

## FOOD AND BEVERAGE SERVICE AGREEMENT

This Food and Beverage Service Agreement (this "**Agreement**") is made as of the \_\_\_\_ day of September 2022 by and between Ovations Food Services of Texas, LLC, a limited liability company organized under the laws of the State of Texas ("**OVG**"), and The City of Corpus Christi, Texas, a Texas home-rule municipality ("**Owner**").

### RECITALS

WHEREAS, Owner owns a sports and entertainment complex consisting of a 2,500-seat auditorium, a 76,500-sq. foot convention center, and a 10,000-seat multi-purpose arena, currently known as the American Bank Center located at 1901 N. Shoreline Blvd., Corpus Christi, Texas (the "**Facility**"); and

WHEREAS, OVG is in the business of managing and operating food, beverage, novelty and merchandise concessions services and catering services at indoor and outdoor single and multi-purpose facilities; and

WHEREAS, Owner desires to grant to OVG the exclusive right and privilege to manage and operate the food, beverage, novelty and merchandise concessions services and catering services at the Facility, except that OVG agrees to allow outside food and beverage sales for the previously booked events as shown in the attached Exhibit B, (the "**Excluded Events**");

WHEREAS, OVG desires to accept the right and privilege to exclusively manage and operate such concessions and catering services at the Facility, subject to the terms and conditions contained herein; and

WHEREAS, Owner and OVG entered into a Food and Beverage Agreement dated June 14, 2022, for the short term provision of food and beverage services at the Facility (the "**Short Term Agreement**"), and beginning on the Effective Date, this Agreement shall supersede and replace the Short Term Agreement in respect of OVG's provision of food and beverage services as set forth herein.

NOW THEREFORE, for and in consideration of the foregoing, the mutual covenants and promises hereinafter set forth and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties, intending to be legally bound, hereby agree as follows:

### ARTICLE 1 DEFINITIONS

Capitalized terms used in this Agreement and not defined elsewhere in this Agreement shall have the following meanings:

**"Agreement"** This Food and Beverage Agreement, together with all exhibits attached hereto, each of which are incorporated herein as an integral part of this Agreement.

**"Buyout Amount"** shall have the meaning given to such term in Section 3.2 of this Agreement.

**“Capital Improvements”** Permanent improvements to the Facility, including any construction as defined by Texas Labor Code §406.096 and replacement of permanent structures and their components. Capital Improvements include any work that requires the use of an architect or an engineer in accordance with the Texas Occupations Code. This definition includes the remodel, replacement, or alteration of permanent improvements at the Facility, and any repair of any piece of equipment, structure, or other item that costs in excess of \$50,000, but does not include routine, day-to-day maintenance and repair.

**“Food and Beverage Areas”** shall have the meaning given to such term in Section 2.1(b) hereof.

**“Food and Beverage Fee”** shall mean 7% of Gross Receipts.

**“Food and Beverage Services”** shall mean the business of managing and providing (or causing to be provided) food, food products, candy, non-alcoholic and alcoholic beverages, novelties, souvenirs and merchandise in the concession areas, seating bowl, picnic areas, luxury boxes, restaurants, lounges, banquet rooms, catering areas, and all other areas of the Facility. For the sake of clarity, Food and Beverage Services shall include all food and beverage concessions and catering services at the Facility.

**“General Manager”** shall have the meaning given to such term in Section 5.1(b) hereof.

**“Gross Receipts”** shall mean the total of all amounts received by OVG from the operation of the Food and Beverage Services, including the management charge, any service charges and gratuities, whether such amounts are evidenced by cash, check, credit, charge account, exchange or otherwise, less only retail sales taxes and other direct taxes imposed upon receipts collected from the consumer. Gross Receipts shall include amounts received from the sale of goods at the Facility as well as amounts received from orders taken or received at the Facility (regardless of where such orders are filled).

**“Improvements and Equipment”** shall have the meaning given to such term in Section 3.2 of this Agreement.

**“Initial Investment”** shall have the meaning given to such term in Section 3.2 of this Agreement.

**“Losses”** shall have the meaning given to such term in Section 10.1 hereof.

**Management-Level Employees:** The General Manager, Head/Executive Chef (or employees with different titles performing similar functions), and any department head employed by OVG to perform managerial Food and Beverage Services at the Facility.

**“Merchandise”** shall mean all non-edible souvenirs, novelties, articles of clothing and publications sold at the Facility.

**“Monthly Accounting Period”** shall mean each approximately 4 week period during the Term ending on the last Wednesday of each month.

**“Operating Account”** shall have the meaning given to such term in Section 9.1 hereof.

**“Operating Expenses”** shall mean the cost to OVG of the sale of food and beverage and Merchandise items and the performance of OVG’s duties under this Agreement, including without limitation (i) personnel and payroll costs, including applicable taxes, benefits, relocation costs, severance, and bonuses with respect to all on-site management, administrative staff, independent contractors, consultants and all other on-site employees, , (ii) product costs, (iii) cost of permits and licenses, including without limitation the cost of securing all alcohol permits and licenses, (iv) all taxes paid by OVG hereunder on the sale of concession items, as described in Section 9.3 below, (v) equipment rental costs, (vi) cost of equipment repairs and maintenance performed by OVG or a contractor of OVG, (vii) insurance costs to the extent they are required by OVG specifically for this Agreement (which shall be allocated by OVG to the Facility in a reasonable and equitable fashion) and bonding costs, including, without limitation, the cost of premiums, and the cost of any coverage deductibles, coinsurance penalties or self-insured retentions, (viii) office supplies, printing costs and postage, (ix) telephone charges, (x) cost of utilities, (xi) cost of cleaning supplies and pest control, (xii) laundry costs, (xiii) armored car and other vehicle expenses, (xiv) legal, accounting, accounts payable processing and audit fees, (xv) cost of serveware and paper supplies, (xvi) trash removal costs, (xvii) dues, subscriptions and membership fees, (xviii) travel, food and lodging costs, (xix) security expenses, (xx) computer costs, (xxi) uniform costs, (xxii) advertising and marketing costs, (xxiii) cost of ice, (xxiv) payments to sub-contractors engaged by OVG hereunder, (xxv) decorating costs, (xxvi) bank charges, (xxvii) temporary housing and relocation expense (xxviii) employment agency fees, (xxix) bad debt expense, (xxx) PCI-DSS compliance costs; (xxxi) time and labor management system costs, and (xxxii) any other miscellaneous expenses related to the foregoing. The parties specifically acknowledge that the term “Operating Expenses” shall not include capital expenditures, debt service, and any expenses incurred in order to provide an initial inventory of food and beverage serveware and/or equipment, the cost and expenses for which shall be borne solely by Owner (or if paid for by OVG, shall be reimbursed to OVG by Owner upon submission of invoice or otherwise as specifically set forth herein).

**“Renewal Investment”** shall have the meaning given to such term in Section 3.2 of this Agreement.

**“Shortfall”** shall have the meaning given to such term in Section 9.2 hereof.

**“Short Term Agreement”** shall have the meaning given to such term in the recitals of this Agreement.

**“Term”** shall have the meaning given to such term in Section 4.1 hereof.

**“Upgrades”** New, updated equipment and replacement of any non-permanent improvements to the Facility. This definition does not include routine, day-to-day maintenance and repair.

## ARTICLE 2 GRANT OF RIGHTS; SCOPE OF SERVICES

### Section 2.1     Concession Services.

(a) Owner hereby grants to OVG the exclusive right and privilege to provide Food and Beverage Services at the Facility, except that OVG agrees to allow outside food and beverage sales for Excluded Events. OVG covenants and agrees to exercise the full Food and Beverage Services rights granted hereunder at all events in the Facility in such manner and with such number of personnel as are necessary to provide adequate supplies and service of the food, beverage and other products described herein to patrons of the Facility. Owner agrees that it will not, without the prior written consent of OVG, grant to any party other than OVG or a sub-contractor mutually agreed by Owner and OVG, the right to perform any Food and Beverage Services at or upon the Facility. The exclusive right to provide Food and Beverage services shall not prevent or prohibit an exhibitor from distributing without charge a sample portion of the type of food or Merchandise manufactured and distributed in the normal course of the exhibitor's business, or from selling food items intended for consumption off the premises.

(b) In connection with the foregoing grant of exclusive rights to provide services, Owner hereby grants to OVG the exclusive use the concession stands, souvenir and gift shops, novelty stands, customer serving locations, food preparation areas, vendor commissaries, kitchen and warehouse facilities, and other areas related to the foregoing and/or reasonably required by OVG to perform the Food and Beverage Services at the Facility ("**Food and Beverage Areas**"), together with the improvements, equipment, and personal property upon or within such areas, along with the non-exclusive right to use the concourses, spectator seating areas, parking areas, common areas, loading areas, walkways, and other public areas of the Facility, solely for the purpose of providing Food and Beverage Services. OVG agrees to operate the Food and Beverage Areas with respect to all events at the Facility, during hours as may be reasonably requested by Owner to adequately meet public demand.

(c) Prior to the Effective Date, Operator shall, at no cost to OVG, provide for use by OVG a turnkey operation for the provision of Food and Beverage Services, equipped with equipment, smallwares, and other tools of the trade reasonably required by OVG to provide the Food and Beverage Services at the level required by this Agreement.

Section 2.2     Performance Measures. In performing its obligations hereunder, OVG agrees to be evaluated based on the performance measures 1 through 3 listed in Exhibit A (the "**Performance Measures**"). OVG agrees that, during each Operating Year, it will use commercially reasonable efforts, subject in all instances to Owner's continued performance hereunder (including, without limitation, funding a mutually agreed Operating Budget, each Operating Year) to meet the Performance Measures as mutually agreed by Owner and OVG during the budget process each Operating Year. For purposes of Performance Measures 1 and 3, OVG will be considered to have met that goal if it achieves at least 80% of the stated number or dollar amount. If OVG fails to meet at least two of the three Performance Measures in any Operating Year, and such failure is not due in whole or in part to Force Majeure or any other cause reasonably outside of OVG's control, the Owner may provide written notice to OVG outlining with reasonable detail and substantiation any missed Performance Measures within 90 days of the end of such Operating Year (a "**Notice of Underperformance**") with such notice to include an outline of how OVG

may improve its performance under such Performance Measures during the following Operating Year. If, during such following Operating Year OVG again fails to meet at least two of the three Performance Measures, the City may terminate this Agreement in accordance with and subject to Section 4.2(d) below.

### **ARTICLE 3**

#### **COMPENSATION; PAYMENT TERMS; INVESTMENT; BUDGET**

##### **Section 3.1     Fees.**

(a)     As consideration for the performance by OVG of its duties hereunder, OVG shall be entitled to the Food and Beverage Fee, which amount shall be paid to OVG on a monthly basis as set forth in Section 3.1(b) below.

(b)     On or about the 20<sup>th</sup> day following the end of each Monthly Accounting Period, OVG shall remit to Owner the Gross Receipts remaining following deduction by OVG of Operating Expenses, the Food and Beverage Fee, any Shortfall advanced by OVG pursuant to Section 9.2 below, and any other amounts due to OVG hereunder) from such Monthly Accounting Period, together with the statements described in Section 9.3 below.

Section 3.2     OVG Investment. During the Initial Term, OVG will make a capital contribution of up to US \$600,000 (the “**Initial Investment**”) in connection with various improvements and investments at the Facility as mutually agreed by the parties, including without limitation, for equipment and other related tangible personal property (collectively, the “**Improvements and Equipment**”). If this Agreement is extended for the Renewal Term, OVG will, during the Renewal Term, invest an additional total of up to US \$250,000 (the “**Renewal Investment**” and, as and if applicable, together with the Initial Investment the “**Investment**”) in connection with various additional Improvements and Equipment at the Facility, as mutually agreed by the parties. The Initial Investment shall be amortized on a straight-line, monthly basis over 120-month period commencing on the Effective Date. The Renewal Investment (if applicable) shall be amortized on a straight-line, monthly basis over a 60-month period beginning on the first date of the Renewal Term. All Improvements and Equipment, including any replacements or substitutions thereof, shall be owned by OVG until payment of the Buyout Amount (as described below), and Owner agrees to execute such documents as OVG shall reasonably request evidencing OVG’s ownership interest in such Improvements and Equipment, including financing statements, so long as all documents are in a form reasonably approved by the Owner’s City Attorney. For the sake of clarity, nothing in this paragraph shall be construed as requiring OVG to replace any equipment or other personal property at its own cost.

Section 3.3     Buyout Amount. Within 30 days of the expiration of early termination of this Agreement (for any reason whatsoever, including without limitation if due to a breach, default, or bankruptcy event by or affecting OVG), Owner shall immediately pay to OVG the unamortized amount of the Investment (the “**Buyout Amount**”). In the event that Owner fails to pay OVG the Buyout Amount when due, the Buyout Amount shall accrue interest in accordance with the Texas Prompt Payment Act. In such event, and without limiting any other rights or remedies available to it, OVG may reenter the Facility, with or without process of law, and remove in a commercially reasonable manner any portion of the Improvements and Equipment and retain or dispose of such Improvements and Equipment as OVG sees fit. In such event, OVG shall retain its right to receive the Buyout Amount, but any proceeds from

the sale of such Improvements and Equipment, less the cost to OVG of removing, storing, and selling such Improvements and Equipment, shall reduce the Buyout Amount. Owner covenants and agrees not to permit any liens or encumbrances to attach to the Improvements and Equipment purchased with the Investment, and hereby waives any right to attach any claim, lien, or attachment to such Improvements and Equipment. Once the Investment is fully amortized or the Buyout Amount is paid in full to OVG, title to the Improvements and Equipment will become vested in Owner, and OVG agrees to execute all necessary documents to evidence same. The rights of OVG set forth in this Section shall be in addition to any other rights of OVG at law or in equity.

Section 3.4      Procurement Process. Once identified, the specific Improvements and Equipment shall be set forth in a writing to be signed by the parties and updated by the parties from time to time as necessary to reflect any replacements or substitutions thereof. The parties shall mutually agree on a procurement process in connection with the specific Improvements and Equipment to be purchased and Owner represents that such process and OVG's disbursement of the Investment in compliance therewith will comply with all applicable laws, rules, and regulations, including without limitation any state-specific procurement guidelines applicable to Owner.

Section 3.5      Establishment of Operating Budget. Attached hereto as Exhibit D is the Operating Budget for the first Operating Year, which Operating Budget is hereby approved by both OVG and Owner. OVG agrees that it will work with the Owner in setting the Operating Budget each year and that, at least 120 days prior to the commencement of each subsequent Operating Year in respect of such year, it will prepare and submit to Owner its proposed Operating Budget for such Operating Year, except that, so long as OVG is in communication with the Owner regarding its Operating Budget, it will not be in default under this Agreement if it does not provide a full and complete proposed Operating Budget by the deadline. Each annual Operating Budget shall include OVG's good faith projection of Gross Receipts and Operating Expenses, presented on a monthly and annual basis, for the upcoming Operating Year. Owner agrees to provide OVG with all information in its possession necessary to enable OVG to prepare each Operating Budget.

Section 3.6      Approval of Operating Budget. Each annual Operating Budget shall be subject to the review and approval of Owner's City Council and/or the Corpus Christi Business and Job Development Board (the "Type A Board") in its sole discretion. In order for Owner to fully evaluate and analyze such budgets or any other request by OVG relating to income and expenses, OVG agrees to provide to Owner such reasonable financial information relating to the Facility as may be requested by Owner from time to time. If events occur during any Operating Year that could not reasonably be contemplated at the time the corresponding Operating Budget was prepared, OVG may submit an amendment to such budget for review and approval by Owner's City Council and/or the Type A Board. Owner agrees to present the requested items to the City Council and Type A Board, but cannot guarantee approval of the funding by either governing body. If Owner's City Council or Type A Board fails to approve any annual Operating Budget (or any proposed amendment thereto), then, to the extent such governing body provided reasoning for the action, Owner shall promptly provide OVG the specific reasons therefor and its suggested modifications to OVG's proposed Operating Budget or amendment in order to make it acceptable. OVG will not be responsible for any failure to perform to the extent such failure is directly related to a failure of the Owner's City Council or Type A Board to approve a requested amendment to the Operating Budget.

Section 3.7 Adherence to Operating Budget. OVG shall use all reasonable efforts to manage and operate the Facility in accordance with the Operating Budget. However, Owner acknowledges that notwithstanding OVG's experience and expertise in relation to the operation of facilities similar to the Facility, the projections contained in the Operating Budget are subject to and may be affected by changes in financial, economic and other conditions and circumstances beyond OVG's control, and that OVG shall have no liability if the numbers within the Operating Budget are not achieved. Any variances that require appropriation of additional funds require a budget amendment, which could require approval of both the Owner's City Council and the Type A Board; provided Owner will promptly present such requested appropriations to the City Council and/or the Type A Board, and ensure that to the extent modifications are needed, it shall attempt to identify available funding to accommodate such modifications. OVG will not be responsible for any failure to perform to the extent such failure is directly related to a failure of the Owner's City Council or Type A Board to approve a requested amendment to the Operating Budget.

#### **ARTICLE 4 TERM; TERMINATION**

Section 4.1 Term; Renewal. The term of this Agreement shall begin effective October 1, 2022 ("**Effective Date**") and conclude on September 30, 2027 (the "**Initial Term**"). Owner shall have the right to extend this Agreement for an additional 5-year period beginning October 1, 2027 and ending September 30, 2032 (the "**Renewal Term**") by providing written notice to OVG on or before March 1, 2027. The Initial Term, together with the Renewal Term (as applicable) shall be referred to herein as the "**Term.**"

Section 4.2 Termination. This Agreement may be terminated:

(a) by either party upon 30 days written notice, if the other party fails to perform or comply with any of the material terms, covenants, agreements or conditions hereof, and such failure is not cured during such 30 day notification period, provided, however, if such failure cannot reasonably be cured within such 30 day period, then a longer period of time shall be afforded to cure such breach, up to a total of 90 days, provided that the party in default is diligently seeking a cure and the non-defaulting party is not irreparably harmed by the extension of the cure period;

(b) by either party immediately by written notice upon the other party being judged bankrupt or insolvent, or if any receiver or trustee of all or any part of the business property of the other party shall be appointed and shall not be discharged within 120 days after appointment, or if either party shall make an assignment of its property for the benefit of creditors or shall file a voluntary petition in bankruptcy or insolvency, or shall apply for bankruptcy under the bankruptcy or insolvency Laws now in force or hereinafter enacted, Federal, State or otherwise, or if such petition shall be filed against either party and shall not be dismissed within 120 days after such filing;

(c) by Owner upon 30 days written notice, and subject to payment of the Buyout Amount prior to the effective date of termination, if during any fiscal year, Owner fails to allocate appropriate funds sufficient to fund the full Operating Budget for the following fiscal year; provided if such funds are

subsequently allocated within 60 days following such termination, then such termination right shall be voided, and the Agreement shall remain in full force and effect;

(d) by Owner upon 120 days written notice, and subject to payment of the Buyout Amount prior to the effective date of termination if OVG fails to meet the requisite Performance Measures during at least 2 consecutive Operating Years, as set forth in Section 2.2; provided that Owner must exercise such right within 6 months of the conclusion of the second Operating Year or shall be deemed to have waived such right; or

(e) as otherwise specifically provided for herein.

4.3 Effect of Termination. Upon expiration or termination of this Agreement, for any reason, the following shall apply:

(a) OVG shall promptly discontinue the performance of all services hereunder, and make available to Owner all data, electronic files, documents, procedures, reports, estimates, summaries, and other such information and materials with respect to the Facility as may have been accumulated by OVG in performing its obligations hereunder, provided that (i) OVG shall own and may retain all employment files/records relating to employees of OVG during the Term, and (ii) OVG may retain copies of all materials pertinent to its operation of the Facility during the Term, such as materials documenting its performance and those relating to claims or potential claims that have been or may be asserted related to OVG's operation of the Facility, including contracts and event incident reports.

(b) Owner shall promptly pay OVG (i) all fees due OVG up to the date of termination or expiration, including the Food and Beverage Fee through the last month in which OVG provides services; and (ii) all Operating Expenses incurred by OVG through the end of the Term that have not previously been paid by Owner or reimbursed to OVG, including the cost of accrued but unused vacation time to the extent due under OVG's policies to any employees whose employment is ceasing with OVG as a result of expiration or termination of this Agreement.

(c) Owner shall reimburse OVG for any actual ordinary and necessary expenses incurred by OVG in withdrawing from the provision of services hereunder following such termination. Such ordinary and necessary expenses shall include, without limitation, the following: (i) to the extent any Management-Level Employee's employment with OVG will cease as a result of the termination or expiration of this Agreement, Owner shall reimburse OVG for any severance paid to such employees, not to exceed 4 months per employee, and (ii) other reasonable costs actually incurred by OVG in withdrawing from the provision of services hereunder. Owner's payment of such expenses will occur only after OVG has provided reasonable evidence of the incurrence of such expenses.

(d) Owner shall pay to OVG, unconditionally and without set-off, the Buyout Amount as further described in Section 3.2.



## ARTICLE 5 PERSONNEL

### Section 5.1     Generally.

(a) OVG shall employ, train and supervise personnel with appropriate qualifications and experience, in sufficient number to provide all the services appropriate for the duties of such party to be performed under this Agreement. All such personnel shall be employees, agents or independent contractors of OVG (or a subsidiary or affiliate thereof), as applicable, and not of Owner. OVG shall select the number, function, qualifications, and compensation, including salary and benefits, of its employees and shall control the terms and conditions of employment relating to such employees. OVG agrees to use reasonable and prudent judgment in the selection and supervision of such personnel, and shall strive to employ persons who are courteous and efficient, and who will not use improper language or act in a loud or boisterous manner while performing duties at the Facility. OVG agrees that it will not discriminate against any employee or applicant for employment for work under this Agreement because of race, religion, color, sex, disability, national origin, ancestry, physical handicap, or age. Except as specifically set forth in Section 5.1(b) below, owner shall have no right to supervise or direct the hiring or firing of any such personnel.

(b) OVG shall employ as part of its personnel at the Facility an individual with managerial experience to serve as a full-time general manager of Food and Beverage Services (“**General Manager**”). Hiring of the General Manager by OVG shall require the prior approval of Owner, which approval shall not be unreasonably withheld or delayed. The General Manager will have general supervisory responsibility for OVG at the Facility and will be responsible for day-to-day operations of the Food and Beverage Services, supervision of OVG employees, and management and coordination of all activities associated with the Food and Beverage Services.

(c) OVG shall ensure that its non-management employees performing the duties of OVG at the Facility shall be neatly attired in clean, commercially-attractive uniforms which shall be subject to the approval of Owner. OVG shall train all such employees so that they are aware of the high standards for cleanliness, courtesy and service required by OVG.

(d) All personnel engaged by OVG to work at the Facility shall be admitted to the Facility without payment of any admission fee, at an entrance to be designated by Owner. All such personnel shall have the right to park at the Facility without charge in areas designated by Owner.

Section 5.2     Non-Solicitation. During the Term and for a period of one (1) year after the end of the Term, Owner and its affiliates shall not, without the prior written consent of OVG, solicit for employment by Owner, or encourage to cease rendering services to OVG, any Management-Level Employee of OVG with whom Owner has had dealings by virtue of the engagement of OVG hereunder. In the event of a breach of this provision, OVG will be entitled (in addition to any other rights and remedies which OVG may have at law or in equity, including money damages) to equitable relief, including an injunction to enjoin and restrain Owner from continuing such breach. Notwithstanding the foregoing, the Parties acknowledge and agree that this Agreement will not prohibit non-targeted solicitations through advertising or other publications of general circulation and employment resulting thereof.

**ARTICLE 6**  
**INVENTORY; EQUIPMENT; SPONSORSHIPS; UTILITIES; PCI COMPLIANCE**

Section 6.1 Inventory. OVG shall order, stock, prepare, pay for and sell quality food, beverage and other concession and catering products. Consumables shall be first quality, wholesome and pure, and all food and beverage and Merchandise on hand shall be stored and handled with due regard for sanitation. OVG shall have sufficient amounts of product prepared and an inventory on the premises so as not to run out of product during an event at the Facility. For the avoidance of doubt, OVG may retain any and all benefit derived from any rebates associated with its purchase of food, beverage and other concession and catering products during the Term. During all events at the Facility, OVG shall post signs and provide menus displaying the prices of items offered for sale. Such signs and menus shall be subject to the reasonable approval of Owner. At the end of the Term, Owner shall purchase (or shall require the successor food and beverage company at the Facility to purchase) from OVG any remaining food and beverage, and consumable goods (e.g., cups, napkins, etc.), inventory on hand at the Facility, for the price paid by OVG for such inventory, as evidence by written invoices or receipts. Notwithstanding the foregoing, Owner shall not be obligated to purchase (or to have the successor food and beverage manager purchase) any such inventory that is branded with the OVG name or logo, or to the extent purchase thereof would be in violation of applicable law. Additionally, the City or its successor food and beverage manager will not be required to purchase any inventory or other items that were purchased as Operating Expenses or paid for out of the Operating Account.

Section 6.2 Brands/Prices. The brands and price of all products sold by OVG shall be determined by OVG, subject to the reasonable approval of Owner. Provided price, quality, market acceptability, service and other terms are generally competitive, OVG agrees to give preference to and feature at the Facility suppliers of products designated by Owner who purchase advertising from Owner (or, if applicable, an agent or licensee of Owner) so long as the giving of such preference does not violate applicable laws, rules or regulations and the features of such product and terms of such transaction are reasonable (as determined by OVG in its sole discretion).

Section 6.3 Equipment. OVG shall have the right to use during the Term, all equipment owned or controlled by Owner existing within the Food and Beverage Areas as of the date hereof and/or subsequently added by Owner or OVG to such areas during the Term. Owner represents that all such equipment is in good working order (unless otherwise disclosed by Owner), and OVG agrees to exercise reasonable care when using such equipment, so as to avoid any damage to such equipment. Any equipment, whether purchased by Owner, OVG, or an agent of the Owner will remain the property of Owner.

Section 6.4 Utilities. Owner, or Owner's agent managing the Facility, shall provide to OVG all utilities necessary for OVG's operation of the Food and Beverage Services (e.g., electricity, gas and water).

Section 6.5 PCI Data Security Standards Compliance. For Payment Card Industry Data Security Standards ("PCI-DSS") compliance purposes, Owner will provide, on a segmented network, an appropriate number of wired data connections to the Internet for OVG's Point of Sale ("POS") devices.

Owner shall be responsible for the security of its network, including, without limitation, applicable PCI-DSS compliance. To the extent provided for in the Investment, OVG shall be responsible for procuring and installing POS payment systems that are compliant with the latest PCI-DSS requirements. A POS payment system may include, but is not limited to, POS terminals, payment card swipers, on-premise servers, and additional network hardware. OVG shall be responsible for the PCI-DSS compliance of its POS systems. OVG will work with the City's IT Department to confirm that all equipment and software complies with the City's security requirements.

Section 6.6 Food Voucher. OVG agrees to use best efforts to provide a \$500 food voucher for every event the Owner attends at the Facility for use within a designated premium seating location as agreed between the parties. The parties agree that the cost of food and beverage subject to the voucher will be an Operating Expense only at cost, with no markup.

## **ARTICLE 7**

### **MAINTENANCE; CAPITAL IMPROVEMENTS; SALE OF PROPERTY**

#### **Section 7.1 Maintenance; Sanitation.**

(a) OVG shall perform minor, routine servicing on all fixtures, equipment, furniture and other property installed, furnished or supplied by or for the benefit of OVG so that such items are kept in good order and repair, except that for any repair that has an aggregate cost in excess of \$1,200, if funding is not available in the current Operating Budget, OVG may seek funding from Owner and will not be obligated to complete such work unless and until such funding is made available to OVG, and any failure of OVG to perform as a result of thereof shall not be deemed a default hereunder. OVG shall further make all necessary repairs thereto, provided that any Capital Improvements and Upgrades will be handled in accordance with Section 7.2, 7.3, and 7.4.

(b) OVG will maintain the Food and Beverage Areas in a clean and neat condition by cleaning, on a day-to-day basis, the interiors of the Food and Beverage Areas and bars, concession stands and vending stations under its control at the Facility (and within a 5-foot perimeter of such stands and stations). OVG shall further clean, as needed, the walls, windows, ceilings, light fixtures and equipment located within the Food and Beverage Areas. OVG shall deposit in receptacles provided by Owner's management agent for the Facility all waste, garbage and refuse which shall accumulate in the Food and Beverage Areas. OVG shall also provide extermination services as may be necessary for the Food and Beverage Areas.

(c) OVG shall comply with and observe all federal, state and local laws, ordinances and regulations as to sanitation and the purity of food and beverages or otherwise relating to its operations under this Agreement.

Section 7.2 Schedule of Capital Improvements and Upgrades. OVG shall provide to Owner a schedule of proposed Capital Improvements and Upgrades (including any Improvements and Equipment to be purchased with the Investment) to be made at the Facility by February 1 of each year, for the

purpose of allowing Owner to consider such projects and to prepare and update a long-range Capital Improvement budget.

Section 7.3     Responsibility for Capital Improvements. Owner shall be solely responsible for all Capital Improvements at the Facility; provided, however, Owner shall be under no obligation to make any Capital Improvements proposed by OVG, and provided further that OVG shall have no liability for any claims, costs or damages arising out of a failure by Owner to make any Capital Improvements. OVG may not make any Capital Improvements to the building without specific authorization from the Owner.

Section 7.4     Responsibility for Upgrades. In accordance with the terms of the Owner's separate management agreement with its management contractor, Owner and/or Owner's management contractor will have the responsibility to complete Upgrades at the Facility, provided, however, that neither Owner or Owner's management contractor shall be under obligation to complete or procure any Upgrades proposed by OVG, and provided further that OVG shall have no liability for any claims, costs or damages arising out of a failure by Owner and/or Owner's management contractor to complete or procure any Upgrades. OVG may not make or procure any Upgrades without specific authorization from the Owner.

Section 7.5     Sale of Obsolete or Unusable Equipment and Machinery. If OVG determines that any equipment, machinery, or other item of Owner's property at the Facility is no longer of use to the Facility, OVG shall provide a memo to the Owner detailing the desire to sell the equipment, machinery, or other item, stating the apparent value of the equipment, machinery, or other item, and detailing the proposed method of sale. In all events, OVG must adopt a method of sale that is consistent with City of Corpus Christi Code of Ordinances §17-6. OVG may not sell any of Owner's property without explicit permission of the Owner. In selling property, OVG will use its best efforts to get the best price for the property. Proceeds from any sale of Owner's property must be deposited in the Operating Account. Revenue from sale of Owner's property will not be included in the calculation of Gross Receipts for purposes of calculating the Food and Beverage Fee, except that any revenue in excess of fair market value (with such value to be mutually agreed by the parties) shall be included in Gross Receipts for purposes of the Food and Beverage Fee calculation.

## **ARTICLE 8**

### **LICENSES; ALCOHOLIC BEVERAGES; TAXES**

Section 8.1     Permits and Licenses. OVG shall use reasonable commercial efforts to secure and maintain throughout the Term all licenses and permits necessary for the operation of the Food and Beverage Services, including those required for the sale of alcoholic beverages at the Facility. Owner shall cooperate with OVG in connection with filing applications for, and securing and maintaining in good standing, any and all licenses and permits and renewals thereof needed by OVG to fulfill its obligations hereunder.

Section 8.2     Alcoholic Beverages. In connection with the sale of alcoholic beverages hereunder by OVG, OVG agrees to strictly comply with the laws of the state where the Facility is located regarding the sale of such beverages to minors. OVG agrees to adopt an identification policy to verify the

age of potential purchasers of alcoholic beverages. OVG further agrees that it will endeavor not to sell alcoholic beverages to customers who are visibly intoxicated. OVG will institute and conduct training programs for OVG employees at the Facility on the proper standards to use to avoid selling alcoholic beverages to customers who are or who appear to be intoxicated.

Section 8.3 Taxes. OVG shall collect and pay all taxes imposed upon the sale of concession items hereunder, as required by Federal, State or local law. OVG shall be responsible for and pay all social security, unemployment insurance, old age retirement and other federal and state taxes that are measured by the wages, salaries, or other remuneration paid to persons employed by OVG. Owner shall be responsible for any and all possessory interest or leasehold taxes which may be levied or are in effect during the Term, which shall be treated as an Operating Expense, and which will be paid by OVG as directed by Owner.

## **ARTICLE 9**

### **OPERATING ACCOUNT; REPORTING; TEXAS PUBLIC INFORMATION ACT**

Section 9.1 Establishment of Operating Account. OVG shall establish and maintain, in its name, separate commercial bank account(s) for the Facility ("**Operating Account**") and shall deposit all Gross Receipts in such account.

Section 9.2 Payment of Expenses; Shortfall. OVG shall pay all Operating Expenses from the Gross Receipts generated under this Agreement. In the event at any time during the Term, Gross Receipts are insufficient to cover agreed and approved Operating Expenses consistent with the annually-approved Operating Budget as may be amended (a "**Shortfall**"), OVG may at its option and in its sole discretion from time to time, either (i) advance its own funds to cover such Shortfall, in which case OVG shall be reimbursed from the first dollars otherwise due and owing to the Owner under Section 3.1 of this Agreement, or (ii) notify Owner of such Shortfall in which case Owner shall be required, within 30 days of receiving such notice, to pay to OVG sufficient funds to cover such Shortfall until it is anticipated that no further Shortfall shall exist, so long as Owner has funds available and appropriated to be used for this purpose. Any advances made by OVG that remain outstanding at the end of the Term shall be paid to OVG within 5 days of the end of the Term and, if not paid when due, shall accrue interest in accordance with the Texas Prompt Payment Act. OVG shall be entitled to offset any amounts owing to it by Owner hereunder against any amounts otherwise payable to Owner under this Agreement. For the avoidance of doubt, the parties agree that any Shortfalls (otherwise known as net losses) shall be the responsibility of Owner and not OVG.

Section 9.3 Books and Records. OVG agrees to maintain separate and independent books and records, in accordance with generally accepted accounting principles, relating to its operations in connection with its management of the Food and Beverage Services, as applicable. Such books and records shall contain documentation regarding the deposit of all Gross Receipts in the Operating Account, and the incurrence by OVG of all Operating Expenses, including copies of invoices of all products and materials purchased by OVG hereunder, and copies of payroll summaries, deposit receipts and bank statements relating to the Operating Account. Owner or its designee shall have the right to inspect such books and records from time to time upon reasonable notice during the ordinary business hours of OVG.

Section 9.4 Financial Reports. OVG shall provide to Owner, within twenty (20) days following the end of each Monthly Accounting Period, financial reports regarding its provision of Food and Beverage Services during such Monthly Accounting Period, including a statement showing Gross Receipts and Operating Expenses for the applicable period. Additionally, OVG shall provide to Owner, within 24 hours following each event at the Facility, a daily Gross Receipts report in a form to be mutually agreed upon.

Section 9.5 Audit. OVG shall cooperate with the Owner's management contractor in the preparation of the portion of its annual audit related to the Facility and provide access to any and all financial records necessary to finalize that audit. Not more than once each calendar year, Owner shall have the right, at its sole cost, to engage an independent third party to audit the books and records of OVG for the preceding 12-month period, for the purpose of confirming that the amounts remitted by OVG to Owner hereunder are the proper amounts due Owner. Such audit shall be completed by Owner or its representatives at OVG's corporate office, on reasonable advance notice to OVG, and on dates and times mutually agreed to by the parties. In the event such audit reveals any underpayment to Owner, OVG shall promptly pay to Owner the amount of such deficiency. If such audit reveals any overpayment to Owner, Owner shall promptly pay to OVG the amount of such overpayment

Section 9.6 Texas Public Information Act. OVG acknowledges that, under current law, it is subject to the Texas Public Information Act, Chapter 552, Texas Government Code (the "**Open Records Act**"). Specifically, OVG understands that the requirements of Subchapter J, Chapter 552, Government Code, apply to this Agreement and agrees that the Agreement can be terminated if OVG knowingly or intentionally fails to comply with a requirement of that subchapter. If OVG receives a request under the Open Records Act for any information pertaining to the Facility or Owner, in connection with this Agreement or the services to be provided hereunder (including, without limitation, with respect to any personnel files or the management by OVG of their accounts and accounting and legal services or in connection with any of the food and beverage operations of the Facility), prior to releasing any information, OVG shall notify Owner of such request in writing within 5 business days of receipt of such request, in which case it shall promptly and timely inform Owner if any of the requested information might constitute confidential, proprietary or trade secret information of Owner and/or OVG which may be exempted from disclosure under the Open Records Act, and further shall notify Owner in writing whether OVG intends to request a determination from the Texas Attorney General as to whether the requested information must be disclosed pursuant to the Open Records Act. If OVG decides to seek an open records determination from the Texas Attorney General as to whether the requested information is excepted from public disclosure, OVG must seek an Attorney General decision ("**Open Records Determination**") to the extent and within the deadlines required by law. OVG must also identify any possible third party whose privacy or property interests may be involved, and they will, to the extent OVG determines appropriate, timely furnish to any such third party any statutory notice required by the Open Records Act. Further, should Owner receive a request for disclosure of information in its possession related to OVG or its services under this Agreement pursuant to the Open Records Act, Owner will promptly provide OVG notice of such request in accordance with Section 552.305 of the Texas Government Code so that OVG may avail itself of any opportunities to establish reasons why the information should be withheld prior to disclosing such information. The burden of establishing the applicability of exceptions to the disclosure of confidential information under the Open Records Act resides with OVG. Should OVG be unable to establish

a valid exception from disclosure or exclusion from the Open Records Act, then Owner may release the information, solely to the extent necessary to comply with the Open Records Act.

Section 9.6 Attendance at Open Meetings. OVG acknowledges that Owner is subject to the Texas Open Meetings Act and that the funding for activities at the Facility may come from multiple different sources that require OVG's attendance at public meetings. Upon Owner's request, and provided that such request is made with reasonable notice, OVG agrees that its Management-Level Employees will attend meetings of the City Council, the Corpus Christi Business and Job Development Board (the "Type A Board"), and other City boards and commissions to discuss activities at the Facility and make budget or funding requests as reasonably requested and noticed in advance; provided that to the extent any Management-Level Employee is unavailable for such meetings the parties shall agree on such other employees to attend. Further, OVG agrees not to engage with a quorum of any City governing body, including the City Council and the Type A Board, outside of any properly posted open meeting. In the event that OVG is contacted by a City Council member or a member of the Type A Board or any other City Board regarding the terms of this Agreement or requesting a formal meeting, OVG will direct the person to contact the Owner.

## **ARTICLE 10 INDEMNIFICATION**

Section 10.1 Indemnification by OVG. OVG agrees to defend, indemnify and hold harmless Owner, its parents, subsidiaries and affiliates, and their respective successors and assigns, and all agents, employees, directors, officers and partners of the foregoing, against any third-party claims, causes of action, costs, expenses (including reasonable attorneys' fees) liabilities, or damages (collectively, "Losses") suffered by such parties, arising out of or in connection with any (i) negligent act or omission, or intentional misconduct, on the part of OVG or any of its employees or agents in the performance of its obligations under this Agreement, or (ii) breach by OVG of any of its representations, covenants or agreements made herein; provided that the foregoing indemnity shall not apply for any Losses arising out of or relating to Owner's negligence, gross negligence, or willful misconduct, violation of any law, rules or regulation, or a condition of the Facility not solely caused by OVG. This indemnification specifically applies to liability related to the sale of alcohol which is otherwise covered by the foregoing.

Section 10.2 Conditions to Indemnification. The party seeking indemnification shall give prompt written notice to the other party of each third-party claim giving rise to an indemnification obligation under this Agreement (and in any event not more than 10 business days after any third-party litigation is commenced asserting the claim giving rise to an indemnification obligation hereunder), specifying the amount and nature of any such claim. The party seeking indemnification shall not settle or compromise any claim by a third party for which it is entitled to indemnification hereunder without the prior written consent of the indemnifying party, which consent shall not be unreasonably withheld. The party seeking indemnification shall cooperate in the indemnifying party's defense of such claim at the sole cost of the indemnifying party.

Section 10.3 Limitation on Indemnity. To the extent that OVG maintains the required insurance for the term of the Agreement and the insurance complies with all of the City's requirements in Section 11.1 and Exhibit C, OVG's liability under the indemnification is limited to the amount of the aggregate insurance coverage under that applicable insurance policy.

Section 10.4 Legal Costs. Notwithstanding the other provisions of this Agreement, if legal costs associated with operation of the Food and Beverage Services are being incurred by OVG (but excluding any incurred in connection with a third party claims for which Owner is claiming indemnity by OVG or incurred in connection with any claims by OVG against the Owner) such costs shall be considered an Operating Expense; provided that to the extent any such legal costs are associated with a third party claim relating to the Food and Beverage Services, such legal costs shall be subject to Owner's prior approval, not to be unreasonably withheld.

Section 10.5 Survival. The obligations of the parties contained in this Article 10 shall survive the termination or expiration of this Agreement and continue on indefinitely.

## **ARTICLE 11 INSURANCE**

Section 11.1 Insurance. Insurance requirements are as stated in Exhibit C, the content of which is incorporated by reference into this Agreement as if fully set out here in its entirety. Notwithstanding anything to the contrary herein, the cost of all insurance required specifically for this Agreement shall be an Operating Expense including, without limitation, the cost of premiums, and the cost of any coverage deductibles, coinsurance penalties or self-insured retentions.

## **ARTICLE 12 MISCELLANEOUS**

Section 12.1 Authorization.

(a) OVG represents and warrants that it has the full right and legal authority to enter into this Agreement and to grant the rights and perform the obligations of OVG herein, and that, except as otherwise set forth herein, no third-party consent or approval is required to grant such rights or perform such obligations hereunder.

(b) Owner represents and warrants that it is the owner of the Facility, and that it has the full right and legal authority to enter into this Agreement and to grant the rights and perform the obligations of Owner herein, and that no other third-party consent or approval is required to grant such rights or perform such obligations hereunder.

Section 12.2 Force Majeure. In the event that a party is prevented or delayed in the performance of any of its obligations under this Agreement (not including any payment obligation hereunder) due to circumstances beyond its control, including but not limited to, (a) fire, earthquake,



hurricane, wind, flood, act of God, riot, or civil commotion occurring at the Facility, or (b) any law, ordinance, rule, regulation, or order of any public or military authority stemming from the existence of economic or energy controls, hostilities, war, or governmental law and regulation, or (c) labor dispute which results in a strike or work stoppage affecting the Facility or services described in this Agreement (each, a “*force majeure*” event) , then, performance hereunder by the affected party shall be excused for the period of delay. If either party’s obligation is affected by any of the causes of force majeure, the party affected shall promptly notify the other party in writing, giving full particulars of the force majeure as soon as possible after the occurrence of the cause or causes relied upon.

Section 12.3 Assignment. Neither party may assign this Agreement without the prior written consent of the other, which consent shall not be unreasonably withheld or delayed; however, OVG or Owner may, without the prior written consent of the other, assign this Agreement and/or its rights and obligations hereunder (i) to any person or entity who succeeds (whether by merger, consolidation or sale of assets or equity or the like) to all or substantially all of the business and properties of such party, or (ii) in connection with a corporate restructuring, to any person who is an owner, parent, subsidiary or affiliate of such party, and who carries on the business of such party in substantially the same manner. Any assignee of OVG or Owner pursuant to the preceding sentence must agree in writing to assume the assignor’s obligations hereunder, in whole or in part (as applicable), in order for such assignment to become effective. This Agreement shall be binding on the parties’ successors and permitted assigns.

Section 12.4 Notices. All notices required or permitted to be given pursuant to this Agreement shall be in writing and delivered personally or sent by registered or certified mail, return receipt requested, or by generally recognized, prepaid, overnight air courier services, to the address and individual set forth below. All such notices to either party shall be deemed to have been provided when delivered, if delivered personally, three (3) days after mailed, if sent by registered or certified mail, or the next business day, if sent by generally recognized, prepaid, overnight air courier services.

If to Owner:

City of Corpus Christi  
1201 Leopard St  
Corpus Christi, TX 78401  
Attn: Assistant City Manager

If to OVG:

OVG Hospitality  
150 Rouse Blvd  
Philadelphia, PA 19112  
Attn: President

With a copy to:

City of Corpus Christi  
1201 Leopard St.  
Corpus Christi, TX 78401  
Attn: City Attorney

With a copy to:

OVG Hospitality  
150 Rouse Blvd  
Philadelphia, PA 19112  
Attn: Legal Department

The designation of the individuals to be so notified and the addresses of such parties set forth above may be changed from time to time by written notice to the other party in the manner set forth above.

Section 12.5 Severability. If a court of competent jurisdiction or an arbitrator determines that any term of this Agreement is invalid or unenforceable to any extent under applicable law, the remainder of this Agreement (and the application of this Agreement to other circumstances) shall not be affected thereby, and each remaining term shall be valid and enforceable to the fullest extent permitted by law.

Section 12.6 Prior Agreements. This Agreement (including the exhibit(s) attached hereto) constitutes the entire agreement of the parties with respect to the subject matter hereof, and supersedes all prior and contemporaneous negotiations, correspondence, conversations, agreements, and understandings concerning the subject matter hereof. Accordingly, the parties agree that no deviation from the terms hereof shall be predicated upon any prior representations, agreements or understandings, whether oral or written.

Section 12.7 Governing Law. The Agreement is entered into under and pursuant to and is to be construed and enforceable in accordance with, the laws of the State of Texas, without regard to its conflict of laws principles and such form and venue for any disputes is the appropriate district, county, or justice court in and for Nueces County, Texas.

Section 12.8 Amendments. Neither this Agreement nor any of its terms may be changed or modified, waived, or terminated (unless as otherwise provided hereunder) except by an instrument in writing signed by an authorized representative of the party against whom the enforcement of the change, waiver, or termination is sought.

Section 12.9 Waiver; Remedies. No failure or delay by a party hereto to insist on the strict performance of any term of this Agreement, or to exercise any right or remedy consequent to a breach thereof, shall constitute a waiver of any breach or any subsequent breach of such term. No waiver of any breach hereunder shall affect or alter the remaining terms of this Agreement, but each and every term of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent breach thereof. The remedies provided in this Agreement are cumulative and not exclusive of the remedies provided by law or in equity.

Section 12.10 Relationship of Parties. OVG is engaged by Owner hereunder as an independent contractor to perform the services described herein, and nothing contained in this Agreement shall be deemed to create, whether express or implied, a partnership, joint venture, employment, or agency relationship between Owner and OVG, except as otherwise expressly set forth in this Agreement.

Section 12.11 Counterparts; Faxed or Emailed Signatures. This Agreement may be executed in counterparts, each of which shall constitute an original, and all of which together shall constitute one and the same document. This Agreement may be executed by the parties and transmitted by facsimile or electronic mail, and if so executed and transmitted, shall be effective as if the parties had delivered an executed original of this Agreement.

## ARTICLE 13 FEDERAL TAX REQUIREMENTS

Section 13.1 Compliance with Federal Tax Requirements. OVG understands that, as of the Effective Date, all or a portion of the Facility has been financed on a tax-exempt basis (such financing, the “**Tax-Exempt Bonds**”) and, as a result, until such time as the Facility is no longer financed under such Tax-Exempt Bonds, Owner must comply with the Internal Revenue Code of 1986, as amended, and certain treasury regulations promulgated thereunder (collectively, the “**Code**”), with respect to the use of the Facility by OVG or any other service provider that may be engaged by Owner or OVG with respect to all or a portion of the Facility. OVG agrees to cooperate with Owner in complying with the requirements of the Code with respect to private business use of property financed with the Tax-Exempt Bonds at the Facility and maintaining the safe harbor conditions provided in Revenue Procedure 2017-13 (as modified, amplified and/or superseded, the “**Rev. Proc.**”), and acknowledges that, as of the Effective Date, the Rev. Proc. includes the following safe harbor conditions that ensure that the Tax-Exempt Bonds will maintain their tax-exempt status:

(a) No third-party service provider shall take a tax position with respect to the Facility or any services agreement that is inconsistent with being a service provider to Owner that provides services at the Facility, including, without limitation, taking any depreciation or amortization, investment tax credit or deduction for any payment as rent with respect to the Facility.

(b) In connection with any third-party service providers services at the Facility and as described in the Rev. Proc., Owner will approve: (i) each disposition of any portion of the Facility, (ii) rates charged for the use of all or any portion of the Facility, and (iii) and the general nature and type of use of the Facility by OVG.

(c) Owner bears risk of loss of the Facility.

(d) No third-party service provider shall have any role or relationship with Owner that, in effect, substantially limits Owner’s ability to exercise its rights under any management agreement.

OVG agrees to cooperate in good faith with Owner in order to ensure that this Agreement and OVG’s services hereunder comply the requirements of the Code with respect to private business use of property financed with the Tax-Exempt Bonds at the Facility and maintaining the safe harbor conditions provided in the Rev. Proc (collectively, the “**Private Use Requirements**”). If Owner reasonably determines that any of OVG’s services or actions hereunder violate the Private Use Requirements, OVG shall reasonably cooperate (without expenditure of material funds) to cease such services or actions following notice thereof from Owner. If following a good faith negotiation period of not less than 90 days (a “**Negotiation Period**”), Owner continues to reasonably determine that OVG’s services or actions hereunder violate the Private Use Requirements notwithstanding OVG’s reasonable cooperation efforts, Owner may terminate this Agreement in its sole discretion and without penalty for a period of 30 days following the end of the Negotiation Period; provided Owner shall be responsible for all costs of OVG in connection therewith as set forth in Section 4.3(c). If Owner does not terminate this Agreement during such 30-day period, such termination right shall expire.

If Owner reasonably determines that the terms of this Agreement violate the Private Use Requirements, the parties shall proceed in accordance with Section 13.2 below as if Changes (as defined below) had occurred.

Section 13.2 Future Changes in Federal Tax Requirements. OVG agrees to negotiate in good faith with Owner to amend this Agreement from time to time (an “**Amendment**”) to address any interpretations, modifications or other changes in federal tax requirements regarding tax-exempt bonds, which may include any modifications and amplifications of the Rev. Proc. or requirements superseding the Rev. Proc. taking place after the Effective Date (collectively, “**Changes**”) to ensure that the tax-exempt status of the Tax-Exempt Bonds utilized to finance all or a portion of the Facility is maintained. The parties acknowledge and agree that the terms of an Amendment shall be limited to modifying this Agreement in order to (i) maintain the tax-exempt status of the Tax-Exempt Bonds notwithstanding such Changes, and (ii) ensuring that the financial arrangements under this Agreement are materially maintained. Notwithstanding anything herein to the contrary, if following a Negotiation Period this Agreement is unable to be amended to the satisfaction of Owner with respect to clause (i) above, or OVG with respect to clause (ii) above, then this Agreement may be terminated by the applicable dissatisfied party in its sole discretion and without penalty for a period of 30 days following the end of the Negotiation Period; provided Owner shall be responsible for all costs of OVG in connection therewith as set forth in Section 4.3(c). If neither party terminates this Agreement during such 30-day period, such termination right shall expire.

Section 13.3 Remedies. Owner acknowledges and agrees that OVG is not responsible for determining whether this Agreement or the services hereunder comply with the Code or the Rev. Proc. or otherwise with the requirements of the Tax-Exempt Bonds, and is relying on Owner’s good-faith, reasonable determinations as to such matters. As such, OVG shall bear no responsibility with respect to maintaining the tax-exempt status of the Tax-Exempt Bonds, under no circumstances shall OVG be liable for any failure by Owner to maintain the tax-exempt status of the Tax-Exempt Bonds, notwithstanding anything to the contrary in this Agreement (including in connection with OVG’s indemnification obligations set forth in Article 10), and Owner’s sole remedies under this Agreement in relation to the Tax-Exempt Bonds or pursuant to this Section 13 shall be termination of the Agreement as set forth in Sections 13.1 and 13.2 above.

Section 13.4 Severability. If at any time during the Term, Owner elects to re-finance the Facility with bonds that are not tax-exempt and therefore no longer subject to the Private Use Requirements, then the foregoing Article 13 shall be deemed deleted from this Agreement after the date any Tax-Exempt Bonds are no longer outstanding on the Facility.

IN WITNESS WHEREOF, each party hereto has caused this Food and Beverage Agreement to be executed on behalf of such party by an authorized representative as of the date first set forth above.

*[Signature Page Follows]*

THE CITY OF CORPUS CHRISTI,  
a Texas home-rule municipality

OVATIONS FOOD SERVICES OF TEXAS, LLC

By: Ovations Food Services, L.P. its sole member

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Name: Brian Rothenberg  
Title: President, Ovations Food Services, LLC,  
general partner of Ovations Food Services, L.P.

**Exhibit A**  
**Performance Measures**

1. Customer Satisfaction Scores. OVG shall demonstrate quality service to customers of the Facility on evaluations related to food and beverage service at the Facility, acknowledging that customer satisfaction in food and beverage servicing is difficult to reasonably measure. Owner and OVG shall cooperate in determining the form and components of the food and beverage service evaluations and the process for administering such service evaluations. No more than 60 days following the start of each Operating Year, the parties shall mutually agree in writing (email shall be sufficient) upon the Customer Satisfaction Score Goal for the Operating Year.

2. Maintenance Implementation. OVG shall demonstrate quality maintenance of the Food and Beverage Areas and equipment therein, normal wear and tear excepted. OVG shall demonstrate compliance with the provision of this Agreement based upon an annual review and quarterly walkthroughs by the Contract Administrator, inspections of the Food and Beverage Areas by the health department, and an annual report from OVG on the maintenance and repairs of the Food and Beverage Areas. If there is a dispute as to whether OVG provided quality maintenance and operation of the Food and Beverage Areas sufficient to meet this Performance Measure, then the City may hire a mutually agreeable third party to conduct a review of the Food and Beverage Areas (which shall be paid for by the City).

3. Revenue. OVG shall work to increase the food and beverage revenue at the Facility (both in the Arena and the Convention Center/Auditorium). No more than 60 days following the start of each Operating Year, the parties shall mutually agree in writing (email shall be sufficient) upon the Gross Receipts goal for the Operating Year.

In the event the parties cannot mutually agree in good faith on a Performance Measure for #1 or #3 above for any Operating Year then the Performance Measure shall remain the same from the previous Operating Year.

**Exhibit B**  
**Excluded Events**

| <b>Event Name</b>        | <b>Date</b>   | <b>Event Client</b>               |
|--------------------------|---|-----------------------------------|
| Buc Days                 | Multiple Dates and Events for the term of the Agreement | Buccaneer Commission              |
| New Wave Xpo Comic Con   | 10/21/22 – 10/22/22                                     | New Wave Xpo                      |
| Feast of Sharing         | 12/22/22 – 12/24/22                                     | HEB Grocery Company               |
| Anime Corpus Christi     | 2/23/23 – 2/26/23                                       | High Tide Events LLC              |
| TEMA Conference          | 4/25/23 – 4/28/23                                       | Texas Energy Managers Association |
| DPS Challenge            | 6/26/23 – 6/27/23                                       | Texas Trucking Association        |
| Coastal Bend Creator Con | 8/18/23 – 8/19/23                                       | Coastal Bender Creator Con        |

**Exhibit C**  
**Insurance Requirements**

**OVG'S LIABILITY INSURANCE**

- A. OVG must not commence work under this Agreement until all insurance required has been obtained and such insurance has been approved by the Owner. OVG must not allow any subcontractor to commence work until all similar insurance required of any subcontractor has been obtained.
- B. OVG must furnish to the Owner's Risk Manager and Contract Administer one (1) copy of Certificates of Insurance (COI) with applicable policy endorsements showing the following minimum coverage by an insurance company(s) acceptable to the Owner's Risk Manager. The Owner must be listed as additional insureds on all applicable policies, except for Workers' Compensation and Crime coverage, **by endorsement**, or by coverage through a blanket additional insured endorsement offering additional insured coverage as required by written contract. A waiver of subrogation is required on all applicable policies. **Endorsements**, where blanket coverage is not provided, must be provided with COI. Project name and or number must be listed in Description Box of COI.

| TYPE OF INSURANCE  |   |
|--|---|
| Commercial General Liability Including:<br>1. Commercial Broad Form<br>2. Premises – Operations<br>3. Products/ Completed Operations<br>4. Contractual Liability<br>5. Independent Contractors<br>6. Personal Injury- Advertising Injury | \$5,000,000 Per Occurrence<br>\$5,000,000 Aggregate   |
| Auto Liability Including:<br>1. Owned<br>2. Hired and Non-Owned<br>3. Rented/Leased  | \$1,000,000 Combined Single Limit   |
| Worker's Compensation<br>(All State's Endorsement if OVG is not domiciled in Texas)<br><br>Employer's Liability  | Statutory and complies with Part II of this Exhibit C.<br><br>\$500,000/\$500,000/\$500,000 |
| Crime/Employee Dishonesty<br><br>Contractor shall name the City of   | \$1,000,000 Per Occurrence  |



|  |  |
|--|--|
| Corpus Christi, Texas as Loss Payee.   |  |
| Liquor Liability   | \$1,000,000 Combined Single Limit<br>\$5,000,000 Aggregate |
| OVG and Any Subcontractors Are Responsible for All Damage to Their Own Equipment or Property |  |

- C. In the event of accidents of any kind related to this agreement, OVG must furnish the Risk Manager with copies of all reports of any accidents within 10 days of the accident.

II. ADDITIONAL REQUIREMENTS

- A. Applicable for paid employees, OVG must obtain workers' compensation coverage through a licensed insurance company. The coverage must be written on a policy and endorsements approved by the Texas Department of Insurance. The workers' compensation coverage provided must be in an amount sufficient to assure that all workers' compensation obligations incurred by OVG will be promptly met.
- B. OVG shall obtain and maintain in full force and effect for the duration of this Contract, and any extension hereof, as an Operating Expense, insurance coverage written on an occurrence basis, by companies authorized and admitted to do business in the State of Texas and with an A.M. Best's rating of no less than A- VII.
- C. OVG shall be required to submit a copy of the replacement certificate of insurance to Owner at the address provided below within 10 days of the requested change. OVG shall pay any costs incurred resulting from said changes. All notices under this Article shall be given to Owner at the following address:

City of Corpus Christi  
Attn: Risk Manager  
P.O. Box 9277  
Corpus Christi, TX 78469-9277

- D. **OVG agrees that with respect to the above required insurance, General and Liquor liability, Auto Liability, and Excess Liability, are to contain or be endorsed to contain blanket additional insured status to Owner as required by written contract the following required provisions:**
- List the Owner and its officers, officials, employees, volunteers, and elected representatives as additional insureds by endorsement, as respects operations, completed operation and activities of, or on behalf of, the named insured performed under contract with the Owner;

- Workers' compensation and employers' liability policies will provide a waiver of subrogation in favor of the Owner; and
  - Provide 30 calendar days advance written notice directly to Owner of any, cancellation, non-renewal, reduction of insured limits below the minimums required herein, or termination in coverage and not less than 10 calendar days advance written notice for nonpayment of premium.
- E. Within 5 calendar days of a cancellation, non-renewal, material change or termination of coverage, OVG shall provide a replacement Certificate of Insurance and applicable endorsements to Owner. Owner shall have the option to suspend OVG's performance should there be a lapse in coverage at any time during this contract. Failure to provide and to maintain the required insurance shall constitute a material breach of this contract.
- F. In addition to any other remedies the Owner may have upon OVG's failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, the Owner shall have the right to order OVG to withhold any payment(s) if any, which become due to OVG hereunder until OVG demonstrates compliance with the requirements hereof.
- G. Nothing herein contained shall be construed as limiting in any way the extent to which OVG may be held responsible for payments of damages to persons or property resulting from OVG's or its subcontractor's performance of the work covered under this agreement.
- H. It is agreed that Manager's insurance shall be deemed primary and non-contributory with respect to any insurance or self-insurance carried by the City of Corpus Christi for liability arising out of operations under this agreement.
- I. It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this agreement.

#### 2021 Insurance Requirements

Ins. Req. Exhibit

Contract for Management of American Bank Center

4/6/2022 – ALA Legal Dept.

**Exhibit D**  
**Operating Budget**

| City of Corpus Christi - Budget<br>Visitors Facilities Fund 4710 |  |                        |                                   |                                  |                          |                        |
|--|--|------------------------|-----------------------------------|----------------------------------|--------------------------|------------------------|
| Account Number   | Account Description                    | Actuals<br>2020 - 2021 | Original<br>Budget<br>2021 - 2022 | Amended<br>Budget<br>2021 - 2022 | Estimated<br>2021 - 2022 | Proposed<br>2022 -2023 |
| <b>Beginning Balance</b>   |  | \$ 8,832,813           | \$ 3,053,775                      | \$ 10,660,901                    | \$ 10,660,901            | \$ 6,910,209           |
| <b>Revenues:</b>   |  |                        |                                   |                                  |                          |                        |
| 302350   | Special events permits                 | \$ 5,000               | \$ 12,750                         | \$ 12,750                        | \$ 13,700                | \$ 9,500               |
| 311500   | Multicultural Center rentals           | 32,510                 | 32,845                            | 32,845                           | 17,540                   | 16,765                 |
| 311510   | Heritage Park maint contract           | 40,646                 | 22,200                            | 22,200                           | 39,954                   | 42,876                 |
| 311600   | Operating Revenues - Convention Center | 2,479,722              | 2,542,684                         | 2,542,684                        | 2,120,639                | 2,460,950              |
| 311760   | Operating Revenues - Arena             | 1,714,500              | 2,002,388                         | 2,002,388                        | 1,800,000                | 2,699,581              |
| 312000   | Pavilion rentals                       | 11,465                 | 2,500                             | 2,500                            | 6,550                    | 2,500                  |
| 360030   | HOT Reimbursements                     | 2,499,996              | 3,000,000                         | 3,000,000                        | 3,000,000                | 1,000,000              |
| 340900   | Interest on investments                | 17,421                 | 5,829                             | 5,829                            | 25,727                   | 137,109                |
| 340995   | Net Inc/Dec in FV of Investments       | (1,982)                | -                                 | -                                | -                        | -                      |
| 341000   | Interest earned other than Investments | 459                    | 2,990                             | 2,990                            | 1,236                    | -                      |
| 344000   | Miscellaneous                          | 55                     | -                                 | -                                | -                        | -                      |
| <b>TOTAL REVENUES</b>  |  | \$ 6,799,791           | \$ 7,624,186                      | \$ 7,624,186                     | \$ 7,025,345             | \$ 6,369,281           |
| <b>Interfund Charges:</b>  |  |                        |                                   |                                  |                          |                        |
| 352000   | Transfer from Arena/General Fund       | \$ 6,680,812           | \$ 3,723,705                      | \$ 3,723,705                     | \$ 3,723,705             | \$ 1,043,886           |
| <b>TOTAL INTERFUND CHARGES</b>                                   |  | \$ 6,680,812           | \$ 3,723,705                      | \$ 3,723,705                     | \$ 3,723,705             | \$ 1,043,886           |
| <b>Total Funds Available</b>                                     |  | \$ 22,313,416          | \$ 14,401,666                     | \$ 22,008,792                    | \$ 21,409,951            | \$ 14,323,376          |
| <b>Expenditures:</b>   |  |                        |                                   |                                  |                          |                        |
| 12930  | Bayfront Arts & Sciences Park          | 748,432                | 978,272                           | 1,068,839                        | 916,412                  | -                      |
| 13600  | Convention Ctr/Auditorium Ops          | 4,090,895              | 4,665,963                         | 4,805,228                        | 4,243,639                | 4,122,591              |
| 13610  | Arena Capital                          | 3,571,172              | 2,282,085                         | 8,333,187                        | 6,051,102                | 4,231,908              |
| 13615  | Arena-Marketing/Co-Promotion           | 130,720                | 650,000                           | 1,540,000                        | 100,000                  | 650,000                |
| 13616  | Convention Ctr Content Development     | 20,000                 | -                                 | 125,000                          | -                        | -                      |
| 13625  | Arena Operations                       | 2,510,674              | 2,697,641                         | 2,711,145                        | 2,513,401                | 3,449,479              |
| 13710  | Cultural Facility Maintenance          | 164,132                | 180,420                           | 304,878                          | 275,738                  | 170,647                |
| 50010  | Uncollectible accounts                 | 3,673                  | -                                 | -                                | -                        | -                      |
| 60010  | Transfer to General Fund               | 229,781                | 216,198                           | 216,198                          | 216,198                  | 236,736                |
| 60130  | Transfer to Debt Service               | 183,036                | 183,252                           | 183,252                          | 183,252                  | 182,100                |
| 10830  | Cash Management                        | -                      | 2,990                             | 2,990                            | -                        | -                      |
| <b>TOTAL EXPENDITURES</b>  |  | \$ 11,652,515          | \$ 11,856,821                     | \$ 19,290,717                    | \$ 14,499,742            | \$ 13,043,461          |
| <b>Gross Ending Balance</b>                                      |  | \$ 10,660,901          | \$ 2,544,845                      | \$ 2,718,075                     | \$ 6,910,209             | \$ 1,279,916           |
| Encumbrances   |  | 8,358,226              |                                   |                                  |                          |                        |
| <b>Net Ending Balance</b>  |  | \$ 2,302,675           | \$ 2,544,845                      | \$ 2,718,075                     | \$ 6,910,209             | \$ 1,279,916           |

Note: Funding source is from Convention and Arena operations, as well as transfers from Arena Fund and HOT Fund.

**City of Corpus Christi - Budget**  
**Hotel Occupancy Tax Fund 1030**

| Account Number               | Account Description                                | Actuals<br>2020 - 2021 | Original<br>Budget<br>2021 - 2022 | Amended<br>Budget<br>2021 - 2022 | Estimated<br>2021 - 2022 | Proposed<br>2022 - 2023 |
|------------------------------|--|------------------------|-----------------------------------|----------------------------------|--------------------------|-------------------------|
| <b>Beginning Balance</b>     |  | \$ 2,280,777           | \$ 1,938,977                      | \$ 5,702,259                     | \$ 5,702,259             | \$ 4,517,197            |
| <b>Revenues:</b>             |  |                        |                                   |                                  |                          |                         |
| 300500                       | Hotel occupancy tax                                | \$ 13,834,119          | \$ 12,752,148                     | \$ 12,752,148                    | \$ 13,492,631            | \$ 13,491,825           |
| 300501                       | Hotel occ tx-conv exp                              | 3,962,499              | 3,643,289                         | 3,643,289                        | 3,849,504                | 3,854,615               |
| 300530                       | Hotel tax penalties-current yr                     | 45,394                 | 36,000                            | 36,000                           | 70,777                   | 60,072                  |
| 300531                       | Hotel tx penalties CY-conv exp                     | 12,959                 | 10,285                            | 10,285                           | 19,792                   | 17,163                  |
| 340900                       | Interest on Investments                            | 1,568                  | 233                               | 233                              | 13,463                   | 135,256                 |
| 340995                       | Net Inc/Dec in FV of Investment                    | (542)                  | -                                 | -                                | -                        | -                       |
| <b>TOTAL REVENUES</b>        |  | \$ 17,855,997          | \$ 16,441,955                     | \$ 16,441,955                    | \$ 17,446,168            | \$ 17,558,931           |
| <b>Total Funds Available</b> |  | \$ 20,136,774          | \$ 18,380,932                     | \$ 22,144,214                    | \$ 23,148,427            | \$ 22,076,128           |
| <b>Expenditures:</b>         |  |                        |                                   |                                  |                          |                         |
| 11305                        | Administration                                     | \$ 107,784             | \$ 150,000                        | \$ 150,000                       | \$ 136,225               | \$ 150,000              |
| 12930                        | Bayfront Arts & Sciences Park                      | -                      | -                                 | -                                | -                        | 995,537                 |
| 13010                        | Special Events                                     | -                      | -                                 | -                                | -                        | 20,000                  |
| 13012                        | Texas Amateur Athletic Federation - Games of Texas | 300                    | 250,000                           | 250,000                          | 250,000                  | -                       |
| 13013                        | Museum of Science & History                        | 48,899                 | 550,000                           | 550,000                          | 550,000                  | 550,000                 |
| 13492                        | Art Museum of South Tx                             | 350,000                | 350,000                           | 350,000                          | 350,000                  | 375,000                 |
| 13495                        | Botanical Gardens                                  | 40,000                 | 65,000                            | 65,000                           | 65,000                   | 70,000                  |
| 13601                        | Convention Center                                  | 2,499,996              | 3,000,000                         | 3,000,000                        | 3,000,000                | 1,000,000               |
| 13605                        | Convention Ctr. Maint                              | 202,911                | 250,000                           | 347,676                          | 347,676                  | 250,000                 |
| 13606                        | Convention Ctr. Capital                            | 514,812                | 1,275,000                         | 2,573,771                        | 1,298,771                | 3,275,000               |
| 13616                        | Group Incentive Program (GIP)                      | 228,482                | 575,000                           | 730,825                          | 575,000                  | 575,000                 |
| 13616                        | Seawall Programming                                | -                      | 100,000                           | 100,000                          | 50,000                   | 100,000                 |
| 13640                        | Harbor Playhouse                                   | -                      | 15,000                            | 15,000                           | -                        | -                       |
| 13641                        | Heritage Park - Historic Tour Guides               | -                      | 6,000                             | 6,000                            | -                        | -                       |
| 13800                        | Convention promotion                               | 5,299,473              | 5,570,077                         | 5,570,077                        | 6,386,812                | 5,933,586               |
| 13812                        | Texas State Aquarium                               | 300,000                | 300,000                           | 300,000                          | 300,000                  | 310,000                 |
| 13815                        | Arts Grants/Projects                               | 17,950                 | 200,000                           | 200,000                          | 200,000                  | 300,000                 |
| 13816                        | Multicultural Services Support                     | 358,860                | 378,318                           | 378,318                          | 378,318                  | 365,084                 |
| 13817                        | City Wide Wayfinding                               | -                      | 500,000                           | 500,000                          | 50,000                   | 450,000                 |
| 13818                        | North Beach Plaza Historical Signs                 | 6,396                  | 100,000                           | 107,753                          | 92,625                   | -                       |
| 13826                        | Baseball Stadium including Insurance               | -                      | 175,000                           | 350,000                          | 175,000                  | 358,653                 |
| 13835                        | Beach Cleaning(HOT)                                | 1,950,000              | 1,950,000                         | 1,950,000                        | 1,950,000                | 1,950,000               |
| 15100                        | Economic Development                               | -                      | 225,000                           | 225,000                          | 201,000                  | 225,000                 |
| 60010                        | Transfer to General Fund                           | 166,191                | 136,715                           | 136,715                          | 136,715                  | 214,668                 |
| 60130                        | Transfer to Debt Service                           | 2,342,460              | 2,138,088                         | 2,138,088                        | 2,138,088                | 2,097,312               |
| <b>TOTAL EXPENDITURES</b>    |  | \$ 14,434,515          | \$ 18,259,198                     | \$ 19,994,224                    | \$ 18,631,230            | \$ 19,564,840           |
| <b>Gross Ending Balance</b>  |  | \$ 5,702,259           | \$ 121,733                        | \$ 2,149,991                     | \$ 4,517,197             | \$ 2,511,287            |
| Encumbrances                 |  | 3,682,476              | -                                 | -                                | -                        | -                       |
| <b>Net Ending Balance</b>    |  | \$ 2,019,783           | \$ 121,733                        | \$ 2,149,991                     | \$ 4,517,197             | \$ 2,511,287            |

**OVG 360  
AMERICAN BANK CENTER - CUMULATIVE  
PRO FORMA OPERATING STATEMENT**

**Year 1**

|  |        |                        |
|--|--------|------------------------|
| Number of Events                       |        | 261                    |
| Total Attendance                       |        | 415,750                |
| <hr/>                                  |        |                        |
| <u>Arena Event Revenue</u>             | \$     | 2,302,801.00           |
| <u>Convention Center Event Revenue</u> | \$     | 2,304,450.00           |
| <br>Total Event Revenue                | <br>\$ | <br>4,607,252.00       |
| <hr/>                                  |        |                        |
| Total Sponsorships & Premium Seating   | \$     | 446,280.00             |
| <br><u>In Kind Revenue</u>             | <br>\$ | <br>297,000.00         |
| <hr/>                                  |        |                        |
| TOTAL OPERATING REVENUE                | \$     | 5,350,532.00           |
| <hr/>                                  |        |                        |
| <u>Indirect Operating Expenses</u>     |        |                        |
| Total Indirect Operating Expenses      | \$     | 6,091,752.00           |
| <hr/>                                  |        |                        |
| Net Before Management Fee              | \$     | (741,221.00)           |
| <hr/>                                  |        |                        |
| OVG 360 Management Fee                 | \$     | (144,000.00)           |
| OVG Hospitality F&B Annual Fee         | \$     | (240,000.00) *Assumpti |
| <hr/>                                  |        |                        |
| Net After Management Fee               | \$     | (1,125,221.00)         |
| <hr/>                                  |        |                        |