facilities or any furniture, fixtures and equipment (collectively, "FF&E"), unless to the extent caused by Contractor's negligence (including that of its employees, officers, or agents). Furthermore, to the extent that Contractor, in the reasonable exercise of its discretion, should determine that any of the food and beverage facilities or FF&E should be replaced or upgraded as opposed to repaired (whether on account of such equipment being obsolete, outdated, or the cost to repair excessive compared to the replacement or upgrade cost), then Contractor shall apprise the Operator and City. City shall replace or upgrade, as appropriate, such items at its sole cost or to the extent of available funds from the Capital Fund. Notwithstanding the foregoing, Operator shall have the right to inspect and inform the City and Contractor of (i) all structural components of the Convention Center, including, without limitation, the foundations, bearing and exterior walls, windows, subflooring, roof and roof membrane, (ii) all mechanical components and utility systems within or serving the Convention Center, including unexposed electrical, gas, plumbing, and sewage systems, including, without limitation, those portions

of the systems lying outside the Convention Center, and (iii) all heating, ventilating, and air-conditioning systems servicing the Convention Center.

#### **8.15. Cleaning, Inspection, and Sanitation**

- 8.15.1.** Unless otherwise stated in this Agreement, Contractor will provide all applicable inventories of Convention Center specified china, glassware, flatware, cooking utensils, and sundry items. These and any replacement costs will be an Allowable Expense. Appropriate records of serviceware replacement costs will be maintained by the Contractor and made available to the Operator and City upon request. Contractor will maintain, at all times, the kitchens and food preparation areas and all equipment, fixtures, paraphernalia, material, utensils and other items therein, in a clean and sanitary manner; and comply with all applicable health and sanitation laws and regulations in effect where the foodservices areas are located. Contractor shall permit and facilitate inspection of the foodservice operation by the Operator and its representatives and by public authorities so authorized at all times.
- 8.15.2.** Contractor shall provide the Operator with the following:
  - 8.15.2.1.** A description of the Contractor's approach to sanitation practices.
  - 8.15.2.2.** A description of the Contractor's program used to train employees in proper sanitation procedures.
- 8.15.3.** All refuse and waste materials created by Contractor's operations in all foodservice areas including cafe(s) and portable cafeteria(s), shall be promptly disposed of after each event by Contractor directly into a compactor designated by the Operator, from which it shall be removed by the Operator. The Operator will invoice Contractor monthly as an Allowable Expense for its proportionate share (generally, one-third of compactor removal costs in each month) of waste removal costs. Contractor will implement all of the sustainability practices outlined in the RFP Proposal. Contractor will report to the City and Operator its progress in achieving those goals including a "zero waste" environment.
- 8.15.4.** Contractor shall be responsible for the regular servicing of fire protection and fire extinguishing systems in the kitchen and food preparation areas to ensure they are fully operable. The Operator may schedule the servicing and forward the invoice to the Contractor for payment as an Allowable Expense.
- 8.15.5.** Contractor will contract for rodent and other vermin prevention and extermination as is necessary or required by law. The Contractor shall exert the utmost vigilance in detecting signs of rodent and other vermin and insect infestation, and when discovered take immediate action to eradicate such infestation.

#### **8.16. Maintenance Contractor**

Notwithstanding the Contractor's responsibility to maintain the foodservice facilities at a high level of neatness and cleanliness, Contractor shall provide standard building janitorial and maintenance services in the food/beverage service areas granted exclusively to Contractor. Should these services be deemed unsatisfactory by the Operator, Operator reserves the right to contract for such service. Nothing contained herein however, shall be construed to alter or affect any duty which Contractor has or may have toward the general public under applicable local, State and Federal law.

#### **8.17. Deliveries**

The movement of products in and out of the foodservice areas must be carefully monitored to avoid all conflicts with other Convention Center functions. Any containers being moved through public areas must be covered or otherwise protected.

#### **8.18. Garbage**

- 8.18.1.** Contractor shall transport all waste materials including grease from the various locations to the food service garbage compaction/pick-up areas, in a manner and by a route designated by the Operator. Such removal shall be made during and after each event. Contractor shall also maintain the food service trash/compaction area in a neat and clean condition at all times.
- 8.18.2.** The entire food and beverage preparation areas (except permanent seating areas) and within a radius of twenty (20) feet of each concession stand, kitchen area and work areas shall be kept clean and free from all rubbish. Contractor shall keep such twenty (20) feet radius of each stand and other concession areas free and clear of all debris. Repair of damage done to floors, walls, windows, or other property in said radius and other foodservice areas by reason of operation of said stand and other foodservice areas, will be the responsibility of the Contractor, and the costs of such repair shall be charged as an Allowable Expense. Contractor must employ the necessary cleaning personnel before, during and after the hours of each event to comply with these provisions subject to approval of Operator. These personnel will provide cleaning services only during designated times.
- 8.18.3.** Contractor shall provide sufficient and appropriate waste receptacles at each location and make certain that they are of the same design and style, kept clean, and promptly serviced during and after each event.

#### **8.19. Grease**

- 8.19.1.** Contractor must not discharge any grease into the building drains and must keep grease in containers for disposal by the Operator. If Contractor fails to comply with this provision, any cost, charge or expense involved in opening, cleaning or repairing drains will be paid by Contractor, the full cost of which will not be considered an Allowable Expense.

#### **8.20. Hours of Operation**

- 8.20.1.** Contractor's hours of operation shall be determined by mutual agreement of Contractor and Operator.

- 8.20.2.** All concession sales shall be conducted and operated in such manner as not to interfere with the orderly operation of events held within the Convention Center. Sales shall be conducted only from and at locations approved by the City and Operator.

**8.21. Use of Premises by Others**

- 8.21.1.** Contractor shall not permit the private use of any part of the premises without in each case the prior written approval of the City and Operator.
- 8.21.2.** Convention Center may lease space for certain major functions which have as their primary purpose the preparation and consumption of food and beverage of a specific geographical derivation, in which case the Operator may grant a tenant permission to sell or otherwise dispense food and beverage products (without limiting the generality of the above, examples could include such events as the International Culinary Olympics); provided, however, that the right of any tenant to dispense food and beverage products at the Convention Center shall be conditioned on (i) compliance with all applicable laws, rules and regulations, (ii) utilizing its own inventory, licenses, equipment and employees, and (iii) any such tenant indemnifying, releasing and providing a Certificate of Insurance to Contractor, Operator, SCCVB and City pursuant to an indemnification agreement acceptable to Contractor for any and all damage to Contractor's property and the areas used by Contractor in the provision of food and beverage services hereunder (and equipment utilized in the operation thereof if so agreed by Contractor in advance), and with respect to any liability resulting from such tenant's sale or service of food and/or beverages at the Convention Center. In such cases, the Contractor may charge a reasonable fee for the tenant's use of the premises and equipment (if any) pursuant to this Agreement (which fee shall be subject to the prior written approval of the City) with the revenues thus gained by the Contractor to be accounted for as Gross Receipts.

**8.22. Take-Out Sales**

It is understood that any items prepared on the Convention Center's premise on a "take-out" or "off-site" use basis for sale or delivery directly to the consumer shall be considered as sales to be included in the Gross Receipts of the food service operation.

**8.23. Restriction on Sales**

- 8.23.1.** Contractor understands and agrees that the City's or Operator's contracts with tenants for particular functions may stipulate reasonable restrictions on the sale of food, beverages and concession items, where necessary, to protect the goods on display or where necessary because of the nature of the function.

**8.24. Sampling**

- 8.24.1.** Contractor understands and agrees that food or beverage may be germane to the function itself, and in such cases, the City's contract with the tenant

may permit to dispense samples of foods and beverages, in quantities smaller than normally offered for sale, all as further described in Section 8.5.

- 8.24.2.** Operator and City reserves the right to examine and/or sample Contractor's products at any time for the purposes of assessing quality and portion controls.

## **Section 9. Purchasing Policy**

- 9.1.** Contractor shall purchase food, beverages and operating supplies, such as uniforms, laundry service, paper goods and detergents needed for the foodservice to be supplied hereunder from whatever source or sources that will establish and effect procedures which assure the quality and quantity required at the most economical prices, it being understood that the Contractor shall avail itself of all lawful trade, cash, quantity discounts and rebates in accordance with its then current methodologies. All such purchases shall be in the Contractor name, and payment shall be made directly to the Supplier.
- 9.2.** All such discounts and rebates shall inure to the benefit of the foodservice operations herein and be recognized on the profit and loss statement where applicable.
- 9.3.** No liens whatsoever may be placed against the property of the Convention Center as a result of the failure of the Contractor, his agents, contractors and/or sub-contractors to make all payments required of them in this connection.
- 9.4.** Notwithstanding the foregoing, Contractor shall purchase Northern California grown and produced food, beverages, and supplies to the fullest extent possibly, but at a minimum of 25%. Contractor will develop a report that demonstrates the overall purchasing volume and details the local purchases that make up the 25% minimum requirement.

## **Section 10. Compensation**

As consideration for the performance by Contractor of its duties hereunder, City shall pay Contractor a management fee equal to 4.5% of Gross Receipts ("Management Fee") plus an additional fee equal to 8% of Net Receipts ("Incentive Fee" together with Management Fee hereinafter shall be referred to as the "Fees"). The Fees shall be paid to Contractor on a monthly basis as set forth in Section 12.

## **Section 11. Performance Measures**

### **11.1. Key Performance Indicators (KPIs)**

This Section defines the KPIs to measure Contractor's performance and the weighted percentage assigned to each KPI ("Weighted Percentage"). The development of specific goals to be assigned from year to year to each KPI shall be developed in good faith between the City and Contractor. If the parties do not agree on new KPIs, the previously agreed to KPI will remain in effect. The weighted achievement percentage shall be calculated as the product of the extent to which Contractor met or exceeded the KPI for a category of KPI multiplied by the Weighted Percentage assigned to such category of KPI ("Weighted Achievement Percentage"). The Weighted Percentage allocated to each category of KPI is

intended to reflect the relative importance of Contractor's satisfactory performance of its duties in that category. If Contractor fails to meet one or more of the assigned goals to a category of KPI, then Contractor will be entitled only to a reduced pro rata share of the Weighted Achievement Percentage for that category of KPI. Similarly, if Contractor exceeds all of the assigned goals to a category of KPI, then Contractor will be entitled to an increased pro rata share of the Weighted Achievement Percentage for that category of KPI. The aggregate of the Weighted Achievement Percentage for all categories of KPI will be added together to determine Contractor's overall KPI score for the year. If that score is less than 84% for any year, then Contractor's Management Fee for that year will be reduced according to the chart set forth in Section 11.2 below.

By way of an example, if Contractor meets 80% of the goals assigned to Customer Service Survey Results Score which category is assigned a Weighted Percentage of 10%, then Contractor shall earn a Weighted Achievement Percentage of 8%. If Contractor exceeded the goals assigned to Customer Service Surveys Results Score by 10%, then Contractor shall earn a Weighted Achievement Percentage of 11%. The KPIs and Weighted Percentages assigned to each KPI are described as follows:

- 11.1.1. Customer Service Survey Results Score.** This category of performance measure is assigned a Weighted Percentage of 10%. Contractor must achieve 90% rating or above. Contractor will ask the decision-maker of each event to rate their overall satisfaction with the product and services provided. Contractor will create a standard survey instrument containing a series of product and service rating metrics, including the following summary questions: "Based on the services provided, please rate our overall performance." The post facility use survey data will be sent directly to the Contract Administrator for review. In addition, Contractor will work on developing post-event surveys. Periodically, Contract Administrator and Contractor shall review and discuss the survey data and identify, as necessary, areas for additional attention and improvement by Contractor. Should Contractor's rating fall below 75%, Contractor will be put on notice and shall improve the rating to over 75% prior to the expiration of the time frame set forth in Section 19.1.1 (h).
- 11.1.2. Room Nights Generated.** This category of performance measure is assigned a Weighted Percentage of 5%. The City will measure the extent to which Contractor contributes to maintaining or increasing the annual average room nights that have been forecasted. Notwithstanding the foregoing, in the event a Force Majeure has a material impact on the City and Contractor's ability to maintain or generate room nights during any year of the Term, the parties agree that the Weighted Percentage assigned to this KPI shall be redistributed to the Customer Service Survey Results Score (which such distribution shall result in the Weighted Percentage of 15% for that KPI).
- 11.1.3. Overall Profit and Loss.** This category of performance measure is assigned a Weighted Percentage of 40%. In the event the Net Profit is greater than 15% below the amount stated in the Operating Budget, Contractor agrees to work with the City to develop and implement a plan (or changes to the then current plan) to achieve the Net Profit.

- 11.1.4. Community Impact Scores – Community Accessibility.** This category of performance measure is assigned a Weighted Percentage of 10%. The City will measure the number community outreach events as they relate to the annual goals set for this category.
- 11.1.5. Sustainability Goals – Zero Waste.** This category of performance measure is assigned a Weighted Percentage of 10%. Contractor shall develop a reporting system that demonstrates the percentage of waste generated by Contractor's operations under this Agreement that is diverted to landfill. This goal will be set annually with a target to achieve a "zero waste" operation.
- 11.1.6. Workforce Development/Training.** This category of performance measure is assigned a Weighted Percentage of 7.5%. Contractor shall develop and submit a specific workforce training and development as outlined in the RFP response and quantify the participation level and impact of the training.
- 11.1.7. Local Purchasing Requirement.** This category of performance measure is assigned a Weighted Percentage of 5%. Contractor shall meet the commitment to purchase a minimum of 25% locally pursuant to Section 9.4
- 11.1.8. Sales Activity – New Business Development.** This category of performance measure is assigned a Weighted Percentage of 7.5%. Contractor shall develop prospecting goals within the social business area as well as participation goals in securing other event types with an emphasis on large conventions.
- 11.1.9. Retail Revenue/Public Space Activation.** This category of performance measure is assigned a Weighted Percentage of 5%. Contractor shall delineate the goal for revenue that will be generated from public spaces at the Convention Center from the Proforma Budget. This will be reported separately as a measure against this KPI.

## **11.2. Rebate of Management Fee**

- 11.2.1.** On a quarterly basis, Contractor shall report to the City whether it is on track to meet the KPIs. Contractor and the City will on a quarterly basis, or as requested by the City, discuss Contractor's performance report.
- 11.2.2.** If in any Operating Year, starting with the 2020-21 Operating Year, Contractor does not achieve an aggregate Weighted Achievement Percentage as set forth in the table below, Contractor shall rebate to the City up to two hundred thousand dollars (\$200,000) of its earned Management Fee in such year. Sample calculations of the Weighted Achievement Percentage are shown in Exhibit C. In no event shall Contractor be required to rebate more than two hundred thousand dollars (\$200,000) of its Management Fee in such year (or any subsequent year).

<b>Sum of the Weighted Achievement Percentage</b>	<b>Rebate Schedule</b>
80% - 84%	\$16,666 or 35% of Management Fee if less than \$200,000 is earned that given year
75% - 79%	\$130,000 or 65% of Management Fee if less than \$200,000 is earned that given year
74% or lower	\$200,000 or 100% of Management Fee if less than \$200,000 is earned that given year

- 11.2.3.** If the City in good faith believes that Contractor has failed to meet a majority of the goals assigned to a KPI category, then City shall provide written notice to Contractor. Promptly after receipt of the written notice, an authorized City representative and the General Manager of Contractor shall meet in person to discuss the effected KPIs and develop a remediation plan acceptable to the City. Contractor shall have thirty (30) days to implement the remediation plan in order to properly cure the KPI category.
- 11.2.4.** In the event the sum of all the resulting Weighted Achievement Percentage falls below 75%, this is considered a material default and Contractor will be notified of City's proposed Termination absent Contractor's cure of the default pursuant to Section 19.1. Nothing herein is intended to limit the City's ability to declare a material default under Section 19.1 to only the Contractor's failure to meet one or more KPI goals. Notwithstanding the foregoing, the cure period for any material default solely for Customer Survey Results shall be no less than ninety (90) days as provided in Section 19.1.1(h).

## **Section 12. Fiscal Arrangement**

### **12.1. Operating Account**

- 12.1.1. Establishment of Operating Account.** Contractor shall establish and maintain, in its name and accessible by City, a separate commercial bank account solely for the Food and Beverage Services at the Convention Center ("Operating Account") and shall deposit all Gross Receipts in such account. The Operating Account shall be used exclusively for deposit of Gross Receipts, reimbursement of Allowable Expenses to Contractor, and disbursement of Net Profit, if any, to the City. Contractor shall pay for all Allowable Expenses from its separate corporate account and shall be reimbursed from the Operating Account after City's approval. The above may be accomplished by Contractor managing disbursements and lock box transactions with Contractor's controlled accounts, with full accounting transactions provided to the City. Disbursement of Net Profit, if any, to the City shall occur monthly after all Allowable Expenses have been funded. The transfer of Net Profit will occur via wire transfer or other method as specified by the City, with banking instructions to be provided to Contractor by the City. Contractor acknowledges that all funds related to this agreement are ultimately controlled by the direction of the City.



**12.1.2. Payment of Allowable Expenses; Shortfall.** Contractor shall pay all Allowable Expenses with the funds in the Operating Account, which Contractor may access only pursuant to Section 12.1. In the event at any time during the Term, the Operating Account is insufficient to cover Allowable Expenses over the next four (4) weeks (a "Shortfall"), Contractor must inform the City of the potential shortfall at least thirty (30) calendar days prior to such occurrence, or as soon as such Shortfall actually occurs. City shall have the obligation to fund any portion of any Shortfalls or "negative cash flow" from the Services. It is expressly understood and agreed that Contractor under no circumstances shall ever be obligated to fund any Shortfalls.

**12.1.3. Books and Records.** Contractor agrees to maintain separate and independent books and records, in accordance with generally accepted accounting principles, relating to its operations in connection with its management of the Food and Beverage Services, as applicable. Such books and records shall contain documentation regarding the deposit of all Gross Receipts in the Operating Account, and the incurrence by Contractor of all Allowable Expenses, including copies of invoices of all products and materials purchased by Contractor hereunder, and copies of payroll summaries, deposit receipts and bank statements relating to the Operating Account. City or its designee shall have the right to inspect such books and records from time to time upon reasonable notice during the ordinary business hours of Contractor and without interfering with Contractor's daily operations.

## **12.2. Capital Fund and Reserves**

**12.2.1. Capital Fund.** As an Allowable Expense, City shall set aside 3.5% of annual Gross Receipts toward expenditures associated with the maintenance, repair and replacement of the FF&E used by Contractor (the "Capital Fund"). This fund will be held by the City and all such expenditures from the Capital Fund shall be mutually agreed upon by the Parties. For purposes of clarity, City shall have the option, but not the obligation, to apply the Capital Fund toward any agreed upon replacements for which City is responsible pursuant to the terms of this Agreement. If there are insufficient funds in the Capital Fund to cover such replacements, then City shall be responsible for the payment of those replacements, unless said replacements are solely caused by Contractor's negligence, in which case Contractor shall be responsible for their payment. Any remaining amount in any given Operating Year may carry over to the next Operating Year or be treated as otherwise mutually agreed upon by City and Contractor. Any balance in the Capital Fund at the time of termination or expiration of the Agreement shall be retained by City.

**12.2.2. Training Reserve.** As an Allowable Expense, City shall set aside 0.25% of annual Gross Receipts toward training programs and other job-related education programs for the food and beverage employees (the "Training Reserve"). This fund will be held by the City. Contractor shall propose an annual training plan. All such expenditures from the Training Reserve shall be proposed by Contractor and approved by City in its reasonable

discretion. Any remaining amount in any given Operating Year may carry over to the next Operating Year or be treated as otherwise mutually agreed upon by City and Contractor. Any balance in the Training Reserve at the time of termination or expiration of the Agreement shall be retained by City.

**12.2.3. Bad Debt Reserve.** As an Allowable Expense, City shall set aside 0.25% of annual Gross Receipts toward covering any bad debt expenses throughout the Term (the "Bad Debt Reserve"). This fund will be held by the City. All such expenditures from the Bad Debt Reserve shall be proposed by Contractor and approved by City in its reasonable discretion. Any remaining amount in any given Operating Year may carry over to the next Operating Year or be treated as otherwise mutually agreed upon by City and Contractor. Any balance in the Bad Debt Reserve at the time of termination or expiration of the Agreement shall be retained by City.

### **12.3. Pre-Opening Expenses**

All pre-opening expenses ("Pre-Opening Expenses") generated in connection with the opening of the food and beverage areas are an Allowable Expense and shall be funded by the Operations Investment and include, but not be limited to, all of the costs, expenses and fees incurred (i) in the case of Contractor, reimbursement of all third-party expenses incurred in providing design and construction consultation services relating to the design and construction of the food and beverage areas pursuant to Section 15, (ii) to procure all required licenses and permits to conduct the Services, (iii) to recruit, hire, relocate and train employees prior to opening, (iv) to market and promote the food and beverage areas prior to the actual commencement of the Services by Contractor, it being understood and agreed that marketing and promotional expenses include, but shall not necessarily be limited to, pre-opening promotional or training events or parties, and (v) all travel and other reasonable out of pocket expenses to prepare for opening. For clarification purposes, the parties acknowledge that the Pre-Opening Expense Estimate, which is attached hereto as Exhibit "B", includes an estimate of the Pre-Opening Expenses.

## **Section 13. Establishment of Operating Budget**

**13.1.** Beginning January 2, 2020, Contractor shall submit to the Operator a two-year operating budget ("Operating Budget") for the Food and Beverage Services that will include budgets for (a) the funds required from City to operate the foodservice facilities in accordance with the standards established in this Agreement, and (b) any proposed capital expenditures for replacements or upgrades (the cost of which shall be paid from the Capital Fund, Operations Investment, or by City) to add to, replace or modify any of the FF&E to be included in the foodservice facilities, which Operating Budget shall be subject to Operator's and City's reasonable approval, provided, however, (A) Operator shall not unreasonably withhold, condition or delay such approval and (B) such approval shall occur by March 15 after the proposed budget has been submitted. Since City budgets on two-year alternating operating and capital cycles, Contractor shall submit revisions, if necessary, to the adopted Operating Budget in the second year of the Operating Budget in accordance with the dates above, and any revisions shall be subject to City Council approval. The Operating Budget shall be based upon the Proforma Budget as shown in Exhibit A and any deviation from the Proforma Budget must be justified and approved by the Operator

and (b) include any changes to the Food and Beverage Services or the foodservice facilities which Contractor reasonably recommends and any other additions, improvements or changes to the Food and Beverage Services which are reasonably approved by City.

- 13.2.** Contractor shall manage and operate the food and beverage operation at the Convention Center in accordance with the Proforma Budget, which is attached hereto and incorporated herein as Exhibit A. However, City acknowledges that notwithstanding Contractor's experience and expertise in relation to the operation of food and beverage operations similar to the Convention Center, the projections contained in the Proforma Budget are subject to and may be affected by changes in financial, economic and other conditions and circumstances beyond Contractor's control, and that Contractor shall have no liability if the Net Profit numbers within the approved Operating Budget are not achieved without any fault of Contractor and notwithstanding Contractor's compliance with all other terms of this Agreement, with the exception set forth in Section 11.2. Contractor agrees to notify the Contractor within ten (10) calendar days if the actual Net Receipt for any month deviates 10% or more from that provided for in the approved Proforma Budget for such time period. In such case and if requested by the City, Contractor agrees to work with the City and Operator to develop and implement a plan (or changes to the then current plan) to limit expenses to be incurred in the remaining months of such Operating Year with the goal of achieving the Operating Budget.

## **Section 14. Investments**

- 14.1.** Contractor shall pay to City an investment in the amount of Five Million Dollars (\$5,000,000) ("Operations Investment") no later than thirty (30) calendar days after the Effective Date, which shall be utilized for Pre-Opening Expenses and other improvements to the foodservice facilities at the Convention Center in consultation with Contractor. Operations Investment shall be amortized on a straight-line over fifteen (15) years. In the event that this Agreement expires or terminates for any reason whatsoever (including without limitation if due to a breach or default by Contractor, or if the Term is not extended beyond the Initial Term or Option Term One, as applicable) prior to full amortization of the Operations Investment, the City shall be obligated to reimburse Contractor for only the unamortized amount.
- 14.2.** In addition, Contractor shall pay to City an investment in the amount of Seven Hundred Fifty Thousand Dollars (\$750,000) ("Community Enrichment Investment") after the Effective Date, which shall be utilized toward programs that drive community enrichment, develop local partnerships, and promote economic development of the City. The Community Enrichment Investment shall amortize on a straight-line over fifteen (15) years. In the event that this Agreement expires or terminates for any reason whatsoever (including without limitation if due to a breach or default by Contractor, or if the Term is not extended beyond the Initial Term or Option Term One, as applicable) prior to full amortization of the Community Enrichment Investment, the City shall be obligated to reimburse Contractor for only the unamortized amount.
- 14.3.** Title to all equipment and assets at the Convention Center, including such that are purchased pursuant to the Operations Investment, Community Enrichment

Investment, Capital Fund, Training Reserve and Bad Debt Reserve, shall be owned and vested in City.

- 14.4.** Neither Party shall be required by the other to make additional deposits to the Operations Investment, Community Enrichment Investment, Capital Fund, Training Reserve, Bad Debt Reserve or pay for budgeted items from its separate funds without such Party's prior written consent, which consent may be granted or withheld in such Party's sole and absolute discretion. In no event shall Contractor be required to fund any capital improvement from its own account except as provided in Section 14.1.

## **Section 15. Capital Improvements, Repairs and Replacements**

- 15.1.** Notwithstanding anything contained herein to the contrary, Contractor shall consult with City with respect to updates and changes to the design, construction, and equipping of the foodservice facilities at the Convention Center, including by participating in the Convention Center design reviews and related work streams; attend all conferences (in person or by telephone) and teleconferences as requested by the City or Operator; make recommendations regarding changes or updates to the design and location of areas of the Convention Center for which foodservices will be provided by Contractor under this Agreement.
- 15.2.** It is expressly understood and agreed that, unless City and Contractor otherwise agree in a separate written agreement, Contractor shall have no responsibilities with respect to any aspect of the Convention Center other than the (i) consulting services with respect to the design, development and construction of the food and beverage areas as set forth in Section 15.1 and (ii) management of the operations of the completed food and beverage areas. It is further expressly understood and agreed that Contractor is a consultant and not a licensed architect, engineer or professional services provider and accordingly, Contractor shall not have control or charge of, and shall not be responsible for, construction means, methods, techniques, sequences or procedures, or for safety precautions and programming in connection with the design, development and construction of the food and beverage areas, nor for the acts or omissions of any architect, engineer, professional services provider, general contractor, subcontractor, supplier, vendor or any other individual or entity performing any of the design, engineering or construction work, or for the failure of any of them to carry out the construction work in accordance with the contract documents. Furthermore, Contractor shall not be obligated to enter into any agreements on behalf of City in connection with the aforementioned design, development and construction of the Convention Center. Notwithstanding the foregoing, if Contractor opts to repair or replace equipment in urgent situations as identified in Section 8.14.4 above, Contractor shall be responsible for doing so in a prudent manner and for following all laws, rules, regulations and City policies applicable to such work or purchase.
- 15.3.** In the event that Contractor becomes aware of the need for a capital repair or replacement that was not anticipated, but is necessary for the continued operation, Contractor shall immediately notify the City's Contract Administrator of the nature of the repair or replacement and of the estimated cost of the repair or replacement. The City's Contract Administrator will make a recommendation to City on how to proceed within thirty (30) calendar days of the request from Contractor.

## **Section 16. Fiscal Responsibility and Accountability**

### **16.1. Monthly and Quarterly Reporting**

- 16.1.1.** Each month and calendar quarter, Contractor will prepare and deliver to Operator and the City a report describing the Food and Beverage Services at the Convention Center for the prior period in a format approved by Operator (hereinafter referred to as "Monthly Report" and "Quarterly Report," and together as "Reports"). The Reports will include information on the activities associated with the Food and Beverage Services at the Convention Center, and shall include KPIs and a financial analysis (balance sheet, profit and loss statement, and forecast of how the Food and Beverage Services at the Convention Center is operating. The Reports will also include information included in the Monthly "Dashboard" Report that is referred to in Section 16.1.3. Contractor shall submit the Reports to Operator by the 12<sup>th</sup> day following such month or quarter.
- 16.1.2.** City retains the right to demand and access all financial records and reports directly related to the Food and Beverages Services at the Convention Center. At City's request, the Parties will meet to discuss the reports at a minimum on a quarterly basis.
- 16.1.3.** Contractor shall prepare a monthly "dashboard" report that will be distributed to the Contract Administrator that will combine the KPIs set forth in Section 11.

### **16.2. Dashboard Reports**

- 16.2.1.** The dashboard reports for each month will be due by the 12th day following such month. The City acknowledges and agrees that certain metrics (such as Gross Receipts and Net Profit) will be available and included in the monthly "dashboard" reports due in connection with the first (1st) month of this Agreement, but other metrics will not be available and provided until July 1, 2020.

### **16.3. Annual Performance Audit and Financial Statement Audit**

- 16.3.1.** City shall have the right, at its sole cost, to engage an independent third party to audit the books and records and overall performance of Contractor for the purpose of confirming that the amounts remitted by Contractor to City hereunder are the proper amounts due City. Such audit shall be completed by City or its representatives at Contractor's corporate office, on reasonable advance notice to Contractor, and on dates and times mutually agreed to by the Parties. In the event such audit reveals any underpayment to City or if Contractor has actual knowledge of an underpayment through any means, Contractor shall promptly pay to City the amount of such deficiency. If such audit reveals any overpayment to City or if the City has actual knowledge of an overpayment through any means, City shall promptly pay to Contractor the amount of such overpayment.

- 16.3.2.** In addition, City, through its authorized employees, representatives or agents shall have the right during the term of this Agreement and for four (4) years from the date of final payment for goods or services provided under this Agreement, to audit the books and records of Contractor for the purpose of verifying any and all charges made by Contractor in connection with compensation under this Agreement. In the event an audit reveals theft or malfeasance on the part of Contractor that results in a loss to the City or if Contractor becomes aware of any such theft or malfeasance, Contractor shall immediately reimburse the City for the loss. Contractor shall submit to City any and all reports concerning its performance under this Agreement that may be reasonably requested by City in writing. Contractor agrees to assist City in meeting City's reporting requirements to the State and other agencies with respect to Contractor's services hereunder. Contractor shall conduct reasonable and prudent oversight of its operations to avoid and to detect any theft or malfeasance on the part of Contractor's employees, agents or contractors.
- 16.3.3.** Within 180 calendar days after the end of each Operating Year, Contractor agrees to provide to the City and Operator a certified audit report on the accounts and records as kept by Contractor for the Convention Center. Costs associated with obtaining such certified audit report shall be an Allowable Expense. Such audit shall be performed by an external auditor approved by the City and shall be conducted in accordance with generally accepted accounting principles. City (through its Director of Finance or other authorized officer or designee) may also cause a performance audit ("Performance Audit") to be conducted and completed by a Performance Auditor (the person or firm so selected referred to herein as the "Auditor") or by the City Auditor. The Performance Audit shall assess Contractor's performance during the previous Operating Year using the KPIs, taking into account applicable funding levels under this Agreement. A draft report of the Performance Audit shall be made available for comment by City and Contractor prior to completion of the audit. The Performance Audit shall include the KPIs agreed to each year as part of the budget process in accordance with Section 11.

#### **16.4. Taxes and Assessments**

##### **16.4.1. Payment of Taxes and Fees**

- 16.4.1.1. Contractor shall be responsible for collecting any sales and use tax assessed on the services provided to customers of the Convention Center and remit such sales and use taxes to the applicable taxing authority on the City's behalf.
- 16.4.1.2. The sole purpose of this Agreement is for Contractor to provide Food and Beverage Services at the Convention Center. Should assessor for the County of Santa Clara determine that Contractor's right to provide Food and Beverage Services as set forth in this Agreement creates a possessory interest subject to a possessory interest tax, City shall reimburse Contractor for any possessory interest tax or taxes imposed upon Contractor as a

result of its Food and Beverage Services operation at the Convention Center, and the amount of such reimbursement shall not be allocated to any of the financial formulas or results of operation under this Agreement.

#### **16.4.2. Income Taxes**

- 16.4.2.1.** Contractor shall timely pay all state, federal and local income taxes arising from Contractor's Fees actually received by Contractor under this Agreement.

#### **16.4.3. Taxes – Hold Harmless**

- 16.4.3.1.** Contractor shall protect, defend, indemnify and hold City and Operator harmless from any liability, loss, or damage, including interest and penalties, resulting from any failure by Contractor to pay applicable taxes on its income received hereunder.

#### **16.5. Internal Control Structure**

- 16.5.1.** Contractor shall maintain an internal control structure designed to provide assurance that City and Convention Center are safeguarded from loss or unauthorized use, that transactions are executed in accordance with this Agreement, and that financial records are reliable for the purpose of preparing financial statements. The internal control structure shall be supported by the selection, training, and development of qualified personnel, by an appropriate segregation of duties, and by the dissemination of written policies and procedures. City's Director of Finance, or designee, or the City Auditor may review such controls at any time during this Agreement, and may commission an agreed upon procedures audit from the External Auditor. Contractor shall cooperate and provide any information relevant to the review by the Director of Finance, City Auditor, or External Auditor.

#### **16.6. Duty to Keep City Informed**

- 16.6.1.** Contractor shall keep City's Director of Finance and/or Contract Administrator informed and advised of all material financial and other matters concerning the Food and Beverage Services at the Convention Center and give due consideration to suggestions which City's designees or consultants may offer with respect thereto from time to time.

#### **16.7. Regarding Notes/Guarantees/Loan Agreements**

- 16.7.1.** Each party hereby covenants and agrees that it will not, and nothing herein shall be deemed to authorize the other to, execute any notes, guarantees, loan agreements or other evidences of indebtedness, or borrow any money on behalf of the other or as a part of the Allowable Expenses herein authorized. Contractor has no power or authority to enter into any mortgage, deed of trust, security agreement, or any other instrument encumbering all or any part of the Convention Center or any accounts or other personal

property arising from or attributable to the Convention Center or its operations.

## **Section 17. Agreement Monitoring**

### **17.1. Monitoring Designee**

Contractor shall designate a specific individual to monitor the Agreement who, as of the Effective Date, shall be Contractor's onsite General Manager.

### **17.2. Authority of Contract Administrator**

City agrees that its City Manager shall name a specific individual as the Contract Administrator. The Contract Administrator shall have such authority as set forth in this Agreement. The Contract Administrator shall be the primary liaison between Contractor and City on all matters relating to this Agreement where City Council or City Manager approval is not otherwise required by applicable law, and shall have the primary responsibility for monitoring and assessing the quality of services provided and contract compliance by Contractor. Contractor can rely on any approvals or instructions given by the City's Contract Administrator that are not inconsistent with the authority set forth herein as being binding against the City.

### **17.3. Operator**

City hereby represents and warrants that it shall cause Operator to perform and comply with all terms and conditions described in this Agreement.

## **Section 18. Data Security**

**18.1.** Contractor must secure, protect at all times, and implement commercially reasonable measures to prevent unauthorized access to any personal identifying information, financial account information, and information designated in writing by the City as "restricted City information" (collectively, "Confidential Information"), whether in electronic form or hard copy. At a minimum, Contractor must encrypt and password-protect electronic files, store and process Confidential Information only in North America, and adhere to any security applicable standards. Standards arise from the service and data processed and may include National Institute for Standards and Technology CSF/800-14/800-53/800-82, International Organization for Standardization 1504/27001/27002, International Society for Automation ISA-62443 series, Payment Card Industry PCI-DSS, Underwriters Laboratory, Health Insurance Portability and Accountability Act, Federal Risk and Authorization Management Program FedRAMP, US Department of Justice/Federal Bureau of Investigation Criminal Justice Information Services Security Policy, et al, as applicable based on the scope of foodservice services hereunder. This includes data saved to host locations, computers, connected devices, and storage devices.

**18.2.** When Confidential Information, regardless of its format, is no longer required by Contractor to execute the work required by this Agreement, the information must be redacted or destroyed through appropriate and secure methods, to ensure the information cannot be viewed, accessed, and reconstructed.

**18.3.** Contractor represents and warrants that for the Term of the Agreement, if Contractor serves as the merchant-of-record for credit or debit card transactions in connection



with the Services provided under this Agreement, the software and services used for processing credit and debit card transactions shall be compliant with standards established by the Payment Card Industry (PCI) Security Standards Council. In the case of a third-party application selected by Contractor, the application will be listed as PA-DSS compliant at the time of implementation by the Contractor. Except for the negligent actions or omissions of the City and/or Operator and/or its contractors, Contractor acknowledges and agrees that it is responsible for the security of all cardholder data. Contractor agrees to indemnify, defend, and hold City, its officers, employees, and agents, as well as Operator and its employees and agents, harmless for, from and against any and all claims, causes of action, suits, judgments, assessments, costs (including reasonable attorneys' fees) and expenses arising out of or relating to any loss of customer payment card or identity information processed, managed, retained or maintained by Contractor, including but not limited to fraudulent or unapproved use of such payment card or identity information. Contractor shall, upon written request, furnish proof of compliance with the Payment Card Industry Data Security Standard (PCI DSS) within 10 business days of the request. Regardless of written request, the Contractor shall provide the proper Attestation of Compliance (AOC), which can be found on the PCI SSC website, annually. Contractor agrees that, notwithstanding anything to the contrary in the Agreement, the City may terminate the Agreement immediately without penalty upon notice to the Contractor in the event Contractor fails to maintain compliance with the PCI DSS or fails to maintain the confidentiality of any cardholder data. If Contractor Systems connect to or interface with City systems, the City agrees to promptly implement upon written request from Contractor, at City's expense, changes to the City Systems that Contractor reasonable requests and believes are necessary or prudent to ensure Contractor's compliance with the PCI DSS.

## **Section 19. Termination**

### **19.1. Termination by City**

**19.1.1.** In addition to any other rights or remedies City may have, City may terminate this Agreement by written notice to Contractor if: (a) Contractor fails to remit, for a period of thirty (30) calendar days after receipt of written notice of demand therefor, any undisputed sums due and owing to City under this Agreement; (b) Contractor fails to correct to the reasonable satisfaction of City any condition created or controlled by Contractor that, in City's reasonable judgment, poses a hazardous condition to occupants of the Convention Center within twenty-four (24) hours after receipt of written notice from City; (c) subject to the last sentence of this Section 19.1.2, Contractor fails to perform any material obligation under this Agreement and such failure continues unremedied for a period of thirty (30) calendar days after receipt of written notice from City of the particular failure to perform; (d) Contractor is placed into bankruptcy either voluntarily or involuntarily (and such involuntary proceeding is not dismissed within sixty (60) calendar days), becomes financially insolvent, takes the benefit of any present or future insolvency statute, makes a general assignment for the benefit of creditors, or consents to the appointment of a receiver, trustee, or liquidator of all or substantially all of its property; (e) Contractor assigns, transfers or permits an assignment or transfer of this Agreement in violation of Section 20; (f) Contractor fails to obtain and/or maintain required

licenses and permits under Section 8.11.2 and such failure continues to be unremedied for a period of thirty (30) calendar days; (g) Contractor's aggregate Weighted Achievement Percentage score for its KPIs is at or below 74% in two (2) consecutive years; or (h) Contractor's Weighted Achievement Percentage score for the Customer Service Survey Results is less than 75% in any one year and that score has not been raised to over 75% over the next three (3) months; provided that during the 3-month cure period, the parties calculate the Customer Service Survey score based only on surveys conducted during that 3 month period (not the entire year); and agree that termination of this Agreement by City pursuant to this Section 19 shall be "for cause."

- 19.1.2.** If any failure that would otherwise entitle City to terminate this Agreement under Section 19.1.1(c) is the result of a Force Majeure, City shall not have a termination right under such Section 19.1.1(c) unless the failure continues unremedied until the earlier of (i) thirty (30) calendar days after the condition constituting the Force Majeure has terminated or (ii) one hundred eighty (180) calendar days from the commencement of such Force Majeure.

## **19.2. Termination by Contractor**

- 19.2.1.** In addition to any other rights or remedies Contractor may have, Contractor may terminate this Agreement by written notice to City if: (a) City fails to remit, for a period of thirty (30) calendar days after receipt of written notice of demand therefor, any undisputed sums due and owing to Contractor under this Agreement; (b) subject to the last sentence of this Section 19.2, City fails to perform any material obligation under this Agreement and such failure continues unremedied for a period of thirty (30) calendar days after receipt of written notice from Contractor of the particular failure to perform; or (c) City is placed into bankruptcy either voluntarily or involuntarily (and such involuntary proceeding is not dismissed within sixty (60) calendar days), becomes financially insolvent, takes the benefit of any present or future insolvency statute, makes a general assignment for the benefit of creditors, or consents to the appointment of a receiver, trustee, or liquidator of all or substantially all of its property. Contractor and City acknowledge and agree that termination of this Agreement by Contractor pursuant to this Section 19.2 shall be "for cause."
- 19.2.2.** If any failure that would otherwise entitle Contractor to terminate this Agreement under Section 19.2.1(b) is the result of a Force Majeure, Contractor shall not have a termination right under such Section 19.2.1(b) unless the failure continues unremedied until the earlier of (i) thirty (30) calendar days after the condition constituting the Force Majeure has terminated or (ii) one hundred eighty (180) calendar days from the commencement of such Force Majeure.

## **19.3. Effect of Termination or Expiration**

- 19.3.1.** In the event that this Agreement expires or terminates for any reason (other than for Contractor's default pursuant to Section 19.1.1), as a condition

precedent to such termination, City agrees to pay to Contractor, in a single lump sum payment, any undisputed amounts owed to Contractor including the unamortized portion of the Operations Investment and the Community Enrichment Investment actually paid to City under this Agreement.

- 19.3.2.** If the Agreement is terminated by City due to Contractor's default pursuant to Section 19.1.1, City shall pay Contractor on the termination date, in a single lump sum payment, any undisputed amounts owed to Contractor including the unamortized portion of the Operations Investment and the Community Enrichment Investment actually paid to City under this Agreement.
- 19.3.3.** Upon the termination or expiration of this Agreement, for any reason whatsoever, (i) Contractor shall immediately surrender possession of the food and beverage facilities, smallwares, uniforms, Customer Service Survey Results and equipment (and related manuals and software) to City, (ii) Contractor shall immediately assign to City or its designee(s) all right, title and interest of Contractor in and to all customer deposits and agreements relating to catered events and, subject to clause (iii) below, all other items purchased by Contractor in connection with the Food and Beverage Services (including uniforms, smallwares, office equipment and warehouse and transportation equipment), (iii) City or its designee shall purchase from Contractor all beverages, paper products and other supplies purchased by Contractor in connection with the Food and Beverage Services that City reasonably determines are saleable or usable in the ordinary course, at Contractor's cost, (iv) Contractor shall make all payments required to be made by Contractor under this Agreement, and (v) to the extent permitted by applicable law, Contractor shall immediately surrender possession of and assign to City (or its designee) all permits and licenses acquired by Contractor for the Convention Center Food and Beverage Services, and (vi) all matters, rights and liabilities existing on the date of termination between the parties hereto shall be determined as of such termination date (except as described in this Section 19.3), and discharged as promptly as possible thereafter, including any known claims for damages either party may have against the other for breach of the terms and conditions hereof; any such surrender shall require delivery of possession in good condition, reasonable and ordinary wear and tear excepted and otherwise in compliance with the terms of this Agreement.
- 19.3.4.** The parties acknowledge and agree that City shall be the sole owner of any property purchased or created as a result of the Operations Investment, the Community Enrichment Investment, and any remaining balance in the Capital Fund, the Training Reserve, or the Bad Debt Reserve.
- 19.3.5.** Notwithstanding any termination or expiration of this Agreement, all liabilities and obligations of the parties will survive until they are fully satisfied.
- 19.3.6.** City hereby expressly agrees that, during the Term (including any extensions thereof) and for a period of twelve (12) months following either the expiration or earlier termination of this Agreement, the City, nor any

subsequent Contractor at the Convention Center or any agent of such parties shall directly solicit any current salaried or management-level employee of Contractor or its affiliates (including, but not limited to, Contractor's current director of operations, chefs, sous chefs and the City's of the various areas of the food and beverage facilities) learned about solely due to the Food and Beverage Services to work in or in connection with the Convention Center or the food and beverage facilities as an employee, without Contractor's prior written approval, which approval can be granted or denied in Contractor's sole and absolute discretion. Contractor hereby expressly agrees that, during the Term (including any extensions thereof) and for a period of twelve (12) months following either the expiration or earlier termination of this Agreement, none of Contractor nor any of its affiliates or agents shall directly solicit any current salaried or management-level employee of City learned about solely due to the Food and Beverage Services to work for or in connection with Contractor as an employee, without City's prior written approval, which approval can be granted or denied in City's sole and absolute discretion. Any public announcements made upon the expiration or earlier termination of this Agreement shall be reasonably agreed upon in advance by City and Contractor.

#### **19.4. Casualty Event**

- 19.4.1.** If the Convention Center is destroyed or otherwise rendered unusable for more than thirty (30) calendar days for any reason (a "Casualty Event"), City shall give Contractor a notice within ninety (90) calendar days after the Casualty Event stating that the City intends to rebuild or restore the Convention Center. If the notice states that the City will not rebuild or restore the Convention Center, this Agreement shall be terminated. If the notice states that the City intends to rebuild or restore the Convention Center, the parties' obligations hereunder shall be abated during the rebuilding or restoration period. If such notice states that the City reasonably believes that it will take longer than two (2) years to restore or rebuild the Convention Center or, if a shorter amount of time, such amount of time is longer than the remainder of the Term, either party shall have the option of terminating this Agreement by written notice to the other at any time within one hundred and eighty (180) calendar days after City gives such notice, and such termination shall be effective one hundred twenty (120) calendar days after the other party's receipt of such notice. Contractor shall not be entitled to any monetary or other damages or compensation from City in the event of a Casualty Event.

### **Section 20. Assignment and Subcontracting**

- 20.1.** City and Contractor bind themselves, their successors and assigns to all covenants of this Agreement. This Agreement shall not be assigned or transferred without the prior written approval of City. Contractor shall not hire subcontractors without express written permission from City,
- 20.2.** Contractor shall ensure that any third-party contractors performing services at the Convention Center through Contractor shall indemnify and hold harmless City (and

Contractor) for their negligence or willful misconduct, and provide insurance appropriate for the activity in which they are engaged, naming City and Operator (and Contractor) as an additional insured.

## **Section 21. No Third-Party Beneficiary**

This Agreement shall not be construed to be an agreement for the benefit of any third party or parties and no third party or parties shall have any claim or right of action under this Agreement for any cause whatsoever.

## **Section 22. Independent Contractor**

Contractor and all person(s) employed by or contracted with Contractor to furnish labor and/or materials under this Agreement are independent contractors and do not act as agent(s) or employee(s) of City. Contractor has full rights to manage its employees in their performance of Services under this Agreement.

## **Section 23. Confidentiality of Material**

All ideas, memoranda, specifications, plans, manufacturing procedures, data, drawings, descriptions, documents, discussions or other information developed or received by or for Contractor and all other written information submitted to Contractor in connection with the performance of this Agreement shall be held confidential by Contractor and shall not, without the prior written consent of City, be used for any purposes other than the performance of the Services nor be disclosed to an entity not connected with performance of the Services. Nothing furnished to Contractor which is otherwise known to Contractor or becomes generally known to the related industry shall be deemed confidential.

## **Section 24. Ownership Of Material**

All material, which shall include, but not be limited to, data, sketches, tracings, drawings, plans, diagrams, quantities, estimates, specifications, proposals, tests, maps, calculations, photographs, reports, designs, technology, programming, works of authorship and other material developed, collected, prepared or caused to be prepared under this Agreement shall be the property of City, but Contractor may retain and use copies thereof. City shall not be limited in any way or at any time in its use of said material. However, Contractor shall not be responsible for damages resulting from the use of said material for work other than that described in this Agreement, including, but not limited to, the release of this material to third parties.

## **Section 25. Hold Harmless/Indemnification**

**25.1.** Contractor shall defend, indemnify and hold harmless the City, its City Council, commissions, officers, employees, volunteers and agents and Operator and its employees and agents from:

**25.1.1.** Any claims, damages, costs and attorney fees for injuries or damages arising from the negligent or intentional acts or omissions of Contractor, its officers, employees and/or agents, including its sub or independent contractors, in connection with the performance of this Agreement.

- 25.1.2.** Any claims, damages, penalties, costs and attorney fees arising from any failure of Contractor, its officers, employees and/or agents, including its sub or independent contractors, to observe applicable laws, including, but not limited to, labor laws and minimum wage laws.
- 25.1.3.** City will not indemnify, defend or hold harmless in any fashion Contractor from any claims arising from any failure, regardless of any language in any attachment or other document that Contractor may provide. City agrees to immediately notify Contractor of all losses or claims for which it will seek indemnity under this Agreement. City agrees not to incur any cost or expense with respect to any such loss or claim without the approval of Contractor and further agrees to fully cooperate with Contractor and Contractor's authorized representatives in the investigation, defense, and settlement of all such claims.
- 25.1.4.** Contractor shall pay City any reasonable expenses incurred as a result of Contractor's failure to fulfill any obligation in a professional and timely manner under this Agreement.
- 25.2.** Contractor's obligation to protect, defend, indemnify, and hold harmless in full City and City's employees, shall specifically extend to any and all employment-related claims of any type brought by employees, contractors, subcontractors or other agents of Contractor, against City (either alone, or jointly with Contractor), regardless of venue/jurisdiction in which the claim is brought and the manner of relief sought.
- 25.3.** To the extent Contractor is obligated to provide health insurance coverage to its employees pursuant to the Affordable Care Act ("Act") and/or any other similar federal or state law, Contractor warrants that it is meeting its obligations under the Act and will fully indemnify and hold harmless City and Operator for any penalties, fines, adverse rulings, or tax payments associated with Contractor's responsibilities under the Act.

## **Section 26. Insurance Requirements**

During the term of this Agreement, and for any time period set forth in Exhibit D, Contractor shall provide and maintain in full force and effect the insurance policies as set forth in Exhibit D. Deductibles for Contractor's insurance policies required hereunder shall be an Allowable Expense.

## **Section 27. Consents; Waiver**

City and Contractor hereby expressly acknowledge and agree that, unless otherwise expressly stated to the contrary in this Agreement, the parties to this Agreement are obligated to act in a reasonable manner. The granting of any consent or approval in any one instance by or on behalf of either City or Contractor shall not be construed to waive or limit the need for such consent in any other or subsequent instance. Contractor agrees that waiver by City of any one or more of the conditions of performance under this Agreement shall not be construed as waiver(s) of any other condition of performance under this Agreement. Neither City's review, acceptance nor payments for any of the Services required under this Agreement shall be constructed to operate as a waiver of any rights under this Agreement or of any cause of action arising out of the performance of this Agreement.

## **Section 28. Notices**

All notices to the Parties shall, unless otherwise requested in writing, be sent to City addressed as follows:

City of Santa Clara  
Attention: City Manager's Office  
1500 Warburton Avenue  
Santa Clara, CA 95050  
and by e-mail at [nthome@santaclaraca.gov](mailto:nthome@santaclaraca.gov)

And to Contractor addressed as follows:

Andrew J. Lansing  
President and CEO  
Levy  
980 North Michigan Avenue  
Suite 400  
Chicago, Illinois 60611

With a copy to: Vice President/General Counsel  
Levy  
980 North Michigan Avenue  
Suite 400  
Chicago, Illinois 60611

With a copy to: Contractor's General Manager at his/her offices in the  
Convention Center

The workday the e-mail was sent shall control the date notice was deemed given. An e-mail transmitted after 1:00 p.m. on a Friday shall be deemed to have been transmitted on the following business day.

## **Section 29. Compliance with Laws**

Contractor shall comply with all applicable laws and regulations of the federal, state and local government, including but not limited to "The Code of the City of Santa Clara, California" ("SCCC"). In particular, Contractor's attention is called to the regulations regarding Campaign Contributions (SCCC Chapter 2.130), Lobbying (SCCC Chapter 2.155), Minimum Wage (SCCC Chapter 3.20), Business Tax Certificate (SCCC section 3.40.060), and Food and Beverage Service Worker Retention (SCCC Chapter 9.60), as such Chapters or Sections may be amended from time to time or renumbered. Additionally, Contractor has read and agrees to comply with City's Ethical Standards (<http://santaclaraca.gov/home/showdocument?id=58299>).

## **Section 30. Conflicts of Interest**

Contractor certifies that to the best of its knowledge, no City officer, employee or authorized representative has any financial interest in the business of Contractor and that no person associated with Contractor has any interest, direct or indirect, which could conflict with the faithful performance of this Agreement. Contractor is familiar with the provisions of California

Government Code section 87100 and following, and certifies that it does not know of any facts which would violate these code provisions. Contractor will advise City if a conflict arises.

### **Section 31. Fair Employment**

Contractor shall not discriminate against any employee or applicant for employment because of race, sex, color, religion, religious creed, national origin, ancestry, age, gender, marital status, physical disability, mental disability, medical condition, genetic information, sexual orientation, gender expression, gender identity, military and veteran status, or ethnic background, in violation of federal, state or local law.

### **Section 32. No Use of City Name or Emblem**

Contractor shall not use City's name, insignia, or emblem, or distribute any information related to services under this Agreement in any magazine, trade paper, newspaper or other medium without express written consent of City.

### **Section 33. Governing Law and Venue**

This Agreement shall be governed and construed in accordance with the statutes and laws of the State of California. The venue of any suit filed by either Party shall be vested in the state courts of the County of Santa Clara, or if appropriate, in the United States District Court, Northern District of California, San Jose, California.

### **Section 34. Severability Clause**

In case any one or more of the provisions in this Agreement shall, for any reason, be held invalid, illegal or unenforceable in any respect, it shall not affect the validity of the other provisions, which shall remain in full force and effect.

### **Section 35. Amendments**

This Agreement may only be modified by a written amendment duly authorized and executed by the Parties to this Agreement.



### Section 36. Counterparts

This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but both of which shall constitute one and the same instrument.

The Parties acknowledge and accept the terms and conditions of this Agreement as evidenced by the following signatures of their duly authorized representatives.

**CITY OF SANTA CLARA, CALIFORNIA**  
a chartered California municipal corporation

Approved as to Form:

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

\_\_\_\_\_  
BRIAN DOYLE  
City Attorney

\_\_\_\_\_  
DEANNA J. SANTANA  
City Manager  
1500 Warburton Avenue  
Santa Clara, CA 95050  
Telephone: (408) 615-2210  
Fax: (408) 241-6771

"City"

**LEVY PREMIUM FOODSERVICE LIMITED PARTNERSHIP**  
an Illinois limited partnership

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

By (Signature): \_\_\_\_\_

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

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

Principal Place of Business Address: 980 N. Michigan Ave.  
Ste. 400  
Chicago, Illinois 60611

Email Address: \_\_\_\_\_

Telephone: ( ) \_\_\_\_\_

Fax: ( ) \_\_\_\_\_

"Contractor"

### Exhibit A – Proforma Budget

Description	Initial Term						
	2019-2020 Operating Year	2020-2021 Operating Year	2021-2022 Operating Year	2022-2023 Operating Year	2023-2024 Operating Year	2024-2025 Operating Year	Total
<b>Gross Receipts</b>	<b>\$5,060,000</b>	<b>\$11,044,000</b>	<b>\$12,977,000</b>	<b>\$13,820,000</b>	<b>\$14,511,000</b>	<b>\$15,237,000</b>	<b>\$72,649,000</b>
<b>Allowable Expenses</b>							
<b>Cost of Sales</b>							
Food	\$574,084	\$1,253,000	\$1,472,000	\$1,568,000	\$1,646,000	\$1,728,000	\$8,241,084
Beverage	\$220,837	\$482,000	\$566,000	\$603,000	\$633,000	\$665,000	\$3,169,837
<b>Total Cost of Sales</b>	<b>\$794,920</b>	<b>\$1,735,000</b>	<b>\$2,038,000</b>	<b>\$2,171,000</b>	<b>\$2,279,000</b>	<b>\$2,393,000</b>	<b>\$11,410,920</b>
<b>Personnel Costs</b>							
Management & Staffing	\$820,500	\$1,641,000	\$1,690,000	\$1,741,000	\$1,793,000	\$1,847,000	\$9,532,500
Payroll Fringe & Related Costs	\$516,833	\$1,030,000	\$1,147,000	\$1,206,000	\$1,257,000	\$1,310,000	\$6,466,833
Administrative Charge	(\$702,371)	(\$1,533,000)	(\$1,801,000)	(\$1,891,000)	(\$1,985,000)	(\$2,085,000)	(\$9,997,371)
Union Costs	\$61,377	\$122,000	\$144,000	\$153,000	\$161,000	\$169,000	\$810,377
Variable Labor	\$1,119,880	\$2,226,000	\$2,615,000	\$2,785,000	\$2,924,000	\$3,071,000	\$14,740,880
<b>Total Personnel Costs</b>	<b>\$1,816,220</b>	<b>\$3,486,000</b>	<b>\$3,795,000</b>	<b>\$3,994,000</b>	<b>\$4,150,000</b>	<b>\$4,312,000</b>	<b>\$21,553,220</b>
<b>General &amp; Administrative Cost</b>							
Other Operating Costs	\$625,120	\$1,037,000	\$1,231,000	\$1,325,000	\$1,405,000	\$1,491,000	\$7,114,120
Bad Debt Reserve	\$12,650	\$28,000	\$32,443	\$34,550	\$36,278	\$38,093	\$182,013
Training Reserve	\$12,650	\$28,000	\$32,443	\$34,550	\$36,278	\$38,093	\$182,013
Capital Fund	\$177,100	\$387,000	\$454,195	\$483,700	\$507,885	\$533,295	\$2,543,175
<b>Total General &amp; Administrative Costs</b>	<b>\$827,520</b>	<b>\$1,480,000</b>	<b>\$1,750,080</b>	<b>\$1,877,800</b>	<b>\$1,985,440</b>	<b>\$2,100,480</b>	<b>\$10,021,320</b>
<b>Contractor Compensation</b>							
Management Fee (4.5% of Gross Receipt)	\$227,700	\$496,980	\$583,965	\$621,900	\$652,995	\$685,665	\$3,269,205
Net Receipt for Distribution	\$1,393,640	\$3,846,020	\$4,809,955	\$5,155,300	\$5,443,565	\$5,745,855	\$26,394,335
Incentive Fee (8% of Net Receipts)	\$111,491	\$307,682	\$384,796	\$412,424	\$435,485	\$459,668	\$2,111,547
<b>Total Contractor Compensation</b>	<b>\$339,191</b>	<b>\$804,662</b>	<b>\$968,761</b>	<b>\$1,034,324</b>	<b>\$1,088,480</b>	<b>\$1,145,333</b>	<b>\$5,380,752</b>
<b>TOTAL ALLOWABLE EXPENSES</b>	<b>\$3,777,851</b>	<b>\$7,505,662</b>	<b>\$8,551,841</b>	<b>\$9,077,124</b>	<b>\$9,502,920</b>	<b>\$9,950,813</b>	<b>\$48,366,211</b>
<b>NET PROFIT</b>	<b>\$1,282,149</b>	<b>\$3,538,338</b>	<b>\$4,425,159</b>	<b>\$4,742,876</b>	<b>\$5,008,080</b>	<b>\$5,286,187</b>	<b>\$24,282,789</b>

**Exhibit A – Proforma Budget (cont.)**

Description	Option Term One					
	2025-2026 Operating Year	2026-2027 Operating Year	2027-2028 Operating Year	2028-2029 Operating Year	2029-2030 Operating Year	Total
<b>Gross Receipts</b>	<b>\$15,998,000</b>	<b>\$16,798,000</b>	<b>\$17,638,000</b>	<b>\$18,520,000</b>	<b>\$19,446,000</b>	<b>\$88,400,000</b>
<b>Allowable Expenses</b>						
<b>Cost of Sales</b>						
Food	\$1,814,304	\$1,905,030	\$2,000,293	\$2,100,319	\$2,205,335	\$10,025,281
Beverage	\$698,213	\$733,128	\$769,789	\$808,282	\$848,697	\$3,858,109
<b>Total Cost of Sales</b>	<b>\$2,512,517</b>	<b>\$2,638,158</b>	<b>\$2,770,082</b>	<b>\$2,908,601</b>	<b>\$3,054,032</b>	<b>\$13,883,389</b>
<b>Personnel Costs</b>						
Management & Staffing	\$1,902,410	\$1,959,482	\$2,018,267	\$2,078,815	\$2,141,179	\$10,100,153
Payroll Fringe & Related Costs	\$1,365,615	\$1,423,766	\$1,484,521	\$1,548,000	\$1,614,326	\$7,436,227
Administrative Charge	(\$2,189,250)	(\$2,298,713)	(\$2,413,648)	(\$2,534,331)	(\$2,661,047)	(\$12,096,988)
Union Costs	\$177,441	\$186,314	\$195,631	\$205,413	\$215,684	\$980,482
Variable Labor	\$3,224,379	\$3,385,618	\$3,554,919	\$3,732,685	\$3,919,319	\$17,816,919
<b>Total Personnel Costs</b>	<b>\$4,480,594</b>	<b>\$4,656,467</b>	<b>\$4,839,689</b>	<b>\$5,030,582</b>	<b>\$5,229,461</b>	<b>\$24,236,793</b>
<b>General &amp; Administrative Cost</b>						
Other Operating Costs	\$1,581,525	\$1,677,399	\$1,778,907	\$1,886,373	\$2,000,138	\$8,924,342
Bad Debt Reserve	\$39,995	\$41,995	\$44,095	\$46,300	\$48,615	\$221,000
Training Reserve	\$39,995	\$41,995	\$44,095	\$46,300	\$48,615	\$221,000
Capital Fund	\$559,930	\$587,930	\$617,330	\$648,200	\$680,610	\$3,094,000
<b>Total General &amp; Administrative Costs</b>	<b>\$2,221,445</b>	<b>\$2,349,319</b>	<b>\$2,484,427</b>	<b>\$2,627,173</b>	<b>\$2,777,978</b>	<b>\$12,460,342</b>
<b>Contractor Compensation</b>						
Management Fee (4.5% of Gross Receipt)	\$719,910	\$755,910	\$793,710	\$833,400	\$875,070	\$3,978,000
Net Receipt for Distribution	\$6,063,535	\$6,398,146	\$6,750,092	\$7,120,243	\$7,509,460	\$33,841,476
Incentive Fee (8% of Net Receipts)	\$485,083	\$511,852	\$540,007	\$569,619	\$600,757	\$2,707,318
<b>Total Contractor Compensation</b>	<b>\$1,204,993</b>	<b>\$1,267,762</b>	<b>\$1,333,717</b>	<b>\$1,403,019</b>	<b>\$1,475,827</b>	<b>\$6,685,318</b>
<b>TOTAL ALLOWABLE EXPENSES</b>	<b>\$10,419,548</b>	<b>\$10,911,706</b>	<b>\$11,427,915</b>	<b>\$11,969,376</b>	<b>\$12,537,297</b>	<b>\$57,265,842</b>
<b>NET PROFIT</b>	<b>\$5,578,452</b>	<b>\$5,886,294</b>	<b>\$6,210,085</b>	<b>\$6,550,624</b>	<b>\$6,908,703</b>	<b>\$31,134,158</b>

### Exhibit A – Proforma Budget (cont.)

Description	Option Term Two					
	2030-2031 Operating Year	2031-2032 Operating Year	2032-2033 Operating Year	2033-2034 Operating Year	2034-2035 Operating Year	Total
<b>Gross Receipts</b>	<b>\$20,030,000</b>	<b>\$20,631,000</b>	<b>\$21,249,000</b>	<b>\$21,887,000</b>	<b>\$22,544,000</b>	<b>\$106,341,000</b>
<b>Allowable Expenses</b>						
<b>Cost of Sales</b>						
Food	\$2,271,565	\$2,339,724	\$2,409,810	\$2,482,164	\$2,556,673	\$12,059,936
Beverage	\$874,185	\$900,414	\$927,386	\$955,231	\$983,905	\$4,641,121
<b>Total Cost of Sales</b>	<b>\$3,145,750</b>	<b>\$3,240,138</b>	<b>\$3,337,196</b>	<b>\$3,437,395</b>	<b>\$3,540,578</b>	<b>\$16,701,057</b>
<b>Personnel Costs</b>						
Management & Staffing	\$2,205,415	\$2,271,577	\$2,339,724	\$2,409,916	\$2,482,214	\$11,708,846
Payroll Fringe & Related Costs	\$1,662,789	\$1,712,678	\$1,764,008	\$1,816,957	\$1,871,486	\$8,827,917
Administrative Charge	(\$2,740,878)	(\$2,823,105)	(\$2,907,798)	(\$2,995,032)	(\$3,084,883)	(\$14,551,696)
Union Costs	\$222,161	\$228,827	\$235,682	\$242,758	\$250,045	\$1,179,473
Variable Labor	\$4,037,024	\$4,158,155	\$4,282,712	\$4,411,300	\$4,543,718	\$21,432,907
<b>Total Personnel Costs</b>	<b>\$5,386,510</b>	<b>\$5,548,131</b>	<b>\$5,714,328</b>	<b>\$5,885,899</b>	<b>\$6,062,580</b>	<b>\$28,597,447</b>
<b>General &amp; Administrative Cost</b>						
Other Operating Costs	\$2,060,142	\$2,121,946	\$2,185,605	\$2,251,173	\$2,318,708	\$10,937,574
Bad Debt Reserve	\$50,075	\$51,578	\$53,123	\$54,718	\$56,360	\$265,853
Training Reserve	\$50,075	\$51,578	\$53,123	\$54,718	\$56,360	\$265,853
Capital Fund	\$701,050	\$722,085	\$743,715	\$766,045	\$789,040	\$3,721,935
<b>Total General &amp; Administrative Costs</b>	<b>\$2,861,342</b>	<b>\$2,947,186</b>	<b>\$3,035,565</b>	<b>\$3,126,653</b>	<b>\$3,220,468</b>	<b>\$15,191,214</b>
<b>Contractor Compensation</b>						
Management Fee (4.5% of Gross Receipt)	\$901,350	\$928,395	\$956,205	\$984,915	\$1,014,480	\$4,785,345
Net Receipt for Distribution	\$7,735,049	\$7,967,149	\$8,205,707	\$8,452,138	\$8,705,894	\$41,065,937
Incentive Fee (8% of Net Receipts)	\$618,804	\$637,372	\$656,457	\$676,171	\$696,472	\$3,285,275
<b>Total Contractor Compensation</b>	<b>\$1,520,154</b>	<b>\$1,565,767</b>	<b>\$1,612,662</b>	<b>\$1,661,086</b>	<b>\$1,710,952</b>	<b>\$8,070,620</b>
<b>TOTAL ALLOWABLE EXPENSES</b>	<b>\$12,913,755</b>	<b>\$13,301,223</b>	<b>\$13,699,750</b>	<b>\$14,111,033</b>	<b>\$14,534,577</b>	<b>\$68,560,338</b>
<b>NET PROFIT</b>	<b>\$7,116,245</b>	<b>\$7,329,777</b>	<b>\$7,549,250</b>	<b>\$7,775,967</b>	<b>\$8,009,423</b>	<b>\$37,780,662</b>

### Exhibit B – Pre-Opening Expenses Estimate

Description		Total
<b>Immediate investment upon contract award for full brand implementation.</b>		<b>\$2,825,750</b>
<b>Description</b>	<b>Total</b>	
Smallwares	\$800,000	
Portable Carts & Transformables	\$400,000	
Bakery / Teaching Kitchen (Terra Spark Kitchen)	\$350,000	
Pre-Opening Budget	\$350,000	
E-Tuk / Portable Vehicles	\$150,000	
Operational Equipment	\$115,000	
Chefs Tables & Service Cart	\$114,750	
Bars & Bar Backs (to Transform Beverage Program)	\$114,000	
Upgraded Technology & POS / Mobile Ordering	\$112,000	
Roof Top Garden Activation & Build Out	\$100,000	
Smart Market	\$100,000	
Branded Uniforms	\$75,000	
Farm Shelf – Indoor Garden	\$25,000	
Briggo Infrastructure	\$20,000	
<b>Total</b>	<b>\$2,825,750</b>	

### Exhibit C – Sample Calculation of Performance Measures

<b>Key Performance Indicator</b>	<b>Goal</b>	<b>Results</b>	<b>% Achieved</b>	<b>Weight</b>	<b>Weighted Achievement Percentage</b>
Customer Service Survey Results	90%	95%	106%	10%	10.6%
Local Purchasing Requirement	25%	20%	80%	5%	4.0%
Room Nights Generated	10,000	8,500	85%	5%	4.3%
Overall Profit and Loss	1.5 Million	1.25 Million	83%	40%	33.2%
Community Impact Scores – Community Accessibility (number of events, community outreach)	10 events/2 programs	8 events /1 program	75%	10%	7.5%
Sustainability Goals	15% waste contribution	10% waste contribution	67%	10%	6.7%
Workforce Development/Training	50 participants	45 participants	90%	7.5%	6.8%
Sales Activity – New Business Development	75 prospects	72 prospects	96%	7.5%	7.2%
Retain Revenue – Public Space Activation	\$500,000	\$425,000	85%	5%	4.3%
<b>Total</b>					<b>84.6%</b>

## **Exhibit D – Insurance Requirements**

Without limiting Contractor's indemnification of City and Operator, and prior to commencing any of the Food and Beverage Services required under this Agreement, Contractor shall provide and maintain in full force and effect during the period of performance of the Agreement as an Operating Expense, the following insurance policies from insurance companies authorized to do business in the State of California. The minimum coverages, provisions and endorsements are as follows:

### **A. COMMERCIAL GENERAL LIABILITY INSURANCE**

1. Commercial General Liability Insurance policy which provides coverage at least as broad as Insurance Services Office form CG 00 01. Policy limits are subject to review, but shall in no event be less than, the following:  
  
\$1,000,000 Each Occurrence  
\$2,000,000 General Aggregate  
\$1,000,000 Personal Injury
2. Exact structure and layering of the coverage shall be left to the discretion of Contractor; however, any excess or umbrella policies used to meet the required limits shall be at least as broad as the underlying coverage and shall otherwise follow form.
3. The following provisions shall apply to the Commercial Liability policy as well as any umbrella policy maintained by the Contractor to comply with the insurance requirements of this Agreement:
  - a. Coverage shall be on a "pay on behalf" basis with defense costs payable in addition to policy limits;
  - b. There shall be no cross liability exclusion which precludes coverage for claims or suits by one insured against another; and

### **B. BUSINESS AUTOMOBILE LIABILITY INSURANCE**

Business automobile liability insurance policy which provides coverage at least as broad as Insurance Services Office (ISO) form CA 00 01 with policy limits a minimum limit of not less than one million dollars (\$1,000,000) each accident using, or providing coverage at least as broad as, ISO form CA 00 01. Liability coverage shall apply to all owned (if any), non-owned and hired autos.

### **C. WORKERS' COMPENSATION**

1. Workers' Compensation Insurance Policy as required by statute and employer's liability with limits of at least one million dollars (\$1,000,000)

policy limit Bodily Injury by disease, one million dollars (\$1,000,000) each accident/Bodily Injury and one million dollars (\$1,000,000) each employee Bodily Injury by disease.

2. This policy must include a Waiver of Subrogation in favor of the City of Santa Clara, its City Council, commissions, officers, employees, volunteers and agents.

#### **D. COMMERCIAL CRIME INSURANCE**

Commercial Crime insurance shall be written on a policy form specifically designed to protect against employee dishonesty crimes of Contractor and its employees. Covered services designated in the policy must include work performed by Contractor and its employees and shall include coverage for computer fraud, employee theft, forgery or alteration, inside the premises – theft of money and securities, inside the premises – robbery or safe burglary of other property, money orders and counterfeit money, and outside the premises. The policy shall also provide for Client Coverage. Coverage shall be in an amount of not less than five million dollars (\$5,000,000). Any deductible or self-retention is the responsibility of the Contractor.

#### **E. COMPLIANCE WITH REQUIREMENTS**

All of the following clauses and/or endorsements, or similar provisions, must be part of each commercial general liability policy, and each umbrella or excess policy.

1. Additional Insureds. City of Santa Clara, its City Council, commissions, officers, employees, volunteers and agents as well as Operator and its employees and agents are hereby included as additional insureds in respect to liability arising out of Contractor's work for City, using ISO Endorsement CG 20 10 11 85, or the combination of CG 20 10 current edition and CG 20 37 current edition, or its equivalent.
2. Primary and non-contributing. The commercial general liability, auto liability and umbrella liability policies insurance policies provided by Contractor as required herein shall contain language or be endorsed to contain wording making it primary insurance as respects to, and not requiring contribution from, any other insurance which the indemnities may possess, including any self-insurance or self-insured retention they may have. Any other insurance indemnities may possess shall be considered excess insurance only and shall not be called upon to contribute with Contractor's insurance.
3. Cancellation.
  - a. Each insurance policy shall contain language or be endorsed to reflect that no cancellation or modification of the coverage



provided for any cause save and except non-payment of premiums shall be effective until written notice has been given to City at least thirty (30) calendar days prior to the effective date of such modification or cancellation. In the event of non-renewal, written notice shall be given at least thirty (30) calendar days prior to the effective date of non-renewal.

4. Other Endorsements. Other endorsements may be required for policies other than the commercial general liability policy if specified in the description of required insurance set forth in Sections A through E of this Exhibit C, above.

#### **F. ADDITIONAL INSURANCE RELATED PROVISIONS**

Contractor and City agree as follows:

1. Contractor agrees to ensure that subcontractors, and any other party involved with the Food and Beverage Services, who is brought onto or involved in the performance of the Food and Beverage Services by Contractor, provide the same minimum insurance coverage required of Contractor, except as with respect to limits. Contractor agrees to monitor and review all such coverage and assumes all responsibility for ensuring that such coverage is provided in conformity with the requirements of this Agreement. Contractor agrees that upon request by City, all agreements with, and insurance compliance documents provided by, such subcontractors and others engaged in the project will be submitted to City for review.

#### **G. EVIDENCE OF COVERAGE**

Prior to commencement of any Food and Beverage Services under this Agreement, Contractor shall, as an Operating Expense, and each and every subcontractor (of every tier) shall, at its sole cost and expense, provide and maintain not less than the minimum insurance coverage with the endorsements and deductibles indicated in this Agreement. Such insurance coverage shall be maintained with insurers, and under forms of policies, satisfactory to City and as described in this Agreement. Contractor shall file with the City all certificates and endorsements for the required insurance policies for City's approval as to adequacy of the insurance protection.

#### **H. EVIDENCE OF COMPLIANCE**

Contractor or its insurance broker shall provide the required proof of insurance compliance, consisting of Insurance Services Office (ISO) endorsement forms or their equivalent and the ACORD form 25-S certificate of insurance (or its equivalent), evidencing all required coverage shall be delivered to City, or its representative as set forth below, at or prior to execution of this Agreement. Unless otherwise required by the terms of this Agreement, all certificates,

endorsements, coverage verifications and other items required to be delivered to City pursuant to this Agreement shall be provided by e-mail to:  
ctsantaclara@ebix.com

Or by mail to:

EBIX Inc.  
City of Santa Clara, City Manager's Office  
P.O. Box 100085 – S2  
Duluth, GA 30096  
Telephone number: 951-766-2280  
Fax number: 770-325-0409

I. QUALIFYING INSURERS

All of the insurance companies providing insurance for Contractor shall have, and provide written proof of, an A. M. Best rating of at least A minus 6 (A- VI) or shall be an insurance company of equal financial stability that is approved by the City or its insurance compliance representatives.