

FIFTH AMENDMENT TO AGREEMENT

THIS FIFTH AMENDMENT TO AGREEMENT ("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 ("City"), and **SMOKIN' BEAR, LLC**, a Colorado Limited Liability Company ("Concessionaire"), (collectively, "Parties").

WITNESSETH:

WHEREAS, the Parties hereto entered into an Agreement (AC43012), dated November 9, 2004, together with amendments ("Original Agreement") for the operation of a concession at Denver International Airport ("DEN"); and

WHEREAS, City has determined it is in City's best interest, in the event an agreement for the Concession Space has not been executed, to avoid interrupting food and beverage services to the traveling public at DEN; and

WHEREAS, Concessionaire has agreed, in the event of holdover, to cease operation of the Smokin' Bear lounge and the sale of tobacco products from the Concession Space; and

WHEREAS, upon these terms, the Parties agree, in the event of holdover, Concessionaire's continual operation of its food and beverage concessions under the holdover provision of the Original Agreement, until City negotiates a concession agreement for the location, is beneficial to both Parties; and

WHEREAS, since Concessionaire agrees to continue its food and beverage concession operations for the traveling public's benefit, the Parties agree to revise the holding over provision of the Original Agreement to recognize month-to-month operations of the permitted holdover and eliminate the two hundred percent (200%) holdover fee otherwise due under the Original Agreement;

NOW, THEREFORE, for the foregoing reasons and for other good and valuable consideration, the Parties hereby agree to amend the Original Agreement as follows:

- 1. Effective as of the date of execution stated herein, and only upon permitted operations after expiration of the Original Agreement, the Compensation section of the Summary Page, is hereby amended by deleting it entirely and replacing it with the following:

COMPENSATION:

Minimum Annual Guarantee: \$1,200,000 or as provided in Section 5.01

Percentage Compensation Fee: \$3,000,000 ≥ 13%
\$3,000,001 - \$5,000,000 14%
\$5,000,001 ≤ 15%

Minimum Monthly Guarantee: \$100,000, or as provided in Section 5.03A

2. Effective as of the date of execution stated herein, and only upon permitted operations after expiration of the Original Agreement, the Permitted Uses section of the Summary Page, is hereby amended by deleting it entirely and replacing it with the following:

PERMITTED USES: Full service “Colorado-themed” steakhouse restaurant and bar serving breakfast, lunch, dinner, and “grab-n-go” good items as well as specialty coffee, Einstein Brother’s Bagels quick serve food, beverages and specialty coffee concepts and alcoholic beverages for on-premises consumption only.

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

Section 4.03 HOLDING OVER

Concessionaire, with the express prior written permission of the City, may exercise the rights and privileges granted herein, after the Expiration Date, on a month-to-month basis with all provisions of this Agreement, including compensation, fees, charges, insurance policies, Surety, and Guarantees remaining in place until such time City gives notice to Concessionaire to surrender the Premises and/or a new agreement for the Concession space is fully executed, whichever comes first. Notice to surrender will be provided in writing not less than ten (10) business days prior to the anticipated surrender date.

Any exercise of the rights or privileges granted herein by Concessionaire after expiration of the Term or any extension thereof, or after termination of this Agreement, without the written approval of City constitutes a trespass, in accordance with D.R.M.C. § 38-115. No occupancy of any portion of the Premises by Concessionaire after the expiration or other termination of this Agreement, without City’s written approval, extends the Term of the Agreement. Nothing herein shall be construed to give Concessionaire the right to hold over. In the event of such trespass, Concessionaire shall indemnify City against all damages arising out of the Concessionaire’s trespass, including but not limited to, any costs incurred by City to evict Concessionaire, regain possession of the Premises or any portion(s) thereof. All insurance policies, Surety, and Guarantees required to be obtained and maintained by Concessionaire as set forth in this Agreement shall continue in full force and effect.

4. 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.
5. This Amendment is expressly subject to and shall not be or become effective or binding on City until approved by City Council, if required by City’s Charter, and fully executed by all signatories of the City and County of Denver. This Amendment may be executed in two or more counterparts, each of which will be deemed an original signature page to this Amendment and either Party in the manner specified by City may sign it electronically.

[SIGNATURE PAGE FOLLOWS]

Contract Control Number: PLANE-CE43012-05

Contractor Name: Smokin' Bear, LLC.

By: Roderick J. Tafoya

Name: Roderick J. Tafoya
(please print)

Title: President / CEO
(please print)

ATTEST: [if required]

By: _____

Name: _____
(please print)

Title: _____
(please print)



Contract Control Number:

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:

By _____

By _____

By _____

