

CITY OF SAN DIEGO

REAL ESTATE ASSETS DEPARTMENT
1200 Third Avenue, Suite 1700
San Diego, CA 92101
Fax: (619) 236-7606

ADDENDUM B

Revised Proposal Deadline Date: July 11, 2014
at 4:00 p.m.

NTC PARK AQUATIC CENTER – BUILDING 619 LIBERTY STATION, SAN DIEGO, CA 92106

The following question was asked regarding Section 7. CITY'S Right to Terminate for Public Convenience, of Exhibit "E" – Draft Concession Agreement:

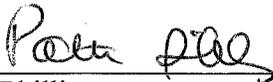
Question: "Is this provision negotiable/not mandatory?"

Response: A termination provision is a mandatory provision pursuant to the Concession Agreement Guidance for the National Park Service U. S. Department of the Interior (NPS). The City has requested clarification from the NPS as to whether or not this provision is negotiable and a response is outstanding.

Notwithstanding the response the City may receive from the NPS, the following changes to the specifications are hereby made effective as though they were originally issued with the Request for Proposals. Proposers are reminded that all previous requirements to this solicitation remain in full force and effect.

1. **The Proposal deadline date has been changed to July 11, 2014.**
2. *Delete* the Addendum A Request for Proposals cover page and *replace* with the attached Addendum B Request for Proposals cover page. (**NOTE:** Addendum B has been noted and Proposal Deadline date has been changed).
3. *Delete* the original pages 1 through 32 of Exhibit "E" – Draft Concession Agreement and *replace* with the attached page 3 of 34 through page 34 of 34, Addendum B Exhibit "E" – Draft Concession Agreement. (**NOTE:** Section 7. CITY's Right to Terminate for Public Convenience, and Section 23. Default and Remedies, have been changed).

CITY OF SAN DIEGO REAL ESTATE ASSETS DEPARTMENT



Patti Phillips
Proposal Coordinator
(619) 236-6766

THE CITY OF SAN DIEGO

REQUEST FOR PROPOSALS

ADDENDUM B



NTC PARK AQUATIC CENTER – BUILDING 619

LIBERTY STATION, SAN DIEGO, CA 92106

PROPOSAL DEADLINE: 4:00 p.m. Friday

July 11, 2014

LOCATION: Real Estate Assets Department

17th Floor, Civic Center Plaza

1200 Third Avenue, Suite 1700

San Diego, CA 92101

CONTACT PERSON: Patti Phillips

TELEPHONE: (619) 236-6766

ADDENDUM B

June 13, 2014

Page 2 of 34

This CONCESSION AGREEMENT (Agreement) is entered into by and between THE CITY OF SAN DIEGO, a California municipal corporation (CITY) and _____, a [California corporation, limited liability corporation, nonprofit, etc.] (CONCESSIONAIRE) to be effective upon execution by the parties and approval by the San Diego City Attorney (Effective Date), but in no event effective prior to concurrence of this Agreement in writing by the Secretary of Interior, as follows:

RECITALS

- A. Whereas, the CITY owns certain land consisting of approximately 49 acres, obtained by the CITY from the United States of America (USA), as surplus property, known as Parcel VI, Naval Training Center San Diego (NTC) and deeded to the CITY on July 6, 2001, (USA Deed) attached as **Exhibit A**.
- B. Whereas, the USA Deed sets forth restrictions and covenants and conditions (Conditions).
- C. Whereas, Condition 3 of the USA Deed provides as follows: "The Property shall not be sold, leased, assigned or otherwise disposed of except to another eligible governmental agency without the prior approval of the Secretary of the Interior in writing. Any such disposition shall assure the continued use and maintenance of the Property for public park or public recreational purposes subject to the same terms and conditions in the original instrument of conveyance. However, nothing in this provision shall preclude the Grantee from providing related recreational facilities and services compatible with the approved application, through concession agreements entered into with third parties, provided prior concurrence to such agreements is obtained in writing from the Secretary of the Interior."
- C. Whereas, the CITY and CONCESSIONAIRE desire to provide an aquatic center as further described below (Aquatic Center) on a portion of the NTC site consisting of approximately 3.6 acres of land, including a 19,650 square foot building, (Premises) for the use and benefit of the general public.
- D. Whereas, the CITY is satisfied that provision of additional services and facilities at the Premises is in the CITY's best interest.

NOW, THEREFORE, for the reasons set forth above, and in consideration of the mutual covenants and agreements as hereinafter set forth, the CITY agrees to allow CONCESSIONAIRE to design and construct the Aquatic Center (Project) and provide aquatic center services and facilities (Services) hereinafter to be mentioned upon the Premises described in **Exhibit B** attached hereto and incorporated herein by this reference and located at the NTC site.

FOR VALUABLE CONSIDERATION, the sufficiency of which is acknowledged, the parties agree as follows:

1. Premises. The Premises consists of 3.6 acres of land including a 19,650 square foot building, commonly referred to as Building 619, at the NTC site, as described in **Exhibit B**.
2. Scope of Work of the Project. The Project shall consist of those improvements described in the Scope of Work as set forth in **Exhibit C-1** and General Development Plan, approved by the San Diego Park and Recreation Board on _____, 2002, as set forth in **Exhibit C-2**.
3. Design and Construction of the Project. CONCESSIONAIRE agrees to design and construct, at its sole cost and expense, a complete and operational Project fully suited to the purpose for which it was designed and in accordance with all federal, state and local laws, rules and regulations, this Agreement, the Construction Requirements set forth in **Exhibit D**, and within the timeframe as established by the parties.

CONCESSIONAIRE shall provide to CITY, prior to commencement of any construction of the Project, a faithful performance bond in the amount of one hundred percent (100%) of the estimated design and construction costs of the work to be performed. The bond may be in cash or may be a corporate surety bond or other security satisfactory to City. The bond shall insure that the construction to be commenced by CONCESSIONAIRE shall be completed in accordance with the plans approved by CITY or, at the option of CITY that the uncompleted construction shall be removed and the Premises restored to a condition satisfactory to CITY. The bond or cash shall be held in trust by CITY for the purpose specified above, or at CITY's option may be placed in an escrow approved by CITY. This requirement is not intended to be duplicative of a construction bond otherwise required of CONCESSIONAIRE.

4. Authorized Uses of the Premises. Upon acceptance of the Project evidenced by recordation of Notice of Completion with the San Diego County Recorder, CONCESSIONAIRE shall use, occupy and maintain the Premises for the operation of the Aquatic Center in strict accordance with this Agreement, the USA Deed, and the operating plan approved in writing by the CITY (Operating Plan), attached as **Exhibit E**. The Services CONCESSIONAIRE shall provide on the Premises shall include, but not limited to, providing swim lessons, locker rooms, offices, water safety instruction, wellness and exercise programs, lifeguard instruction, kayak training, and scuba/snorkel training. Concessionaire may operate a snack bar. CONCESSIONAIRE shall not sell alcoholic beverages without the prior written approval of the CITY. CONCESSIONAIRE shall not operate or permit to be operated on or from the Premises a general purpose child care or day care facility. CONCESSIONAIRE shall conduct its operations continuously throughout the Term and shall keep the Premises open for business as set forth in this Agreement except for approved, in advance by the CITY, closures for remodeling, repair or renovation.

CONCESSIONAIRE shall serve the general public under the terms and conditions of this Agreement. Written approval by the CITY and written concurrence by the Secretary of the Interior or his/her delegated representative, the National Park Service (NPS), shall be

required for other proposed use in conjunction with or in addition to the Services as specified in this Agreement.

5. Conditions in USA DEED and Program of Utilization. This Agreement and the obligations of the parties hereto are subject to the terms and conditions set forth in the USA Deed and the current Program of Utilization which governs the use of the Premises. CONCESSIONAIRE shall use the Premises in strict accordance with all terms and conditions imposed by the USA as set forth in the USA Deed that pertain to the use of the Premises including, but not limited to, the terms and conditions regarding hazardous materials, lead based paint, and asbestos contained in Conditions 9, 10, 11, 12, 13, 17 and 18 of the USA Deed. In the event of any conflict between the terms and conditions of the USA Deed and any provision of this Agreement, the terms of the USA Deed shall control. Violations of any terms and conditions of the USA deed may be grounds for termination of this Agreement and reversion of the Premises to the USA and with no compensation to either the CONCESSIONAIRE or the CITY from the USA.

CONCESSIONAIRE acknowledges that the Premises is subject to the possibility of reversion to the USA in accordance with the USA Deed in the event of a breach of noncompliance by the CITY or the CONCESSIONAIRE for not adhering to the covenants and agreements contained in the USA Deed. CONCESSIONAIRE agrees that the CITY is not liable to CONCESSIONAIRE or any third party as a result of termination of this Agreement or a reversion of the Premises to USA in accordance with the USA Deed.

6. Term. The term of this Agreement shall be twenty (20) years commencing on the Effective Date ("Initial Term"). "Agreement Year" as used in this Agreement shall mean the twelve (12) month period commencing on the first day of the calendar month following the Effective Date and each twelve (12) month period thereafter, prior to the expiration of the Agreement.

If CONCESSIONAIRE is in compliance with Section 4, above, and is not otherwise in default under this Agreement, CONCESSIONAIRE shall have the option to extend this Agreement for two (2) successive terms of five (5) years (each the "Extended Term"), on the same terms and conditions set forth herein except that the renewed Agreement shall contain no further renewal options. If CONCESSIONAIRE desires to extend this Agreement, CONCESSIONAIRE shall provide to CITY written notice of its intention to do so at least one (1) year prior to the beginning of each Extended Term. As used in this Agreement, "Term" means the Initial Term and any Extended Term.

7. CITY'S Right to Terminate for Public Convenience.
- a. Right to Terminate. The CITY shall have an option to terminate this Agreement for public convenience on the tenth (10th) anniversary of the Effective Date and once every five (5) years thereafter on the anniversary of the Effective Date during the Term of this Agreement. The CITY may exercise its termination option by written notice to CONCESSIONAIRE (**Notice**) specifying the effective

termination date which shall in no event be less than two (2) years from the date of the Notice.

- b. **Capital Cost Reimbursement.** In the event CITY elects to exercise its termination option as set forth in Section 7.a, above, CITY shall reimburse CONCESSIONAIRE for the unamortized portion of CONCESSIONAIRE's capital expenditures (Expenditures) in accordance with the Scope of Work as set forth in Exhibit C-1. These expenditures may include hard and soft costs such as, but not limited to, labor, materials, architecture and engineering costs, permits, licensing fees, equipment costs or rental fees, construction or project management fees, and consultant's fees. Expenditures shall not include interest on construction financing. Not less than 120 days from the date of the Notice, CONCESSIONAIRE shall provide CITY with an accounting of its Expenditures together with supporting documentation (Expenditure Documents). CITY shall have up to 60 days to review, request additional information, and reject, in its sole discretion, the Expenditure Documents. CITY shall reimburse CONCESSIONAIRE for CITY approved Expenditures within 90 days of the effective termination date.

8. **Concession Payment.** CONCESSIONAIRE shall pay to CITY a concession payment in the amount of Three Thousand Two Hundred Fifty Dollars (\$3,250.00) per Agreement Year paid annually in advance for the use of the Premises to offset administrative costs incurred by CITY to administer this Agreement. CONCESSIONAIRE shall pay concession payment within thirty (30) days after the Effective Date, and thereafter no later than on each annual anniversary of the Effective Date. The concession payment shall be adjusted upward annually, based on increases in the Consumer Price Index as provided below (Adjusted Concession Payment). In no event shall the Adjusted Concession Payment, as established by the CPI, be less than the concession payment in existence on the immediately prior Agreement Year.

- a. **CPI Adjustments.** On each annual anniversary of the Effective Date, the concession payment shall only be adjusted upward to reflect any increase in the Consumer Price Index for "All Urban Consumers" for Los Angeles/Riverside/Orange County, California ("CPI") based on the average of the then three most recently published monthly indices just prior to each adjustment. If the CPI is no longer published, the index for adjustment shall be the U.S. Department of Labor's "Comprehensive Official Index" most comparable to the CPI.

- i. If concession payment adjustment is calculated using an index from a different base year than 1982-84, which equaled a base figure of 100 for the CPI, the base figure used shall first be converted under a formula supplied by the Bureau of Labor Statistics or its successor.
- ii. If the Department of Labor indices are no longer published, CITY in its sole and absolute discretion may use another index deemed by CITY to be

reasonably comparable to the CPI, which shall then constitute the CPI under this Agreement.

iii. CITY's failure to deliver timely notice of any concession payment adjustment shall not constitute a waiver by CITY of its rights hereunder.

b. CPI Adjustment Computation. Each year concession payment shall be calculated as follows:

The "adjustment multiplier" shall be calculated by dividing the "current index" by the "base index" as defined below:

- i. The "current index" shall be the average of the three monthly indices most recently published before the adjustment date ("Current Indices").
- ii. The "base index" shall be the average of the same months' indices published a year prior to the Current Indices.

The "base figure" for calculating concession payment shall be the dollar amount of concession payment for the year immediately preceding the adjustment date. The "base figure" is then multiplied by the "adjustment multiplier" to determine the new concession payment, as follows:

(CURRENT INDEX ÷ BASE INDEX) X BASE FIGURE = NEW CONCESSION PAYMENT

c. Delinquent Concession Payment. If CONCESSIONAIRE fails to pay all or any part of the concession payment or other payments, as discussed in Section 23, below, when due, CONCESSIONAIRE shall pay, in addition to the unpaid amount, five percent (5%) of the unpaid amount. If the concession payment is still unpaid at the end of fifteen (15) days, CONCESSIONAIRE shall pay an additional five percent (5%) of the unpaid amount [for a total of ten percent (10%)], which is hereby mutually agreed by the parties to be appropriate to compensate CITY for loss resulting from the delinquency, including lost interest, lost opportunities, legal costs, and the cost of servicing the delinquent account. Notwithstanding the foregoing, in no event shall the charge for late concession payment be less than Twenty-Five Dollars (\$25) each time.

d. Time and Place of Payment. All payments to be paid by CONCESSIONAIRE under this Agreement shall be made payable to the City Treasurer and be mailed to:

San Diego City Treasurer
P.O. Box 129030
San Diego, California 92112-9030

or hand delivered to:

The Office of the City Treasurer
Civic Center Plaza
1200 Third Avenue, First Floor
San Diego, California 92101

CITY may change the place of payment at any time upon thirty (30) days written notice to CONCESSIONAIRE. Mailed payments shall be deemed paid upon the date the payment is postmarked by the postal authorities. If postmarks are illegible, the payment shall be deemed received only upon actual receipt.

9. Inspection of Records. CONCESSIONAIRE shall keep and maintain accurate and complete records and accounts in accordance with generally accepted accounting principles consistently applied, showing all revenue derived from use of the Premises. CONCESSIONAIRE shall make such records and accounts available to CITY for inspection at all reasonable times and shall provide any and all documentation as may be needed to file compliance reports to the Secretary of the Interior or his/her delegated representative, NPS. Such records and accounts shall be made available to CITY at the Premises during the Term and in a location within San Diego County after the expiration or earlier termination of this Agreement. CONCESSIONAIRE shall maintain such records and accounts and make them available to CITY for inspection for five (5) years after the date such records are produced.
10. Unauthorized Use Charge. In addition to the right to terminate this Agreement in accordance with Section 23, below, CONCESSIONAIRE shall pay CITY one hundred percent (100%) of the gross receipts from any use of the Premises that is not allowed by this Agreement, regardless of any related penalties charged CONCESSIONAIRE by competent governmental authorities. Such unauthorized use charge shall be payable to CITY within thirty (30) days after CONCESSIONAIRE receives such gross receipts. The unauthorized use charge shall be considered "concession payment" under this Agreement, but shall not be used to offset any concession payment otherwise required under this Agreement. The existence of such unauthorized use charge and CITY'S acceptance thereof shall not constitute authorization for the use in question, and shall not waive any of CITY'S rights under this Agreement.
11. Competent Management. CONCESSIONAIRE shall provide competent management of the Premises to CITY's reasonable satisfaction. "Competent management" shall mean demonstrated ability in the management and operation of an aquatic center and related activities in a fiscally responsible manner to serve the greatest number of members of the community.
12. CITY'S Consent, Discretion. Whenever required under this Agreement, CITY's consent or approval shall mean the written consent or approval of the San Diego Mayor or his or her designee ("Mayor"). CITY's discretionary acts hereunder shall be made in the Mayor's discretion, unless otherwise legally required or expressly provided in this Agreement.

13. Political Activities. CONCESSIONAIRE may make the Premises available for political activities by contracted users on a non-discriminatory basis at standard and established rates, terms, and conditions.
14. Public Use. The general public shall have access to the Premises for the uses allowed under this Agreement during CONCESSIONAIRE's hours of operation and CONCESSIONAIRE shall not impose membership requirements for use of the Premises by the general public. A regular schedule of days and hours of operation shall be established by CONCESSIONAIRE to best serve the public in accordance with the Schedule of Days and Hours of Operation as set forth in **Exhibit F**. Any changes to CONCESSIONAIRE's hours of operation shall be subject to the prior written approval of CITY, and CONCESSIONAIRE's hours of operation shall be reviewed at least annually by CONCESSIONAIRE and CITY.

The general public shall not be wholly or permanently excluded from any portion of the Premises. However, CONCESSIONAIRE may apply reasonable restrictions for the general public's use of the Premises so long as such restrictions are consistent with the rights of the general public and do not conflict with CONCESSIONAIRE's use of the Premises as authorized by this Agreement (for example, staff offices for CONCESSIONAIRE).

15. Rates and Fees. All fees associated with the use of the facilities on the Premises shall be set forth in a schedule of rates and fees and approved in writing by CITY prior to imposing such rates and fees. All rates and fees charged shall be reasonable, in the opinion of CITY, so as not to deny participation by the general public and comparable with those charged at similar facilities in San Diego County. Any changes in the schedule of rates and fees shall be subject to the prior written approval of CITY, and the schedule shall be reviewed at least annually by CONCESSIONAIRE and CITY.
16. Public Signage. CONCESSIONAIRE shall, at all times during the Term, maintain a prominent CITY-approved sign identifying the property as CITY-owned and available for public use consistent with the terms of this Agreement. The sign shall be installed by CONCESSIONAIRE at a location approved by CITY.

CONCESSIONAIRE shall not erect or display any banners, pennants, flags, pennants signs, decorations, marquees, awnings, or similar devices or advertising on the Premises, without CITY's prior written consent. If any such unauthorized item is found on the Premises, CONCESSIONAIRE shall remove the item at its expense within twenty-four (24) hours notice by CITY, or CITY may thereafter remove the item at CONCESSIONAIRE's cost.

17. CITY Use. The Premises shall be available to CITY for civic events and special programs, free of charge, except where CONCESSIONAIRE has scheduled events or programs. After every CITY use, CITY shall leave the Premises in the same condition

found, and CONCESSIONAIRE shall not be required to incur any additional costs by reason of CITY use.

CONCESSIONAIRE acknowledges and agrees that the Premises may be used as an emergency shelter, free of charge, immediately upon notice by CITY.

18. Holdover. Any holding over by CONCESSIONAIRE after the expiration or earlier termination of this Agreement shall not be considered a renewal or extension of this Agreement. CONCESSIONAIRE's occupancy of the Premises after the expiration or earlier termination of this Agreement shall constitute a month-to-month tenancy at will, and all other terms and conditions of this Agreement shall continue in full force and effect, except that CONCESSIONAIRE shall then pay to CITY fair market rent determined by an appraisal prepared by the CITY's Real Estate Assets Department (READ).
19. Surrender of Premises. Upon the expiration or earlier termination of this Agreement, CONCESSIONAIRE shall vacate the Premises and surrender the Premises to CITY free and clear of all liens and encumbrances, and in as good or better condition as the Premises were in at the Effective Date, except normal wear and tear. Prior to surrender of the Premises and in the City's discretion, CONCESSIONAIRE shall remove all moveable trade fixtures and personal property without damage to the Premises at CONCESSIONAIRE's sole cost and expense, and shall repair at its sole cost and expense any damage resulting from the removal.
20. Survival. Any obligation which accrues under this Agreement prior to its expiration or termination shall survive such expiration or termination.
21. Assignment and Subconcession. CONCESSIONAIRE shall not assign this Agreement or any interest therein during the term of this Agreement. CONCESSIONAIRE shall not concession or subconcession the Premises or any part thereof, or any right or privilege appurtenant thereto, or suffer any other person, except employees, agents, and guests of CONCESSIONAIRE, to use or occupy the Premises or any part thereof, without the prior written consent of both the CITY and NPS. Consent to concession, subconcession, occupation, or use by any other person shall not be deemed to be consent to any subsequent concession, subconcession, occupation, or use by another person or entity. Any concession or subconcession without consent shall be void and shall, at the option of CITY, terminate this Agreement or may result in possible reversion by the USA.

"Assignment" for the purposes of this clause shall include any transfer of any ownership interest in this Agreement by CONCESSIONAIRE or by any partners, principals, or stockholders, as the case may be, from the original CONCESSIONAIRE, its general partners, or principals.

Approval of any subconcession shall be conditioned upon the subconcessionaire agreeing in writing that it will assume the rights and obligations thereby subconcession and that it will keep and perform all covenants, conditions, and provisions of this Agreement which

are applicable to the rights acquired. The CITY may require, as a condition to approval of any subconcession of the majority portion of the Premises, that this Agreement or the requested subconcession otherwise be revised to comply with standard CITY agreement requirements that are then current. The CITY may also require, as a condition to approval of any subconcession of a commercial nature (e.g., food vending or telecommunications installations), that CONCESSIONAIRE pay CITY fair market rents for the uses. Pursuant to City Charter section 225, the CITY must review and approve every person or entity which will have an interest in this Agreement as a subconcessionaire.

22. Encumbrance and Liens. CONCESSIONAIRE shall keep the Premises free from all encumbrances and liens of any nature which arise out of or are in any manner directly or indirectly connected with this Agreement or CONCESSIONAIRE's occupancy, use, development, or maintenance of the Premises. CONCESSIONAIRE shall protect, defend, indemnify, and hold CITY harmless from and against any and all such encumbrances and/or liens, and from and against any claim, liability, cost or expense, including without limitation all attorney fees and costs, relating to or charged against the Premises, including without limitation CONCESSIONAIRE's failure or the failure of any contractor or subcontractor hired by CONCESSIONAIRE to pay any person or persons referred to in section 3181 of the California Civil Code or other applicable sections thereof.

CONCESSIONAIRE shall protect, defend, indemnify, and hold CITY harmless from and against all claims for labor or materials in connection with construction, operations, improvements, alterations, or repairs on or to the Premises and the costs of defending against such claims, including, without limitation, reasonable attorney fees. If CONCESSIONAIRE causes improvements, alterations, or repairs to be made to the Premises, and a lien or notice of lien is filed against the property, CONCESSIONAIRE shall notify CITY of the lien within five (5) days after CONCESSIONAIRE first becomes aware of the existence of the lien, and within thirty (30) days after the filing either: (a) take all actions necessary to record a valid release of the lien; or (b) file with CITY a bond, cash, or other security acceptable to CITY sufficient to pay in full all claims of all persons seeking relief under the lien.

23. Default and Remedies.
- a. Default by CONCESSIONAIRE. Except for Safety Violations (as defined under subsection b., below) and major defaults (as set forth in this Agreement) which are grounds for immediate termination, in the event that:
- i. CONCESSIONAIRE shall default in the performance or fulfillment of any covenant or condition required by this Agreement to be performed or fulfilled by CONCESSIONAIRE, including any covenant or condition in CONCESSIONAIRE's Operating Plan and shall fail to cure the default within thirty (30) days following written notice from CITY; or if any default is not curable within thirty (30) days, and CONCESSIONAIRE

shall fail to commence to cure the default(s) within said thirty (30) day period and diligently pursue cure to completion;

- ii. CONCESSIONAIRE shall voluntarily file or have involuntarily filed against it any petition under bankruptcy or insolvency act or law; or
- iii. CONCESSIONAIRE shall make a general assignment for the benefit of creditors;

then CITY may, at its option, without further notice or demand upon CONCESSIONAIRE or upon any person claiming rights through CONCESSIONAIRE, immediately terminate this Agreement and all rights of CONCESSIONAIRE and of all persons claiming rights through CONCESSIONAIRE and expel CONCESSIONAIRE and all persons so claiming rights thereto. Provided, however, in the event that any default described in this subsection "a." above is not curable within thirty (30) days after written notice to CONCESSIONAIRE, CITY shall not terminate this Agreement pursuant to the default if CONCESSIONAIRE immediately commences to cure the default and diligently pursues cure to completion.

- b. Safety Violations by CONCESSIONAIRE. Notwithstanding subsection "a." above, in the event CONCESSIONAIRE shall default in the performance or fulfillment of any covenant or condition required by this Agreement to be performed or fulfilled by CONCESSIONAIRE, including any covenant or condition in CONCESSIONAIRE's Operating Plan, and said default by CONCESSIONAIRE consists of any violation of municipal, state or federal law, or any covenants or conditions in CONCESSIONAIRE's Operating plan that, in the CITY's sole discretion, impinge on public safety ["Safety Violations"], CITY may, at its option, require CONCESSIONAIRE to immediately cure said default, or, without further notice or demand upon CONCESSIONAIRE or upon any person claiming rights through CONCESSIONAIRE, terminate this Agreement:

- c. Abandonment by CONCESSIONAIRE. In the case that CONCESSIONAIRE breaches this Agreement and abandons the Premises, this Agreement shall continue in full force and effect for so long as CITY does not terminate this Agreement, and CITY may enforce all its rights and remedies under this Agreement, including, but not limited to, the right to recover any concession payment, rent, or other payments as set forth in Section 8, above, as they become due, plus damages. For purposes of this subsection, the following do not constitute a termination of CONCESSIONAIRE's right to possession or operation:

- i. Acts by CITY of maintenance, preservation, or efforts to negotiate a new Agreement.

- ii. The appointment of a receiver upon initiative of CITY to protect CITY's interest under this Agreement.

d. No Reimbursement for Expenditures. Notwithstanding anything to the contrary in this Agreement, CONCESSIONAIRE shall not be entitled to any reimbursement for Expenditures as set forth in Section 7, above, or any other costs or liabilities as a result of termination of this Agreement pursuant to this Section 23.

24. Indemnification & Hold Harmless. CONCESSIONAIRE shall protect, defend, indemnify, and hold CITY and its elected officials, officers, employees, representatives, and agents harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to CONCESSIONAIRE's officers, employees, invitees, guests, agents, or contractors, which arise out of or are in any manner directly or indirectly connected with CONCESSIONAIRE's acts or omissions in the performance of its obligations under this Agreement or with CONCESSIONAIRE's use, development, or maintenance of the Premises, including damages arising out of release of hazardous materials; and all expenses of investigating and defending against same, including without limitation attorney fees and costs; provided, however, that CONCESSIONAIRE's duty to indemnify and hold CITY harmless shall not include any established liability arising from the gross negligence or willful misconduct of CITY and its elected officials, officers, employees, representatives, and agents. The City may, at its own discretion, conduct the defense, or participate in the defense, of any claim related in any way to this indemnification. If the City elects to conduct its own defense, participate in its own defense, or obtain independent legal counsel in defense of any claim related to this indemnification, CONCESSIONAIRE shall pay the City for all costs related thereto, including, without limitation, attorney's fees and costs.
25. Eminent Domain. If all the premises are taken by Eminent Domain, this Agreement shall terminate as of the date CONCESSIONAIRE is required to vacate the Premises and all concession payment shall be paid to that date. Exercise by the USA of its right to revert the property under the terms and conditions of the USA Deed shall not be construed as an exercise of Eminent Domain by the USA. The term "Eminent Domain" shall include the taking or damaging of property by, through or under any governmental or statutory authority, and any purchase or acquisition in lieu thereof, whether the damaging or taking is by government or any other person. If a taking of any part of the Premises by Eminent Domain renders the remainder thereof unusable for CONCESSIONAIRE's business, in the reasonable judgment of CONCESSIONAIRE, CONCESSIONAIRE may terminate this Agreement by written notice given to CITY not more than thirty (30) days after CITY gives CONCESSIONAIRE written notice of the taking, and such termination shall be effective as of the date when CONCESSIONAIRE is required to vacate the portion of the Premises taken. If this Agreement is terminated, all concession payment shall be paid to the date of termination. Whenever any portion of the Premises is taken by Eminent Domain and this Agreement is not terminated, the CITY, at its expense, shall proceed with all reasonable dispatch to restore, to the extent of available proceeds and to the

extent it is reasonably prudent to do so, the remainder of the Premises to the condition they were in immediately prior to such taking, and CONCESSIONAIRE, at its expense, shall proceed with all reasonable dispatch to restore its personal property and all improvements made by it to the Premises to the same condition they were in immediately prior to such taking. Concession payment payable hereunder shall be reduced from the date CONCESSIONAIRE is required to partially vacate the Premises.

Except as otherwise provided below, CITY reserves all right to the entire damage award or payment for any taking by Eminent Domain, and CONCESSIONAIRE waives all claim whatsoever against CITY for damages for termination of any interest it may have, if any, in the Premises or for interference with its business. CONCESSIONAIRE hereby grants and assigns to CITY any right CONCESSIONAIRE may now have or hereafter acquire to such damages and agrees to execute and deliver such further instruments of assignment as CITY, from time to time, may request. CONCESSIONAIRE, however, shall have the right to claim from the condemning authority all compensation that may be recoverable by CONCESSIONAIRE on account of any loss incurred by CONCESSIONAIRE in moving CONCESSIONAIRE's merchandise, furniture, trade fixtures and equipment and the cost of restoring its personal property and improvements made by it to the Premises.

26. Insurance. CONCESSIONAIRE shall deliver to READ a current certificate of insurance and relevant endorsements for:
- (1) Commercial General Liability Insurance, providing coverage for bodily injury, including death, personal injury, and property damage with limits of at least Five Million Dollars (\$5,000,000) per occurrence, subject to an annual aggregate of at least Five Million Dollars (\$5,000,000);
 - (2) Automobile Liability Insurance, providing coverage for all bodily injury and property damage, with a limit of at least One Million Dollars (\$1,000,000) per occurrence. Such insurance shall cover liability arising out of any vehicle (including owned, hired, and non-owned vehicles) operated in performing any and all work pursuant to this Agreement. Coverage shall be written on *ISO form CA 00 01 12 90*, or a substitute form providing equivalent liability coverage;
 - (3) Workers' Compensation Insurance, as required by the laws of the State of California for all of CONCESSIONAIRE's employees who are subject to this Agreement, with Employers' Liability coverage with a limit of at least One Million Dollars (\$1,000,000); and
 - (4) Causes of Loss - Special Form Property Insurance on all of CONCESSIONAIRE's insurable property related to this Agreement or the Premises in an amount to cover 100 percent (100%) of the replacement cost. CONCESSIONAIRE shall deliver to CITY a certificate of such insurance.

- a. Additional Insureds. Pursuant to a separate endorsement [CG2010 (11/85) or equivalent form], "The City of San Diego, its elected officials, officers, employees, representatives, and agents" shall be named as additional insureds in all policies.
- b. Primary & Non-Contributory. Insurance policies shall be endorsed such that the coverage is primary and non-contributory to any coverage carried or maintained by CITY.
- c. Qualified Insurer(s). All insurance required by the terms of this Agreement must be provided by insurers licensed to do business in the State of California which are rated at least "A-, VI" by the current AM Best Ratings Guide and which are acceptable to CITY. Non-admitted surplus lines insurers may be accepted provided they are included on the most recent list of California eligible surplus lines insurers (LESLI list) and otherwise meet CITY requirements.
- d. Deductibles/Retentions. All deductibles and self-insured retentions on any insurance policy are the sole responsibility of CONCESSIONAIRE and must be disclosed and acceptable to CITY at the time evidence of insurance is provided.
- e. Continuity of Coverage. All policies shall be in effect on or before the first day of the Term, except "course of construction fire insurance" shall be in force on commencement of all authorized construction, and full applicable fire insurance coverage shall be effective upon completion of each insurable improvement. The policies shall be kept in force for the duration of the Term. At least thirty (30) days prior to the expiration of each insurance policy, CONCESSIONAIRE shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the requirements of this Agreement. CONCESSIONAIRE shall provide proof of continuing insurance at least annually during the Term. If insurance lapses or is discontinued for any reason, CONCESSIONAIRE shall immediately notify CITY and immediately obtain replacement insurance or do so as soon as required by CITY. Failure to do so constitutes a major default under this Agreement subject to immediate termination of the Agreement.
- f. Modification. To ensure protection from and against the kind and extent of risk existing with the Use of the Premises, CITY, at its discretion, may require the revision of amounts and coverage at any time during the Term by giving CONCESSIONAIRE thirty (30) days prior written notice. CONCESSIONAIRE shall also obtain any additional insurance required by CITY for new improvements, changed circumstances, or CITY's reasonable re-evaluation of risk levels related to this Agreement or the Premises.
- g. Accident Reports. CONCESSIONAIRE shall immediately report to the CITY any accident causing property damage or injury to persons and related to this Agreement or the Premises. Such report shall contain the names and addresses of the involved parties, a statement of the circumstances, the date and hour of the

accident, the names and addresses of any witnesses, and other pertinent information.

- h. Failure to Comply. If CONCESSIONAIRE fails or refuses to take out and maintain the required insurance or fails to provide the proof of coverage, CITY has the right to obtain the insurance. CONCESSIONAIRE shall reimburse CITY for the premiums paid with interest at the maximum allowable legal rate then in effect in California. CITY shall give notice of the payment of premiums within thirty (30) days of payment stating the amount paid, names of the insurer(s), and rate of interest. The reimbursement and interest shall be paid by CONCESSIONAIRE on the first (1st) day of the month following the notice of payment by CITY. Notwithstanding any other provision of this Agreement to the contrary, if CONCESSIONAIRE fails or refuses to obtain or maintain insurance as required by this Agreement, or fails to provide proof of insurance at any time and from time to time as reasonably requested by CITY, CITY may terminate this Agreement after five (5) business days' prior written notice to CONCESSIONAIRE. Upon such termination, CONCESSIONAIRE shall immediately cease its use of the Premises and commence and diligently pursue the removal of its property from the Premises, in accordance with Section 19, above.
27. Property Insurance Costs. CITY shall obtain and maintain property insurance for fire, property, and extended coverage that includes coverage of the Premises.
28. Waste, Damage, or Destruction. CONCESSIONAIRE shall not commit or allow to be committed any waste or any public or private nuisance on the Premises, shall keep the Premises clean and clear of refuse and obstructions, and shall dispose of all garbage, trash, and rubbish in a manner satisfactory to CITY. If the Premises are put into a condition which is not decent, safe, healthy, and sanitary, CONCESSIONAIRE shall at its sole cost and expense restore the Premises to the condition which existed prior to the waste, damage, or destruction within a reasonable time.
29. Acceptance of Premises. CONCESSIONAIRE accepts the Premises in its present As-Is and Where-Is condition without warranty, expressed or implied. CONCESSIONAIRE represents and warrants that it has independently inspected the Premises and made all tests, investigations, and observation necessary to satisfy itself of the condition of the Premises. CONCESSIONAIRE agrees it is relying solely on its independent inspection, tests, investigations and observations in entering into this Agreement. CONCESSIONAIRE further acknowledges that the Premises are in the condition called for by this Agreement, that CITY has performed all work, if any, related to the Premises and required by this Agreement, and that CONCESSIONAIRE shall hold CITY harmless for any defects, whether apparent or latent, in the Premises, including without limitation the presence of any hazardous substances.
30. Entry and Inspection. CONCESSIONAIRE may quietly enjoy the Premises, free from unreasonable interference by CITY, except as reasonably required in emergency

situations as determined in CITY's sole discretion. During such an emergency, CITY may at all times enter and inspect the Premises and the operations conducted on the Premises. For all non-emergency situations, CITY and/or the Secretary of Interior's designated representative, NPS, may at any and all reasonable times enter and inspect the Premises and the operations conducted on the Premises. In the event that entry or inspection by CITY discloses that the Premises are not in a decent, safe, healthy, and sanitary condition, CITY shall have the right, but not the obligation, after ten (10) days written notice to CONCESSIONAIRE, to have any necessary maintenance work done at the expense of CONCESSIONAIRE, and CONCESSIONAIRE hereby agrees to pay promptly any and all costs incurred by CITY in having the necessary maintenance work done, in order to keep the Premises in a decent, safe, healthy, and sanitary condition. Further, if at any time CITY determines that the Premises are not in a decent, safe, healthy, and sanitary condition, CITY may at its sole option, without additional notice, require CONCESSIONAIRE to file with CITY a faithful performance bond to assure prompt correction of any condition which is not decent, safe, healthy, and sanitary. The bond shall be in an amount adequate in the opinion of CITY to correct the unsatisfactory condition. CONCESSIONAIRE shall pay the cost of the bond. The rights reserved in this section shall not create any obligations on CITY or increase obligations elsewhere in this Agreement imposed on CITY.

31. Maintenance. CONCESSIONAIRE shall, at CONCESSIONAIRE's sole cost and expense and to the CITY's satisfaction, maintain the Premises in a decent, safe, healthy, and sanitary condition at all times and perform such repairs that become necessary from time to time during the term of this Agreement.
32. Improvements/Alterations. No improvements, structures, or installations shall be constructed on the Premises, and the Premises may not be altered by CONCESSIONAIRE without prior written approval by CITY, which approval shall not be unreasonably delayed or withheld. Further, CONCESSIONAIRE agrees that major structural or architectural design alterations to approved improvements, structures, or installations may not be made on the Premises without prior written approval by CITY and that the approval shall not be unreasonably delayed or withheld. This provision shall not relieve CONCESSIONAIRE of any obligation under this Agreement to maintain the Premises in a decent, safe, healthy, and sanitary condition, including structural repair and restoration of damaged or worn improvements. CITY shall not be obligated by this Agreement to make or assume any expense for any improvements or alterations.
33. Utilities. CONCESSIONAIRE shall order, obtain and pay for all utilities and service installation charge in connection with operation of the Premises. All such service utilities shall be installed underground.
34. Taxes. Subject to the provisions of Article XIII, section 3(d) of the California Constitution and section 202.2 of the California Revenue and Taxation Code, CONCESSIONAIRE shall pay, before delinquency, all taxes, assessments, and fees assessed or levied upon CONCESSIONAIRE or the Premises, including the land, any buildings, structures, machines, equipment, appliances, or other improvements or

property of any nature whatsoever erected, installed, or maintained by CONCESSIONAIRE or levied by reason of the business or other CONCESSIONAIRE activities related to the Premises, including without limitation licenses and permits. CONCESSIONAIRE acknowledges that this Agreement may create a possessory interest subject to property taxation, and that CONCESSIONAIRE may be subject to the payment of taxes levied on CONCESSIONAIRE's interest, and that CONCESSIONAIRE shall pay all possessory interest taxes. CONCESSIONAIRE's payment of taxes, fees, and assessments shall not reduce any concession payment due the CITY. CITY shall not assume any responsibility for any taxes whatsoever resulting from CONCESSIONAIRE's possession, use, or occupancy of the Premises.

35. Ownership of Improvements and Personal Property.

- a. Improvements. Any and all improvements, trade fixtures, structures, and installations or additions to the Premises now existing or accepted Project improvements on the Premises by CONCESSIONAIRE shall be deemed to be part of the Premises and shall be CITY'S property free of all liens and claims.
- b. Personal Property. CONCESSIONAIRE shall remove CONCESSIONAIRE-owned machines, appliances, equipment (other than trade fixtures), and other items of personal property prior to the expiration of the Term, or as soon as reasonably practicable after a notice of termination, but in no event later than sixty (60) days after such notice of termination. Any such items which CONCESSIONAIRE fails to remove in accordance with this subsection b., shall be considered abandoned and will be processed and disposed of in accordance with applicable provisions of California law. If any removal of such personal property by CONCESSIONAIRE or CITY results in damage to the Premises, CONCESSIONAIRE shall repair or pay for the repair of all such damage at its sole cost and expense. Notwithstanding the foregoing, if CONCESSIONAIRE elects to dispose of any of its personal property used in its operations on the Premises, upon expiration or termination of this Agreement, CITY shall have the first right to acquire or purchase such personal property.

36. Unavoidable Delay. If the performance of an act required by this Agreement is directly prevented or delayed by a cause beyond the reasonable control of the party required to perform the act, that party shall be excused from performing the act for a period equal to the period of the prevention or delay. This provision shall not apply to obligations to pay concession payment. The party claiming a delay shall notify the other party in writing within five (5) calendar days after the beginning of any claimed delay.

37. Hazardous Substances. CONCESSIONAIRE shall not allow the illegal installation, storage, utilization, generation, sale or release of Hazardous Substances or otherwise regulated substances in, on, under, or from the Premises. CONCESSIONAIRE and CONCESSIONAIRE'S agents and contractors shall not install, store, utilize, generate or sell any Hazardous Substance on the Premises without CITY' prior written consent. CONCESSIONAIRE shall, prior to initiating any design, construction, use or operations,

obtain all required permits from applicable regulatory agencies, including without limitation the San Diego County Department of Environmental Health, local fire agencies, the San Diego County Department of Weights and Measures, the San Diego County Air Pollution Control District, and the San Diego Regional Water Quality Control Board. Installing, utilizing, storing, or any other presence of a Hazardous Substance includes boxes, bags, bottles, drums, cylinders, above or below ground tanks, equipment with tanks, or any other type of container, equipment or device which holds or incorporates a Hazardous Substance or hazardous waste.

- a. Release. For all purposes of this Agreement, a “release” shall include without limitation any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leeching, dumping, or otherwise disposing of hazardous substances.
- b. Hazardous Substance. For all purposes of this Agreement, “Hazardous Substance” shall mean any substance listed by the Environmental Protection Agency or the State of California as a hazardous substance, and all types of petroleum-related substances and their chemical constituents.
- c. Remediation. If CONCESSIONAIRE’s construction, occupancy, use, development, maintenance or restoration of the Premises results in a release of a Hazardous Substance, CONCESSIONAIRE shall pay all costs of remediation and removal to CITY’s satisfaction for unrestricted reuse of the Premises, and in accordance with all applicable laws, rules and regulations of governmental authorities.
- d. Removal. If CONCESSIONAIRE or CONCESSIONAIRE’s agent has received approval and permits to store, utilize, generate or install, or otherwise bring Hazardous Substances to the Premises, CONCESSIONAIRE or CONCESSIONAIRE’s agent shall remove all Hazardous Substances in any type of container, equipment or device from the Premises immediately upon or prior to the expiration or earlier termination of this Agreement. CITY reserves the right to conduct inspections of the Premises and/or request documentation demonstrating the legal removal and/or disposal of the hazardous materials, wastes or other containers, equipment or devices from the Premises. CONCESSIONAIRE shall be responsible for any and all costs incurred by CITY to remove any container, equipment or device requiring disposal or removal as required by this provision.
- e. Indemnity. CONCESSIONAIRE shall protect, defend, indemnify, and hold CITY harmless from any and all claims, costs, and expenses related to environmental liabilities resulting from CONCESSIONAIRE’s construction, occupancy, use, development, maintenance or restoration of the Premises, including without limitation: (i) costs of environmental assessments; (ii) costs of regulatory remediation oversight; (iii) costs of remediation and removal; (iv) any necessary CITY response costs; (v) all fines, penalties or fees assessed by any regulatory agency; (vi) damages for injury to natural resources,

CONCESSIONAIRE's officers, employees, invitees, guests, agents or contractors, or the public, and (vii) all costs of any health assessments or health effect studies.

f. Notice of Release. If CONCESSIONAIRE knows or has reasonable cause to believe that a Hazardous Substance has been released on, from or beneath the Premises, CONCESSIONAIRE shall immediately notify CITY and any appropriate regulatory or reporting agency pursuant to California Code of Regulations Title 19 and any other applicable laws or regulations. CONCESSIONAIRE shall deliver a written report thereof to CITY within three (3) days after receipt of the knowledge or cause for belief and submit any required written reports to regulatory or reporting agencies as required by regulation or law. If CONCESSIONAIRE knows or has reasonable cause to believe that such substance is an imminent release or imminent substantial danger to public health and safety, CONCESSIONAIRE shall take all actions necessary to alleviate the danger. CONCESSIONAIRE shall immediately notify CITY in writing of any violation, notice to comply, or notice of violation received or the initiation of environmental actions or private suits related to the Premises.

g. Environmental Assessment. Upon reasonable cause to believe that CONCESSIONAIRE's construction, occupancy, use, development, maintenance, or restoration of the Premises resulted in any Hazardous Substance being released on, from or beneath the Premises, CITY may cause an environmental under regulatory oversight of the suspect area to be performed by a professional environmental consultant registered with the State of California as a Professional Engineer, Certified Engineering Geologist, or Registered Civil Engineer. The environmental assessment shall be obtained at CONCESSIONAIRE's sole cost and expense, and shall establish what, if any, Hazardous Substances have more likely than not been caused by CONCESSIONAIRE's construction, occupancy, use, development, maintenance, or restoration of the Premises, and in what quantities. If any Hazardous Substances exist in quantities greater than allowed by city, county, state, or federal laws, statutes, ordinances, or regulations, or require future restricted re-use of the Premises, then the environmental assessment shall include a discussion of such substances with recommendations for remediation and removal necessary to effect unrestricted re-use and in compliance with those laws or statutes, and estimates of the cost of such remediation or removal. CONCESSIONAIRE shall cause, or if CONCESSIONAIRE fails to do so within a reasonable period of time, as determined by CITY in its sole discretion, then CITY may cause, the remediation and/or removal recommended in the environmental assessment such that UNRESTRICTED REUSE OF THE Premises and compliance with environmental laws and regulations are achieved, and CONCESSIONAIRE shall pay all costs and expenses therefore.

38. Asbestos Disclosure. Portions of the structural components of the Premises may contain asbestos. If so, CONCESSIONAIRE acknowledges having received notice from CITY of the presence of asbestos in accordance with Health and Safety Code section 25915.

ADDENDUM B

June 13, 2014

Page 20 of 34

CONCESSIONAIRE shall disclose the existence of asbestos on the Premises, as required by Health and Safety Code section 25915. CONCESSIONAIRE shall indemnify and hold CITY harmless from any loss or claim which may result from the existence of asbestos on the Premises.

39. Asbestos. Asbestos removal, management, or containment shall be conducted in accordance with all applicable laws and as approved by CITY. CITY reserves the right to inspect any improvements, alterations, or repairs to the Premises made by CONCESSIONAIRE. CITY may, at its discretion, station supervisory personnel at the work site to ensure that CONCESSIONAIRE's obligations under this section are fulfilled. Each party shall coordinate with the other regarding any improvement, alteration, or repair, and, except in the event of an emergency, the party responsible for such work shall provide written notice to the other party at least fifteen (15) days prior to commencing the work.
40. Notices. Any notice required or permitted to be given under this Agreement shall be in writing and may be served personally or by United States mail, postage prepaid, addressed as follows:

If to CONCESSIONAIRE:

If to CITY:

THE CITY OF SAN DIEGO
Real Estate Assets Department
Attention: Director, Real Estate Assets Department
1200 Third Avenue, Suite 1700, MS 51A
San Diego, California 92101

41. Compliance with Law. CONCESSIONAIRE shall at its sole cost and expense comply with all local, state and federal rules, regulations, and laws, and all direction by competent authority, which now or hereafter pertain to CONCESSIONAIRE's occupancy, use, development, maintenance, and restoration of the Premises. In addition, CONCESSIONAIRE shall comply with any and all notices issued by CITY under the authority of any law, statute, ordinance, or regulation.
42. No Discrimination. CONCESSIONAIRE shall not discriminate in any manner against any person or persons on account of race, color, religion, gender, sexual orientation, medical status, national origin, age, marital status, or physical disability in CONCESSIONAIRE's use of the Premises, including but not limited to the providing of goods, services, facilities, privileges, advantages, and accommodations, and the obtaining and holding of employment. CONCESSIONAIRE shall not discriminate in accordance with Conditions 5 and 7 of the USA Deed.

Additionally, CONCESSIONAIRE shall not discriminate on the basis of race, gender, religion, national origin, ethnicity, sexual orientation, age, or disability in the solicitation, selection, hiring or treatment of consultants, contractors, subcontractors, vendors or suppliers. CONCESSIONAIRE shall provide equal opportunity for contractors, subcontractors to participate in contracting and subcontracting opportunities. CONCESSIONAIRE understands and agrees that violation of this clause shall be considered a material breach of this Agreement and may result in Agreement termination, debarment, and other sanctions. This language shall be in contracts between the CONCESSIONAIRE and any consultants, contractors, subcontractor's vendors and suppliers.

43. Local Business and Employment. CONCESSIONAIRE acknowledges that CITY seeks to promote employment and business opportunities for local residents and firms in all CITY contracts. CONCESSIONAIRE will, to the extent legally possible, solicit applications for employment, and bids and proposals for subcontracts, for work associated with this Agreement from local residents and firms as opportunities occur. CONCESSIONAIRE shall hire qualified local residents and firms whenever feasible.
44. Drug-free Workplace. CONCESSIONAIRE shall comply with San Diego City Council Policy 100-17. "DRUG-FREE WORKPLACE", adopted by San Diego Resolution R-277952 and fully incorporated into this Agreement by this reference. CONCESSIONAIRE shall ensure that its contractors comply with the requirements of CITY's Council Policy 100-17. CONCESSIONAIRE shall adopt and enforce a policy to maintain a drug-free workplace by doing all of the following:
- a. Publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession or use of controlled substances are prohibited on the Premises and specifying the actions that will be taken against employees for violations of the prohibition; and
 - b. Establish a drug-free awareness program to inform employees about all of the following:
 - (1) The dangers of drug abuse in the workplace;
 - (2) CONCESSIONAIRE's policy of maintaining a drug-free workplace;
 - (3) Any available drug counseling, rehabilitation, and employees assistance programs; and
 - (4) Penalties that may be imposed upon employees for drug abuse violations.
45. Compliance with CITY'S Equal Employment Opportunity Contracting Program. CONCESSIONAIRE acknowledges and agrees that it is aware of, and will comply with, City Council Ordinance No. 18173 (San Diego Municipal Code sections 22.2701 through 22.2708, as amended), EQUAL EMPLOYMENT OPPORTUNITY OUTREACH

PROGRAM, a copy of which is on file in the Office of the City Clerk and by this reference is incorporated herein. CONCESSIONAIRE shall ensure that its contractors comply with CITY's Equal Opportunity Contracting Program. Nothing in this section shall be interpreted to hold CONCESSIONAIRE liable for any discriminatory practice of its contractors.

46. CITY Employee Participation Policy. Pursuant to City Council Policy 300-11, CITY, at its sole discretion, may unilaterally and immediately terminate the Agreement if CONCESSIONAIRE employs an individual who, within the twelve (12) months immediately preceding employment, did in his or her capacity as a CITY officer or employee participate in, negotiate with, or otherwise have an influence on the recommendation made to the City Council in connection with this Agreement or selection of CONCESSIONAIRE.
47. Disabled Access Compliance. CONCESSIONAIRE shall comply with all nondiscrimination laws of the United States, State of California and CITY, including but not limited to those laws set forth in Conditions 5 and 7 of the USA Deed; the California Government Code sections 11135-11139.5; the Federal Rehabilitation Act of 1973, Section 504, Title V; the Americans with Disabilities Act of 1990 (ADA); and any other applicable state and federal laws and regulations in effect or hereafter enacted protecting the rights of people with disabilities. CONCESSIONAIRE's compliance shall include but not necessarily be limited to the following:
 - a. CONCESSIONAIRE shall not discriminate against qualified persons with disabilities in any aspects of employment, including recruitment, hiring, promotions, conditions and privileges of employment, training, compensation, benefits, discipline, layoffs, and termination of employment.
 - b. No qualified individual with a disability may be excluded on the basis of disability from participation in, or be denied the benefits of, services, programs, or activities of CONCESSIONAIRE.
 - c. CONCESSIONAIRE shall post a statement addressing the requirements of the ADA in a prominent place at the work site.
 - d. Where required by law, any improvements made to the Premises by CONCESSIONAIRE shall comply with municipal, state and federal disabled access requirements by bringing up to code and making accessible any areas of the Premises which deny access to disabled persons. All improvements and alterations shall be at the sole cost of CONCESSIONAIRE.
 - i. CONCESSIONAIRE shall include language in each subagreement which indicates the subConcessionaire's agreement to abide by the foregoing provisions. CONCESSIONAIRE and subConcessionaires shall be individually responsible for their own ADA employment programs.

- ii. CONCESSIONAIRE understands that failure to comply with the above requirements and/or submitting false information in response to these requirements shall constitute a default under this Agreement.

48. Prevailing Wage Rates. Prevailing wage rates apply to this Agreement.

REQUIREMENTS FOR CONTRACTS SUBJECT TO STATE PREVAILING WAGE REQUIREMENTS.

In accordance with California Labor Code (Labor Code) sections 1770, et seq., as amended, the Director of the Department of Industrial Relations (DIR) has determined the general prevailing rate of per diem wages (Prevailing Wage Rate) in accordance with the standards set forth in sections for the locality in which the work is to be performed. CONCESSIONAIRE may review the Prevailing Wage Rate at the CITY's Purchasing and Contracting Department or Equal Opportunity Contracting (EOC) Office or on-line at http://www.dir.ca.gov/dlsr/statistics_research.html. CONCESSIONAIRE shall post a copy of the Prevailing Wage Rate at each job site and make copies available to any interested party on request.

Pursuant to Labor Code sections 1720 et seq., and 1770 et seq., CONCESSIONAIRE and all subcontractors shall pay not less than the Prevailing Wage Rate to all persons employed by them in the execution of the work. CONCESSIONAIRE and any subcontractor shall comply with section 1775 (Penalties for Violations) in the event workmen are paid less than said specified rates.

The wage rates determined by the DIR and published in the Department of Transportation publication entitled "General Prevailing Wage Rates" refer to expiration dates. If the published wage rate does not refer to a predetermined wage rate to be paid after the expiration date, said published wage rate shall be in effect for the life of this Agreement. If the published wage rate refers to a predetermined wage rate to become effective upon expiration of the published wage rate and the predetermined wage rate is on file with the DIR, such predetermined wage rate shall become effective on the date following the expiration date and shall apply to this Agreement in the same manner as if it had been published in said publication. If the predetermined wage rate refers to one or more additional expiration dates with additional predetermined wage rates, which expiration dates occur during the life of this Agreement, each successive predetermined wage rate shall apply to this Agreement on the date following the expiration date of the previous wage rate. If the last of such predetermined wage rates expires during the life of this Agreement, such wage rate shall apply to the balance of the contract.

The successful bidder intending to use a craft or classification not shown on the prevailing rate determinations may be required to pay the rate of the craft or classification most closely related to it.

CONCESSIONAIRE and subcontractors must comply with Labor Code section 1776 by keeping accurate payroll records that show the name, address, social security number, work classification, straight time, and overtime hours worked each day and week by each worker, and the actual per diem wages paid to each worker employed by CONCESSIONAIRE or subcontractor in connection with the public works project. Each payroll record shall contain or be verified by a written declaration signed by CONCESSIONAIRE or subcontractor under penalty of perjury that states that: 1) the information contained in the payroll record is true and correct; and 2) CONCESSIONAIRE or subcontractor has complied with the requirements of Labor Code sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project. The payroll records must be certified. CONCESSIONAIRE and subcontractor(s) shall submit weekly certified payrolls online via the CITY's web-based labor compliance program. CONCESSIONAIRE shall be responsible for the compliance with these provisions by its subcontractors. CITY will withhold contract payments when payroll records are delinquent or deemed inadequate by CITY or another governmental entity, or when it is established after investigation by CITY or another governmental entity that underpayment has occurred.

You must abide by the requirements of Labor Code sections 1777.5, 1777.6, and 1777.7 concerning the employment of apprentices by contractors and subcontractors performing public works contracts.

49. Equal Benefits. CONCESSIONAIRE shall comply with San Diego Municipal Code sections 22.4301-22.4308, which require Concessionaires of City-owned property to offer the same employment benefits to employees with spouses and employees with domestic partners. CONCESSIONAIRE shall certify that it will maintain such equal benefits throughout the term of this Agreement.
50. Water Quality Assurances. CONCESSIONAIRE shall comply with all applicable requirements of the National Pollutant Discharge Elimination System ("NPDES") Permit No. R9-2007-0001, and any subsequent versions of this NPDES permit that become effective during the Term of this Agreement. CONCESSIONAIRE shall comply with San Diego Municipal Code Chapter 4, Article 3, Division 3: Storm Water Management and Discharge Control (the "Storm Water Code"), as amended from time to time, and employ "Best Management Practices" including a "Storm Water Pollution Prevention Plan" as those terms are defined by the Storm Water Code (collectively, "Prevention Plan") and as approved by CITY under its Storm Water Management Program. Within the first thirty (30) days of the Term, CONCESSIONAIRE shall submit a Prevention Plan satisfactory to CITY that will control any "Pollutants," as defined by the Storm Water Code, discharged from the Premises. CITY may review the Prevention Plan periodically. Within thirty (30) days after written notice from CITY requesting an update of the Prevention Plan, CONCESSIONAIRE shall submit an updated Prevention Plan to CITY's satisfaction. CONCESSIONAIRE shall implement all changes to the Prevention Plan as required by CITY and to ensure compliance with all applicable laws, ordinances, and regulations. CONCESSIONAIRE shall inform its employees, contractors,

subcontractors, agents and vendors of the Prevention Plan and ensure their compliance therewith. CONCESSIONAIRE shall at all times keep and maintain Best Management Practices required by the Prevention Plan in a manner which controls and prevents discharge of Pollutants to the Maximum Extent Practicable. CONCESSIONAIRE understands and agrees that storm water pollution prevention requirements may change from time to time by regulation of the San Diego Regional Water Quality Control Board, and CONCESSIONAIRE expressly agrees that it will at its sole cost and expense maintain compliance with applicable regulations notwithstanding any change in law relating to storm water management.

51. Cumulative Remedies. CITY's rights and remedies under this Agreement are cumulative and shall not limit or otherwise waive or deny any of CITY's rights or remedies at law or in equity.
52. Survival. Any obligation which accrues under this Agreement prior to its expiration or termination shall survive such expiration or termination.
53. Joint and Several Liability. If CONCESSIONAIRE is comprised of more than one person or legal entity, such persons and entities, and each of them, shall be jointly and severally liable for the performance of each and every obligation of CONCESSIONAIRE under this Agreement.
54. No Affiliation. Nothing contained in this Agreement shall be deemed or construed to create a partnership, joint venture or other affiliation between CITY and CONCESSIONAIRE or between CITY and any other entity or party, or cause CITY to be responsible in any way for the debts or obligations of CONCESSIONAIRE or any other party or entity.
55. Entire Agreement. This Agreement constitutes the entire agreement between the parties and pertaining to this Agreement and CONCESSIONAIRE's occupancy, use, development, maintenance, and restoration of the Premises. Any modification, alteration, or amendment of this Agreement shall be in writing and signed by all the parties hereto with written concurrence by the Secretary of the Interior or his/her delegated representative, NPS.
56. Partial Invalidity. If any term, condition, or provision of this Agreement is found invalid, void, or unenforceable by a court of competent jurisdiction, the remaining provisions shall remain in full force and effect.
57. Governmental Approvals. By entering into this Agreement, neither CITY nor CITY's City Council is obligating itself to any governmental agent, board, commission, or agency with regard to any other discretionary action relating to CONCESSIONAIRE's occupancy, use, development, or maintenance of the Premises. Discretionary action includes but is not limited to re-zonings, variances, environmental clearances, or any

other governmental approvals which may be required for CONCESSIONAIRE's occupancy, use, development, or maintenance of the Premises.

58. Standard of Employees. CONCESSIONAIRE and its employees shall at all times conduct themselves and the operations on the Premises in a creditable manner, as determined by CITY in its sole and reasonable discretion.
59. Criminal Background Screenings. CITY may require background investigations on all CONCESSIONAIRE employees assigned to this Agreement when information becomes available that indicates a potential breach in safety or security.
60. Gratuities. This Agreement may be terminated by written notice if CITY determines that CONCESSIONAIRE, its agent, or another representative:
 - a. Offered or gave a gratuity (e.g. an entertainment or gift) to an officer, or employee of CITY; and
 - b. Intended by the gratuity to obtain a contract or favorable treatment under a contract.

If this Agreement is terminated under this section, CITY is entitled to pursue breach of contract remedies and all other remedies available at law or in equity.

61. Conflict of Interest. CONCESSIONAIRE is subject to all federal, state and local conflict of interest laws, regulations and policies applicable to public contracts and procurement practices, including but not limited to California Government Code sections 1090, et. seq. and 81000, et. seq., the City of San Diego Ethics Ordinance, codified in the San Diego Municipal Code at section 27.3501 to 27.3595. CITY may determine that a conflict of interest code requires the CONCESSIONAIRE to complete one or more statements of economic interest disclosing relevant financial interests. Upon CITY's request, CONCESSIONAIRE shall submit the necessary documents to the CITY.
62. Product Endorsement. CONCESSIONAIRE is prohibited from indicating, either directly or by implication, that CITY has endorsed its goods or services without prior written authorization by CITY.
63. Confidentiality of Services. All services performed by CONCESSIONAIRE, and any subcontractors if applicable including but not limited to provision of all drafts, data, information, correspondence, proposals, reports or any nature, estimates compiled or composed by CONCESSIONAIRE, are for the sole use of CITY, its agents and employees. Neither the documents nor their contents shall be released to any third party without the prior written consent of CITY. This provision does not apply to information that (a) was publicly known, or otherwise known to the CONCESSIONAIRE, at the time that it was disclosed to the CONCESSIONAIRE by CITY, (b) subsequently becomes publicly known through no act or omission of the CONCESSIONAIRE, or (c) otherwise becomes known to the CONCESSIONAIRE other than through disclosure by CITY.

64. Public Records. This Agreement is a public document subject to the California Public Records Act, and as such may be subject to public review in accordance with the attached **Exhibit G**.
65. Conformity. The policies established by CONCESSIONAIRE for the operation of the Premises shall conform to the general policies established by CITY for the use and operation of CITY-owned properties like the Premises.
66. Use of Proceeds. CONCESSIONAIRE shall use all revenue received from the operation of the Premises exclusively for the continued operation, maintenance, and improvement of the Premises and purposes incidental thereto. CONCESSIONAIRE's compliance with this requirement shall be certified in CONCESSIONAIRE's annual financial report as required herein.
- a. Annual Report. Within ninety (90) days after the last day of each of CONCESSIONAIRE's fiscal years during the Term, CONCESSIONAIRE shall deliver to CITY a preliminary, non-audited financial report for that fiscal year. The financial report shall include an operating statement and a report of net worth, and shall be in a form reasonably satisfactory to CITY, and shall be subject to review and audit by the CITY and the San Diego City Auditor. Within one hundred fifty (150) days after the last day of each of CONCESSIONAIRE's fiscal years during the Term, CONCESSIONAIRE shall deliver to CITY audited financial reports that complies with the above requirements for an annual financial report certified by an independent certified public accountant.
- b. Financial Records. CONCESSIONAIRE shall keep or cause to be kept true, accurate, and complete accounting records using generally accepted accounting principles consistently applied, including double-entry books, a profit-and-loss statement, and a balance sheet, making it possible at all times to determine the nature and amount of revenue and expenditures. All of CONCESSIONAIRE's expenditures and transactions shall be supported by documents of original entry such as sales slips, cash register tapes, purchase invoices, and receipts. CONCESSIONAIRE shall retain documents supporting its profit-and-loss statements for a minimum period of five (5) years.
- c. Inspection of Records and Audit. CONCESSIONAIRE shall make all of its books, statements, documents, records, and financial data open at all reasonable times for CITY's or Secretary of the Interior or his/her delegated representative, NPS inspection and audit upon reasonable notice. CITY may conduct an audit of CONCESSIONAIRE's books, statements, documents, records, and financial data, or demand and receive from CONCESSIONAIRE the results of a complete audit as conducted by an independent certified public accountant in the event that: (i) CONCESSIONAIRE's chief executive officer, executive director, or other such manager resigns, retires, or is discharged; (ii) a majority in the membership of

CONCESSIONAIRE's governing body changes; or (iii) the purposes for which CONCESSIONAIRE was created are materially or substantially changed.

d. Proposed Budget. Upon CITY's request during the Term, CONCESSIONAIRE shall deliver to CITY copies of documents evidencing CONCESSIONAIRE's proposed programs and business plan for the next fiscal year. Such documents shall be in a form and content reasonably satisfactory to CITY.

67. Permits and Licenses. CONCESSIONAIRE shall obtain all licenses and permits necessary for the construction, operation and use of the Premises in accordance with Sections 3 and 4 of this Agreement, at CONCESSIONAIRE's sole cost and expense before commencement of construction and operation, as applicable.

CONCESSIONAIRE shall pay for all of CITY'S administrative costs (CITY's Administrative Costs) necessary for the construction of the Project. City's Administrative Costs shall consist of the costs and expenses incurred by CITY to: (i) implement, process, and administer the Project, (ii) review and approve the Plans and Specifications for the Project, and (iii) inspect and approve work performed on Project during construction until completion and acceptance of Project by CITY.

68. Implementation of Renovation Plan. CONCESSIONAIRE shall submit a general development plan (GDP), to the City for review and approval prior to any renovation or rehabilitation of the Premises. The GDP, upon approval by the CITY, shall be attached hereto and made a part of this Agreement.

CITY shall have the authority to authorize subsequent changes to the approved GDP provided that the proposed changes are consistent with the terms and conditions of this Agreement and are subject to any and all required development permit conditions and CEQA mitigation measures.

Failure by CONCESSIONAIRE to comply with the requirements of this Section 68 or with the approved GDP shall constitute a major default and subject this Agreement to immediate termination by CITY.

69. No Waiver. No failure of either CITY or CONCESSIONAIRE to insist upon the strict performance by the other of any covenant, term, or condition of this Agreement, nor any failure to exercise any right or remedy consequent upon a breach of any covenant, term, or condition of this Agreement, shall constitute a waiver of any such breach of such covenant, term or condition. No waiver of any breach shall affect or alter this Agreement, and each and every covenant, condition, and term hereof shall continue in full force and effect to any existing or subsequent breach.

70. Jurisdiction, Venue and Choice of Law. The venue for any suit or proceeding concerning this Agreement, including the interpretation or application of any of its terms or any related disputes, shall be in the County of San Diego, State of California. This

Agreement is entered into and shall be construed and interpreted in accordance with the laws of the State of California.

71. Municipal Powers. Nothing contained in this Agreement shall be construed as a limitation upon the powers of the CITY as a chartered city of the State of California.
72. Third-Party Relationships. Nothing in this Agreement shall create a contractual relationship between CITY and any third-party; however, the Parties understand and agree that CITY, to the extent permitted by law, is an intended third-party beneficiary of all CONCESSIONAIRE's contracts, purchase orders and other contracts between CONCESSIONAIRE and third-party services. CONCESSIONAIRE shall incorporate this provision into its contracts, supply agreements and purchase orders.
73. Authority to Contract. Each individual executing this Agreement on behalf of another person or legal entity represents and warrants that they are authorized to execute and deliver this Agreement on behalf of such person or entity in accordance with duly adopted resolutions or other authorizing actions which are necessary and proper and under such legal entity's articles, charter, bylaws, or other written rules of conduct or governing agreement, and that this Agreement is binding upon such person or entity in accordance with its terms. Each person executing this Agreement on behalf of another person or legal entity represents and warrants such entity is a valid, qualified corporation, limited liability company, partnership, or other unincorporated association in good standing in its home state and that such entity is qualified to do business in California.

*****SIGNATURES ON FOLLOWING PAGE*****

IN WITNESS WHEREOF, this Agreement is executed to be effective as of the Effective Date.

BY: _____
Name: _____
Title: _____

THE CITY OF SAN DIEGO, a California municipal corporation

BY: _____
Name: _____
Title: _____

Approved as to Form and Legality:

JAN I. GOLDSMITH, City Attorney

BY: _____
Name: _____
Title: _____
Date: _____

- Exhibit A: USA Deed
- Exhibit B: Premises
- Exhibit C-1: Scope of Work
- Exhibit C-2: Approved General Development Plan
- Exhibit D: Construction Requirements
- Exhibit E: Operating Plan
- Exhibit F: Schedule of Days and Hours of Operation
- Exhibit G: California Public Records Act

PDP/cb
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Exhibit A: USA Deed

DRAFT

Exhibit B: Premises

DRAFT



THE CITY OF SAN DIEGO

AND

CONCESSION AGREEMENT