

CITY OF EL PASO, TEXAS
DEPARTMENT HEAD'S SUMMARY REQUEST FOR COUNCIL ACTION (RCA)

DEPARTMENT: Aviation

AGENDA DATE: INTRODUCTION - March 30, 2010 PUBLIC HEARING - April 6, 2010

CONTACT PERSON/PHONE: Monica Lombrana -780-4724

DISTRICT(S) AFFECTED: All

SUBJECT:

Authorize an ordinance to authorize the City Manager to execute User/Distribution Site Operator Agreements on behalf of the City of El Paso.

BACKGROUND / DISCUSSION:

The City of El Paso is known as the Grantee and Operator of Foreign-Trade Zone (FTZ) No. 68, which is operated through the Aviation Department's FTZ Administrative office. On July 11, 1995, City Council approved (Ordinance No. 012476) the use of the FTZ User Agreement for FTZ No. 68. Thereafter, on November 20, 2001, City Council authorized (Ordinance No. 014981) the Director of Aviation to execute FTZ User Agreements for FTZ No. 68. This year, on June 16, 2009, City Council approved FTZ No. 68's revised Tariff Schedule (Ordinance No. 017125) which allows a distribution operation to be recognized as a Site Operator permitting a high volume company to benefit from Direct Delivery procedures that streamlines the inbound process for shipments. The Aviation Department is recommending that City Council authorize the City Manager to sign all User Agreements and User/Distribution Site Operator Agreements. A sample of the User/Distribution Site Operator Agreement is attached.

PRIOR COUNCIL ACTION:

The last related item was approved by City Council on December 15, 2009.

AMOUNT AND SOURCE OF FUNDING:

N/A

BOARD / COMMISSION ACTION:

N/A

*****REQUIRED AUTHORIZATION*****

LEGAL: (if required) _____ **FINANCE:** (if required) _____
Deputy City Attorney

DEPARTMENT HEAD: _____
Monica Lombrana, A. A. E., Director of Aviation

APPROVED FOR AGENDA:

CITY MANAGER: _____ **DATE:** _____

ORDINANCE NO. _____

AN ORDINANCE AMENDING ORDINANCE NO. 010873, ORDINANCE NO. 12476 AND ORDINANCE NO. 14981 TO APPROVE THE USE OF THE USER AGREEMENTS AND USER/DISTRIBUTION SITE OPERATOR AGREEMENTS FOR FOREIGN TRADE ZONE NO. 68 AND TO AUTHORIZE THE CITY MANAGER TO EXECUTE THESE TYPES OF AGREEMENTS ON BEHALF OF THE CITY OF EL PASO.

WHEREAS, Ordinance No. 010873 authorized the Director of Economic Development to execute User Agreements for Foreign Trade Zone No. 68;

WHEREAS, Ordinance No. 012476 approved the use of the User Agreements for Foreign Trade Zone No. 68;

WHEREAS, Ordinance 014981 authorized the Director of Aviation to execute User Agreements for Foreign Trade Zone No. 68; and

WHEREAS, Ordinance No.017125 approved the creation of a designation for Distribution Site Operator within Foreign Trade Zone No. 68,

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

1. That Ordinance No. 010873, Ordinance No. 12476, and Ordinance No.14981 are amended as follows:

A. User Agreements and User/Distribution Site Operator Agreements and Authorized Signature. The City Manager shall be authorized to execute User Agreements for Foreign Trade Zone No. 68 and User/Distribution Site Operator Agreements for Foreign Trade Zone No. 68 on behalf of the City of El Paso. All such agreements shall be approved as to form by the City Attorney prior to execution.

2. Except as herein amended, Ordinance No. 010873, Ordinance No. 12476, and Ordinance No.14981 shall remain in full force and effect.

PASSED AND APPROVED this _____ day of _____, 2010.

THE CITY OF EL PASO

ATTEST:

John F. Cook, Mayor

Richarda Duffy Momsen, City Clerk

APPROVED AS TO FORM:

Theresa Cullen
Theresa Cullen, Deputy City Attorney

APPROVED AS TO CONTENT:

Monica Lombraña
Monica Lombraña, A. A. E., Director of Aviation

APPROVED AS TO CONTENT:

Jose Quiñonez, Jr.
Jose Quiñonez, Jr., Foreign Trade Zone Manager

STATE OF TEXAS)
)
COUNTY OF EL PASO)

**FOREIGN-TRADE ZONE
USER/DISTRIBUTION SITE OPERATOR
AGREEMENT**

THIS FOREIGN-TRADE ZONE USER/DISTRIBUTION SITE OPERATOR AGREEMENT is made and entered into this ____ day of _____ 20__, by and between the City of El Paso, Texas, _____, each as identified in Article I below.

WITNESSETH:

WHEREAS, the City of El Paso, as recipient of a grant of authority from the U.S. Foreign-Trade Zones Board, is authorized to establish, operate, and maintain Foreign-Trade Zone No. 68; and

WHEREAS, the City of El Paso, by and through its Department of Aviation, owns, operates, maintains Foreign-Trade Zone No. 68 in order to expedite and encourage foreign commerce in the El Paso region; and

WHEREAS, Foreign-Trade Zone No. 68 (the "Zone") has been approved by the Foreign-Trade Zones Board; and

WHEREAS, the Premises described below are within the boundaries of the Zone; and

WHEREAS, it is the desire of the City of El Paso and _____ that _____ be a designated user/distribution site operator of the Zone in the location identified herein, in accordance with the terms hereof; and

WHEREAS, it is the further desire of the City of El Paso, and _____ that _____ also be designated as a Distribution Site Operator for the location identified herein, so that _____ may avail itself of direct delivery procedures.

NOW, THEREFORE, the City of El Paso and _____, in consideration of the terms, covenants, and conditions contained herein, hereby agree as follows:

ARTICLE I – PARTIES, DEFINITIONS AND TERM

1.01 PARTIES.

- A. **GRANTEE/OPERATOR:** City of El Paso, Department of Aviation
Foreign-Trade Zone No. 68
International Trade Processing Center
501 George Perry, Suite I
El Paso, Texas 79906
Attn: Jose Quiñonez, Manager

B. **USER/DISTRIBUTION SITE OPERATOR:** _____

Attn: _____

C. **OWNER:** _____

Attn: _____

1.02 DEFINITIONS.

- A. **ACT:** Foreign-Trade Zones Act of 1934, as amended (19 U.S.C. Sections 81a - 81u).
- B. **BOARD:** Foreign-Trade Zones Board, United States Department of Commerce, Washington, D.C., which consists of the Secretary of the Department of Commerce and the Secretary of the Treasury or their designated alternates.
- C. **CUSTOMS SERVICE:** The United States Customs and Border Protection, a division of the Department of Homeland Security, or its successor agency.
- D. **MANAGER:** Foreign-Trade Zone Manager, designated by the City of El Paso.
- E. **PORT DIRECTOR:** The Port Director of Customs, El Paso, Texas, U.S. Customs and Border Protection.
- F. **PREMISES:** Includes [insert description of parcel(s)] which is owned by Owner and are more fully described in **Exhibit "A"**, which is attached hereto and incorporated herein by reference for all purposes.
- G. **ZONE:** Foreign-Trade Zone No. 68 approved by the Foreign-Trade Zones Board on April 14, 1981, and expanded on May 2, 1984, January 3, 1991, January 20, 1999, September 8, 2000, and June 16, 2006.
- H. **ZONE OFFICES:** Foreign Trade Zone No. 68
City of El Paso
El Paso International Airport
International Trade Processing Center
501 George Perry, Suite I
El Paso, Texas 79906

1.03 TERM. Unless otherwise terminated as herein provided, this Agreement shall remain in effect for ____ () years commencing on the date of this Agreement (the "Initial Term"). At the end of the Initial Term, this Agreement shall automatically renew for successive one-year terms

(the “Renewal Term(s)”), unless either party provides written notice of its desire not to renew at least ninety (90) days prior to the end of the Initial Term or Renewal Term; provided, however, that such ninety (90)-day notice period shall not commence unless and until (i) a written plan for deactivation is supplied to the Grantee and a planning meeting is held with the Customs Service on the deactivation; and/or (ii) the Zone Operator has transferred, or secured an agreement to transfer, sponsorship of the Zone Site to another Foreign Trade Zone. Grantee will not unreasonably withhold authorization for deactivation during such ninety (90)-day notice period or at any time in the event that a shorter period is required by FTZ laws and/or the U.S. Customs Service. In the event the Zone Operator seeks to transfer sponsorship of the Zone Site to another Foreign Trade Zone, Grantee will cooperate and support the Zone Operator in seeking and timely completing such transfer. If the U.S. Customs Service requires deactivation of the Zone Site “Term” shall hereinafter be used in this Agreement to refer to the Initial Term or the applicable Renewal Term, as the case may be.

ARTICLE II – GRANTEE/OPERATOR OBLIGATIONS

2.01 ADMINISTRATION OF ZONE. In accordance with the terms of this Agreement, the Grantee/Operator shall be responsible for operating the Zone and shall provide all personnel, services, and materials it deems necessary for the proper administration and operation of the Zone. The Grantee/Operator shall conduct all of its operations hereunder in an orderly and business-like manner. The Grantee/Operator shall not discriminate in the application of any rules, regulations, or procedures adopted by the Board and the laws and regulations of the United States, and the Tariff as referenced herein, in effect for the Zone. The Grantee/Operator shall keep its Zone Offices open for business during such times as are set forth in the applicable Zone Tariff in effect and on file with the Board. The Grantee/Operator shall be entitled to enter upon the Premises for Zone business. All such entries should be in accordance with the established security procedures of the User/Distribution Site Operator. By execution of this Agreement the User/Distribution Site Operator and Owner have consented in advance to entrance upon the Premises by the Grantee/Operator, its agents and employees and the agents and employees of the Customs Service.

2.02 DESIGNATION OF USER AS DISTRIBUTION SITE OPERATOR. Grantee/Operator hereby designates User/Distribution Site Operator as a Distribution Site Operator in order that User/Distribution Site Operator may apply for direct delivery status pursuant to 19 CFR 146.39.

2.03 NOTICE OF CHANGE IN OPERATING RULES. The Grantee/Operator shall provide the User/Distribution Site Operator with copies of applicable laws, regulations, directives, rules, rates, or procedures adopted by it at least five (5) days before the User/Distribution Site Operator shall be required to comply therewith.

2.04 ZONE TARIFF. Pursuant to and in compliance with instructions of the Board, the Grantee/Operator has issued certain rates, rules, charges and regulations, known as the Tariff,

which applies to operations within the Zone. The Tariff has been issued by the Grantee/Operator following its approval by the Board.

The Grantee/Operator shall, pursuant to the Act and the rules and regulations issued thereunder, abide by and apply such Tariff uniformly and without prejudice and shall at all times provide reasonable notice to User/Distribution Site Operator of all changes in said Tariff.

ARTICLE III - USER/DISTRIBUTION SITE OPERATOR OBLIGATIONS

3.01 OCCUPANCY OF PREMISES. Through the Term of this Agreement, the User/Distribution Site Operator shall be either the owner of the real estate, which comprises the Premises or tenant in possession of the Premises pursuant to a lease by and between the Owner and the User/Distribution Site Operator (Lease Agreement). If requested by the Manager, the User/Distribution Site Operator shall provide copies of any leases or other agreements affecting the Premises including any and all attachments and amendments.

3.02 COMPLIANCE WITH APPLICABLE LAWS AND REGULATIONS.

- A. Tariff. The User/Distribution Site Operator shall use the Zone in accordance with the provisions of this Agreement, the Act and the Tariff, as the Act and the Tariff might be modified from time to time during the term of this Agreement.
- B. Ordinances, Statutes and Regulations. The User/Distribution Site Operator shall observe and obey (and require its officers, employees, guests, invitees, and those doing business with it in the Zone to observe and obey) all applicable laws, rules, and regulations including but not limited to those of the City of El Paso, the State of Texas, the United States of America, the Board, and the Customs Service.
- C. Operating and Reporting Procedures. In conducting its business and operations within the Zone, the User/Distribution Site Operator shall adopt such operating and reporting procedures as are necessary to assure its compliance with the requirements of the Act, the Board and the Grantee/Operator. The User/Distribution Site Operator shall keep its books, records and accounts in accordance with generally accepted principles of accounting, and in compliance with any requirements of Federal, State or local governmental agencies having appropriate jurisdiction. All such books, records and accounts shall be kept on the Premises and shall be made available to the Grantee/Operator, its agents, employees and representatives during normal business hours. Additionally, the User/Distribution Site Operator shall provide any and all reports requested by the Grantee/Operator in a timely manner. Failure to prepare and submit such reports and to keep the books, records and accounts in the manner and location required herein shall be deemed an event of default.

- D. Inventory Control System ("I.C.S."). The User/Distribution Site Operator shall also prepare and maintain an I.C.S. in a form acceptable to the Grantee/Operator and to the Customs Service. The User/Distribution Site Operator shall maintain records indicating a constant total of active Zone space in its use, as well as records indicating the quantity, value and type of merchandise processed by the User/Distribution Site Operator. The I.C.S. shall be delivered to and approved by the Grantee/Operator and the Customs Service prior to the execution of this Agreement.
- E. Maintenance. The User/Distribution Site Operator and/or the Owner, as applicable, shall at all times maintain the structures, fixtures, equipment and personal property and other facilities within the Zone in first-class operating order, condition and appearance at all times. The User/Distribution Site Operator's Failure to make repairs and replacements within thirty (30) days of receipt of written notice from the Manager shall be considered an event of default under the Agreement and may, at the Grantee/Operator's option, result in termination of this Agreement. In the event the Board or the Customs Service assesses penalties for failure to make such repairs, the User/Distribution Site Operator and/or the Owner, as applicable, covenants and agrees that it shall be responsible for paying such penalties. The obligations of the User/Distribution Site Operator and the Owner to the Grantee/Operator shall be apportioned as set forth in the Lease Agreement.
- F. Cooperation with Government Personnel. The User/Distribution Site Operator and Owner shall reasonably cooperate with United States Government personnel having jurisdiction over the Zone, and the employees, representatives and agents of the Grantee/Operator in every respect.
- G. Responsibility for Appeals. By execution of this Agreement the User/Distribution Site Operator acknowledges that the Grantee/Operator in its dual role as a Foreign-Trade Zone Grantee and Grantee/Operator is ultimately responsible for all communications with the Customs Service and Board in all matters involving the operation of the Zone. Therefore, any correspondence with the Customs Service and the Board concerning the Zone shall be made through the Grantee/Operator.

In the event a penalty is assessed in connection with the User/Distribution Site Operator's operations within the Zone, the Grantee/Operator will inform the User/Distribution Site Operator as soon as practicable. The User/Distribution Site Operator covenants and agrees that it will make payment of any such fines, penalties and liquidation damages in accordance with the instructions by the Customs Service and/or the Board. If the User/Distribution Site Operator desires to appeal the amount of penalty as permitted by the Act, the User/Distribution Site Operator must coordinate all such communications through the Grantee/Operator.

3.03 MARKETING OF THE ZONE. Neither the User/Distribution Site Operator nor the Owner shall promote or market the Zone on behalf of, or as a representative of, the Grantee/Operator, without the prior written consent of the Grantee/Operator. Nor shall the User/Distribution Site Operator or the Owner warrant or imply that the User/Distribution Site Operator or Owner represents the Grantee/Operator in any manner or to any extent other than as specifically provided for in the Foreign-Trade Zone laws and regulations and as mutually agreed pursuant to this Agreement.

3.04 PAYMENT OF FEES. By execution of this Agreement, the User/Distribution Site Operator covenants and agrees to pay the following fees to the Grantee/Operator:

- A. Activation Fee. If the Zone site has not previously been in active operation, then the User/Distribution Site Operator shall pay an activation fee in the amount of _____ AND 00/100 DOLLARS (\$_.00) to the Grantee/Operator for the purpose of covering administrative expenses incurred in commencing Zone operations.
- B. User/Distribution Site Operator Fees. The Grantee/Operator shall provide a statement each calendar month itemizing charges for each transaction, which occurred during the preceding month. At the time of the execution of this Agreement, the transaction fee is _____ AND 00/100 DOLLARS (\$_.00) per transaction. However, the transaction fee shall be the amount enumerated within the Tariff as may be amended from time to time. The transaction fee is subject to modification during the term of this Agreement by action of the El Paso City Council. Failure of User/Distribution Site Operator to make payment in full within thirty (30) days following the date these fees are accrued will result in an assessment of a past due penalty equal to the maximum allowed by law from the date when the same was due and may result in termination of this Agreement without further notice or demand. Further, in the event of User/Distribution Site Operator's continued failure to make any such payment, the Grantee/Operator will notify Customs Service, and in addition, may choose to not process any transactions for the User/Distribution Site Operator until such time as the default in payment has been cured. In the event the default continues for more than thirty (30) days the User/Distribution Site Operator will be required to pay a new Activation Fee at the prevailing rate in effect at the time of such re-activation.

ARTICLE IV - ADDITIONAL CHARGES

4.01 CUSTOMS SERVICE CHARGES AND LIENS.

- A. Operational Expenses. If ever assessed, charges for services rendered by the Customs Service in connection with User/Distribution Site Operator's operations within the Zone shall be paid for by User/Distribution Site Operator and also shall be passed on, if billed directly to Grantee/Operator, to the User/Distribution Site

Operator incurring such charges. Failure to pay such charges within ten (10) days from receipt of notification shall be an event of default and cause for termination.

- B. Fines and Penalties. The User/Distribution Site Operator shall reimburse the Grantee/Operator for any fees, penalties or other charges assessed against the Grantee/Operator by the Board, the Customs Service or any other governmental entity resulting from the User/Distribution Site Operator's operations within the Zone. Failure to reimburse the Grantee/Operator within thirty (30) days of receipt of written notice shall be an event of default and may be cause for termination. This Agreement may be terminated and may result in the Grantee/Operator's taking action to collect the amount owed.

4.02 SECURITY EXPENSES. The Board, Customs Services and/or any federal agency can impose and revise security requirements for the Premises as a Zone site. The parties agree that the Premises shall be maintained in accordance with those requirements. The User/Distribution Site Operator shall pay for the expenses incurred in satisfying the security requirements imposed by the Board, the Customs Service and/or any other federal agency.

4.03 LIENS AND TAXES. The User/Distribution Site Operator shall pay all taxes and governmental charges of any kind that may be lawfully assessed against the User/Distribution Site Operator or the Grantee/Operator, with respect to the Premises.

ARTICLE V - BONDS

5.01 PAYMENT BOND Upon execution of this Agreement, the User/Distribution Site Operator shall deliver a payment bond in the amount of _____ AND 00/100 DOLLARS (\$____.00), issued by a surety approved by the Grantee/Operator. The purpose of the bond is to secure payment of any fees or penalties assessed against the User/Distribution Site Operator or Grantee/Operator resulting from the User/Distribution Site Operator's activities within the Zone. Twelve (12) months from the effective date of this Agreement and every twelve (12) months thereafter the Grantee/Operator shall review the records of Zone activity by the User/Distribution Site Operator to determine whether the amount of the bond stated herein is sufficient. Based upon the number of transactions, the value of the merchandise routinely moved through the Zone, and any events of default, the Grantee/Operator may adjust the amount required for said payment bond; provided however the bond shall never be less than _____ AND 00/100 DOLLARS (\$___.00).

5.02 PROOF OF BOND. Upon execution of this Agreement the User/Distribution Site Operator shall provide the Manager appropriate evidence that such a bond has been acquired and has been paid for. Corresponding evidence of renewal shall be delivered at least ten (10) days prior to the expiration date of any policy. The bond shall be written by a company authorized to do business in the State of Texas and approved by the Grantee/Operator. Such bond shall be written in favor of the Grantee/Operator and shall provide that the surety will pay the Grantee/Operator, up to the amount of the bond, the amount of any fines, penalties or liquidated damages assessed against the User/Distribution Site Operator or the Grantee/Operator resulting

from the User/Distribution Site Operator's activities within the Zone and which are not promptly paid by the User/Distribution Site Operator.

5.03 CUSTOMS BOND. In the event the Port Director approves an application by User/Distribution Site Operator for direct delivery pursuant to 19 CFR 146.39, as may be amended, User/Distribution Site Operator shall be required to obtain a Customs 301 Bond, in an amount set by U.S. Customs, as a guarantee for the payment by the Zone Grantee/Operator of all duties and taxes on such merchandise as may be removed or otherwise missing from its specific Zone site without proper Customs permits. This Customs 301 Bond shall be in addition to the Payment Bond referred to in 5.01 above and shall be effective on the date User/Distribution Site Operator's application for direct delivery is approved by the Port Director, and shall be a "Continuous Bond".

ARTICLE VI - INDEMNIFICATION AND INSURANCE

6.01 INDEMNIFICATION. USER/DISTRIBUTION SITE OPERATOR AGREES TO INDEMNIFY AND HOLD THE GRANTEE/OPERATOR, ITS OFFICERS, REPRESENTATIVES, ASSIGNS, AGENTS AND EMPLOYEES HARMLESS AGAINST ANY AND ALL CLAIMS, DEMANDS, DAMAGES, COSTS, AND EXPENSES, INCLUDING INVESTIGATION EXPENSES AND REASONABLE ATTORNEY'S FEES FOR THE DEFENSE OF SUCH CLAIMS AND DEMANDS, ARISING OUT OF OR ATTRIBUTED DIRECTLY, OR INDIRECTLY TO THE OPERATION, CONDUCT OR MANAGEMENT OF USER/DISTRIBUTION SITE OPERATOR'S BUSINESS ON THE PREMISES, INCLUDING BUT NOT LIMITED TO ITS USE OF THE PREMISES, OR FROM ANY BREACH ON THE PART OF USER/DISTRIBUTION SITE OPERATOR OF ANY TERMS OF THIS AGREEMENT, OR FROM ANY ACT OR NEGLIGENCE OF USER/DISTRIBUTION SITE OPERATOR, ITS AGENTS, CONTRACTORS, EMPLOYEES, SUBTENANTS, CONCESSIONAIRES, OR LICENSEES IN OR ABOUT THE PREMISES, **INCLUDING CLAIMS AND DAMAGES ARISING IN WHOLE, OR IN PART, FROM THE NEGLIGENCE OF THE GRANTEE/OPERATOR.** IN CASE OF ANY ACTION OR PROCEEDING BROUGHT AGAINST THE GRANTEE/OPERATOR BY REASON OF ANY SUCH CLAIM, USER/DISTRIBUTION SITE OPERATOR, UPON NOTICE FROM THE GRANTEE/OPERATOR, AGREES TO DEFEND THE ACTION OR PROCEEDING BY COUNSEL ACCEPTABLE TO THE GRANTEE/OPERATOR.

6.02 FIDELITY OBLIGATION. To the extent that the losses described in the above paragraph (6.01) are recovered by the User/Distribution Site Operator under insurance policies in force, and to the extent that any such losses arise directly or indirectly from or out of any act or omission of the User/Distribution Site Operator or any act or omission of the User/Distribution Site Operator's agents, employees or invitees as authorized by the User/Distribution Site Operator, and that occurs in the User/Distribution Site Operator's operations within the Zone, the User/Distribution Site Operator agrees and covenants, during the term of this Agreement, to indemnify the Grantee/Operator, its officers, employees, representatives, assigns, and agents against all loss of money or other personal property belonging to the Grantee/Operator, or in

which the Grantee/Operator has a pecuniary interest, or which is held by the Grantee/Operator in any capacity.

6.03 NOTICE. The parties hereby agree that prompt and reasonable notice shall be given to all parties concerning every demand, notice, summons or other process received in any claim, allegation or legal proceeding covered hereby.

6.04 COMPREHENSIVE GENERAL LIABILITY INSURANCE, INCLUDING INDEPENDENT CONTRACTOR'S LIABILITY. User/Distribution Site Operator agrees that, at its own cost and expense, it shall procure and continue in force throughout the Term of this Agreement, for the benefit of User/Distribution Site Operator and the Grantee/Operator, general liability insurance against any and all claims for injuries to persons or damage to property arising in connection with the User/Distribution Site Operator's operations in the Zone or in the performance of its obligations under this Agreement, except that User/Distribution Site Operator shall not be required to procure insurance for User/Distribution Site Operator's obligation to indemnify Grantee/Operator for Grantee/Operator's own negligence. Such insurance at all times to be in an amount of not less than FIVE HUNDRED THOUSAND AND 00/100 DOLLARS (\$500,000.00) for bodily injury or death arising out of any one occurrence and ONE HUNDRED THOUSAND AND 00/100 DOLLARS (\$100,000.00) for property damage arising out of any one occurrence.

6.05 COMPREHENSIVE AUTOMOBILE AND TRUCK LIABILITY INSURANCE. The User/Distribution Site Operator agrees that, at its own cost and expense, it shall procure and continue in force throughout the Term of this Agreement, for the benefit of the User/Distribution Site Operator and the Grantee/Operator, comprehensive automobile insurance, and liability insurance covering vehicles owned and hired by the User/Distribution Site Operator against all claims for injuries to persons or damage to property in an amount of not less than FIVE HUNDRED THOUSAND AND 00/100 DOLLARS (\$500,000.00) for bodily injury or death arising out of any one occurrence, and ONE HUNDRED THOUSAND AND 00/100 DOLLARS (\$100,000.00) for property damage arising out of any one occurrence.

6.06 FORM AND EVIDENCE OF INSURANCE. Upon execution of this Agreement, but prior to the commencement of any activities by User/Distribution Site Operator in the Premises, the User/Distribution Site Operator shall deliver to the Manager appropriate evidence (either by a copy of the policy/policies or by a certificate of insurance in a form acceptable to the Manager) that such insurance is in effect and the applicable premium has been paid. Corresponding evidence of renewal of coverage shall be delivered at least ten (10) days prior to the expiration date of any policy. The insurance required in this Article shall be written by a company authorized to do business in the State of Texas, and as may be approved by the Grantee/Operator. Such insurance shall name the Grantee/Operator as an additional insured. Notwithstanding the preceding sentence, the Parties agree to use best efforts to coordinate the defense of any claims. No such insurance policy or policies may be canceled, terminated or modified without giving at least thirty (30) days advance written notice to the Grantee/Operator. Renewal policies or certificates shall be delivered to the Manager at least thirty (30) days prior to the expiration date of each policy.

If, during the Term of this Agreement, any of the policies are or become unsatisfactory to the Grantee/Operator as to form or substance, or if the carrier(s) issuing any such policy or policies are or become unsatisfactory to the Grantee/Operator, the User/Distribution Site Operator shall promptly obtain a new and satisfactory policy or policies. If the User/Distribution Site Operator shall fail to take out and maintain any of the insurance listed in this Article, and to pay the premiums thereon, the Grantee/Operator shall have the right to take out such insurance and invoice the User/Distribution Site Operator for the costs thereof. However, failure by the User/Distribution Site Operator to comply with the insurance requirements of the Grantee/Operator shall be deemed an event of default and may result in the termination of this Agreement.

6.07 ACCIDENT AND CLAIM REPORTS. In the event of any injury to any person on or in the Premises, other than an employee of the User/Distribution Site Operator, or in the event of damage or loss to any property within the Premises, other than the property of the User/Distribution Site Operator, the User/Distribution Site Operator shall immediately notify the Manager in writing.

6.08 RECORDS. The User/Distribution Site Operator shall maintain records in accordance with generally accepted accounting principles and practices, and in accordance with any rules, regulations or directives of the Customs Service, the Board, or the Grantee/Operator throughout the term of this Agreement; and shall keep for five (5) years after the event, records, statements, and books of account (including records of original entry) recording all transactions pertaining to the User/Distribution Site Operator's operations under this Agreement. The records will be kept at the Premises or in a secure and accessible location for the statutory period and at the sole expense of the User/Distribution Site Operator. If the records are not kept at the Premises, the User/Distribution Site Operator will provide written notice of the location of the records to the Grantee/Operator. All statements of record required under this Article shall be prepared in accordance with generally accepted accounting principles and practices, and shall be sworn to by a Certified Public Accountant. Each statement shall be subject to verification and audit by the Grantee/Operator, Customs Service, and the Board.

6.09 INSPECTION. The Grantee/Operator shall have the right at all reasonable times and with reasonable notice to inspect the Premises and to examine the equipment of the User/Distribution Site Operator to observe the performance by the User/Distribution Site Operator of its obligations under this Agreement; and to do any act or thing which the Grantee/Operator may be obligated or have the right to do, by law, under this Agreement. The Grantee/Operator agrees not to interfere unreasonably with the User/Distribution Site Operator's business during such inspections.

ARTICLE VII – DEFAULT, REMEDIES AND DEACTIVATION

7.01 DEFAULT BY USER/DISTRIBUTION SITE OPERATOR. The following events shall be deemed events of default by User/Distribution Site Operator, and may result in the termination of this Agreement:

- A. User/Distribution Site Operator's failure to pay any transaction fee and such failure shall continue for a period of thirty (30) days.
- B. User/Distribution Site Operator's failure to comply with any term, provision or covenant of this Agreement, other than the payment of fees noted in Section 7.01A above, and failure to cure such non-compliance within ten (10) days after receipt of written notice thereof.
- C. User/Distribution Site Operator under this Agreement becomes insolvent, or shall make a transfer in fraud of creditors, or makes an assignment for the benefit of creditors.
- D. User/Distribution Site Operator under this Agreement files a petition under any section or chapter of the Bankruptcy Reform Act of 1978, as amended, or under any similar law or statute of the United States or any State thereof; or User/Distribution Site Operator under this Agreement is adjudged bankrupt or insolvent in proceedings filed against User/Distribution Site Operator under this Agreement.
- E. A receiver or trustee is appointed for the Premises or for all, or substantially all, of the assets of User/Distribution Site Operator under this Agreement.
- F. User/Distribution Site Operator's failure to keep books, records and accounts in accordance with the manner set forth herein following thirty (30) days notice and an ability to cure.
- G. User/Distribution Site Operator's failure to provide reports to Grantee/Operator in a timely manner following thirty (30) days notice and an ability to cure.
- H. User/Distribution Site Operator's failure to pay fines and penalties assessed by the Customs Service, the Board or any other governmental agency following thirty (30) days notice and an ability to cure.
- I. Receipt of notice from the Customs Service regarding the deactivation of the Premises, Zone, or any area affecting the User/Distribution Site Operator's ability to operate within the Zone.

7.02 REMEDIES. Upon the occurrence of any such event of default, Grantee/Operator shall have the option to pursue any one or more of the following remedies without any notice or demand whatsoever:

- A. Discontinue processing User/Distribution Site Operator's Zone transactions until such time as the default is cured.
- B. Cessation of foreign trade zone operations until such time as the default is cured.
- C. Terminate this Agreement.
- D. Make claim against the User/Distribution Site Operator's surety pursuant to the payment bond required herein.

7.03 NON-WAIVER OF REMEDIES. Pursuit of any of the foregoing remedies shall not preclude pursuit of any other remedies herein provided or provided by law, nor shall pursuit of any other such remedy constitute a forfeiture or waiver of any fees due to Grantee/Operator hereunder or of any damages accruing to Grantee/Operator by reason of the violation of any of the terms, provisions and covenants herein contained. Forbearance by Grantee/Operator to enforce one or more of the remedies herein provided upon an event of default shall not be deemed or construed to constitute a waiver of such default.

7.04 DEACTIVATION. In the event of deactivation of the Premises, the Zone, or any area of the Zone affecting the operations of the User/Distribution Site Operator, the User/Distribution Site Operator shall reconcile all pending transactions and provide a reconciliation letter to the Grantee/Operator indicating that there is no remaining inventory in zone status within the Premises or the Zone. Such reconciliation letter shall also state that all transactions have been completed, leaving a zero balance on hand.

ARTICLE VIII - MISCELLANEOUS PROVISIONS

8.01 NOTICES. Whenever any notice is required or permitted hereunder such notice shall be in writing. Any such notice or document required or permitted shall be deemed to have been delivered, whether actually received or not, when deposited in the United States mail postage prepaid, registered mail, return receipt requested, addressed to the respective parties at the address for notice specified in Article I above or to such other address as the parties from time to time may designate to each other by prior written notice.

8.02 CAPTIONS. The captions and headings contained in this Agreement are used only to facilitate reference, and in no way define or limit the scope or intent of any of the provisions of this Agreement.

8.03 APPLICABLE LAW. This Agreement is entered into in El Paso, El Paso County, Texas, and the laws of the State of Texas shall govern the validity, performance, interpretation and enforcement of this Agreement. The Parties agree that venue shall be in El Paso County, Texas.

8.04 NON-ASSIGNABILITY. The User/Distribution Site Operator shall not assign, sublet, sell, convey, or transfer all or any part of this Agreement in any way without the prior written consent of the Grantee/Operator. Any attempt to transfer or assign without the prior written consent of the Grantee/Operator shall be void and at the option of the Grantee/Operator may be deemed an event of default.

8.05 NO THIRD PARTY BENEFIT. No provision contained or incorporated in this Agreement shall create or give to third parties any claim or right of action against the Grantee/Operator or the User/Distribution Site Operator beyond such as legally may exist in the absence of any such provision.

8.06 ATTORNEY'S FEES. In any successful action brought by the Grantee/Operator for the enforcement of the obligations of the User/Distribution Site Operator under this Agreement the Grantee/Operator shall be entitled to recover court costs, interest and reasonable attorney's fees. In any successful action brought by the User/Distribution Site Operator for the enforcement of the obligations of the Grantee/Operator under this Agreement, the User/Distribution Site Operator shall be entitled to recover court costs, interest and reasonable attorney's fees.

8.07 WAIVER. One or more waivers of any covenant, term or condition of this Agreement by either Party shall not be construed by the other Party as a waiver of any subsequent breach of the same covenant, term or condition. The consent or approval of either Party shall not be deemed to waive or render unnecessary consent to or approval of any subsequent similar act.

8.08 SEVERABILITY. Every provision of this Agreement is intended to be severable. If any term or provision hereof is found to be illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of this Agreement.

8.09 ENTIRE AGREEMENT. This Agreement constitutes the entire Agreement of the parties on the subject matter hereof and may not be changed, modified, discharged, or extended except by written instrument duly executed by the parties.

8.10 SUCCESSORS AND ASSIGNS. All of the terms, covenants and agreements herein contained shall be binding upon and shall inure to the benefit of the successors and assigns of the respective parties hereto.

8.11 ELECTION OF REMEDIES. User/Distribution Site Operator agrees that the Grantee/Operator shall have all the rights and remedies granted by this Agreement at law or in equity, and that these same rights and remedies shall be cumulative and may be pursued separately, successively or concurrently against the User/Distribution Site Operator and/or the User/Distribution Site Operator's surety company. The exercise or failure to exercise any right or

remedy by the Grantee/Operator shall never be construed to be a waiver or release of any other right or remedy.

8.12 NON-PARTNERSHIP. Nothing herein contained shall be deemed or construed by the parties hereto, nor by any third party, as creating the relationship of principal and agent or of partnership or joint venture between the parties hereto, it being understood and agreed that neither the provisions contained herein, nor any acts of the parties hereto, shall be deemed to create any relationship between the parties hereto other than the relationship of Grantee/Operator/Grantee and User/Distribution Site Operator in a foreign-trade zone.

8.12 VIOLATIONS OF LAWS, RULES, REGULATIONS. The Grantee/Operator shall be under no obligation to perform under this Agreement if the activity would cause the Grantee/Operator to be, or result in the Grantee/Operator being in violation of any law, rule or regulation of the State of Texas, the United States of America, or any governmental agency governing foreign-trade zones. Subject to the foregoing sentence, for the term of the Lease Agreement, the Owner shall not interfere with the User/Distribution Site Operator's use of the Premises as a foreign trade zone.

8.13 CONFIDENTIALITY OF ZONE RECORDS. The parties acknowledge that the Grantee/Operator is a public entity and is therefore subject to the Texas Public Information Act ("TPIA"). Should the Grantee/Operator receive a request under the TPIA for information which has been identified by User/Distribution Site Operator as confidential, the Grantee/Operator will notify the User/Distribution Site Operator of the receipt of such request so that the User/Distribution Site Operator may assert its rights as a third party to protect such information in such proceedings involving a determination by the Office of the Attorney General as to whether such information must be released under the TPIA.

[SIGNATURES BEGIN ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by a duly authorized representative on the date first noted above.

THE CITY OF EL PASO:

Director of Aviation

APPROVED AS TO FORM:

Deputy City Attorney

APPROVED AS TO CONTENT:

_____, Manager
Foreign-Trade Zone No. 68

**ACKNOWLEDGMENT
(GRANTEE/OPERATOR)**

STATE OF TEXAS)
)
COUNTY OF EL PASO)

This instrument was acknowledged before me on this ____ day of _____, 20__
by _____, Director of Aviation of the **City of El Paso, Texas**
(Grantee/Operator).

Notary Public, State of Texas

[SIGNATURES CONTINUE ON THE FOLLOWING PAGE]

**USER/DISTRIBUTION
OPERATOR:**

SITE

By: _____

Printed Name: _____

Title: _____

**ACKNOWLEDGMENT
(USER/DISTRIBUTION SITE GRANTEE/OPERATOR)**

THE STATE OF _____)

)

COUNTY OF _____)

This instrument was acknowledged before me on this ____ day of _____,
20__ by _____, as _____ of
_____(User/Distribution Site Grantee/Operator).

Notary's Commission Expires:

Notary Public, State of

Notary's Name (printed):

[SIGNATURES CONTINUE ON FOLLOWING PAGE]

OWNER: _____

By: _____

Printed Name: _____

Title: _____

**ACKNOWLEDGMENT
(OWNER)**

THE STATE OF _____)

COUNTY OF _____)

This instrument was acknowledged before me on this ____ day of _____,
20__, by _____, as _____ of ____ (Owner).

Notary's Commission Expires:

Notary Public, State of
Notary's Name (printed):
