



FORT HAYS STATE UNIVERSITY

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CONTRACT AWARD

Date of Award: July 1, 2018

Contract Number: 18019

Replaces Contract: 09012

Fort Hays State University Purchasing Office

Telephone: 785-628-4251

E-Mail Address: purchasing@fhsu.edu

Web Address: <http://www.fhsu.edu/purchasing/>

Item: **Exclusive Beverage Contract**

Agency: Fort Hays State University

Location(s): Hays, KS

Performance Bond: \$500,000.00

Term of Contract: July 1, 2018 through June 30, 2028
10 Year Contract for the University and the Department of Athletics

Contractors: Bottling Group LLC operating as Pepsi Beverages Company
1860 East 8th Street
Hays, KS 67601
Phone: 785-628-3024
Contact Person: Tiffany Brady, Key Account Manager
Email: tiffany.brady@pepsico.com
Phone: (620) 417-0029

Prices: See Attached

Payment Terms: Net 30

Political Subdivisions: Pricing **is not** available to the political subdivisions of the State of Kansas.

The above referenced contract award was recently posted to the Fort Hays State University Internet website. The document can be downloaded by going to the following website:
<http://www.fhsu.edu/purchasing/>

CONDITIONS

1. **Term of Contract:** The term of this contract is for a 10-year period from July 1, 2018 through June 30, 2028 for the University and the Department of Athletics.
2. **Conditions of Contract:** The following terms and conditions of award are incorporated by reference and include: DA-45/146a; specifications and conditions of the proposal including any addenda; vendors response including any addenda, appendices and exhibits.
3. **Order of Preference:** Any conflict to the provisions of this contract and the documents incorporated by reference shall be determined by the following priority order:
 - a. Contract Provisions Attachment DA-45/146a;
 - b. Written modifications and addenda to the executed contract;
 - c. Written contract signed by the parties and attachments;
 - d. The above referenced Request for Proposal (RFP) #18019 including any and all addenda, subject to Pepsi's Exceptions/Clarifications as written to the RFP;
 - e. Any supporting manuals/documents that have been incorporated in this Request; and
 - f. Contractor's written proposal submitted in response to this RFP as finalized, including any addenda, appendices and exhibits:
 - 1) Original Technical and Cost Sale Price, Commission Rate and Other Support Proposals;
 - 2) Best and Final Cost, Sale Price, Commission Rate and Other Support Proposal (revised 6.11.18).
4. **Notices:** All notices, demands, requests, approvals, reports, instructions, consents or other communications (collectively "notices") which may be required or desired to be given by either party to the other shall be **IN WRITING** and addressed as follows:

Fort Hays State University
Purchasing Office
601 Park Street Sheridan Hall Rm 318
Hays, KS 67601
RE: Contract number see page 1

or to any other persons or addresses as may be designated by notice from one party to the other.

5. **FHSU Contacts:**

Department of Athletics:
Mr. Curtis Hammeke, Director, 785-628-4050

University Contact:
Mr. Mike Barnett, Vice President for Administration and Finance, 785-628-4251

Financial Contact. Annual support payments and financial and scholarship contributions should be designated as "University" or "Department of Athletics" and mailed to:
Mr. Mike Barnett, Vice President for Administration and Finance
601 Park Street, Sheridan Hall 318, Hays, KS 67601

Pepsi Contacts:

Pepsi Beverages Company
1775 E Kansas City Road
Olathe, KS 66061
Attn: Director, FoodService

With a copy to (which shall not constitute notice):

Pepsi Beverages Company
1111 Westchester Avenue
White Plains, NY 10604
Attn: Legal Department

6. Termination for Cause:

A. University's Termination Rights.

Without prejudice to any other remedy available to University at law or in equity in respect of any event described below, this Agreement may be terminated by University at any time effective thirty (30) days following written notice to Pepsi from University if:

(1) Pepsi fails to make any payment due hereunder, and such default shall continue for thirty (30) days after written notice of such default is received by Pepsi; or

(2) Pepsi breaches or fails to perform any other material term, covenant or condition of this Agreement or any representation or warranty shall prove to have been false or misleading in any material respect and Pepsi fails to cure such breach within forty-five (45) days after written notice of default is delivered to Pepsi. If such cure cannot reasonably be accomplished within such forty-five (45) day period, this provision shall not apply where Pepsi shall have, in good faith, commenced such cure and thereafter shall diligently proceed to completion; *provided, however*, that such cure is completed to the reasonable satisfaction of University within ninety (90) days from the date of Pepsi's receipt of such written notice of default. In the event default is not cured Pepsi has no right to recovery of any amount already paid.

B. Pepsi's Termination Rights.

Without prejudice to any other remedy available to Pepsi at law or in equity in respect of any event described below, this Agreement may be terminated in whole or in part by Pepsi at any time, effective thirty (30) days following written notice to the University if (i) any of the Products are not made available as required in this Agreement by the University, their agents or concessionaires, pursuant to this Agreement (specifically but not limited to the exceptions to the Exclusivity); (ii) any of the rights granted to Pepsi herein are materially restricted or limited during the Term of this Agreement; (iii) a final judicial opinion or governmental regulation prohibits, or materially and significantly impacts or impairs (e.g., beverage tax or size restriction) the availability or cost of Beverages, whether or not due to a cause beyond the reasonable control of the University; or (iv) University breaches any or fails to perform any other material term, covenant or condition of this Agreement or any representation or warranty shall prove to have been false or misleading in any material respect. In connection with the foregoing, Pepsi shall give University notice of the event and where applicable (for events within University's control), shall provide University forty-five (45) days to cure such breach. If the identified breach/event is not remedied with the applicable notice period, then Pepsi may terminate this Agreement and recover from the University a reimbursement in accordance with Section D below (Sponsorship Fees in the Event of Termination). In addition to the termination rights set forth herein, in the event of any of the occurrences outlined in subsections (i) – (iii) above, Pepsi shall have the right, at its discretion and in lieu of termination, to mandate that the University meet and engage in good faith negotiations aimed at modifying the Agreement to reduce Pepsi's ongoing support of the University by an amount that is equitable in light of the diminution of right to Pepsi (e.g., equivalent to the percentage volume decline on campus). If such negotiations fail, then Pepsi shall have the right to terminate the Agreement upon thirty (30) days' notice.

C. Additional Termination Rights Available to Pepsi and University.

Without prejudice to any other right or remedy available to either party at law or in equity of any event described below, this Agreement may be terminated by either party if the other party, or any parent of such other party, shall: (i) have an order for relief entered with respect to it, commence a voluntary case or have an involuntary case filed against it under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect (and such order or case is not stayed, withdrawn or settled within sixty (60) days thereafter) it is the intent of the parties hereto that the provisions of Section 365(e)(2)(A) of Title 11 of the United States Code, as amended, or any successor statute thereto, be applicable to this Agreement; or (ii) file for reorganization, become insolvent or have a receiver or other officer having similar powers over it appointed for its affair in any court of competent jurisdiction, whether or not with its consent (unless dismissed, bonded or discharged within 60 days thereafter); or (iii) admit in writing its inability to pay its debts as such debts become due.

D. Sponsorship Fees in the Event of Termination.

If Pepsi terminates this Agreement pursuant to Section 6(B) or if University terminates this Agreement without cause, then Pepsi shall be entitled to from University, without prejudice to any other right or remedy available to Pepsi, and University shall pay to Pepsi all funding paid by Pepsi to the University which remains unearned as of the time of termination. With regard to the Initial Support Funds, the amount of such reimbursement shall be determined by multiplying the Initial Support Funds by a fraction, the numerator of which is the number of months remaining in the Term at the time such termination occurs and the denominator of which is the total number of months within the Term (e.g., 10 year term is 120 months). With regard to the Annual Sponsorship Fee, the amount of such reimbursement shall be determined by multiplying Annual Sponsorship Fee by a fraction, the numerator of which is the number of months remaining in the Year in which the Agreement is terminated at the time such termination occurs and the denominator of which is twelve (12).

7. **Debarment of University Contractors:** Any vendor who defaults on delivery or does not perform in a satisfactory manner as defined in this contract may be barred for a period up to three (3) years, pursuant to KSA 75-37,103, or have their work evaluated for pre-qualification purposes.

8. **Rights and Remedies:** If this contract is terminated, FHSU, in addition to any other rights provided for in this contract, FHSU shall be obligated only for those services and materials rendered and accepted prior to the date of termination.

The rights and remedies of the parties provided for in this contract shall not be exclusive and are in addition to any other rights and remedies provided by law.

9. **Force Majeure:** The Contractor or the University shall not be held liable if the failure to perform under this contract arises out of causes beyond the control of the Contractor or the University. Causes may include, but are not limited to, acts of nature, fires, tornadoes, quarantine, strikes other than by Contractor's employees, and freight embargoes, etc. Nothing contained herein shall be construed as requiring either party hereto to accede to any demands of, or to settle any disputes with, labor or labor unions, suppliers or other parties that such party considers unreasonable.

10. **Waiver:** Waiver of any breach of any provision in this contract shall not be a waiver of any prior or subsequent breach. Any waiver shall be in writing and any forbearance or indulgence in any other form or manner by either party shall not constitute a waiver.

11. **Independent Contractor:** Both parties, in the performance of this contract, shall be acting in their individual capacity and not as agents, employees, partners, joint ventures or associates of one another. The employees or agents of one party shall not be construed to be the employees or agents of the other party for any purpose whatsoever.

The Contractor accepts full responsibility for payment of unemployment insurance, workers compensation and social security as well as all income tax deductions and any other taxes or payroll deductions required by law for its employees engaged in work authorized by this contract.

12. **Staff Qualifications:** The Contractor shall warrant that all persons assigned by it to the performance of this contract shall be employees of the Contractor (or specified Subcontractor) and shall be fully qualified to perform the work required. The Contractor shall include a similar provision in any contract with any Subcontractor selected to perform work under this contract.
13. **Subcontractors:** The Contractor shall be the sole source of contact for the contract. FHSU will not subcontract any work under the contract to any other firm and will not deal with any subcontractors. The Contractor is totally responsible for all actions and work performed by its subcontractors. All terms, conditions and requirements of the contract shall apply without qualification to any services performed or goods provided by any subcontractor.
14. **Proof of Insurance:** Upon request, the vendor shall present Certificates of Insurance to the FHSU Purchasing Office evidencing the following coverage during the performance of the Services:
 - (a) Worker's Compensation with statutory limits;
 - (b) Employers Liability, with a minimum \$1,000,000 limit of liability per occurrence;
 - (c) Commercial General Liability, including Contractual Liability coverage, with the following minimum limits of liability: \$1,000,000 per occurrence for Bodily Injury and Property Damage, and \$1,000,000 General Aggregate.
15. **Conflict of Interest:** The Contractor shall not knowingly employ, during the period of this contract or any extensions to it, any professional personnel who are also in the employ of the FHSU and who are providing services involving this contract or services similar in nature to the scope of this contract to the University. Furthermore, the Contractor shall not knowingly employ, during the period of this contract or any extensions to it, any FHSU employee who has participated in the making of this contract until at least two years after his/her termination of employment with FHSU.
16. **Confidentiality:** The Contractor may have access to private or confidential data maintained by FHSU to the extent necessary to carry out its responsibilities under this contract. Contractor must comply with all the requirements of the Kansas Open Records Act in providing services under this contract. Contractor shall accept full responsibility for providing adequate supervision and training to its agents and employees to ensure compliance with the Act. No private or confidential data collected, maintained or used in the course of performance of this contract shall be disseminated by either party except as authorized by statute, either during the period of the contract or thereafter. Contractor must agree to return any or all data furnished by FHSU promptly at the request of FHSU in whatever form it is maintained by Contractor. On the termination of expiration of this contract, Contractor will not use any of such data or any material derived from the data for any purpose and, where so instructed by FHSU, will destroy or render it unreadable.

Except as otherwise required by law or the rules or regulations of any national securities exchange or the rules or regulation of the Customer, the Customer and Pepsi agree not to disclose Confidential Information (as hereinafter defined) to any third party other than to their respective directors, officers, employees and agents (and directors, officers, employees and agents of their respective affiliates) and advisors (including legal, financial and accounting advisors) (collectively, "**Representatives**"), as needed.

"**Confidential Information**" shall include all non-public, confidential or proprietary information that Customer or its Representatives make available to Pepsi or its Representatives or that Pepsi or its Representatives make available to Customer or its Representatives in connection with this Agreement. "**Confidential Information**" shall include, but not be limited to, the terms and conditions of this Agreement. It is expressly understood that the disclosure in or pursuant to this Agreement by Customer, Pepsi or their respective Representatives of Confidential Information is not a public disclosure thereof, nor is a sale or offer for sale of any product, equipment, process or service of Customer or Pepsi.

17. **Nondiscrimination and Workplace Safety:** The Contractor agrees to abide by all federal, state and local laws, rules and regulations prohibiting discrimination in employment and controlling workplace safety. Any violations of applicable laws, rules and regulations may result in termination of this contract.
18. **Environmental Protection:** The Contractor shall abide by all federal, state and local laws, rules and regulations regarding the protection of the environment. The Contractor shall report any violations to the applicable governmental agency. A violation of applicable laws, rule or regulations may result in termination of this contract.
19. **Hold Harmless:** The Contractor shall indemnify FHSU against any and all loss or damage to the extent arising out of the Contractor's negligence in the performance of services under this contract and for infringement of any copyright or patent occurring in connection with or in any way incidental to or arising out of the occupancy, use, service, operations or performance of work under this contract.

FHSU shall not be precluded from receiving the benefits of any insurance the Contractor may carry which provides for indemnification for any loss or damage to property in the Contractor's custody and control, where such loss or destruction is to state property. The Contractor shall do nothing to prejudice the FHSU's right to recover against third parties for any loss, destruction or damage to State property.

20. **Care of State Property:** The Contractor shall be responsible for the proper care and custody of any state-owned personal tangible property and real property furnished for Contractor's use in connection with the performance of this contract, and Contractor will reimburse FHSU for such property's loss or damage caused by Contractor, normal wear and tear excepted.
21. **Prohibition of Gratuities:** Neither the Contractor nor any person, firm or corporation employed by the Contractor in the performance of this contract shall offer or give any gift, money or anything of value or any promise for future reward or compensation to any FHSU employee at any time.
22. **Retention of Records:** Unless FHSU specifies in writing a different period of time, the Contractor agrees to preserve and make available all of its books, documents, papers, records and other evidence involving transactions related to this contract for a period of five (5) years from the date of the expiration or termination of this contract.

Matters involving litigation shall be kept for one (1) year following the termination of litigation, including all appeals, if the litigation exceeds five (5) years.

The Contractor agrees that authorized federal and state representatives, including but not limited to, personnel of FHSU; independent auditors acting on behalf of state and/or federal agencies shall have access to and the right to examine records during the contract period and during the five (5) year post-contract period. Delivery of and access to the records shall be at no cost to FHSU.

23. **Antitrust:** If the Contractor elects not to proceed, the Contractor assigns to FHSU all rights to and interests in any cause of action it has or may acquire under the anti-trust laws of the United States and FHSU relating to the particular products or services purchased or acquired by FHSU pursuant to this contract.
24. **Modification:** This contract shall be modified only by the written agreement of the parties with the mutual approval of the parties. No alteration or variation of the terms and conditions of the contract shall be valid unless made in writing and signed by the parties. Every amendment shall specify the date on which its provisions shall be effective.
25. **Assignment:** The Contractor shall not assign, convey, encumber, or otherwise transfer its rights or duties under this contract without the prior written consent of the University.

This contract may terminate in the event of its assignment, conveyance, encumbrance or other transfer by the Contractor without the prior written consent of the University.

26. **Third Party Beneficiaries:** This contract shall not be construed as providing an enforceable right to any third party.
27. **Captions:** The captions or headings in this contract are for reference only and do not define, describe, extend, or limit the scope or intent of this contract.
28. **Severability:** If any provision of this contract is determined by a court of competent jurisdiction to be invalid or unenforceable to any extent, the remainder of this contract shall not be affected and each provision of this contract shall be enforced to the fullest extent permitted by law.
29. **Governing Law:** This contract shall be governed by the laws of the State of Kansas and shall be deemed executed at Hays, Ellis County, Kansas, unless otherwise specified and agreed upon by FHSU.
30. **Jurisdiction:** The parties shall bring any and all legal proceedings arising hereunder in the State of Kansas, District Court of Ellis County, unless otherwise specified and agreed upon by FHSU. The United States District Court for the State of Kansas sitting in Topeka, Shawnee County, Kansas, shall be the venue for any federal action or proceeding arising hereunder in which the State is a party.
31. **Mandatory Provisions:** The provisions found in Contractual Provisions Attachment (DA-146a) which is attached are incorporated by reference and made a part of this contract.
32. **Integration:** This contract, in its final composite form, shall represent the entire agreement between the parties and shall supersede all prior negotiations, representations or agreements, either written or oral, between the parties relating to the subject matter hereof. This contract between the parties shall be independent of and have no effect on any other contracts of either party.
33. **Criminal Or Civil Offense:** Any conviction for a criminal or civil offense of an individual or entity that controls a company or organization or will perform work under this contract that indicates a lack of business integrity or business honesty must be disclosed. This includes (1) conviction of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract or in the performance of such contract or subcontract; (2) conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property; (3) conviction under state or federal antitrust statutes; and (4) any other offense to be so serious and compelling as to affect responsibility as a state contractor. For the purpose of this section, an individual or entity shall be presumed to have control of a company or organization if the individual or entity directly or indirectly, or acting in concert with one or more individuals or entities, owns or controls 25 percent or more of its equity, or otherwise controls its management or policies. Failure to disclose an offense may result in disqualification of the bid or termination of the contract.
34. **Injunctions:** Should FHSU be prevented or enjoined from proceeding with the acquisition before or after contract execution by reason of any litigation or other reason beyond the control of the University, vendor shall not be entitled to make or assert claim for damage by reason of said delay.
35. **Statutes:** Each and every provision of law and clause required by law to be inserted in the contract shall be deemed to be inserted herein and the contract shall be read and enforced as though it were included herein. If through mistake or otherwise any such provision is not inserted, or is not correctly inserted, then on the application of either party the contract shall be amended to make such insertion or correction.
36. **Materials and Workmanship:** The Contractor shall perform all work and furnish all supplies and materials, machinery, equipment, facilities, and means, necessary to complete all the work required by this solicitation, within the time specified, in accordance with the provisions as specified.

The contractor shall be responsible for all work put in under these specifications and shall make good, repair and/or replace, at the contractor's own expense, as may be necessary, any defective work, material, etc., if in the opinion of Fort Hays State University said issue is due to imperfection in material, design, workmanship or contractor fault.

37. **Industry Standards:** If not otherwise provided, materials or work called for in this contract shall be furnished and performed in accordance with best established practice and standards recognized by the contracted industry and comply with all codes and regulations which shall apply.
38. **Federal, State and Local Taxes:** Unless otherwise specified, the contract price shall include all applicable federal, state and local taxes. The successful vendor shall pay all taxes lawfully imposed on it with respect to any product or service delivered in accordance with this contract. **FHSU is exempt from state sales or use taxes and federal excise taxes for direct purchases. These taxes shall not be included in the vendor's price quotation.**

The University makes no representation as to the exemption from liability of any tax imposed by any governmental entity on the Contractor.

39. **Accounts Receivable Set-Off Program:** If, during the course of this contract the Contractor is found to owe a debt to the State of Kansas, agency payments to the vendor may be intercepted / setoff by the State of Kansas. Notice of the setoff action will be provided to the Contractor. Pursuant to K.S.A. 75-6201 et seq., Contractor shall have the opportunity to challenge the validity of the debt. If the debt is undisputed, the Contractor shall credit the account of the agency making the payment in an amount equal to the funds intercepted.

K.S.A. 75-6201 et seq. allows the Director of Accounts & Reports to setoff funds the State of Kansas owes Contractors against debts owed by the Contractors to the State of Kansas. Payments setoff in this manner constitute lawful payment for services or goods received. The Contractor benefits fully from the payment because its obligation to the State is reduced by the amount subject to setoff.

40. **Immigration and Reform Control Act of 1986 (IRCA):** All contractors are expected to comply with the Immigration and Reform Control Act of 1986 (IRCA), as may be amended from time to time. This Act, with certain limitations, requires the verification of the employment status of all individuals who were hired on or after November 6, 1986, by the contractor as well as any subcontractor or sub-contractors. The usual method of verification is through the Employment Verification (I-9) Form.

With this contract, the contractor hereby certifies without exception that such contractor has complied with all federal and state laws relating to immigration and reform. Any misrepresentation in this regard or any employment of persons not authorized to work in the United States constitutes a material breach and, at FHSU's option, may subject the contract to termination and any applicable damages.

Unless provided otherwise herein, all contractors are expected to be able to produce to FHSU any documentation or other such evidence to verify Contractor's IRCA compliance with any provision, duty, certification or like under the contract.

41. **Worker Misclassification:** The contractor and all lower tiered subcontractors under the contract shall properly classify workers as employees rather than independent contractors and treat them accordingly for purposes of workers' compensation insurance coverage, unemployment taxes, social security taxes, and income tax withholding. Failure to do so may result in contract termination.
42. **Definitions:** A glossary of common procurement terms used by the State of Kansas is available at <http://da.ks.gov/purch>, under "Purchasing Forms".
43. **Graphic Identity Standards and Use of University Marks:** Compliance with FHSU Graphic Identity Standards and Use of University Marks Policies is required and may not be waived with equivalents.
44. **Indefinite Quantity Contract:** This Request is for an open-ended contract between a Contractor and FHSU to furnish an undetermined quantity of a good or service in a given period of time. The quantities ordered will be those actually required during the contract period, and the Contractor will deliver only such

quantities as may be ordered. No guarantee of volume is made. An estimated quantity based on past history or other means may be used as a guide.

The Contractor shall establish and maintain procedures and controls acceptable to FHSU to protect the privacy of members' information. Unless the Contractor has the member's written consent, the Contractor shall not use any personally identifiable information obtained for any reason other than that mandated by this agreement

45. **Off-Shore Sourcing:** Bidders shall disclose in their bid response the location where the contracted services will be performed and whether or not any of the work necessary to provide the contracted services will be performed at a site outside the United States.

If, during the term of the contract, the Contractor or subcontractor moves work previously performed in the United States to a location outside of the United States, the Contractor shall immediately notify the FHSU Purchasing Office in writing, indicating the new location and the percentage of work relocated.

46. Intentionally deleted

47. **Payment:** Payment Terms are Net 30 days, in accordance with the credit agreement between Contractor and FHSU. Payment date and receipt of order date shall be based upon K.S.A. 75-6403(b). This Statute requires Fort Hays State University to pay the full amount due for goods or services on or before the 30th calendar day after the date Fort Hays State University receives such goods or services or the bill for the goods and services, whichever is later, unless other provisions for payment are agreed to in writing by the vendor and Fort Hays State University. NOTE: If the 30th calendar day noted above falls on a Saturday, Sunday, or legal holiday, the following workday will become the required payment date.

Payments shall not be made for costs or items not listed in the vendor's invoice.

48. **Shipping and F.O.B. Point:** Unless otherwise specified, prices shall be F.O.B. DESTINATION, PREPAID AND ALLOWED (included in the price), which means delivered to FHSU's receiving dock or other designated point as specified in this contract without additional charge. Shipments shall be made in order to arrive at the destination at a satisfactory time for unloading during receiving hours.

49. **Deliveries:** All orders shall be shipped FOB destination, prepaid and allowed clearly marked with the purchase order number. If delays in delivery are anticipated, the Contractor shall immediately notify the Fort Hays State University of the revised delivery date or partial delivery date. The order may be cancelled if delivery time is unsatisfactory. The Contractor shall inform the FHSU Purchasing Office of any supply or delivery problems. Continued delivery problems may result in a breach of the contract.

In the event delivery minimums apply, the contractor shall provide information to FHSU.

50. **Product Delivery.** All Products must be purchased by Customer and the Food Service Provider, defined herein, directly and exclusively from Pepsi. In the event Contractor fails to deliver Products within a reasonable delivery time as communicated to FHSU, then FHSU and/or the Food Service Provider may purchase the Products from a wholesaler on the open market.

51. **Subcontractors:** Kansas Statute K.S.A. 75-3741, as amended, requires a Bidder to list and identify the "Major Sub-Contractors" for Mechanical Construction, Plumbing Construction, and/or Electrical Construction included as a part of the Proposed, when a single contract for the "Project as a whole" is to be awarded.

FHSU requires tax clearance certificates for all subcontractors be submitted with the proposal, and that the bidder additionally provide subcontract(s) legal company name, contract information and tax ID number (FEIN/TIN) as well.

52. **Performance Bond:** The Contractor shall file with the FHSU Director of Purchases a Performance Bond in the amount of five hundred thousand dollars (\$500,000) as security for the faithful performance of this contract and as security for the payment of all persons performing labor and furnishing materials in connection with this solicitation.
- Bond form will be furnished by the FHSU Purchasing Office and can be completed by any General Insurance Agent. Bond shall be issued by a Surety Company licensed to do business in the State of Kansas.
53. **Equipment:** All proposed equipment, equipment options, and hardware expansions will be mutually agreed to by the parties.
54. **Implied Requirements:** All products and services not specifically mentioned in RFP, but which are necessary to provide the functional capabilities described by the specifications, shall be included. Other products required to make the described software functional shall be identified in the vendor's response.
55. **Warranty:** Contractors shall indicate the type and extent of the warranty for all equipment, hardware, software, and services proposed. FHSU requires a "standard" warranty of a specific amount of days, or one (1) year, whichever is greater. This warranty shall be included in the cost of the equipment.
- The successful bidder will be the sole point of contact on any problems with the equipment or systems during the warranty period.
- The Contractor shall be responsible for all work performed under these specifications. The Contractor shall make good, repair and replace, at the Contractor's own expense, as may be necessary, any defective work, material acceptance, if in the opinion of the FHSU Purchasing Office said defect is due to imperfection in material, design, or workmanship for the warranty period specified.
56. **Acceptance:** No contract provision or use of items by FHSU shall constitute acceptance or relieve the vendor of liability in respect to any expressed or implied warranties.
57. **Ownership:** All reports provided by the Contractor to FHSU under this contract shall be owned by FHSU. The Contractor may not release any materials without the written approval of FHSU.
58. Intentionally deleted
59. **Data:** Any and all data required to be provided at any time during the bid process or contract term shall be made available in a format mutually agreed to by the parties.
60. **Graphic Identity Standards and Use of University Marks:** Compliance with FHSU Graphic Identity Standards and Use of University Marks Policies is required and may not be waived with equivalents.
61. **New Materials, Supplies or Equipment:** Unless otherwise specified, all Products offered by a vendor shall be new, unused in any regard and of most current design; equipment will be new or like new. All materials, supplies and equipment shall be first class in all respects. Seconds or flawed items will not be acceptable. All materials, supplies or equipment shall be suitable for their intended purpose and, unless otherwise specified, fully assembled and ready for use on delivery.
62. **Vendor Contracts:** Include a copy of any contracts, agreements, licenses, warranties, etc. proposed. (State of Kansas form DA-146a remains a mandatory requirement in all contracts.)
63. **Transition Assistance:** In the event of contract termination or expiration, Contractor shall provide all reasonable and necessary assistance to FHSU to allow for a functional transition to another vendor.

64. **Acceptance:** Acceptance of Bid and Agreement is formalized upon execution of a contract and issuance of an FHSU purchase order, which incorporates all terms of this RFP, and corresponding execution of FHSU marks licensing agreement by the parties.

SPECIFICATIONS

The following specifications were provided in RFP 18019. Refer to Bottling Group LLC's Technical Proposal Response for specific contract details.

Definitions:

“Beverage” or ***“Beverages”*** means all carbonated and non-carbonated, non-alcoholic drinks, however dispensed, including but not limited to, (i) colas and other flavored carbonated drinks; (ii) fruit juice, fruit juice containing and fruit flavored drinks; (iii) chilled coffee drinks; (iv) chilled tea products; (v) hypertonic, isotonic and hypotonic drinks (sports drinks and fluid replacements); (vi) energy drinks, (vii) packaged carbonated or still water (including spring, mineral or purified), (viii) liquid concentrate teas (***“LCT”***), (ix) frozen carbonated and non-carbonated beverages (***“FB”***), (x) value-added protein beverages and (xi) any future categories of nonalcoholic beverage products that may be distributed by Pepsi.

“Cases” shall mean the number of cases of Packaged Products purchased by the FHSU from Pepsi, initially delivered in quantities of 24, 15, and 12 bottle/can units, and thereafter in such other size, quantity and type of containers as determined by Pepsi, from time to time.

“Facilities” shall mean the entire premises of every facility owned, leased, occupied or operated by the FHSU or its Food Service Provider, now or in the future, including all buildings, the grounds, parking lots, dining facilities, snack bars, food carts, book stores, athletic facilities and concession stands, and, for each building, the grounds, parking, lots, dining facilities, unbranded and branded food service outlets and vending areas. ***“Facilities”*** shall also be deemed to include: convenience store operations and restaurants initiated during the Term of this Agreement in space leased to third-party commercial tenants within FHSU-owned buildings.

“Food Service Provider” shall mean Chartwells or any food service provider which may serve at the Facilities at any point during the Term. The FHSU acknowledges and agrees that this Agreement, including the pricing, funding and other consideration provided for herein is based on the FHSU's current operating model/use of third party Food Service Providers. Thus, in the event that: (i) if the FHSU is currently self-operated, the FHSU switches to a Food Service Provider, or (ii) if the FHSU currently uses a Food Service Provider to operate its concessions, such agreement between the FHSU and the current Food Service Provider expires or is terminated, and the FHSU enters into a new arrangement with a Food Service Provider; then any such new or subsequent agreement between the FHSU and any Food Service Provider (pursuant to either (i) or (ii) above) shall require such Food Service provider to abide by the applicable pricing and other terms set forth in this Agreement to the exclusion of all other benefits, and shall specifically require such Food Service Provider to affirm that it will not be entitled or seek to receive any funding or other benefits/consideration in connection with any agreement such Food Service Provider may separately have with Pepsi or Pepsi's affiliates. In the event that the FHSU fails to adhere to this requirement (or the Food Service Provider refuses to abide accordingly), then FHSU hereby authorizes Pepsi, and Pepsi shall be entitled to adjust its pricing, funding or other consideration provided to the FHSU by an amount equal to the incremental costs incurred by Pepsi as a result of the FHSU's change in Food Service Providers.

“**Gallons**” shall mean the number of gallons of the Postmix Products purchased by the FHSU from Pepsi.

“**Packaged Products**” shall mean Beverages that are sold/or distributed by Pepsi in pre-packaged form (*i.e.*, Bottles & Cans).

“**Postmix Products**” shall mean Beverage products sold and/or distributed by Pepsi and used to create and dispense fountain beverages.

“**Products**” shall mean Postmix Products and Packaged Products manufactured, bottled, sold and/or distributed by Pepsi.

“**Year**” shall mean each 12-month period during the Term commencing on the first day of the Term or an anniversary thereof.

I. SCOPE

A. Overview

Fort Hays State University (hereinafter “University” or “FHSU”) desires an exclusive beverage pouring rights contract for the selected beverage supplier to sell and promote the sale, distribution, and merchandising of beverages throughout the University as described and qualified in these specifications. The vendor must submit a bid to be considered. FHSU anticipates a contract which provides exclusive rights.

Unless otherwise set forth in Section II(B) of this Agreement, during the Term, FHSU, its agents, representatives, intercollegiate athletic teams coaches and players, and staff (i) shall not themselves nor shall they permit a third party to, sell, serve, promote, market, advertise, sponsor or endorse competitive Beverage products at FHSU Facilities or in connection with the FHSU, its intercollegiate athletic teams coaches and players, and its staff and (ii) shall ensure that the Products are the only Beverages sold, served, promoted, marketed, advertised, merchandised, sponsored or endorsed, at the Facilities or in connection with the Customer, intercollegiate athletic teams coaches and players, and its staff

B. Contractor

The Contractor will sell and promote the sale, distribution, and merchandising of beverages throughout the University campus, which includes the Department of Athletics and the current dining service contractor (Chartwells) for the University. Beverages will be sold directly to the Department of Athletics and to the dining service contractor by the beverage contractor. The “Annual Financial Support Package” and “Commission Support” will be paid directly to the University by the Contractor as determined in negotiations.

C. University

The University shall furnish all utilities such as electricity, water and sewer needed for beverage operations. See **Appendices A, B, and C** for general information about the University.

II. GENERAL PROVISIONS

A. Contract Term

FHSU is interested in proposals for ten (10) years commencing on July 1, 2018 (the "Initial Term"), with one five (5) year optional extension upon written agreement of both parties (the "Renewal Term", together with the Initial Term, the "Term"). Contractor is required to submit bids for both terms.

B. Exclusivity

The University acknowledges and recognizes the tremendous benefit of providing an exclusive beverage opportunity to prospective beverage suppliers and supports the development of an exclusive relationship. This exclusivity does not apply to the following:

- (i) current Licensed Starbuck's Franchise location in the Memorial Union building; and
- (ii) certain events sponsored by an FHSU benefactor where Beverages are provided at no cost to the guests/attendees; and
- (ii) at FHSU President's special events ("President's Events"), competitive Beverages may be used to stock the bar; provided such President's Events are by invitation only and not open to the public and the competitive Beverages are dispensed and made available, but not sold, to the guests. Examples of such President's Events include the President's dinner, football pre-game buffets (Lewis Field Press Box) and basketball pre-game buffets (Victor E Lounge of Gross Coliseum).

In consideration for this exclusive commitment and support, the University requests appropriate compensation. Please specify the amount and term of payment proposed by respondent for an exclusive beverage contract. Also include any additional compensation that may be available to FHSU upon exercise of an option to continue the contract for an additional period of time.

By entering into an exclusive contract, the Department of Athletics and the Memorial Union are able to provide numerous marketing and advertising opportunities to the Contractor at our various facilities. These opportunities can come in the form of signage at all venues, concessions, print media, radio (Tiger Radio Network), game-day program ads, media guide ads, message center promotions, game-day sponsorships, and an overall partnership for promotional activities throughout the year in the Western Kansas Market. The Department of Athletics has new video boards at Gross Memorial Coliseum and Lewis Field Stadium. The Memorial Union has digital signage available.

C. Beverage Distribution Operations

The University currently distributes and/or promotes beverages through the following operations:

- Department of Athletics Concession Operations
- Memorial Union Dining and Catering Services
- University Bookstore
- President's Special Events (Back to School Picnic and other social events)
- Residential Life Dining Services
- Sternberg Museum Store (The Gift Shop at the Sternberg Museum of Natural History offers visitors a wide variety of gift items and souvenirs for all ages. Approximately 40,000 visit the museum annually.)
- University-Wide Vending Machines (Locations to be approved by Director of Purchasing.)

D. Department of Athletics Event and Memorial Union Exposure

Over 150,000 fans annually attend events in FHSU athletic facilities. These events include FHSU collegiate events in soccer, football, basketball, volleyball, wrestling, baseball, softball, track and field, and tennis, as well as Kansas State High School Activities Association State Championship Events including State football, volleyball, wrestling, basketball, and tennis. Additional events such as Special Olympics, graduations, career fairs, etc. create additional exposure opportunities throughout the year. In summary, FHSU's Athletics facilities serve as the host site for most major athletic events in Western Kansas in a variety of age groups. See **Appendix D** for Department of Athletics Calendars.

Approximately 4,600 meetings, banquets, conferences and special events are scheduled in the Memorial Union on an annual basis. These events bring people into the Memorial Union from campus, the city of Hays, and the entire state of Kansas. These events include Chamber of Commerce Banquets, Science and Engineering Fairs, Homecoming and Commencement events, Student Organization Activities, Bloodmobiles, Academic Conferences, Science Olympiads, New Student Orientation, and State-Wide Organization's meetings. In addition, daily exposure opportunities on a daily basis occur to thousands who visit the Union to eat in the various food venues, visit the bookstore, or access the numerous services offered in the facility. In 2017 the Memorial Union had 617,921 visitors.

E. Beverage Product Selection

Beverages furnished by the Contractor may include, without limitation, carbonated and non-carbonated artificially flavored drinks; packaged waters; fruit and/or vegetable juices; fruit and/or juice containing drinks; coffee and tea products; and drink and beverage bases in the form of syrups, whether powders, crystals, concentrates or otherwise, from which such drinks and beverages can be prepared. This proposal also includes the right to sell and promote isotonic drinks, and the right to develop new beverage concepts introduced on the University campus during the term of the relationship.

The Department of Athletics is interested in sports nutrition endurance and energy supplements: recovery drinks, energy bars, or energy chews.

The Contractor shall identify all Beverages, packaged, manufactured or distributed, including juice and isotonic beverages, by the Contractor and any and all additional beverages available to the University through subcontracts, supplier agreements, or other cooperative efforts. The Contractor shall provide all of the identified products, at the option of the University, and all future Beverages packaged, manufactured or distributed by the supplier as well as other future beverages available through other arrangements made by the supplier.

The University shall be the sole judge of quality and equivalency of products offered. In case of any difference of opinion regarding quality of product or interpretation of general conditions and specifications, the decision of the University shall be final and binding. Provided, however, throughout the Term, the University shall sell, dispense and/or make available carbonated soft drinks, isotonic and bottled water.

F. Product Specifications

All beverages will be made available to the University in packages and pursuant to specifications reasonably requested by the University. The Contractor shall identify all specifications pertaining to the above products including portion size, packaging, and dispensing capability in concentration, if applicable, of each beverage. Each proposal must include a complete listing of all syrup and concentrate flavors offered by the Contractor.

G. Product Delivery

Provide a proposal for a delivery plan and schedule for the University, including regular deliveries, "as needed" deliveries, and after regular business hour deliveries. Also include the return policy for unopened, in date product to the vendor.

H. Beverage Fountain and Cooler Equipment

The University currently operates fountain equipment in Gross Memorial Coliseum and Lewis Field, the Memorial Union dining services, and the Residential Life dining services. Equipment is supplied by the current beverage contractor. (Bottles are served in the track, soccer, and softball facilities.)

The Contractor will be required, at the inception and throughout the term of this Contract, to supply, install, service and maintain all fountain, display, and other equipment used to sell, dispense or display beverages, without cost to the Department of Athletics, University, or to the current dining service provider. All equipment must be all equipment provided by Contractor to the University hereunder will be new or like new. The Contractor shall supply any additional equipment as needed due to the alteration or expansion of the dining service programs as agreed upon by the University and current dining service provider.

All dispensers shall be equipped with locks and/or shut off valves at the Contractors sole expense. The dispensers shall be filtered with a stainless steel, vented, double check valve backflow. All dispensers shall be equipped with separate water supply shut off.

The Contractor shall be responsible for installing CO² gas lines for CO² tanks to dispensing equipment where such installation is necessary. The University shall be responsible to provide passage through walls, ceilings, etc. if required at installation sites. The University reserves the right to withhold approval of dispensing equipment installation depending upon the total investment required.

All one-door and two-door coolers shall be supplied, installed, serviced, and maintained by the Contractor.

Equipment currently located at the University is included in **Appendix E**.

I. Vending Equipment and Retail Bottle/Can Sales

The contractor must supply, install, service, and maintain all new, state-of-the-art vending equipment at no cost to the University, and/or to provide equipment upgrades such as labels, front facing, dollar bill validators, bill changers, ID card technology, etc. The placement and location of beverage vending equipment must be placed effectively to promote beverage sales and service. The contractor will be expected to purchase and install in its vending equipment the debit card technology which is currently in use.

The University reserves the right to designate the products to be dispensed where canned and bottled products are sold.

Equipment currently located at the University is included in **Appendix E**.

J. Changeover of Equipment and Products

The changeover of equipment and products from those of the current Contractor to those of the Contractor granted beverage rights under the terms of this contract will be negotiated.

K. Service

The University is committed to exemplary service. The Contractor shall at the Contractor's sole expense service and repair all equipment within twenty-four (24) hours of notification, seven (7) days a week. An on-call service technician(s) must be available for all athletic events in Gross Memorial Coliseum and Lewis Field Stadium. Contractor will respond to service calls with respect to the fountain Beverage equipment within 4 hours.

L. Marketing Initiatives / Advertising for the University

The University recognizes the importance of timely and effective marketing initiatives/advertising to promote the sale of beverages on campus. These efforts are intended to support the sale of beverages on campus through all available means of distribution for the University campus, including the Department of Athletics, President's Special Events, Memorial Union food service, University Bookstore, Residential Life, and Sternberg Museum Store. Examples include can panels, truck backs, cube inserts, and in-market promotions.

FHSU will sincerely use the products to the program objectives agreed upon by FHSU and the beverage supplier. Any products not used in any given year to promote the FHSU program for which they were intended, will be retained by FHSU to be applied to similar program objectives in subsequent years.

N. Licensing

The Contractor shall have the right to use any of Fort Hays State University's licensed trademarks and logos for promotional purposes, with prior approval from the FHSU University Relations and Marketing. Promotions involving Athletics must be approved through the Department of Athletics. All approved promotional efforts must include the University and incorporate the relationship with the Sponsor. Refer to the University Relations Licensing Program information:
<http://www.fhsu.edu/univrel/license.shtml>.

O. Subcontracting

The Contractor shall identify any and all subcontractor(s) and the qualifications of said subcontractor(s). The Contractor shall furnish a list of current clients or customers of each proposed subcontractor and a description of how each subcontractor will contribute to the Contract. The University may request a meeting with any or all subcontractors.

The University reserves the right to reject any and all subcontractors. The use of a subcontractor does not relieve the Contractor of its obligations and responsibilities to the University.

P. Pricing

One intent of this contract is to provide product for resale allowing maximum profit margins. The University reserves the right to approve all selling prices.

On the yearly anniversary date of this contract, costs may increase at the rate specified in Pepsi's RFP response.

Q. Cost of Product

In the response section of this proposal (**Section 12 through Section 17**), the Contractor shall furnish a proposed wholesale pricing structure for all beverages sold, packaged, manufactured, distributed, or otherwise offered by the Contractor to the dining services contractor, as well as additional beverages that are available through supplier agreements, alliances, or other cooperative efforts. The pricing structure should include specific pricing commitments and incentives, and identify the beverage

category, package size and case count (if applicable), and cost of each beverage product offered by the Contractor will not change during the first year of the contract. The University reserves the right to negotiate with the Contractor to establish cost, sale price, commission rate, and other support for current offerings and products developed and entering the market during the term of this Contract.

Current annual beverage volume information is provided in **Appendix F**. The cost schedule should be provided in sufficient detail to identify costs of all products and any volume incentives.

R. Financial Reporting and Control

The Contractor shall provide a listing (with examples and frequency of issuance) of reports that will be periodically furnished to the University administration, i.e., sales reports, sales histories, promotional activities, etc. The Contractor shall demonstrate the organization's system and methodology for purchasing, receiving, storage, and inventory control systems for product.

The University reserves the right to audit any aspect of this Contract as performed by the Contractor at the Contractor's expense. The Contractor shall keep full, timely and accurate records in accordance with generally accepted accounting practices and as may be satisfactory to the University. The Contractor shall furnish the University with all requests of daily, weekly, monthly, and annual reports to verify pertinent financial information so requested. Separate and consolidated operational reports and other supporting data will be provided to the University for each beverage operation previously listed (see Section II, A, page 3) by the Contractor and/or any subcontractors.

Pricing and Financial Support

For the exclusive rights provided to Pepsi hereunder, Pepsi will provide the following sponsorship / scholarships to the University. See original cost and technical proposals and the best and final offer dated 6.11.18 for the details on the items listed below:

<u>Best and Final</u>	<u>Year 1</u>	<u>Year 2</u>	<u>Year 3</u>	<u>Year 4</u>	<u>Year 5</u>	<u>Year 6</u>	<u>Year 7</u>	<u>Year 8</u>	<u>Year 9</u>	<u>Year 10</u>	<u>Total</u>
Upfront Sponsorship ¹	\$220,000										\$220,000
Annual Sponsorship ²	\$30,000	\$30,000	\$30,000	\$40,000	\$40,000	\$40,000	\$45,000	\$45,000	\$45,000	\$45,000	\$390,000
Academic Scholarships ²	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$15,000	\$15,000	\$15,000	\$15,000	\$15,000	\$125,000
Athletic Scholarships ²	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$15,000	\$15,000	\$15,000	\$15,000	\$15,000	\$125,000
Additional Scholarship ²	\$12,000	\$12,000	\$12,000	\$12,000	\$12,000	\$12,000	\$12,000	\$12,000	\$12,000	\$12,000	\$120,000
Free Goods* 280 cases	\$1,200	\$1,200	\$1,200	\$1,200	\$1,200	\$1,500	\$1,500	\$1,500	\$1,500	\$1,500	\$13,500
Marketing ²	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$12,500	\$12,500	\$12,500	\$12,500	\$12,500	\$112,500
Gatorade Kits [^]	\$1,500	\$1,500	\$1,500	\$1,500	\$1,500	\$2,000	\$2,000	\$2,000	\$2,000	\$2,000	\$17,500
Gatorade Nutrition Value ^{^^}	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$10,000	\$100,000
Estimated Vending Commissions ^{**}	\$8,800	\$8,800	\$10,000	\$10,000	\$10,000	\$11,200	\$11,200	\$11,200	\$12,400	\$12,400	\$106,000
Totals	\$313,500	\$93,500	\$94,700	\$104,700	\$104,700	\$119,200	\$124,200	\$124,200	\$125,400	\$125,400	\$1,329,500

1 To be earned by the University over the Initial Term, as more fully described in Section C(1)(a) herein

2 To be earned by the University over each Year, as more fully described in Section C(1)(b)(c)(d) and (e) herein.

[^]Please see technical section of Pepsi's RFP original response for details on what items are available at what cost.

^{^^}Amount shown is the value based on Gatorades current price list. See the details in the Best and Final.

*Free goods will be allotted based on then current FHSU price list. These funds may be used towards G Protein Bars at the proposed special Athletics price rate. Free goods will be available in accordance with Section C(2) herein

^{**}Vending commission increases assume proposed mech rate increases and flat volume

A. Volume Related Cost.

See product size and cost per unit on page 3, Sections 12 – 17 Cost, Sale Price, Commission Rate and Other Support Proposal.

B. Commission Support.

Vending canned/bottle rate – 25% commission support.

C. Financial Support Package.

1. Pepsi will provide the following Sponsorships / Scholarships (each by separate check to FHSU):
 - a. Upfront Sponsorship – one-time payment of \$220,000 paid within the first 45 days of the new contract signing of this Agreement by both parties. The Initial Support Funds are earned by the FHSU over the Term. In the event Pepsi terminates this Agreement due to the FHSU's failure to cure a breach hereof, the unearned Initial Support Funds will be repaid to Pepsi pursuant to the terms of Section 6.D (Sponsorship Fees in the Event of Termination.) herein.
 - b. Annual Sponsorship: \$30,000 paid annually in years 1 – 3; \$40,000 paid annually in years 4 – 6; \$45,000 paid annually in years 7 – 10 within the first 45 days of the beginning of each new Agreement Year. The Annual Sponsorship Fee is earned throughout the Year in which it is paid. In the event Pepsi terminates this Agreement due to the FHSU's failure to cure a breach hereof, the unearned Annual Sponsorship Fees will be repaid to Pepsi pursuant to the terms of Section 6.D (Sponsorship Fees in the Event of Termination.) herein.
 - c. Annual Academic Scholarship: \$10,000 paid annually in years 1 – 5 and \$15,000 paid annually in years 6 – 10 within the first 45 days of the beginning of each new Agreement Year. The Annual Academic Scholarship is earned throughout the Year in which it is paid. In the event Pepsi terminates this Agreement due to the FHSU's failure to cure a breach hereof, the unearned Annual Academic Scholarship will be repaid to Pepsi pursuant to the terms of Section 6.D (Sponsorship Fees in the Event of Termination.) herein.
 - d. Annual Department of Athletics Scholarship: \$10,000 paid annually in years 1 – 5 and \$15,000 paid annually in years 6 – 10 within the first 45 days of the beginning of each new Agreement Year. The Annual Department of Athletics Scholarship is earned throughout the Year in which it is paid. In the event Pepsi terminates this Agreement due to the FHSU's failure to cure a breach hereof, the unearned Annual Department of Athletics Scholarship will be repaid to Pepsi pursuant to the terms of Section 6.D (Sponsorship Fees in the Event of Termination.) herein.
 - e. Annual Additional Scholarship: \$12,000 paid annually in years 1 –10 within the first 45 days of the beginning of each new Agreement Year. The Annual Additional Scholarship is earned throughout the Year in which they are paid. In the event Pepsi terminates this Agreement due to the FHSU's failure to cure a breach hereof, the unearned Annual Additional Scholarship will be repaid to Pepsi pursuant to the terms of Section 6.D (Sponsorship Fees in the Event of Termination.) herein.
2. Upon request from FHSU, Pepsi will provide 280 cases of donated product (Free Goods) per Year in agreement Years 1 – 10. (Karen Allen in the President's Office will be the contact for the donated product.) Any free goods that remain unrequested or unused at the end of a given Year, will not carry forward to the subsequent Year and is not redeemable for cash.

Pepsi agrees to review requests for additional donated product made by FHSU on a case by case basis.

3. Pepsi will provide Marketing Advertising support totaling \$10,000 annually for the University and Department of Athletics to be used and spent by Pepsi and/or FHSU for marketing, advertising and/or

promotional opportunities for the benefit of Pepsi and the University or the purchase of products (not for resale). Use of these funds is at the discretion of the University. Any Marketing Support remaining unused at the end of a given Year will be paid to FHSU within 45 days following the end of each such Agreement Year.

4. Pepsi will provide the Department of Athletics Gatorade Kits totaling \$1,500 annually in years 1 - 5 and \$1,500 annually in years 6 - 10 of sideline coolers and cups to be utilized by FHSU staff and student athletes on a daily basis.
5. Upon request from the University, Pepsi will provide Gatorade Nutritional products at a value of \$10,000 annually Years 1 – 10.

D. Additional Points.

1. Except with respect to the exclusivity exceptions set forth in Section II(B), Beverage exclusivity as described in the RFP document.
2. Availability of signage in at least as prominent of positions as Pepsi has (with the current contract).
 - a. Pepsi request to have advertising on every digital screen or advertising as such. Each event minimum of once a quarter or period. Listed on all advertising as a primary sponsor of FHSU.
 - b. Pepsi requests six (6) VIP tickets to each sporting event along with parking passes for that event.
3. Price Increases:
 - a. Fountain pricing to FHSU's third party operator will increase based on Pepsi's regularly published national account pricing.
 - b. Pepsi may take annual price increases on bottle and can products not to exceed 3%.
 - c. Pepsi proposed \$.25 per unit mech rate increases in years 3, 6, and 9 with prior notice to FHSU.

E. Payments to Pepsi: Payment Terms are Net 30 days, in accordance with the credit agreement between Contractor and FHSU. Payment date and receipt of order date shall be based upon K.S.A. 75-6403(b). This Statute requires Fort Hays State University to pay the full amount due for goods or services on or before the 30th calendar day after the date Fort Hays State University receives such goods or services or the bill for the goods and services, whichever is later, subject to the provisions of Pepsi's Standard Credit Agreement. NOTE: If the 30th calendar day noted above falls on a Saturday, Sunday, or legal holiday, the following workday will become the required payment date.

F. Payments shall not be made for costs or items not listed in the vendor's response, unless such items are approved by mutual written consent of Pepsi and Fort Hays State University.

The University shall be afforded the greatest variety of payment options possible, including cash, approved checks, or credit cards, subject to the terms of Pepsi's Standard Credit Agreement.

G. Payments to Fort Hays State University: Commissions shall be paid to the University within thirty (30) days after the end of each of Pepsi's accounting quarter during the Term.

H. Performance Bond. The University requires the Contractor to provide a Performance Bond prior to the commencement of the work under this agreement. The bond shall be in the amount of five hundred thousand dollars (\$500,000) and shall cover the University for any economic losses incurred by the University in connection with Contractor's failure to perform its obligations under this Agreement. The initial Performance Bond will be set forth for the first three (3) years of the Agreement. Upon expiration, the Performance Bond will be renewed on an annual basis.

I. Equipment. Pepsi will do a complete review of all equipment on the FHSU campus to insure working condition and replace all that is not in prime working condition. Pepsi will also change all debit card readers as specified in RFP and other documented responses. All equipment shall remain the property of Pepsi and will be returned to Pepsi upon expiration or earlier termination of the Agreement.

Upon request from time to time throughout the Term, Pepsi shall provide a list of replacement and new equipment to the Director of Purchasing.

State of Kansas
Department of Administration
DA-146a (Rev. 07/18)

CONTRACTUAL PROVISIONS ATTACHMENT

Important: This form contains mandatory contract provisions and must be attached to or incorporated in all copies of any contractual agreement. If it is attached to the vendor/contractor's standard contract form, then that form must be altered to contain the following provision:

"The Provisions found in Contractual Provisions Attachment (Form DA-146a, Rev. 07/18), which is attached hereto, are hereby incorporated in this contract and made a part thereof."

The parties agree that the following provisions are hereby incorporated into the contract to which it is attached and made a part thereof, said contract being 1 July 2018.

1. **Controlling Provisions:** It is expressly agreed that the terms of each and every provision in this attachment shall prevail and control over the terms of any other conflicting provision in any other document relating to and a part of the contract in which this attachment is incorporated. Any terms that conflict or could be interpreted to conflict with this attachment are nullified.
2. **Disclaimer Of Liability:** No provision of this contract will be given effect that attempts to require Fort Hays State University or any of its affiliates ("University") to defend, hold harmless, or indemnify any contractor or third party for any acts or omissions. The terms, conditions, and limitations of liability of the State of Kansas, the University, and their employees are defined under the Kansas Tort Claims Act (K.S.A. 75-6101 et seq.).
3. **Termination Due To Lack Of Funding Appropriation:** If, in the judgment of the Director of Accounts and Reports, Department of Administration, sufficient funds are not appropriated to continue the function performed in this agreement and for the payment of the charges hereunder, the University may terminate this agreement at the end of its current fiscal year. The University agrees to give written notice of termination to contractor at least 30 days prior to the end of its current fiscal year, and shall give such notice for a greater period prior to the end of such fiscal year as may be provided in this contract, except that such notice shall not be required prior to 90 days before the end of such fiscal year. Contractor shall have the right, at the end of such fiscal year, to take possession of any equipment provided under the contract for which it has not been paid. The University will pay contractor all regular contractual payments incurred through the end of such fiscal year, plus contractual charges incidental to the return of any such equipment. Upon termination of the agreement under this provision, title to any such equipment shall revert to contractor at the end of the University's current fiscal year. The termination of the contract pursuant to this paragraph shall not cause any penalty to be charged to the agency or the contractor; however, the University would be subject to the reimbursement of unearned funds as described in Section 6(D) of the Contract Award.
4. **Kansas Law and Venue:** All matters arising out of or related to this agreement shall be subject to, governed by, and construed according to the laws of the State of Kansas, and jurisdiction and venue of any suit arising out of or related to this agreement shall reside only in courts located in the State of Kansas.
5. **Required Non-Discrimination Provision:** Contractor agrees to comply with all applicable state and federal anti-discrimination laws. Contractor specifically agrees: (a) to comply with the Kansas Act Against Discrimination (K.S.A. 44-1001 et seq.) and the Kansas Age Discrimination in Employment Act (K.S.A. 44-1111 et seq.) and the applicable provisions of the Americans With Disabilities Act (42 U.S.C. 12101 et seq.) (ADA) and to not discriminate against any person because of race, religion, color, sex, disability, national origin or ancestry, or age in the admission

or access to, or treatment or employment in, its programs or activities; (b) to include in all solicitations or advertisements for employees, the phrase "equal opportunity employer"; (c) to comply with the reporting requirements set out at K.S.A. 44-1031 and K.S.A. 44-1116; (d) to include those provisions in every subcontract or purchase order so that they are binding upon such subcontractor or vendor; (e) that a failure to comply with the reporting requirements of (c) above or if the contractor is found guilty of any violation of such acts by the Kansas Human Rights Commission or if it is determined that the contractor has violated applicable provisions of ADA, such violation(s) shall constitute a breach of contract and the contract may be cancelled, terminated or suspended, in whole or in part, by the University. The provisions of this paragraph (except the provisions relating to the ADA) are not applicable to a contractor who employs fewer than four employees during the term of such contract or whose contracts with the University cumulatively total \$5,000 or less during the fiscal year.

Contractor shall abide by the requirements of 41 CFR §§ 60-1.4(a), 60-300.5(a) and 60-741.5(a). These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex, or national origin. Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance individuals in employment without regard to race, color, religion, sex, national origin, protected veteran status or disability.

6. **Acceptance Of Contract:** This contract shall not be considered accepted, approved or otherwise effective until the statutorily required approvals and certifications have been given.
7. **Arbitration, Damages, Warranties:** Notwithstanding any language to the contrary, no interpretation of this contract shall find that the University has agreed to binding arbitration, or the payment of damages or penalties. Further, the University does not agree to pay attorney fees, costs, or late payment charges beyond those available under the Kansas Prompt Payment Act (K.S.A. 75-6403), and no provision will be given effect that attempts to exclude, modify, disclaim or otherwise attempt to limit any damages or rights of action available to the University at law, including but not limited to the implied warranties of merchantability and fitness for a particular purpose.
8. **Authority To Contract:** By signing this contract, the representative of the contractor thereby represents that such person is duly authorized by the contractor to execute this contract on behalf of the contractor and that the contractor agrees to be bound by the provisions thereof.
9. **Responsibility For Taxes:** The University shall not be responsible for, nor indemnify a contractor for, any federal, state or local taxes which may be imposed or levied upon the subject matter of this contract.
10. **Insurance:** The University shall not be required to purchase any insurance against loss or damage to property or any other subject matter relating to this contract, nor shall this contract require the University to establish a "self-insurance" fund to protect against any such loss or damage.
11. **Information/Confidentiality:** As a state agency, the University's contracts are generally public records. Accordingly, no provision of this contract shall restrict the University's ability to produce this contract in response to a lawful request or from otherwise complying with the Kansas Open Records Act (K.S.A. 45-215 et seq.). Moreover, no provision of this contract shall be construed as limiting the Legislative Division of Post Audit from having access to information pursuant to K.S.A. 46-1101 et seq.

12. **The Eleventh Amendment:** The Eleventh Amendment is an inherent and incumbent protection of the State of Kansas and need not be reserved, but the University here reiterates that nothing in or related to this contract shall be deemed a waiver of the Eleventh Amendment.
13. **Campaign Contributions / Lobbying:** Funds provided through a grant award or contract shall not be given or received in exchange for the making of a campaign contribution. No part of the funds provided through this contract shall be used to influence or attempt to influence an officer or employee of any State of Kansas agency or a member of the Legislature regarding any pending legislation or the awarding, extension, continuation, renewal, amendment or modification of any government contract, grant, loan, or cooperative agreement.
14. **Privacy of Student Records:** Contractor understands that the University is subject to FERPA (Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g) and agrees to handle any student education records it receives pursuant to this Agreement in a manner that enables the University to be compliant with FERPA and its regulations. Contractor agrees to protect the privacy of student data and educational records in a commercially reasonable manner and shall not transmit, share, or disclose any data about a student without the student's written consent, except to other University officials who seek the information within the context of his/her professionally assigned responsibilities and used within the context of official University business. Contractor shall promptly report to the University any disclosure of University's student educational records.
15. **Boycotts of Israel Prohibited:** Kansas 2018 HB 2482 generally prohibits the University from entering into a contract with a company to acquire or dispose of services, supplies, information technology or construction, unless such company submits a written certification that such company is not currently engaged in a boycott of Israel. For the purposes of this Section, "company" means an organization, association, corporation, partnership, venture or other entity, its subsidiary or affiliate, that exists for profitmaking purposes or to otherwise secure economic advantage. Accordingly, by executing this contract, Contractor hereby certifies that it is not currently engaged in a boycott of Israel.