



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Richard Doyle  
City Attorney

**SUBJECT:** Areas USA SJC, LLC Addendum  
to First Amendment to Food and  
Beverage Concession  
Agreement

**DATE:** October 14, 2011

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## RECOMMENDATION

Approve settlement of the claim from Areas USA SJC, LLC, and authorize the City Attorney to execute an Addendum to First Amendment to Food and Beverage Concession Agreement in the amount of \$131,153.31.

## OUTCOME

Approve Addendum to First Amendment to Food and Beverage Concession Agreement to settle a claim for refund of liquidated damages paid by Airport food and beverage concessionaire, Areas USA SJC, LLC, for underpayment of wages pursuant to contract provisions requiring payment of prevailing wage to Areas employees at the Airport.

## BACKGROUND

The City and Areas entered into an Airport food and beverage concession agreement in January 2009, and the agreement runs through June 30, 2020. Areas is one of two food and beverage concessionaires at the Airport, and it operates concessions in both Terminals A and B.

Under the Agreement, Areas pays a concession fee equal to the greater of a \$2,023,200 Minimum Annual Guarantee (MAG) or 14% of its gross revenues at the Airport.

Prior to its amendment in March 2011, the Agreement included provisions that required Areas to pay prevailing wages to certain of its employees at the Airport. The prevailing wage contract provisions provided that Areas would pay liquidated damages equal to three times the amount of any prevailing wage underpayments.

By letter dated February 9, 2010, the City notified Areas that: (a) Areas failed to pay prevailing wages to 28 of its employees working in its concession operations at the Airport; and (b) pursuant to the terms of the Agreement, Areas owed a total of \$34,543.18 in restitution to its underpaid employees and \$103,629.54 as liquidated

damages to the City on account of the wage underpayment. Areas paid the full amount of restitution to its employees on February 15, 2010, and the full amount of the liquidated damages to the City on May 21, 2010.

By letter dated February 4, 2011, the City notified Areas that: (a) Areas failed to pay prevailing wages to 32 of its employees working in its concession operations at the Airport; and (b) pursuant to the terms of the Agreement, Areas owed a total of \$9,174.59 in restitution to its underpaid employees and \$27,523.77 as liquidated damages to the City on account of the wage underpayment. Areas paid the full amount of restitution to its employees on February 18, 2011, and the full amount of the liquidated damages to the City on March 11, 2011.

On December 14, 2010, Council adopted an ordinance to amend portions of the Airport Living Wage Ordinance, including a provision that authorized the City Manager to amend Airport contracts that currently are subject to the City's prevailing or living wage policy to delete the prevailing or living wage provisions, thereby making such agreements subject to the Airport Living Wage Ordinance. The Ordinance also amended the Airport Living Wage Ordinance to revise the fine for non-compliance from three times the amount of the living wage underpayment to an amount equal to the wage underpayment.

On March 22, 2011, the parties entered into a First Amendment to the Agreement to delete the terms and conditions of the City's Living Wage Policy and/or Prevailing Wage Policy from the Agreement for its remaining term, thereby making the Agreement subject to the Minimum Compensation requirements of the Airport Living Ordinance as of the date of the First Amendment.

## ANALYSIS

Both prior and subsequent to the date of the First Amendment, Areas has requested that the City refund the liquidated damages paid by Areas on account of Areas's prompt payment of restitution when notified of its prevailing wage underpayments and Areas's confusion as to the differences between the prevailing wage provisions in the Agreement and the provisions of the Airport Living Wage Ordinance. Areas has also pointed out that while there is an opportunity for an appeal and hearing in the event that fines for living wage underpayments are assessed under the Airport Living Wage Ordinance, there is no corresponding provision for an appeal and/or hearing under the prevailing wage contractual provisions. At the December 14, 2010, Council meeting, certain councilmembers discussed the possibility of refunding liquidated damages paid by Areas. However, a refund to Areas was not part of the final Council action on that date.

To resolve this matter, the City Attorney's Office recommends that the City refund the liquidated damages paid by Areas in the total amount of \$131,153.31, pursuant to the terms of the proposed Addendum to First Amendment to Food and Beverage Concession Agreement.

**PUBLIC OUTREACH/INTEREST**

This memorandum and the Addendum have been posted on the City's website for the November 1, 2011 City Council agenda.

**COORDINATION**

The City Attorney's Office has discussed the terms of the proposed settlement with the Airport Department, and the City Manager.

**COST SUMMARY/IMPLICATIONS**

Fund #	Appn #	Appn. Name	RC #	Total Appn.	Amount for Contract	2011-2012 Proposed Operating Budget Page	Last Budget Action (Date, Ord. No.)*
523	0802	Airport Non-Personal/ Equipment	50110	\$37,581,440	\$103,629.54	XI-3	6/21/11 Ord # 28928

Fund #	Appn #	Appn. Name	Total Appn.	Amount for Project	2011-2012 Proposed Operating Budget Page*	Last Budget Action (Date, Ord. No.)
001	0018	General Liability Claims	\$10,250,000	\$27,524	IX - 24	06/21/2011 28928

\* The City Council adopted the 2011-2012 Proposed Operating Budget on June 21, 2011. The Adopted Budget will be published in Fall 2011.

**CEQA**

CEQA: Not a Project; File No. PP10-066h, Settlement Agreements.

RICHARD DOYLE, City Attorney

By:   
 KEVIN FISHER  
 Sr. Deputy City Attorney

cc: Debra Figone, City Manager  
 William F. Sherry, AAE, Director of Aviation

For questions please contact RICHARD DOYLE, City Attorney, at (408) 535-1900.