

1 **BY AUTHORITY**

2 ORDINANCE NO.  
3 SERIES OF 2013

COUNCIL BILL NO. CB13-0385  
COMMITTEE OF REFERENCE:

4 BUSINESS, WORKFORCE, & SUSTAINABILITY

5 **A BILL**

6 For an ordinance approving a proposed Fifth Amendment to Agreement  
7 between the City and County of Denver and Way Out West, Inc. for a  
8 concession at Denver International Airport.  
9

10 **BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:**

11 **Section 1.** The proposed Fifth Amendment to Agreement between the City and County of  
12 Denver and Way Out West, Inc. (AC68001) in the words and figures contained and set forth in that  
13 form of Agreement available in the office and on the web page of City Council, and to be filed in  
14 the office of the Clerk and Recorder, Ex-Officio Clerk of the City and County of Denver, under City  
15 Clerk's Filing No. 1996-1081-E, is hereby approved.

16 COMMITTEE APPROVAL DATE: June 13, 2013

17 MAYOR-COUNCIL DATE: June 18, 2013

18 PASSED BY THE COUNCIL: \_\_\_\_\_, 2013

19 \_\_\_\_\_ - PRESIDENT

20 APPROVED: \_\_\_\_\_ - MAYOR \_\_\_\_\_, 2013

21 ATTEST: \_\_\_\_\_ - CLERK AND RECORDER,  
22 EX-OFFICIO CLERK OF THE  
23 CITY AND COUNTY OF DENVER

24 NOTICE PUBLISHED IN THE DAILY JOURNAL: \_\_\_\_\_, 2013; \_\_\_\_\_, 2013

25 PREPARED BY: Skip Gray, III, Assistant City Attorney DATE: June 20, 2013

26 Pursuant to section 13-12, D.R.M.C., this proposed ordinance has been reviewed by the office of  
27 the City Attorney. We find no irregularity as to form, and have no legal objection to the proposed  
28 ordinance. The proposed ordinance is submitted to the City Council for approval pursuant to §  
29 3.2.6 of the Charter.

30 Douglas J. Friednash, City Attorney for the City and County of Denver

31 BY: \_\_\_\_\_, Assistant City Attorney DATE: June 20, 2013

## FIFTH AMENDMENT TO AGREEMENT

**THIS FIFTH AMENDMENT TO AGREEMENT ("Fifth Amendment")** is made and entered into as of the date stated on the City's signature page, by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado, for and on behalf of the Department of Aviation (the "City"), Party of the First Part, and **WAY OUT WEST, INC.**, a Colorado corporation ("Concessionaire"), dba **Way Out West**, Party of the Second Part (collectively, the Parties).

### WITNESSETH:

**WHEREAS**, the Parties hereto entered into an Agreement (AC68001), dated November 14, 1996, which has been amended several times the last being a Fourth Amendment dated May 18, 2011 (collectively, the "Original Agreement"), for the operation of a concession at Denver International Airport, which expires December 31, 2013; and

**WHEREAS**, because it is in the City's best interest to avoid interrupting services to the traveling public, the City has authorized and Concessionaire has agreed, if necessary, to continue to operate its concession under the holdover provision after the Original Agreement expires while the City completes the process of competitively soliciting proposals for this location; and

**WHEREAS**, as Concessionaire has agreed to continue its operation for the City's benefit, the Parties have agreed to revise the holding over provision of the Original Agreement to recognize the month-to-month tenancy of a permitted holdover, eliminate the 150% holdover fee otherwise due under the holdover provision, and provide that the Parties will give each other no less than thirty (30) days' notice before terminating Concessionaire's tenancy and vacating the space;

**NOW, THEREFORE**, for the foregoing reasons and for other good and valuable consideration, the sufficiency of which is acknowledged, the Parties hereby agree to amend the Original Agreement as follows:

1. Effective as of the date of execution, Section 4.03, Holding Over, of the Original Agreement hereby is amended by deleting it entirely and replacing it with the following:

#### **4.03. HOLDING OVER**

**A. Holding Over.** If Concessionaire holds over after the Expiration Date, or any extension or early termination of this Agreement as herein provided, and the City and Concessionaire have not otherwise agreed to the terms and provisions of such holding over, thereafter Concessionaire's occupancy shall be deemed by the City to be either a month-to-month holdover tenant at the same rental as was in effect immediately prior to the Expiration Date, or a tenant at sufferance, at a monthly rental, payable in advance, equal to 150% of the monthly Rent provided for in Section 5 of this Agreement, and Concessionaire shall otherwise remain bound by all terms, conditions, covenants, and agreements hereof.

**B. Permitted Holdover.** The City may, at its option, allow Concessionaire to hold over under this Agreement on a month-to-month basis. A holdover by Concessionaire shall be deemed permitted until expiration of thirty (30) days after

notice to vacate has been given by the City unless the City shall have entered into a binding agreement to deliver possession to another concessionaire on a date that is less than thirty (30) days following the Expiration Date. It is agreed and understood that any holding over of Concessionaire after the termination of this Agreement with the City's consent shall not renew and extend the Term but shall operate and be construed as a month-to-month permit and Concessionaire agrees to pay to the City fees or other payment that are in effect at the end of the regular Term of the Agreement unless the City has given prior notice of any increased fees. Such increase in fees may be given at any time with notice of not less than thirty (30) days. Concessionaire shall be liable to the City for all loss or damage on account of any such holding over against the City's will after the termination of this Agreement, whether such loss or damage may be contemplated at this time or not. It is expressly agreed that acceptance of the foregoing payment to the City in the event that Concessionaire fails or refuses to surrender possession shall not constitute a waiver by the City of its right to immediate possession.

**C. Month-to-Month Tenancy.** If Concessionaire is deemed to be a permitted holdover tenant as provided above, Concessionaire and the City agree that the tenancy may be terminated at any time by thirty (30) days prior written notice from either Party to the other.

**D. No Right to Holdover.** Nothing herein shall be construed to give Concessionaire the right to hold over at any time, and the City (after expiration or termination of this Agreement, as the case may be), may exercise any and all remedies at law or in equity to recover possession of the Concession Spaces, as well as any damages incurred by City on account of such holding over.

**E. Tenant at Sufferance.** In the event that the City deems Concessionaire a tenant at sufferance, the City will notify Concessionaire, in writing, that Concessionaire is a tenant at sufferance. Thereafter, the City may take immediate action to evict Concessionaire without further notice and may otherwise exercise any other rights and remedies available to it under this Agreement, at law, or in equity.

2. Except as modified or revised herein, all terms, conditions, covenants and provisions of the Original Agreement shall remain in full force and effect as if fully set forth herein.

3. This Fifth Amendment is expressly subject to and shall not be or become effective or binding on the City until approved by City Council, if required by the City's Charter, and fully executed by all signatories of the City and County of Denver. This Sixth Amendment may be executed in two or more counterparts, each of which will be deemed an original signature page to this Amendment and it may be signed electronically by either Party in the manner specified by the City.

**[SIGNATURE PAGES FOLLOW]**

Contract Control Number: PLANE-AC68001-05

Contractor Name: Way Out West, Inc.

By: 

Name: John Avila  
(please print)

Title: President  
(please print)

ATTEST: (if required)

By: \_\_\_\_\_

Name: \_\_\_\_\_  
(please print)

Title: \_\_\_\_\_  
(please print)



**Contract Control Number:** PLANE-AC68001-05

**Contractor Name:** Way Out West, Inc.

IN WITNESS WHEREOF, the parties have set their hands and affixed their seals at Denver, Colorado as of

SEAL

**CITY AND COUNTY OF DENVER**

ATTEST:

By \_\_\_\_\_

\_\_\_\_\_

APPROVED AS TO FORM:

REGISTERED AND COUNTERSIGNED:

DOUGLAS J. FRIEDNASH, Attorney  
for the City and County of Denver

By \_\_\_\_\_

By \_\_\_\_\_

By \_\_\_\_\_

