

SAMPLE ONLY

APPENDIX TWO

AGREEMENT

Schedule 1 of APPENDIX TWO

BEVERAGE VENDING AND POURING RIGHTS AGREEMENT

This Beverage Vending and Pouring Rights Agreement (this “**Agreement**”) is entered into effective as of _____, 2023 (the “**Effective Date**”) by and between **THE UNIVERSITY OF TEXAS PERMIAN BASIN**, an agency and institution of higher education authorized by the State of Texas (“**University**”), and _____, a _____ (“**Contractor**”).

RECITALS

University desires that certain beverage products and services be made available on University's Campus for the benefit and convenience of its students, faculty, staff and visitors.

Contractor represents that it has the knowledge, ability, equipment, and personnel to properly conduct beverage pouring services, retail single serve coolers and fountain machine operations on University's including, dining halls, Athletics, Dining and Concessions and the Basin Sports Complex

University, in reliance on such assurances from Contractor, is willing to contract with Contractor on the terms and conditions provided in this Agreement.

TERMS AND CONDITIONS

THEREFORE, in consideration of the mutual benefits and covenants contained in this Agreement, the parties agree as follows:

1. Definitions.

- 1.1 “**Agreement Year**” means the twelve-month period beginning on the Effective Date and ending twelve calendar months thereafter and each successive twelve-month period during the Term of this Agreement.
- 1.2 “**Beverage**” or “**Beverages**” means all nonalcoholic beverages of any kind, but will not include milk, flavored milk, fresh-brewed coffee and fresh-brewed tea products, hot chocolate, tap water or unbranded fresh-squeezed juices.
- 1.3 “**Beverage Dispensing Equipment**” means all Beverage dispensing equipment and all related supplies.
- 1.4 “**Campus**” means all the real property constituting University's main campus located at 4901 E. University Blvd, under the possession and control of the Board of Regents of The University of Texas System for the use and benefit of University, including all buildings and grounds associated with branded or unbranded food service outlets, vending locations, and athletic facilities, but excluding any real property owned by a third party and leased to University as the tenant.

- 1.5 **"Competitive Products"** means all Beverages that are not Products.
 - 1.6 **"Concessionaires"** means one or more third parties that manage or operate food and beverage operations on Campus.
 - 1.7 **"NCAA"** means National Collegiate Athletic Association.
 - 1.8 **"Products"** means all Beverages manufactured and distributed by Contractor.
 - 1.9 **"TAC"** means Texas Administrative Code.
 - 1.10 **"Tournament"** means a tournament, play-off, championship, or exhibition contest.
 - 1.11 **"University Rules"** means (i) the Rules and Regulations of the Board of Regents of The University of Texas System, (ii) the policies of The University of Texas System (**"UT System"**), and (iii) the policies and procedures of University, all as amended from time to time.
2. **Term.** The term (the **"Term"**) of this Agreement will commence on the Effective Date and will expire on TBD, unless earlier terminated pursuant to the terms and conditions of this Agreement. University may elect to renew this Agreement for up to two (2) additional one (1) year term.

University has also entered into a Sponsorship Rights Agreement (**"Sponsorship Rights Agreement"**) with the Contractor dated effective on the Effective Date. *The term of the Sponsorship Rights Agreement will run conterminously with the Term of this Agreement. Upon the expiration or earlier termination of this Agreement, the Sponsorship Rights Agreement will automatically and simultaneously terminate.*

3.0 Grant of Rights to Contractor. Subject to the terms and conditions of this Agreement, University grants to Contractor the following rights that will be exclusive among persons, companies, or other entities selling Beverages, and are described as follows:

- 3.1 Contractor will have the right to (i) offer Beverages for sale on Campus through supply Beverages and Beverage Dispensing Equipment for concession and food service operations on Campus operated by University or University's Concessionaires; (iii) have Contractor's Products be the only Beverages sold, served, or offered for sale on Campus by University or any of University's Concessionaires; (iv) have Contractor's Products be the only Beverages sold at athletic contests held on Campus; and (v) prominently display materials promoting Products at the point-of-sale on Campus, including translites and pictorials depicting Contractor's name and logos on Beverage Dispensing Equipment, trademark cups, and Products.
- 3.2 **Limitation on Exclusive Rights.** The rights granted in this Agreement, including Contractor's exclusivity rights and privileges, do not extend to locations that are not included in the definition of Campus (ref. Section 1.4)
- 3.2 The rights granted in this Section do not apply to events held on Campus as a part of (i) an NCAA Tournament; (ii) a Tournament of an athletic conference of which University is a member; or (iii) a Tournament controlled by an entity other than University, including professional or semi-professional sport teams, conferences or entities; provided, that, these exceptions will be effective only if and to the extent that the NCAA, the athletic conference, or other entity controlling the contests has a Beverage distribution agreement, sponsorship agreement, advertising agreement or

similar agreement covering the Tournament with an entity offering Competitive Products.

- 3.3 The rights granted in this Section do not apply to University-sponsored events, athletic contests and Tournaments that are not held on Campus and involve co-sponsorship by other organizations or business entities.
- 3.4 All rights granted to Contractor and all activities conducted by Contractor under this Agreement must comply with all University Rules and must be conducted in a manner that does not disturb or interfere with the academic programs or administrative activities of UT System or any of the institutions or any program or activity that is conducted by or is authorized by UT System or any of the institutions; does not interfere with entry to or exit from a building, structure, or facility; does not interfere with the flow of pedestrians or vehicular traffic on sidewalks or streets or at places of ingress and egress to and from property, buildings, or facilities; does not harass, or intimidate the person or persons being solicited; and does not violate applicable state, federal, or local laws, regulations, or ordinances ("**Applicable Laws**").
- 3.5 The rights granted in this Agreement do not apply to private events held on Campus in which a third party provides University compensation for short term use of a University facility.

4. **Purchase and Sale of Beverages.**

- 4.1 University will purchase from Contractor, and Contractor will sell to University, one hundred percent (100%) of University's requirements for Beverages to be offered for sale by University on Campus at the prices specified in **EXHIBIT B** attached and incorporated for all purposes.
- 4.2 University will cause its Concessionaires to purchase from Contractor, and Contractor will sell to Concessionaires, one hundred percent (100%) of Concessionaires' requirements for Beverages offered for sale by Concessionaires on Campus. Concessionaire will purchase one hundred percent (100%) of Concessionaire's requirements for Beverages offered for sale by Concessionaire on Campus at pricing available to Concessionaire through its own contract with Contractor.
- 4.3 The prices specified in **EXHIBIT B** for Products to be sold to University and Concessionaires will remain in effect until the date that is one (1) year after the Effective Date. Thereafter, not more than one (1) time each Agreement Year and only after thirty (30) days written notice to University and approval by University, prices may be increased by Contractor in the same amount as Contractor's increase in cost of goods sold, including labor, fuel, and raw materials associated with the manufacture and/or distribution of the Products. Contractor's notice must be supported by documentation, including raw cost data reflecting the change in Contractor's costs.

5. **Vending Operations.**

- 5.1 Not Applicable to this agreement

6. **Vending Equipment.**

- 6.1 Not Applicable to this agreement

7. **Consideration.**

Payments and other consideration from Contractor to University described in this Agreement will be referred to herein collectively as “**Consideration.**”

8. **Dispensing Equipment.**

8.1 Contractor will loan to University all Beverage dispensing equipment (“**Dispensing Equipment**”) reasonably required to dispense Products on Campus. Contractor’s duties will include delivery and set-up, cleaning, maintenance and repairs of all Dispensing Equipment required for University and all current and future Concessionaires. University will not be liable for loss or damage to Dispensing Equipment loaned to current or future Concessionaires.

8.2 University agrees that (i) Dispensing Equipment may not be removed from Campus without Contractor’s written consent, (ii) University will not encumber Dispensing Equipment in any manner except as authorized by Contractor, and (iii) University will be responsible to Contractor for any loss or damage to Dispensing Equipment loaned to University, reasonable wear and tear excepted.

9. **Installation: Operation and Removal.** Contractor will pay all costs for obtaining, installing, operating, servicing, and replacing Dispensing Equipment. University will provide Contractor with electric energy and water for operation of Dispensing Equipment at no cost to Contractor. University will not be responsible for interruptions in electric energy, water or other utility services. However, University will exercise reasonable diligence in pursuing the restoration of interrupted utility services. Contractor will, within thirty (30) days after the expiration or earlier termination of this Agreement, remove all of Contractor’s equipment placed on Campus and restore Campus property to a condition that is reasonably satisfactory to University.

10. **Service.** Contractor will provide on-call maintenance and repair service for Dispensing Equipment 24-hours a day, seven days a week, at no cost. Contractor will make available to University a toll-free telephone number for service calls, and will respond on-site to calls within four (4) hours between 7:30 AM and 5:30 PM, Monday through Friday, and within twenty-four (24) hours during weekends. Contractor will keep at least one (1) on- duty supervisor available from 8:00 AM to 5:00 PM each day that University is open, and at least one (1) on-call supervisor available at other times. Contractor will service all Dispensing Equipment as often as necessary to keep the equipment properly supplied and in good working order. Contractor will keep all Dispensing Equipment in a neat and sanitary condition at all times. Contractor will clean all spills that occur while filling, cleaning, or maintaining Dispensing Equipment, clean the front of each piece of equipment each time Contractor restocks or services the equipment, and remove packaging and waste from Campus after each service call. Contractor will cooperate with University to promptly remedy any sanitary problems related to Contractor’s machines.

In the event University reasonably believes that Contractor is not in compliance with Applicable Laws and reasonably determines that the violation of the Applicable Laws creates an imminent health hazard or immediate threat to the health and safety of University’s campus

community or the public, University may immediately (a) perform any cleaning or other services deemed necessary by University (Contractor will reimburse University for all reasonable costs, including overtime costs.), (b) report Contractor's non-compliance with Applicable Laws to any governmental body or authority, and (c) *at University's option*, (i) require Contractor to cure within a timeframe that is acceptable to University, or (ii) suspend Contractor's performance of the Services, and/or (iii) terminate this Agreement *without notice or opportunity to cure*. Upon receipt of written notice of suspension or termination of this Agreement, Contractor will immediately cease performance of the Services and all other food handling operations under this Agreement.

Contractor will maintain a program of regular preventive maintenance and replacement of worn, damaged, or malfunctioning Dispensing Equipment. University may require Contractor to replace Dispensing Equipment that cannot be returned to service within four (4) working days after University's service call. Replacement equipment will be of a type and condition at least equal to the equipment that is replaced. Contractor may enter Campus at all reasonable times during normal business hours, to install, repair, service, inspect or supply Dispensing Equipment and to remove Dispensing Equipment upon the expiration or earlier termination of this Agreement. Contractor may enter Campus at other times upon written approval of University.

10. **Signs.** Contractor will not post signs or posters at the Locations or elsewhere on Campus. Contractor may only engage in marketing or promotional activity on Campus, that in each instance, (a) fully complies with Applicable Laws and University Rules, (b) has received University's advance written approval, and (c) qualifies as "use or acknowledgement" as defined in [Treasury Regulations 1.513-4\(c\)\(iv\)](#).

11. **Indemnification.** TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR WILL INDEMNIFY, PROTECT, DEFEND WITH COUNSEL APPROVED BY UNIVERSITY, AND HOLD HARMLESS UNIVERSITY AND UT SYSTEM, AND THEIR RESPECTIVE AFFILIATED ENTERPRISES, REGENTS, OFFICERS, DIRECTORS, ATTORNEYS, EMPLOYEES, REPRESENTATIVES AND AGENTS (COLLECTIVELY, **INDEMNITEES**) FROM AND AGAINST ALL DAMAGES, LOSSES, LIENS, CAUSES OF ACTION, SUITS, JUDGMENTS, EXPENSES, AND OTHER CLAIMS OF ANY NATURE, KIND, OR DESCRIPTION, INCLUDING REASONABLE ATTORNEYS' FEES INCURRED IN INVESTIGATING, DEFENDING OR SETTLING ANY OF THE FOREGOING (COLLECTIVELY, **CLAIMS**) BY ANY PERSON OR ENTITY, ARISING OUT OF, CAUSED BY, OR RESULTING FROM CONTRACTOR'S PERFORMANCE UNDER OR BREACH OF THIS AGREEMENT AND THAT ARE CAUSED IN WHOLE OR IN PART BY ANY NEGLIGENT ACT, NEGLIGENT OMISSION OR WILLFUL MISCONDUCT OF CONTRACTOR, ANYONE DIRECTLY EMPLOYED BY CONTRACTOR OR ANYONE FOR WHOSE ACTS CONTRACTOR MAY BE LIABLE. THE PROVISIONS OF THIS SECTION WILL NOT BE CONSTRUED TO ELIMINATE OR REDUCE ANY OTHER INDEMNIFICATION OR RIGHT WHICH ANY INDEMNITEE HAS BY LAW OR EQUITY. ALL PARTIES WILL BE ENTITLED TO BE REPRESENTED BY COUNSEL AT THEIR OWN EXPENSE.

IN ADDITION, CONTRACTOR WILL INDEMNIFY, PROTECT, DEFEND WITH COUNSEL APPROVED BY UNIVERSITY, AND HOLD HARMLESS INDEMNITEES FROM AND AGAINST ALL CLAIMS ARISING FROM INFRINGEMENT OR ALLEGED INFRINGEMENT OF ANY PATENT, COPYRIGHT, TRADEMARK OR OTHER PROPRIETARY INTEREST ARISING BY OR OUT OF THE PERFORMANCE OF SERVICES OR THE PROVISION OF GOODS BY CONTRACTOR, OR THE USE BY INDEMNITEES, AT THE DIRECTION OF CONTRACTOR, OF ANY ARTICLE OR MATERIAL; PROVIDED, THAT, UPON BECOMING AWARE OF A SUIT OR THREAT OF SUIT FOR INFRINGEMENT, UNIVERSITY WILL PROMPTLY NOTIFY CONTRACTOR AND CONTRACTOR WILL BE GIVEN THE OPPORTUNITY TO NEGOTIATE A SETTLEMENT. IN THE EVENT OF LITIGATION, UNIVERSITY WILL REASONABLY COOPERATE WITH CONTRACTOR. ALL PARTIES WILL BE ENTITLED TO BE REPRESENTED BY COUNSEL AT THEIR OWN EXPENSE.

12. **Insurance.**

- 12.1 Contractor, consistent with its status as an independent contractor will carry and will cause its subcontractors to carry, at least the following insurance, with companies

authorized to do insurance business in the State of Texas or eligible surplus lines insurers operating in accordance with the [Texas Insurance Code](#), having an A.M. Best Rating of A:VII or better, and in amounts not less than the following minimum limits of coverage:

12.1.1 Workers' Compensation Insurance with statutory limits, and Employer's Liability Insurance with limits of not less than \$1,000,000:

Employers Liability - Each Accident	\$1,000,000
Employers Liability – Disease - Each Employee	\$1,000,000
Employers Liability – Disease - Policy Limit	\$1,000,000

Workers' Compensation policy must include under Item 3.A. of the information page of the Workers' Compensation policy the state in which Work is to be performed for University.

12.1.2 Commercial General Liability Insurance with limits of not less than:

Each Occurrence Limit	\$1,000,000
Damage to Rented Premises	\$ 300,000
Personal & Advertising Injury	\$1,000,000
General Aggregate	\$2,000,000
Products - Completed Operations Aggregate	\$2,000,000

Policy shall include bodily injury, property damage and liability assumed under an insured contract, including defense costs with respect to liability arising out of activities performed by or on behalf of the Contractor.

12.1.3 Business Auto Liability Insurance covering all owned, non-owned or hired automobiles, with limits of not less than \$1,000,000 single limit of liability per accident for Bodily Injury and Property Damage;

12.1.4 Umbrella/Excess Liability Insurance with limits of not less than \$2,000,000 per occurrence and aggregate with a deductible of no more than \$10,000. The Umbrella/Excess Liability policy will be excess over and at least as broad as the underlying coverage as required under Sections 5.1.1 Employer's Liability; 5.1.2 Commercial General Liability; and 5.1.3 Business Auto Liability. Inception and expiration dates will be the same as the underlying policies. Drop down coverage will be provided for reduction or exhaustion of underlying aggregate limits and will provide a duty to defend for any insured.

12.1.5 Third Party Employee Crime Insurance to protect the assets and property of University with limits of not less than \$1,000,000 per claim. Independent contractor's insurance shall be primary to any insurance carried by UT System or any of its Institutions.

12.2 Contractor will deliver to University:

12.2.1 After the execution and delivery of this Agreement and prior to the performance of any Work by Contractor, evidence of insurance on a Texas Department of Insurance (TDI) approved certificate form (the Acord form is a TDI-approved form) verifying the existence and actual limits of all required insurance policies; and, if the coverage period shown on the current certificate form ends during the Term, then prior to the end of the coverage period, a new certificate form verifying the continued existence of all required insurance policies.

- 12.2.2 **All insurance policies** (with the exception of workers' compensation, employer's liability and professional liability) will be endorsed and name the Board of Regents of The University of Texas System and University as Additional Insureds for liability caused in whole or in part by Contractor's acts or omissions with respect to its on-going and completed operations up to the actual liability limits of the required insurance policies maintained by Contractor. Commercial General Liability Additional Insured endorsement including ongoing and completed operations coverage will be submitted with the Certificates of Insurance. Commercial General Liability and Business Auto Liability will be endorsed to provide primary and non-contributory coverage.
- 12.2.3 Contractor hereby waives all rights of subrogation against the Board of Regents of The University of Texas System and University. **All insurance policies** will be endorsed to provide a waiver of subrogation in favor of the Board of Regents of The University of Texas and University. No policy will be canceled until after thirty (30) days' unconditional written notice to University. **All insurance policies** will be endorsed to require the insurance carrier providing coverage to send notice to University thirty (30) days prior to any cancellation, material change, or non-renewal relating to any insurance policy required in this **Section 5**.
- 12.2.4 Contractor will pay any deductible or self-insured retention for any loss. Any self-insured retention must be declared to and approved by University prior to the performance of any Work by Contractor under this Agreement. All deductibles and self-insured retentions will be shown on the Certificates of Insurance.
- 12.2.5 Certificates of Insurance and Additional Insured Endorsements as required by this Agreement will be mailed, faxed, or emailed to the following University contact:
- Name: Lail Grant
Address: 4901 E. University Blvd.
Odessa, TX 79762
Email Address: grant_l@utpb.edu
- 12.2.6 Contractor's or subcontractor's insurance will be primary to any insurance carried or self-insurance program established by University. Contractor's or subcontractor's insurance will be kept in force until all Work has been fully performed and accepted by University in writing.

13. **Default and Termination.**

- 13.1 In addition to any other legal or equitable remedy, University will have the right to terminate this Agreement upon thirty (30) days' written notice to Contractor at any time if:
- 13.1.1 Contractor fails to make any payment due under this Agreement, and if such default continues uncured for the thirty (30) day period; or

- 13.1.2 Contractor breaches any material term or condition of this Agreement, and if such breach continues uncured for the thirty (30) day period.
- 13.2 In the event University reasonably believes that Contractor is not in compliance with Applicable Laws and reasonably determines that the violation of the Applicable Laws creates an imminent health hazard or immediate threat to the health and safety of University's campus community or the public, University may immediately (a) perform any cleaning or other services deemed necessary by University (Contractor will reimburse University for all reasonable costs, including overtime costs.), (b) report Contractor's non-compliance with Applicable Laws to any governmental body or authority, and (c) *at University's option*, (i) require Contractor to cure within a timeframe that is acceptable to University, or (ii) suspend Contractor's performance of the Services, and/or (iii) terminate this Agreement *without notice or opportunity to cure*. Upon receipt of written notice of suspension or termination of this Agreement, Contractor will immediately cease performance of the Services and other operations under this Agreement.
- 13.3 In addition to any other legal or equitable remedy, Contractor will have the right to terminate this Agreement upon forty-five (45) days' written notice to University at any time if:
- 13.3.1 University breaches any material term or condition of this Agreement, and if such breach continues uncured for the forty-five (45) day period; or
- 13.3.2 University's right to convey any of the promotional and product exclusivity rights contained in this Agreement expire or are revoked and if such breach continues uncured for the forty-five (45) day period.
- 13.4 If this Agreement is terminated before the stated expiration date either (i) by University for any reason other than a default by Contractor as provided in this Agreement, or the Sponsorship Agreement, or (ii) by Contractor by reason of a default by University as provided in this Agreement, or the Sponsorship Agreement, then, to the extent authorized by the Constitution and laws of the State of Texas, University will within sixty (60) days after the termination date refund the prepaid but unearned portion of all Exclusivity Fees previously received by University with respect to the Agreement Year in which termination occurs. The Exclusivity Fees for each Agreement Year will be deemed "earned" pro rata on a daily basis during such Agreement Year, up to the date of termination.
- 13.5 The University's Office of The Vice President for Business Affairs in conjunction with the University's Purchasing Department will establish a method by which to review or audit Contractor's performance to determine sufficiency of performance and compliance with the requirements of this Agreement.

14. **Assignment and Subcontracting.**

Except as specifically provided in **Exhibit E**, Historically Underutilized Business Subcontracting Plan, attached and incorporated for all purposes, Contractor's interest in this Agreement (including Contractor's duties and obligations under this Agreement, and any amounts due to Contractor under this Agreement) may not be subcontracted, assigned, delegated, or otherwise transferred to a third party, in whole or in part, and any attempt to do so will (a) not be binding on University; and (b) be a default under this Agreement for which Contractor will be subject to all remedial actions provided by Texas law, including [Chapter 2161, Texas Government Code](#), and 34 TAC §§[20.285\(g\)\(5\)](#), [20.585](#) and [20.586](#). The benefits and burdens of this Agreement are assignable by University.

15. Historically Underutilized Business Subcontracting Plan.

Contractor will use good faith efforts to subcontract Work in accordance with the Historically Underutilized Business Subcontracting Plan (HSP) (ref. **Exhibit E**). Contractor will maintain business records documenting its compliance with the HSP and submit a monthly compliance report to University in the format required by the Statewide Procurement and Statewide Support Services Division of the Texas Comptroller of Public Accounts or successor entity (collectively, **SPSS**). Submission of compliance reports will be required as a condition for any payments by University under this Agreement. If University determines that Contractor has failed to subcontract as set out in the HSP, University will notify Contractor of any deficiencies and give Contractor an opportunity to submit documentation and explain why the failure to comply with the HSP should not be attributed to a lack of good faith effort by Contractor. If University determines that Contractor failed to implement the HSP in good faith, University, in addition to any other remedies, may report nonperformance to SPSS in accordance with Texas law, including 34 TAC §§[20.285\(g\)\(5\)](#), [20.585](#) and [20.586](#). University may also terminate this Agreement for default and make a claim against Contractor.

12.1 Changes to the HSP. If at any time during the term of this Agreement, Contractor desires to change the HSP, before the proposed changes become effective (a) Contractor must comply with [34 TAC §20.285](#); (b) the changes must be reviewed and approved by University; and (c) if University approves changes to the HSP, this Agreement must be amended in accordance with **Section 13** to replace the HSP with the revised subcontracting plan.

12.2 Expansion of Work. If University expands the scope of Work through a change order or any other amendment, University will determine if the additional Work contain probable subcontracting opportunities *not* identified in the initial solicitation for Work. If University determines additional probable subcontracting opportunities exist, Contractor will submit an amended subcontracting plan covering those opportunities. The amended subcontracting plan must comply with the provisions of [34 TAC §20.285](#) before (a) this Agreement may be amended to include the additional Work; and (b) Contractor may perform the additional Work. If Contractor subcontracts any of the additional subcontracting opportunities identified by University without prior authorization and without complying with [34 TAC §20.285](#), Contractor will be deemed to be in default of this Agreement under **Section 10** and will be subject to any remedial actions provided by Texas law including Chapter 2161, *Texas Government Code*, and [34 TAC §20.285](#). University may report nonperformance under this Agreement to SPSS in accordance with Texas law, including [34 TAC §20.285\(g\)\(5\)](#), [§20.585](#) and [20.586](#).

16. Merger and Amendment. The provisions of this Agreement (including the exhibits) constitute the entire agreement between the parties with regard to the subject matter hereof and no prior or contemporaneous agreement, written or oral, will affect the terms thereof. No amendment to this Agreement will be effective unless reduced to writing and signed by the authorized representative of each party.

17. Venue: Governing Law. Ector County, Texas, will be the proper place of venue for suit on or in respect of this Agreement. This Agreement, all of its terms and conditions, all rights and obligations of the parties, and all claims arising out of or relating to this Agreement, will be construed, interpreted and applied in accordance with, governed by and enforced under, the laws of the State of Texas.

18. Organization and Authority. Contractor is duly organized, validly existing and in good standing under the laws of the state of its incorporation or organization and is duly authorized and in good standing to conduct business in the State of Texas, that it has all necessary power and has received all necessary approvals to execute and deliver this Agreement, and the individual executing this Agreement on behalf of Contractor has been duly authorized to act for and bind Contractor

19. **State Auditor.** Contractor understands acceptance of this Agreement constitutes acceptance of authority of the Texas State Auditor's Office or any successor agency (Auditor), to conduct an audit or investigation in connection with this Agreement (ref. §§[51.9335\(c\)](#), [73.115\(c\)](#) and [74.008\(c\)](#), *Texas Education Code*). Contractor agrees to cooperate with Auditor in the conduct of the audit or investigation, including providing all records requested. Contractor will include this provision in all contracts with permitted subcontractors.
20. **Financial Statement: Reports, and Bond.** Contractor must present to University at the time of contracting a financial statement prepared by a certified public accountant licensed in Texas. Contractor must provide a payment statement monthly, supported by quarterly sales tax reports for each quarter. Contractor's payment reports must be certified on an annual basis by a certified public accountant licensed in Texas, and must be provided each Agreement Year on or before the anniversary of the Effective Date, as required by *Texas Government Code*, Chapter 2252, Subchapter C. **Performance Bond.** In accordance with Section 2252.064, *Texas Government Code*, Contractor will provide University with a performance bond for each Agreement Year during the Term and any Renewal Term (ref. **Section 2**). The amount of the performance bond for the first Agreement Year during the Term will be equal to **\$160,000.00**, the amount of the projected Royalty payable to University during that Agreement Year. *Thereafter, the amount of the performance bond will be adjusted at the beginning of each Agreement Year to reflect the amount of the Royalty payable to University for the previous Agreement Year.* The performance bond will be issued by a surety company authorized to do business in the State of Texas and acceptable to University's Representative in all respects. The performance bond will be made payable to University and conditioned upon the prompt and faithful performance of the Work and all of Contractor's other duties and obligations under this Agreement.
21. **Texas Family Code Child Support Certification.**
- Pursuant to [§231.006, Texas Family Code](#), Contractor certifies that it is not ineligible to receive the award of or payments under this Agreement and acknowledges that this Agreement may be terminated and payment may be withheld if this certification is inaccurate.
23. **Tax Certification.**
- If Contractor is a taxable entity as defined by [Chapter 171, Texas Tax Code](#) (Chapter 171), then Contractor certifies that it is not currently delinquent in the payment of any taxes due under Chapter 171, or that it is exempt from the payment of those taxes, or that it is an out-of-state taxable entity that is not subject to those taxes, whichever is applicable.
24. **Payment of Debt or Delinquency to the State.**
- Pursuant to §§[2107.008](#) and [2252.903](#), *Texas Government Code*, Contractor agrees that any payments owing to Contractor under this Agreement may be applied directly toward any debt or delinquency that Contractor owes the State of Texas or any agency of the State of Texas regardless of when it arises, until such debt or delinquency is paid in full.
26. **Student Evaluation.**
- Contractor will comply with requirements of [§51.945, Texas Education Code](#), and all University Rules regarding students' involvement in the evaluation of the performance of Contractor, by periodically holding meetings or forums to provide University's students with a reasonable opportunity to discuss the performance of Contractor. Contractor will obtain University's prior written approval concerning the date, time and location for each meeting or forum at least thirty (30) days in advance.

27. Notices.

Except as otherwise provided by this Section, notices, consents, approvals, demands, requests or other communications required or permitted under this Agreement, will be in writing and sent via certified mail, hand delivery, overnight courier, facsimile transmission (to the extent a facsimile number is provided below), or email (to the extent an email address is provided below) as indicated below, and notice will be deemed given (i) if delivered by certified mail, when deposited, postage prepaid, in the United States mail, or (ii) if delivered by hand, overnight courier, facsimile (to the extent a facsimile number is provided below) or email (to the extent an email address is provided below), when received:

If to University: Office of Purchasing
Director of Purchasing
Email: Montalvo_e@utpb.edu
Attention: E. Montalvo

with copy to: Athletics
Todd Dooley
Vice President of Athletics
Email: dooley_w@utpb.edu

If to Contractor: _____

Fax: _____
Email: _____
Attention: _____

or other person or address as may be given in writing by either party to the other in accordance with this Section.

28. Breach of Contract Claims.

To the extent that [Chapter 2260, Texas Government Code](#), is applicable to this Agreement and is not preempted by other applicable law, the dispute resolution process provided for in Chapter 2260 and the related rules adopted by the Texas Attorney General pursuant to Chapter 2260, will be used by University and Contractor to attempt to resolve any claim for breach of contract made by Contractor that cannot be resolved in the ordinary course of business. The chief business officer of University will examine Contractor's claim and any counterclaim and negotiate with Contractor in an effort to resolve the claims. The parties specifically agree (i) neither execution of this Agreement by University nor any other conduct, action or inaction of any representative of University relating to this Agreement constitutes or is intended to constitute a waiver of University's or the state's sovereign immunity to suit; and (ii) University has not waived its right to seek redress in the courts.

29. **Limitations.**

THE PARTIES ARE AWARE THAT THERE ARE CONSTITUTIONAL AND STATUTORY LIMITATIONS ON THE AUTHORITY OF UNIVERSITY (A STATE AGENCY) TO ENTER INTO CERTAIN TERMS AND CONDITIONS THAT MAY BE A PART OF THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO, THOSE TERMS AND CONDITIONS RELATING TO LIENS ON UNIVERSITY'S PROPERTY; DISCLAIMERS AND LIMITATIONS OF WARRANTIES; DISCLAIMERS AND LIMITATIONS OF LIABILITY FOR DAMAGES; WAIVERS, DISCLAIMERS AND LIMITATIONS OF LEGAL RIGHTS, REMEDIES, REQUIREMENTS AND PROCESSES; LIMITATIONS OF PERIODS TO BRING LEGAL ACTION; GRANTING CONTROL OF LITIGATION OR SETTLEMENT TO ANOTHER PARTY; LIABILITY FOR ACTS OR OMISSIONS OF THIRD PARTIES; PAYMENT OF ATTORNEYS' FEES; DISPUTE RESOLUTION; INDEMNITIES; AND CONFIDENTIALITY (COLLECTIVELY, **LIMITATIONS**), AND TERMS AND CONDITIONS RELATED TO THE LIMITATIONS WILL NOT BE BINDING ON UNIVERSITY EXCEPT TO THE EXTENT AUTHORIZED BY THE LAWS AND CONSTITUTION OF THE STATE OF TEXAS.

30. **Energy Devices.**

Contractor is responsible for any and all expenses associated with the acquisition, installation, or maintenance of all energy-saving devices required by this Section.

31. **Loss of Funding.**

University's performance of its duties and obligations under this Agreement may be dependent upon the appropriation and allotment of funds by the Texas State Legislature (**Legislature**) and/or allocation of funds by the Board of Regents of The University of Texas System (**Board**). If the Legislature fails to appropriate or allot the necessary funds, or the Board fails to allocate the necessary funds, then University will issue written notice to Contractor and University may terminate this Agreement without further duty or obligation. Contractor acknowledges that appropriation, allotment, and allocation of funds are beyond the control of University.

32. **Confidentiality and Safeguarding of University Records: Press Releases: Public Information.**

Under this Agreement, Contractor may (1) create, (2) receive from or on behalf of University, or (3) have access to, records or record systems (collectively, **University Records**). Among other things, University Records may contain social security numbers, credit card numbers, or data protected or made confidential or sensitive by Applicable Laws. Additional mandatory confidentiality and security compliance requirements with respect to University Records subject to the Family Educational Rights and Privacy Act, [20 United States Code \(USC\) §1232g \(FERPA\)](#) are addressed in **Section 12.41**. Contractor represents, warrants, and agrees that it will: (1) hold University Records in strict confidence and will not use or disclose University Records except as (a) permitted or required by this Agreement, (b) required by Applicable Laws, or (c) otherwise authorized by University in writing; (2) safeguard University Records according to reasonable administrative, physical and technical standards (such as standards established by the National Institute of Standards and Technology and the Center for Internet Security as well as the Payment Card Industry Data Security Standards) that are no less rigorous than the standards by which Contractor protects its own confidential information; (3) continually monitor its operations and take any action necessary to assure that University Records are safeguarded and the confidentiality of University Records is maintained in accordance with all Applicable Laws and the terms of this Agreement; and (4) comply with University Rules regarding access to and use of University's computer systems, including UTS165 at <http://www.utsystem.edu/board-of-regents/policy-library/policies/uts165-information-resources-use-and-security-policy>. At the request of University, Contractor agrees to provide University with a written summary of the procedures Contractor uses to safeguard and maintain the confidentiality of University Records.

- 12.11.1 **Notice of Impermissible Use.** If an impermissible use or disclosure of any University Records occurs, Contractor will provide written notice to University within one (1) business day after Contractor's discovery of that use or disclosure. Contractor will promptly provide University with all information requested by University regarding the impermissible use or disclosure.
- 12.11.2 **Return of University Records.** Contractor agrees that within thirty (30) days after the expiration or termination of this Agreement, for any reason, all University Records created or received from or on behalf of University will be (1) returned to University, with no copies retained by Contractor; or (2) if return is not feasible, destroyed. Twenty (20) days before destruction of any University Records, Contractor will provide University with written notice of Contractor's intent to destroy University Records. Within five (5) days after destruction, Contractor will confirm to University in writing the destruction of University Records.
- 12.11.3 **Disclosure.** If Contractor discloses any University Records to a subcontractor or agent, Contractor will require the subcontractor or agent to comply with the same restrictions and obligations as are imposed on Contractor by this **Section 12.11**.
- 12.11.4 **Press Releases.** Except when defined as part of Work, Contractor will not make any press releases, public statements, or advertisement referring to the Project or the engagement of Contractor as an independent contractor of University in connection with the Project, or release any information relative to the Project for publication, advertisement or any other purpose without the prior written approval of University.
- 12.11.5 **Public Information.** University strictly adheres to all statutes, court decisions and the opinions of the Texas Attorney General with respect to disclosure of public information under the *Texas Public Information Act (TPIA)*, [Chapter 552, Texas Government Code](#). In accordance with §§[552.002](#) and [2252.907](#), *Texas Government Code*, and at no additional charge to University, Contractor will make any information created or exchanged with University pursuant to this Agreement (and not otherwise exempt from disclosure under TPIA) available in a format reasonably requested by University that is accessible by the public.
- 12.11.6 **Termination.** In addition to any other termination rights in this Agreement and any other rights at law or equity, if University reasonably determines that Contractor has breached any of the restrictions or obligations in this Section, University may immediately terminate this Agreement without notice or opportunity to cure.
- 12.11.7 **Duration.** The restrictions and obligations under this Section will survive expiration or termination of this Agreement for any reason.
- 12.12 **Binding Effect.** This Agreement will be binding upon and inure to the benefit of the parties hereto and their respective permitted assigns and successors.
- 12.13 **Records.** Records of Contractor's costs, reimbursable expenses pertaining to the Project and payments will be available to University or its authorized representative during business hours and will be retained for four (4) years after final Payment or abandonment of the Project, unless University otherwise instructs Contractor in writing.

34. Personnel and Background Checks.

Each individual who is assigned to perform any of Contractor's duties and obligations under this Agreement will be an employee of Contractor or an employee of a subcontractor engaged by Contractor and previously approved by University in writing. Contractor is responsible for the performance of all individuals performing Work under this Agreement. Prior to commencing any Work on Campus, Contractor will at its expense (a) provide University with a list ("**List**") of all individuals who may be assigned to perform Work, and (b) have an appropriate criminal background screening performed concerning each individual. Contractor will determine on a case-by-case basis whether each individual is qualified to provide Work. Contractor will not knowingly assign any individual to provide Work who has a history of criminal conduct unacceptable for a university campus, including violent or sexual offenses. Contractor will update the List each time there is a change in the individuals assigned to perform Work.

35. Survival of Provisions.

The restrictions and obligations under this Section will survive expiration or termination of this Agreement for any reason.

36 THIS AGREEMENT IS NOT EFFECTIVE FOR AMOUNTS OVER \$1,000,000 WITHOUT APPROVAL OF THE BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM.

THIS AGREEMENT IS NOT EFFECTIVE FOR AMOUNTS OVER \$1,000,000 WITHOUT APPROVAL OF THE BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM.

This Agreement is executed on behalf of University and Contractor, to be effective as of the Effective Date.

CONTRACTOR

By: _____

Name: _____

Title: _____

Date Signed: _____

UNIVERSITY

By: _____

Name: _____

Title: _____

Date Signed: _____

Attached:

EXHIBIT A- Prices for Sale and Purchase of Beverages

EXHIBIT B- Products, Units Sales Prices and Royalty Percentages

EXHIBIT C- HUB Subcontracting Plan

EXHIBIT F- Scope of Work

SAMPLE ONLY

EXHIBIT A

PRICES FOR SALE AND PURCHASE OF BEVERAGES

PLEASE SEE SECTION 6 OF THE RFP

SAMPLE ONLY

EXHIBIT B

PRODUCTS, UNIT SALES PRICES AND ROYALTY PERCENTAGES

PLEASE SEE SECTION 6 OF THE RFP

SAMPLE ONLY

EXHIBIT C

HUB SUBCONTRACTING PLAN

CONTRACTOR'S HUB SUBCONTRACTING PLAN SUBMITTED WITH ITS PROPSAL
WILL BE ATTACHED AS EXHIBIT D.

SAMPLE ONLY

EXHIBIT D

PRICING AND ROYALTIES

PLEASE SEE SECTION 6 OF THE RFP

EXHIBIT E

SCOPE OF WORK

5.3 Scope of Work

Contractor will provide the following services to University:

(1) high quality beverage services and concessionaire equipment on University's campus at prices that are competitive with local vendors in the Odessa, TX area; (2) a variety of beverage offerings; (unless exempted by University – see **Section 5.5** below); (3) prompt and professional operation of the beverage machines and concessionaire equipment and all related equipment; and (4) adequate financial compensation to University in consideration for exclusive rights to operate pouring beverage services, provide beverages for dining and concessions operations, (5) sponsorship, advertising rights and promotional payments at certain athletic facilities on University's campus and (6) facility and capital improvement considerations.

University expects that the products will include: all carbonated and noncarbonated nonalcoholic beverages, including but not limited to soft drinks, flavored and unflavored packaged waters, fruit juices, fruit juice-containing or flavored drinks, fruit punches, teas, energy drinks, "aides" and sports drinks. "**Beverage**" or "**Beverages**" means all nonalcoholic beverages of any kind, but will not include milk, flavored milk, fresh-brewed coffee and fresh-brewed tea products, hot chocolate, tap water or unbranded fresh-squeezed juices.

Contractor's duties will include delivery and set-up, cleaning, maintenance, and repairs of all necessary equipment.

University will furnish all utilities necessary for operation of the pouring services at no charge to Contractor.

All beverage and dispensing equipment installed must be of a size specified by University and must be a new or relatively recent model.

All products vended will conform in all respects to local, state, and federal laws and regulations relating to the standards of food and drink and will be suitable for human consumption in all respects.

Contractor will cooperate with University concerning student participation in the selection and monitoring of food and beverage service vendors, as required by Section 51.945, *Texas Education Code*. Cooperation will include the participation in periodic meetings or forums to provide University students with a reasonable opportunity to discuss Contractor's performance of its services.

Contractor will enter into an agreement with University to provide beverage services and concessionaire equipment and dispensing machines on University's campus in accordance with the requirements and specifications of this RFP, including, without limitation, the terms and conditions of the Sample Agreement (ref. **Appendix Two**).

5.3.1 Specific Duties Required

5.3.1.1 Fountain Machine Services.

Contractor will provide for the installation and operation of beverage fountain machines on University's campus, including the delivery and set-up, cleaning, maintenance, repair and operation of equipment and all necessary related equipment, in accordance with the terms and conditions in the Sample Agreement (ref. **Appendix Two**) and under the following conditions:

- 5.3.1.1.1 Contractor's equipment will be located only in areas identified in this RFP or otherwise designated in writing by University.
- 5.3.1.1.2 Contractor will be responsible for all costs related to producing, delivering, setting-up and maintaining Contractor's fountain machines and other equipment.
- 5.3.1.1.3 All revenue from the fountain machines operated by Contractor will be collected on a regular schedule and, at a minimum of every two weeks.
- 5.3.1.1.4 Contractor will be liable for all damages resulting from acts of negligence and willful misconduct by Contractor, or its employees or agents and for injuries to customers caused by Contractor's equipment.
- 5.3.1.1.5 Contractor will be required to perform in accordance with the standards stated in its proposal concerning response to maintenance calls on its equipment.
- 5.3.1.1.6 All activities of Contractor and its employees and agents conducted on the campus of University must comply with all applicable federal, state, and local laws and ordinances, the Rules and Regulations of the Board of Regents of The University of Texas System, and any applicable institutional rules of The University of Texas Permian Basin.
- 5.3.1.1.7 Contractor will be responsible for timely payment of all taxes and licensing fees associated with installation and operation of fountain machines and the revenue generated from those operations.
- 5.3.1.1.8 Contractor will have regular access to its equipment located on the University campus during the University's regular operating

hours only and for only the buildings where Contractor's equipment is located. If Contractor requires access at other times, Contractor must obtain admittance by permission from an authorized officer of the University and purchase parking permits as necessary.

5.3.2 Refunds to Customers.

As specified in the Sample Agreement (ref. Section 2.10 of **Appendix Two**), Contractor will provide two cash fund to University in the amount of \$50.00 each for use in making refund payments to customers at campus locations specified by University. Contractor will make additional funds available to University as required to maintain the refund payment fund at a level adequate to pay refunds to customers promptly. Contractor will supply a written form, satisfactory to University, for use a voucher for submitting refund claims. The refund claim form will include space for claimants to identify (1) the type of machine, (2) the machine location, (3) the amount of the loss, (4) a description of how the loss occurred, (5) the date of the loss, and (6) the claimant's signature. Contractor will absorb all money shortages that may develop due to theft, burglary, inoperable vending machines, or other cause.

5.3.3 Performance Bond.

As specified in the Agreement (ref. Section 5.4 of **Appendix Nine**), the Contractor will execute and keep in force for the term of the Agreement a bond issued by a surety company authorized to do business in the State of Texas for 100% of the project total conditioned on the full and faithful performance of the obligations, agreements, and covenants of the Agreement.

5.4 Exclusivity Privileges

The Agreement, if any, resulting from this RFP will convey to the Contractor (a) an exclusive privilege to be the sole operator of beverage vending machines on the University's main campus, and (b) exclusive privilege to supply both pre-packaged and dispensed beverages at University-sponsored events (subject to exclusions listed below):

Contractor's exclusivity privileges under the Agreement **will NOT include** the following:

- 5.4.1 Privilege of supplying beverages at University-sponsored special events and tournaments that are held at locations off-campus and involve co-sponsorship by other local organizations and business entities. Such events will be designated at the sole discretion of the University.
- 5.4.2 Privilege of supplying beverages for NCAA-sponsored events conducted on University campus, except with the prior consent of the NCAA.

Contractor's exclusivity privileges under the Agreement **will include** the following:

- 5.4.3 Privilege of operating and supplying all beverage vending machines located on the main campus and all satellite campuses of University, except those specifically excluded above.
- 5.4.4 Privilege of supplying beverages required by all of University's on-campus food concession operators. Contractor will supply ALL beverages sold by such operators, including those

beverages dispensed from drink machines or sold from coolers or beverage displays by those operators on campus.

- 5.4.5 Privilege of supplying beverages for sale at on-campus University Athletic events, competitions, and tournaments, subject to the exceptions stated in the Agreement.
- 5.4.6 Privilege of supplying beverages for sale at on-campus non-athletic University-sponsored events at which University specifies that beverages will be sold.
- 5.4.7 Privilege of displaying prominent signage in all University Athletic venues including the Basin Sports Complex, Central and Midland Campuses any additional locations requested by The University of Texas Permian Basin
- 5.4.8 Reports, Contractor must present to University at the time of contracting a financial statement prepared by a certified public accountant licensed in Texas. Contractor must provide a payment statement monthly supported by quarterly sales tax reports for each quarter. Contractor's payment reports must be certified on an annual basis by a certified public accountant licensed in Texas, as required by *Texas Government Code*, Chapter 2252, Subchapter C, and must be provided to University each year on or before the 15th day of each month.

5.5 Exception of Exclusivity for Certain Locations

- 5.5.1 **Special Promotional Events:** During the Term, temporary signage (e.g., banners, table covers, posters, electronic messages on existing videoboard(s),) for Competitive Products may be displayed on the Campus during Special Promotional Events provided, however, that (i) Sponsor's marketing, advertising, and promotional rights under this Agreement will not otherwise be permanently affected during any such Special Promotional Event(s), (ii) Competitive Products will not be sold, distributed, dispensed, sampled, served, or otherwise made available during any such Special Promotional Event(s), (iii) Blockage of any signage Sponsor may have on the Campus may occur temporarily only during any such Special Promotional Event(s), as well as for incidental Blockage due to the construction and/or placement of a person, stage or other structure necessary to and actually used during the Special Promotional Event(s), and (iv) all temporary signage for Competitive Products will be promptly removed from the Campus upon the conclusion of the Special Promotional Event(s).
- 5.5.2 **NCAA and Intercollegiate Athletic Conference Promotional Programs:** The University reserves the right to participate in promotional programs involving intercollegiate athletic conference corporate partners (which may include a Competitive Product) when the program includes all institutions in the Athletic Conference. In the event that the University participates in a NCAA championship event, the University reserves the right to participate in promotional programs coordinated by corporate partners of the NCAA in which all event participants are featured (and which may include a Competitive Product). In the event that the University participates in a Bowl Championship Series or other post-season bowl game, tournament or other similar event, the University reserves the right to participate in a promotion with the corporate partners of said event if all event participants are involved (and which may include a Competitive Product).