



WILLIAM A. BELL, SR.  
MAYOR

# CITY OF BIRMINGHAM

FINANCE DEPARTMENT

## PURCHASING DIVISION

P-100 CITY HALL  
710 NORTH 20TH STREET  
BIRMINGHAM, ALABAMA 35203-2227

TELEPHONE (205) 254-2265  
FAX (205) 254-2484

J. THOMAS BARNETT, JR.  
FINANCE DIRECTOR

RON NICKEL  
PURCHASING AGENT

WILLIAM E. CAFFEE  
ASSISTANT PURCHASING AGENT

July 6, 2015

### INVITATION TO BID #15-52

Sealed bids for the pouring rights contract for the Birmingham CrossPlex/Bill Harris Arena at the CrossPlex for the City of Birmingham for a period of three (3) years, will be received by the Purchasing Agent, P-100 First Floor City Hall, Birmingham, Alabama until 2:00 p.m., August 12, 2015 at which time and place they will be publicly opened and read.

Bidders wishing to bid can download the complete solicitation including the specifications and bid forms via the internet at [www.birminghamal.gov](http://www.birminghamal.gov) (go to link titled **Bidding Opportunities**), or by visiting the Purchasing Office at the address shown above, or by calling (205) 254-2265, fax (205) 254-2484 and requesting a copy be mailed to you. Any addenda will be available on the internet. Bidder is responsible for checking the website for addenda until bid opening date. Addenda will be mailed to only those vendors who were provided a copy in person or by mail.

The City follows a policy of nondiscrimination. No contractor with the City should discriminate on the basis of race, sex, religion, or national origin. Failure by the vendor to carry out these requirements is a material breach of its obligations, which may result in its termination or such other remedy as the City deems appropriate.

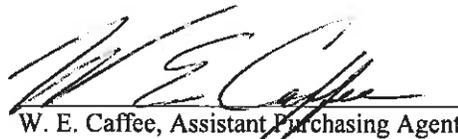
Bids are to be submitted on the bid form provided and all bid pricing is to be F.O.B. Birmingham, AL delivered.

No bid may be withdrawn for a period of sixty (60) days after the date of the bid opening.

The City reserves the right to reject any or all bids submitted in whole or part, and to waive any informalities.

Bids must be submitted in a sealed envelope marked, **SEALED BID – POURING RIGHTS BIRMINGHAM CROSSPLEX/BILL HARRIS ARENA AT THE CROSSPLEX – 2:00 P.M., 08/12/15.** Bids may be hand delivered to Room P-100 First Floor City Hall, Birmingham, Alabama or mailed to City of Birmingham, P.O. Box 11295, Birmingham, Alabama 35202-1295. **(DO NOT MAIL BIDS TO ROOM P-100 1ST FLOOR CITY HALL).** However, bids sent by any express carrier (i.e. Federal Express, UPS, Airborne, etc.) must be mailed to 710 North 20th Street, and specify delivery to Room P-100, 1st Floor-City Hall.

It is the bidder's responsibility to make sure that his bid is in the possession of the Purchasing Agent on or before 2:00 p.m., August 12, 2015. Bids received after this time will not be considered.

  
W. E. Caffee, Assistant Purchasing Agent

aj  
B.N. 07/15/15

## SPECIFICATIONS FOR POURING RIGHTS AT THE BIRMINGHAM CROSSPLEX/BILL HARRIS ARENA AT THE CROSSPLEX

### GENERAL:

The City of Birmingham is seeking bids for pouring rights at the Birmingham CrossPlex/Bill Harris Arena at the CrossPlex. Award will be made to the highest priced responsive, responsible bid submitted for the total lot.

The proposed contract shall extend for a minimum time frame of three (3) years. The City shall have the right to terminate this agreement at any time for cause or convenience.

Successful bidder shall not assign this contract to any other party without prior written approval of the City of Birmingham. Contract shall not be assigned to an unsuccessful bidder who was rejected because he was not a responsive or responsible bidder.

Enclosed is a tentatively proposed sample pouring rights agreement form for review by potential bidders. Certain terms and conditions are subject to change upon mutual agreement of both parties..

Any questions concerning these specifications should be addressed to Bill Caffee, at (205) 254-2265, between the hours of 8:00 a.m. and 4:00 p.m., Monday through Friday.

Failure to adhere to any or all terms, conditions and specifications as set forth in the contract may result in the immediate termination of the contract. Should termination occur, the holder of the contract may be declared a "non-responsible vendor". This declaration may result in the rejection of any future bids submitted by the vendor for a period of time to be determined by the City.

The City reserves the right to cancel the contract, in whole or part, and seek new bids at any time the City determines that the service being supplied is not satisfactory and unacceptable.

The successful party shall carry general liability insurance (either primary or a combination of primary and umbrella coverage) with limits of not less than \$1,000,000.00 combined single limit for each occurrence and shall include, but not be limited to, personal injury, property damage, vandalism, property loss and theft. The successful party shall also carry automobile liability insurance with limits of not less than \$1,000,000.00 bodily injury and property damage per occurrence combined single limit. Party shall carry Workman's Compensation coverage in an amount adequate to comply with the statutory requirements. Such policies shall name the City of Birmingham as an additional insured and shall contain an endorsement providing that the City will be given not less than thirty (30) days notice in writing prior to cancellation or change of coverage provided by said policies. Insurance shall be through companies authorized to do business in the State of Alabama. Certificate of insurance must be presented to the City within ten (10) days of notice of award and prior to commencement of any work. Successful party is required to include the bid number on the evidence of insurance document. Policies that state the company will endeavor to provide thirty (30) days notice prior to cancellation or change of coverage, but failure to do so shall impose no obligation or liability of any kind upon the insurer, its agents or representatives are not acceptable. Insurance shall be through companies authorized to do business in the State of Alabama with a B+ rating or better according to the most current edition of Best's Insurance Reports. Party is to provide written documentation of the company's rating with his bid.

Vendor shall defend, indemnify, and hold harmless the City of Birmingham, and its agents, employees and officials (hereinafter the "Indemnitees") from and against all demands, actions, damages, judgments, expenses (including but not limited to attorneys' fees, expert fees, court costs, and other litigation costs), losses, and claims (including those for bodily injury, sickness, disease or death, or to injury to, destruction or loss of use of tangible property) (collectively hereinafter "Claims") by any third parties (including any employee, subcontractor or representative of the Vendor, hereafter a "Vendor Representative") that arises out of, relates to, results from, or is attributable to any of the following: (a) Vendor's performance or failure to perform its obligations hereunder; (b) any conditions in or about the work sites that the Vendor or any Vendor Representative may encounter; or (c) the use or occupancy of the work sites by Vendor and any Vendor Representatives. This indemnification obligation includes Claims that are caused in part by the negligence of an Indemnitee(s); provided nothing herein shall obligate Vendor to indemnify any of the Indemnitees for Claims resulting from the sole negligence or from the willful misconduct of the Indemnitees.

The successful vendor ("Vendor") warrants that it will inspect the work sites before performing the services and work contemplated here under (services"). Vendor is exclusively responsible for performing the services in a safe manner that does not put at risk the safety of persons (including its own employees or representatives) or endanger property. Vendor shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to: (i) all its employees and all other persons who may be affected by the services; (ii) all the services and all materials and equipment to be incorporated therein, whether in storage on or off the worksite, or under the care, custody or control of the Vendor or any of its subcontractors; and (iii) other property at the work sites or adjacent thereto. Vendor further agrees to comply with all provisions and requirements set forth in applicable laws, ordinances, rules, regulations and orders of any public authority having jurisdiction over safety of persons or property or to protect them from damage, injury or loss.

The bidder's attention is directed to the fact that all applicable state laws, municipal ordinances and rules and regulations of the authorities having jurisdiction over the work to be performed shall apply to the Contract throughout, and they will be deemed to be included in the Contract as though written out in full in the Contract.

Contract award to purchase the service covered in this bid document shall be construed under and governed by the law of the State of Alabama and each party thereto irrevocably agrees to be subject to the jurisdictions of the courts of the State of Alabama.

Bidder (and its employees, agents and any subcontractors) shall not discriminate on the basis of race, color, national origin, or sex in the performance of the services contemplated hereunder. Failure by the bidder to carry out these requirements is a material breach of its obligations, which may result in its termination or such other remedy as the City deems appropriate.

Bidder acknowledges and agrees that, consistent with federal law and City's public policy, it will encourage disadvantaged business enterprise (DBE) participation to the extent permitted by law. A "disadvantaged business enterprise" is a for-profit small business concern (i) at least 51% owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51% of the stock is owned by one or more such individuals; and (ii) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it. In accordance with federal law, a "socially and economically disadvantaged individual" includes African-Americans, Hispanic Americans, Native Americans, Asian-Americans, women, and any additional groups designated as socially and economically disadvantaged by the federal Small Business Administration.

**Successful bidder acknowledges and agrees that the City has the right to deduct from total amount of consideration to be paid, if any, to the successful bidder under this agreement all unpaid, delinquent, or overdue license fees, taxes, fines, penalties and other amounts due the City from the successful bidder.**

**The City of Birmingham must have a copy of the successful bidder's current City of Birmingham business license prior to formal award of contract. Each bidder may submit a copy of his/her license along with his/her bid. However, bidder must provide a copy of his/her current business license no later than seven (7) working days of receipt of notice of intent to award. Failure to submit the requested information will result in the notice of intent to award being revoked.**

**Any successful bidder who is not currently set up as a vendor in the City of Birmingham vendor file will be required to submit a completed W-9 tax form prior to any award. The W-9 tax form may be submitted with your bid or no later than seven (7) working days of receipt of notice of intent to award.**

Successful Vendor (located in the State of Alabama or located outside of the State of Alabama, but employs one or more employees within the State of Alabama) represents and warrants that it does not knowingly employ, hire for employment, or continue to employ an "unauthorized alien", as defined by the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, Act No. 2011-535 (H.B.56) of the Alabama Legislature, as amended from time to time (the "Act") and that, during the performance of this contract, Vendor shall participate in the E-Verify program as required under the term of the Act. Vendor agrees to comply with all applicable provisions of the Act. As a condition for the award of any contract, Vendor shall provide documentation establishing that the Vendor is enrolled in the E-Verify program, or a signed, written statement that the Vendor does not have a presence (one or more employees) in the State of Alabama. Vendor may submit applicable documentation with his/her bid or no later than seven (7) working days of receipt of notice of intent to award. Furthermore, a contracting party found to be in violation of this provision shall be deemed in breach of the contract/agreement and shall be responsible for all damages resulting therefrom.

## POURING RIGHTS BID SPECIFICATIONS

### BIRMINGHAM CROSSPLEX/BILL HARRIS ARENA AT THE CROSSPLEX

#### I. KEY REQUIREMENTS:

- Bid shall include a one-time up front CrossPlex Facility Fee payable within thirty (30) days at contract signing plus an annual Pouring Rights Fee for each year of the three (3) years agreement. First year's pouring rights is also payable within thirty (30) days of contract signing.
- Bidders are required to submit detailed plans for all aspects of the base program (II. A through E). All expenses and investments are the responsibility of winning bidder.
- Sales/incentives based on captured/reported consumption projections vs. actual should be included as part of the bid response. See sales incentives section of bid specifications.
- Agreement shall be for a term of three (3) years.
- Winning bidder shall be required to negotiate with Birmingham CrossPlex Staff and invest additional money in Potential Incremental Marketing Inventory as currently available. See Potential Incremental Marketing Inventory Section of bid specifications. Investments by the winning bidder with regards to incremental inventory will be a required second step after winning the bid. Monetary Investments for Incremental Marketing Inventory shall be payable annually over the three (3) year term of the agreement.

#### II. BASE PROGRAM REQUIREMENTS. ALL REQUIREMENTS ARE SUBJECT TO CITY REVIEW AND APPROVAL.

##### A. Beverage Portfolio:

Required Product Availability on an as determined basis:

1. Sports Drinks (Isotonic)
2. Energy Drink
3. Bottled, Flavored and Enhanced Water
4. Colas
5. Low/No Cal Drink
6. Caffeine Free Drink
7. Flavored & Variety Drinks
8. Teas & Juices

Provide a detailed listing of available products, container sizes, and brands. Bidder is to provide a unit price for each item offered for year one, for year two and for year three. This pricing will be available to the City of Birmingham and/or the City's contracted concessionaire for the CrossPlex facility. New products may be added as they become available during the contract term.

##### B. Mutually Agreed "In-Venue Concession Area" Signage for both Birmingham CrossPlex and Bill Harris Arena at the CrossPlex:

1. Concession Fountain Back Signage
2. Concession Area Banners

##### C. Pouring Equipment:

1. Valve Free Standing Fountains
2. Single Door Merchandiser(s)
3. Counter Top Merchandiser(s)
4. Double Door Merchandiser(s)
5. Bottle/Can Vending

##### D. Ancillary Requirements:

1. Sustainability (recycling)/Material Recovery Containers Plan
2. Conversions/re-engineering of existing pouring equipment at Bill Harris Arena at the CrossPlex
3. Bill Harris Arena at the CrossPlex Scoreboard with Cobranding
4. Waste Container Receptacles with Cobranding
5. Mobile Drink Kiosk(s)
6. Concourse Signage
7. Courtesy Branded Products (drinks) with a minimum value of \$10,000.00/year.
8. Courtesy Branded Supplies/Starter contributions (cups, napkins, carts, coolers, etc.) with a minimum value of \$10,000.00/year.

**E. Sales Incentives:**

1. Provide a minimum rebate dollar amount offered using baseline consumption rates based on projected annual attendance and average drink purchase rate/cost factor. In your plan, provide your formula for arriving at the annual dollar value of the rebate incentive. Calculation should show the value for the average cost/drink, average drinks consumed, total sales, a stated percent of sales offered as the incentive and the total value of the incentive offered. The actual incentive value calculated using the given estimates for each year will consider the minimum amount that will be paid to the City, regardless of the actual total sales up to the calculated total value of sales based on the baseline estimate.
  - a. Estimated 2015/16 attendance 120K
  - b. Estimated 2016/17 attendance 130K
  - c. Estimated 2017/18 attendance 135K
2. The incentive dollar value received by the City shall never be less than the calculated baseline incentive value for each year. Should sales surpass the baseline calculated sales value, the City shall receive the baseline incentive amount plus additional incentive dollars based on the actual dollar sales above the calculated baseline sales at least at the same percentage of sales or higher as the baseline consumption percentage rate.

**III. POTENTIAL INCREMENTAL MARKETING INVENTORY:**

Vendor must have the ability to choose, bundle and customize a strategic branding program within the track & field and natatorium venues and concourse of the CrossPlex, the Bill Harris Arena at the CrossPlex as well as gateway signage external to CrossPlex/Bill Harris Arena at CrossPlex. Annual monetary commitment over the three (3) year term of the agreement will be required and based on programs, representations and visuals chosen from the listing provided below. All inventory menu items will have a predetermined unit price assigned to each item. Marketing inventory will also be made available to other potential advertisers, except for competing beverage providers, at the same established prices. Marketing payments are due at the beginning of each contract year.

- A. LED Video Board Naming Rights
- B. LED Video Board Static Panel Advertising
- C. Individual Venue Naming Rights
- D. VIP Box Sponsorship Term Option
- E. Venue Banners
- F. Individual Event Sponsorship/Development
- G. A-Frame Advertising
- H. LED Video Board Messaging Packages
- I. Internal Directional Signage
- J. Community Development Programs
- K. Branded Disposable Products (ex. Towels)
- L. Strategic Wraps Advertising
- M. Test Marketing
- N. Web-Site
- O. Concourse Ribbon Board Messaging
- P. Ticketing Area Ribbon Boards
- Q. Lead-In/Complex Approach (i.e. street directional signage, etc.)
- R. Parking Lot Signage
- S. Marquee Building Signage for Bill Harris Arena at CrossPlex

**BID FORM**

William E. Caffee  
Assistant Purchasing Agent  
Birmingham, Alabama

Submitted below is my firm bid for pouring rights contract for the Birmingham CrossPlex/Bill Harris Arena at the CrossPlex for the City of Birmingham for a period of three (3) years in accordance with your invitation to bid and specifications dated July 6, 2015. Prices quoted are f.o.b. delivered to jobsite, Birmingham CrossPlex/Bill Harris Arena and I am bidding in accordance with specifications except as listed below.

<b>APPROX QTY</b>	<b>DESCRIPTION</b>	<b>PRICE</b>
1	One-time payment Pouring Rights CrossPlex Facility Fee	
1	Annual Pouring Rights Fee for year 2015/16	
1	Annual Pouring Rights Fee for year 2016/17	
1	Annual Pouring Rights Fee for year 2017/18	
1	Incentive rebate from 2015/16 product consumption baseline estimate	
1	Incentive rebate from 2016/17 product consumption baseline estimate	
1	Incentive rebate from 2017/18 product consumption baseline estimate	
<b>GRAND TOTAL</b>		<b>\$</b>

**BID FORM-cont'd**

**Exceptions to Specifications:**

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I hereby certify that we do not discriminate in employment of our personnel against any persons on account of race, creed, color, sex, or national origins, and acknowledge and agree that the City encourages minority and women-owned business participation to the maximum extent possible. This policy includes Historically Underutilized Business Enterprises such as architectural firms, engineering firms, investment banking firms, other professional service providers, and construction contractors as part of the City's business, economic and community revitalization programs.

Bidder acknowledges receipt of \_\_\_\_\_ addenda.  
(addenda numbers)

**This page must be returned with bid.**

\_\_\_\_\_  
Date of Bid

\_\_\_\_\_  
Name (Print legibly or Type)

\_\_\_\_\_  
Company

\_\_\_\_\_  
Title

\_\_\_\_\_  
Street Address

\_\_\_\_\_  
Signature

\_\_\_\_\_  
City                      State                      Zip

\_\_\_\_\_  
Tax ID Number

\_\_\_\_\_  
Post Office Box (Zip if different from street address)

\_\_\_\_\_  
E-Mail Address

\_\_\_\_\_  
City                      State                      Zip

\_\_\_\_\_  
Telephone Number

\_\_\_\_\_  
Terms of Payment

\_\_\_\_\_  
Fax Number

\_\_\_\_\_  
Delivery Date

\_\_\_\_\_  
Website

**IF AVAILABLE PLEASE SUBMIT COPY OF CURRENT CITY OF BIRMINGHAM BUSINESS LICENSE WITH THIS BID.**

**INDICATE THE FOLLOWING ADDRESSES IF DIFFERENT FROM ABOVE:**

- 1. BID AWARD NOTICE ADDRESS**
- 2. PURCHASE ORDER ADDRESS**
- 3. REMITTANCE ADDRESS (and NAME if different than above)**

## POURING RIGHTS AGREEMENT

The City of Birmingham, Alabama ("City") and Vendor enter into this **Pouring Rights Agreement** (the "**Agreement**") effective as of \_\_\_\_\_, 2015 (the "**Effective Date**").

WHEREAS, the City owns and operates the Crossplex/Bill Harris Arena at the Crossplex facilities that are located in the western part of the City's corporate limits (hereinafter, collectively the "**Facilities**");

WHEREAS, in connection with Invitation to Bid #15-52 (the "**Bid**"), the City heretofore has solicited bids for the pouring rights and associated the supply of non-alcoholic Beverages (as defined below) at the Facilities (the "**Pouring Rights**"); and

WHEREAS, Vendor submitted the successful Bid, and the City grants Vendor the Pouring Rights and rights associated with it subject to the terms and conditions below.

### WITNESSETH

**1. Additional Defined Terms.** The additional defined terms that are applicable to and used in this Agreement are as follows:

**1.1 "Beverages"** means all non-alcoholic beverages, whether hot or cold, carbonated or non-carbonated or naturally or artificially flavored drinks, including, without limitation, cans, bottles, fountain dispensed products, soft drinks, bottled water, enhanced water, sports drinks, juice products and energy drinks. "Beverages" does not include milk, flavored milk, beer and other alcoholic beverages, unbottled tap water, fresh squeezed juice or fresh brewed coffee and/or tea.

**1.2 "Approved Cups"** means disposable cups, the design of which is approved by Vendor. These Cups must prominently bear the trademarks of Vendor or other Vendor Beverages, and the Crossplex logo. Approved Cups also means disposable souvenir cups prominently featuring trademarks(s) for Vendor Beverages, the Crossplex logo and the Facilities. All Approved Cups must be recyclable.

**1.3 "Affiliate"** means, as to any entity, any other entity that is controlled by, controls, or is under common control with that entity. The term "control" (including the terms "controlled", "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an entity.

**1.4 "Vendor Beverages"** means all Beverages distributed and marketed by Vendor whether under trademarks or brand names owned or controlled by or licensed for use to Vendor.

**1.5 “Mark”** means – with respect to any party – any trademark, trade name, service mark, design, logo, slogan, symbol, mascot, character, identification, or other proprietary design now or in the future owned, licensed, or otherwise controlled by that party. The term “Property Marks” means any Marks associated with the Property and includes the Designations (as defined in Section 4.1) and the Property’s name, logo and emblems. The term “Property Marks” does not include the name or likeness of any artist or athlete performing at the Facilities.

**1.6 “Property”** means all buildings and grounds of the Facilities owned or operated by the City during the Term of this Agreement, whether currently existing or built or acquired during the term, including all branded or unbranded food service outlets, vending locations, arenas, exhibition halls, meeting rooms, and the planned Natatorium warm-up pool. For purposes of this Agreement, “Property” does not include the planned retail area near the Facilities.

**1.7 “Pouring Rights Fee”** is defined in Section 7.

**2. General Scope.** During the three year period contemplated in Section 10 of this Agreement, Vendor shall have the Pouring Rights (and associated rights stated herein) with respect to activities conducted at the Property on the terms and conditions – and subject to the limitations and exceptions - described herein and in the Bid Specifications for Pouring Rights at the Birmingham Crossplex/Bill Harris Arena at the Crossplex. The rights granted by the City herein only extend to Vendor, and are not transferrable or assignable by Vendor to a third party without the express written approval of the City or except as provided in Section 15.16 of this Agreement.

**3. Beverage Rights.** City grants Vendor the exclusive right to offer Beverages, for sale or otherwise, at the Property, including the following specific Beverage availability and Beverage merchandising rights:

**3.1 Beverage Availability.** City grants Vendor the right to sell and distribute Vendor Beverages at all concessions and vending locations within the Property. City will require that it, or any concessionaire or other entity that it authorizes to perform operations at the Property, purchase from Vendor its complete requirements of Vendor Beverages and products used in the manufacture of those Beverages.

**(A) Minimum Availability:** Vendor will make available, at a minimum, the brands and types of all fountain drink Beverages and related fountain equipment that were set forth in Vendor’s response to the Bid, which response is incorporated by reference.

Vendor will make available, at a minimum, the following bottle/can brand Beverages in all related refrigerated equipment that were set forth in Vendor’s response to the Bid, which response is incorporated by reference.

Vendor will make available, at a minimum, the following brands on all portable bars:

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**3.2 Beverage Merchandising.** Vendor shall merchandise Vendor Beverages at the Property, including the following specific rights:

**(A) Point of Sales Advertising.** Materials promoting Vendor Beverages at the point of sale must be clearly visible to the purchasing public and must be displayed in a manner and location acceptable to City.

**(B) Advertising.** City grants Vendor the following rights to advertise Beverages solely in the concession areas of the Facilities (i.e., the Lower Concourse areas) and, subject to City approval, for external gateway advertising signage:

1) Trademarks and/or names of Vendor Beverages will be listed on Vendor's dispensing equipment and the menu boards of all food and refreshment outlets where Vendor Beverages are sold.

2) During the entire Term, no advertising of Beverages other than those distributed by Vendor shall be made available at the Property to anyone other than Vendor.

3) Vendor will have the right to distribute coupons and/or promotional materials, pre-approved by the City or its designee.

No advertising rights are granted hereunder in the Upper concourse areas, or in the track, pool, basketball court or other competition areas of the Facilities.

**(C) Approved Cups.** All Vendor Beverages served, sold, or dispensed at the Property must be done so in Approved Cups, Vendor packaging, or in promotional containers designed or approved by Vendor. As stipulated in section 1.2, All Approved Cups must be recyclable.

#### **4. Rights to Use Marks**

**4.1 General Designation.** Vendor may promote the fact that it is the Beverage provider for the Facilities and that Vendor Beverages are available at the Property. This promotion may occur in advertising (including television, radio, print, and all other media) and at the point of sale of any Vendor Beverages. In the event any such advertising or promotional activities reference the Crossplex Facilities and/or events at the Crossplex Facilities, Vendor agrees that it will include the approved Crossplex logo in any such promotional activities.

#### **4.2 License to Use Property Marks.**

**(A) Grant of License.** Subject to the City approval rights in Section 6.2, the City grants Vendor a license to use Property Marks – on a royalty-free basis – for the purposes of promoting Vendor Beverages. The license gives Vendor the right to use the Property Marks (including the approved Crossplex logo) in or on all of its advertising and promotional materials, which includes – for the purposes of this Agreement – point-of-sales materials; broadcast, print, electronic and all other forms of media; and merchandise.

**(B) Use With Customers.** Subject to City approval rights in Section 6.2, the license also gives Vendor the right to use the Property Marks in joint advertising and promotions with its customers and to display the Property Marks with its customers' trademarks, logos and branded products in or on all advertising, promotional materials and activities, so long as they appear with Vendor's trademarks and the customer is not depicted as a sponsor of the Facilities. The City acknowledges that Vendor's customers operate in all channels of trade, including grocery stores, mass merchandise stores, convenience stores, oil and gas/petroleum stores; drug stores; quick serve restaurants and all other types of restaurants; institutional foodservice operations; "at work" accounts; video and music stores; movie theatres and indoor entertainment facilities; and theme parks and outdoor attractions. Because they are included in the Pouring Rights Fee, no separate royalty or license fee will be charged to Vendor or its customers for using the Property Marks in this manner. Vendor acknowledges that City has or will have Property sponsors or marketing partners in various channels of trade other than the Beverage category, most or all of which may be Vendor's customers. Therefore, for their mutual benefit, Vendor and City agree to work together in good faith to include such other Property sponsors or marketing partners in the joint advertising and promotional programs where commercially reasonable and feasible.

**(C) Use on Merchandise.** Subject to the City approval rights in Section 6.2, Vendor may create merchandise bearing trademarks for Vendor Beverages together with any Property Marks. Vendor will not pay any royalties to City for this merchandise, as long as it is distributed in connection with Vendor Beverages. City agrees that royalties will not apply in any circumstances to any of

the following that bear Property Marks: cups; vessels; and advertising or promotional materials.

**5. Promotional Rights.** City grants Vendor the following rights concerning the promotion of its Beverages:

**5.1 Promotional Rights.** Subject to approval process set forth in Section 6.2, City grants Vendor the right to use the City's Property Marks (if any) to promote Vendor Beverages. Subject to approval process set forth in Section 6.2, Vendor may engage in promotional activities in order to establish and promote its association with City, the Property and the Property Marks.

**5.2 Sampling Programs.** Vendor will have the right to conduct mutually agreeable sampling programs for Vendor Beverages with audiences at the Property. All sampling programs will be at the sole expense of Vendor and must be approved by the City in advance.

## **6. Cooperation and Approvals**

**6.1 General Cooperation.** City will cooperate, within its reasonable discretion, with Vendor's promotional activities – in and outside the Property -- concerning Vendor's promotional activities.

### **6.2 City Approval.**

**(A) Promotions.** In advance of the use of any of the following, Vendor shall submit to the City in writing, and the City has the right to approve, each of the following:

- (1) The concept and proposed execution for any promotional activity concerning the use of Vendor Beverages at the Property; and
- (2) Any materials that display the Property Marks in connection with Vendor Beverages.

**(B) Approval Process.** If the City does not respond to Vendor's written submission to the City for a promotional approval within ten (10) working days, then Vendor will resubmit its request for approval. If the City still does not respond within 48 hours of that second notice, Vendor may treat the submission as approved. The parties acknowledge that City does not have the authority to approve Vendor's use of an artist's name and/or likeness in Vendor's advertising and promotional materials, and that Vendor will be responsible for securing all such approvals.

**(C) Discretion to Approve.** City will exercise its reasonable discretion in determining whether to approve or deny approval of any promotional material

submitted by Vendor. As provided in Section 2 above, the rights granted by the City herein only extend to Vendor (unless otherwise approved by City). Therefore Vendor acknowledges that the City has the discretion to deny promotional activities that benefit third parties.

**7. Fees and Other Payments to City.**

**7.1 Fees.** In exchange for the rights granted under this Agreement, Vendor will pay the City each of the following:

(A) a One-Time Pouring Rights CrossPlex Facility Fee in the amount of \$ \_\_\_\_\_ in connection with the Facilities. Vendor will remit payment to City for this One-Time Pouring Rights Fee within 30 days after the execution of this Agreement;

(B) an Annual Pouring Rights fee of for each year the Agreement is in effect (the "Pouring Rights Fee).” Vendor shall pay the first annual Pouring Rights Fee, \$ \_\_\_\_\_, within 30 days after the execution of this Agreement, shall make the payment for the second year of the Agreement, \$ \_\_\_\_\_, within 30 days after its first anniversary date, and shall make the payment for the third year of the Agreement, \$ \_\_\_\_\_, within 30 days after its second anniversary date; and

(C) Annual Baseline Incentive Sales Value Payments: The Bid Specifications provide for payment to the City of an incentive sales value amount for each year of the Agreement. In addition to the above Fees in subparts (a) and (b), Vendor agrees to pay the following minimum baseline incentive sales value amounts: \$ \_\_\_\_\_ for year one of the Agreement; \$ \_\_\_\_\_ for year two of the Agreement; and \$ \_\_\_\_\_ for year three of the Agreement. Should actual consumption of beverages surpass these minimum amounts for any year of the Agreement, the City shall receive the minimum baseline incentive sales amount plus additional amounts based on the number of physical cases of Vendor products purchased in that Agreement year. This additional amount shall be based on the same calculations used to arrive at the minimum baseline incentive. The sales incentive is applicable to Vendor products purchased from Vendor and is not applicable to any products donated for any reason. Vendor shall make the first incentive sales value payment within 30 days after the first anniversary of this Agreement, shall make the second incentive sales value payment within 30 days after its second anniversary date, and shall make the third incentive sales value payment within 30 days after the expiration of the Term.

Within 30 days after the Effective Date of this Agreement, Vendor will provide the City the methodology and data that Vendor used to calculate the baseline incentive sales values that were included in Vendor’s

response to the Bid. Also, within 30 days after each anniversary of the Agreement, Vendor will provide the City all information used by Vendor to determine the annual incentive sales value payment for the preceding year. The supporting data that Vendor submits to substantiate those annual payments shall include all categories of Beverages sold at the Facilities.

## **7.2. In-Kind Support for Events.**

(A) Vendor agrees to support the Facilities with donated Branded product (drinks) with minimum value of \$10,000.00 in Wholesale Value for each year of the Term (as defined below in Section 10). This product shall be used throughout each year of the Term to supplement and/or enhance the efforts of hosted events in such a manner so as not to negatively impact concession based sales. The exact products and quantities shall be mutually agreed upon by Vendor and City's management for the Facilities. Any amount left unused at the completion of each agreement year shall be forfeited.

(B) Vendor agrees to support the Facilities with donated Branded supplies/starter contributions (cups, napkins, carts, coolers, etc.) with a minimum value of \$10,000.00/year.

**7.3 Payments Exclusive Consideration.** City agrees that the payments described in this Section 7 constitute the sole consideration payable by Vendor for the rights granted to Vendor under this Agreement, and, unless otherwise agreed in writing, no other fees or other consideration will be charged.

## **8. Beverage Equipment**

**8.1 Dispensing Equipment.** At its sole expense, Vendor will furnish and locate at the Facilities the types and quantities of Beverage dispensing and Pouring Equipment (collectively, the "Vendor Equipment") that were set forth in Vendor's response to the Bid, which response is incorporated by reference. The Vendor Equipment will at all times remain the property of Vendor and shall be used for the merchandising and sale of Vendor Beverages only.

**8.2 Equipment Obligations.** With respect to Vendor Equipment described in this section, the following understandings apply:

(A) After this Equipment initially is placed at the Property, City will refrain from moving or relocating it without written consent from Vendor; and

(B) Vendor retains risk of loss (including damage or loss resulting from any casualty) for the Vendor Equipment at all times. City warrants that it will not encumber the Vendor Equipment with any liens or attach other interests to it that are adverse to Vendor's title in that Equipment.

**8.3 Equipment Service.** During the Term, Vendor will perform regular mechanical repair service, routine maintenance and otherwise keep the Vendor Equipment in good working condition at no charge to the City (“Maintenance Service”). Any Maintenance Service that is necessitated by damage or adjustments resulting from the City’s misuse, abuse, failure to follow operating instructions or service by unauthorized personnel is not considered regular service, and will not be provided free of charge to the City.

**8.4 Limitation of Liability.** Vendor disclaims any liability for consequential damages of any kind arising out of delays in maintaining Vendor Equipment at the Property due to causes beyond Vendor’s reasonable control.

### **9. Non-Beverage Marketing Inventory at the Property.**

Nothing in this Agreement restricts the right of the City or precludes it from offering non-beverage marketing and sponsorship inventory for the Property (“Non-Beverage Marketing Inventory”) to entities other than Vendor. This Non-Beverage Inventory includes, without limitation, the following:

- LED Video Board Naming Rights
- LED Video Board Static Panel Advertising
- Individual Venue Naming Rights
- VIP Box Sponsorship Options
- Venue Banners
- Individual Event Sponsorship/Development
- A-frame Advertising
- LED Video Board Messaging Packages
- Internal Directional Signage
- Community Development Programs
- Branded Disposable Products (e.g. towels)
- Strategic Wraps Advertising
- Test Marketing
- Web Site Marketing
- Concourse Ribbon Board Messaging
- Ticketing Area Ribbon Boards
- Lead-In/Complex Approach (i.e. street directional signage etc.)
- Parking Lot Signage
- Marque Building Signage for Bill Harris Arena at CrossPlex

City agrees that it will not make or enter into agreements for Non-Beverage Marketing Inventory at the Property with entities who compete with Vendor in the sale of Beverages.

Vendor agrees to negotiate in good faith with the City for a separate agreement with it concerning Vendor’s potential procurement of Non-Beverage Marketing Inventory.

**10. Term/Early Termination.** This Agreement will commence on the Effective Date and remain in effect for a period of three (3) years (the "Term"). Either party may terminate this Agreement before its expiration if (a) the other party materially breaches the terms of this Agreement, its obligations to the other party, or any of the warranties or representations made herein (a "Default"), (b) the non-breaching party provides the breaching party with written notice of such Default, and (c) the defaulting party fails to remove or cure such Default within thirty (30) days after the transmittal of the notice of Default (the "Cure Period"). If the Default is not so removed, the termination shall become effective with the expiration of the Cure Period.

Upon the expiration or early termination of the Agreement for any reason, Vendor shall remain responsible to the City for obligations that arise from events that occur prior to the effective time of the termination. Moreover, Vendor agrees that, within ten (10) days of the effective time of termination and provided that it does not continue to hold Pouring Rights for the Property after that date, it, at its sole expense, will remove all signage, equipment, products, marketing indicia and other personal property from the Property, and return the premises to the condition that existed before the Effective Date of this Agreement, ordinary wear and tear excepted.

#### **11. Representations, Warranties, and Covenants.**

**11.1 By City.** City represents, warrants and covenants to Vendor the following:

**(A) Authority.** The undersigned City representative has full power and authority to enter this Agreement and to grant Vendor the rights described in it.

**(B) Binding Obligation.** The City has obtained all necessary approvals required for its execution, delivery, and performance of this Agreement.

**(C) Right to License Marks.** City represents that, to its knowledge, it has the right to use any Property Marks for which it authorizes use by Vendor; provided that Vendor acknowledges that the City has not registered any such Marks, that City makes no warranty that it is the exclusive user or holder of any such Marks, and that City will not reimburse or indemnify Vendor for any claims, losses, damages or other expenses that may arise from claims by third parties arising from the use of such Marks.

**(D) Other Agreements.**

(1) To its knowledge, City has not entered into any agreement, and during the Term will not enter into any agreement, that would prevent it from complying with its obligations with this Agreement; or any agreement granting rights that are in conflict with the rights granted to Vendor under this Agreement; and

(2) To the extent within its reasonable control, the City will require third parties (including any concessionaires, third party food-service operators, vending

companies and licensing agents) to comply with the relevant provisions of this Agreement.

**11.2 By Vendor.** Vendor represents, warrants and covenants to City the following:

**(A) Authority:** Vendor has full power and authority to enter this Agreement.

**(B) Binding Obligation:** Vendor has obtained all necessary approvals for its execution, delivery, and performance of this Agreement, and has duly executed and delivered this Agreement, which is now its binding legal obligation.

**(C) No Conflicting Agreements:** Vendor has not entered, and during the Term will not enter into any other agreement, that would prevent it from complying with its obligations under this Agreement.

**(D) Disadvantaged Businesses.** Vendor acknowledges that the City, as a matter of public policy and to the extent possible, seeks to provide opportunities for and actively engage Disadvantaged Business Enterprises (DBEs) and Historically Underutilized Business Enterprises (HUBEs) (including professional firms, consultants, and contractors) in its business, economic and community revitalization programs. Vendor agrees to comply with this policy with respect to its retention of any sub-contractors or third parties it retains hereunder with respect to this Agreement.

**(E) No Discrimination.** Vendor (and its employees, agents and consultants) shall not discriminate on the basis of race, color, national origin, or sex in the performance of its obligations hereunder. Failure to perform these requirements is a material breach of this contract and may result in its termination as the City deems appropriate.

**(F) Bid Certification.** Vendor warrants and certifies that it has not employed or retained any firm, entity or person to solicit or secure its selection to enter into this contract, and that it has not paid or agreed to pay any fee, commission, percentage, gift or other consideration to any such firm, entity or person that is contingent upon or resulting from the award or making of this Agreement. The City, at its sole discretion, may terminate the contract without liability if Vendor violates this warranty.

**12. Confidentiality.**

“Confidential Information” shall mean all information disclosed in writing by one party to the other party that is clearly marked “CONFIDENTIAL” or “PROPRIETARY” by the disclosing party at the time of disclosure. Confidential Information does not include any information that (i) was already known by the receiving party free of any obligation to keep it confidential at the time of its disclosure; (ii) becomes publicly known through no wrongful act of the receiving party; (iii) is rightfully received from a third person without knowledge of any

confidential obligation; (iv) is independently acquired or developed without violating any of the obligations under this Agreement; or (v) is approved for release by written authorization of the disclosing party.

To the extent provided by applicable law, a recipient of Confidential Information shall Not disclose the information to any person or entity except for the recipients and/or its employees, contractors and consultants who have a need to know such Confidential Information. The recipient may disclose Confidential Information pursuant to a judicial or governmental request, requirement or order; provided that the recipient shall take all reasonable steps to give prior notice to the disclosing party.

To the extent provided by applicable law, Confidential Information shall not be disclosed to any third party. The recipient shall use Confidential Information only for purposes of this Agreement and shall protect Confidential Information from disclosure using the same degree of care used to protect its own Confidential Information, but in no event less than a reasonable degree of care. Confidential Information shall remain the property of the disclosing party and shall be returned to the disclosing party or destroyed upon request of the disclosing party. Because monetary damages may be insufficient in the event of a breach or threatened breach of the foregoing provisions, the affected party may be entitled to seek an injunction or restraining order in addition to such other rights or remedies as may be available under this Agreement, at law or in equity, including but not limited to monetary damages.

Vendor acknowledges that City is a governmental entity that may be obligated to disclose information to third parties pursuant to the open or public records laws of the State of Alabama. Therefore, notwithstanding any provision in this Section to the contrary, to the extent that City determines, in the exercise of its reasonable discretion, that the disclosure of Confidential Information is required by state law, it does not commit to keep confidential all Information that City may designate as Confidential. However, if Vendor designates information as "Confidential," before making any disclosure of that information to a third party who requests its disclosure, City will notify the party requesting disclosure of Vendor's desire to protect the confidentiality of that Information, and promptly notify Vendor so that it will be afforded an opportunity to oppose the disclosure.

### **13. Vendor Insurance Requirements:**

**13.1** For the duration of this Agreement and for limits not less than stated below, Vendor shall maintain the following insurance:

- a. **Comprehensive General Liability:** This insurance shall cover all operations performed by or on behalf of the Vendor, with policy limits of not less than \$1,000,000 combined single limit and aggregate for bodily injury and property damage, per occurrence. This insurance shall cover liability for damages to third party for personal injury, death and property damage, and also shall extend to damage, destruction and injury to City owned or leased property and City personnel caused by or resulting from the acts, operations

or omissions of Vendor, its officers, agents, employees or contractors in performing its responsibilities under this Agreement;

b. Comprehensive Automobile Liability: Insurance covering owned and rented vehicles operated by Vendor, with policy limits of not less than \$1,000,000 per occurrence for bodily injury and property damage; and

c. Workers' Compensation and Employers Liability as required by statute.

All such insurance shall be provided by a policy or policies issued by a company or companies qualified by law to engage in the insurance business in the State of Alabama with a rating of B+ or better according to the most current edition of Best's Insurance Reports. Vendor may use umbrella or excess liability insurance to achieve the required coverage, provided that such umbrella or excess insurance results in the same type of coverage as required for the individual policies. These insurance requirements are in addition to and do not affect, limit or modify any indemnification obligation of Vendor herein.

**13.2 City Additional Named Insured.** Except for the Workers Compensation coverage, all coverages shall contain endorsements naming the City, and its officers, employees and agents as additional named insured with respect to liabilities that arise out of and result from the operations of Vendor or the performance of its work. The additional named insured endorsement shall not limit the scope of coverage to the City to vicarious liability, but shall allow coverage for the City to the fullest extent provided by the policies. Such additional insured coverage shall be at least as broad as Additional Insured endorsement form ISO, CG 2010.11 85.

**13.3 Policies Primary.** All insurance policies required herein are to be primary and non-contributory with any insurance or self-insurance program administered by the City.

**13.4 Waiver of Subrogation.** Vendor hereby waives any rights of subrogation against the City.

**13.5 Proof of Coverage.** By the Effective Date of this Agreement, Vendor shall provide to the City a certificate(s) of insurance and endorsements (including the additional insured endorsements) evidencing compliance with the requirements in this Section. In the event of cancellation by the insurance company(ies) the policy(ies) has been endorsed to provide 30 days' Notice of Cancellation (except for non-payment) to the certificate holder shown below. In the event the City is notified that any of the coverage required herein is to be cancelled or changed in such a manner as not to comply with the requirements of this Contract, Vendor shall, within fifteen (15) days prior to the effective date of such cancellation or change, obtain and provide the City with binder (s) of insurance evidencing the re-establishment of the insurance coverage required herein. The City's bid number (#15-52) must appear on any/all copies of the certificate(s) of insurance.

## **14. Indemnification.**

**14.1. Claims by Vendor Representatives.** Vendor agrees to defend, indemnify, and hold harmless the City of Birmingham, and its agents, employees and officials (hereinafter the "Indemnitees") from and against all demands, actions, damages, judgments, expenses (including but not limited to attorneys' fees, expert fees, court costs and other litigation costs), losses, and claims (including those for bodily injury, sickness, disease or death, or to injury to, destruction or loss of use of tangible property) asserted against any of the Indemnitees (collectively hereinafter "Claims") by any of its employees, subcontractors or other representatives (hereafter, "Vendor Representatives") that arise out of, relate to, result from, or are attributable to any of the following: (a) Vendor's performance of its work, services or obligations hereunder; or (b) any conditions in or about the Facilities that any Vendor Representatives may enter or encounter in performing their work. This indemnification obligation in Section 14.1 includes Claims that are caused by the negligence of an Indemnitee(s); provided nothing herein shall obligate Vendor to indemnify any of the Indemnitees for Claims resulting from the sole negligence or from the willful misconduct of the Indemnitees.

**14.2 Claims by Other Parties.** Vendor agrees to defend, indemnify, and hold harmless the Indemnitees from and against any Claims by any third party other than a Vendor Representative (collectively, "Other Parties") that arises out of or results from the negligence of Vendor or a Vendor Representative in performing or failure to perform its work or obligations under this Agreement, provided nothing herein shall obligate Vendor to indemnify any of the Indemnitees for Claims by such Other Parties that result from the negligence or from the willful misconduct of the Indemnitees.

**14.3 Infringement Claims.** Vendor agrees to defend, indemnify and hold the City (and any of its officials, employees or representatives) harmless from any claims, suits, demands or actions by any third party for damages or losses (alleged or incurred) and that arise from Vendor's preparation, use or publication of any promotional material contemplated in this Agreement or infringe upon the intellectual property rights of a third party, including, but not limited to, the alleged or unauthorized use of an artist's name and/or likeness, failure to secure licenses or releases, or any other claimed infringement of intellectual property or rights related to Vendor's promotional material.

**14.4 Indemnification Procedures.** Whenever the indemnified party receives notice of any potential claim that might be subject to indemnity, that party will promptly notify the party obligated to indemnify (the "Indemnifying Party"). The Indemnifying Party will assume the defense of the claim through counsel designated by it and reasonably acceptable to the indemnified party. The Indemnifying Party will not settle or compromise any claim, or consent to the entry of any judgment, without the written consent of the indemnified party, which consent will not be unreasonably withheld. The indemnified party and its Affiliates, employees, and representatives will cooperate with the Indemnifying Party in the defense of the claim. If the Indemnifying Party fails to assume the defense of the claim as soon as reasonably possible then the indemnified party

may defend or settle the claim on behalf of and at the risk and expense of the Indemnifying Party.

## **15. Miscellaneous Provisions**

**15.1 Future Agreements.** In entering this Agreement, the City does not make any commitment or representation that Vendor will be awarded Pouring Rights following this Agreement.

**15.2 Entire Agreement.** This Agreement (including the attachments) and the Bid materials (including the Bid Specifications and Vendor's response thereto) represent the entire agreement between the parties concerning the subject matter herein, and supersede all prior negotiations, representations or agreements, either written or oral.

**15.3 Modification.** This terms and provisions in this Agreement can be modified only through a written instrument signed by both parties.

**15.4 Retained Rights.** Except as specifically authorized in this Agreement, this Agreement does not grant any party any interest in or the right to use the trademarks or other symbols and indicia of the other party.

**15.5 Independent Contractor.** Vendor is an independent contractor of the City. This Agreement does not create any partnership, joint venture or principal-agent relationship between the City and Vendor. Further, the City retains no control or authority with respect to its means and methods in which the Vendor (or any of its employees or representatives) performs its obligations hereunder.

**15.6 The Agreement.** Is made only for the benefit of the City and Vendor. It is not intended, nor shall it be construed, to grant or bestow any benefit, right or privilege to any third party.

**15.7 Licensing.** Before commencing the Services, Vendor, at its own expense, will obtain all licenses, permits or other governmental authorizations needed to complete the Services, including without limitation, a business license issued by the City (collectively, the "Licensing"). Vendor further agrees to maintain that Licensing throughout the performance of its Services.

**15.8 Work Site.** If Vendor or its representatives perform operations on City property (the "Work Site"), the following understandings apply. Vendor has inspected, or will have inspected the Work Site, before commencing the Services. Vendor agrees that it (a) has the sole responsibility to identify any condition or hazard that will prevent it from safely performing the Services, and (b) is exclusively responsible for performing the Services in a safe manner that does not put at risk the safety of persons or endanger property. Vendor shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to: (i) all its employees and all other person (except other agents of the City or project participants) who may be affected by the

Services; (ii) all the Services and all materials and equipment to be incorporated therein, whether in storage on or off the Work Site, or under the care, custody or control of the Vendor or any of its representatives; and (iii) other property at the Work Site or adjacent thereto.

**15.9 Attorney Expense.** If (i) either party should employ attorneys or incur other expenses in any legal action regarding a Dispute, and (ii) that party secures a final judgment before a court of competent jurisdiction or obtains other relief from an administrative body related thereto against the other party, the losing party will pay the prevailing party its reasonable attorneys' fees and other reasonable expenses that are incurred in that action.

**15.10 Offset for Overdue Fees, Taxes, Etc.** Pursuant to Executive Order of the Mayor of Birmingham NO. 76-09 (effective as of August 21, 2009), Company acknowledges and agrees that the City has the right to deduct from the total amount of consideration to be paid, if any, to Vendor under this Agreement all unpaid delinquent, or overdue license fees, taxes, fines, penalties and other amounts due the City from Vendor.

**15.11 Buy Local.** Company agrees that in connection with any portion of the Services, it will make commercially reasonable efforts to buy and/or lease supplies, materials and equipment from vendors located within the corporate limits of the City of Birmingham.

**15.12 Local Hiring.** Company agrees to make, and cause its subcontractors, if any, to make commercially reasonable efforts to hire residents of the City of Birmingham to fill available positions with respect to the Services.

**15.13 Immigration Act Compliance.** (a) Vendor represents and warrants that it does not knowingly employ, hire for employment, or continue to employ, in Alabama, an "unauthorized alien," as defined by the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, §31-13-1, et seq., Code of Alabama 1975, as amended (the "Act"). (b) Vendor represents and warrants that it will enroll in the E-Verify program prior to performing any work on the project in Alabama and shall provide documentation establishing that Vendor is enrolled in the E-Verify program. During the performance of this Agreement, Vendor shall participate in the E-Verify program as required under the terms of the Act and shall verify every employee in Alabama that is required to be verified according to the applicable federal rules and regulations. (c) Vendor agrees to comply with all applicable provisions of the Act with respect to its subcontractors by entering into an agreement with or by obtaining an affidavit from such subcontractors providing work for Vendor on the Project in Alabama, that such subcontractors are in compliance with the Act with respect to their participation in the E-Verify program. Vendor represents and warrants that Vendor shall not hire, retain or contract with any subcontractor to work on the Project in Alabama which Vendor knows is not in compliance with the Act. (d) By signing this Contract, the contracting parties affirm, for the duration of the Agreement, that they will not violate federal immigration law or knowingly employ, hire for employment, or continue to employ an unauthorized alien within the State of Alabama. Furthermore a contracting party found to be in violation of

this provision shall be deemed in breach of the agreement and shall be responsible for all damages resulting there from.

**15.14 Waiver.** No term or provisions of this Agreement may be waived, released or discharged by a party unless such waiver is in writing and signed by that party. A party's specific waiver does not constitute a waiver by that party of an earlier, concurrent or later breach or default. Further, a waiver will not occur if a party either fails to insist on strict performance of the terms or provisions herein, or a party pays or accepts money under this Agreement with knowledge of a breach.

**15.15 Severability.** If any provision of this Agreement is held to be invalid, illegal or unenforceable by a court of competent jurisdiction, the remaining provisions of it shall remain in full force and effect. No severance shall deprive a party of its available remedies, including the right to terminate this Agreement.

**15.16 Assignment.** Neither Vendor nor City may assign or transfer this Agreement (or any part, obligation or benefit hereunder) to a third party without the other party's prior written consent. Vendor and City agree that neither will unreasonably withhold its consent to such an assignment. City agrees that, if (a) Vendor desires to assign its rights or obligations hereunder to an affiliate or wholly-owned subsidiary, (b) Vendor reasonably demonstrates to the City that such assignee has the operational and financial resources to fulfill Vendor's obligations hereunder, and (c) that assignee agrees in writing to be bound by the terms of the Agreement, City will not withhold consent to such assignment. Any assignment that violates the terms of this provision is void.

**15.17 Survival.** Any obligations to the other hereunder concerning confidentially and indemnification survive the expiration or termination of this Agreement.

**15.18 Notice.** Any notice or other communication required hereunder to be made in writing shall be sent by certified mail or by an overnight courier service (such as Federal Express) that provides a confirmation of a receipt. Notice is considered duly given when it is properly addressed to the location specified below and deposited (postage prepaid) in the mail or delivered to the courier. Unless otherwise designated by the parties, written notices required hereunder shall be to the following addresses:

To Vendor:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Tel No: \_\_\_\_\_

Email: \_\_\_\_\_

To City:

\_\_\_\_\_, Director - Crossplex

2337 Bessemer Road  
Birmingham, AL 35208  
Tel No: 205-279-8954

Email: \_\_\_\_\_

To City Clerk:  
Lee Frazier, City Clerk  
710 North 20<sup>th</sup> Street, Room \_\_\_\_\_  
Birmingham, Alabama 35203

And a copy to:  
City of Birmingham  
City Attorney  
710 North 20<sup>th</sup> Street, Room 600  
Birmingham, Alabama 35203  
Attention: \_\_\_\_\_

**15.19 Headings.** All headings are for reference purposes only and do not affect the interpretation of this Agreement. All references to “days” in this Agreement mean calendar days, unless working days are expressly stated.

**15.20 Governing Law.** This Agreement is governed by and interpreted under Alabama law, without giving effect to any applicable conflict or choice-of-law provisions.

**15.21 Force Majeure.** If either party is prevented from performing its obligations to the other under this Agreement due to acts of God, strikes, war, riots, acts of governmental authorities, shortage of raw materials or any other cause outside the reasonable control of the nonperforming party (a “Force Majeure Condition”), the nonconforming party is excused from such performance during the period that the Force Majeure Condition remains in effect.

**15.22 No Consequential Damages.** In the event of a Default by a party, the non-defaulting party may not recover any consequential, economic, special or indirect damages (by way of example, lost profits, lost business opportunity, etc.) in any action that arises from the failure of the defaulting party to perform its obligations hereunder.

**15.23 Dispute Resolution.** The parties will use their good faith efforts to resolve any dispute or claim between them arising from the performance or failure to perform their respective obligations under this Agreement (a “Dispute”). Those efforts will include escalation of the Dispute to the senior manager/official level of each party. However, if the parties are unable to amicably resolve any Dispute, the dispute resolution mechanism shall be litigation in a court that is located in Jefferson County, Alabama.

**15.24 Interpretation.** In the event of any conflict between the provisions of this Agreement (including the attachments) and the provisions of the Bid (including the Bid Specifications and Vendor’s response thereto), the provisions in this Agreement shall govern and control.

**15.25 Counterparts.** This Agreement may be executed in counterparts each of which when executed by the parties shall be deemed to be a complete original. An electronic or facsimile copy of the executed contract or counterpart shall be deemed, and shall have the same legal force and effect as, an original document.

*(Signature Page Follows)*

SAMPLE

In witness whereof, the parties have executed this instrument or caused the same to be executed by their representatives, thereunto duly authorized, effective as of the day and year first above written.

**Vendor**

\_\_\_\_\_  
By:  
Its:

**CITY**

**City of Birmingham, Alabama**

\_\_\_\_\_  
By: William A. Bell, Sr.  
Its: Mayor

**ATTEST:**

\_\_\_\_\_  
Lee Frazier (City Clerk)

APPROVED AS TO FORM BY LAW DEPARTMENT:

\_\_\_\_\_  
Assistant City Attorney / Date