

Report to Community and Protective Services Committee

To: Chair and Members
Community and Protective Services Committee

From: Cheryl Smith, Deputy City Manager, Neighbourhood and Community-Wide Services

Subject: Supply of Cold Bottled Beverages – RFP 2022-041 – Award of Contract

Date: May 31, 2022

Recommendation

That, on the recommendation of the Deputy City Manager, Neighbourhood and Community-Wide Services, the by-law attached as Appendix A, **BE INTRODUCED** at the Municipal Council meeting of June 14, 2022:

- a) to approve an Agreement between The Corporation of the City of London and PepsiCo Beverages Canada, to supply cold beverages at the City's two municipal golf courses and for the vending machines at City of London Arenas, Community Centres, Dearness Home, and City Hall, substantially in the form attached as Schedule A to the above-noted by-law, and satisfactory to the City Solicitor; and,
- b) to authorize the Mayor and the City Clerk to execute the above-noted Agreement.

Executive Summary

The City of London issued a Request for Proposal (RFP) for cold bottled beverages to be sold at various city facilities. PepsiCo Beverages Canada was one of three proponents to submit a bid and earned the highest ranking score. This report is to seek approval to enter into an Agreement with PepsiCo Beverages Canada.

Linkage to the Corporate Strategic Plan

This Agreement is aligned with the following strategic area of focus in the City of London Strategic Plan (2019 – 2023):

- Leading in Public Service – The City of London is a leader in public service as an employer, a steward of public funds, and an innovator of service.

Analysis

1.0 Background Information

1.1 Previous Reports Related to this Matter

- [Beverage Vending Machines in City of London Recreation Facilities and City Hall](#) (January 24, 2017)
- [Contract Extension: C11-119 Cold Beverage Vending at City Facilities](#) (August 23, 2016)
- RFP 11-07 Cold Beverage Vending (May 2, 2011)

2.0 Discussion and Considerations

2.1 Background

The City of London issued RFP 2022-041 for the provision of cold beverage vending in various city facilities on February 8, 2022. The City was looking for a supplier to be the exclusive provider of cold beverages at the City's two municipal golf courses and for the vending machines at City of London Arenas, Community Centres, Dearness Home, and City Hall.

The submissions were evaluated using the following criteria:

- Ability to meet RFP requirements and goals;
- Corporate profile;
- Value added incentives; and,
- Revenue.

Based on the evaluation of the three submitted proposals, PepsiCo Beverages Canada scored overall highest of all submissions and offered the City the best financial return.

3.0 Financial Impact/Considerations

It is anticipated that this Agreement will result in revenue of approximately \$100,000 annually over the term of this Agreement, and based on 2019 actual volumes.

Conclusion

PepsiCo Beverages offered the City the best revenue options and service in City facilities and administration is recommending they be awarded the Agreement for a period of three (3) years with an option, at the City's discretion, for a further two (2) year term.

Prepared by: Scott Oldham, Manager, Recreation and Sport Administration

Submitted by: Jon-Paul McGonigle, Director, Recreation and Sport

Recommended by: Cheryl Smith, Deputy City Manager, Neighbourhood and Community-Wide Services

Appendix A:

Bill No.
2022

By-law No. A.-_____

A by-law to authorize and approve an Agreement between The Corporation of the City of London and PepsiCo Beverages Canada to supply cold beverages at the City's two municipal golf courses and for the vending machines at City of London Arenas, Community Centres, Dearness Home, and City Hall, substantially in the form attached and satisfactory to the City Solicitor and to authorize the Mayor and the City Clerk to execute the Agreement.

WHEREAS section 5(3) of the *Municipal Act, 2001* S.O. 2001, c.25, as amended, provides that a municipal power shall be exercised by by-law;

AND WHEREAS section 9 of the *Municipal Act, 2001* S.O. 2001, c.25 as amended, provides that a municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act;

AND WHEREAS it is deemed expedient for The Corporation of the City of London to enter into an Agreement with PepsiCo Beverages Canada;

AND WHEREAS it is appropriate to authorize the Mayor and the City Clerk to execute the Agreement on behalf of The Corporation of the City of London;

NOW THEREFORE the Municipal Council of The Corporation of the City of London enacts as follows:

1. The Agreement attached as Schedule "A" to this by-law, being an Agreement between The Corporation of the City of London and PepsiCo Beverages Canada is hereby authorized and approved.
2. The Mayor and the City Clerk are hereby authorized to execute the Agreement authorized and approved under Section 1 of this by-law.
3. This by-law shall come into force and effect on the day it is passed.

PASSED in Open Council on June 14, 2022.

Ed Holder
Mayor

Michael Schulthess
City Clerk

First Reading –
Second Reading –
Third Reading –

SCHEDULE A



BEVERAGE SALES AGREEMENT

This sets forth the agreement (“**Agreement**”) between PepsiCo Beverages Canada, a business unit of PepsiCo Canada ULC, and its affiliates and subsidiaries (“**PBC**”) and The Corporation of the City of London (the “**Customer**”), on its own behalf and on behalf of its affiliates and subsidiaries, and on behalf of its individual franchisees and licensees, if any, relating to the purchase by the Customer from PBC of the Products.

Customer represents and warrants that it has full authority to bind all Outlets (as defined below) to the terms and conditions of this Agreement throughout the Term.

Definitions

As used in this Agreement, the following capitalized terms have the meanings set out below, and terms defined elsewhere in this Agreement shall have the meanings ascribed to them in this Agreement.

“**Authorized FS Distributor**” if applicable, shall mean a food service distributor as designated by Customer and prior approval by PBC.

“**Beverage**” or “**Beverages**” means all carbonated and non-carbonated, non-alcoholic beverages, however dispensed, during the Term including but not limited to, (i) colas and other flavored soft drinks; (ii) fruit juice, fruit juice containing other ingredients and fruit flavored drinks; (iii) chilled coffee drinks; (iv) chilled tea products; (v) hypertonic, isotonic and hypotonic drinks (sports drinks and fluid replacements); (vi) milk based drinks; (vii) protein drinks and smoothies; (viii) energy drinks; (ix) water (including but not limited to: flat, plain, sparkling, carbonated, spring, mineral and/or purified); (x) kombucha and sparkling fermented beverages; and (xi) any future categories of nonalcoholic beverage products that may be distributed by PBC.

“**Cases**” shall mean the number of “raw” cases of Packaged Products purchased by the Customer from PBC, delivered in quantities of 8, 12, 15 and 24 bottles/cans, and thereafter in such other size, quantity and type of containers as determined by PBC, from time to time.

“**Outlets**” shall mean the existing Customer facilities operated by the Customer as listed in attached Exhibit A, and shall include any other Outlet that may be opened, acquired, operated, owned, managed, controlled or franchised by the Customer during the Term. Customer agrees to provide PBC with prompt notice of any changes to the list of Outlets in Exhibit A and any additional Outlets shall automatically become part of this Agreement. The parties agree to verify the list of Outlets and modify Exhibit A as necessary to reflect such additions and deletions on an annual basis during the Term.

“**Packaged Products**” shall mean Beverages that are sold and/or distributed by PBC in pre-packaged form (e.g., bottles and cans) by PBC. A current list of PBC’s Packaged Products is listed in the attached Exhibit B which may be amended by PBC from time to time.

“**Products**” shall mean packaged products manufactured, bottled, sold and/or distributed by PBC.

“Third Party Operator”, if applicable, includes those persons or entities operating businesses selling or otherwise distributing Products from a location within the Outlets.

“Year” will mean a term of 13 financial periods coinciding with PBC’s financial periods (each a “Financial Period” typically consisting of four weeks) during the Term, beginning the first day of the Term and each period of 13 Financial Periods thereafter. Term “quarter” or “quarterly” will mean a consecutive period of approximately 3 months coinciding with PBC’s Financial Periods each Year during the term of this Agreement.

1.0 Term

1.1. The term (the **“Term”**) of this Agreement shall commence on July 1, 2022 (the **“Effective Date”**) and shall expire on and, unless earlier terminated in accordance herewith, shall terminate on June 30, 2025. Prior to the end of the Term, Customer has the option to extend the Term of this Agreement, at its sole discretion (the **“Extended Term”**).

1.2. Prior to the end of the Term, or Extended Term, if applicable, if Customer determines that it wishes to renew this Agreement based on its review, which will include criteria such as performance, milestone achievement, value added attributes and pricing, Customer shall, in its sole discretion, renew this Agreement for a period of two (2) years, on the same terms and conditions.

1.3. When fully executed, this Agreement will constitute a binding obligation of both parties until such time as the foregoing commitment has been fulfilled.

2.0 Exclusivity

2.1. Exclusive Beverage Rights. During the Term of this Agreement, PBC shall have the exclusive right to make all Beverages available for sale and distribution within the Customer’s Outlets, including at all locations located within the Outlets where beverages are sold and catering operations for Customer or its Outlets. Accordingly, the Products shall be the only Beverages of their respective type sold, dispensed or served anywhere at the Outlets, and Customer will cause the purchasing representative for each of the Outlets to purchase all its respective requirements (including a Third Party Operator, if applicable) for such Products directly and exclusively from PBC. In no event shall there be served, dispensed or otherwise made available Beverage products licensed, produced or otherwise distributed by Nestle S.A., Nestle Canada Inc., Coca-Cola Ltd. or Coca-Cola Enterprises or any of their respective affiliates.

2.2. PBC acknowledges that the Customer rents space within the Outlets to third parties for short and long term periods. During these periods, if such third parties serve and/or distribute products that are competitive to the Beverages, Customer will not be found in breach of Section 2.1.

3.0 Pricing and Distribution

3.1. PBC shall sell and provide the Products set forth in Exhibit B directly to Customer through Direct to Store delivery method for resale at Customer’s Outlets.

3.2. The prices for the Products (the **“Prices”**) as of the Effective Date, are listed in Exhibit B and are exclusive of any applicable product deposits, fees or sales/excise taxes (local, provincial or federal). Pricing may vary in territories where PBC bottler rights apply.

3.3. PBC shall increase Prices by 3% each Year during the Term of the Agreement upon (30) days written notice to Customer.

3.4. Price increases exceeding and/or in addition to those referred to above may be made by PBC, in the event of significant demonstrable increase in production or distribution costs to PBC, including without limitation, raw material costs (e.g. sweeteners, aluminum, plastic) and energy/utility costs (e.g. fuel, hydro).

3.5. During the term, if Customer would like to move from Direct to Store delivery to purchasing Products through an Authorized FS Distributor, Customer must first obtain PBC's prior written approval. If approval is granted, then all sales of Products by PBC to Authorized FS Distributors shall be made on terms determined by PBC. PBC expressly reserves the right to withhold shipment of any new order at any time that existing invoices to an Authorized FS Distributor are outstanding beyond terms. Customer agrees to use commercially reasonable efforts to cause the Authorized FS Distributors to make timely payment for the Products. Notwithstanding delivery of Products to any Outlet(s) via a distributor, Customer shall remain subject to all of its obligations pursuant to this Agreement for the Term.

4.0 Funding, Rebates and Financial Commitments

4.1. In consideration of the rights granted to PBC by Customer during the Term of this Agreement, and provided Customer is not in breach of this Agreement, PBC shall provide Customer with the funding and support set out in the attached Exhibit C.

4.2. PBC will not accrue, pay or otherwise provide any funding or support set out in Exhibit C in respect of: (i) any Products for which PBC has not received payment in full; or (ii) if Customer is in breach of any of the terms this Agreement.

5.0 Additional Customer Performance Requirements

5.1. This Agreement, including all of PBC's support to the Customer as described herein, is contingent upon the Customer complying with the terms of this Agreement.

5.2. Customer will use its commercially reasonable efforts to ensure that all PBC Products maintain continuous or increased presence and exposure within the Outlets following implementation of this Agreement.

5.3. Customer acknowledges that funding is generally being made available to Customer under this Agreement to enable Customer to promote and encourage sales of PBC Products at the Outlets. All marketing and promotional activities relating to the Products will be as mutually agreed to by the parties and will specifically include the following, but not limited to combo meals, branding and menu boards.

5.4. Unless otherwise authorized by PBC, the Customer shall purchase all of their requirements for Product directly from PBC. The Customer and the Outlets will only sell those PBC Products purchased in accordance with this Agreement from the equipment provided to the Outlets by PBC, as applicable.

5.5. The Customer and its Outlets shall have appropriate brand identification, as identified by PBC, for each PBC Product served on all menus (including catering), menuboards throughout the Term.

5.6. At all times during the Term, the Customer agrees to maintain a reasonable distribution of all PBC Products.

5.7. Customer understands that the Products provided hereunder are perishable. PBC will not replace stale or spoiled Products. Customer agrees that no Product shall be sold past the code date, and that it shall abide by policies on product handling and quality control periodically advised by PBC.

6.0 Equipment and Service

6.1. PBC will loan Customer, at no charge, appropriate equipment for dispensing and cooling the Products during the Term ("**Equipment**"). Customer agrees that the Equipment shall be exclusively used to display and merchandise the Products, and the Customer shall not use the Equipment to display, stock, advertise, sell or maintain any other products (including on the exterior of the Equipment). Title to all Equipment will remain vested in PBC or its affiliate and all such Equipment will be returned to PBC upon expiration or earlier termination of this Agreement. Customer shall not, and shall not allow any Outlet or any other party to, repair, service, maintain, replace, relocate, move or remove any Equipment. PBC shall have the exclusive right to repair, service, maintain, replace, relocate, move and remove any Equipment.

6.2. Each Year during the Term or at PBC's request, Customer shall provide PBC with a written Equipment verification list indicating the asset number, Equipment type and location of the Equipment loaned to the Customer pursuant to this Agreement. Failure to provide such verification list to PBC shall be deemed a material breach of this Agreement.

6.3. PBC will provide, at no charge to the Customer, preventative maintenance and service to the Equipment during the Term. PBC will also provide Customer with a telephone number to request emergency repairs and receive technical assistance related to the Equipment after business hours. PBC will promptly respond to each applicable Customer request, and will use reasonable efforts to remedy the related Equipment problem as soon as possible. Customer will be responsible for all Equipment costs (including service fees) resulting from Customer's willful or negligent damage or abuse.

6.4. Except to the extent attributable to the intentional and/or negligent acts or omissions of Customer, its employees, or its agents, PBC will be responsible for and will bear the risk of loss or damage to unit(s) of Equipment placed and installed upon Outlets and arising as a result of theft and/or vandalism upon the Outlets; provided, however, that in the event of repeated (defined as two or more occurrences) or significant theft, vandalism, destruction or loss, without limitation, PBC will have the right, at its sole discretion, to move or remove any applicable unit of such Equipment from the Outlets.

6.5. The Customer shall supply and install, or cause to be supplied and installed, at the Customer's cost and expense, all facilities, as may be reasonably necessary, for the use and operation of the Equipment in the Outlets, including, but not limited to, electrical outlets and wiring, drains, conduits, water outlets and cut-off valves.

6.6. In respect of all Equipment that is vending equipment, if applicable, PBC shall have the exclusive right to stock and re-stock, at no cost to Customer, Products in each of the vending machines and to collect the monies that each vending machine generates. Title to all monies and Products located in such vending equipment will remain vested in PBC or its affiliate. The Product mix offered in each such vending machine shall be determined by PBC.

6.7. Customer acknowledges and agrees that PBC shall have the right to delegate its obligations in respect of the administration, installation and maintenance of vending services, including payment of vending commissions, to a third party vending operator ("**Third Party Vending Operator**"), which as of the date of agreement is Canteen Vending. PBC shall have the right to change its Third Party Vending Operator at any time during the Term, subject to Customer's prior approval, which approval shall not be unreasonably withheld. Notwithstanding such delegation, PBC shall remain subject to all of its obligations pursuant to this Agreement for the Term.

6.8. Upon termination or expiration of this Agreement, if Customer has not entered into a further agreement with PBC for the purchase of the Products, Customer shall surrender to PBC all Equipment installed in the Outlets, whether leased, loaned or

otherwise made available by PBC. PBC shall have the right to deduct the full value of the Equipment from any and all funds owing to Customer and/or the applicable Outlet(s) in the event PBC is prevented from removing such Equipment within thirty (30) days of the expiration or earlier termination of this Agreement.

6.9. Customer and/or each Outlet, as applicable, shall be responsible for the full replacement cost of all Equipment not returned, damaged, lost, or stolen while in its possession.

7.0 General Terms

7.1 Termination.

- (a) Either party may terminate this Agreement: (i) if the other commits a material breach of this Agreement, provided, however, that the terminating party has given the other party written notice of the breach and the other breaching party has failed to remedy or cure the breach within thirty (30) days of such notice; or (ii) if the other party takes any action with respect to its liquidation or winding-up, or makes an assignment for the benefit of creditors, or any proposal under the Bankruptcy and Insolvency Act (Canada), or any comparable statute, or if a bankruptcy petition is filed or presented by such party, or if a court of competent jurisdiction enters a judgment or order approving any such petition or any petition seeking reorganization, arrangement or composition of such party or its debts or obligations, or if a custodian or receiver or receiver and manager or similar official is appointed for such party or any of its assets. If for any reason the Customer's volume declines by more than 25% from the average annualized volumes, for a period of sixty (60) business days or more, then such event shall be deemed a material breach of this Agreement, and PBC shall have the right to renegotiate funding in Exhibit C and/or terminate this Agreement upon five (5) days prior written notice.
- (b) Without prejudice to any other remedy available to PBC at law or in equity in respect of any event described above, this Agreement may be terminated in whole or in part by PBC upon thirty (30) days' advance written notice to Customer if (i) any of the Products are not made available at the Outlets as required in this Agreement, (ii) any of the rights granted to PBC herein are materially restricted or limited during the Term; or (iii) a final judicial opinion or governmental regulation prohibits, or materially impacts or impairs (e.g., beverage tax or package size restriction) the availability or cost of Beverages, whether or not due to a cause beyond the reasonable control of Customer. Before PBC exercises its right to terminate as described in this Section, PBC agrees to engage in good faith renegotiations with Customer to adjust the funding offered to Customer herein on an equitable basis to neutralize any negative impact such change may have on the economics of the original Agreement.
- (c) From time to time, factors outside of PBC's control may lead to certain Products being out of stock, which shall not be deemed as breach of this Agreement.

7.2 Remedies / Expiration. Without limiting any of the other remedies available to PBC, if this Agreement is terminated before its expiration for any reason other than uncured material breach by PBC, then Customer will immediately make the following payments by no later than 30 days following the effective date of such termination:

- I. an amount reflecting reimbursement for all funding previously advanced by PBC but not earned by Customer and/or the Outlets pursuant to the terms of this Agreement in respect of the unexpired portion of the Term, or the Year for which it was paid, as the case may be, on a pro rata basis; and

- II. an amount reflecting reimbursement for the cost of installation, service and PBC Equipment that has been installed in the Outlets, if applicable.

7.3. **Transition Period.** Upon termination or expiration of this Agreement, if Customer has not entered into a further agreement with PBC for the purchase of Products, PBC may, upon request by the Customer, continue to provide Products to the Customer to ensure the uninterrupted supply of beverages, for a transition period not to exceed 120 days (unless otherwise mutually agreed upon) following expiration or termination of the Agreement (the "Transition Period"). During the Transition Period, the parties will continue to perform pursuant to the terms and conditions of this Agreement, except that Customer shall not be required to comply with any exclusivity requirements set forth herein and PBC shall not be obligated to provide any funding or other consideration as set forth in this Agreement. During the Transition Period, Customer will provide PBC with reasonable access to the Outlets, free from any claims of trespass and on a mutually agreed upon schedule, for the purposes of removing Equipment. For clarity purposes, although Customer shall no longer be required to comply with the exclusivity requirements of this Agreement, Customer acknowledges and agrees that, except as specifically agreed by PBC in writing, Equipment must be used exclusively to display and/or dispense PBC beverage products, even during the Transition Period.

7.4. **Right of Offset.** PBC reserves the right to withhold payments due hereunder as an offset against amounts not paid by Customer pursuant to this Agreement.

7.5. **Trademarks.** PBC reserves the right to final approval, in its sole discretion, of any and all promotional or other materials utilizing PBC trademarks, and no documents, point of sale, coupons, sell sheets, etc. shall be released without PBC's prior written approval. Any and all trademarked, copyrighted or other material in which a party claims or has proprietary rights shall remain the sole and exclusive property of that party and shall be used by the other solely for the purposes listed and to the extent allowed by this Agreement. Upon termination or expiry of this Agreement each party shall immediately cease all use of the other trademarks, trade names, slogans, and or other identification of the other party or its products.

7.6. **Payment.** Payment of PBC invoices shall be in accordance with their stated terms which, if credit is granted, are currently the thirtieth (30th) day from date of invoice. All payments to PBC shall be rendered without deduction or set off. Customer and each Outlet shall, upon request, complete a PBC credit application and shall be subject to PBC's credit policies. Customer acknowledges that in the event PBC ceases to sell Products to Customer or any Outlet in accordance with PBC's credit policies, PBC shall not be in breach of this Agreement.

7.7. **Product Changes.** PBC reserves the right to change or supplement Products offered for sale to Customer at its discretion, upon notice.

7.8. **Confidentiality.** The Customer and PBC agree to keep this Agreement and its terms, as well as the information which is disclosed to it by the other party in connection with the performance of this Agreement, confidential and not to disclose this Agreement or its terms to any third party without the prior written consent of the other party, subject only to disclosure of such information to the party's auditors and legal counsel and as required by law or legal process. The Customer further acknowledges and agrees that the disclosure of the terms of this Agreement could reasonably be expected to significantly harm the competitive position and/or significantly interfere with the general negotiating and business position of PBC. The parties acknowledge and agree that details of any public announcements, statements or disclosure concerning this Agreement shall be jointly agreed to prior to the making of any such public announcements, statements or disclosure by either party.

7.9. **Assignment/Acquisition.** In the event that a third party acquires Customer or all or a group of the Outlets, or if Customer merges with a third party, Customer will, in connection with such transaction, cause the acquiring party/merged entity, in writing, to ratify this Agreement and assume all of the obligations of Customer hereunder. In the

event that Customer does not deliver written evidence of such ratification and assumption of this Agreement by the acquiring party/merged entity within ten (10) days following the closing of the transaction, PBC may, at its option, terminate this Agreement effective immediately. The Agreement shall not be otherwise assignable without the express written consent of PBC. In the event the transferee has an existing local agreement with PBC (which agreement covers the purchase of Products), then, PBC shall have the right to determine which Agreement shall continue in force and effect. PBC may assign this Agreement at any time to any PBC affiliate without any prior consent. This Agreement shall enure to the benefit of, and be binding upon, the successors and permitted assigns of PBC and Customer.

7.10. **Governing Law.** This Agreement shall be governed by the laws of the Province of Ontario and the federal laws of Canada applicable therein without regard to conflict of laws principles.

7.11. **Tax.** Customer will remain responsible for any applicable taxes, fees or other tax liability incurred in connection with Customer's receipt of funding and/or Equipment provided by PBC under this Agreement. In addition, Customer will neither assess nor impose upon PBC any common area maintenance fees, taxes or other charges based on occupation of the space allocated to Equipment, nor with respect to the ownership or usage thereof.

7.12. **Force Majeure: Impossibility of Performance.** Neither party shall be responsible to the other or to any third party for any failure, in whole or in part, to perform any obligations hereunder, to the extent and for the length of time that performance is rendered impossible or commercially impractical, owing to acts of God, public insurrections, floods, fires, pandemic/epidemic, strikes, lockouts, or other labor disputes, disruptions in supply, shortages or scarcity of materials, crop failures, freezes, and other circumstances of substantially similar character beyond the reasonable control of the affected party (collectively, a "Force Majeure Event"). Any party so affected shall (i) use all reasonable efforts to minimize the effects thereof and (ii) promptly notify the other party in writing of a Force Majeure Event and the effect of a Force Majeure Event on such party's ability to perform its obligations hereunder. The affected party shall promptly resume performance after it is no longer subject to a Force Majeure Event. In the event Customer's performance obligations are suspended pursuant to a Force Majeure Event as set forth herein, PBC's funding obligations will be suspended for the duration of Customer's nonperformance; once the Force Majeure Event has concluded and Customer resumes performance or in the event Customer is able to perform some but not all of its obligations herein, any fixed or guaranteed funding will be adjusted commensurate with the decline in volume associated with the suspended or partial performance.

7.13. **Right of First Negotiation/Refusal.** As of the commencement of this Agreement until six(6) months prior to the expiration of the Term, Customer hereby grants PBC exclusive negotiation rights with respect to extending the current Agreement or entering into a new agreement for the supply of beverage products to the Customer and/or its Outlets upon expiration of the current Term. Thereafter, if the parties have not entered into a new agreement, the Customer shall be free to enter into discussions/negotiations with third parties except that Customer shall grant PBC the right of first refusal to match any bona fide offers made by a third party with respect to the supply of beverage products to the Customer and/or its Outlets after the Term. The Customer shall provide PBC with details of any such bona fide offers, and PBC shall have a fifteen (15) day window to decide whether it will match such offer and exercise its right of first refusal. The parties agree that beverage type/category and not brand names shall be considered for the purposes of determining a match. In the event that PBC declines to match such offer, or fails to respond within the fifteen (15) day period, then Customer shall be free to enter into an agreement with any third party based on terms and conditions equal or favorable to those presented to PBC in connection with the notice specified herein.

7.14. Dispute resolution. If a dispute arises out of or relates to this Agreement, including any dispute about the existence of a breach of this Agreement, and if the dispute cannot be settled through direct discussions, the parties agree to attempt to settle the dispute in an amicable manner by mediation pursuant to the National Mediation Rules of the ADR Institute of Canada, Inc. Such mediation must occur within sixty (60) days after a party's request for mediation. The place of mediation shall be Toronto, Ontario and the language of the mediation shall be English. Thereafter, any unresolved controversy or claim shall be settled by arbitration under the Arbitration Rules of the ADR Institute of Canada, Inc., and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Any arbitration brought under the terms of this Agreement shall be conducted in Toronto, Ontario, in the following manner: Each party shall appoint one person as an arbitrator. The two arbitrators so chosen shall select a third impartial arbitrator within ten (10) days of the date on which the second arbitrator is selected. If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator, such arbitrator shall be selected by the ADR Institute of Canada, Inc. The three arbitrators shall determine all questions presented to them by majority vote. The language of the arbitration shall be English. The decision of a majority of the arbitrators shall be final and conclusive on the parties hereto and shall be accompanied by written findings of fact and conclusions of law.

7.15. Release, Discharge or Waiver. No release, discharge or waiver of any provision hereof shall be enforceable against or binding upon either party hereto unless in writing and executed by both parties hereto. Neither the failure to insist upon strict performance of any of the agreements, terms, covenants or conditions hereof, nor the acceptance of monies due hereunder with knowledge of a breach of this Agreement, shall be deemed a waiver of any rights or remedies that either party hereto may have or a waiver of any subsequent breach or default in any of such agreements, terms, covenants or conditions.

7.16. Insurance.

Customer shall, at its sole cost and expense, place and maintain insurance throughout the Term that it deems adequate, sufficient and consistent with prudent industry standards to insure its activities and obligations in connection with this Agreement. Without limiting the generality of the foregoing, Customer shall name PBC as a loss payee under its applicable insurance policies and shall notify PBC of any loss or damage to the Equipment.

PBC shall at its own expense obtain and maintain until the termination of the contract, and provide the City with evidence of:

- a) Comprehensive general liability insurance on an occurrence basis for an amount not less than five million (\$5,000,000.00) dollars and shall include the City as an additional insured with respect to the successful Proponents operations, acts and omissions relating to its obligations under this Agreement, such policy to include non-owned automobile liability, personal injury, broad form property damage, contractual liability, owners' and contractors' protective, products and completed operations, contingent employers liability, cross liability and severability of interest clauses.
- c) Automobile liability insurance for an amount not less than two million (\$2,000,000.00) dollars on forms meeting statutory requirements covering all vehicles used in any manner in connection with the performance of the terms of this Agreement.

7.17. Indemnity. Except for any claim caused by the gross negligence of PBC, the Customer shall protect, indemnify and hold harmless PBC and its parent(s), subsidiaries and affiliates, and its and their officers, directors, employees, franchisees, licensees, representatives and agents, from and against any and all losses, liabilities, costs,

expenses (including, without limitation, reasonable legal fees), damages, claims, actions, judgments and suits whatsoever arising from, based upon, in any way connection with or relating to: (a) the acts or omissions of the Customer and its franchisees and licensees, and its and their employees, servants, agents or representatives; (b) the breach by the Customer of any of its obligations, covenants, representations or warranties hereunder; or (c) any dispute of a third party in respect of the payments made by PBC to the Customer hereunder.

7.18. **Title.** Title and risk of loss to the Products purchased for the Outlets shall pass to the Customer immediately upon delivery of same.

7.19. **Relationship of the Parties.** Each party hereto is an independent contractor and has no authority or right to incur obligations of any kind in the name of or for the account of the other party. Neither party shall be deemed to be an associate, partner, principal or agent of the other.

7.20. **Construction.** If any covenant, obligation or provision contained in this Agreement or the application thereof to any person or circumstance shall, to any extent, be held invalid or unenforceable, the remainder of this Agreement or the application of such covenant, obligation or provision to persons or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby and each covenant, obligation and provision of this Agreement shall be separately valid and enforceable to the fullest extent permitted by law.

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

7.22. **Notices.** All notices and other communications by the parties will be in writing and deemed to have been duly given when delivered in person, via an overnight courier delivery service of general commercial use and acceptance (such as Federal Express or UPS) or via certified or registered mail with return receipt (each, a "Primary Delivery Method"), in each case, with a confirmatory copy by email, addressed as follows (unless notification of change of address is given in writing by means of this Notice provisions), and shall be effective upon receipt via the Primary Delivery Method:

If to PBC:

PepsiCo Beverages Canada
2095 Matheson Blvd E
Mississauga, Ontario L4W 0G2
Attn: Director, Foodservice

With a copy to (which shall not constitute notice) the PBC Legal Department at the same address.

If to Customer:

The Corporation of the City of London
300 Dufferin Avenue
P.O. Box 5035
London, Ontario
N6A 4L9
Attn: Cheryl Smith /designate
Deputy City Manager, Neighbourhood and Community-Wide

Services

7.23. **Representations and Warranties.** Each party represents and warrants to the other that it has full power and authority, corporate and otherwise, and has been duly authorized, to enter into and perform its obligations under this Agreement and that neither the execution and delivery of this Agreement, nor the consummation of the transactions contemplated hereby, nor compliance with or performance of any of the

provisions hereof, will: (a) violate or conflict with, or result in a breach of any provision of, or constitute a default (or an event which, with the giving of notice or the passage of time or otherwise, would constitute such a default) under any of the terms, conditions or provisions of any existing agreement or other instrument or obligation to which it is a party, or by which it or any of its properties, assets or operations may be bound or affected; (b) violate any order, writ, injunction, decree, or any statute, rule or regulation, applicable to it or any of its properties, assets, or operations: or (c) require any action, or consent or approval of, or review by, any other party, including without limitation any third party, court or governmental body or other agency, instrumentality or authority, except as shall have been duly obtained and effective as of the date of this Agreement. There are no representations and warranties or conditions of sale other than those expressly set out herein.

7.24. **Entire Agreement.** This Agreement contains the entire agreement between the parties hereto regarding the subject matter hereof and supersedes all other agreements between the parties. This Agreement may be amended or modified only by a writing signed by each of the parties.

7.20 At the request of all parties, this Agreement has been drawn up in the English language. A la demande expresse des parties, ce contrat a été rédigé en langue anglaise.

IN WITNESS WHEREOF, the undersigned have caused this Agreement to be duly executed as of the date set forth below.

**PEPSICO BEVERAGES CANADA,
a business unit of PEPSICO CANADA
ULC**

The Corporation of the City of London

By: _____

By: _____

Print Name: _____

Print Name: Ed Holder

Title: _____

Title: Mayor

Date: _____

Date: _____

(I have authority to bind the corporation)

(I have authority to bind the corporation)

By: _____

By: _____

Print Name: _____

Print Name: Michael Schulthess

Title: _____

Title: City Clerk

Date: _____

Date: _____

(I have authority to bind the corporation)

(I have authority to bind the corporation)

Exhibit A Customer Outlets

Customer ID	Customer Location	Address	City	Province	Postal Code
9673518	Argyle Arena FSV	1948 Wavell Street	London	Ontario	N5V 4B7
9673561	Canada Games Aquatic Centre (FSV)	1045 Wonderland Road North	London	Ontario	N6G 2Y9
9673546	Carling Arena (FSV)	675 Grosvenor Street	London	Ontario	N6Y 3T5
9673571	Carling Heights Optimist Centre FSV	656 Elizabeth Street	London	Ontario	N5Y 6L3
9673581	City Hall Cafeteria (FSV)	300 Dufferin Avenue	London	Ontario	N6B 1Z2
9673577	Dearness Home FSV	710 Southdale Road	London	Ontario	N6E 1R8
9673550	Farquharson Arena FSV	411 Techumseh Avenue	London	Ontario	N6C 1T4
9673531	Glen Cairn Arena FSV	370 Chippendale Crescent	London	Ontario	N5Z 3G2
9673554	Kinsmen Arena	20 Granville Street	London	Ontario	N6H 1J3
9673538	Lambeth Community Centre (FSV)	7112 Beattie Street	London	Ontario	N6P 1A2
9673544	Medway Arena FSV	119 Sherwood Forest Square	London	Ontario	N5V 4B7
9673558	North London Optimist Community Centre FSV	1345 Cheapside Street	London	Ontario	N5V 3N9
9673541	Oakridge Arena FSV	825 Valletta Street	London	Ontario	N6H 2Z2
9673529	Silverwoods FSV	50 Sycamore Street	London	Ontario	N5Z 1K8
9673568	South London Community Centre FSV	1119 Jalna Boulevard	London	Ontario	N6E 2S9
3572194	Storybook Gardens (FSV)	1958 Storybook Lane	London	Ontario	N6K 4Y6
9674560	Stronach Arena (FSV)	1221 Sandford Street	London	Ontario	N5V 1J8
9673536	Earl Nichols (FSV)	799 Home View Road	London	Ontario	N6C 5J4
4014107	East Lions Community Centre (FSV)	1731 Churchill Avenue	London	Ontario	N5W 5P4
8423422	Thames Valley Golf	850 Sunninghill Avenue	London	Ontario	N6H 3L9
8135433	Top of the Hill Café	300 Dufferin Avenue	London	Ontario	N6A 4L9
3569184	Storybook Gardens	1958 Storybook Lane	London	Ontario	N6K 4Y6
8411374	Fanshawe Golf Course	2835 Sunnysdale Road East	London	Ontario	N5X 3Y7

**Exhibit B
Products and Prices**

Package	Price	Rebate	Net
CSD / NCB			
591ml 24L CSD	\$25.00	\$3.00	\$22.00
591ml 24L Lipton Brisk	\$25.00	\$3.00	\$22.00
Juice / Tea			
450ml 12L Dole	\$17.41	\$3.00	\$14.41
450ml 12L Ocean Spray	\$17.41	\$3.00	\$14.41
547ml 12L Lipton Pure Leaf	\$22.55	\$3.00	\$19.55
Lipton 500ml 12L	\$13.15	\$3.00	\$10.15
Water			
1 Liter 12L Evian	\$27.10	\$3.00	\$24.10
1 Liter 12L ARTO LifeWTR	\$16.21	\$3.00	\$13.21
1 Liter 12L Montellier	\$11.10	\$3.00	\$8.10
1 Liter 15L Aquafina	\$15.93	\$3.00	\$12.93
1.5 Liter 12L Aquafina	\$15.93	\$3.00	\$12.93
1.5 Liter 12L Evian	\$27.10	\$3.00	\$24.10
330ml 20L Glass Evian	\$26.00	\$3.00	\$23.00
500ml 24L Evian	\$30.90	\$3.00	\$27.90
500ml 24L Montellier	\$19.10	\$3.00	\$16.10
591ml 12L Aquafina Plus	\$17.24	\$3.00	\$14.24
591ml 24L Aquafina Base	\$14.60	\$3.00	\$11.60
591ml 12L Gatorade Propel	\$19.17	\$3.00	\$16.17
700ml 12L ARTO LifeWTR	\$16.10	\$3.00	\$13.10
750ml 12L PET Evian	\$26.90	\$3.00	\$23.90
750ml 12L Glass Evian	\$26.90	\$3.00	\$23.90
Can 473ml 12P Bubly	\$9.38	\$1.50	\$7.88

Package	Price	Rebate	Net
AMP / Gatorade / Rockstar / SOBE / Starbucks			
405ml 12L Starbucks RF	\$22.52	\$3.00	\$19.52
591ml 12L Gatorade	\$18.00	\$3.00	\$15.00
710ml 24L Gatorade	\$39.01	\$3.00	\$36.01
950ml 12L Gatorade	\$22.00	\$3.00	\$19.00
Can 444ml 12L Starbucks	\$22.52	\$3.00	\$19.52
Can 473ml 12L AMP	\$23.00	\$3.00	\$20.00
Can 473ml 12L Rockstar	\$23.00	\$3.00	\$20.00
Fountain			
12L Cranberry (Generic)	\$76.82	\$0.00	\$76.82
12L Margarita (Generic)	\$71.76	\$0.00	\$71.76
12L Org Juice 100% (Dole)	\$83.91	\$0.00	\$83.91
12L Motts Clamato	\$79.92	\$0.00	\$79.92
BIB 12L CSD	\$37.24	\$0.00	\$37.24
BIB 12L Lipton Brisk	\$47.69	\$0.00	\$47.69
BIB 20L CSD	\$62.03	\$0.00	\$62.03
CO2	\$28.00	\$0.00	\$28.00
Cups / Lids			
Cups 12 OZ	\$114.85	\$0.00	\$114.85
Cups 21 OZ (1200C)	\$67.55	\$0.00	\$67.55
Cups 32 OZ	\$52.92	\$0.00	\$52.92
Lids 12/16/21/24 OZ (2400C)	\$67.50	\$0.00	\$67.50
Lids 32 OZ	\$55.95	\$0.00	\$55.95

Delivery is included in the pricing. Minimum delivery is 20 cases or \$300.

**Tropicana, Naked and Kevita are available via Approved PepsiCo Distributor only.
Invoice price subject to Distributor program.**

Exhibit C Funding and Support

Exclusivity Rebate – PBC will accrue the amount specified in Exhibit “B” under the “Rebate” column for each raw Case of Product purchased by the Customer and the Outlets (excluding Products sold through vending equipment) (the “Purchase Rebate”). The Exclusivity Rebate shall be calculated and paid by PBC to the Customer on a PBC quarterly basis, within sixty (60) days of the end of the applicable PBC quarter. PBC shall not accrue or pay any Exclusivity Rebates if Customer and/or the Outlets are in breach of the terms of this Agreement.

Annual Exclusive Beverage Rights Fee – PBC will pay to the Customer an annual exclusive beverage rights fee of \$17,000.00 (the “**Exclusive Beverage Rights Fee**”) each Year during the Term. The Exclusive Beverage Rights Fee shall be earned pro rata over the applicable Year in which it is paid and shall be paid within sixty (60) days of the first (1st) day of the applicable Year.

Upfront Marketing Support Funds – PBC will provide the Customer with annual marketing support payment in the amount of \$3,000.00 (the “**Marketing Support Funds**”) each Year during the Term, which shall be used for such marketing programs as may be mutually agreed by PBC and the Customer with the objective of increasing Product sales in the Outlets. The Marketing Support Funds will also include golf passes and the parties will mutually agree on the number of passes provided by PBC for each Year during the Term.

Vending Commissions – PBC will pay to the Customer a vending commission (the “**Vending Commission**”) in an amount equal to 40% of net revenue actually collected by PBC from vending equipment placed on the premises of the Outlets by PBC in each Year. The Vending Commission shall be calculated and paid by PBC to the Customer on a PBC quarterly basis within thirty (30) days of the end of the applicable PBC quarter. A detailed report outlining the calculation of the Vending Commission, the volume of Products sold through each piece of vending equipment by Outlet and an overall summary of the Vending Commission paid to date shall be delivered to the Customer on or about the same time as paying the Vending Commission.