

## SECOND AMENDMENT TO AGREEMENT

**THIS SECOND AMENDMENT TO AGREEMENT** is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2011, 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 **Earth Spirit**, Party of the Second Part.

### WITNESSETH:

**WHEREAS**, the Parties hereto entered into an Agreement dated July 13, 2004 (AC47001), as amended (collectively the "Original Agreement") for the operation of a concession at Denver International Airport, which expired November 30, 2010; and

**WHEREAS**, because it is in the City's best interest to avoid interrupting services to the traveling public after the Original Agreement expires, Concessionaire agreed and the City authorized Concessionaire to continue to operate its concession under the holdover provision of the Original Agreement 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 City has offered to eliminate the 150% holdover fee due under the holdover provision and both Parties agree to 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 hereby acknowledged, the Parties hereby agree to amend the Original Agreement as follows:

1. Effective as of November 30, 2010, 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**

**Holding Over.** If Concessionaire holds over after the Agreement expires or after any earlier termination of this Agreement as herein provided, and the City and Concessionaire have not otherwise agreed, in writing, to the terms and provisions of such holding over, thereafter Concessionaire's tenancy shall be deemed by the City to be month-to-month and Concessionaire shall remain bound by all terms, conditions, covenants, and agreements hereof and shall continue to pay the monthly compensation in effect as of the final month of the expiration of this Agreement.

**Tenancy.** Concessionaire and the City agree that the tenancy shall be month-to-month and may be terminated at any time by thirty (30) days prior written notice from either Party to the other. Concessionaire recognizes that this permission to holdover is not a lease; it is only

temporary and it shall not obligate the City subsequently to enter into a license, lease or any other such agreement with the Concessionaire.

**No Right to Holdover.** Nothing herein shall be construed to give Concessionaire the right to hold over at any time, and the City (after "Due Notice"), may exercise any and all remedies at law or in equity to recover possession of the Concession Space, as well as any damages incurred by City on account of such holding over. In such event, the City shall deem Concessionaire's tenancy to be at sufferance and thereafter may take immediate action to evict Concessionaire without further notice and may otherwise exercise any other rights and remedies available to the City 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 and the Original Agreement hereby is revived, confirmed and ratified in all respects.

3. This Second Amendment to Agreement is expressly subject to and shall not be or become effective or binding on the City until approved by City Council, if required, and fully executed by all signatories of the City and County of Denver.

**[SIGNATURE PAGE FOLLOWS]**

IN WITNESS WHEREOF, the Parties hereto have caused this Second Amendment to Agreement to be executed as of the date first above written.

ATTEST:

CITY AND COUNTY OF DENVER

By

STEPHANIE Y. O'MALLEY, Clerk and Recorder, ex-Officio Clerk of the City and County of Denver

Mayor

APPROVED AS TO FORM:

RECOMMENDED AND APPROVED:

DAVID R. FINE, Attorney for the City and County of Denver

By

Assistant City Attorney

By

Manager of Aviation

REGISTERED AND COUNTERSIGNED:

By

Manager of Finance  
Contract Control AC47001-2

By

Auditor

Party of the First Part

ATTEST:

WAY OUT WEST, INC.

By

By

Title

Title

Party of the Second Part