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Model Healthy Municipal Snack and Beverage Vending Agreement

Developed by ChangeLab Solutions

This model is provided as a guide and is not offered or intended as legal advice. Readers should seek the advice of an attorney when confronted with legal issues, and attorneys should perform an independent evaluation of the issues raised.

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INTRODUCTION

The purpose of the Model Healthy Municipal Snack and Beverage Vending Agreement is to help nutrition advocates and municipalities use the contracting process to achieve the following goals: (1) improve the nutritional quality of snacks and beverages sold on municipal property, (2) negotiate favorable terms and conditions, (3) develop strategic vendor relations, (4) increase process efficiencies, and (5) improve communication and customer service.

Our goal is to make this document useful to lawyers and non-lawyers alike. Toward that end, we analyzed municipal snack and beverage vending contracts from large and small cities, counties, and recreation departments and then crafted model clauses that improve upon commonly used language. We provide plain English explanations of what key clauses mean, how they apply to municipal vending contracts, and how the clauses might be applied during contract negotiation.

As with any document intended as a model, our Model Healthy Municipal Snack and Beverage Vending Agreement has been drafted to serve as an exemplar. In reality, of course, each contract negotiation is a unique transaction reflecting the particular goals and relative bargaining strengths of each of the parties. However, the value of our model contract is that it provides municipalities with a blueprint they can use to construct the best of all possible snack and beverage vending contracts by: (1) collecting in one place contract terms and conditions that promote the sale of healthy snacks and beverages, (2) predicting what may go wrong during the contracting process, and (3) offering the municipality tested legal options to respond to different contingencies.

Our Model Healthy Municipal Snack and Beverage Vending Agreement is based on a few important assumptions. We assume that the municipality is seeking to enter into a healthy vending contract as a result of having adopted a “healthy snack/beverage policy” (perhaps as part of its overall municipal wellness policy); that the municipality has identified a vendor through a competitive procurement process using either an invitation for bids or request for proposals; and that the municipality representative who will be negotiating the contract is fully committed to the goals contained in the healthy snack/beverage policy. If any of these

assumptions do not apply, municipality personnel can adapt the contract language to serve their own purposes.

Furthermore, state and local law will affect both the solicitation and administration of vending agreements. We therefore advise consulting with legal counsel about adapting provisions as necessary to comply with the specific laws applicable to your municipality.

We hope that our Model Healthy Municipal Snack and Beverage Vending Agreement will prove useful to those who are tasked with procuring, drafting, and negotiating healthy municipal vending contracts and that it will ultimately help nutrition advocates and municipalities achieve their goals of improving the municipal food environment, promoting the health of its citizens, and maintaining a reasonable cash flow.

HEALTHY MUNICIPAL SNACK AND BEVERAGE VENDING AGREEMENT

This vending agreement (“Agreement”) is between XYZ MUNICIPALITY (“Municipality”) and ABC SNACK/BOTTLING COMPANY (“Vendor”).

RECITALS

Municipality issued a request for proposals (RFP) [*Alternative: or invitation for bid (IFB)*] to identify a qualified vendor to provide vending services for “direct delivery” sales and vending machine services of healthy snacks and beverages for the benefit of Municipality administrative offices, buildings, organizations, facilities, and institutions.

Municipality selected Vendor’s proposal [*Alternative: bid*] on the basis of Vendor’s qualifications in providing healthy snack and beverage products to municipalities through the installation, operation, servicing, and maintenance of vending and other equipment and because Vendor offered the best and highest total expected value to Municipality.

Municipality and Vendor desire to confirm the terms and conditions under which Vendor will develop, furnish, and carry out a program for the full-service sales of authorized healthy snack and beverage products and the full-service placement and maintenance of Vendor’s equipment on Municipal property.

The parties therefore agree as follows:

COMMENTS About “Recitals” section

Purpose: The purpose of the “Recitals” section is to tell the basic story of the contract and provide whatever background information the parties regard as factually relevant to the transaction. Recitals set the stage of the contract, outlining the context and structure of the transaction. Though recitals are generally not as important as the terms and conditions detailed in the body of the contract, courts sometimes use them to help determine the intent of the parties in instances where intent is otherwise unknown, vague, or ambiguous.

Application: These recitals frame the purpose of the contract. They specify the healthy snacks and beverages to be sold and the financial value that the Municipality will derive from their sale. The recitals are written from the Municipality’s point of view, which emphasizes the Municipality’s needs rather than the Vendor’s. In this they are unlike the recitals found in typical municipal snack and beverage vending contracts, which usually are drafted by soda and snack companies for their own benefit. If the parties end up in litigation over the contract’s purpose, the existence of clear recitals that place healthy snacks and beverages at the center of the contract should help guide a court toward an accurate interpretation of the intent of the parties.

Note, too, that the contract is entered into by the Municipality rather than by an individual municipal department. State laws often grant legal authority to sign binding contracts only to the governing legislative body and not to individual municipal officials.

Negotiation Tip: The overarching premise of this Model Healthy Municipal Snack and Beverage Vending Agreement is that it resulted from a competitive procurement process initiated by the Municipality through either a request for proposal or invitation for bid.

1.0 HEALTHY SNACK AND BEVERAGE POLICY SPECIFICATIONS SHEET

Municipality has adopted a Healthy Snack and Beverage Policy Specifications Sheet (“the Specifications Sheet”), which governs the types of snacks and beverages that can be sold on Municipal property. A copy of the Specifications Sheet is attached as Exhibit A to this Agreement. In providing snack and beverage products and services under this Agreement, Vendor shall comply with the terms of the Specifications Sheet and shall offer for sale only such products as conform to the requirements set forth in that document.

- 1.1. **Permitted Snack and Beverage Products:** “Permitted Snack and Beverage Products” are those brand name products of Vendor’s that Municipality has approved as conforming to the Specifications Sheet and have selected for sales under the terms and conditions set forth in this Agreement. This Agreement’s Permitted Snack and Beverage Products List is attached as Exhibit B.

- 1.2. **Revisions to Policy:** Municipality retains the sole right to revise or delete the Specifications Sheet from time to time during the term of this Agreement. If such a revision results in a need to revise the Permitted Snack and Beverage Products List, Municipality and Vendor shall mutually revise the Permitted Snack and Beverage Products List and amend this Agreement in writing by selecting other products by type and/or brand name for sale under the terms and conditions set forth in this Agreement.
- 1.3. **Adverse Financial Change:** If Vendor can demonstrate that a revision to the Permitted Snack and Beverage Products List would materially and adversely affect the financial terms of this Agreement, Municipality and Vendor will endeavor to reach concurrence regarding the potential loss of profitability and will then modify this Agreement accordingly. Any impasse or dispute will be resolved in accordance with Subsection 27.17 of this Agreement.
- 1.4. **Product Substitutions/Manufacturer’s Brand Change:** This Agreement does NOT allow for product substitutions unless Vendor obtains prior written authorization from the Municipality representative identified in Subsection 27.2 of this Agreement. If a manufacturer’s product or brand change occurs during the course of this Agreement, Vendor’s representative shall not automatically substitute product. Vendor shall submit product specifications and a sample (on request) for Municipality’s approval prior to any shipment. If the Municipality accepts the new brand, all other terms, conditions, and prices shall remain in effect.
- 1.5. **Compliance:** Vendor’s failure to comply with Section 1 of this Agreement shall be deemed a material breach of the Agreement, which may subject the Agreement to immediate termination at Municipality’s sole discretion or to such other remedies as may be specified in this Agreement.

COMMENTS about “Healthy Snack and Beverage Policy Specifications Sheet” Section

Purpose: This Section appears at the beginning of the contract to signify its overarching importance to the performance of the contract and to ensure that the Vendor only sells certain pre-identified snacks and beverages on Municipality property.

Application: This section compels the Vendor to sell only products that both comply with the Municipality’s Specifications Sheet and are identified in the Permitted Snack and Beverage Products List. Subsection 1.5 anticipates that the

Vendor might fail to perform this duty properly (e.g., by stocking vending machines with nonconforming products, either by accident or by design) and protects the Municipality's interests by defining such an act as a "material breach" of the contract. A material breach may be defined as "a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract."¹ The Vendor's material breach would, in turn, give the Municipality the right to *enforce* the Vendor's promise to sell only conforming products. The Municipality could employ one or more of the remedies available under the Agreement or under general contract law.

Subsection 1.2 ensures that the Municipality can change its policies from time to time without having to obtain prior approval from the Vendor to do so.

Negotiation Tip: A commercial entity may not enter into a vending contract with a municipality unless there is a provision like Subsection 1.3 ("Adverse Financial Change"), which allows a vendor to address revenue reductions that might arise from changes in a policy over which it has no control. Some drafters may choose to omit this subsection until asked by a vendor to include it. Note, however, that there may be a downside to such an approach. A vendor may consider such an omission to be antagonistic and a time waster, since a municipality should know that the vendor would not agree to a contract provision that allows unilateral changes that may result in a financial loss without any recourse.

2.0 SCOPE OF CONTRACT

- 2.1. **Services:** Vendor shall provide full-service vending machine services for the sale of Permitted Snack and Beverage Products on Municipality property. Vendor's services shall include, but not be limited to furnishing product (as required), stocking vending machine equipment, and servicing and maintaining equipment in accordance with the terms, conditions, requirements, and specifications set forth in this Agreement.
- 2.2. **License:** Vendor and Municipality mutually intend that the service and related rights granted herein shall provide only a limited, revocable license to enter Municipality real property. Under no circumstances shall the rights granted under this Agreement constitute a lease of real property, and Vendor acknowledges that it shall not possess any right as a tenant of any part of the Municipality premises. Any improvements needed to accommodate vending machines shall be constructed in accordance with plans and specifications approved by Municipality prior to the commencement of construction.
- 2.3. *[Optional Add-on: **Exclusive Rights:** Vendor shall have the exclusive right to make Permitted Snack and Beverage Products available for sale and*

distribution on Municipal property, and Municipality agrees that Vendor's products will be the exclusive Permitted Beverage Products sold, dispensed, served, or sampled at all locations on the Municipality property. Vendor's exclusive rights do not, however, extend to snacks and beverages that Municipality is required to sell in conjunction with federally assisted meals programs such as the National School Lunch or Breakfast program, or to snacks and beverages that may be sold on Municipality property by parties over which Municipality has no control.]

- 2.4. **Personal Consumption:** This Agreement does not apply to any products that are purchased off-site by personnel, visitors, or their guests for personal consumption and not for resale on Municipal property, or foods and beverages sold through any on-site cafeterias or other non-vending machine delivery systems.

COMMENTS About the "Scope of Contract" Section

Purpose: Generally, the "Scope of Contract" section provides a clear and comprehensive description of the work to be done or the deliverables to be provided under the contract. In this case, the section establishes the Vendor's duty to provide the Municipality with a full-service vending program. If this is an exclusive contract, the Municipality promises to use only the Vendor's products. Municipalities can absolutely choose not to enter into exclusive vending contracts; however, it is quite possible that the financial value of the contract will diminish if they do.

Application: Why would a municipality sign an exclusive vending contract versus a nonexclusive vending contract? Simply put, money. With exclusive contracts, municipalities can obtain large sums of money in the form of vendor "sponsorship" fees or "cash advances." All contracts, but especially commercial transactions such as vending contracts, are premised on the exchange of something of value (i.e., "consideration") between the parties. This exchange is what makes agreements legally binding. For beverage vending contracts, vendors appear to be willing to pay more money in exchange for receiving the exclusive right to sell and advertise their beverage products on property owned by public agencies. A recent survey of more than 120 school district beverage vending contracts showed that 93 percent of the contracts analyzed were exclusive to a single company.² While municipal vending markets have different economics than the school vending markets, exclusivity may have value even in the municipal context. For the life of the contract, the vendor would not have to compete against rival companies for either point-of-purchase sales or promotion and advertising.

Negotiation Tip: But what about the 7 percent of school beverage vending

contracts in the study above that were not exclusive beverage deals? As this study demonstrates, public agency vending contracts do not have to be negotiated on an exclusive basis. In fact, there are many good reasons for not doing so. Despite the fact that the vending company prefers exclusive contracts, some evidence suggests that companies and municipalities can sign nonexclusive agreements that provide tangible rewards to both sides. For example, one contract between Pepsi Bottling Group and the Los Angeles Unified School District (LAUSD) was explicitly structured as a nonexclusive contract, yet the parties considered it to be worth \$26 million to LAUSD over five years. Another type of nonexclusive vending contract gives the vendor “primary” (but not exclusive) rights. For example, the contract between Pepsi Bottling Group and Mountain View–Los Altos Union High Municipality is a primary, not exclusive, rights contract. Primary rights give a vendor preferred status but at the same time do not foreclose a public agency’s right to sell products manufactured by other companies.

3.0 TERM

The term of this Agreement shall be for five years, commencing on _____, 20____ (the “Effective Date”) and continuing through _____, 20____, unless earlier terminated pursuant to termination conditions contained in Section _____ below. All indemnification provisions contained in this Agreement shall survive beyond the expiration of this Agreement.

COMMENTS about the “Term” Section

Purpose: By establishing the contract’s beginning and end dates, this section makes clear when performance under the contract starts and stops. The section also clarifies that certain promises made in the contract will continue to be binding even after the contract ends, either because the agreement naturally expires or is terminated prematurely by one of the parties.

Application: State or local law governs how long the terms of a contract can be. Within these constraints, sometimes a long-term contract is not advisable—even with a healthy snack and beverage contract—because it: (1) ties the hands of future municipal administrators and legislatures who weren’t in office when the long-term contract was signed; (2) locks in disadvantageous terms and conditions or a vendor’s poor performance for a very long time; and (3) is anti-competitive and thus contrary to public contracting principles.

Negotiation Tip: Vendors favor long-term contract periods and are likely to offer more money for them. This holds true especially for exclusive contracts. Also, long terms enable vendors to avoid competition with other snack and beverage companies, which means that they have to make fewer concessions to municipalities. Municipalities too might initially favor long-term contracts because they may save time and money associated with reissuing an RFP or IFB. But the benefits provided by a shorter contract (such as contract flexibility and greater financial

rewards obtained from a competitive procurement process) should be balanced against the perceived savings of long-term contracts.

4.0 **PRICES**

Vendor shall provide the items identified on the Permitted Snack and Beverage Products List to Municipality or its concessionaires at the prices set forth on the Rate Schedule, which is attached to this Agreement as Exhibit C. All rates are firm for the first contract year.

4.1. **Price Adjustment:** For the second, third, fourth, and fifth additional contract years, the rates automatically will be increased or decreased for the percentage rate indicated in the Exhibit C Rate Schedule or the annual change in the local Consumer Price Index (CPI), whichever is lower, effective _____ [Note: e.g., July 1st of each year]. Should the CPI be used in lieu of the pre-determined increase, the following would apply.

4.1.1. **CPI:** Increases allowed shall be calculated by using the percentage change between the previous year and the current year's CPI, published by the U.S. Department of Labor's Bureau of Labor Statistics. The specific index to be reviewed is the CPI for _____ [Note: e.g., Chicago-Gary-Kenosh, IL-IN-WI, or Houston-Galveston-Brazoria, TX] for _____ [Note: e.g., March] of each year using the "Special Aggregate Index" category of "All Items Less Shelter" under the "All Urban Consumers" column. Vendor's written notification to Municipality shall include a copy of the calculations Vendor used to justify a price increase.

4.2. [Optional: **Pricing Models for Healthy Options:** Product pricing models that encourage healthy choices—e.g., by establishing lower prices for healthy options identified in Subsection 1.0 and in the Specifications Sheet—are established and set forth in the Rate Schedule, which is attached to this agreement as Exhibit C.

4.3. [Optional: **Product Placement:** Healthy options identified in Subsection 1.0 and in the Specifications Sheet must be placed in the position of the vending machines with the highest selling potential. Conversely, products that do not qualify as "healthy snacks and beverages," but that are allowed to be sold to some limited degree, must be placed in the position of the vending machines with the lowest selling potential.

- 4.4. [Optional: **Most Favored Customer Pricing:** Product pricing offered by Vendor shall be equal to or less than those prices offered by Vendor to other customers within the state.]

COMMENTS about the “Prices” Section

Purpose: Negotiation of prices is entirely appropriate in a commercial transaction such as this, and municipalities should not accept a “take it or leave it” offer from a vendor. Instead, the contract should strike a balance between the prices that vending machine customers can afford and the overall profitability of the contract.

First-year prices are firm because, at the time of the negotiation, the Vendor has “perfect” knowledge about its manufacturing and delivery costs, as well as its desired profit margin. Such knowledge allows the Vendor to lock in prices reflecting those realities. The following years’ prices are not firm, however, because costs (and thus prices) invariably fluctuate from year to year.

Subsection 4.2 provides an optional provision for “most favored customer” pricing. Whether such a provision can be secured will vary according to the market power of the municipality.

Application: This section acknowledges the reality of increasing (or decreasing) prices and gives the Vendor the option of using one of two methods to adjust for price on a yearly basis. However, all adjustments in the contract are tied to the widely accepted objective standard found in the Consumer Price Index.

Negotiation Tip: This section establishes a low price ceiling for price increases over the life of the contract because it requires the parties to use the *lower* of two price indicators in establishing the following year’s prices. It works like this: At the beginning of the contract, the Vendor makes a best estimate about its projected price increases in the second through fifth years. These figures are then compared against actual price changes documented by the CPI for the applicable year. Whichever figure is found to be *lower* becomes the figure that establishes the next year’s price increase. In this way, the Municipality can ensure that yearly price increases remain as low as possible.

5.0 EXISTING AGREEMENTS

By signing this Agreement, Vendor expressly agrees that any contracts or other arrangements, whether written or verbal, that currently exist or that Vendor believes may have previously existed between Vendor and Municipality or any of its departments or personnel regarding: snack and beverage sales; advertising; gifts or donations; past, present,

or future financial contributions and support in the Municipality; and all obligations of the Municipality and Vendor arising from such relationships, if any, are automatically terminated effective as of the signing and delivery of this Agreement. Neither Municipality nor Vendor shall have any further obligations under such preexisting contracts or arrangements.

COMMENTS about the “Existing Agreements” Section

Purpose: This section ensures that the Vendor will not use a preexisting agreement between itself and the Municipality as a barrier to implementing the terms of the new contract. If the Municipality knows for certain that it has no such preexisting agreements with the Vendor, this section may be deleted.

Application: All contracts should comply with state and local procurement laws. But, in some municipalities, individual departments within the municipality may have negotiated their own vending deal. Often such deals are no more formal than a handshake between a police captain and the local bottler, lack well-defined terms and conditions, and fail to comply with standard procurement procedures. This section prevents the Vendor from relying on such informal agreements (which sometimes are not beneficial to the Municipality) and causes the Vendor and the Municipality to consolidate all vending activities under one unified and comprehensive contract.

Negotiation Tip: If a municipality doesn’t know with 100 percent certainty whether it has any preexisting oral or written contracts with the Vendor, it is prudent to include this section in the contract.

6.0 LABELING

All ingredients must be declared on the product label, as required by the Food and Drug Administration and other applicable regulations. All products provided are required to carry legible, open code dating on each can, bottle, or case, and must indicate pack code or expiration date. If any code is encrypted, Vendor must provide the key from the manufacturer to decode the information.

Furthermore, every machine shall display the total calorie content for each item sold, clearly and conspicuously, on or in sufficient proximity to the machine so as to be clearly associated with the vended products. Such information must be in a font and format that is at least as prominent, in size and appearance, as that used to post either the name or price of the item. Calorie information must be visible to the consumer before item selection. Municipality shall have sole discretion in determining the adequacy of calorie disclosure for purposes of this Agreement.

COMMENTS about the “Labeling” Section

Purpose: Providing ingredient and calorie information is an important way to empower customers to make healthy choices.

Application: This Section requires the disclosure of ingredient and calorie information. It should be noted that at the time of the drafting of this Agreement, the Food and Drug Administration was in the midst of the rulemaking process for new federal regulations governing the posting of calorie information for certain articles of food sold from vending machines. These regulations were being developed pursuant to provisions of the Patient Protection and Affordable Care Act of 2010. Municipalities may wish to review federal vending machine regulations and reference or incorporate them in this Section, if desired.

7.0 PUBLIC INFORMATION REQUIREMENTS

All Agreement terms, conditions, offers, and disclosures, as well as information or disclosures arising out of this Agreement, shall be deemed public information. As such, they may be subject to release as public records. Municipality shall not in any way be liable to Vendor for the disclosure of any such records, and Municipality assumes no obligation or responsibility for asserting legal arguments on Vendor’s behalf.

COMMENTS about the “Public Information Requirements” Section

Purpose: The goal of this section is to ensure that the Vendor cannot prevent the Municipality from disclosing any aspect of the contract to the public at large or to municipal administrators in other municipalities, even after the contract is under way. Community access to municipal snack and beverage contracts is essential because municipal snack and beverage contracts are entered into on behalf of the *public* and should be available to all who wish to review any aspect of the deal.

Sometimes, however, municipal snack and beverage contracts contain “Confidentiality” clauses that emphasize the non-disclosure of contract information. A typical clause will state: “Except as may otherwise be required by law or legal process, neither party shall disclose to any third party the terms or conditions of this agreement or any information respecting sales or revenue of the equipment during the Term or thereafter.”

The language “Except as may otherwise be required by law or legal process” acknowledges the fact that all 50 states have adopted public access laws that provide varying degrees of access to vital documents or information about the government’s (i.e., the municipality’s) business. However, most such laws also make some exceptions for commercial or financial information contained within public contracts. Depending on how they are worded, such exceptions can block public access to any financial or trade-secret information that’s contained within the contract. In the “Public Information Requirements” section, the Vendor is agreeing

that a commercial or financial information exemption would simply not apply to this contract.

Application: This section states that all contract information is *deemed* to be a public record. By using the word “deemed,” the parties are agreeing to treat the contract as a public record even if the state’s public records act would not treat it as such.

For added protection, the section also provides the Municipality with protection from liability should the disclosure of information result in some financial loss for the Vendor.

8.0 SERVICE AND DELIVERY REQUIREMENTS

- 8.1. **Vending Machine Service and Delivery Times:** The servicing of vending machines for restocking, maintenance, and repair must occur during normal business hours, weekdays from ____ a.m. until ____ p.m., excluding municipal and national holidays. Invoices should accompany the delivery. [*Optional Add-on: Prior confirmation of delivery time must be obtained for access to secured sites which are not open to the public.*] Deliveries of products to the vending machines and collections made by Vendor may be verified by an authorized representative of the Municipality at the time of delivery or collection.

COMMENTS about the “Vending Machine Service and Delivery Times” Section

Purpose: The goal of this Section is to ensure that the Vendor’s restocking, maintenance, and repair services do not interfere with Municipal activities on the premises (e.g., park and recreation programs, etc.). There may be further restrictions on the servicing of vending machines in security-sensitive installations (e.g., police stations, restricted-access utilities pump stations, etc.).

- 8.2. **Delays Beyond Vendor’s Control:** Vendor shall not be obligated to provide service hereunder during a “Force Majeure Event,” as that term is defined in Subsection 27.12. Vendor shall not be liable for damages arising out of such delays in rendering services.
- 8.3. **Personnel Presentation and Decorum:** Vendor’s personnel shall be courteous, neat, drive at safe and appropriate speeds, and drive vehicles that clearly identify them as Vendor employees.

9.0 INVOICES AND PAYMENTS FOR DIRECT DELIVERY PRODUCTS

Delivery slips or invoices for direct delivery product sales must be furnished on the same day of delivery to each Municipality's _____ [*title of municipal administrator who is authorized to receive invoices*]. Payments to Vendor will be made ___ days from the receipt of Vendor's invoice for the previous month's billing period. Credit memos shall be issued in a reasonable time but not to exceed ___ days from the date of return products.

10.0 RESPONSIBILITY FOR PRODUCTS, MATERIAL, AND EQUIPMENT

Vendor shall be responsible for all products, materials, and equipment until they are delivered and accepted by Municipality at the designated delivery point, regardless of the point of inspection. After delivery to and acceptance by the Municipality of the equipment or snack and beverage products specified in this Agreement, Municipality shall be responsible for the loss or destruction of or damage to the equipment or supplies only if such loss, destruction, or damage results from the negligence of Municipal officers, agents, or employees acting within the scope of their employment. Vendor reserves the right upon 30 days' written notice to Municipality to relocate or remove equipment that is subjected to loss or damage. Vendor shall not be liable for payments of commissions with respect to sales for which money has been stolen. Vendor assumes the risk of any loss of profit resulting from mechanical defects whereby the vending machines vend merchandise without the use of cash or dispense extra merchandise.

COMMENTS about the "Responsibility" Section

Purpose: This section establishes the point in time when the obligation to safeguard the Vendor's products and equipment shifts from the Vendor to the Municipality. This section is necessary because the Vendor retains legal title to all of its equipment (such as vending machines) and products (such as cases of water stocked in a municipal storeroom) during the term of the contract, yet the equipment and products themselves are located on Municipality property and are under the Municipality's control.

Application: This section addresses financially important questions such as: Who has to pay for damages if a vending machine is vandalized? Or is tipped over by an earthquake? What happens if a case of water is stolen from a municipal storeroom? Or is ruined by flooding in a municipal basement? The answer is: It depends on the language of the contract. In this model contract section, the Municipality would be responsible if the equipment or products were damaged or destroyed due to the Municipality's negligence; however, if they were damaged or destroyed for other reasons, the Municipality would not be liable. For example, the Municipality might be responsible if one of the vending machines were vandalized because the Municipality didn't lock a building that was known to be accessible to the public after regular municipal hours. On the other hand, the Municipality would likely not be responsible if the same machine

fell over during an earthquake.

Negotiation Tip: If it's possible that the Vendor's equipment or products might be damaged or stolen while on Municipality property, it's a good idea for the contract to anticipate those problems and provide the parties with an explicit contractual remedy.

11.0 SAFETY REQUIREMENTS

Municipality reserves the right to reject any products, supplies, and equipment that are unsafe for their intended use or that fail to meet established FDA and OSHA [*Note Optional Language:* and state-specific] health and safety requirements and standards.

12.0 EQUIPMENT

- 12.1. **Energy Efficiency:** All machines provided by Vendor under this Agreement shall conserve energy and reduce energy-related costs through energy efficiency. To satisfy this requirement, Vendor either can install machines with an Energy Star[®] label (or equivalent) or can utilize energy-saving devices such as the Vending Miser[®] or equivalent. Vendor shall incur all costs associated with energy-saving machines or devices. Municipality reserves the right to install energy-saving devices after machines have been placed on Municipality property. Municipality shall do so at its own expense and shall be responsible for any service-related issues that result from such installation.
- 12.2. **Vending Machine Equipment:** Vendor shall provide, install and maintain sufficient vending equipment and supplies necessary to facilitate the continued sale of Permitted Snack and Beverage Products. Vending machines shall be new or completely reconditioned at the time of installation. No machine shall be installed that does not meet the energy efficiency requirements set forth in Subsection 12.1. Automatically operated dispensing machines shall be adequately metered with non-reset meters and shall operate on AC-110 volts. The machines shall be double insulated or grounded. All machines shall be equipped with dollar validators and coin-operated mechanisms with change return, slug rejection, and coin-return features.
- 12.3. **Location, Removal, and Addition of Vending Machines:** Municipality and Vendor have mutually determined the initial number of vending machines to be installed by Vendor under this Agreement, as well as the location of those machines on Municipality property. Municipality reserves the sole right to

increase or decrease the number and type of machines at each location. No equipment shall be added or removed by Vendor without prior written approval from Municipality.

- 12.4. **Americans with Disabilities Act:** All vending machines shall meet the requirements of the Americans with Disabilities Act in that all controls must be located between two and four feet from ground level.
- 12.5. **Refunds:** Vendor shall set aside a minimum of \$_____ for possible refunds due to machine malfunctions. This fund shall be checked periodically to ensure adequate funding. Vendor shall provide Municipality with a form to account for any refunds. At a minimum, this form shall contain fields to enter the date, refunded amount, name of person receiving refund, reason for refund, and the serial number of the machine involved.

[Optional Add-on: Each machine shall have a sign affixed to it with necessary information as to how refunds can be obtained by the customer if problems arise during the term of the Agreement.]

COMMENTS about the “Equipment” Section

Purpose/Application: Subsection 12.1 is included to protect both the environment and the Municipality’s bottom line, because most vending machines use electricity very inefficiently, the cost of electricity is high, and the Municipality is the party that’s responsible for paying all electricity bills. Though a typical vending machine uses about \$400 of electricity per year, that figure can be cut in half if a Vending Miser® device is installed on each machine. At a cost of about \$165 per device, a Vending Miser® will pay for itself in less than two years.³

Subsection 12.3 provides that the Municipality and the Vendor will work together to determine how many vending machines will be installed by the Vendor and at what locations. Such cooperation can enhance the value of the contract because vendors have marketing expertise and municipalities can benefit from that. However, a municipality should not cede ultimate power over these critical decisions to its vendor; if it does, a municipality may lose its ability to control what occurs on its property. Moreover, municipality should retain control in order to administer their healthy vending program in accordance with their own policies and procedures.

Subsection 12.5 provides for a minimum fund for customer refunds in the event of malfunctions and a means of tracking malfunctions. The Municipality may also wish to clearly allocate all refund-processing responsibilities onto the Vendor. Refund requests are often a friction point with vending machine clientele.

Negotiation Tip: Vendors have been known to resist the installation of energy-saving devices, largely because they don't know how such devices work. Providing vendors with some upfront information should allay any fears they have about the utility and function of such devices.

13.0 EQUIPMENT MAINTENANCE AND REPAIR RESPONSE TIME

- 13.1. **Ordinary Maintenance:** During the term of this Agreement, Vendor shall be responsible for the ordinary maintenance and repair of vending equipment and other Vendor-owned equipment that it provides for use on Municipal property.
- 13.2. **Repair Response Time:** Vendor shall respond within ___ hours [*Note: e.g., 48 hours*] (excluding weekends and holidays) to all communications from Municipality or one of Municipality's individual municipal sites regarding defective or inoperable machines. Any defective or inoperable machine will be fixed or replaced within ____ [*Note: e.g., 5*] working days.
- 13.3. **Custodial Schedule:** Vendor shall ensure that all equipment is kept in reasonably clean and sanitary conditions; that the vending area is reasonably free of debris and spills; and that all debris is removed from the building during normal business hours. Notwithstanding the foregoing, Municipality shall have the right, but not the obligation, to clean up spills and other conditions that may pose a threat to human health or safety.

COMMENTS about the "Repair Response Time" Section

Purpose/Application: Neither the Municipality nor the Vendor will be able to earn the full value of the contract if vending machines are broken or customers don't want to use them because they're dirty. Unfortunately, vendors don't always make repairs or keep equipment clean with any frequency. Consequently, this section is necessary to create an agreed-upon repair response time, to ensure that the Vendor keeps the vending area in a sanitary condition, and to provide the Municipality with a way to compel the Vendor to take action on both of these promises.

Negotiation Tip: A five-day repair time may not be possible in smaller municipalities or in rural areas where a vendor must cover a lot of territory. The parties should negotiate whatever time frame is appropriate to the scale of the contract.

14.0 ELECTRICITY

- 14.1. **Electrical Power:** Municipality shall furnish, at no cost to Vendor, the electrical power necessary for the operation of the vending machines. Vendor shall provide Municipality with a projection of the maximum aggregate annual electrical consumption per machine. Vendor shall provide information detailing the amperage of the machines and electrical consumption. Municipality will review its power consumption during the term of this Agreement, and machines utilizing an unreasonable or excessive amount of power will be replaced by Vendor within 10 business days of Vendor's receipt of Municipality's notification. Notwithstanding the foregoing, Municipality's responsibility to provide electrical power shall be excused in the event of a Force Majeure Event or a scheduled interruption with notice of at least 10 business days to Vendor.
- 14.2. *[Note Optional Language: All machines must have non-illuminated signage/logo panels].*
- 14.3. **Electrical Outlets:** Municipality will not be required to relocate any electrical outlets or circuits in order to provide electrical power to vending machines at desired locations. Vendor shall bear all costs associated with any such relocation, unless such relocation is requested solely by Municipality, in which case Municipality shall bear the cost of relocation. Each installed vending machine shall be connected on its own electrical circuit. Any new electrical circuits required shall be provided by Vendor at no cost to Municipality. Vendor must obtain Municipality's prior written approval for the use of vending machine electrical cords that are longer than 10 feet.
- 14.4. **Electrical Circuits:** For the initial installation of vending machines, Vendor shall obtain prior written permission from Municipality to install additional electrical outlets or circuits, or to move existing outlets. All requested and approved electrical outlet or circuit additions shall be done by a duly licensed electrical contractor. All work performed must be done in full compliance with state and local building, electrical, and safety codes and regulations. All electrical work shall be subject to Municipality's inspection. Any re-work deemed necessary by Municipality inspectors, due to code non-compliance, shall be done at Vendor's sole expense.

15.0 PROMOTION AND ADVERTISING RIGHTS

[Option One: The following paragraph is for municipalities that have chosen NOT to permit advertising through this Agreement on municipal property.]

No promotion, advertising, or merchandising rights of any kind whatsoever are granted to Vendor under this Agreement. Vendor shall not display or cause to be displayed any identifying marks connected to the products or services provided under this Agreement, whether trade-/service-marked or not, anywhere on Municipality property allocated to vending machine units, except as those identifying marks are or may be applied directly on a product. All vending machines shall have non-illuminated panels, and such panels shall be decorated with the official municipal seal or other Municipality images of its choosing

[Option Two: The following paragraphs are for municipalities that have chosen to permit limited advertising of healthy snacks and beverages on municipal property.]

Municipality hereby grants to Vendor the following promotion and advertising rights:

- 15.1. **Vending Machine Panels:** Vendor may affix such logos/advertising imagery to its vending machine panels as may be pre-approved by Municipality in its sole discretion. Pre-approval will be given only to advertising related to products listed on the Permitted Snack and Beverage Products List and the Vendor trademark.
- 15.2. **Concurrent Municipal Seal or Imagery:** [The details of this subsection are to be determined by the parties. This subsection applies only if the Municipality also desires to have its seal or image placed on machines along with private advertising.]
- 15.3. **Other Promotion and Advertising Rights:** [The details of this subsection are to be determined by the parties.]
- 15.4. **Compliance:** Vendor's failure to comply with Section 15 of this Agreement shall be deemed a material breach of the Agreement that may subject the Agreement to immediate termination at Municipality's sole discretion.
- 15.5. **Voluntary Restriction on Advertising:** By signing this Agreement, Vendor voluntarily submits to the advertising restrictions set forth herein and knowingly and intentionally waives any rights it might otherwise be entitled

to under the First Amendment of the U.S. Constitution and the free speech provisions of the state constitution.

COMMENTS about the “Promotion and Advertising Rights” Section

Purpose: Advertising is a potential revenue stream for the Municipality and offers an economic benefit for the Vendor. The Municipality should consider whether to allow vending machine advertising, keeping in mind that such advertising may provide a mutual economic benefit and promote healthy food and beverage consumption.

Food and beverage promotion and advertising may constitute protected free speech under federal and state constitutions. However, courts have held that businesses can waive their free speech rights via contract, so long as the waiver is done voluntarily and with full awareness of the legal consequences. Section 15.5 establishes that the vendor is waiving any free speech rights it might otherwise have to engage in the types of promotion and advertising enumerated above.

16.0 REVENUE ENHANCEMENT PAYMENT AND PRODUCT SALES COMMISSION

In consideration of the rights and privileges granted to Vendor under this agreement, Vendor agrees to pay Municipality such yearly “Revenue Enhancement Payments” and “Commission on Vending Machine Sales” as are set forth in the Exhibit C Rate Schedule.

- 16.1. **Revenue Enhancement Payment:** Revenue Enhancement Payments shall be paid in installments over the term of the Agreement, each installment due within 30 days following the effective date of the Agreement for each successive year of the Agreement. Vendor shall make payments to:

XYZ Municipality
Street Address
City, State, Zip
Attention: Name of authorized municipal officer

- 16.2. **Commissions on Vending Machine Sales:** Commissions on vending machine sales shall be paid based on cash collected by Vendor, after deducting taxes, recycling fees, and state-mandated deposits, if any apply. Vendor shall pay commissions on or about the 30th of each month following the month in which they are earned. Vendor shall make payments to Municipality.

COMMENTS about the “Revenue Enhancement Payments and Product Sales Commission” Section

Purpose: In thinking about how much money a municipal vending contract is worth to a municipality, it is important to remember that a snack and beverage contract is NOT a philanthropic donation made by a soda company to a cash-strapped municipality to help further the municipality’s goals. For one thing, the profit earned on sales comes directly out of the municipal employee’s or general public’s pockets. For another, municipal vending contracts are actually sophisticated commercial transactions that share much in common with other types of contracts that have commerce and profit as their twin goals. And, as is true of ALL contracts—but especially of commercial contracts—in order to be enforceable, the contract must be supported by the exchange of something of value between the parties. Here, the Vendor is receiving the rights to market and sell its products on municipality property (which the Vendor would otherwise have no right to do), in exchange for a yearly cash payment (i.e., the Revenue Enhancement Payment) and a commission payment made on each unit sold.

Application: Unlike typical municipal vending contracts, this Section provides for a straightforward exchange of value between the parties rather than an upfront “cash advance” or “sponsorship payment” to the Municipality that is then tied to sales quotas over the life of the contract. With sales quotas, municipalities can only “earn” the full amount promised in the contract if they sell an ever-increasing volume of the Vendor’s products. Cash advances tied to sales quotas are a bad deal for municipalities because vendors continue to receive extremely valuable marketing and sales rights *every single day* of the contract regardless of how many units are sold. Logically—and fairly—the appropriate place for municipalities to earn greater or lesser amounts under the contract is under the commission rate that’s tied to unit sales, and not to an upfront cash advance that’s tied to sales quotas.

Contractor administrators are also urged to review their local municipal and state law restrictions on the allowable uses of vending machine commission and cash payment revenues. Vending machine revenues may be restricted to particular funds, accounts, or public purposes by law.⁴

Negotiation Tip: A recent national study, which analyzed 120 school district beverage contracts from 16 states, found enormous variation in the upfront cash advances offered and commission rates paid to school districts even though the same three parent companies (i.e., Coca-Cola Company, Pepsi-Co, and Cadbury Schweppes) were behind each of the contracts.⁵ A review of more than 20 school district vending contracts in California and 19 school district vending contracts in Oregon confirms these findings.⁶ Though some of the variation can be attributed to large vs. small (or urban vs. rural) differences between municipalities, much of the difference is due to the fact that public agencies often lack sophistication when it comes to negotiating commercial transactions, while soda companies are multibillion-dollar transnational enterprises rich in legal/ commercial expertise and resources.

17.0 FINANCIAL REPORTS

- 17.1. **Financial Reports:** Vendor shall provide the Municipality with an accurate and truthful report detailing the total sales per month generated from all vending machines at each municipal location. This report shall be sent with the monthly commission check and shall specify the calculations Vendor used to determine the commission value, as established in the Exhibit C Rate Schedule. The commission check shall be for the aggregate units sold from all vending machines per municipal location after applicable deductions such as tax [*Note Optional Language:* “and bottle redemption value” for those states that have bottle recycling programs].
- 17.2. **Additional Monthly Report:** Vendor also shall provide Municipality with an accurate and truthful monthly sales report. This report shall detail sales activity across different facilities, if applicable, and also by vending machine and product item. This report is due by the second week of the following month to: _____ [name of Municipal business official].

COMMENTS about the “Financial Reports” Section

Purpose/Application: Receiving monthly financial reports should be an essential component of the Municipality’s comprehensive financial management system. In accordance with Generally Accepted Accounting Principles (GAAP), the Municipality’s accounting system should comply with policies and procedures related to internal controls over the Municipality’s money and equipment. Monthly financial reports from the Vendor help ensure fiscal accountability and accuracy, help the Municipality generate reliable financial information, help reduce the risk of the Vendor’s fraud and abuse, and ultimately help protect the municipality’s assets.

Negotiation Tip: Municipalities should not enter into a vending contract unless it contains a financial reporting requirement. There is no valid reason for a vendor to object to such a section, and it would not be unreasonable to consider it a deal breaker if the vendor refused to include one. If the Vendor argues that monthly reports are too burdensome, the Municipality might consider allowing the Vendor to provide quarterly reports.

18.0 FINANCIAL RECORDS AND AUDIT

- 18.1. **Financial Records:** Vendor shall maintain complete and accurate records of vending transactions for each machine in accordance with accepted industry

standards, and will keep such financial records for a period of ____ years after the close of each year’s operation.

- 18.2. **Municipality Audit:** Vendor shall make all applicable financial books and records pertaining to this Agreement available for audit during normal business hours by Municipality or its designated auditor. Upon ____ days’ written notice to Vendor, Municipality personnel may perform an audit of Vendor’s books and records if Municipality believes a discrepancy has occurred regarding the commission checks or other payments made under this Agreement. The cost of such an audit shall be borne by Vendor, calculated as follows: number of hours worked by an Audit Supervisor, multiplied by his/her respective hourly rate. The average rate per hour of an Audit Supervisor is \$_____.

Municipality may seek any remedy allowed under this Agreement’s terms and conditions or under general law. Municipality is not obligated to pay any reimbursement for overpayment by Vendor.

- 18.3. **Third-Party Audit:** At Municipality’s discretion, and as an alternative to the audit performed under Subsection 18.2, Municipality reserves the right to hire a third-party auditor at Vendor’s expense to perform an audit of Vendor’s books and records pertaining to this Agreement. Municipality shall provide Vendor with ____ days’ written notice prior to the commencement of such an audit. The cost of a third-party audit shall be paid by Vendor at the prevailing rates charged by qualified auditors in Municipality’s geographical region.

COMMENTS about the “Financial Records and Audit” Section

Purpose/Application: The Municipality’s ability to audit the Vendor’s financial books and records should be just as important to the Municipality as its right to receive monthly financial reports—and for all of the same reasons. In fact, each section reinforces the other by working in tandem to safeguard the Municipality’s earnings under the Agreement.

The length of time records must be kept will partly depend on how long the statute of limitations is for breach of contract under whatever law is applicable to the contract. Statutes of limitations vary considerably from state to state (e.g., three years in Delaware, four years in California, six years in New York, and ten years in Illinois).

Negotiation Tip: Just as with monthly financial reports, municipalities should

not enter into a vending contract that doesn't give the municipality the right to audit the vendor's financial books and records. There is no valid reason for a vendor to object to such a section; municipalities should consider it a deal breaker if the vendor refuses to include one.

19.0 TAXES

Vendor is responsible for its own applicable taxes, including payroll taxes, and miscellaneous overhead expenses. Vendor shall be responsible for the remittance of taxes on the sales of Permitted Snack and Beverage Products through vending machines on Municipality property. A material provision of this Agreement is the Vendor's payment of any applicable local business licenses and sales taxes.

COMMENTS about the "Taxes" Section

Purpose/Application: A vending contract may trigger state and local sales tax provisions, if such provisions exist in your jurisdiction and apply to the types of snacks and/or foods sold through vending machines. Likewise, as a taxing entity, a municipality may be entitled to business license fees or business registration taxes for vending activity within its boundaries.

20.0 SERVICE PERSONNEL

Municipality shall have the right, in its absolute discretion, to require the removal of Vendor's personnel at any level assigned to the performance of the services provided under this Agreement. Municipality shall provide written notice to Vendor of its request for removal of Vendor's personnel, which notice will become effective upon receipt. Such personnel shall be promptly removed from performing services under this Agreement at no cost or expense to Municipality. Further, an employee who is removed from the project for any reason shall not be re-employed under this Agreement.

21.0 REQUIRED MEETINGS

Vendor and Municipality representatives shall meet [_____], and at such other times as may be agreed upon, to plan and coordinate services provided under this Agreement with the intent to enhance sales in a manner that is nutritionally sound, to increase process efficiencies, and improve communication and customer service.

COMMENTS about the "Required Meetings" Section

Purpose/Application: One of the best outcomes of a well-drafted vending contract is to foster good working relations between the parties. Requiring representatives to meet on a regularly scheduled basis helps everyone realize this goal.

Negotiation Tip: The Vendor and the Municipality should negotiate whatever meeting schedule is appropriate to the scale of the contract. Complex contracts, with machines spread out over many facilities, may require more frequent meetings.

22.0 LAWS, PERMITS, TAXES, AND REGULATIONS

22.1. **Licenses:** Vendor shall obtain all necessary licenses or permits for its proper performance of this Agreement and shall perform in accordance with applicable federal, state, and local laws, regulation, ordinances, or codes in force where Vendor is providing its services and selling its products.

22.2. **Change in Law or Regulation:** If at any time during the term of this Agreement either state, federal law, or local law or regulation is revised to materially limit the snack and beverage types, hours of operation, or location of vending machines on Municipality property, Vendor shall act in conformance with such revised law or regulation, and Municipality shall not be responsible for any lost profits which may result therefrom.

23.0 INDEMNIFICATION

Vendor shall defend, indemnify, and hold harmless Municipality, its officers, employees, agents, and members of its governing body at all times after the date of this Agreement against

- (a) All third-party claims, any liability, loss, damages (including punitive damages), settlement payment, cost and expense, interest, award, judgment, diminution of value, fine, fee, and penalty, or other charge, other than any Litigation Expenses (as defined in Subsection [b]), arising out of or relating to the services, equipment, or products provided under this Agreement; and
- (b) any court filing fee, court cost, arbitration fee or cost, witness fee, and each other fee and cost of investigating and defending or asserting any claim for indemnification under this Agreement, including without limitation, in each case, attorneys' fees, other professionals' fees, and disbursements (collectively, "Litigation Expenses").

COMMENTS about the “Indemnification” Section

Purpose: “Indemnification” is a legal term that means to reimburse another for a loss suffered because of a third party’s or one’s own action or lack of action. In general, indemnification provisions in contracts clarify and fix or limit the monetary risk of the parties to the contract.⁷ This section holds the Vendor responsible for liability—and any resulting costs from liability—in the unlikely event that a third party, such as a customer, suffers an injury arising out of or relating to the services, equipment, or products provided under the Agreement.⁸

This section also includes a separate promise by the Vendor to “defend” the Municipality against losses and liabilities that the Municipality may suffer as a result of the products the Vendor provides or the services it delivers. This creates in the Vendor a duty to make the Municipality whole for costs the Municipality expends protecting itself against the kind of damages that are enumerated in the section. In some states, the duty to defend also includes the obligation to provide a municipality with the legal counsel of its choosing. It’s important to check with an attorney as to local practices and requirements.

Negotiation Tip: Note that only the Vendor is making a promise of indemnification in this section. That’s because the Vendor’s performance under the contract will be largely taking place on the Municipality’s property. Since the legal liability caused by this arrangement could have a huge effect on the Municipality’s finances, the Municipality is the party most in need of the protection offered by an indemnification section.

That said, the Vendor may ask the Municipality for a “cross indemnification” section, in which the Municipality would promise to cover losses the vendor suffers as a result of the Municipality’s performance under the Agreement. The Municipality should discuss cross indemnification with its insurance carrier before agreeing to this kind of clause.

24.0 INSURANCE

- 24.1. **General Requirement:** Vendor shall secure and maintain such insurances as will protect it and the Municipality from claims under Workers’ Compensation laws, and such public liability insurance as will protect it and the Municipality from claims for damages for personal injury, including death and damage to property, which may arise from operations under this Agreement, whether such operations be by Vendor itself or anyone directly or indirectly employed by it.

COMMENTS about the “Insurance” Section

Purpose/Application: This Section is intended to provide only general guidance. State or local laws and policies may require vendors to carry specific types of insurance. Check with your municipality's risk manager and/or insurance provider and conform the Agreement to applicable requirements.

- 24.1.1. **Insurance Rating:** Vendor shall not commence work under this Agreement until it has obtained all required insurance hereunder and certificates evidencing such insurance have been delivered to Municipality. All insurance required under this Agreement shall be provided by a surety admitted to transact business in the State of _____. Insurance carrier shall possess a current A.M. Best's Key Rating of A Minus (A-) or better, unless such insurance coverage is provided under a self-insurance program.
- 24.2. **Certificates of Insurance:** Vendor shall file a certificate of insurance for all insurance required under this Agreement with Municipality. Certificates shall include the following language: "This policy shall not be canceled or reduced in required amounts of liability or amounts of insurance until notice has been mailed to Municipality stating the date of cancellation or reduction. The date of cancellation or reduction may not be less than 15 days after the date of mailing the notice."
- 24.3. **Additional Insureds:** Municipality, its officers, officials, employees, and agents are to be covered as additional insureds in respect to any liability arising out of work or services performed by or on behalf of the Vendor during the Agreement's term.
- 24.4. **Workers' Compensation Insurance:** Vendor shall provide, during the life of this Agreement, Workers' Compensation Insurance or state-approved self-insurance for all of its employees engaged in work under this Agreement.

In case any class of employees engaged in work under this Agreement, on or at the site of the project, is not protected under the Workers' Compensation statute, Vendor shall provide adequate insurance coverage for the protection of such employees not otherwise protected.

- 24.5. **Public Liability and Property Damage Insurance:** Vendor shall secure and maintain during the life of this Agreement Public Liability and Property Damage Insurance to protect itself and the Municipality from all claims for personal injury, including accidental death, as well as from all claims for

property damage arising from the operations under this Agreement. The minimum amounts of such insurance shall be:

(A) Commercial General Liability \$X,XXX,XXX per occurrence

(B) Auto Liability \$X,XXX,XXX combined single limit

24.6. Fire Insurance: Vendor shall secure and maintain Fire Insurance on all work, material, equipment, appliances, tools, and structures that are a part of this Agreement and subject to loss or damage by fire.

25.0 VENDOR'S FAILURE TO PROVIDE SERVICES OR PRODUCTS

25.1. Vendor's Representation of Performance: Municipality requires the Permitted Snack and Beverage Products and Services identified under this Agreement be supplied to Municipality in a timely and accurate manner. Municipality has entered into this Agreement with Vendor because Vendor has represented that it can meet Municipality's time-related service and product specification needs.

25.2. Obtain Other Services: If, in Municipality's opinion, Vendor fails to properly or satisfactorily perform the services or provide the Permitted Snack and Beverage Products called for under this Agreement, or otherwise fails or neglects to comply with the material terms of this Agreement, Municipality may make arrangements with other providers to obtain substitute services and/or Permitted Snack and Beverage Products.

25.3. Unsatisfactory Performance: Unsatisfactory performance may include but not be limited to: late/non-deliveries; failure to repair vending machines as promised; partial deliveries; delivery of wrong products; delivery of unauthorized substituted products not meeting the specifications identified in this Agreement; incorrect pricing; failure to provide revenue as specified in the Agreement; or invoicing problems.

25.4. Cure Notice: Before Municipality may make an arrangement to obtain substitute services or Permitted Snack and Beverage Products from another provider, Municipality shall give Vendor final written notification to perform within ____ number of days ("Cure Notice"). With regard specifically to items that are out of stock, the Cure Notice shall allow Vendor a minimum of ____ days (*Note:* or hours) to resolve any issues related to that problem.

- 25.5. **Vendor’s Duty to Pay:** If Vendor fails to comply with a Cure Notice, Vendor shall pay Municipality for such reasonable re-procurement costs as Municipality may incur to obtain substitute services or Permitted Snack and Beverage Products.
- 25.6. **Other Remedies:** If Vendor fails to perform its services or provide its products as called for under this Agreement, Municipality may, in addition to any other remedy available to Municipality, elect to terminate the contract.

COMMENTS about the “Vendor’s Failure to Provide Services or Products” Clause:

Purpose: During the procurement phase of the contract, the Vendor should represent that it stands ready, willing, and able to provide the Municipality with good-quality direct sale/vending services and healthy products at certain specified prices and at certain specified commission rates. The Municipality then selects the Vendor as the winning bidder on the strength of such representations. In fact, such representations are the *inducement* that brings the Municipality into the deal with the Vendor. These representations then form the core deal between the municipality and the Vendor and are written into the contract in the form of *operative provisions*.

Application: In this section, the Municipality is seeking to ensure that the Vendor *performs what it promised* to the fullest extent possible. It isn’t enough that the Vendor agrees to deliver Permitted Snack and Beverage Products to the Municipality—what if the Vendor fails to do so and instead stocks a vending machine with carbonated soda? This section provides the Municipality with an explicit way to compel the Vendor to perform as promised. And, by giving the Municipality a remedy that ties performance (or the lack thereof) to the Vendor’s bottom line, this section ensures that the Vendor is far more likely to make performance under the contract its number one priority.

26.0 **LIQUIDATED DAMAGES**

- 26.1. **Parties’ Acknowledgments:** The parties acknowledge the following:
- 26.1.1. The purpose of this Agreement is to provide healthy snack and beverage products (i.e., “Permitted Snack and Beverage Products” as that term is defined under this Agreement) to Municipal facilities, buildings, campuses, offices, and institutions and in municipal food service areas.

- 26.1.2. Municipality has invested significant amounts of time and resources towards improving the health of its population by implementing a comprehensive health curriculum and by improving the foods and beverages sold on Municipal property.
- 26.1.3. Vendor's delivery of snacks and beverages other than the Permitted Snack and Beverage Products will directly undermine Municipality's efforts in this regard.
- 26.1.4. The costs to Municipality resulting from the delivery of snacks and beverages other than the Permitted Products are not easily measured, and the amount specified in Subsection 26.2 below represents the parties' reasonable estimate of what Municipality's damages might be.
- 26.2. **Remedies:** In addition to the remedies provided in Section 25 and Section 26, if Vendor fails to deliver Permitted Snack and Beverage Products or to perform the services within the schedule or time as mutually agreed upon by Vendor and individual site, Vendor shall pay to Municipality, as liquidated damages and not as a penalty, an amount equal to [*Dollar Amount chosen by the Municipality that is a reasonable estimate of either the anticipated or the actual damages to the Municipality from the missed delivery or service*] for each day Permitted Snack and Beverage Products delivery is delayed or services are not performed within the scheduled time.

COMMENTS about the "Liquidated Damages" Section

Purpose: Parties to a contract can agree in advance on an amount (called "liquidated damages") that will be paid to compensate an injured party for its anticipated loss or injury caused by a particular contract breach,⁹ regardless of the level of actual damages involved. A liquidated damages clause offers a number of advantages; for one thing, it frees the parties from having to prove what actual damages are in cases where that figure is impractical or impossible to calculate. As a general rule, a liquidated damages clause will be enforced by a court as long as the damage amount agreed to in the contract bears a reasonable relationship to the probable loss or harm—in other words, as long as the clause is not viewed as a penalty.

Application: The Municipality has devoted great amounts of time and resources toward improving the health of its employees and its customers from the general public. The Municipality would suffer harm if the Vendor were to sell

nonconforming products on Municipality property, because the sale of such goods would undermine the Municipality's efforts. The Municipality can benefit from including a liquidated damages clause because it would be difficult to prove what monetary damages the Municipality would sustain if someone purchased an unhealthy snack or beverage while on Municipality property.

Negotiation Tip: Note that this section addresses the damages the Municipality would suffer from having its efforts to improve consumer health undermined and doesn't address the health damages consumers would suffer from having consumed an unhealthy snack or beverage (e.g., diabetes). The reason for this is that the basis of upholding a liquidated damages section is the principle of just compensation. Liquidated damages are designed to give one party (the party that has not breached the contract) a remedy for *its own* losses and not the losses of a third party (i.e., consumers and their individual health status). Also note in Subsection 26.2 that no specific amount is suggested because each liquidated damages clause will need to be negotiated and drafted in light of the economic expectations of the parties particular to the specific deal under consideration.¹⁰

27.0 GENERAL PROVISIONS

- 27.1. **Authority of the Chief Procurement Officer** [*or other Municipal representative*]: Municipality has the final approval in all matters relating to or affecting the Scope of Work. Except as expressly specified in the Agreement, the Chief Procurement Officer may exercise any powers, rights or privileges that have been lawfully delegated by Municipality. Nothing in the Agreement shall be construed to bind Municipality for acts of its employees, including the Chief Procurement Officer, that exceed the delegation of Municipality.
- 27.2. **Municipality's Technical Representative:** The Chief Procurement Officer also will act as the technical representative for all technical aspects related to the performance of the Agreement. Vendor shall make such oral or written reports to the Chief Procurement Officer as may be requested by Municipality or as specified in the Agreement. All contractual matters also shall be addressed to the Chief Procurement Officer.
- 27.3. **Independent Contractor:** Vendor is acting herein as an independent contractor. Nothing herein shall be interpreted to create or be construed to create a partnership, joint venture, or agency relationship between any of the parties, and no party shall have the authority to bind the other in any respect. Notwithstanding any other local, state, or federal policy, rule, regulation, law,

or ordinance to the contrary, Vendor and any of its officers, employees, and agents providing services under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any and all claims to, any compensation, benefit, or any incident of employment by Municipality, including but not limited to eligibility to enroll in any public employee retirement system.

- 27.4. **Conflict of Interest:** Vendor warrants and covenants that no official or employee of Municipality has been retained or employed to aid in the procurement of this Agreement. The existence of such a relationship or engagement may constitute grounds for termination of this Agreement.

COMMENTS about the “Conflict of Interest” Section

Purpose/Application: Bids or proposals for vending agreements are often extremely competitive. Contract provisions referencing or incorporating your municipality’s conflict of interest/anti-nepotism codes are therefore recommended.

- 27.5. **Waste Reduction and Recyclable Materials:** Municipality prohibits the sale or use of non-recyclable containers, plastics, or Styrofoam packaging. No pull-top cans with removable tabs are to be used or sold by Vendor.

[Alternative: Municipality encourages the use of products with recycled materials, reusable products, and products designed to be recycled, to the maximum practical extent.]

COMMENTS about the “Waste Reduction and Recyclable Materials” Section

Purpose/Application: Self-service vending machine products are sometimes criticized for contributing to environmental problems. One possible approach is to prohibit certain types of packaging and containers.

Negotiation Tip: The parties may wish to collaborate on sustainable packaging. Compostable containers and recyclable containers might be used as a metric for determining what products get placed on the Permitted Snack and Beverage Products List.

- 27.6. **Notices:** Formal notices, demands, and communication to be given hereunder by either party shall be in writing and shall be delivered in person, by U.S. mail, or electronically, and shall be deemed received as of the date of verifiable delivery. “Verifiable delivery” of electronic transmission shall

mean email “delivery status notifications” or fax “transmittal confirmation reports,” or their equivalents.

- 27.7. **Announcements:** Vendor shall not issue any press release or make any announcement with respect to this Agreement without the prior written consent of Municipality. Despite the previous sentence of this section, Vendor is entitled to make any disclosures required by law.
- 27.8. **Amendments:** The parties may amend this Agreement if such amendment is in writing, if the writing identifies itself as an amendment to this Agreement and is signed by both parties to the Agreement.
- 27.9. **Waivers:**
- 27.9.1. **No Oral Waivers:** The parties may waive any provision in this Agreement only by a writing executed by the party against whom the waiver is sought to be executed.
- 27.9.2. **Effect of Failure, Delay, or Course of Dealing:** No failure or delay in exercising any right or remedy or in requiring the satisfaction of any condition under this Agreement, and no act, omission, or course of dealing between the parties operates as a waiver or estoppel of any right, remedy, or condition.
- 27.9.3. **Each Waiver for a Specific Purpose:** A waiver made in writing on one occasion is effective only in that instance and only for the purpose stated. A waiver once given is not to be construed as a waiver on any future occasion or against any other person.
- 27.10. **Severability:** If any provision of this Agreement is determined to be invalid, illegal, or unenforceable, the remaining provisions of this Agreement remain in full force, if the essential terms and conditions of this Agreement for each party remain valid, binding, and enforceable.
- 27.11. **Merger:** This Agreement and its Exhibits constitute the final agreement between the parties. It is the complete and exclusive expression of the parties’ agreement on the matters contained in this Agreement. All prior and contemporaneous negotiations and agreements between the parties on the matters contained in this Agreement are expressly merged into and superseded by this Agreement. The provisions of this Agreement may not be

explained, supplemented or qualified through evidence of trade usage or a prior course of dealings. In entering into this Agreement, neither party has relied upon any statement, representation, warranty, or agreement of the other party, except for those expressly contained in this Agreement. There are no conditions precedent to the effectiveness of this Agreement, other than any expressly stated in this Agreement.

27.12. **Force Majeure:** “Force Majeure Event” means any act or event, whether foreseen or unforeseen, that meets all three of the following tests: (a) The act or event (i) prevents a party (the “Nonperforming Party”), in whole or in part, from performing its obligations under this Agreement or satisfying any conditions to the obligations of the other party (the “Performing Party”) under this Agreement or (ii) frustrates the purpose of this Agreement; (b) The act or event is beyond the reasonable control of and not the fault of the Nonperforming Party; and (c) The Nonperforming Party has been unable to avoid or overcome the act or event by the exercise of due diligence. Despite the preceding definition of a Force Majeure Event, a Force Majeure Event excludes economic hardship, changes in market conditions, and insufficiency of funds.

27.12.1. **Suspension of Performance:** If a Force Majeure Event occurs, the Nonperforming Party is excused from (i) whatever performance is prevented by the Force Majeure Event to the extent prevented; and (ii) satisfying whatever conditions precedent to the Performing Party’s obligations that cannot be satisfied, to the extent they cannot be satisfied. Despite the preceding sentence, a Force Majeure Event does not excuse any obligation by either the Performing Party or the Nonperforming Party to make any payment required under this Agreement, provided, however, that no payment need be made if corresponding performance is not rendered or a relevant condition is not fulfilled because of a Force Majeure Event.

27.12.2. **Resumption of Performance:** When the Nonperforming Party is able to (i) resume performance of its obligations under this Agreement, or (ii) satisfy the conditions precedent to the Performing Party’s obligations, it shall immediately give the Performing Party written notice to that effect and shall resume performance under this Agreement no later than two working days after the notice is delivered.

27.12.3. **Exclusive Remedy:** The relief offered by this Force Majeure provision is the exclusive remedy available to the Nonperforming Party with respect to a Force Majeure Event.

27.13. **Assignment and Delegation:**

27.13.1. **No Assignments:** The parties agree that the expertise and experience of Vendor are material considerations for this Agreement. Unless specifically authorized by the Municipality, Vendor may not assign the performance of any obligation or interest under this Agreement without the prior written consent of Municipality. Any attempt by Municipality to assign this Agreement, in violation of this Section, will be voidable at Municipality's sole option.

27.13.2. **No Delegations:** No party may delegate any performance under this Agreement.

27.13.3. **Ramifications of Purported Assignment or Delegation:** Any purported assignment of rights or delegation of performance in violation of this Section is void.

27.14. **Third-Party Beneficiaries:** This Agreement does not and is not intended to confer any rights or remedies upon any person other than the signatories.

27.15. **Captions:** The descriptive headings of the articles, sections, and subsections of this Agreement are for convenience only, do not constitute a part of this Agreement, and do not affect this Agreement's construction or interpretation.

27.16. **Governing Law:** The laws of the State of _____ (without giving effect to its conflict of laws principles) govern all matters arising out of or relating to this Agreement and the transactions it contemplates, including, without limitation, its interpretation, construction, performance, and enforcement.

COMMENTS about the "Governing Law" Section

Purpose: This section states that the contract is to be interpreted and enforced under the law of a particular state that has been pre-selected by the parties. "Choice of law" clauses such as these should not be an afterthought because they can have a significant real-world impact on the resolution of issues

between the parties.

Application: The Municipality should select the law of the state in which it is located so that it can avoid the expense of hiring out-of-state counsel.

Negotiation Tip: If the Municipality and the Vendor's corporate headquarters are in different states, the Vendor may try to use the law of its home state as the contract's governing law. The Municipality should not agree. The Municipality's negotiating position should be that the laws in the Municipality's state are the appropriate ones because the subject matter of the contract (vending goods and services) will be provided within the state where the Municipality is located.

27.17. Dispute Resolution and Forum Selection:

27.17.1.1. **Arbitration:** All controversies and claims arising under or relating to this Agreement are to be resolved by arbitration in accordance with the rules of the American Arbitration Association before a panel of three arbitrators selected in accordance with those rules. The arbitration is to be conducted in _____ . The arbitrators are to apply _____ law, without regard to its conflict of laws principles. Each party shall submit to any court of competent jurisdiction for purposes of enforcing any award, order, or judgment. Any award, order, or judgment pursuant to the arbitration is final and may be entered and enforced in any court of competent jurisdiction.

27.17.1.2. **Designation of Forum:** Any party bringing a legal action or proceeding against any other party arising out of or relating to this Agreement shall bring the legal action or proceeding in the United States District Court for the [insert district court region] or in any court of the State of [insert Municipality's state name] sitting in [insert Municipality's city or county name].

27.17.1.3. **Waiver of Right to Contest Jurisdiction:** Each party waives, to the fullest extent permitted by law, (a) any objection that it may now or later have to the laying of venue of any legal action or proceeding arising out of or relating to this Agreement brought in any court of the State of [insert state name] sitting in [insert city or county name], or the United States District Court for the [insert district court region]; and (b) any claim that any action or

proceeding brought in any such court has been brought in an inconvenient forum.

- 27.17.1.4. **Submission to Jurisdiction:** Each party to this Agreement submits to the nonexclusive jurisdiction of (a) the United States District Court for the [insert district court region] and its appellate courts, and (b) any court of the State of [insert state name] sitting in [insert city or county name] and its appellate courts, for the purposes of all legal actions and proceedings arising out of or relating to this Agreement.
- 27.17.1.5. **Appointment of the Process Agent:** Vendor irrevocably (a) appoints [insert name of process agent] (the “Process Agent”) as its agent to receive service on behalf of Vendor and its property; and (b) authorizes and directs the Process Agent to accept service on its behalf. Vendor shall pay all costs and expenses of the Process Agent in connection with its service as Process Agent with respect to this Agreement.
- 27.17.1.6. **Service Upon Process Agent:** If process is to be served, Municipality shall serve that process by mailing or delivering a copy of the process in care of the Process Agent at [insert address of Process Agent] or any other address as to which the Process Agent has given notice to Municipality.
- 27.17.1.7. **Alternative Methods of Service of Process:** Nothing set forth in this sSection affects the right to serve process in any other manner permitted by law.
- 27.18. **Rights and Remedies Cumulative:** Any enumeration of Municipality’s rights and remedies set forth in this Agreement is not intended to be exhaustive. Municipality’s exercise of any right or remedy under this Agreement does not preclude the exercise of any other right or remedy. All of Municipality’s rights and remedies are cumulative and are in addition to any other right or remedy set forth in this Agreement, any other agreement between the parties, or which may now or subsequently exist at law or in equity, by statute or otherwise.

ACCEPTED AND AGREED:

XYZ MUNICIPALITY

By: _____
Name Title

Date: _____

ABC SNACK/BOTTLING COMPANY

By: _____
Name Title

Date: _____

EXHIBIT A

XYZ MUNICIPALITY HEALTHY SNACK AND BEVERAGE POLICY SPECIFICATIONS SHEET

All vending machine snacks and beverages must comply with the following standards:

COMMENTS about the “Healthy Snack and Beverage Policy Specifications Sheet”

Purpose: This exhibit should provide standards that all snacks and beverages must meet. If the Municipality has a pre-existing healthy snack and beverage vending policy, it should be attached here. If the Municipality has not adopted such a policy, standards may be created for purposes of this Agreement.

Healthy snack and beverage vending standards and guidelines are available from various sources. Some examples include:

New York City (standards for beverage vending machines)

www.nyc.gov/html/doh/html/cardio/cardio-vend-nutrition-standard.shtml

California Center for Public Health Advocacy (model language for California city and county food and beverage policy)

www.publichealthadvocacy.org/_PDFs/soda/ModelLanguage_CityFoodAndBeverages.pdf

EXHIBIT B

PERMITTED SNACK AND BEVERAGE PRODUCTS LIST

COMMENTS about the “Permitted Snack and Beverage Products List”

Purpose: This exhibit lists those specific products that the Vendor and the Municipality have mutually identified as meeting the Specifications Sheet and qualifying for sale in contracted vending machines. (See Subsection 1.1.)

EXHIBIT C

RATE SCHEDULE

This tool was developed with support from the Centers for Disease Control and Prevention. Its contents are solely the responsibility of the authors and do not necessarily represent the official views of the Centers for Disease Control and Prevention.

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- ¹ 23 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 63:3 (4th Ed. 1993).
- ² Center for Science in the Public Interest & the Public Health Advocacy Institute. *Raw Deal: School Beverage Contracts Less Lucrative Than They Seem*. 8 (December 2006). Available at: www.cspinet.org/beveragecontracts.pdf.
- ³ Tufts Institute on the Environment, *Vending Misers: Facts and Issues*. Available at: www.tufts.edu/tie/tci/pdf/VendingMiserHandout.pdf (last visited June 26, 2007).
- ⁴ *See, e.g.*, Fla. Admin. Code R. 15-5.001(3) (restricting net proceeds of vending machines located in department buildings to employee benefit funds); Minnesota Office of the State Auditor, *Vending Machines in County Buildings* (2009) (requiring deposit of commissions from vending machines in areas accessible to the general public into the general fund).
- ⁵ Center for Science and the Public's Interest & the Public Health Advocacy Institute, *supra* note 2.
- ⁶ California review performed by the author; for Oregon review, *see* Nicola Pinson. *Community Health Partnership, School Soda Contracts: A Sample Review of Oregon Public Municipalities*. 11, 2004 . Available at: <http://nepc.colorado.edu/files/CERU-0504-147-OWI.pdf>.
- ⁷ Morton Moskin. *Commercial Contracts: Strategies for Drafting and Negotiating*. (Aspen Publishers) (2007).
- ⁸ Tina Stark. *Negotiating and Drafting Contract Boilerplate*. 248 (ALM Publishing) (2003).
- ⁹ Morton Moskin, *supra* note 7.
- ¹⁰ Tina Stark, *supra* note 8, at 226–27.