

# Memo



**Date:** July 6, 2010  
**File:** 1140-51  
**To:** City Manager  
**From:** Manager, Property Management  
**Subject:** **MOBILE CONCESSION AGREEMENT - D. THOMPSON**  
Report Prepared by: T. Abrahamson, Property Officer

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## **Recommendation:**

THAT Council approve the City entering into a Concession Agreement, in the form attached to the Report of the Manager, Property Management dated July 6, 2010, between the City of Kelowna and Daniel Thompson to provide exclusive mobile concession services to City-owned property for a term of three (3) years from May 15, 2010 to September 15, 2012 at a rate of \$4,500 per term and renewal of two (2) further one (1) year terms at the sole discretion of the City;

AND THAT the Director, Real Estate & Building Services be authorized to execute the Concession Agreement.

## **Purpose:**

To enter into an exclusive Concession Agreement for mobile concession services at three City of Kelowna beach parks.

## **Background:**

The City entered into a three (3) year contract, with two (2) further one (1) year renewals for mobile concession services in May, 2005. Both renewal terms were granted and the contract expired in September, 2009.

The City issued a new Request for Proposals (RFP) to provide, equip and operate the exclusive mobile concession within the designated parking area at three City of Kelowna beach parks:

- Rotary Park, 3600 block of Lakeshore Road
- Sarsons Beach, end of Sarsons Road
- Strathcona Park, Strathcona Avenue and Abbott Street

Mobile concession services are to be provided during the period May 15<sup>th</sup> to September 15<sup>th</sup> annually for a term of three (3) years. Two (2) further one (1) year renewals will be granted at the sole discretion of the City.

A single bid was received from Daniel Thompson (Dickie Dee/Good Humour Ice Cream) who was subsequently awarded the contract. Mr. Thompson held the previous three (3) year contract.

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**Considerations not applicable to this report:**

Internal Circulations:

Legal/Statutory Authority:

Legal/Statutory Procedural Requirements:

Existing Policy:

Financial/Budgetary Considerations:

Personnel Implications:

Technical Requirements:

External Agency/Public Comments:

Communications Considerations:

Alternate Recommendation:

In light of the above, the Property Management branch of the Real Estate & Building Services department request Council's support of this matter.

Submitted by:



Ron Forbes, Manager  
Property Management

Approved for inclusion:



Doug Gilchrist, Director, Real Estate & Building Services

## REVENUE AGREEMENT Reference Mobile Concession Service Package 2010

BETWEEN:

CITY OF KELOWNA  
1435 Water Street  
Kelowna, BC V1Y 1J4

OF THE FIRST PART

AND:

Daniel Thompson  
846 Burne Avenue,  
Kelowna, BC V1Y 5P7

(the "Contractor")

OF THE SECOND PART

WHEREAS the City desires to appoint the services of the Contractor to provide Mobile Concession services in the City's beach parks during the 2010-2012 seasons.

NOW THEREFORE this Agreement witnesses that the parties hereby covenant and agree with each other as follows:

### **Services**

The Contractor shall provide services for the Works on the terms and conditions set out in the attached.

- Mobile Concessions.

(the "Services")

which together form part of this Agreement and are binding upon the parties.

### **Appendices**

The following attached Appendices are a part of this Agreement:

- Appendix A – Insurance Requirements
- Appendix B – Scope of Services
- Appendix C – Fees – Schedule

If there is any inconsistency or conflict between the provisions of the Agreement and the Appendices, the Agreement shall govern and take precedence over all other Contract Documents.

## (A) AGREEMENT TERMS AND CONDITIONS

### 1.0 Definitions (For purposes of this Agreement, the following terms shall have the meanings set forth below):

**“Agreement”** means the executed agreement between the City and the successful Contractor on the terms and conditions set out in this document;

**“Agreement Administrator”** refers to the individual appointed by the Manager, Purchasing & Stores to administer this Agreement on behalf of the City, and any participating members and other authorized purchasers;

**“City’s Representative”** means the Manager; Purchasing & Stores or her designate;

**“Department”** means the Real Estate & Building Services Department of the City of Kelowna

**“Department Representative”** means the Manager, Property Management, who shall represent all City Departments for the purposes of this Agreement, or, such other person who may subsequently be appointed in writing by the Department Representative and notified to the Contractor;

**“Event of Default”** references Article 6.1(c);

**“Force Majeure”** shall mean failures which occur for reasons beyond the reasonable control of the non-performing party, which include acts of God, acts of any governmental authority, strikes, blacklisting, embargo, and lockouts or other industrial disturbances not related to that Party, acts of the public enemy, wars, blockades, insurrections, explosions, rebellions, revolutions, riots, epidemics, landslides, lightning, earthquakes, storms, subsidence, floods, fires, high waters, washouts, orders or acts of civil or military authorities, or civil disturbances, but it shall not include: any inability to fulfill its financial obligations or financial difficulty or condition, insolvency, or any court protection from creditors or any other occurrence similar to those recited, which is beyond the reasonable control of the non-performing party;

**“G.S.T.” or “H.S.T.”** means any Goods and Services Tax or Harmonized Sales Tax payable in connection with the goods and services pursuant to the Excise Tax Act of Canada and shall also include any sales, value added or like taxes as well as any capital tax adopted by any lawful authority in addition to or in substitution for the Goods and Services Tax;

**“Term”** means the term as specified in Section 5.0;

**“Purchasing”** means the department within City of Kelowna, Finance Department, 1435 Water Street, Kelowna, BC V1Y 1J4, responsible for acquiring equipment, materials, supplies and services;

**“Schedule”** means a schedule to this agreement;

**“Year of the Term”** as used herein shall mean each four-month period **May 15th to September 15th** in the Term.

## **2.0 Interpretations**

(a) "Authorized", "directed", "required", "requested", "approved", "ordered", "sanctioned", and "satisfactory" shall, unless some other meaning is obvious from the context, respectively mean authorized, directed, required, requested, approved, ordered or sanctioned by, or satisfactory to, the City;

(b) "Determination" shall mean the written documentation of a decision of the City's Representative including findings of fact to support a decision. A Determination becomes part of the procurement file to which it pertains;

(c) the Heading and Subheadings inserted in this Agreement are designed for convenience only and do not form a part of this Agreement nor are they intended to interpret, define, or limit the scope, extent, or intent of this Agreement or any provision thereof;

(d) the word "including", when following any general statement, term or matter, shall not be construed to limit such general statement, term or matter to the specific items or matters set forth immediately following such word or to similar items or matters, whether or not non-limiting language (such as "without limitation" or "but not limited to" or words of similar import) is used with reference thereto but rather shall be deemed to refer to all other items or matters that could reasonably fall within the broadest possible scope of such general statement, term or matter;

(e) any reference to a statute shall include and shall be deemed to be a reference to such statute and to the regulations made pursuant thereto, as amended and in force from time to time, and to any statute or regulation that may be passed which has the effect of supplement or superseding the same;

(f) no approval, authorization, sanction or permission required to be provided hereunder shall be unreasonably or arbitrarily withheld or delayed by the party providing same; and

(g) words importing the masculine gender include the feminine or neuter gender and words in the singular include the plural, and vice versa and words importing individuals shall include firms and corporations, and vice versa.

## **3.0 Representations of Contractor**

3.1 The Contractor covenants, represents and warrants to the City that:

(a) Contractor is a corporation, duly organized, validly existing and legally entitled to carry on business in British Columbia and is in good standing with respect to filings of annual reports according to the records of the Registrar of Companies of British Columbia;

(b) Contractor has the power and capacity to enter into this Agreement and to comply with every term and condition of this Agreement;

(c) all necessary proceedings have been taken to authorize Contractor to enter into this Agreement and to execute and deliver this Agreement;

(d) this Agreement has been properly executed by Contractor and is enforceable against Contractor in accordance with its terms;

(e) any statement, representation or information, whether oral or written, made furnished or given by Contractor, its directors, officers or anyone acting on behalf of Contractor, to the City in connection with this Agreement is materially correct and accurate;

(f) Contractor has no knowledge of any fact that materially adversely affects or, so far as it can be foreseen, might materially adversely affect either its financial condition or its ability to fulfill its obligations under this Agreement;

(g) the observance and performance of the terms and conditions of this Agreement will not constitute a breach by it or a default by it under any statute, regulation or bylaw of Canada or of the Province of British Columbia applicable to or binding on, its contracting documents, or any contract or agreement to which it is a party;

(h) Contractor is neither a party to nor threatened with any litigation and has no knowledge of any claims against it that would materially adversely affect its financial condition or its ability to fulfill its obligations under this Agreement;

(i) Contractor has filed all tax, corporate information and other returns required to be filed by the laws of British Columbia and Canada, and has complied with all Workers' Compensation legislation and other similar legislation to which it is subject and has paid all taxes, fees and assessments due by Contractor under those laws as of the reference date of this Agreement;

(j) Contractor holds all permits, licenses, consents and authorities issued by any level of government, or any agency of any level of government, that are required by law to conduct its business;

(k) Contractor's investigation has been based on its own examination, knowledge, information and judgment and not upon any statement, representation or information made or given by or on behalf of the City;

(l) Contractor accepts the risks assigned within this Agreement identified as being borne by Contractor;

(m) Contractor has sufficient trained staff, facilities, materials, appropriate equipment and approved sub-contractual agreements in place and available to enable it to fully perform the work;

(n) Contractor pays punctually as they become due, all accounts, expenses, wages, salaries, taxes, rates, fees and assessments required to be paid by it on any of its undertakings;

(o) Contractor has investigated and satisfied itself of every condition affecting the work including labour, equipment and material to be provided; but not limited to, the standards, responsibilities, task schedules and subsequent written instructions if any, all as prepared by the City;

(p) Contractor acknowledges that it has the responsibility for informing itself of all aspects of the work and all information necessary to perform the work;

(q) Contractor will comply with all the requirements of the Agreement and will perform all work and supply all labour, equipment and materials necessary to do so;

(r) Contractor is an independent Contractor and not the servant, employee, partner, or agent of the City;

(s) Contractor will not, in any manner whatsoever, commit or purport to commit the City to the payment of any money to any person;

(t) no partnership, joint venture, or agency involving the City is created by this Agreement or under this Agreement;

(u) the City may, from time to time, give such instructions to Contractor as the City considers necessary in connection with provision of the work, which instructions Contractor will comply with, but Contractor will not be subject to the control of City with respect to the manner in which such instructions are carried out;

(v) all employees and sub-contractors employed by Contractor to provide the work are at all times the employees and sub-contractors of Contractor and not of the City. Contractor is solely responsible for arranging all matters arising out of the relationship of employer and employee, and

(w) Contractor has independently reviewed all labour relations issues related to the performance of Contractor's obligations under this Agreement.

#### **4.0 General Obligations of Contractor**

##### **4.1 Contractor shall:**

- (a) offer mobile concession services;
- (b) perform and contract in its own name and for its sole account for all things necessary or desirable for the proper and efficient provision of Mobile Concession services during the term;
- (c) use its best endeavours to provide the services to the City in a timely manner and in accordance with the terms of the Contract;
- (d) ensure that all its employees engaged in this contract are suitably qualified and experienced, and act to the best of their skills and ability and in accordance with accepted mobile concession standards for persons having those qualifications and experience;
- (e) follow all instructions of the City's Property Manager, in respect of the performance by Contractor of its obligations under this contract and cooperate fully with the various Departments and act in good faith towards the City;
- (f) maintain clear communication lines with staff in order to offer the best customer service;
- (g) comply with all laws;
- (h) only use the facilities provided by the City for the purposes of this Contract; and

## **5.0 Term**

5.1 Collectively, the Initial Term and Renewal Term are referred to as the "Term".

### **5.2 Initial Term**

The term of the "Agreement" shall be for 4-month periods running from May 15<sup>th</sup> to September 15<sup>th</sup> in 2010, 2011 and 2012 and will expire no later than September 15<sup>th</sup>, 2012, subject to specific termination rights in this document and subject to a first option to extend the Agreement at the sole and exclusive discretion of the Manager, Property Management.

### **5.3 Renewal Term**

The City agrees that prior to entering into discussions with any third party with respect to the supply and/or advertising of a Mobile Concession for the period commencing after the end of the Initial Term, the City may in its sole discretion with respect to each renewal term renew this Agreement for an additional year to a maximum of two (2), one (1)-year renewals following the completion of the Initial Term.

No later than ninety (90) days prior to the start of the optional second consecutive term of the Agreement (**May 15<sup>th</sup>, 2014**), the City may exercise an option to renew for an additional season in 2015, provided the Contractor is in total compliance with all the terms and conditions of the Agreement.

The City of Kelowna shall notify the Contractor of its intentions to exercise the aforementioned option in writing.

## **6.0 Termination - City**

6.1 This Agreement will terminate:

- (a) at the expiration of the initial term, unless extended by mutual agreement; or
- (b) If at any time there occurs an Event of Default (defined below), the City may give written notice ("Notice of Complaint") to Contractor specifying in reasonable detail the Event of Default. If Contractor shall fail to perform or observe any covenant, condition or agreement to be performed or observed herein and such Event of Default continues un-remedied for a period of thirty (30) days after receiving the Notice of Complaint thereof from the City, then the City may, at its option, terminate this Agreement forthwith without prejudice to any other rights it may have in law or equity. If this Agreement is terminated by the City, Contractor shall be entitled to an immediate pro-rata refund of all unearned monies paid in advance to the City, as determined by mutual agreement.
- (c) For the purposes hereof, "Event of Default" shall mean any one or more of the following:
- (d) if Contractor fails to observe, perform and keep each and every one of the covenants, agreements, provisions, stipulations and conditions to be observed,



performed and kept by Contractor in this Agreement, or any agreement entered into pursuant to any such agreements;

- (e) if Contractor is adjudged bankrupt, makes a general assignment for the benefit of creditors, or a receiver is appointed on account of its insolvency;
- (f) if Contractor has made an assignment of the Agreement without the required consent of the City;
- (g) if Contractor fails to provide Mobile Concession services as required under the terms of this Agreement, and
- (h) The City may conduct inspections, audits, and assessments of Contractor's performance to verify that all duties, financial records, responsibilities and obligations of Contractor are being performed in accordance with the provisions of this Agreement and to the quality standards set out in this Agreement.

## 7.0 Dispute Resolution Procedures

The parties will make reasonable efforts to resolve any dispute, claim or controversy arising out of this agreement or related to this agreement ("**Dispute**") using the dispute resolution procedures set out in this section.

(a) Negotiation

The parties will make reasonable efforts to resolve any Dispute by amicable negotiations and will provide frank, candid and timely disclosure of all relevant facts, information and documents to facilitate negotiations.

(b) Mediation

If all or any portion of a dispute cannot be resolved by good faith negotiations within 30 days, either party may by notice to the other party refer the matter to mediation. Within 7 days of delivery of the notice, the parties will mutually appoint a mediator. If the parties fail to agree on the appointment of the mediator, then either party may apply to the British Columbia International Commercial Arbitration Centre for appointment of a mediator. The parties will continue to negotiate in good faith to resolve the Dispute with the assistance of the mediator. The place of mediation will be Kelowna, British Columbia. Each party will equally bear the costs of the mediator and other out-of-pocket costs and each party will bear its own costs of participating in the mediation.

(c) Litigation

If within 90 days of the request for mediation the Dispute is not settled, or if the mediator advises that there is no reasonable possibility of the parties reaching a negotiated resolution, then either party may without further notice commence litigation.

## 8.0 Compensation to the City

- 8.1 The initial Agreement, with an optional renewal for the following years, will commence immediately upon authorization of an Agreement for Mobile Concession in the beach parks. **The Proponent will pay a monthly fee as detailed in Appendix C Fees Schedule.**

## **9.0 Independent Contractor**

9.1 Nothing in this Agreement shall be construed as to constitute a partnership between the City and Contractor. The duties to be performed and the obligations assumed by Contractor under this Agreement shall be performed and assumed by it as an independent Contractor and not an agent or in any other way a representative of the City. In no circumstances shall Contractor have any authority to represent or contract on behalf of or otherwise bind the City.

9.2 Contractor is and shall at all times during the performance of this Agreement be an independent Contractor, and at no time shall Contractor be considered an agent, servant, or partner of the City; and all persons employed by Contractor to perform its obligations under the Agreement shall be its employees or servants and not the employees, servant, or agents of the City.

9.3 Employees

The Contractor shall not employ on the work any unfit person or anyone not skilled in the work assigned, and shall devote only his best-qualified personnel to work on this project. Should the City deem anyone employed on the work incompetent or unfit for his duties, and so inform the Contractor, Contractor shall immediately remove such person from work under this contract and he/she shall not again, without written permission of the City, be assigned to work under this contract. All Contractor employees working in the City must complete and clear a criminal record check.

## **10.0 Liaison**

10.1 Each party shall maintain liaison with the other party in accordance with their respective obligations under this Agreement. In particular:

- Contractor shall appoint a representative ("Contractor's Representative") who shall have the duty of instituting and maintaining liaison with the City as to the requirements of this Agreement, plus an alternative representative to so act in the absence or inability to act of Contractor's Representative; and
- The City shall appoint a representative ("City's Representative") who shall have the duty of instituting and maintaining liaison with Contractor as to the requirements of this Agreement, plus an alternative representative to so act in the absence or inability to act of the City's Representative.

10.2 Each party's representative shall have the full power and authority to act on behalf of and to bind such party in all administrative issues and to carry out such party's obligations hereunder and each party's representative may be relied upon by the other party as the official representative of such party. Meetings between the Contractor Representative and the City's Representative may be held by telephone with the consent of all parties participating in such meetings. Each party may change their respective representative or alternative representative by written notice to the other.

## **11.0 Governing Law**

11.1 This agreement shall be governed by and construed in accordance with the laws of the Province of British Columbia, which shall be deemed to be the proper law hereof. The courts of British Columbia shall have jurisdiction (but not exclusive jurisdiction) to

entertain and determine all disputes and claims, whether for specific performance, injunction, declaration or otherwise arising out of or in any way connected with the construction, breach, or alleged, threatened or anticipated breach of this Contract and shall have jurisdiction to hear and determine all questions as to the validity, existence or enforceability hereof. For the purposes of any legal actions or proceedings brought by the City in respect of this Contract, the Contractor hereby irrevocably submits and attorns to the jurisdiction of the courts of British Columbia and acknowledges their competence and the convenience and propriety of the venue and agrees to be bound by any judgment thereof and not to seek, and hereby waives, any review of its merits by the courts of any jurisdiction.

- 11.2 Notwithstanding any provisions herein, the Contractor(s) shall in the performance of the contract comply with provisions of The Employment Standards Act and Regulations of British Columbia and City of Kelowna Policies and By-laws and Parks, Recreation and Cultural Services Policies and By-laws and any amendment thereto and without limiting the generality of the foregoing, the Contractor(s) shall pay all of the Contractor(s) employees as required by the Act and the regulations then in force.

## **12.0 Waiver - City**

- 12.1 Any failure of the City at any time or from time to time, to enforce or require the strict keeping and performance of any of the terms or conditions of this Agreement, shall not constitute a waiver of such terms or conditions and shall not affect or impair any terms or conditions in any way or the right of the City at any time to avail itself of such remedies as it may have for any breach of such terms or conditions.
- 12.2 No action or want of action on the part of the City at any time to exercise any rights or remedies conferred upon it under the Agreement shall be deemed to be a waiver on the part of the City of any of its said rights or remedies.

## **13.0 Waiver – Contractor**

- 13.1 Any failure of Contractor at any time or from time to time, to enforce or require the strict keeping and performance of any of the terms or conditions of this Agreement, shall not constitute a waiver of such terms or conditions and shall not affect or impair any terms or conditions in any way or the right of the Contractor at any time to avail itself of such remedies as it may have for any breach of such terms or conditions.
- 13.2 No action or want of action on the part of the Contractor at any time to exercise any rights or remedies conferred upon it under the Agreement shall be deemed to be a waiver on the part of the Contractor of any of its said rights or remedies.

## **14.0 Subcontractors**

- 14.1 Contractor shall not subcontract the whole of the work nor shall any part of the work be subcontracted without the prior written consent of the City's Representative, which consent may not be arbitrarily withheld in the City Representative's sole discretion.
- 14.2 The subcontracting of any of its duties, obligations or responsibilities of Contractor under this Agreement shall not relieve it of the responsibility for the proper commencement, execution or completion of the duties, obligations or responsibilities as set out herein and Contractor shall be fully responsible for the acts, omissions and debts of its subcontractors.

## **15.0 Amendments**

No amendment to this Agreement shall be binding on either party hereto unless such amendment is in writing and executed by both parties with the same formality as this Agreement is executed.

## **16.0 Survival of Covenants**

All obligations of each of the parties which expressly or by their nature survive termination or expiration or assignment of this Agreement including, without limitation, the indemnities in section 20.0 shall continue in full force and effect subsequent to and notwithstanding such termination or expiration or assignment and until they are satisfied or by their nature expire.

## **17.0 Confidentiality of Information**

The Contractor should be aware that the City of Kelowna is a "public body" defined by and subject to the *Freedom of Information and Protection of Privacy Act* of British Columbia.

## **18.0 Non Assignability**

This Agreement may not be assigned by Contractor without the prior written consent of the City. For the purpose of this Agreement, a change in the corporate control of Contractor, shall be deemed to be an assignment requiring the consent of the City pursuant to the terms hereof.

## **19.0 Joint and Several**

If this Agreement is executed by more than one person, firm or Corporation, it is understood and agreed that all persons, firms or Corporations executing this Agreement are jointly and severally liable under and bound by this Agreement.

## **20.0 Force Majeure**

Except for defaults of subcontractors, neither party shall be responsible for delays or failures in performance resulting from acts beyond the control of the offending party. Such acts shall include but shall not be limited to acts of God, fire, flood, earthquake, other natural disasters, nuclear accident, strike, lockout, riot, freight embargo, public regulated utility, or governmental statutes or regulations superimposed after the fact. If a delay or failure in performance by Contractor arises out of a default of its subcontractor, and if such default arose out of causes beyond the control of both Contractor and subcontractor, and without the fault or negligence of either of them, Contractor shall not be liable for damages of such delay or failure, unless the products or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit Contractor to meet the required performance schedule, (where provided).

## **21.0 Insurance & Indemnity**

### **21.1 Indemnity Save Harmless**

Contractor agrees to indemnify and save harmless the City, its elected officials, officers, employees and agents, from and against all claims, liabilities, demands, actions, proceedings, loss and expense (including legal costs) whatsoever for damage to or destruction or loss of property and loss of use thereof, and injury to or death of any person or persons arising directly or indirectly out of (i) the installation, operation, use, relocation, removal, maintenance and/or repair of any/all equipment or of property of Contractor (ii) the performance, purported performance or non-performance of this Agreement, or (iii) any act of negligence, willful misconduct or omission by Contractor, its employees subcontractors and agents except only where such death, injury to persons or damage to property is due to the sole negligence of the City.

### **21.2 Insurance**

The Contractor shall, without limiting its obligations or liabilities herein and at its own expense, provide and maintain the following insurances in forms and amounts acceptable to the City as detailed in Appendix A

### **21.3 Compliance with Statutes, By-laws & Regulations**

The Contractor shall in the performance of the Agreement, comply with all applicable City By-laws, and all amendments thereto and The Consumer Protection Act, R.S.B.C. 1996, c.69, and any other applicable acts or regulations.

All equipment/vehicles used for the work outlined in the Agreement must comply with the Motor Vehicle Act, R.S.B.C. 1996, Chapter 318 and Regulations, as amended and the Commercial Transport Act, R.S.B.C. 1996, Chapter 58 and Regulations, as amended.

All principal vehicles of the Contractor will be identified with signs setting out its name and telephone number. Employee owned vehicles, which may be periodically used for company business, will not necessarily be marked.

## **22.0 Occupational Health and Safety**

22.1 The Contractor agrees that it is the Prime Contractor for the purposes of the *Workers Compensation Act*. The Contractor shall have an occupational health and safety program acceptable to the WorkSafe BC Board and shall ensure that all WorkSafe BC Health & Safety Regulations are observed during performance of this Contract, not only by the Contractor, but by all workers, subcontractors, employees, personnel, servants and others engaged in the performance of this Contract.

22.2 The Contractor and its workers, subcontractors, employees, personnel, servants and others engaged in the Services shall conform to all current occupational health and safety laws, by-laws, or regulations of the Province of British Columbia including any regulations requiring installation or adoption of safety devices or appliances. The City may, on twenty-four (24) hours written notice to the Contractor, suspend the Services hereunder immediately as a result of failure to install such devices or because the conditions of immediate danger exist that would be likely to result in injury to any person. Such suspension will continue until the default or failure is corrected.

22.3 Without limiting the generality of any other indemnities granted by the Contractor herein, the Contractor shall indemnify and save harmless the City against any loss or expense or penalty suffered or incurred by the City by reason of failure of the Contractor, its agents or employees, or any subcontractors of the Contractor, its agents or employees to comply or ensure compliance with the health and safety laws, by-laws and regulations mentioned above.

### **23.0 WorkSafe BC Coverage**

23.1 The Contractor agrees that it shall, at its own expense, procure and carry or cause to be procured and carried and paid for full WorkSafe BC coverage for itself and all workers, subcontractors, employees, personnel, servants and others engaged in or upon any Services. The Contractor agrees that the City has the unfettered right to set off the amount of the unpaid premiums and assessments for such WorkSafe BC coverage against any monies owing by the City to the Contractor. The City shall have the right to withhold payment under this Contract until the WorkSafe BC premiums, assessments or penalties in respect of the Services done or Services performed in fulfilling this Contract have been paid in full.

23.2 The Contractor shall provide the City with the Contractor's WorkSafe BC registration number and a letter from the WorkSafe BC confirming that the Contractor is registered in good standing with the WorkSafe BC and that all assessments have been paid to the date thereof prior to the City having any obligations to pay monies under this Contract.

23.3 The Contractor shall indemnify and hold harmless the City from all manner of claims, demands, costs, losses, penalties and proceedings arising out of or in any way related to unpaid WorkSafe BC assessments owing from any person or corporation engaged in the performance of this Contract or arising out of or in any way related to the failure to observe safety rules, regulations and practices of WorkSafe BC, including penalties levied by WorkSafe BC.

### **24.0 Audit**

At its option, the City may cause at any reasonable time upon forty eight (48) hours prior written notice to Contractor, a complete audit to be made of Contractor's business affairs and records relating to the mobile concession by an accountant acceptable to the City for the period covered by any statement issued by Contractor as above set forth. If such audit shall disclose a liability for commission payable Contractor shall promptly pay the City. The City would be responsible to cover the auditor's expenses.

### **25.0 Conflict of Interest**

A council member or any employee of the City shall not have a direct or indirect interest in a Company or own a Company that is the successful Contractor.

The Contractor shall disclose to the City prior to accepting the contract, any potential conflict of interest. If such a conflict of interest does exist, the City may, at its sole discretion, withhold the contract from the Contractor until the matter is suitably resolved. And further, that if during the conduct of the contract, the Contractor is retained by another client giving cause to a potential conflict of interest, then the Contractor shall so inform the City. If a significant conflict of interest is deemed by the City to exist, then the Contractor shall refuse the contract or shall take such steps as are necessary to remove the conflict of interest.

Contractor shall disclose to the City Representative, prior to awarding of the Contract, any actual, potential or apparent conflict of interest. If such a conflict of interest does exist, the City may, at its discretion, withhold the Contract from the Contractor until the matter is resolved to the satisfaction of the City.

Contractor will upon request, provide all pertinent information regarding ownership of their company. This information to be supplied within forty-eight (48) hours after request.

## **26.0 Non-liability of City Officials**

Under no circumstances shall any officer, employee, or agent of the City of Kelowna acting within the course and scope of his/her City responsibility be personally liable to the Contractor, or any party claim through or on behalf of the Contractor, with regards to the contract, including but not limited to its negotiation, execution, performance, or termination.

## **27.0 Protection and Security**

a) **Acknowledgment of Proprietary Materials/Limitations on Use.** Contractor acknowledges that the records are unpublished work for purposes of copyright law and embodies valuable confidential and secret information of the City. The Contractor will treat such information so received in confidence and will not use, copy, disclose, nor permit any of its personnel to use, copy, or disclose the same for any purpose that is not specifically authorized under the Agreement. Notwithstanding the above, nothing herein shall prevent the Contractor from utilizing same or similar information, if it is independently provided by a third party or independently developed in-house.

b) **Property Rights.** Each party acknowledges and agrees that the other party's products and all other material related thereto constitute valuable trade secrets of the party furnishing the products or materials, or proprietary and confidential information of such party, and title thereto remains in such party. All applicable copyrights, trade secrets, patents and other intellectual and property rights in the products and related material are and remain in the party furnishing such products. All other aspects of the products and related material, including without limitation, technologies, procedures, programs, methods of processing, specific design and structure of individual programs and their interaction.

## **28.0 Business Licence**

The Contractor shall have or obtain a City of Kelowna Business License and shall keep the license current for the duration of the contract term.

## **29.0 Contractor Performance Review**

Contractor's performance will be evaluated by the City no less than annually on the following criteria:

- ❖ Volume of customer complaints.
- ❖ Service levels.
- ❖ Cleanliness of sites.

### **30.0 Business Review & Planning**

- 30.1 Contractor agrees to conduct bi-monthly business review meetings with Property Management Department Representatives if required.

### **31.0 Enurement**

This Agreement shall enure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, successors and permitted assigns.

### **32.0 Service of Notices**

- 32.1 All notices and other communications required or permitted to be given hereunder shall be in writing and may be given by (i) facsimile transmission, if the matter is urgent or immediate; (ii) personally delivered; or (iii) transmitted by prepaid registered mail, to the party to whom such notice or communications is being given at the following address or fax number:

To the City

**(City Representative)**

Attention: Ron Forbes

Manager, Property Management

City of Kelowna

1435 Water Street, Kelowna, BC V1Y 1J4

Telephone: 250-469-8669

Fax No.: 250-862-3349

E-mail: rforbes@kelowna.ca

**(Contractor Representative)**

Attention: Danny Thompson

846 Burne Avenue, Kelowna BC V1Y 5P7

Telephone: 250-448-8134

- 32.2 Except as otherwise specified herein, all notices and other communications shall be deemed to have been duly given (i) on the date of receipt if delivered personally, (ii) five (5) days after posting if transmitted by mail, or (iii) on the date of transmission if transmitted by fax (provided the sending machine gives confirmation that all pages have been transmitted to the fax number of the receiver without error), whichever shall be first.



IN WITNESS WHEREOF the parties hereto, by their respective representatives duly authorized in that behalf, have caused this Agreement to be executed on the day and year indicated below.

Accepted on behalf of  
Contractor:

Per: X



Accepted on behalf of the  
CITY OF KELOWNA:

Per:

Director, Real Estate & Building Services



Date Executed:

April 29, 2010

WITNESS

RON FORBES



## **Appendix A – Insurance Requirements**

### **1. Contractor To Provide**

The Contractor shall procure and maintain, at its own expense and cost, the insurance policies listed in section 2, with limits no less than those shown in the respective items, unless in connection with the performance of some particular part of the Work or Services, the City advises in writing that it has determined that the exposure to liability justifies less limits. The insurance policy or policies shall be maintained continuously from commencement of the Work or Services until total completion of the Work or Services or such longer period as may be specified by the City.

### **2. Insurance**

As a minimum, the Contractor shall, without limiting its obligations or liabilities under any other contract with the City, procure and maintain, at its own expense and cost, the following insurance policies:

- 2.1 WorkSafe BC Insurance covering all employees of Contractor engaged in the Work or Services in accordance with the statutory requirements of the province or territory having jurisdiction over such employees.
- 2.2 Comprehensive General Liability Insurance
  - (i) providing for an inclusive limit of not less than \$2,000,000 for each occurrence or accident;
  - (ii) providing for all sums which the Contractor shall become legally obligated to pay for damages because of bodily injury (including death at any time resulting therefrom) sustained by any person or persons or because of damage to or destruction of property caused by an occurrence or accident arising out of or related to the Work or Services or any operations carried on in connection with this Contract;
  - (iii) including coverage for Products/Completed Operations, Blanket Contractual, Contractor's Protective, Personal Injury, Contingent Employer's Liability, Broad Form Property Damage, and Non-Owned Automobile Liability.
  - (iv) providing for Completed Operations Liability to continue for a period of 24 months after total completion of the Work or any part of the Work.
  - (v) providing for the use of explosives for blasting; vibration from pile driving or caisson work; the removal of, or weakening of support of such property, building or land, whether such support shall be natural or otherwise; demolition; or any other work below ground level.
  - (vi) including a Cross Liability clause providing that the inclusion of more than one Insured shall not in any way affect the rights of any other Insured hereunder, in respect to any claim, demand, suit or judgment made against any other Insured.
- 2.3 Automobile Liability Insurance covering all motor vehicles, owned, operated and used or to be used by the Contractor directly or indirectly in the performance of the Work or Services. The Limit of Liability shall not be less than \$2,000,000 inclusive, for loss or damage including personal injuries and death resulting from any one accident or occurrence.
- 2.4 All Risks Insurance for loss of or damage to all Contractor's equipment, owned, leased or for which Contractor may otherwise be responsible and used or to be used in the performance of the Work. This insurance shall be for an amount not less than the replacement cost value of the equipment. In the event of loss or damage, Contractor shall if so requested by the City, forthwith replace such lost or damaged equipment. Such All Risks Insurance shall be endorsed to waive all rights of subrogation against the City.

### **3. The City Named As Additional Insured**

The policies required by sections 2.2 and 2.3 above shall provide that the City is named as an Additional Insured thereunder and that said policies are primary without any right of contribution from any insurance otherwise maintained by the City.

### **4. Contractor's Subcontractors**

The Contractor shall require each of its subcontractors to provide comparable insurance to that set forth under section 2.

**5. Certificates of Insurance**

The Contractor agrees to submit Certificates of Insurance, in the form of Appendix A-1, attached hereto and made a part hereof, for itself and for all of its subcontractors to the Risk Management Department of the City prior to commencing the Work or providing the Services. Such Certificates shall provide that 30 days' written notice shall be given to the Risk Management Department of the City, prior to any material changes or cancellations of any such policy or policies.

**6. Other Insurance**

After reviewing the Contractor's Certificates of Insurance, the City may require other insurance or alterations to any applicable insurance policies in force during the period of this Contract and will give notifications of such requirement. Where other insurances or alterations to any insurance policies in force are required by the City and result in increased insurance premium, such increased premium shall be at the Contractor's expense.

**7. Additional Insurance**

The Contractor may take out such additional insurance, as it may consider necessary and desirable. All such additional insurance shall be at no expense to the City. The Contractor shall ensure that all of its subcontractors are informed of and comply with the City's requirements set out in this Appendix A.

**8. Insurance Companies**

All insurance, which the Contractor is required to obtain with respect to this contract, shall be with insurance companies registered in and licensed to underwrite such insurance in the province of British Columbia.

**9. Failure to Provide**

If the Contractor fails to do all or anything which is required of it with regard to insurance, the City may do all that is necessary to effect and maintain such insurance, and any monies expended by the City shall be repayable by and recovered from the Contractor. The Contractor expressly authorizes the City to deduct from any monies owing the Contractor, any monies owing by the Contractor to the City.

**10. Non-payment of Losses**

The failure or refusal to pay losses by any insurance company providing insurance on behalf of the Contractor or any subcontractor shall not be held to waive or release the Contractor or subcontractor from any of the provisions of the Insurance Requirements or this Contract, with respect to the liability of the Contractor otherwise. Any insurance deductible maintained by the Contractor or any subcontractor under any of the insurance policies is solely for their account and any such amount incurred by the City will be recovered from the Contractor as stated in section 9.

APPENDIX A-1  
**CERTIFICATE OF INSURANCE**

**This Certificate is issued to:**          **The City of Kelowna**  
**1435 Water Street**  
**Kelowna, BC V1Y 1J4**

**Insured**

Name:

Address:

**Broker**

Name:

Address:

**Location and nature of operation or contract to which this Certificate applies:**

Beach Parks Mobile Concession Services – Strathcona Park, Rotary Park & Sarson's Beach

Type of Insurance	Company & Policy Number	Policy Dates		Limits of Liability/Amounts
		Effective	Expiry	
<b>Section 1</b> Comprehensive General Liability including: <ul style="list-style-type: none"> <li>• Products/Completed Operations;</li> <li>• Blanket Contractual;</li> <li>• Contractor's Protective;</li> <li>• Personal Injury;</li> <li>• Contingent Employer's Liability;</li> <li>• Broad Form Property Damage;</li> <li>• Non-Owned Automobile;</li> <li>• Cross Liability Clause.</li> </ul>				Bodily Injury and Property Damage  \$ <u>2,000,000</u> Inclusive \$ _____ Aggregate \$ _____ Deductible
<b>Section 2</b> Automobile Liability				Bodily Injury and Property Damage \$ <u>2,000,000</u> Inclusive

It is understood and agreed that the policy/policies noted above shall contain amendments to reflect the following:

1. Any Deductible or Reimbursement Clause contained in the policy shall not apply to the City of Kelowna and shall be the sole responsibility of the Insured named above.
2. The City of Kelowna is named as an Additional Insured.
3. 30 days prior written notice of material change and/or cancellation will be given to the City of Kelowna.

Print Name \_\_\_\_\_

Title \_\_\_\_\_

Company (Insurer or Broker) \_\_\_\_\_

Signature of Authorized Signatory \_\_\_\_\_

Date \_\_\_\_\_

## APPENDIX B – SCOPE OF SERVICES

The contractor will provide, equip and operate a mobile concession within the designated area of the parking lots of three City beach parks:

Rotary Park, 3600 block of Lakeshore Road  
Sarson's Beach, end of Sarson's Road  
Strathcona Park, Strathcona Ave & Abbott Street

during the period May 15<sup>th</sup> to September 15<sup>th</sup> of each year beginning May 15<sup>th</sup>, 2010. The parks are open from 6 am to 11 pm each day and the contractor has agreed to service the parks between 11 am and 8 pm, 7 days per week weather permitting. The contract to supply this service will be for a three (3) year period with the option of extending for two (2) additional one (1) year terms at the discretion of the City.

- a) Each location will be the equivalent of two (2) parking stalls in the parking lots.
- b) The vehicle (s) must be fully self-contained.
- c) The contractor may make arrangements with the City to connect to a power source. All costs of connections and a stipulated fee to be determined shall be the responsibility of the contractor and shall be paid fully in advance of each season of use.
- d) The contractor will pay all utilities, permits, taxes and licenses.
- e) The contractor will clean and maintain the area surrounding the mobile unit to the satisfaction of the City, including cleanup of litter from immediate area (a radius of 30 metres from the mobile concession unit). All paper products used shall be clearly identifiable with the contractor's operation. The contractor will arrange for regular garbage pick-up.
- f) The contractor shall comply with all regulations regarding fire, traffic, safety and sanitation and shall acquire all necessary permits.
- g) The contractor will remove the vehicle from the site each day prior to the park closure.
- h) No outside advertising will be permitted without the consent of the City.
- i) The use of individual packaged condiments is prohibited.
- j) The contractor will have the exclusive right to operate a food concession within the designated sites, subject only to the City maintaining the right to lease or otherwise permit operation of "other concessions" within the individual sites for a maximum of five (5) days in each season in conjunction with special events.
- k) The contractor must seek to minimize any conflict with adjacent property owners and with any other users of the park.
- l) The contractor may not sublet, nor assign the contract without the written consent of the City. The minimum amount for such assignment shall be \$500.00.
- m) The contractor has supplied a bid deposit in the form of a certified cheque payable to the City of Kelowna in the amount of \$1000.00. The deposit submitted by the contractor will be retained as a "performance deposit" and the City will place it into an interest bearing bank account with interest accruing to the depositor.
- n) The contractor must conform to the following:

### EXCLUSIVE SPONSORSHIP AGREEMENT:

The Lessee acknowledges that Pepsi Bottling Group is the exclusive supplier of Cold Beverage Products at all of the City of Kelowna facilities, and agrees not to utilize, purchase, sell or advertise (or permit) the utilization, purchase, sale or advertising of, on or from the Premises, Cold Beverage Products other than those of Pepsi Bottling Group. For the purpose of this tender, "Cold Beverage Products" means all carbonated and non-carbonated, natural or artificially-flavoured, non-alcoholic beverages, whether meant to be served at room temperature or colder, consumed independently or used as a mixer, including but not limited to: non-alcoholic beverages with nutritive or

non-nutritive sweeteners; flavoured and/or sweetened water; naturally or artificially flavoured fruit juices; fruit juice-containing drinks, fruit-flavoured drinks (sweetened or unsweetened); fruit punches and ades; hypertonic, hypotonic and isotonic energy and fluid replacement drinks (sometimes referred to as "sports drinks"); frozen carbonated beverages; bottled/canned carbonated and non-carbonated waters, and packaged cold teas and coffees; and all drink or beverage bases, whether in the form of syrups, powders, crystals, concentrates or otherwise, from which drinks and beverages are prepared;

**BUT DOES NOT INCLUDE:**

- dairy and dairy-like beverages including, without limitation, milk, milkshakes, flavoured milk, hot chocolate and cocoa, and coffee beverages which are primarily (that is, more than 50% by volume) dairy based;
- cold brewed un-packaged coffee or tea, hot coffee, hot tea, tea bags, loose tea, loose coffee grains or beans, water packaged in bulk or water drawn from the public water supply;
- beer and near beer beverages whether alcoholic or non-alcoholic;
- alcoholic or low alcoholic beverages, and non-alcoholic wines, coolers and spirits;
- all drink or beverage bases, whether in the form of syrups, powders, crystals, concentrates or otherwise, from which drinks and beverages as described in subparagraphs (iii) through (vi) are prepared; and
- freshly squeezed or extruded vegetable and fruit juices;

## APPENDIX C – FEE SCHEDULE

The contractor acknowledges and agrees to pay to the City of Kelowna the total sum of **\$13,500.00 + GST or HST** for the term of the contract (\$4,500 per year for 3 years + GST or HST). Each season will be paid as follows in four instalments on or before:

		<b>Total Instalment</b>
April 28, 2010	\$4,500.00 + 5% GST \$225.00	<b>=\$4,725.00</b>
May 1, 2011	\$4,500.00 + 12% HST \$540.00	<b>= \$5,040.00</b>
May 1, 2012	\$4,500.00 + 12% HST \$540.00	<b>= \$5,040.00</b>

June 15	2010	- \$1000 + 50 <sup>GST</sup>	= 1050.00
July 15	"	- \$2000 + 240 <sup>HST</sup>	= 2240.00
Aug 15	"	\$1500 + 180	= 1680.00
		Total	\$4500