

1 BY AUTHORITY

2 ORDINANCE NO. _____

COUNCIL BILL NO. _____

3 SERIES OF 2011

COMMITTEE OF REFERENCE:

4 BUSINESS, WORKFORCE & SUSTAINABILITY

5 A BILL

6 For an ordinance approving a proposed Fifth Amendment to Concession Agreement
7 between the City and County of Denver and Denver Airport Enterprises, LLC,
8 concerning a 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 Concession Agreement between the City
12 and County of Denver and Denver Airport Enterprises, LLC in the words and figures contained and
13 set forth in that form of the Agreement filed in the office of the Clerk and Recorder, Ex-Officio
14 Clerk of the City and County of Denver, on the 3rd day of February, 2011, City Clerk's Filing
15 No. 93-319-E is hereby approved.
16

17 COMMITTEE APPROVAL DATE: January 28, 2011

18 MAYOR-COUNCIL DATE: February 1, 2011


19 PASSED BY THE COUNCIL _____ 2011

20 _____ - PRESIDENT

21 APPROVED: _____ - MAYOR _____ 2011

22 ATTEST: _____ - CLERK AND RECORDER,
23 EX-OFFICIO CLERK OF THE
24 CITY AND COUNTY OF DENVER
25

26 NOTICE PUBLISHED IN THE DAILY JOURNAL _____ 2011 _____ 2011

27 PREPARED BY: George "Skip" Gray, III,  DATE: February 3, 2011

28 Pursuant to section 13-12, D.R.M.C., this proposed ordinance has been reviewed by the office of the
29 City Attorney. We find no irregularity as to form, and have no legal objection to the proposed
30 ordinance. The proposed ordinance is submitted to the City Council for approval pursuant to § 3.2.6
31 of the Charter.
32

33 David R. Fine, City Attorney

34 BY: _____, _____ City Attorney

35 DATE: February 3, 2011

FIFTH AMENDMENT TO CONCESSION AGREEMENT

THIS FIFTH AMENDMENT TO CONCESSION AGREEMENT is made and entered into this _____ day of _____ ("Effective Date"), 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 DENVER AIRPORT ENTERPRISES, LLC, ("Concessionaire"), a Colorado limited liability company dba *Peak Concepts Newsstands*, Party of the Second Part.

RECITALS

A. Since the opening of the Airport in 1995, Concessionaire has operated newsstands, other retail concessions and support facilities in 15 locations at the Airport. The Airport concession program has proven successful but in the late 1990s, the Airport's Concessions Management Team initiated discussions with Concessionaire about potential concept changes for some of Concessionaire's less lucrative locations. Later, pursuant to amendments executed in 2003, each of Concessionaire's 15 locations was extended for six years and Concessionaire agreed to a Term Extension Renovation for each location. This Term Extension Renovation was to be completed on or before the commencement date of the new six-year term extensions, or September 1, 2006. The amount Concessionaire was required to invest in renovating the 15 locations was approximately \$582,361.00.

B. In 2006, as the date for these Term Extension Renovations approached, the Concessions Management Team again approached Concessionaire about making concept changes to certain Concessionaire's locations so that the changes would coincide with the required Term Extension Renovations. Concessionaire responded with enthusiasm to these overtures and even considered the possibility of collaborating with others to bring in concepts that would be more appealing to the traveling public. Meanwhile, the Concessions Management Team continued to work with Concessionaire in anticipation of the deadline for the Term Extension Renovations. When the deadline passed, the renovation requirement was converted to a cash due amount as required by Concessionaire's agreements, however the City agreed to forebear collection during the 6-8 month period Concessionaire entertained serious discussions with potential buyers. In March of 2010, when it became evident that those discussions would not result in a sale, the Concessions Management Team began to urge Concessionaire to either pay the City the amount owed or complete the Term Extension Renovations. On May 5, 2010, the City forwarded a final past due notice and advised Concessionaire that each location would be placed in default if payment was not received.

C. Thereafter, against the backdrop of a concession program at the Airport that the City envisions to be among the best in the world at offering value, excitement and a wide range of culinary, retail experiences and services reflecting the best of Denver, Colorado and the Rocky Mountain West, Concessionaire and the Concessions Management Team entered into further discussions. On June 25, 2010, to avoid being placed in default with the potential expense of litigation and to resolve the Term Extension Renovation issues, Concessionaire reached an agreement with the Concessions Management Team generally as follows:

(1) Concessionaire agreed to keep the three newsstands it presently operates (AC-38041 - Newsstand, Concourse A Center Core; AC-38040 - Newsstand, Concourse B

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Center Core; and AC-38038 – Newsstand, Concourse C Center Core) and through a complete “gut and remodel” of the concession space, create an engaging environment designed to entice and excite consumers, maintain a vibrant first-class concession at the Airport by providing value and great customer service (prompt, clean, courteous and efficient) offer quality services in the branded environment agreed to by the Parties, and keep a fresh and dynamic concession program thereby maximizing revenue potential.

(2) The City agreed to reverse the cash due amount of approximately \$582,361.00, plus accrued interest which had been booked to the Airport’s finance and accounting system as the amount Concessionaire was required to invest when Concessionaire failed to timely complete the several required Term Extension Renovations for Concessionaire’s locations.

(3) Concessionaire agreed to retain one office/storage location (Terminal, Level 4 West; AC-39025 - Storage Space), return the two remaining storage/office locations: (AC-57001 Office Space, Concourse A Mezzanine; AC-46003 - Storage Space - Sportsterminal.com, Terminal, Level 4 West) to the City, and return to the City the other nine concessions: (AC-38043 - Retail-Gifts, Concourse A East Subcore; AC-37006 - Sportsterminal.com, Concourse A Center Core; AC-38036 - Children's Store, Concourse B West Inboard Subcore; AC-38039 - Newsstand, Concourse B West Inboard Subcore; AC-38035 - Sportsterminal.com, Concourse B Center Core; AC-38023 - Children's Store, Concourse B East Outboard Subcore; AC-38042 - Retail-Gifts, Concourse C East Subcore; AC-38037 - Newsstand, Terminal, Level 5 West, Mod 1; AC-37007 - Sportsterminal.com, Terminal, Level 5 East, Mod 3.

(4) Recognizing that it is in the best interest of the City to have Concessionaire continue to serve the traveling public, Concessionaire agreed to continue to operate the concession locations and by amendment, give the City the ability to terminate each agreement upon no less than 90 days written notice, thereby giving the Concessions Management Team the opportunity to re-market the locations to interested parties that may bring in concepts more appealing to the traveling public.

NOW THEREFORE, for the premises set forth in these recitals, which are made a part of this Agreement, for the reasons stated above and for other good and valuable consideration the sufficiency of which hereby is acknowledged, the City and Concessionaire (collectively, the “Parties”) intending to be legally bound, agree as follows:

AGREEMENT

1. The City entered into this Agreement (AC-38040) dated May 4, 1993 with Concessionaire, a First Amendment dated June 26, 1995; a Second Amendment dated September 22, 1995; a Third Amendment dated July 11, 2003 and a Fourth Amendment dated May 17, 2004 (collectively, the “Original Agreement”) to operate a Newsstand on the Center Core of Concourse B.

2. The Summary Page attached to the Original Agreement hereby is amended by deleting it entirely and replacing it with the Summary Page appended hereto, which is incorporated by this reference as if fully set forth herein.

3. Section 4.01 of the Original Agreement (Term) hereby is amended by deleting it entirely and replacing it with the following:

4.01. TERM

This Agreement shall commence and become fully effective and binding upon the Parties as of February 28, 1995 and shall expire August 31, 2017 unless sooner terminated pursuant to the provisions of this Agreement or by law.

4. Section 5.03 of the Original Agreement hereby is amended by deleting Subsection C (Daily Revenue Program Participation) in its entirety.

5. To comply with Concessionaire's Term Extension Renovation obligations, the Original Agreement is further amended to reflect that Concessionaire has agreed to the following:

A. Concessionaire shall demolish, remodel and refurbish the Concession Space at its own cost and expense and all improvements made to the Concession Space, unless otherwise specified herein, shall be made and maintained by Concessionaire, at Concessionaire's sole cost and expense. The Parties agree that time is of the essence in the performance of Concessionaire's construction and performance obligations throughout the Term of this Agreement. Concessionaire, shall complete its design, obtain building permits and commence construction no later than one year from the date of execution of this Fifth Amendment. Concessionaire shall complete construction no later than the date set forth on the Summary Page. Such periods may be extended by the Manager or the Manager's authorized representative, in writing, if completion of the design or construction or installation of the improvements was delayed by fault of the Airport. The Parties understand and agree that the design process outlined in Section 6.18 shall commence before the date for commencing construction and that Concessionaire shall follow and comply with the construction process described in Sections 6.18 through 6.29 below.

B. Concessionaire guarantees that it will make capital investments and shall construct the improvements, furnish and equip the Concession Space at a minimum investment in the amount stated on the Summary Page ("Required Term Extension Minimum Investment"). The Required Term Extension Minimum Investment shall not include financial costs, interest, inventory, pre-opening expenses or intra-company charges, but may include architectural and engineering fees not exceeding 15% of the total. The Required Term Extension Minimum Investment is a material part of the consideration to the City for this Fifth Amendment. Within 90 days after completion of construction, Concessionaire shall file with the Manager lien releases for the above expenditures and a statement certified by its architect setting forth the total construction costs with appropriate detail itemizing design fees, original construction contract amount, total change orders, decorations, furnishings, fixtures, and equipment. At City's request, Concessionaire shall also submit copies of invoices supporting such costs. Non-receipted expenditures will not be credited. If the total amount of the Concessionaire's construction costs is less than the Required Term Extension Minimum Investment, the difference between such total cost (as detailed by the certified receipts) and the Required Term Extension Minimum Investment for renovating the Concession Space, shall be paid to City within 30 days after written notice from City to Concessionaire.

C. Section 6 of the Original Agreement (Operation and Use of Concession Space) hereby is amended by adding the following:

6.18. APPROVAL OF PLANS AND SPECIFICATIONS

Conceptual Plans. As soon as practicable but no later than 30 days after execution of this Fifth Amendment, Concessionaire shall attend a pre-design meeting with the Airport's Concessions Management Team and thereafter, prepare and submit for City review, conceptual plans and specifications (collectively "Conceptual Plans") and a proposed design and construction progress and completion schedule ("Construction Schedule") for the construction of all proposed improvements.

Prompt Submission. Conceptual Plans shall show architectural design as well as planned furnishings, equipment and decorative effects. Conceptual Plans must be submitted to the City promptly. Prior to submission of Conceptual Plans, Concessionaire should carefully review the DIA Design Standards and the DIA Tenant Development Guidelines, paying particular attention to the Sense of Place Guidelines, which outline the process for preparing the Conceptual Plans and for working with the City in obtaining approval of Conceptual Plans.

Prompt Review. The City shall promptly review and comment on the Conceptual Plans. City approval shall extend to all design elements including all architectural and aesthetic matters. During this comment and review period, Concessionaire must be available to respond to the City in order to arrive at mutually acceptable plans for the Concession Space. Concessionaire will promptly submit necessary modifications and revisions thereof and the City agrees to act promptly upon receipt of such modifications and revisions and upon Concessionaire's requests for approval of Concessionaire's Conceptual Plans.

6.19. FINAL PLANS

Design Considerations. Once Conceptual Plans are approved, Concessionaire may move forward with the design for the Concession Space. The design shall include all tenant finish requirements including but not limited to lighting, power, plumbing, HVAC distribution from main air supply, HVAC controls for the tie in to the base building system, supplemental HVAC if needed, life safety systems, interior finishes, all furnishings, fixtures, trade fixtures, equipment, and signage necessary to operate in a first-class manner. Special attention must be given to the design of the HVAC and electrical systems. For a concept that creates odors, the mechanical system must be designed or configured to prevent the transmission of said odors to other portions of the Concourses or the Terminal. All plans and specifications, materials and color selections are subject to review and approval by the Manager's authorized representative.

Preparation of Final Plans. Concessionaire shall prepare final plans and detailed specifications that incorporate the design intent approved in the Conceptual Plans ("Final Plans"). Final Plans shall be submitted for approval by

the City. Final Plans must be prepared by an architect or engineer licensed to practice in the State of Colorado.

Resubmission until Approved. The City reserves the right to reject any design concept or layout plan submitted and to require Concessionaire promptly to submit necessary modifications and revisions that address the City's concerns and resubmit Final Plans until they meet the City's approval. Concessionaire agrees to submit promptly all necessary modifications and revisions thereof and the City agrees to act promptly upon receipt of such modifications and revisions and upon Concessionaire's requests for approval of Concessionaire's Final Plans. Once the Final Plans have been approved, in writing, by the City, all construction shall conform to the Final Plans, and no substantial changes or alterations shall be made in any plans or specifications at any time during this Agreement without the prior written approval of the City.

No Construction without Final Plans. As soon as practicable but no later than 10 days after approval by the City of Concessionaire's Final Plans, Concessionaire shall attend a pre-construction meeting with the Airport's Concession Tenant Facilities Manager. Concessionaire may not construct or install improvements without City approved Final Plans and a City issued Notice to Proceed ("NTP").

6.20. NOTICE TO PROCEED

Once Final Plans are approved and prior to the commencement of demolition and construction, Concessionaire shall submit to the Airport's Tenant Facility Manager all necessary documents identified in the DIA Tenant Development Guidelines, which outline the process for working with the City to obtain an NTP. As provided therein, Concessionaire shall deliver to the Manager a payment bond that guarantees prompt and faithful payment of the construction contract by the Concessionaire directly to the contractor and shall ensure that Concessionaire's contractors deliver a construction performance and payment bond that guarantees prompt and faithful performance of the contract and prompt payment by Concessionaire's contractors to all persons supplying labor, materials, team hire, sustenance, provisions, provender, supplies, rental machinery, tools and equipment used directly or indirectly by the said contractor, subcontractor(s), and suppliers in the prosecution of the work provided for in said construction contract, which shall protect the City from any liability, losses or damages arising therefrom. All bonds shall be issued by a surety company licensed to transact business in the State of Colorado and satisfactory to and approved by the City, and shall be in form and with conditions as provided by the City. In lieu of a construction bond, the Concessionaire may provide only such alternate forms of security as are permitted by the Manager, in such form and with conditions as the Manager requires.

6.21. CONSTRUCTION OF IMPROVEMENTS

Concessionaire to Install Improvements. Once an NTP is issued by the City, Concessionaire shall construct and install at Concessionaire's own expense, all

improvements necessary for the customary operation of Concessionaire's business, including, but not limited to, lighting, power, plumbing, HVAC distribution from main air supply, HVAC controls for the tie in to the base building system, supplemental HVAC if needed, life safety systems, interior finishes, all furnishings, fixtures, trade fixtures, equipment, signage, counters, display cabinets, interior partitions, lighting, fixtures, wall and ceiling finishes, flooring and floor coverings, and all other equipment and furnishings necessary to operate in a first-class manner.

Concessionaire to Supply Concessionaire's Equipment. Concessionaire shall supply all of Concessionaire's furniture, furnishings, trade fixtures and equipment. All non-affixed items, including point of sale equipment, moveable furnishings, safes, racks, telephone equipment and non-affixed display fixtures, shall be deemed to be Concessionaire's Equipment as defined in Section 6.17. All of Concessionaire's Equipment must be of first-class quality, safe, attractive, in compliance with all applicable codes and the DIA Tenant Development Guidelines and may be installed only with the City's prior written approval. All of Concessionaire's Equipment that cannot be removed without damage to the Concession Space shall be considered "Tenant Improvements." As used in this Agreement, "Tenant Improvements" shall mean affixed Improvements.

6.22. OPERATING DURING RENOVATION

Permission to Operate During Renovation. Should Concessionaire's renovation plans for the Concession Space require Concessionaire to close, once the construction wall is installed and written permission to commence operations is given by the Manager's authorized representative, Concessionaire may operate temporarily from a free standing unit (which for retail may be incorporated into the construction wall) placed in a temporary location identified and approved by the Manager's authorized representative. Concessionaire agrees to operate as follows:

Expense of Operating during Renovation to be Born by Concessionaire. Prior to commencing temporary operations, Concessionaire shall submit to the Airport's Tenant Facilities Manager, for the City's prior written approval of the operation of the proposed free standing unit, all plans and detailed specifications including but not by way of limitation, elevations, sections, materials, finishes, fixtures, trade fixtures, equipment, signage necessary to operate in a first-class manner, queuing, special lighting, power, plumbing, HVAC needs (especially for a concept that creates odors) and such other information as may be necessary to completely and accurately convey the proposed design and use of the free standing unit. City approval shall extend to all design elements (e.g., materials, color selections), all architectural and aesthetic matters and all proposed uses of the freestanding unit. Once Concessionaire's plans for the free standing unit have been approved in writing and the appropriate bonds have been submitted, the City will issue a notice to proceed and Concessionaire may proceed to construct and install the free standing unit in substantial conformity to the final approved plans and in compliance with the relevant provisions of Section 6 of this Agreement. No substantial changes or alternations shall be made in any

plans or specifications at any time during the time Concessionaire operates from the freestanding unit without the prior written approval of the City. Any work necessary to accommodate Concessionaire's request to operate temporarily during the renovation period, including but not limited to accommodating Concessionaire's temporary needs for water service, electricity, natural gas, lighting, or HVAC, shall be at the Concessionaire's cost and expense. Costs and expenses associated with such work shall be paid promptly when due and shall be accomplished free of liens of mechanics and materialmen.

Plans for Operating during Renovation to be Approved. Prior to commencing temporary operations, Concessionaire shall also submit to the Project Manager for the Manager's prior written approval, Concessionaire's plans for operating from the free standing unit and a list of items to be sold with comparable pricing. Concessionaire must comply with all operational conditions imposed by the Manager in her commercially reasonable judgment, including but not limited to time, place, manner, and type of free standing unit from which Concessionaire is permitted to operate, products and services to be offered for sale, prices to be charged for each item, number of employees that may operate from the unit at any given time, hours of operation, signage, waste disposal, sanitation, hygiene and cleanliness, janitorial services as well as all required construction payment and performance bonds, approvals, submittals, and other such conditions of whatsoever nature.

Temporary Operation During Renovation to be First-Class. Once the freestanding unit is installed, Concessionaire agrees that it shall operate from the approved temporary location in a first-class, dignified and ethical manner satisfactory to the Manager's authorized representative and in accordance with the relevant operational requirements of Section 6 of this Agreement. Concessionaire, at all times and at its sole cost and expense, shall display where applicable and maintain as required, all current federal, State, and local licenses, certificates, permits and any other such documents necessary or required by law for the operation of Concessionaire's business at the Airport. Concessionaire shall comply with all applicable health, safety and sanitary laws, regulations and inspections concerning its operations in the temporary location. Concessionaire shall keep such licenses and permits displayed on the freestanding unit, as may be required by law. Concessionaire shall allow duly authorized representatives of governmental entities access to the freestanding unit and its temporary operations for inspection purposes.

6.23. CONSTRUCTION STANDARDS

All construction performed by Concessionaire, including construction and installation of all Tenant Improvements, shall conform in all material respects to the Final Plans, DIA Tenant Development Guidelines, applicable statutes, ordinances, building codes, fire codes, State and federal Occupational Safety and Health Act safety requirements, Airport Rules and Regulations, the City's tenant construction permit requirements, the requirements of ***Exhibit X, Provisions for Design and Construction of Improvements*** and the Americans with Disabilities Act ("ADA") requirements. Any approval given by the City shall

not constitute a representation or warranty as to such conformity. Responsibility for conformity at all times shall remain with Concessionaire. Before beginning any construction work on the Concession Space, Concessionaire must obtain at Concessionaire's expense, an NTP, as described in the Tenant Development Guidelines.

6.24. COORDINATION OF CONSTRUCTION

Periodic Design and Construction Meetings. Concessionaire shall cooperate with City and its planners, designers, architects, and engineers in the construction and installation of improvements on the Concession Space, and shall comply with all approved plans and the Building Code. Concessionaire agrees to meet with the City on a periodic basis, as requested by the Project Manager. The Project Manager shall be copied on all design and construction meeting minutes.

Construction in Adjacent Areas. Concessionaire recognizes that during the Term of this Agreement, construction may also occur in adjacent areas surrounding its Concession Space, and Concessionaire agrees to cooperate with and grant to other contractors access to Concessionaire's Concession Space when necessary to accommodate construction occurring in adjacent areas.

Work Subject to Inspection. All construction work, materials and installations involved in or incidental to the construction on the Concession Space shall be subject at all times to inspection and regulatory control by the City. The City shall at all times have the right of access to the Concession Space to monitor and inspect the construction, work, materials and installation of the improvements to ensure that such improvements conform in all respects to the Final Plans.

6.25. ENVIRONMENTAL REQUIREMENTS FOR CONSTRUCTION

In the performance of construction activities upon the Concession Space, Concessionaire is responsible for compliance and shall require its contractors to comply with all federal, state, and local environmental requirements including, without limitation the Environmental Requirements set forth on **Exhibit N, DIA Environmental Requirements**.

6.26. BUILDING PERMITS

In addition to approvals required by the Airport, Concessionaire and its contractor are solely responsible for applying for, obtaining, and paying for all required building permits, licenses and other required approvals, and are responsible for submitting plans and specifications to the City's Building Inspection Division for any necessary building permits.

6.27. COMPLETION OF CONSTRUCTION

Completion of Construction. Upon completion of construction, Concessionaire shall deliver to City a copy of the Temporary Certificate of Occupancy ("TCO") and Certificate of Occupancy ("CO") for the entire (100%) Concession Space, if

one is issued by the City Building Department. If a TCO or CO is not issued by the City Building Department, Concessionaire shall provide a copy of the final Permit Inspection Card indicating inspection and approval by the issuer of said permit. Concessionaire shall obtain the City's written permission to remove its construction wall and shall immediately thereafter open for business.

6.28. RESTRICTION ON CHANGES AND ALTERATIONS

Subsequent Construction Requires Prior Approval. After construction and installation of improvements, Concessionaire agrees not to materially improve, change, alter, add to, remove or demolish all or any part of the improvements without the prior written consent of the Manager or the Manager's authorized representative.

Concessionaire to Comply with all Imposed Conditions. Subsequent construction work occurring during the term of this Agreement, including all repairs, refurbishments, and remodeling, shall be subject to the prior written approval of the City and, if required, in the determination of the City, an NTP. If subsequent construction remodeling, repairs and/or refurbishment changes are approved, the same process outlined herein for City approval of the initial construction shall be followed, unless otherwise directed by the City. Concessionaire must comply with all conditions imposed by the Manager's authorized representative in his commercially reasonable judgment and all required approvals, submittals, and procedures of whatsoever nature, as set forth in the City's approval. Any work necessary to make alterations, improvements or additions to the Concession Space throughout the term of this Agreement shall be done at the Concessionaire's cost and expense.

Revised Drawings, Final Waivers to be Provided. Upon completion of subsequent construction work, the Concessionaire shall deliver to the City revised as-constructed drawings, evidence of payment, contractor's affidavits and full and final waivers of any liens for labor, services or materials. The Concessionaire shall include in its agreement with its contractors provisions whereby such contractors shall defend and hold the City harmless from all costs, damages, liens and expenses related to such work.

Removal And Demolition of Improvements. Concessionaire shall not replace, remove or demolish, in whole or in part, any Tenant Improvement on the Concession Space during the term of this Agreement without the prior written approval of the Manager's authorized representative. The Manager's authorized representative, in his or her sole discretion, may condition such approval upon the obligation of Concessionaire to replace the Improvement by a comparable improvement specified by the Manager's authorized representative.

City may Demand Removal or Satisfactory Changes. In the event that any construction, improvement, alteration, modification, addition, repair (excluding emergency repairs), or replacement is made without the prior written consent of the Manager's authorized representative, or made in a different manner than approved, the City may terminate this Agreement in accordance with the

provisions for termination herein, or upon notice to do so, Concessionaire will remove the same, or, at its discretion, cause the same to be changed to the satisfaction of the City. In case of any failure on the part of Concessionaire to comply with the notice, the City may, in addition to any other remedies available to it, effect the removal or change referenced above in this Section and Concessionaire shall pay the cost thereof to the City upon demand.

6.29. TITLE TO IMPROVEMENTS

Concessionaire agrees that all Improvements to the Concession Space, including approved changes and renovations, which are affixed to the realty, shall become the property of the City upon their completion and acceptance by the City.

6. The Original Agreement is further amended to provide the following:

A. On or about the "Mid-Term Refurbishment Completion Date" stated on the Summary Page, Concessionaire, at its sole cost and expense, shall have completed all design and aesthetic refurbishments approved by the Manager, shall have updated and completed all repairs/refurbishments necessary to comply with current applicable life safety and health code requirements and shall have completed renovating and refurbishing the improvements in the Concession Space as required by the Manager at a minimum investment specified in the Summary Page, in November 2010 dollars, subject to reasonable escalation according to the Engineering News Record Building Cost Index for the Denver, Colorado area ("Refurbishment Minimum Investment"). Of this amount, no less than 15% shall be allocated to aesthetic refurbishment, defined as replacement of all parts of the premises visible to, used by, and/or provision for enhanced service to the public including but not limited to signage, flooring, paint, finishes, fixtures, furnishings, lighting, ceiling and millwork. Life safety and health code upgrades are not considered aesthetic refurbishment. The Refurbishment Minimum Investment shall not include financial costs, interest, inventory, pre-opening expenses, loss of revenue related to construction or intra-company charges related to construction, but may include architectural and engineering charges not exceeding 15% of the total Refurbishment Minimum Investment.

B. Concessionaire shall provide design plans and specifications of the proposed refurbishment of the Concession Improvements for the approval of the Manager's authorized representative no later than one (1) year prior to the Refurbishment Completion Date, or such lesser time as is agreed to in writing by the Manager's authorized representative. Within 90 days of completion of the mid-term refurbishment, Concessionaire shall file with the Manager a statement certified by its architect setting forth the total refurbishment costs, with appropriate detail itemizing the elements of decorations, furnishings, fixtures, and equipment. At City's request, Concessionaire shall also submit copies of invoices supporting such costs. If the total cost of the Concessionaire's refurbishment investment is less than the Minimum Refurbishment Investment, the difference between such total cost and the Minimum Refurbishment Investment for refurbishing the Concession Space, shall be paid to City within 30 days after written notice from City to Concessionaire.

7. The Original Agreement is further amended to provide the following:

A. The Parties agree that Concessionaire may rebrand its concept in conjunction with the new design and remodel of the Concession Space. As used herein, "Brand" shall mean the local, regional or national brand or brands that will be proposed by Concessionaire, listed on the Summary Page and accepted by the City as a material part of the consideration to the City for this Fifth Amendment. "Brand" shall include the plural where the context requires. The Parties further agree that the concept of "rebranding" shall not include any change in merchandising without the prior written permission of the Manager's authorized representative based upon current Airport policy. Concessionaire acknowledges that the use of brand(s), branded items or branded concepts is of critical importance to meeting the City's purpose for the concessions program at Denver International Airport and therefore any Brand(s) that Concessionaire is authorized to operate at Denver International Airport are a material part of the consideration to the City for this Fifth Amendment and once accepted by the City and implemented by Concessionaire may not be unilaterally discontinued or changed by Concessionaire.

B. If the Brand that Concessionaire is authorized to operate from the Concession Space, in accordance with the terms of this Agreement, is not owned or controlled outright by Concessionaire but granted through a separate License Agreement or Franchise Agreement, Concessionaire shall provide to the City a copy of the License or Franchise Agreement or other documentation satisfactory to the City that conclusively demonstrates that Concessionaire has entered into such a License Agreement or Franchise Agreement. Concessionaire must continuously abide by the terms of the License or Franchise Agreement and maintain the License or Franchise Agreement in good standing throughout the term of this Agreement. Concessionaire hereby represents that there is nothing contained in the License or Franchise Agreement, which would prevent it from fully performing this Agreement and agrees that, in the event of a conflict between this Agreement and the Franchise Agreement or License Agreement, the terms and conditions of this Agreement shall control.

8. When 50 concession agreements contain this Joint Marketing Fund provision, Concessionaire has agreed that it shall participate in the City's Joint Marketing Fund. Therefore, the Original Agreement is further amended to provide the following: The City shall provide or cause to be provided a central marketing and promotional fund which, in the City's sole judgment, will serve to promote overall service, retail and food and beverage concessions at the Airport. The fund shall be known as the "Joint Marketing Fund." Beginning the first month after written notice from the City that the Joint Marketing Fund has been established, Concessionaire shall contribute during each month, as Concessionaire's share of the Joint Marketing Fund, an amount equal to the percentage of monthly Gross Revenue stated on the Summary Page as the Marketing Assessment. This amount is payable to the City by the 10th day following the end of each calendar month. If Concessionaire is unable to calculate actual Gross Revenues in time to make the required payment to the Joint Marketing Fund, the payment may be made based on an estimate of Gross Revenues. Any and all such estimated payments shall be adjusted as of the end of each six (6) month period of each year. Within 30 days of the end of each six (6) month period, Concessionaire shall send a report to the City reconciling estimated and actual Gross Revenues and showing any over or underpayments to the Joint Marketing Fund. A check for any underpayments must accompany the reconciliation. All overpayments will be credited to the next payment(s) due to Concessionaire within 30 days of the Agreement termination date. The City shall not be obligated to expend more for promotions and advertising than is actually collected from Concessionaires. Any promotional services and personnel so provided shall be under the exclusive control and supervision of the

City. The City reserves the right at any time to terminate the Joint Marketing Fund and thereafter to provide central marketing and promotional services until the remaining funds are exhausted.

9. The Parties acknowledge and agree that except as amended herein, the provisions contained in the Original Agreement, which constitute the entire agreement between the parties, shall remain in full force and effect as if fully set forth herein and that no alterations, amendments, changes or modifications to this Agreement shall be valid unless they are contained in an instrument which is executed by all the parties with the same formality as this Agreement.

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

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties hereto have executed this Fifth Amendment to Agreement as of the day and year first above written.

ATTEST:

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

APPROVED AS TO FORM:

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

By _____
Assistant City Attorney

CITY AND COUNTY OF DENVER

By _____
Mayor

RECOMMENDED AND APPROVED:

By  _____
Manager of Aviation

REGISTERED AND COUNTERSIGNED:

By _____
Manager of Finance

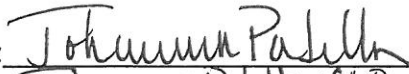
Contract Control No. AC-38040(5)

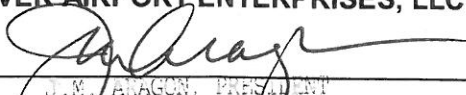
By _____
Auditor

"CITY"

PARTY OF THE FIRST PART

DENVER AIRPORT ENTERPRISES, LLC

By:  _____
Johanna M. Patella, CEO
Title: Proserve Corporation
Manager / Member

By:  _____
J.M. ARAGON, PRESIDENT
Title: PROSERVE CORPORATION
MANAGER / MEMBER

"CONCESSIONAIRE"

PARTY OF THE SECOND PART

FIFTH AMENDMENT TO CONCESSION AGREEMENT

DENVER INTERNATIONAL AIRPORT

SUMMARY PAGE

DENVER AIRPORT ENTERPRISES, LLC

This Summary Page, consisting of three pages, is attached to and made a part of that certain Agreement dated _____, 2010, between the City and County of Denver and the Concessionaire listed below.

CONCESSIONAIRE: Name

Address for Notice

City, State and Zip

Contact

Trade Name

State of Incorporation

Denver Airport Enterprises, LLC

985 Tabor Street

Golden, CO 80401

Joe Aragon

Peak Concepts Newsstands

Colorado

CONCESSION LOCATION and RENT (Initial)						
Loca Num	Concourse /Terminal	Address	Square Feet	Initial MAG	Initial Minimum Monthly Guarantee	Minimum Investment PSF
	Con. B, Con Level	R18-1-3-W4-N6-1	1250.3	N/A	\$5,731.00	\$187,500
CURRENT AMOUNTS*			1273.9	*\$89,173	*\$7,431	*\$382,090
(*Per Section 5.08 Reestablishment of Rate, Fees and Charges; rates are adjusted periodically throughout the agreement changing the initial MAG, MMG, and Performance Surety amount to the current amounts.)						

PERCENTAGE RENT:

15%

INTERIM RENT AMOUNT:

N/A

PERFORMANCE SURETY AMOUNT:

Initial

\$34,386

Current

*\$44,587

MARKETING ASSESMENT:

1% of Gross Revenues

STORAGE SPACE LEASE:

N/A

TERM:

Approximately 22 years

Effective Date:

February 28, 1995

Expiration Date:	<u>August 31, 2017</u>
PERMITTED USE:	<u>Retail sale of local and national newspaper publications, periodicals, magazines, tobacco items, nonprescription drugs, traveler's necessity items, miscellaneous souvenirs not exceeding \$15.00 in price (subject to annual C.P.I. adjustment), paperback books on wall racks not wider than four (4) feet, prepackaged candy bars, nuts, chewing gum and T-Shirts Denver and Colorado related under \$20.00. Required: foreign language travel guides in at least five (5) languages.</u>
Concession Category	<u>Retail</u>
Concept type(s)	<u>Newsstands</u>
Brand	<u>N/A</u>
Express Restrictions:	<u>T-shirts (except as permitted above) or any other type of apparel, souvenirs, and books except as provided above.</u> <u>Not less than 16 hours each day, seven days per week, as provided in Section 7.07</u>
HOURS OF OPERATION:	
RENT COMMENCEMENT DATE	<u>2/28/1995</u>
REQUIRED MINIMUM INVESTMENT (Initial):	<u>\$158,500</u>
Renovation Minimum Investment	<u>Pursuant to Sec. 6.15, Renovation Minimum Investment shall be as agreed or a minimum of 20% of the Required Minimum Investment (including equipment)</u>
Renovation Completion Date	<u>October 31, 2001 (90 days prior to expiration of original term)</u>
TERM EXTENSION RENOVATION OBLIGATIONS:	
Required Minimum Investment:	<u>\$382,170</u>
Completion Date:	<u>No later than 1 year after execution of the 5th Amendment</u>
MIDTERM REFURBISHMENT	
Minimum Investment	<u>\$ 76,434</u>

Midterm Refurbishment Deadline

By a date no earlier than 180 days before and no later than December 31, 2014

INSURANCE POLICY AMOUNTS:

Comprehensive General Liability:	\$1,000,000
Automobile/Delivery Vehicle Liability:	\$1,000,000 non-airside; \$10,000,000 airside
Workers Compensation:	Statutory requirements
Alcohol Liability:	N/A

ACDBE GOAL:

50%

DESIGN AND CONSTRUCTION DEADLINE:

No later than 1 year after execution of the 5th Amendment

CONSTRUCTION PERFORMANCE AND PAYMENT BOND AMOUNTS:

100% of construction contract price

CONSTRUCTION INSURANCE POLICY AMOUNTS:

Builder's Risk:	100% of construction contract price
Minimum Commercial General Liability:	
Combined Single Limit:	\$1,000,000
General Aggregate:	\$2,000,000
Business Auto Liability:	
Combined Single Limit:	\$1,000,000
Workers Compensation:	Statutory requirements

M/WBE DESIGN AND CONSTRUCTION GOALS:

TBD by Goals Committee

MBE/WBE Participation. This Agreement is subject to the requirements of Articles III and VII of the Denver Revised Municipal Code. Concessionaire agrees that it shall provide for participation of Minority Business Enterprises ("MBE") and Women Business Enterprises ("WBE") in the design and construction of Improvements, in compliance with the requirements of Article III, Divisions 1 and 3 of Chapter 28, of the Denver Revised Municipal Code ("MBE/WBE Ordinance"), or applicable successor ordinance, during the life of this Agreement. Concessionaire agrees to comply with rules and regulations issued by the Director of the Division of Small Business Opportunity ("DSBO"), a division of the Mayor's Office of Economic Development. The goal for percentage of design and construction work to be performed by MBE/WBE firms is set forth on the Construction Summary Page, and Concessionaire shall meet, or make a good faith effort to meet, such goals as have been set in accordance with the ordinance. Further, the City and County of Denver encourages Concessionaires to utilize MBE/WBE firms and to divide the design and construction work into economically feasible units or segments to allow the most opportunity for subcontracting.

DESCRIPTION OF EXHIBITS AND ADDENDA:

Exhibit A	Concession Space Plan original
Exhibit B	Disadvantaged Business Enterprise Participation
Exhibit C	Insurance Certificate
Exhibit N	DIA Environmental Requirements

Exhibit X

Provisions for Design and Construction of Improvements

Appendix 1

Standard Federal Assurances

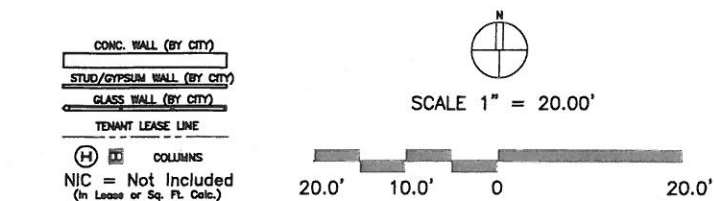
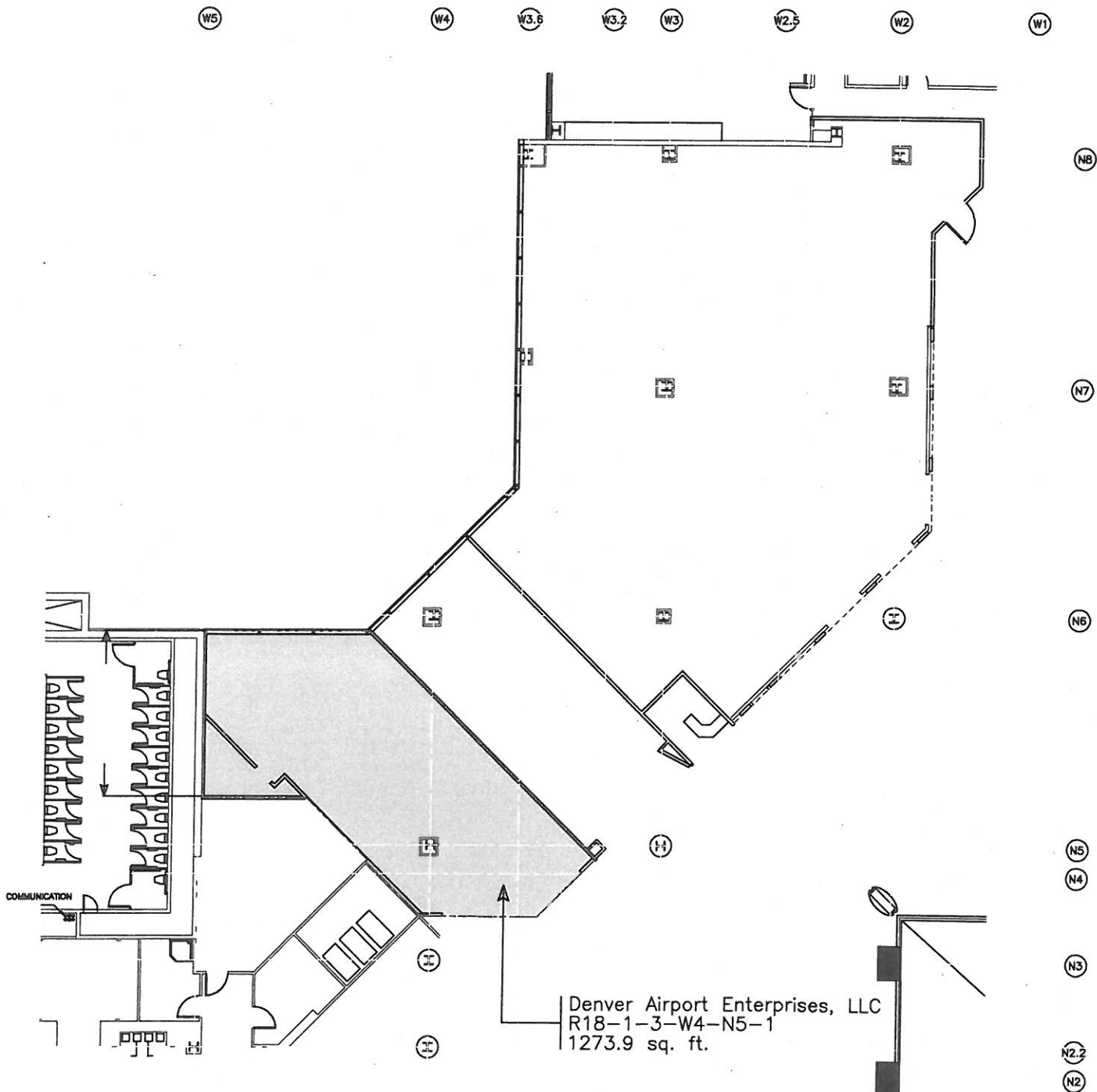
Appendix 2

Standard Federal Assurances, Nondiscrimination

Appendix 3

Nondiscrimination in Airport Employment Opportunities

EXHIBIT A
CONCESSION SPACE PLAN



[Signature]
 Concessionaire's Initials

John W. Brennan
 DIRECTOR OF ENGINEERING/AIRPORT

NOTE: This exhibit depicts only square footage of leased area based upon planning data and is not intended to address construction details.

<p>KEY PLAN CONCOURSE B</p>		<p>REVISED</p>	<p>DENVER INTERNATIONAL AIRPORT</p> <p>EXHIBIT A Concourse B Conc. Level Denver Airport Enterprises, LLC</p> <p>CC#: doe DATE: 2/5/93</p>
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R18-1-3-11-5

EXHIBIT B

DISADVANTAGED BUSINESS ENTERPRISE PARTICIPATION

DENVER AIRPORT ENTERPRISES, LLC

SECTION 1 – GENERAL. Except as the context otherwise requires and unless otherwise expressly provided herein, the capitalized terms in this **Exhibit** to the Agreement shall have the same meaning as any similarly capitalized terms defined in the Agreement or in any **Exhibit** thereto.

SECTION 2 – ACDBE OBLIGATION. This agreement is subject to the requirements of the U.S. Department of Transportation's Regulations, 49 CFR Part 23. The Concessionaire agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any concession agreement, management contract, or subcontract, or other agreement covered by 49 CFR Part 23.

SECTION 3 – OTHER AGREEMENTS. The Concessionaire agrees to include the above statements in any subsequent concession agreement or contract covered by 49 CFR Part 23, that it enters and cause those businesses to similarly include the statements in further agreements.

EXHIBIT C
INSURANCE CERTIFICATE

**CITY AND COUNTY OF DENVER
CERTIFICATE OF INSURANCE FOR DEPARTMENT OF AVIATION (02/07/01)**

☐ Original COI

☐ Advice of Renewal

☐ Change

Party to Whom this Certificate is Issued:

Name and Address of Insured:

CITY AND COUNTY OF DENVER
Manager of Aviation
Denver International Airport
8500 Pena Boulevard, Room 8810
Denver CO 80249

Denver Airport Enterprises, LLC
Joe Aragon
985 Tabor Street
Golden, CO 80401

CONTRACT NAME & NUMBER TO WHICH THIS INSURANCE APPLIES: Retail Concessions and Storage Location @ DIA

I. MANDATORY COVERAGE

WC-1 Colorado Workers' Compensation and Employer Liability Coverage

Coverage	Minimum Limits of Liability (In Thousands)	Policy No. & Company	Policy Period
COLORADO Workers' Compensation Employer's Liability	WC Statutory Limits \$100, \$500, \$100 Limits		

Any Policy issued under this section must contain, include or provide for the following:

1. All States Coverage or Colorado listed as a covered state for the Workers' Compensation
2. Waiver of Subrogation and Rights of Recovery against the City and County of Denver (the "City"), its officers, officials and employees.

CGL-1 Commercial General Liability Coverage

Coverage	Minimum Limits of Liability (In Thousands)	Policy No. & Company	Policy Period
Commercial General Liability (coverage at least as broad as that provided by ISO form CG0001 or equivalent)	Each Occurrence: \$1,000 General Aggregate Limit: \$2,000 Products-Completed Operations Aggregate Limit: \$2,000 Personal & Advertising Injury: \$1,000 Fire Damage Legal (Any one fire \$50 (\$300 if a City facility is leased)		

Any Policy issued under this section must contain, include or provide for the following:

1. City, its officers, officials and employees as additional insureds, per ISO form CG2010 or equivalent
2. Coverage for defense costs of additional insureds outside the limits of insurance, per CG0001.
3. Liability assumed under an Insured Contract (Contractual Liability).
4. The full limits of coverage must be dedicated to apply to this project/location, per ISO form CG2503 or equivalent, if applicable.
5. Waiver of Subrogation and Rights of Recovery, per ISO form CG2404 or equivalent.
6. Separation of Insureds Provisions
7. General Aggregate Limit Applies Per: Policy ___ Project ___ Location X ___, if applicable

BAL-1. Business Automobile Liability Coverage

Coverage	Minimum Limits of Liability (In Thousands)	Policy No. & Company	Policy Period
Business Automobile Liability (coverage at least as broad as ISO form CA 0001)	Combined Single Limit \$1,000		

Any Policy issued under this section must contain, include or provide for the following:

1. Symbol 1, coverage for any auto. If no autos are owned, Symbols 8 & 9, (Hired and Non-owned) auto liability.
2. If this contract involves the transport of hazardous cargo such as fuel, solvents or other hazardous materials may occur, then Broadened Pollution Endorsement, per ISO form CA 9948 or equivalent and MCS 90 are required.

IV. NOTICE OF CANCELLATION

It is understood and agreed that should any Policy issued hereunder be cancelled or non-renewed before the expiration date thereof, or sustain a material change in coverage adverse to the City, the issuing company or its authorized Agent shall mail to the address shown above, by mail, return receipt requested, thirty (30) days prior written notice ten (10) days for non-payment of premium, referencing the contract/project number set forth herein.

EXHIBIT N

DIA ENVIRONMENTAL REQUIREMENTS

Section 1. General Requirements. Tenant, in conducting any activity on DIA property, shall comply with all applicable airport, local, state, and federal rules, regulations, statutes, laws, and orders (Environmental Requirements). In addition, these Environmental Requirements include applicable Environmental Guidelines developed for DIA's Environmental Management System (EMS), as summarized in DIA Rules and Regulations Part 180. DIA's Environmental Guidelines, Environmental Policy, and all Rules and Regulations are available at www.flydenver.com/. These Environmental Requirements address, but are not limited to, requirements regarding the storage, use, and disposal of Hazardous Materials, solid and hazardous waste, or petroleum products; the National Environmental Policy Act (NEPA); and other federal, state, and local water, wastewater, and air quality regulations.

A. EMS: DIA's EMS has been certified to the ISO 14001 standard. DIA's EMS includes the above-noted airport-wide Environmental Policy and is designed around the significant aspects identified in DIA Rule and Regulation 180. It is a requirement of the standard that all entities providing products, goods, and/or services on behalf of DIA ensure that their personnel are aware of DIA's Environmental Policy, DIA's significant environmental aspects, and the specific environmental aspects and associated impacts for the products, goods, and/or services that will be provided by the Tenant,

B. Permits: Tenant shall acquire all necessary federal, state, local, and airport permits/approvals and comply with all permit/approval requirements. Tenant shall prepare and update all plans and provide all information required by the City for regulatory compliance purposes and provide copies of all permit applications and permits to DIA.

C. Hazardous Materials Limited: Any hazardous materials not normally used in Tenant's operations are barred from DIA premises. Tenant shall identify all hazardous materials to be used at DIA along with a description of how these materials and any associated hazardous or other waste materials generated by Tenant will be managed while on airport property. This information is required prior to the Tenant conducting activities on DIA property.

D. MSDSs: Prior to operation, Tenant shall maintain copies of Material Safety Data Sheets (MSDSs) for all chemicals to be used in their activities, including those used for cleaning and maintenance. This obligation is continuing for the term of this Agreement, and Tenant shall make this documentation available for inspection by DIA upon request.

E. Pollution Prevention: Tenant is encouraged to utilize the concepts of pollution prevention, energy efficiency, and waste minimization with regard to its activities at DIA.

Section 2. Review of Environmental Documents. Tenant, at the request of the City, shall make available for inspection and copying, upon reasonable notice and at reasonable times, any or all of the documents and materials that the Tenant has prepared pursuant to any Environmental Requirement hereunder or submitted to any governmental or regulatory agency. If there is a requirement to file any notice or report of a release or threatened release of a substance on, under, or about the work conducted on DIA property, Tenant shall provide a copy of such report or notice to the City.

Section 3. Access for Environmental Inspection. The City shall have an unimpeded right of access to the occupancy or work areas without prior notice to Tenant to inspect the same in order to confirm that Tenant is conducting its activities in accordance with this Agreement. At the City's request, Tenant shall conduct any testing and analysis at its cost as is necessary to ascertain whether the Tenant is in compliance with this Agreement.

Section 4. Correction of Environmental Non-Compliance. If the Tenant fails to comply with any applicable Environmental Requirement, the City, in addition to its rights and remedies described elsewhere in this Agreement, at its election, may enter the facility and/or work area and take such measures as may be necessary to ensure compliance with the Environmental Requirements, all at the Tenant's expense.

Section 5. Duty to Notify City. In the event of a release or threatened release of a substance relating to or arising out of the Tenant's use or activities on DIA, or in the event any claim, demand, cause of action, or notice is made against the Tenant with regard to the Tenant's failure or alleged failure to comply with any requirement hereunder, the Tenant, immediately shall notify the City verbally by contacting the Airport Communications Center (303-342-4200) and the appropriate regulatory agency. Tenant shall immediately control and remediate the contaminated media and, as provided below, follow-up Tenant's verbal notice with a written report within three days of such incident. In addition, the Tenant shall provide the City, at Tenant's expense, with copies of any written claims, demands, notices or actions so made.

Section 6. Environmental Remediation. Tenant shall undertake all actions necessary to remedy or remove any released or spilled materials and any other contamination discovered on or under DIA property introduced by or affected by Tenant and shall restore the Access Premises to either its condition immediately prior to the initiation of this Agreement or to a condition in compliance with all applicable local, state, federal, or airport laws, rules, regulations, or orders, at the City's sole discretion. This work shall be performed at Tenant's expense and the City shall have the right to review the project plan and review and inspect all such work at any time using consultants and representatives of the City's choice. Tenant shall further conduct surface and subsurface monitoring pertaining to Tenant's activities hereunder to ensure compliance with applicable laws, rules, regulations, and permits or as determined by the Manager of Aviation.

Section 7. Environmental Requirements for Construction. Tenant agrees to ensure that its premises are designed, constructed, operated, and maintained in a manner that minimizes environmental impacts through application of appropriate preventive measures and complies with all federal, state, and local environmental requirements. Tenant shall comply with the DIA Tenant Development Guidelines, as amended, for any alterations to existing facilities or the construction of any new facilities. In addition, the Tenant shall comply with Exhibit X of this agreement.