

**FIFTH AMENDMENT TO THE FIRST RESTATED
OPERATING AGREEMENT**

(CITY CONTRACT NO. 53440-005)

THIS FIFTH AMENDMENT TO THE FIRST RESTATED OPERATING AGREEMENT (CITY CONTRACT NO. 53440-005) (the "Fifth Amendment") is made and entered into as of July 9, 2012 (the "Effective Date") by and between the CITY OF PHOENIX, ARIZONA, a municipal corporation organized and existing under the laws of the State of Arizona (the "City") and PHOENIX ARENA DEVELOPMENT LIMITED PARTNERSHIP, a Delaware limited partnership (the "Operator").

RECITALS

A. The City is the owner of the land and improvements originally known as the "America West Arena" now the "U.S. Airways Center" (the "Facility").

B. The Operator operates the Facility pursuant to the First Restated Operating Agreement, dated December 4, 1994, between the City and the Operator, as amended by the First Amendment to the First Restated Operating Agreement, dated July 19, 1989, the Second Amendment to the First Restated Operating Agreement, dated December 4, 1994, the Third Amendment to the First Restated Operating Agreement, dated June 21, 2004, and the Fourth Amendment to the First Restated Operating Agreement, dated July 28, 2005 (collectively, the "Amended Operating Agreement").

C. The City and the Operator have a mutual interest in the Facility's continued success and long-term viability and agree that certain maintenance and renovations to the roof and the interior of the Facility are currently necessary to maintain that success and viability in the future. To that end the Operator with the consent of the City has identified certain high priority maintenance or renovations that are necessary to maintain the Facility's future success, which maintenance and renovations are described on Exhibit A hereto (the "2012 Renovations").

D. The Renewal and Replacement Account is a trust account established under the Amended Operating Agreement to fund Capital Improvements, like the 2012 Renovations, and is currently maintained by Bank of New York Mellon, as trustee (the "Trustee") under the Trust Agreement dated as of October 31, 1996 by and among the City, the Operator and Trustee's predecessor Bank One, Arizona NA.

E. The parties acknowledge that there are insufficient funds in the Renewal and Replacement Account to complete any of the desired 2012 Renovations.

F. The City and the Operator desire to enter into this Fifth Amendment to memorialize the City's agreement to make a one-time contribution of \$7,000,000 to the Renewal and Replacement Account and the Operator's agreement to make a one-time contribution of \$3,000,000 to the Renewal and Replacement Account (collectively, the "Budget") for the purpose of funding the 2012 Renovations to the extent described below.

G. The City and the Operator further acknowledge that the priority construction and related contracts necessary to complete the 2012 Renovations may exceed the Budget. As set forth below the City has authorized the Operator to identify and prioritize the 2012 Renovations reflected on Exhibit A as priority improvements (the "Priority Improvements"), secondary improvements (the "Secondary Improvements") and residual improvements (the "Residual Improvements").

H. Concurrently with execution of this Fifth Amendment, the parties agree to amend the Trust Agreement (the "Amended Trust Agreement") to authorize the Trustee to disburse up to the amount of the Budget from the Renewal and Replacement Account to pay for the all Priority Improvements identified on Exhibit A.

I. If the cost of completing the Priority Improvements is less than the Budget, the parties agree the Trustee shall be authorized to disburse any remaining portion of the Budget from the Renewal and Replacement Account to the extent it is sufficient to fully fund any or all of the Secondary Improvements selected by the Operator in accordance with the terms and conditions below.

J. If the cost of completing the Priority Improvements and the Secondary Improvements is less than the Budget, the parties agree the Trustee shall be authorized to disburse any remaining portion of the Budget from the Renewal and Replacement Account to the extent it is sufficient to fully fund any or all of the Residual Improvements selected by the Operator in accordance with the terms and conditions below. The term "Designated Improvements" shall refer to the Priority Improvements, the Secondary Improvements and the Residual Improvements indentified on Exhibit "A," which are designated for funding by the Operator in accordance with the process and in the order of priority described above.

K. Subject to those terms and conditions, the Operator desires to enter into and oversee the construction contracts and related agreements necessary to complete the Designated Improvements as described above and the City desires that the Operator complete the Designated Improvements.

AGREEMENT

NOW, THEREFORE, in consideration of the premises and the mutual consideration contained therein, the Operator and the City hereby agree to further amend and supplement the Amended Operating Agreement as follows:

1. Obligations of the City Related to the Designated Improvements.

1.1 Concurrently with the execution of this Fifth Amendment, the City agrees to deposit \$7,000,000 (the "City's Contribution") into the Renewal and Replacement Account to be disbursed by the Trustee under the Amended Trust Agreement to pay for a portion of the Designated Improvements.

1.2 The City agrees to cooperate with the Trustee and the Operator to enter into the Amended Trust Agreement to require the Trustee to disburse the City's Contribution and the Operator's Contribution (the "Combined Contributions") to provide for payment of the Designated Improvements from the Renewal and Replacement Account, consistent with Section 5.3.3 of the Amended Operating Agreement.

1.3 The City agrees to review the contracts for the Designated Improvements to determine if they meet the criteria set forth in Section 2.2 below.

1.4 The City also agrees to review the payment requests provided for under Section 3 hereof and approve all or any portion of the request, that in the City's reasonable judgment, satisfies the requirements of subsection 3.3(c) below.

2. Obligations of the Operator Relating to the Designated Improvements.

2.1 Concurrently with the execution of this Fifth Amendment and in addition to the obligation of the Operator to pay the annual Renewal and Replacement Account Payments under the Trust Agreement, the Operator agrees to deposit \$3,000,000 (the "Operator's Contribution") into the Renewal and Replacement Account to be disbursed by the Trustee under the Amended Trust Agreement to pay for the Designated Improvements, consistent with Section 5.3.3 of the Amended Operating Agreement.

2.2 Provided the City has deposited the City's Contribution as required in Section 1.1 herein, the Operator shall be responsible for completion of the Designated Improvements and acknowledges that because the Facility is publicly owned, the Designated Improvements must be completed in accordance with the standards that would be applicable to City if it agreed to provide such service. Therefore, the Operator agrees to:

(a) Prepare and be responsible for all required documents and applications necessary to obtain all approvals and permits required to complete the Designated Improvements and shall obtain all such approvals and permits.

(b) Competitively bid the Designated Improvements in accordance with Title 34, Chapter 2 of Arizona Revised Statutes to the extent such provisions would be applicable if the City were responsible for the Designated Improvements or follow any other competitive process approved by the City.

(c) Document the basis of any sole source exception to the above competitive bidding requirements in writing and obtain the prior written concurrence of the City's Finance Director that the subject goods or services cannot be competitively bid.

(d) With the prior written consent of the City, enter into contracts with licensed, bonded and insured contractors, vendors or suppliers to complete, or furnish services and materials to complete, the Designated Improvements.

(e) In addition to the requirements in subsection (d) above, require in the case of a Designated Improvement that involves construction, a contract that includes a budget, which when aggregated with the costs of the other Designated Improvements does not exceed the Budget, and provides the City with the rights and remedies of a third party beneficiary, including all rights under all contractor's warranties and a designation that the City is an additional insured under all insurance provisions.

(f) Oversee the completion of each of the Designated Improvements to ensure it meets the standards required for City-owned facilities and applicable State and Federal law.

(g) Coordinate and facilitate any unforeseen conditions or issues related to the Designated Improvements, and resolve them in a timely matter, consistent the applicable scope, Budget, and schedule.

(h) Resolve disputes regarding the Designated Improvements, including disputes related to construction, specifications, payments, materials, finishes and scheduling.

2.3 The Operator agrees to cooperate with the Trustee and the City to enter into the Amended Trust Agreement to allow the Trustee to disburse the Combined Contributions to provide for payment of the Designated Improvements from the Renewal and Replacement Account consistent with Section 5.3.3 of the Amended Operating Agreement. Such Amended Trust Agreement shall be executed contemporaneously with this Fifth Amendment.

3. Payment Procedures.

3.1 The Operator shall be responsible for submitting and appropriately documenting monthly requests to pay the contractors hired in accordance with this Fifth Amendment as set forth below:

(a) The Operator agrees to submit an original pay request to the City, in the form of Exhibit B hereto, which for each contract shall (i) reflect the payment amount requested, (ii) the total contract amount, (iii) the amount disbursed to date, (iv) the undisbursed amount remaining, if the proposed request is approved and (v) the aggregate amount disbursed by the Operator for all the Designated Improvements to date.

(b) In addition to the payment request form, the Operator shall attach all invoices and receipts supporting payment under each such contract, a certificate of the Operator certifying the Operator has received and approved the specified goods and services, and in the case of a construction contract, an unconditional lien waiver and release.

(c) As long as the Operator is not in default under the Amended Operating Agreement, this Fifth Amendment or a related agreement, if the Operator has presented the documentation required in (a) and (b) above and the aggregate payment request together with all previous disbursements and the remaining commitments to disburse do not exceed the Budget, the City shall approve the payment request in whole or in part within five business days of its receipt by the City; for purposes of this Fifth Amendment, "business day" shall refer to any day the Phoenix City Hall is open for business.

(d) Upon the City's approval or disapproval of the payment request, the City shall return the request to the Operator, which will submit any payment request or portion thereof approved by the City to the Trustee for direct payment to the Operator or the appropriate contractors.

(e) Subject to Section 3.3 hereof, the parties further agree that the Combined Contribution shall remain in the Renewal and Replacement Account and be used to fund all payment requests approved by the City and for no other purpose.

(f) Notwithstanding the forgoing, the City agrees that all payments shall be made in accordance with Arizona law.

3.2 Upon completion of the Designated Improvements as determined by the parties hereto, any part of the Combined Contribution and any interest earned thereon remaining in the Renewal and Replacement Account shall be retained by the Trustee for

payment of any obligations authorized under Section 5.3.3 of the Amended Operating Agreement.

4. Indemnification and Insurance.

4.1 The City and the Operator agree that the indemnification provided in Section 8 of the Amended Operating Agreement shall encompass any and all actions or inaction related to the Designated Improvements or this Fifth Amendment.

4.2 The City and the Operator further agree that the insurance required under Section 9 of the Amended Operating Agreement shall cover the Designated Improvements, whether in process or completed.

5. Use of Renewal and Replacement Account. The parties acknowledge and agree that any disbursements for Designated Improvements will be consistent with Section 5.3.3 of the Amended Operating Agreement.

6. Authorized Signatory For the City. For purposes of the Amended Operating Agreement as further amended by this Fifth Amendment, the City's Finance Director shall be the City's authorized signatory, the person authorized to provide all consents or approvals under this Fifth Amendment and the person authorized to receive notices, demands, requests or other communications along with the City Attorney. Such notices to the Finance Director shall be sent to the address reflected on the signature page hereto.

7. Operating Agreement. The City and the Operator hereby agree, that except as expressly amended or supplement herein, all other provisions of the Amended Operating Agreement that do not conflict with the provisions of this Fifth Amendment shall remain in full force and effect. Upon execution of this Fifth Amendment, the term Operating Agreement shall mean the Amended Operating as further amended by this Fifth Amendment. All other "capitalized terms" not otherwise defined herein, shall have the meanings previously assigned.

8. Entire Understanding. This Fifth Amendment contains the entire agreement and understanding of the parties regarding the Designated Improvements, and may not be amended except by a writing signed by the City and the Operator. The parties agree that there are no oral or written representations, understandings, circumstances or other agreements that modify any of the provisions of this Fifth Amendment.

9. Recitals Incorporated. The Recitals set forth above are hereby incorporated by reference into the body of this Fifth Amendment and shall have the same binding force and effect as if they had been included herein.

10. Authority. Each individual signing this Fifth Amendment on behalf of an entity represents and warrants that he or she has the necessary power and authority to execute and deliver this Amendment and to bind such entity to the terms hereof, and that the entity which he or she represents has all necessary corporate or partnership authority and has taken all necessary action in connection with the execution and delivery of this Amendment.

11. Counterparts. This Fifth Amendment may be executed in any number of counterparts, all of which when taken together shall constitute a single, binding agreement.

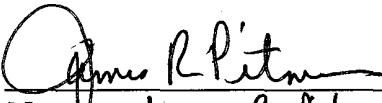
(Signature page follows.)

IN WITNESS WHEREFORE, the parties have executed this Fifth Amendment as of the Effective Date.

OPERATOR

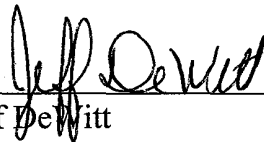
Phoenix Arena Development Limited Partnership,
a Delaware limited partnership

By: Phoenix Arena Development Corporation,
an Arizona corporation and its general partner

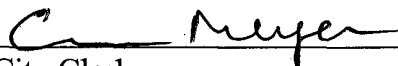
By: 
Name: James R. Pitman
Title: Executive Vice President

CITY

City of Phoenix, a municipal corporation
DAVID CAVAZOS, City Manager

By: 
Jeff DeWitt
Finance Director
Address: City of Phoenix
251 W. Washington Street, 9th Floor
Phoenix, Arizona 85003
Attention: Finance Director

ATTEST:


City Clerk

APPROVED AS TO FORM


Acting City Attorney *ewp*

Doc: 984396_1



CITY CLERK DEPT.
2012 JUL -9 PM 12: 28

EXHIBIT A
IMPROVEMENTS

PRIORITY IMPROVEMENTS (in alphabetical order):

- ADA Improvements
- Boilers
- Boiler Storage Tank
- Elevator Improvements
- Escalator Improvements
- Fire System Sprinklers
- Glass – Exterior Fixed – gas seals
- Level A Renovations – Suites/Theater Boxes (to be funded by Operator's contribution)
- Phone System Replacement
- Rigging Grid Improvements
- Seating – Bowl and Suites, including decks and undercarriage (50% to be funded by Operator's contribution)
- Wiring Infrastructure Replacement

SECONDARY IMPROVEMENTS (in alphabetical order):

- Expansion Joints/Caulking
- Fork Lifts
- Pallet Jacks
- Roof Repairs
- Security Radios
- Show Power
- Transformers (phase 1)

RESIDUAL IMPROVEMENTS (in alphabetical order):

- Ad Panel Renovations/Grid Weight Reduction
- Glass – Exterior Fixed – silicone seals
- Sports Lighting
- Transformers (phase 2)
- Television Broadcast Interconnect Infrastructure

US Airways Center
Summary of Payment Request

EXHIBIT B - FORM OF PAY REQUEST

Item No.	Renovation Description	Total Budget	Work Completed		Total Completed to Date (D+E)	Estimate to Completion	Projected Total Cost (F+G)	Variance Proj. to Budg. (C-H)
			Previous Requests	Current Request				
1		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
2		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
3		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
4		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
5		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
6		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
7		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
8		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
9		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
10		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
11		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
12		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
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16		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
17		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
18		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
19		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
20		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
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23		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
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TOTALS		\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -