

SAMPLE EXCLUSIVE MARKETING AND
SPONSORSHIP AGREEMENT
RFP 11202-P Sponsor for Concessions
At Kiwanis Park Ball Fields

THIS EXCLUSIVE MARKETING AND SPONSORSHIP AGREEMENT (hereinafter the "Agreement") is entered into by and between the City of Yakima, a municipal corporation (hereinafter the "City"), and _____, a _____ corporation (hereinafter "Sponsor").

WHEREAS, the Sponsor desires certain exclusive marketing and sponsorship privileges concerning beverage sales at Kiwanis Park Ball Fields (the "Facilities").

WHEREAS, the City is willing to grant certain exclusive marketing and sponsorship privileges to the Sponsor for said Facilities in accordance with the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the terms, conditions, covenants, and agreements provided herein, the City and the Sponsor agree to the following:

1. Definitions.

a. "Beverages" means all non-alcoholic beverages of any kind sold at the City's Kiwanis Park Ball Fields, and all beverage bases from which said beverages can be prepared; provided, however, that beverages does not include non-alcoholic beverages and beverage bases that are dairy and dairy like products (i.e., milk, yogurt drinks), nor does it include coffee beverages; provided, further, that these stated exceptions to the definition of "beverages" do include and/or apply to any products manufactured, licensed and/or distributed by a competitor company, and/or any affiliate, license and/or joint venture thereof.

b. "Concession sales" means all beverages sold at the City's Kiwanis Park Ball Fields, except for beverages sold from the Sponsor's vending machines.

c. "Equipment" means all equipment provided by the Sponsor for the Kiwanis Park Ball Fields under this Agreement.

d. "Vending sales" means any beverages sold from the Sponsor's vending machines located at the City's Kiwanis Park Ball Fields.

2. Term of Agreement.

a. General Term of Agreement. It is the intent of the RFP to establish a long-term contractual relationship with the Sponsor to continue to supply concession services and signage sponsorship as the City of Yakima requires. The initial period of this contract shall be for a period of five (5) years from its effective date. The City may, at its option, extend the contract on a year to year basis for up to five (5) additional one-year terms, provided, however, that either party may at any time during the life of this contract, or any extension thereof, terminate this contract by giving thirty (30) days notice in writing to the other party of its intention to cancel **per the terms and conditions of this Agreement**. Contract extensions shall be automatic, and shall go into effect without written confirmation, unless the City provides advance notice of the intention to not renew.

3. Termination of Agreement.

a. Termination for cause. Either party may terminate this Agreement upon thirty (30) days' written notice to the other party in the event that said other party is in default and fails to cure such default within that thirty (30) day period, or such longer period as provided by the non-defaulting party. The notice of termination shall state the reasons therefore and the effective date of the termination.

b. Termination without cause. The City may terminate this Agreement at any time without cause upon thirty (30) days' written notice to the Sponsor. In the event of such termination, and in consideration of the expenditures made by the Sponsor in carrying out its obligations and duties under this Agreement, the City shall pay the Sponsor a "buy-out fee" that shall be calculated at the rate of Five Thousand Dollars (\$5,000.00) on a pro-rata basis for each year and/or portion of a year that is remaining of the ten (10) year term of the Agreement.

c. Termination by the City under Sections 22(c) or 24. The City may also terminate this Agreement in accordance with Section 22(c) (Severability Section) or Section 24 (Appropriation Section). In such event, the City shall not be obligated to pay the "buy-out fee" described in Section 3(b), nor shall the City forfeit its right to ownership of the special equipment described in Section 5(b) in the event that this provision applies.

4. Marketing Privileges. To the extent it is legally permitted to do so, the City grants the Sponsor the following marketing privileges during the term of this Agreement.

a. Exclusive provider of beverages. The Sponsor shall be the exclusive provider of all beverages sold at the City's Kiwanis Park Ball Fields.

b. Exclusive beverage promotional privileges. The Sponsor shall have the exclusive privilege to market and promote beverages in connection with the City's Kiwanis Park Ball Fields (including recognition of the Sponsor on the panels of equipment provided by the Sponsor and changing of existing panels on all scoreboards and reader boards located at Kiwanis Park Ball Fields to reflect the Sponsor's logo). If the City cannot legally recognize the Sponsor on said scoreboards and/or reader boards (for example, if prohibited from doing so under the Yakima Sign Code (YMC Chapter 11.08), then the City shall work with the Sponsor to find mutually agreeable and legally permitted alternate locations for displaying recognition of the Sponsor.

c. Prominent display of beverage trademarks. At its discretion, the Sponsor may prominently display its beverage trademarks on each menu board and beverage vending machine at Kiwanis Park Ball Fields.

5. Equipment Provided by Sponsor.

a. Equipment. In consideration of the exclusive marketing and sponsorship privileges granted by the City to the Sponsor under this Agreement, the Sponsor shall provide the following equipment to the City:

Kiwanis Ball Fields

- Three (3) one-door coolers/refrigerated display cases of type and size approved by the City's designated representative.
- One (1) electronic menu board of type and size approved by the City's designated representative. Suggested board is Daktronics 6 mm Indoor Message Display or similar. Please see Specification Sheet (Attachment C).
- Two (2) or three (3) digital clocks. **Size?**

- Two (2) post mix fountains of type and size approved by the City's designated representative.
- Three (3) ice barrels. **Size?**
- One (1) ice machine (Manitowoc Q-600 with S-570 Bin or other type/model with approval of the City's designated representative).
- Beverage vending machine(s) of a type, size and number determined by mutual agreement of the City and the Sponsor.
- Banners promoting upcoming events at the Kiwanis Park Ball Fields of a type, size and number determined by mutual agreement of the City and the Sponsor.
- Signs (i.e., neon, replica antique).
- Special event promotions (i.e., giveaways, t-shirts, water bottles & products) of a type and number determined by mutual agreement of the City and the Sponsor.

The Sponsor shall remain the owner of all equipment provided to the City pursuant to this subsection, with the exception of banners and special event promotional items. Upon termination of this Agreement, the City shall provide the Sponsor with reasonable access at a reasonable time so that the Sponsor can pick up said equipment at its expense.

b. Special equipment. In further consideration of the exclusive marketing and sponsorship privileges granted by the City to the Sponsor under this Agreement, the Sponsor shall provide the following special equipment to the City:

- Three (3) Daktronics model BA-2618-31 PanaView Home/Away Scoreboards with 18" LED digits, with two (2) wireless remotes with privilege panels *or approved and acceptable equal*. The logo of both the Sponsor and the Kiwanis Park Ball Fields shall be displayed on said panels. The design of the panels (including the color of panels and placement and size of said logos) shall involve input form and be subject to the approval of the City's designated representative. Its overall dimensions shall be 6" (depth) x 5' (vertical height) x 10' (width). The Scoreboards shall be installed by the Sponsor at a location decided by the City. The Scoreboards shall be installed per industry standard and with the sign bottom 10' above the ground. The City shall provide all electrical wiring and apparatus necessary for this Scoreboard to be installed at the desired location. **Scoreboards must be installed by March 1, 2013.**

Upon installation and successful testing of the above special equipment, the City shall become the owner of the special equipment.

6. Wholesale Pricing of Beverages and Related Goods. The Sponsor shall provide the City with beverages, beverage cups and lids, post-mix syrup, and related goods and products under this Agreement in accordance with the following pricing schedule:

Suggested Items: Enter name(s) of proposed beverage in box below:	Case Prices/Qty per case (note if an additional beverage tax applies):	Unit Cost:
20 oz Carbonated Soft Drink:	\$ #	\$
20 oz Sports Drink:	\$ #	\$
20 oz Water:	\$ #	\$
20 oz Juice Blends:	\$ #	\$
15.2 oz Teas:	\$ #	\$
15.2 oz Juices:	\$ #	\$
Energy Drinks:	\$ #	\$
5 gal Bag in Box (BIB) :	\$ #	\$
2.5 gal Bag in Box (BIB):	\$ #	\$
2.5 gal Non-Carbonated Beverage BIB:	\$ #	\$
16 oz Cups	\$ #	\$
20 oz Cups	\$ #	\$
32 oz Cups	\$ #	\$
16 oz, 20 oz & 32 oz Lids	\$ #	\$
Co2 & Deposit	\$ #	\$

Due to possible increases in the cost of such goods and products, the Sponsor reserves the right to increase wholesale pricing on an annual basis. Any such increase shall not exceed three percent (3%) per year.

7. Commission Percentages and Payment.

a. Commission Percentage. The Sponsor shall pay the City a commission on the sale of all beverages from all beverage vending machines located at Kiwanis Park Ball Fields. Said commission shall be based on percentage of the gross receipts, excluding state sales tax, received from said sales in accordance with following commission rate structure:

12 ounce carbonated soft drinks	_____%
12 ounce non-carbonated drinks	_____%
20 ounce carbonated soft drinks	_____%
16 or 20 ounce non-carbonated drinks	_____%

b. Payment Due Date. The Sponsor shall pay the City the commission percentage payment referred to in Section 7(a) on or before the thirtieth (30th) day of each month, or the next business day if the 30th day occurs on a weekend, a detailed itemization of the gross receipts collected, sales tax amount and percentage due the City.

8. Monitoring and Stocking of Beverage Inventory in Vending Machines. The Sponsor shall regularly monitor and stock as needed the beverage inventory in the vending machines to ensure that the vending machines are, to the extent reasonably possible, in adequate supply of beverages at all times.

9. Account Representative. Sponsor shall assign one account representative to work with the designated City representative to ensure a consistent working relationship between the Sponsor and the City.

10. Maintenance of Equipment.

a. General maintenance and availability for service calls. The Sponsor shall, at no cost to the City, upgrade, maintain and service all equipment provided hereunder during the term of this Agreement. This maintenance and service shall include but not be limited to: guaranteed responses to service or out-of-product calls within twenty-four (24) hours of placement of call; dispatching of service technicians shall be available 7 a.m. to 4 p.m., Monday through Friday, and through a twenty-four (24) hour answering service otherwise; and the provision of annual inspections of fountain equipment as recommended by the manufacturer and as required to meet all county, state and other applicable health codes, regulations and laws.

b. Damage to equipment. If any of the equipment other than special equipment that is provided by Sponsor under this Agreement is damaged by any cause other than due to the negligence of the City, its employees or agents, the Sponsor shall, at its sole cost and expense, restore the equipment to a conditions equivalent to or better than their condition immediately prior to such damage, or replace it with equipment that is equivalent to or better than the equipment being replaced.

c. Responsibility for special equipment. The Sponsor shall provide general and normal maintenance and servicing of the special equipment provided to the City under this Agreement. Such maintenance and servicing shall include but not be limited to bulb replacement, cleaning and similar items and service. Beyond such general and normal maintenance and servicing, the City shall be solely and exclusively responsible for damage and/or destruction to said special equipment.

11. Utilities. The City shall provide water and electricity necessary for operation of the equipment provided under this Agreement; provided, however, that the City does not guarantee the uninterrupted supply of water and/or electricity to said equipment, and the parties agree that the City shall not be responsible for any damage to such equipment, and/or beverages contained therein that result from any interruption and/or failure in such utility services.

12. Maintenance of Records and Inspections. The Sponsor shall maintain (in accordance with generally accepted accounting practices) books, accounts, records, documents and other materials related directly or indirectly to the costs, expenses and revenues incurred or generated under this Agreement. All such books, accounts, records, documents and other material shall be subject to inspection and audit at reasonable times by representative of the City and/or of the Washington State Auditor. The Sponsor shall make such books, accounts, records, documents and other materials available and afford the proper facilities for such inspection and/or audit within forty-eight (48) hours of inspection/audit notification from City representatives and/or the Washington State Auditor. Such books, accounts, records, documents and other materials may be copied by representatives of the City and/or of the Washington State Auditor as part of such an inspection/audit. The Sponsor shall preserve and make available all such book, accounts, records, documents and other materials for a period of at least three (3) years after termination of the Agreement.

13. Status of Sponsor. The Sponsor and the City understand and expressly agree that the Sponsor is an independent contractor in the performance of each and every part of this Agreement. No officer, employee, volunteer, and/or agent of the Sponsor shall act on behalf of or represent him or herself as an agent or representative of the City. The Sponsor, as an independent contractor, assumes the entire responsibility for carrying out and accomplishing the services required under this Agreement. The Sponsor expressly represents, warrants and agrees that its status as an independent contractor in the performance of the work and services required under this Agreement is consistent with and meets the six-part independent contractor test set forth in RCW 51.08.195. The Sponsor and its officers, employees, volunteers, agents and/or subcontractors shall make no claim of City employment nor shall claim against the City and any related employment benefits, social security, and/or retirement benefits. Nothing contained herein shall be interpreted as creating a relationship of servant, employee, partnership or agency between the Sponsor and the City.

14. Taxes and Assessments. The Sponsor shall be solely responsible for compensating its officers, employees and agents, and for paying all related taxes, deductions, and assessments, including but not limited to federal income tax, FICA, social security tax, assessments for unemployment and industrial injury, and other deductions from income which may be required by law or assessed against either party as a result of this Agreement. In the event the City is assessed a tax or assessment as a result of this Agreement, the Sponsor shall pay the same before it becomes due.

15. Nondiscrimination Provision. During the performance of this Agreement, Sponsor shall not discriminate in violation of any applicable federal, state and/or local law or regulation on the basis of race, color, sex, religion, national origin, creed, age, marital status, disability, honorably discharged veteran or military status, pregnancy, sexual orientation, political affiliation, or the presence of any sensory, mental or physical handicap, and any other classification protected under federal, state, or local law. This provision shall include but not be limited to the following: employment, upgrading, demotion, transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, selection for training, and the provision of services under this Agreement.

16. The Americans with Disabilities Act. With regard to the services to be performed pursuant to this Agreement, Sponsor agrees to comply with the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. (ADA) and its implementing regulations, and Washington State's anti-discrimination law as contained in RCW Chapter 49.60 and its implementing regulations. The ADA provides comprehensive civil rights to individuals with disabilities in the area of employment, public accommodations, state and local government services, and telecommunications.

17. Compliance with Law. The Sponsor agrees to perform all work/services under and pursuant to this Agreement in full compliance with any and all applicable laws, rules, and regulations adopted or promulgated by any governmental agency or regulatory body, whether federal, state, local, or otherwise.

18. No Conflict of Interest. The Sponsor covenants that neither it nor its employees have any interest and shall not hereafter acquire any interest, direct or indirect, which would conflict in any manner of degree with the performance of it this Agreement. The Sponsor further covenants that it will not hire anyone or any entity having such a conflict of interest during the performance of this Agreement.

19. Insurance.

a. Liability Insurance. On or before the date this Agreement is fully executed by the parties, the Sponsor shall provide the City with a certificate of insurance as proof of liability insurance with a minimum liability limit of One Million Dollars (\$1,000,000.00) combined single limit bodily injury and property damage. The certificate shall clearly state who the provider is, the amount of coverage, the policy number, and when the policy and provisions provided are in effect. Said policy shall be in effect for the duration of this Agreement. The policy shall name the City, its elected officials, officers, agents, and employees as additional insured and shall contain a clause that the insurer will not cancel or change the insurance without first giving the City thirty (30) calendar days' prior written notice. The insurance shall be with an insurance company or a company rated A-VII or higher in Best's Guide and admitted in the State of Washington.

b. Industrial Insurance. The Sponsor shall comply with the provisions of RCW Title 51, Industrial Insurance. During the duration of this Agreement, the Sponsor shall provide or purchase industrial insurance coverage for its employees, as may be required of an "employer" as defined in RCE Title 51, and shall maintain full compliance with RCW Title 51.

c. City does not provide insurance for Sponsor. It is understood the City does not maintain any form of insurance for the Sponsor, its officers, employees, volunteers, and/or agents.

d. Survival. The provisions of this Section shall survive the expirations or termination of this Agreement with respect to any event occurring prior to such expiration or termination.

20. Indemnification and Hold Harmless.

a. The Sponsor agrees to protect, defend, indemnify, and hold harmless the City, its officers, elected officials, employees and agents from any and all claims, demands, losses, liens, liabilities, penalties, fines, lawsuits, and other proceedings and all judgments, awards, costs and expenses (including reasonable attorney's fees and disbursements) resulting from any negligent act and/or omission of the Sponsor, its officers, employees, volunteers, agents, and/or subcontractors, arising out of the performance of this Agreement.

b. In the event that both the Sponsor and the City are negligent, the Sponsor's liability for indemnification of the City shall be limited to the contributory negligence for any resulting suits, actions, claims, liability, damages, judgments, costs and expenses (including reasonable attorney's fees) that can be apportioned to the Sponsor, its officers, employees, volunteers, agents, and/or subcontractors.

c. The foregoing indemnity is specifically and expressly intended to constitute a waiver of the Sponsor's immunity under Washington's industrial insurance Act, RCW Title 51, as respects the other party only, and to the extent necessary to provide the indemnified party with a full and complete

indemnity of claims made by the Sponsor's employees, The parties acknowledge that these provisions were specifically negotiated and agreed upon by them.

d. Nothing contained in this Section or this Agreement shall be construed to create a liability or right of indemnification in any third party.

e. This Section of the Agreement shall survive the term or expiration of this Agreement and shall be binding on the parties to this Agreement.

21. Assignment. This Agreement, or any interest herein or claim hereunder, shall not be assigned or transferred in whole or part by the Sponsor to any other person or entity without the prior written consent of the City. In the event that such prior written consent to an assignment is granted, then the assignee shall assume all duties, obligations, and liabilities of the Sponsor stated herein.

22. Severability.

a. If a court of competent jurisdiction holds any part, term or provision of this Agreement to be illegal, or invalid in whole or in part, the validity of the remaining provisions shall not be affected, and the parties' rights and obligations shall be construed and enforced as if the Agreement did not contain the particular provision held to be invalid.

b. If any provision of this Agreement is in direct conflict with any statutory provision of the State of Washington, that provision which may conflict shall be deemed inoperative and null and void insofar as it may conflict and shall be deemed modified to conform to such statutory provision.

c. Should the City determine that the severed portions substantially alter this Agreement so that the original intent and purpose of the Agreement no longer exists, the City may, in its sole discretion, terminate this Agreement. No penalty or expense shall accrue to the City in the event this provision applies. The City shall not forfeit its right to ownership of the special equipment described in Section 5(b) in the event that this provision applies.

23. Waiver of Breach. A waiver by either party hereto of a breach by the other party hereto of any covenant or condition on this Agreement shall not impair the right of the party not in default to avail itself of any subsequent breach thereof. Leniency, delay or failure of either party to insist upon strict performance of any agreement, covenant or condition of this Agreement, or to exercise any right herein given in any one or more instances, shall not be construed as a waiver or relinquishment of any such agreement, covenant, condition or right.

24. Non-Appropriation of Funds. In sufficient funds are not appropriated or allocated for payment under this Agreement for any future fiscal period, the City shall not be obligated to make payments under this Agreement for services or amounts incurred after the end of the current fiscal period, and this Agreement shall terminate upon the completion of all remaining services for which funds are allocated. No penalty or expense shall accrue to the City in the event this provision applies. The City shall not forfeit its right to ownership of the special equipment described in Section 5(b) in the event that this provision applies.

25. Notices. Unless stated otherwise herein, all notices and demands shall be in writing and sent or hand delivered to the parties to their addresses as follows or to such other addresses as the parties may hereafter designate in writing.:

TO CITY: Ken Wilkinson, Manager
Yakima Parks & Recreation Division
2301 Fruitvale Boulevard
Yakima, WA 98902-1225

TO SPONSOR: _____

Notices and/or demands shall be sent by registered or certified mail, postage prepaid, or hand delivered. Such notices shall be deemed effective when mailed or hand delivered at the addresses specified above.

26. Drafting Agreement. Both the Sponsor and the City have participated in the drafting of this Agreement. As such, it is agreed by the parties that the general Agreement rule of law that ambiguities in the Agreement language shall be construed against the drafter of an Agreement shall have no application to any legal proceeding, arbitration and/or action in which this Agreement and its terms and conditions are being interpreted and/or enforced.

27. Third Parties. The City and the Sponsor are the only parties to this Agreement and are the only parties entitled to enforce its terms. Nothing in this Agreement gives, is intended to give, or shall be construed to give or provide any right or benefit, whether directly or indirectly or otherwise, to third persons.

28. Binding Effect. The provisions, covenants, and conditions in this Agreement apply to bind the parties, their legal heirs, representatives, successors, and assigns.

29. Captions. The respective captions of the Sections and Subsections of this Agreement are inserted for convenience of reference only and shall not be deemed to modify or otherwise affect any provisions of this Agreement.

30. Remedies Cumulative. Any remedies provided for under the terms of this Agreement are not intended to be exclusive but shall be cumulative with all other remedies available to the City at law, in equity or by statute.

31. Integration. This written document constitutes the entire agreement between the City and the Sponsor. There are no other oral or written agreements between the parties as to the subjects covered herein. No changes or additions to this Agreement shall be valid or binding upon either party unless such change or addition be in writing and executed by both parties.

32. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington.

33. Venue. The venue for any action to enforce or interpret this Agreement shall lie in the Superior Court of Yakima County, Washington.

34. Authority. Each individual executing this Agreement on behalf of the City or the Sponsor represents and warrants that such individual is duly authorized to execute and deliver this Agreement on behalf of the City or the Sponsor.

35. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which shall constitute one and the same Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement by having their authorized representatives affix their signatures below.

CITY OF YAKIMA: _____

By: _____
Tony O'Rourke, City Manager

By: _____

Date: _____

Date: _____

Attest: _____
City Clerk

Attest: _____

City Contract No. _____

Resolution No. _____