

CITY OF EL PASO, TEXAS
REQUEST FOR COUNCIL ACTION (RCA)

DEPARTMENT: AVIATION

AGENDA DATE: JUNE 9, 2009

CONTACT PERSON/PHONE: Monica Lombraña, Director of Aviation – 780-4793

DISTRICT(S) AFFECTED: All

SUBJECT:

Resolution authorizing the City Manager to sign a Baggage Cart Concession Agreement by and between the City of El Paso and Smarte Carte, Inc. The term of the agreement will be for a period of five (5) years with an option to extend the term for an additional three (3) years.

BACKGROUND / DISCUSSION:

The Baggage Cart Concession Agreement will allow Smarte Carte, Inc. the right to operate a self-service rental baggage cart system for use by the traveling public. Also, Smarte Carte, Inc. will provide five (5) “vending” massage chairs at various locations in the terminal building.

Percentage of rentals to be paid to the City:

- 15% of Gross Receipts derived from the operation of Concessionaire’s rental of Baggage Carts.
- 10% of Gross Receipts derived from operation of Concessionaire’s rental of Massage Chairs

Revenues to EPIA for FY2008 from Smarte Carte, Inc. were \$10,603.98

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

N/A Revenue Generating

BOARD / COMMISSION ACTION:

Approved by Airport Advisory Board on May 28, 2009

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

LEGAL: (if required) _____ **FINANCE:** (if required) _____

DEPARTMENT HEAD: Monica Lombraña 5/29/09

(Example: if RCA is initiated by Purchasing, client department should sign also)
Information copy to appropriate Deputy City Manager

APPROVED FOR AGENDA:

CITY MANAGER: _____

DATE: _____

RESOLUTION

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the City Manager be authorized to sign a Baggage Cart Concession Agreement by and between the City of El Paso and Smarte Carte, Inc. ("Concessionaire") at the El Paso International Airport.

APPROVED AND ADOPTED on this _____ day of _____ 2009.

THE CITY OF EL PASO

John F. Cook
Mayor

ATTEST:

Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:



Cynthia Osborn
Assistant City Attorney

APPROVED AS TO CONTENT:



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

BAGGAGE CART CONCESSION AGREEMENT

**EL PASO INTERNATIONAL AIRPORT
EL PASO, TEXAS**

and

**SMARTE CARTE, INC.
CONCESSIONAIRE**

July 1, 2009
EFFECTIVE DATE

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BAGGAGE CART CONCESSION AGREEMENT

THIS BAGGAGE CART CONCESSION AGREEMENT ("Agreement") is made this ____ day of _____, 2009 between the **CITY OF EL PASO** a municipal corporation existing under the laws of the State of Texas ("Lessor") and **SMARTE CARTE, INC.** a corporation organized under the laws of the State of Minnesota with its principal offices and address being 4455 White Bear Parkway, St. Paul, Minnesota 55110 ("Concessionaire").

WHEREAS, the Lessor owns and operates the El Paso International Airport located in El Paso County, Texas ("Airport");

WHEREAS, Concessionaire is engaged in the business of operating baggage cart rental concessions and massage chairs at airports;

WHEREAS, such services are essential to passengers arriving at or departing from the Airport and other patrons of the Airport;

WHEREAS, City deems it advantageous to itself and to its operation of the Airport to grant and lease unto Concessionaire certain premises and certain rights, licenses and privileges, as hereinafter set out; and

WHEREAS, Concessionaire desires to make baggage cart services and massage chairs available in the Airport Terminal Building and is qualified, ready and able to perform said services, and agrees to construct, equip, furnish, operate and maintain first-class self service baggage cart units and massage chairs in connection therewith.

NOW, THEREFORE, in consideration of the mutual covenants, terms, conditions, privileges, obligations and agreements herein contained, the parties agree as follows:

ARTICLE 1 – DEFINITIONS

The following words and phrases, wherever used in this Agreement shall, for the purpose of this Agreement, have the following meanings:

- A. "Airport" means El Paso International Airport, as shown on the Airport Layout and Cost Center Plan on file at the El Paso International Airport administrative offices and as it may be modified or expanded by Lessor from time to time.
- B. "Baggage Cart" means a push design cart designed to help travelers easily move baggage through the terminal building and parking lots.

- C. "Cart Management Unit" (CMU) means portable, expandable, self-service, coin-operated (which also accepts a dollar bill and credit card, where applicable) vending machines capable of collecting and dispensing baggage carts for a fee.
- D. "Chair" means massage chair that will be operated by a pay-per-use fee by passengers.
- E. "Concessionaire" means Smarte Carte, Inc., a corporation organized under the laws of the State of Minnesota with its principal offices and address being 4455 White Bear Parkway, St. Paul, Minnesota 55110.
- F. "DBE" means disadvantaged business enterprise as that term is defined by 49 CFR Part 23 and amendments thereto.
- G. "Department" means the Department of Aviation of the City of El Paso.
- H. "Director" means the Director of Aviation of the Department of Aviation.
- I. "FAA" means the Federal Aviation Administration of the U.S. Department of Transportation or any federal agency(s) succeeding to its jurisdiction.
- J. "Gross Receipts" shall mean the total revenue from business conducted by Concessionaire, as further defined in Section 7.05 herein, upon or from the Leased Premises, the Terminal, or the Airport pursuant to this Agreement.
- K. "Hazardous Material or Materials" means any hazardous or toxic substances, or wastes, including but not limited to, those substances, materials, and wastes listed in the United States Department of Transportation Hazardous Materials Table (49 CFR 172.101 as amended) or by the Environmental Protection Agency as hazardous substances, materials, and wastes that are or become regulated under any applicable local, state or federal law including, without limitation, any material, waste or substance which is petroleum or a petroleum distillate, asbestos, polychlorinated biphenyls, defined as a "hazardous waste" pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. §6901, et seq, as amended, or defined as a "hazardous substance" pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §6901, et seq, as amended.
- L. "Leased Premises" means any areas on the Airport leased by Lessor to Concessionaire, whether on a temporary, permanent, or non-exclusive basis, as depicted on **EXHIBITS "A-1"** and **"A-2"** as attached hereto.

- M. "Leasehold Improvements" means all improvements and equipment which are affixed to the Leased Premises by Concessionaire and which cannot be removed without material damage to the Leased Premises, whether purchased, installed or altered by Concessionaire during the term of this Agreement or any previous agreements.
- N. "Lease Year" means a twelve (12) month period beginning on the Effective Date of this Agreement first noted on the Title Page and ending twelve (12) months later.
- O. "Lessor" means the City of El Paso, Texas, its duly elected Council, or any duly constituted agent/committee appointed through said Council to fulfill the obligations herein required.
- P. "Rules and Regulations" means those rules, regulations, policies, and procedures that have been established by Lessor or the Department for the orderly and efficient use of the Airport as the same may be amended
- Q. "Terminal" means the El Paso International Airport terminal building, including all concourses, located at 6701 Convair Road, El Paso, Texas 79925.
- R. "Title 14" means that portion of the El Paso City Code addressing aircraft and airports, as amended.
- S. "Trade Fixtures" means all Concessionaire owned furniture, fixtures, equipment and decorations located at the Airport not affixed to the Leased Premises, related to operation of self-service baggage cart rental and massage chair services which can be removed without damage to the Leased Premises.

ARTICLE 2 – LEASED PREMISES

2.01 DESCRIPTION OF LEASED PREMISES. Lessor hereby leases to Concessionaire and Concessionaire hereby leases from Lessor the Leased Premises and certain attendant privileges, uses and rights, as hereinafter specifically set out under paragraphs A and C hereinbelow.

Lessor disclaims any warranty of suitability that may arise by operation of law or otherwise. Lessor does not warrant that there are no latent defects in the facilities that are vital to Concessionaire's using the Leased Premises for their intended commercial purpose or that these essential facilities will remain in a suitable condition. Concessionaire leases the Leased Premises "as is", whether suitable or not.

Concessionaire shall not, at any time during the term hereof, abandon any or all of the

Leased Premises without the prior written consent of Lessor.

- A. The CMU Unit locations at the Airport as identified on **EXHIBITS “A-1” AND “A-2”**, attached hereto and made a part hereof, shall include:

LOCATION NUMBER	TYPE OF UNIT	DESCRIPTION OF LOCATION	CAPACITY
1	CMU	Baggage Claim – Near Carousel 1	35 foot unit
2	CMU	Baggage Claim – Near Carousel 4	30 foot unit
3	CMU	West Concourse – Near Gate A2	15 foot unit
4	CMU	East Concourse – Near Gate B3	15 foot unit
5	CMU	Near Auto Rental Ready Lot	15 foot unit
6	CMU	Baggage Claim-Near Carousel 2	15 foot unit
7	CMU	Short Term Parking Lot-Near Departures Entry	15 foot unit
8	Chair	Meeter/Greeter area	20 sq ft unit
9	Chair	West Concourse	20 sq ft unit
10	Chair	East Concourse	20 sq ft unit
11	Chair	East Concourse	20 sq ft unit
12	Chair	West Concourse	20 sq ft unit

- B. The capacity and location of CMUs and Chairs are based on the best estimates of existing and projected needs at the Airport at the inception of this Agreement. After consultation with Concessionaire, the Director shall have the right, at any time throughout the term of this Agreement, to require additions, deletions or modifications to the existing CMUs, Baggage Carts and Chairs without any liability to the Lessor for expenses incurred, lost revenues, or obligations incurred because of such actions.

Director, from time to time, may require Concessionaire to relocate or remove from the Terminal their CMUs, Baggage Carts or Chairs, at Concessionaire’s sole expense, to other locations in or around the Airport during the term of this Agreement. Director will determine the location of all and any temporary Leased Premises and will provide Concessionaire ten (10) days’ prior written notice of any relocation.

Should Concessionaire request a change in the number or location of CMUs, Baggage Carts or Chairs, the Director has the right and authority to make conditions on granting his approval, including but not limited to, the right to require that Concessionaire pay for any improvements made necessary by the requested changes.

- C. Concessionaire shall be permitted to use office space as identified on **EXHIBIT “A-1”**. Said office space consists of approximately 117 square feet.

2.02 ACCESS BY CONCESSIONAIRE

- A. Subject to the provisions delineated herein, Title 14, other applicable Rules and Regulations, the needs of Lessor during any construction or renovation, and such restrictions as Lessor may impose with respect to Concessionaire's use of the Leased Premises, Lessor hereby grants to Concessionaire, its agents, suppliers, employees, contractors, passengers guests, and invitees, the right and privilege of free and unrestricted access, ingress, and egress to Concessionaire's Leased Premises and to public areas and public facilities of the Terminal.
- B. The ingress and egress provided for in Section 2.03 shall not be used, enjoyed, or extended to any person engaged in any activity or performing any act or furnishing any service for or on behalf of Concessionaire that Concessionaire is not authorized to engage in or perform under the provisions hereof unless expressly authorized in writing by Lessor.
- C. Lessor shall have the right, at any time, to close, relocate, reconstruct, change, alter, or modify any such means of access provided for Concessionaire's use pursuant to this Agreement or otherwise, either temporarily or permanently, provided that reasonable notice is given to Concessionaire and that reasonably convenient and adequate means of access, ingress, and egress exist or are provided in lieu thereof. Lessor shall suffer no liability by reason of such action and such action shall in no way alter or affect any of Concessionaire's obligations under this Agreement.
- D. Concessionaire agrees that all of its tenants, subtenants, patrons, invitees, agents, employees, servants or independent contractors must be authorized by the Concessionaire to enter restricted areas pursuant to Chapter 14 as amended, of the El Paso City Code. Concessionaire agrees that no person authorized to enter a restricted area by virtue of this Agreement, shall permit any person, who is not otherwise authorized, to enter a restricted area unless such unauthorized person is, at all time while in the restricted area, in the company of an authorized person.
- E. Concessionaire shall comply with all Lessor, TSA and FAA security directives, rules and regulations, in effect as of the Effective Date or as may be modified or enacted from time to time throughout the Term. Concessionaire understands and agrees that fines and/or penalties may be assessed by the TSA or FAA for Concessionaire's noncompliance with the provisions of 49 CFR Parts 1540 and 1542 entitled "Airport Security" or by other agencies for noncompliance with regulations applicable to Concessionaire's operations. In the event the TSA or FAA assesses a civil penalty against the Lessor or Airport for any violation of any rule,

regulation or standard as a result of any act or failure to act on the part of Concessionaire, its tenants, subtenants, patrons, agents, servants, employees, invitees, or independent contractors, Concessionaire shall, upon demand of Lessor, immediately pay Lessor in the amount of the civil penalty assessed.

2.03 ACCESS BY LESSOR. Lessor, by its officers, employees, agents and representatives, shall have the right, at all reasonable times, to enter upon the Leased Premises for any reason.

Lessor, its officers, employees, agents and representatives, shall also have unlimited access through the Leased Premises for the completion of any inspections, repairs, renovations and construction in areas adjoining the Leased Premises or in the Leased Premises. Lessor shall not be responsible for damage to any property which may result from Lessor's access to the Leased Premises pursuant to this Section.

2.04 REDELIVERY OF LEASED PREMISES. Concessionaire shall, upon early termination or expiration of this Agreement, quit and deliver the Leased Premises to Lessor peaceably, quietly and in as good order and condition as the same now are or may hereafter be improved by Concessionaire to Concessionaire, reasonable use and wear excepted.

ARTICLE 3 - TERM OF AGREEMENT

3.01 TERM. The term of this Agreement shall be for a period of five (5) years, commencing on the Effective Date first noted on the Title Page ("Initial Term").

3.02 OPTION TO EXTEND. So long as Concessionaire is not in default of any terms or conditions of this Agreement, this Agreement may, at the Concessionaire's option, be extended for an additional three (3) years, subject to the rental rates as further described in Section 7.01. Concessionaire shall notify Lessor in writing of concessionaire's election to extend at least one hundred and twenty (120) days prior to the expiration of the initial term of this Agreement.

3.03 HOLDING OVER. In the event that Concessionaire shall hold over and remain in possession of the Leased Premises after the expiration of this Agreement without any renewal thereof, such holding over shall not be deemed to operate as a renewal or extension of this Agreement, but shall create a tenancy from month to month subject to the same terms and conditions of this Agreement. During any hold-over period, Concessionaire shall pay monthly to Lessor an amount equal to the greater of the Percentage Rental or one-twelfth (1/12) of the Minimum Annual Guarantee, as set forth below:

A. Minimum Annual Guarantee during Hold-over: For any hold-over period,

the Minimum Annual Guarantee shall be equal to the greater of the Percentage Rentals or Minimum Annual Guarantee due for the immediately preceding Lease Year.

- B. Percentage Rental during Hold-over. For any hold-over period, the Percentage Rental shall be as follows:

15% of Gross Receipts derived from the operation of Concessionaire's rental of Baggage Carts.

10% of Gross Receipts derived from the operation of Concessionaire's rental of Massage Chairs.

The provisions of this paragraph shall survive the expiration of this Agreement.

3.04 NATIONAL EMERGENCY. In the event the rights and privileges hereunder are suspended by reason of change in airport security regulations, war or other national emergency, this Agreement shall be immediately canceled.

3.05 TERMINATION. Either party to this Agreement may terminate this Concession Agreement by providing the other party thirty (30) days prior written notice.

ARTICLE 4 – CONCESSION PRIVILEGES

4.01 DESCRIPTION OF PRIVILEGES, USES AND RIGHTS. Lessor grants to Concessionaire the following privileges, uses, and rights, all of which shall be subject to the terms, conditions, and covenants hereinafter set forth:

- A. The non-exclusive right, license and privilege to operate, at its sole cost and expense, a first class, professionally designed and functional self-service rental baggage cart system and massage chairs within the Leased Premises for the purpose of providing such services to airline passengers and such other persons who may request such service at the Airport. No other use may be made of the Leased Premises.
- B. The concession rights granted herein shall be subject to all applicable laws, ordinances, rules and regulations.
- C. The right to temporarily install (or cause to be installed) appropriate signs in the Leased Premises to advertise said baggage cart or massage chair concessions; provided that such installation and advertisement shall be subject to the prior written approval of the Director and shall not conflict with the Advertising Concession Agreement.

4.02 CONDITIONS AND TERMS. This Agreement is entered into subject to the following conditions and terms.

- A. That no alteration to the Leased Premises shown on **EXHIBITS “A-1”** and **“A-2”** or change in uses of such premises shall be made without the prior written consent of the Director.
- B. Concessionaire agrees that the right to use the Airport is to be shared in common with others and shall be used subject to all laws, rules, and regulations of the United States, the State of Texas and the City of El Paso.
- C. Concessionaire warrants that it is able to and will provide and maintain first-class quality facilities and service on the Airport. Concessionaire agrees it will provide and maintain such quality facilities and service on the Airport during the term of this Agreement.
- D. Concessionaire agrees to construct, equip, furnish, operate and maintain first-class self service CMUs, Baggage Carts and Chairs in connection with the operation of the Baggage Cart Concession.
- E. Any improvements, facilities, decorations, fixtures, equipment, supplies and cabinets furnished by Concessionaire shall be in keeping with the general decor of the terminal building and shall be subject to the written approval of the Director of Aviation prior to installation.

ARTICLE 5 – RESTRICTIONS ON USES AND PRIVILEGES

5.01 USE OF PREMISES. Concessionaire shall not use or permit the Leased Premises to be used, in whole or in part during the term of this Agreement, for any purpose other than as set forth in this Agreement, or for any use in violation of any present or future local, state, or federal laws, ordinances, rules and regulations at any time applicable to the Leased Premises. Concessionaire hereby expressly agrees, at all times during the term of this Agreement, at its own cost, to maintain, use and operate the Leased Premises and all improvements, furnishings, fixtures, and equipment thereon in compliance with any and all present and future laws, ordinances and valid rules and regulations.

5.02 PUBLIC ADDRESS SYSTEM. Concessionaire shall not have the right to make or cause to be made on its behalf any announcements over the public address and flight announcement system in the Terminal. As deemed necessary by the Director, Concessionaire shall permit the installation on or in the Leased Premises of a public address system, and shall permit the broadcasting thereon of flight announcements and other information.

ARTICLE 6 – STANDARDS OF SERVICE

6.01 BAGGAGE CART USER FEES. Concessionaire shall charge a fee for the use of each Baggage Cart rented (“User Fee”).

The User Fee for each baggage cart rental shall be as follows and shall include a twenty-five cent (\$0.25) refund to User for the return of each baggage cart to any CMU:

<u>RENTAL PERIOD</u>	<u>BAGGAGE CART RENTAL</u>
Initial Term	\$4.00 per use per baggage cart
Option Period, if exercised	\$4.00 per use per baggage cart

6.02 MESSAGE CHAIR USER FEES. Concessionaire shall charge a fee for the use of the Massage Chair (“User Fee”).

The User Fee for each use of the Massage Chair shall be as follows:

<u>RENTAL PERIOD</u>	<u>MESSAGE CHAIR RENTAL</u>
Initial Term	\$1.00 for 3 minutes or \$5.00 for 15 minutes
Option Period, if exercised	\$1.00 for 3 minutes or \$5.00 for 15 minutes

6.03 HOURS OF OPERATION. Concessionaire agrees to keep each CMU, Baggage Cart and Massage Chair operational twenty-four (24) hours a day, seven (7) days a week, including holidays.

6.04 TYPE OF OPERATION. For and during the Term of this Agreement, Concessionaire, in providing, maintaining and operating the facilities and services necessary for a first-class baggage cart concession, shall:

- A. Furnish and maintain a standard of service and quality at least equal to that of the highest quality of service rendered by similar concessionaires at other airports in the United States.
- B. Furnish prompt, courteous and efficient service adequate to meet all reasonable requests therefore, ensuring polite and inoffensive conduct and demeanor on the part of its representatives, agents, servants and employees.
- C. Operate its said business on the Leased Premises with due diligence and efficiency so as to satisfy customer requirements, while operating in a commercially reasonable manner, and producing a maximum return to Concessionaire and Lessor under the terms of this Agreement.

6.05 CONCESSIONAIRE'S MANAGER. The management, maintenance and conduct of Concessionaire's operations shall at all times during the term of this Agreement be under the supervision and direction of an active, qualified, competent and experienced manager representing Concessionaire, who shall be subject, at all times, to the direction and control of Concessionaire. Concessionaire will cause such manager to be assigned an office on the Leased Premises at which he/she shall be available during normal business hours, and Concessionaire will, at all times during the absence of such manager, have a manager available by phone.

ARTICLE 7 – RENTALS AND ACCOUNTING RECORDS

7.01 RENTALS.

A. Office Rentals

Concessionaire shall occupy and pay to Lessor rent for office space occupied by Concessionaire commencing on the Effective Date first noted on the Title Page and continuing throughout the term of this Agreement, including any option periods or holdover. For the purpose of computing the Office Rent, Lessor and Concessionaire agree that the proposed office space comprises approximately 117 square feet. The Office Rental for the first Lease Year of this Agreement shall be calculated on the basis of 117 square feet at a rate of \$15.00 per square foot per year. This annual rental rate shall be adjusted for each additional Lease Year of this Agreement as Airline rental rates for Terminal are determined and established pursuant to the City of El Paso Budget Resolution for that year.

B. Minimum Annual Guarantee and Percentage Rentals

In addition to the Office Rentals paid under Paragraph A, hereinabove, Concessionaire shall also pay to Lessor a Minimum Annual Guarantee or Percentage Rentals, whichever is greater.

1. Minimum Annual Guarantee: The Minimum Annual Guarantee for the first Lease Year shall be SIX THOUSAND DOLLARS (\$6,000.00). For the second Lease Year and each succeeding Lease Year thereafter, the Minimum Annual Guarantee shall be equal to eighty percent (80%) of the immediately preceding Lease Year's Percentage Rental; however, in no event shall the Minimum Annual Guarantee be less than the Minimum Annual Guarantee set forth in the immediately preceding Lease Year.

2. Percentage Rentals:

15% of Gross Receipts derived from the operation of Concessionaire's rental of Baggage Carts.

10% of Gross Receipts derived from operation of Concessionaire's rental of Massage Chairs.

Any overpayment of rentals, as determined by the annual statement of Gross Receipts required in Section 7.05, shall be applied to reduce rents due in the year succeeding the year covered by said annual statement. Any overpayment in the last year of the term of this Agreement shall be refunded to Concessionaire within sixty (60) days following receipt of the annual statement of Gross Receipts required in Section 7.06.

7.02 TIME OF PAYMENT. The Minimum Annual Guarantee and Office Rental due hereunder shall be paid in equal monthly installments. Said installments shall be paid in advance, without invoice, on or before the first day of each and every month during the term or any extension of this Agreement. Any deficiency between said Minimum Annual Guarantee and the Percentage Rentals shall be paid to Lessor on or before the twentieth (20th) day of the month following the month for which the Gross Receipts were reported.

7.03 PLACE OF PAYMENT. All rentals, fees or other charges provided herein shall be paid to City at the following address:

Accounting Department
El Paso International Airport
P.O. Box 971278
El Paso, Texas 79997-1278

7.04 UNPAID RENT, FEES AND CHARGES. Concessionaire agrees to pay interest in an amount equal to the highest rate allowed by applicable law for any payment of rent, fees, or other charges accruing hereunder and not paid within ten (10) days from the time payment is due.

7.05 DEFINITION OF GROSS RECEIPTS. All computations to be made in connection with determining Percentage Rentals, including the amount of Gross Receipts, as defined herein, shall be made in accordance with generally accepted accounting principles. The actual amounts expended or received by Concessionaire for the following items may be deducted from Gross Receipts prior to making such computations:

- A. Any refund paid by the Concessionaire to persons returning said Baggage Carts to the CMU's.

- B. Sales taxes; transaction taxes; or equivalent taxes by whatever name called, the amount of which is determined by the amount of sales made and which is accounted for to any governmental entity; provided, however, that this exclusion shall not include any license or permit fees or taxes payable by Concessionaire.
- C. The proceeds from all sales of furniture, fixtures or equipment which had been used in the Leased Premises as part of Concessionaire's operations hereunder.

No deduction shall be made from Gross Receipts, as this term is used herein, by reason of any credit loss sustained or discount or deduction that may be applicable by reason of the acceptance or use of credit cards, other credit arrangements or the like. Except as hereinabove specified, if any charge for any of the services or goods mentioned in this Section is not assessed, charged or collected, irrespective of the reason therefore, the proper amount of such charge shall, nevertheless, be included in the term Gross Receipts.

7.06 RECORDS OF CONCESSIONAIRE.

- A. Within twenty (20) days after the close of each calendar month of the term of this Agreement, Concessionaire shall submit to Lessor, in a form and with detail satisfactory to Lessor (including statistics with respect thereto), a statement of its Gross Receipts during the preceding month upon which the Percentage Rentals to Lessor set forth in Section 7.01, if any, is computed. Said statement shall be signed by Concessionaire's accounting officer.

Concessionaire shall keep full and accurate, records, books and data with respect to business done by it hereunder which shall show all the Gross Receipts of said business as defined herein. Lessor shall have the right, through its representatives and at all reasonable times, to inspect such books and records, including any State of Texas sales tax return records for accuracy. Concessionaire hereby agrees that all such records and instruments will be retained by Concessionaire and be made available to Lessor at the Leased Premises for at least the immediately preceding three-year period.

The making of any willfully false report of Gross Receipts by Concessionaire shall be grounds for the immediate termination by the Lessor of this Agreement.

- B. Concessionaire shall employ a nationally recognized firm of independent certified public accountants who shall furnish annually, a written statement to Lessor stating that, in their opinion, based upon accepted sampling techniques, the Minimum Annual Guarantee and the Percentage Rentals

paid by Concessionaire to Lessor during the preceding calendar year pursuant to this Agreement were made in accordance with the terms of this Agreement. Such statement shall also contain a list of the Gross Receipts as shown on the books and records of Concessionaire which were used to compute the rental payments made to Lessor during the period covered by the statement.

7.07 CASH AND RECORD HANDLING REQUIREMENTS.

- A. Concessionaire's cash and record handling systems shall be incorporated in its written policy, rules and regulations covering accounting and handling of all transactions of merchandise and services. Such policy, rules and regulations shall be available for review by Director.
- B. Fidelity bonds or theft insurance, in an amount determined adequate by Director, will be maintained by Concessionaire on its employees engaged in the operation of the Baggage Cart Concession.
- C. Where customers' sales have not been recorded because of failure by Concessionaire to comply with this section, Concessionaire shall pay to Lessor the amount which would have been due Lessor from such sales including interest thereon as set forth in Section 7.04. Lessor shall have the right to make a reasonable estimate of such losses, and Concessionaire shall be bound by Lessor's estimates.

7.08 AUDIT. For the purpose of determining accuracy of reporting Gross Receipts, the Director may make a spot test audit and base its findings for the entire period upon such spot test; provided however, that such a spot test shall include at least twenty-five percent (25%) of the total time of the period being audited.

In addition, the Director shall have the right, during any one calendar year of this Agreement, to authorize up to two (2) audits of Concessionaire's records pertaining to Concessionaire's business conducted at the Airport. Such audits shall be undertaken by a reputable firm of certified public accountants with offices in El Paso. The cost of such audits shall be borne by City, unless the results of such audits reveal a discrepancy of more than five percent (5%) between the Gross Receipts reported in accordance with this Article and the Gross Receipts as determined by audit for any twelve (12) month period. In case of such discrepancy, the full cost of the audit shall be borne by Concessionaire.

Failure of City to exercise its right to audit Concessionaire, as set forth herein, shall in no way be construed as a waiver of any right to payment by City of any Percentage Fees or other payments due City under the terms of this Concession Agreement, and City hereby expressly reserves its rights under common or statutory law, or otherwise, to enforce all terms of this Concession Agreement, including any right to payment hereunder.

7.09 OTHER CHARGES.

- A. Concessionaire shall pay all utility charges used in connection with the operation of the Baggage Cart Concession, including but not limited to deposits, installation costs, meters, and service charges, where applicable. Payment of utilities shall not be considered as payment of rent or credit against any other provision of this Agreement.

In any Leased Premises in which utility meters are not installed, Concessionaire shall be responsible for payment of all utilities used by Concessionaire in said Leased Premises based on a price per square foot as determined by the Director, which will be payable monthly and adjusted from time-to-time by the Director based on increases or decreases in utility rates and consumption for the Terminal.

- B. Concessionaire's employees working at the Terminal will be provided vehicular parking facilities, if available, in common with other Airport Employees. Such facilities shall be located in an area designated by Director. Lessor reserves the right to assess a reasonable charge to Concessionaire or its employees for such parking facilities.

ARTICLE 8 – INSTALLATION OF IMPROVEMENTS

8.01 GENERAL. All plans for improvements, alterations or renovations to the Leased Premises, either for the installation of Trade Fixtures or alterations to existing facilities and Trade Fixtures, shall be prepared, submitted and approved as outlined in this Article, and shall be subject to the same restrictions as provided herein. Concessionaire, at its sole expense, must obtain appropriate approval from all local, state, and federal agencies, as required, for the completion of any and all improvements. Approval of any and all improvements plans or documents by Director does not constitute approval by other city departments or any other local, state, or federal agency. All improvements, Trade Fixtures, furniture, and equipment used in the Leased Premises shall be of high quality, safe, fire-resistant, and attractive in appearance.

8.02 INSTALLATION OF TRADE FIXTURES. Concessionaire agrees to install, maintain, and operate, at Concessionaire's sole cost and expense, Trade Fixtures, including but not limited to CMUs, Baggage Carts and Chairs, necessary for the operation of the Baggage Cart Concession and as further described in Exhibits "A-1" and "A-2". Said Trade Fixtures shall be installed within sixty (60) days from the effective date of this Agreement. Installation of CMUs and Baggage Carts, and Chairs which have been previously used at other airports or locations, will not be acceptable.

The installation of all necessary electric lines, telephone lines, and communications-related data lines that are not in place upon the Leased Premises prior to the effective date of this Agreement, shall be the responsibility of Concessionaire.

8.03 SUBMISSION OF PLANS AND SPECIFICATIONS. Concessionaire shall prepare and submit to Director, construction documents, including but not limited to plans and specifications, for the completion of any improvements or the installation of any Trade Fixtures or Leasehold Improvements. Construction documents shall be prepared and submitted in accordance with the following requirements:

- A. All construction documents shall be prepared by registered engineers or architects, and shall require the prior written approval of Director before any construction may begin.
- B. All improvements shall be planned and constructed in accordance with the laws and ordinances of the City of El Paso with applicable building codes and all applicable state and federal laws; and in compliance with the rules and regulations of the Federal Aviation Agency or any successor agencies.
- C. Three copies of full and complete plans and specifications for all work, facilities, improvements, finishes, and subsequent changes and the time required to complete same, shall be submitted to and receive the written approval of Director before any work or construction may commence. First-class standards of design and construction shall be complied with in connection with all such work, facilities, and improvements; and all construction shall conform with the general architectural requirements of Director as established for each improvement. After final approval by Director, Director shall return to Concessionaire two (2) approved copies for Concessionaire's records and shall retain one (1) approved copy as an official record.
- D. Upon completion of any construction project, Concessionaire shall provide the Director with two (2) complete sets of as-built drawings in reproducible form as specified by Director. Concessionaire agrees that, upon the request of Director, Concessionaire will inspect the Leased Premises jointly with Director to verify the as-built drawings.
- E. Concessionaire acknowledges that approval of plans and specifications by Director does not end Concessionaire's requirement to obtain approval from other City of El Paso departments, or other local, state or federal entities. The approval of plans and specifications by Director shall not create a responsibility on the part of the Director or Lessor for their completeness, design, or sufficiency of compliance with all applicable local, state or federal laws and codes.

8.04 COMPLETION OF IMPROVEMENTS. Upon receipt of written approval of the construction drawings, Concessionaire shall commence the completion of said improvements. Failure to complete such work in the time specified herein or as determined by Lessor shall constitute a material default of this Agreement and Lessor may terminate this Agreement in accordance with the provisions set forth in Article XII unless:

- A. Lessor, by its action or inaction, is solely responsible for the delay of the completion of said improvements;
- B. Lessor grants a written extension of the completion date; or
- C. Completion is delayed by Force Majeure.

8.05 CONSTRUCTION WITHOUT APPROVAL. If the Leased Premises, Leasehold Improvements, or Trade Fixtures are altered, erected, placed or maintained upon any portion of the Leased Premises other than in accordance with plans and specifications approved by Director, such alterations, erection and maintenance shall be deemed to have been undertaken without approval required herein. This restriction shall be applicable to architectural aesthetic matters as well as architectural plans.

In the event of such alteration, erection, placement, or maintenance without approval, Concessionaire will be considered in default of this Agreement and Lessor may terminate this Agreement in accordance with the provisions set forth in Article XII.

8.06 TITLE TO IMPROVEMENTS. All Leasehold Improvements, Trade Fixtures, and Personal Property, shall be and remain the property of Concessionaire until the termination of this Agreement whether by expiration, cancellation, or otherwise. At termination, title to such Leasehold Improvements, Trade Fixtures, and Personal Property shall vest in accordance with Article 12.

8.07 REMOVAL AND DEMOLITION. Concessionaire shall not remove or demolish, in whole or in part, any Leasehold Improvements or Trade Fixtures upon the Leased Premises without the prior written consent of Lessor who may, at its discretion, condition such consent upon the obligation of Concessionaire to replace the same by another Leasehold Improvement or Trade Fixture specified in such consent.

ARTICLE 9 – MAINTENANCE AND OPERATION OF AIRPORT

9.01 LESSOR'S RESPONSIBILITY. Lessor, with its own forces or by contract, shall operate, maintain, repair and keep in good condition the Terminal and all additions, improvements, facilities, and equipment now or hereafter provided by Lessor at or in connection with the Terminal. Lessor shall have no responsibility for the operation, maintenance, repair or upkeep of the Leased Premises or any improvements or Trade Fixtures thereon.

Lessor shall also, throughout the term of this Agreement, take reasonable steps to maintain Airport roads and provide access to the Terminal.

9.02 CONCESSIONAIRE'S RESPONSIBILITIES. Concessionaire shall, without cost to Lessor, maintain the Leased Premises in good appearance, repair and safe condition. Custodial services shall be provided by Concessionaire for the Leased Premises in a prompt and timely manner as required to keep all portions of the Leased Premises clean, neat, wholesome and attractive. Concessionaire shall maintain and repair all Leasehold Improvements and Trade Fixtures within the Leased Premises or utilized in Concessionaire's operation of baggage cart rental or massage chair services, whether installed by Concessionaire or by Lessor. Concessionaire shall repair any and all damages caused by itself or its agents, contractors, employees, subtenants, concessionaires, or licensees or by its operation of said privileges in the Terminal and upon the Airport. All maintenance, repairs, replacement, renovation and remodeling shall be of equal quality to the original in materials and workmanship.

9.03 LESSOR'S RIGHT TO INSPECT AND MAKE REPAIRS. Authorized agents of Lessor may at any reasonable time, without notice, enter upon the Leased Premises to determine if such satisfactory maintenance is being performed. If it is determined that said maintenance is not satisfactory, Lessor shall so notify Concessionaire in writing and, if satisfactory maintenance is not performed or ongoing with due diligence by Concessionaire within fifteen (15) days after receipt of written notice, Lessor or its agents shall have the right to enter upon the Leased Premises and perform the maintenance therefore and Concessionaire agrees to promptly reimburse Lessor for the cost thereof, plus ten percent (10%) for administrative overhead.

9.04 TRASH, GARBAGE AND OTHER REFUSE. Concessionaire shall provide and pay all costs for the adequate sanitary handling of all trash, garbage and other refuse caused as a result of its operations pursuant hereto and shall provide for its timely removal off the Airport. Concessionaire shall be responsible for the proper disposal of its refuse in such a manner as to not contaminate or restrict sewer lines. All such disposal methods shall be in full accord with applicable regulations of governing local, state and Federal laws, rules and regulations.

9.05 COMPLIANCE WITH LAWS. Concessionaire, at Concessionaire's expense, agrees that it will design, construct, operate, and maintain any tenant improvements on the Leased Premises in accordance with all laws, rules, orders, ordinances, directions, regulations and requirements of federal, state, county and municipal authorities, now in force or which may hereafter be in force, including, but not limited to, those which shall impose any duty upon the Lessor or Concessionaire, with respect to the use, occupation or alteration of the Leased Premises or any improvements thereon.

Concessionaire, at Concessionaire's expense, specifically agrees to make or cause to be made all such alterations to the Leased Premises and any improvements thereon including, without limiting the generality of the requirements of this sentence, removing

such barriers and providing such alternative services, as shall be required by the Americans with Disabilities Act, as amended and any other laws, rules, orders, ordinances, directions, regulations and requirements of federal, state, county and municipal authorities, now in force or which may hereafter be in force, which relate to the use or occupation of Leased Premises and any improvements thereon by disabled persons ("Disabilities Laws").

Concessionaire shall, at Concessionaire's expense, comply with all present and hereinafter enacted Environmental Laws, and any amendments thereto, affecting Concessionaire's use, operation, occupation or alteration of the Leased Premises and any improvements thereon.

A. Definitions.

- (1) "Environmental Laws" means any one or all of the following as the same are amended from time to time: the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601 et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. Section 6941 et seq.; the Toxic Substances Control Act, 15 U.S.C. Section 2601 et seq.; the Safe Drinking Water Act, 42 U.S.C. Section 300h et seq.; the Clean Water Act, 33 U.S.C. Section 1251 et seq.; the Clean Air Act, 42 U.S.C. Section 7401 et seq.; and the regulations promulgated thereunder and any other laws, regulations and ordinances (whether enacted by the local, state or federal government) now in effect or hereinafter enacted that deal with the regulation or protection of the environment, including, but not limited to, the ambient air, ground water, surface water, and land use, including sub-strata land.
- (2) "Hazardous Material" shall mean all substances, materials and wastes that are, or that become, regulated under or classified as hazardous or toxic under any Environmental Law and gasoline, oil, jet fuel, lubricants, and all other petroleum products.
- (3) "Release" shall mean any releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, disposing, or dumping into the environment.

B. Compliance.

- (1) Concessionaire shall not cause or permit any Hazardous Material to be used, generated, manufactured, produced, stored, brought upon, or released, on, under or about the Leased Premises, or transported to and from the Leased Premises, by Concessionaire, its agents, employees, contractors, invitees, or a third party in violation of any Environmental Law. **Without limiting the generality of any other**

indemnity clauses contained in this Agreement, Concessionaire shall indemnify, defend and hold harmless Lessor, its successors and assigns, its employees, agents and attorneys from and against any and all liability, loss, damage, expense, penalties and legal and investigation fees or costs, arising from or related to any claim or action for injury, liability, breach of warranty or representation, or damage to persons or property and any and all claims or actions brought by any person, entity or governmental body, alleging or arising in connection with contamination of, or adverse effects on, the environment or violation of any Environmental Law or other statute, ordinance, rule, regulation, judgment or order of any government or judicial entity which are incurred or assessed as a result (whether in part or in whole) of any activity or operation on or discharge from the Leased Premises or any improvements thereon. This obligation includes but is not limited to all costs and expenses related to cleaning up the Leased Premises, improvements, land, soil, underground or surface water as required under the law. Concessionaire's obligations and liabilities under this paragraph shall continue so long as Concessionaire bears any liability or responsibility under the Environmental Laws for any action that occurred on the Leased Premises. This indemnification of Lessor by Concessionaire includes, without limitation, costs incurred in connection with any investigation of site conditions or any cleanup, remedial, removal or restoration work required by any federal, state or local governmental agency or political subdivision because of hazardous material located on the Leased Premises or in any improvements thereon or present in the soil or ground water on, under or about the Leased Premises. The parties agree that Lessor's right to enforce Concessionaire's promise to indemnify is not an adequate remedy at law for Concessionaire's violation of any provision of this Section. Lessor shall also have all other rights and remedies provided by law or otherwise provided in this Agreement.

- (2) Without limiting the foregoing, if the presence of any Hazardous Material on, under or about the Leased Premises or in any improvements thereon or permitted by Concessionaire results in any contamination of the Leased Premises, any improvements thereon, or any surrounding property, Concessionaire shall promptly take all actions, at its sole cost and expense, as are necessary to return the Leased Premises, and any improvements thereon or the surrounding property to the condition existing prior to the introduction of any such Hazardous Material to the Leased Premises, any improvements thereon or the surrounding property; provided that Lessor's approval of such actions shall first be obtained, which approval shall not be unreasonably withheld so long as such actions would not potentially

have any material adverse long-term effect on the Leased Premises, any improvements thereon or the surrounding property.

- (3) Concessionaire shall, at Concessionaire's own cost and expense, make all submissions to, provide all information to, and comply with all requirements of the appropriate governmental authority (the "Government") under the Environmental Laws. Should the Government determine that site characterization, site assessment and/or a cleanup plan be prepared or that a cleanup should be undertaken on the Leased Premises, any improvements thereon or on surrounding property then Concessionaire shall, at Concessionaire's own cost and expense, prepare and submit the required plans and financial assurances, and carry out the approved plans. At no cost or expense to Lessor, Concessionaire shall promptly provide all information requested by Lessor to determine the applicability of the Environmental Laws to the Leased Premises or to respond to any governmental investigation or to respond to any claim of liability by third parties, which is related to environmental contamination.
- (4) Concessionaire shall immediately notify Lessor of any of the following: (a) any correspondence or communication from any governmental entity regarding the application of Environmental Laws to the Leased Premises or Concessionaire's operation on the Leased Premises, and (b) any change in Concessionaire's operation on the Leased Premises that will change or has the potential to change Lessor's or Concessionaire's obligations or liabilities under the Environmental Laws.
- (5) Concessionaire shall insert the provisions of this section in any lease agreement or contract by which it grants a right or privilege to any person, firm or corporation under this Agreement.

C. Reporting:

At any time that Concessionaire submits any filing pertaining to its property, operations, or presence of the Airport with any governmental entity (other than the Internal Revenue Service) by way of example but not in limitation, the Federal Aviation Administration (FAA), the Environmental Protection Agency (EPA) or the TCEQ, Concessionaire shall provide duplicate copies of the filing(s) and all related documents to Lessor.

Upon expiration, termination or cessation of this Agreement for any reason, Concessionaire shall provide a current Phase I environmental site assessment of the Leased Premises acceptable to Lessor; and if, in the opinion of Lessor, the Leased Premises shall require environment

remediation, Concessionaire shall perform same to return the Leased Premises into a (like new) condition equal or better to that as of the effective date of this Agreement.

9.06 SELF HELP. Notwithstanding any other provision in this Agreement to the contrary, Lessor shall have the right of self-help or similar remedy in order to minimize any damages, expenses, penalties and related fees or costs, arising from or related to a violation of any law or under or about the Leased Premises.

ARTICLE 10 – INSURANCE AND INDEMNIFICATION

10.01 FIRE AND OTHER RISKS INSURANCE. Concessionaire, at its sole cost and expense, shall, throughout the term of this Agreement, keep or cause to be kept all Leasehold Improvements, Trade Fixtures, and Personal Property now or hereafter located upon the Leased Premises insured for the mutual benefit of Lessor and Concessionaire against loss or damage by fire and against loss or damage by other risks embraced by “extended coverage” and against civil commotions, riots, vandalism and malicious mischief, in an amount equal to the actual replacement cost of such improvements, including costs of replacing excavations and foundation, but without deduction for depreciation (“Full Insurable Value”). In the event a dispute arises as to the Full Insurable Value, which cannot be resolved by agreement of the parties, an appraisal of the Leasehold Improvements and Trade Fixtures thereon shall be made by an appraiser selected by Concessionaire, and reasonably acceptable to Lessor, to determine the Full Insurable Value. The expense of the appraisal shall be borne by Concessionaire. The resulting determination shall be conclusive between the parties for the purpose of this Section. Should the appraiser selected by Concessionaire be unsatisfactory to Lessor, the carrier of the insurance then in force shall be requested to determine the Full Insurable Value.

10.02 LIABILITY INSURANCE. Concessionaire, at its sole cost and expense shall, throughout the term of this Agreement, provide and keep in force for the benefit of Lessor and Concessionaire, as their respective interests may appear, comprehensive general liability and property damage insurance in an amount not less than One Million Dollars (\$1,000,000.00) for bodily injury to one person for each occurrence, One Million Dollars (\$1,000,000.00) for bodily injuries to more than one person arising out of each occurrence and One Million Dollars (\$1,000,000.00) for property damage arising out of each occurrence, or in amounts equal to the maximum liability for damages for municipalities for claims arising under governmental functions provided for under the Texas Tort Claims Act, whichever is greater. If at any time during the life of the agreement or any extension, the Concessionaire fails to maintain the required insurance in full force and effect; all work under the agreement shall be discontinued immediately. Any failure to maintain the required insurance shall be sufficient cause for the City to terminate the agreement.

10.03 WORKER’S COMPENSATION. For the duration of this agreement and any extension hereof, Concessionaire shall carry Worker’s Compensation and Employers’

Liability Insurance in the amount required by Texas law. The policy must be endorsed to include a waiver of subrogation in favor of the City. Any termination, cancellation, or non-renewal of worker's compensation insurance coverage for the Concessionaire shall be a material breach of this agreement. If at any time during the life of the agreement or any extension, the Concessionaire fails to maintain the required insurance in full force and effect; all work under the agreement shall be discontinued immediately. Any failure to maintain the required insurance shall be sufficient cause for the City to terminate the agreement.

10.04 PERFORMANCE AND PAYMENT BONDS. Concessionaire, at its own cost and expense, shall cause to be made, executed, and delivered to Lessor two (2) separate bonds, as follows:

- A. Prior to the date of commencement of any construction, a contract surety bond in a sum equal to the full amount of the construction contract awarded.

This bond shall guarantee the faithful performance of necessary construction and completion of improvements in accordance with approved final plans and detailed specifications; and shall guarantee Lessor against any losses and liability, damages, expenses, claims and judgments caused by or resulting from any failure of Concessionaire to perform completely the work described as herein provided.

- B. Prior to the date of commencement of any construction, a payment bond with Concessionaire's contractor or contractors as principal, in a sum equal to the full amount of the construction contract awarded.

This bond shall guarantee payment of all wages for labor and services engaged and of all bills for materials, supplies, and equipment used in the performance of said construction contract.

10.05 AUTHORIZED INSURANCE COMPANIES. All such policies of insurance and bonds shall be written by insurance companies authorized to do business in the State of Texas and shall be written by companies approved by Lessor, such approval not to be unreasonably withheld. Certificates of insurance shall be delivered to Lessor at least ten (10) days prior to the effective date of the insurance policy for which the certificate is issued. Each such certificate shall contain:

- A. A statement of the coverage provided by the policy;
- B. A statement of the period during which the policy is in effect;
- C. A statement that the annual premium or the advance deposit premium for such policy has been paid in advance;

- D. An agreement by the insurance company issuing such policy that the policy shall not be canceled or reduced in any amount for any reason whatsoever without at least thirty (30) days' prior written notice to Lessor; and
- E. A statement certifying the Lessor has been listed as an additional named insured on the policy.

10.06 INDEMNIFICATION. WITHOUT LIMITING THE GENERALITY OF ANY OTHER INDEMNITY CONTAINED IN THIS AGREEMENT, CONCESSIONAIRE AGREES TO INDEMNIFY AND HOLD LESSOR HARMLESS AGAINST ANY AND ALL CLAIMS, DEMANDS, DAMAGES, COSTS, LIABILITIES 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 CONCESSIONAIRE'S ACTIVITIES ON THE PREMISES, ITS USE OF THE PREMISES, OR FROM ANY BREACH ON THE PART OF CONCESSIONAIRE OF ANY TERMS OF THIS AGREEMENT, OR FROM ANY ACT OR NEGLIGENCE OF CONCESSIONAIRE, ITS AGENTS, CONTRACTORS, EMPLOYEES, CONCESSIONAIRES, OR LICENSEES IN OR ABOUT THE PREMISES INCLUDING CLAIMS AND DAMAGES ARISING IN WHOLE, OR IN PART, FROM THE NEGLIGENCE OF LESSOR. IN CASE OF ANY ACTION OR PROCEEDING BROUGHT AGAINST LESSOR BY REASON OF ANY SUCH CLAIM, CONCESSIONAIRE, UPON RECEIPT OF WRITTEN NOTICE FROM LESSOR, AGREES TO DEFEND THE ACTION OR PROCEEDING BY COUNSEL ACCEPTABLE TO LESSOR.

10.07 RELEASE OF LIABILITY REGARDING CERTAIN DAMAGES. Lessor shall not be liable for, and is hereby released from all liability to Concessionaire, to Concessionaire's insurance carrier, or to anyone claiming under or through Concessionaire for any loss or damage whatsoever to the property or effects of Concessionaire, its employees, agents, subcontractors, or any other entity from any cause whatsoever including, but not limited to, damage resulting from the accidental discharge or discharge beyond the Lessor's control, of water or other substances from pipes, sprinklers, or conduits, containers or appurtenances thereto, or for any damage resulting from the discharge or failure of electrical current regardless of cause or origin. The provisions of this Section shall not be construed as a limitation of Lessor's rights, but are additional to the rights and exclusions from liability provided and by operation of law herein to which Lessor can resort to cumulatively or in the alternative.

ARTICLE 11 DAMAGE OR DESTRUCTION OF PREMISES

11.01 DAMAGE OF LEASED PREMISES. If all or a portion of the Leased Premises are damaged by fire, explosion, the elements, public enemy, or other casualty, Lessor

shall be under no obligation to repair, replace and reconstruct said Leased Premises. The Minimum Annual Guarantee payable hereunder shall abate as of the time of such damage or destruction and shall cease until such time as the Leased Premises are fully restored; however, Concessionaire shall continue to be responsible for the payment of Percentage Rentals. If, within twelve (12) months after the time of such damage or destruction, the Leased Premises shall not have been repaired or reconstructed, Concessionaire may terminate this Agreement.

Notwithstanding the foregoing, if the Leased Premises, or a portion thereof, are completely destroyed as a result of the act or omission of Concessionaire, its sublessees, agents, invitees, contractors, representatives, subcontractors, suppliers or employees, Minimum Annual Guarantee and Percentage Rentals shall not abate and Lessor may, in its discretion, require Concessionaire to repair and reconstruct the said premises within twelve (12) months of such destruction and pay the costs therefore; or Lessor may repair and reconstruct the said premises within twelve (12) months of such destruction and Concessionaire shall be responsible for reimbursing Lessor for the costs and expenses incurred in such repair.

Regardless of the cause of such damage, redecoration and replacement of Leasehold Improvements, Trade Fixtures, and Personal Property shall be the responsibility of Concessionaire, at its sole expense, and any such redecoration and refurbishing/re-equipping shall be of equivalent quality to that originally installed hereunder and shall be subject to written approval of Director.

11.02 DAMAGE OR DESTRUCTION OF LEASEHOLD IMPROVEMENTS AND TRADE FIXTURES. Should the Leasehold Improvements, Trade Fixtures, and Personal Property provided by Concessionaire or by Lessor on behalf of Concessionaire or any part of them be destroyed or damaged, they shall in all instances be repaired or replaced by Concessionaire, whether or not said damage or destruction is covered by insurance. If Concessionaire fails to repair or replace such damaged Leasehold Improvements and Trade Fixtures subject to a schedule set by Director and in accordance with the procedures described in Article 8, Lessor may make such repairs or replacements and recover from Concessionaire the cost and expense of such repair or replacement, plus ten percent (10%) thereof for administrative costs.

ARTICLE 12 EXPIRATION/TERMINATION/CANCELLATION

12.01 EXPIRATION. This Agreement shall expire at the end of the Initial Term, Option Period or any extension thereof.

12.02 TERMINATION BY CONCESSIONAIRE. This Agreement may be terminated, in writing, by Concessionaire after the happening of one or more of the following events:

- A. The abandonment of the Airport as an airline terminal or the removal of all certified passenger airline service from the Airport for a period of greater than ninety (90) consecutive days.
- B. The lawful assumption by the United States Government, or any authorized agency thereof, of the operation, control or use of the Airport, or any substantial part or parts thereof, in such a manner as to substantially restrict Concessionaire for a period of least ninety (90) consecutive days from operating thereon.
- C. Issuance by any court of competent jurisdiction of an injunction preventing all Commercial Air Carrier Operations at the Airport for a period of at least ninety (90) consecutive days.
- D. The default by Lessor in the performance of any covenant or agreement herein required to be performed by Lessor and the failure of Lessor to remedy such default for a period of sixty (60) consecutive days after receipt from Concessionaire of written notice to remedy the same.

12.03 TERMINATION BY LESSOR. Subject to the provisions herein, this Agreement shall be subject to cancellation by Lessor in the event Concessionaire shall:

- A. Be in arrears in the payment of the whole or any part of the amounts agreed upon hereunder for a period of ten (10) days after Lessor has notified Concessionaire in writing that payment was not received when due;
- B. File in any court a petition in bankruptcy or insolvency or for the appointment of a receiver or trustee of all or a portion of Concessionaire's property;
- C. Make any general assignment for the benefit of creditors;
- D. Abandon the Premises;
- E. Default in the performance of any of the covenants and conditions required herein (except rental payments) to be kept and performed by Concessionaire, and such default continues for a period of thirty (30) days after receipt of written notice from Lessor to cure such default, unless during such thirty-day period, Concessionaire shall commence and thereafter diligently perform such action as may be reasonably necessary to cure such default;
- F. Be adjudged bankrupt in involuntary bankruptcy proceedings; or
- G. Be made a party to any receivership proceeding in which a receiver is appointed for the property or affairs of Concessionaire where such

receivership is not vacated within sixty (60) days after the appointment of such receiver.

In any of the aforesaid events, Lessor may take immediate possession of the Premises including any and all improvements thereon and remove Concessionaire's effects, forcibly if necessary, without being deemed guilty of trespassing.

Failure of Lessor to declare this Agreement canceled upon the default of Concessionaire for any of the reasons set out shall not operate to bar or destroy the right of Lessor to cancel this Agreement by reason of that or any subsequent violation of the terms of this Agreement.

No receipt or acceptance of money by Lessor from Concessionaire after the expiration or cancellation of this Agreement or after the service of any notice, after the commencement of any suit, or after final judgment for possession of the Premises, shall reinstate, continue, or extend the term of this Agreement, or affect any such notice, demand or suit or imply consent for any action for which Lessor's consent is required or operate as a waiver of any right of the Lessor to retake and resume possession of the Premises.

12.04 RIGHT OF ENTRY UPON TERMINATION. In any case in which provision is made herein for the termination of this Agreement by Lessor or in the case of abandonment or vacating of the Leased Premises by Concessionaire, Lessor, in lieu of declaring a forfeiture, may enter upon the Leased Premises. In such case, Lessor shall use its best efforts to release the Leased Premises upon commercially reasonable terms, and if a sufficient sum shall not be realized thereby, after paying expenses of such releasing, to satisfy the rent and other sums herein agreed to be paid by Concessionaire, Concessionaire hereby agrees to pay any such deficiency. Concessionaire further agrees to save Lessor harmless from any loss or damage or claim arising out of the action of Lessor in pursuance of this paragraph except for any loss, damage, or claim caused by the sole negligence of Lessor or its employees.

12.05 RIGHTS UPON EXPIRATION OR EARLY TERMINATION. Upon expiration or early termination of this Agreement, Concessionaire shall immediately return the Leased Premises to Lessor clear of all Leasehold Improvements, Trade Fixtures, and Personal Property. If Concessionaire fails to so remove said Leasehold Improvements, Trade Fixtures or Personal Property as provided herein, Lessor may remove same at Concessionaire's expense or said items shall be considered abandoned.

Lessor may take title to the Leasehold Improvements and, at its option, take title to the Trade Fixtures in lieu of such removal by or for Concessionaire with no additional consideration due to Concessionaire.

12.06 REPOSSESSING AND RELETTING. In the event of default by Concessionaire hereunder, which shall remain uncured after the required notices have been given pursuant to this Agreement, and for such time as provided herein, Lessor may at once thereafter, or at any time subsequent during the existence of such breach or default:

- A. Enter into and upon the Premises or any part thereof and repossess the same, expelling therefrom Concessionaire and all personal property of Concessionaire (which property may be removed and stored at the cost of and for the account of Concessionaire), using such force as may be necessary; and
- B. Either cancel this Agreement by notice or without canceling this Agreement, relet the Premises or any part thereof upon such terms and conditions as shall appear advisable to Lessor. If Lessor shall proceed to relet the Premises and the amounts received from reletting the Premises during any month or part thereof be less than the rent due and owing from Concessionaire during such month or part thereof under the terms of this Agreement, Concessionaire shall pay such deficiency to Lessor immediately upon calculation thereof, providing Lessor has exercised good faith in the terms and conditions of reletting. Payment of any such deficiencies shall be made monthly within ten (10) days after receipt of notice of deficiency.

12.07 LANDLORD'S LIEN. It is expressly agreed that in the event of default in the payment of rent or any other sum due from Concessionaire to Lessor under the terms of this Agreement, Lessor shall have a lien upon all goods, chattels, personal property or equipment, save and except delivery vehicles or rolling stock belonging to Concessionaire which are placed in, or become a part of, the Premises, as security for rent due and to become due for the remainder of the Agreement term, which lien shall not be in lieu of or in any way affect the statutory landlord's lien given by law, but shall be in addition to that lien, and Concessionaire grants to Lessor a security interest in all of Concessionaire's personal property placed in or on the Premises for purposes of this contractual lien. Provided, however, that the terms of this provision shall have effect only to the extent they are not inconsistent with the rules and regulations of the Interstate Commerce Commission and any other laws pertaining thereto and the Railroad Commission of the State of Texas. Lessor agrees that Lessor will not levy a landlord's lien against any delivery vehicle or rolling stock or any of the goods or personal property of third parties in the possession of Concessionaire, any sublessee or any assignee of the Concessionaire. In the event Lessor exercises the option to terminate the leasehold as provided herein, the Lessor, after providing reasonable notice to Concessionaire of its intent to take possession and giving an opportunity to cure the default, may take possession of all of Concessionaire's property on the Premises and sell it at public or private sale after giving Concessionaire reasonable notice of time and place of any public sale or of the time after that any private sale is to be made, for cash or credit, for such prices and terms as Lessor deems best. The proceeds of the sale shall be applied first the necessary proper expense of removing, storing and selling such property, then to the payment of any rent due or to become due under this Agreement, with the balance, if any, to be paid to Concessionaire.

ARTICLE 13
ASSIGNMENT, TRANSFER OR SUBLEASE

13.01 GENERAL. Concessionaire shall not at any time, transfer, convey, sublet, mortgage, pledge, or encumber its interest under this Agreement, or any part of the Leased Premises. Concessionaire shall not assign its interest under this Agreement or any part of the Leased Premises to any party without prior written approval by Lessor.

Concessionaire agrees that in the event of such assignment, transfer, or sublease, all terms, provisions, covenants and conditions of this Agreement shall inure to the benefit of and be binding upon Lessor and Concessionaire and their successors, assigns, legal representatives, heirs, executors and administrators.

13.02 RELINQUISHMENT OF SPACE. No assignment, vacation, transfer, conveyance, or sublease by Concessionaire shall relieve Concessionaire of its responsibility for payment of rents, utilities, fees and other charges and performance of all other obligations provided in this Agreement.

13.03 CONSENT. Consent by Lessor to any type of transfer provided for by this Article shall not in any way be construed to relieve Concessionaire from obtaining further consent for any subsequent transfer or assignment of any nature whatsoever.

ARTICLE 14
GENERAL PROVISIONS

14.01 RULES AND REGULATIONS. Concessionaire shall observe and obey all Rules and Regulations established, promulgated or adopted from time to time during the term hereof, by Lessor, governing conduct on and operations at the Airport and use of its facilities.

Concessionaire shall not violate, nor knowingly permit its officers, agents, employees, invitees or independent contractors acting on Concessionaire's behalf to violate any such Rules and Regulations.

14.02 COMPLIANCE WITH LAW. At all times during the term of this Agreement, Concessionaire shall, in connection with its activities and operations at the Airport:

- A. Comply with all laws, rules, orders, regulations, ordinances, directions, and requirements of federal, state, county, and municipal authorities, now in force or which may hereafter be in force, which relate to the use or occupation of the Leased Premises.
- B. Make, at its own expense and subject to prior written approval of Lessor, repairs and alterations to its Leased Premises including Leasehold Improvements, Trade Fixtures, and Personal Property but excluding

Structural Elements and repairs to the Terminal, that are required to comply with or conform to any such statutes and ordinances, and regulations which are promulgated or enacted by Lessor or other governmental agency.

14.03 NONDISCRIMINATION COVENANT. Concessionaire, for itself, its heirs, personal representatives, successors in interest and assigns, as part of the consideration hereof, does hereby covenant and agree as follows:

- A. That in the event facilities are constructed, maintained, or otherwise operated on the said property described in this Agreement for the purpose for which a Department of Transportation program or activity is extended or for another purpose involving the provision of similar services or benefits, the Concessionaire shall maintain and operate such facilities and services in compliance with all other requirements imposed pursuant to 49 CFR Part 21, Nondiscrimination in Federally Assisted Programs of the Department of Transportation, and as said regulations may be amended.
- B. That no person on the grounds of race, creed, color, sex, age, disability, or national origin shall be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of Premises.
- C. That in the construction of any improvements on, over, or under the Premises and the furnishing of services thereon, no person on the grounds of race, creed, color, sex, age, disability, or national origin shall be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination.
- D. That Concessionaire shall use the Premises in compliance with all requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A. Part 21, Nondiscrimination in federally assisted programs of the Department of Transportation-Effectuation of Title VI of the Civil Rights Act of 1964, and as said Regulation may be amended. Concessionaire shall also comply with the applicable provisions of Section 504 of the Rehabilitation Act of 1973 (P.L. 93-112) and 49 CFR Part 27.
- E. Economic Discrimination. To the extent that, under this Agreement, Concessionaire furnishes goods or services to the public at the Airport, Concessionaire agrees that it shall:
 - 1. Furnish each and every good and service in a fair, reasonable, and not unjustly discriminatory basis to all users of the Airport; and
 - 2. Charge fair, reasonable and not unjustly discriminatory prices for each unit or service, provided that Concessionaire may be allowed

to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers as otherwise permitted under the law.

- F. That, in the event of breach of any of the above nondiscrimination covenants, Lessor shall have the right to terminate this Agreement and re-enter and repossess Premises, and hold the same as if said Agreement had never been made or issued.

14.04 AFFIRMATIVE ACTION. Concessionaire assures that it will undertake an affirmative action program as required by 14 CFR Part 152, Subpart E, and any amendments thereto, and any other federal statutes or regulations applicable to the receipt of federal assistance from the Department of Transportation by local governments for Airport use, or otherwise applicable to persons leasing premises from the Lessor, to insure that no person shall, on the grounds of race, color, sex, or national origin be excluded from participating in or receiving the services or benefits of any program of activity covered by this Subpart. Concessionaire assures that it will require that its covered suborganizations (sublessees or otherwise) provide assurances to Lessor, as set forth herein, that they similarly will undertake affirmative action programs, and that they will require assurance from their suborganizations (sublessees or otherwise) to the same effect.

14.05 DISADVANTAGED BUSINESS DEVELOPMENT.

- A. This Agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR Part 23, Subpart F, as amended. The Concessionaire agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, age, sex or disability in connections with the award of performance of any concession agreement covered by 49 CFR Part 23, Subpart F.
- B. Concessionaire agrees to include the statements in this Section in any subsequent concession agreements that it enters into and cause those businesses to similarly include the statements in further agreements.
- C. Concessionaire shall comply with all requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation, Office of the Secretary, Part 23, participation by Minority Business Enterprise programs of the Department of Transportation-Effectuation of Title VI of the Civil Rights Act of 1964, and as said Regulations may be amended.

14.06 RIGHT OF FLIGHT. The City of El Paso reserves unto itself, its successors and assigns, for the use and benefit of the public a right of flight for the passage of aircraft in the airspace above the surface of the Premises, together with the right to cause in said airspace such noise as may be inherent in the operation of aircraft, now known or

hereafter used, for navigation of or flight in the said airspace, and for the use of said airspace for landing on, taking off from or operation on the Airport.

The City of El Paso reserves to itself, its successors and assigns, for the use and benefit of the public, a continuing right and easement over the Premises, to take any action it deems necessary to prevent the construction, erection, alteration or growth of any structure, tree or other object in the vicinity of the runways at the Airport which would constitute an obstruction to air navigation according to the criteria or standards prescribed in Subpart C of Part 77 of the Federal Aviation Regulations and any amendments or successor regulations.

The City of El Paso reserves for itself, its successors and assigns the right to prevent any use of the Premises which would interfere with aircraft landing on, or taking off from, the Airport and the right to prevent any other use of said land which would constitute an airport hazard.

14.07 SUBORDINATION OF AGREEMENT. All rights granted in this Agreement shall be subordinate to the rights in any deed from the United States to the City of El Paso. This Agreement shall further be subordinate to the provisions of any existing or future agreements between Lessor and the United States relative to the operation and maintenance of the Airport, the execution of which has been or may be required as a condition precedent to the expenditure of federal funds for the development of the Airport. Should the effect of such agreement with the United States Government be to substantially destroy the commercial value of the Premises, Concessionaire may cancel this Agreement in its entirety.

14.08 AGREEMENT SUBJECT TO COVENANTS IN DEED. It is mutually agreed that this Agreement is made subject to the covenants, requirements and restrictions contained in the Deed by which Lessor obtained title to said El Paso International Airport from the Government of the United States.

14.09 EMINENT DOMAIN. In the event that the United States of America or the State of Texas shall, by exercise of the right of eminent domain or any other power, acquire title in whole or in part to the Airport, including any portion assigned to Concessionaire, Concessionaire shall have no right of recovery whatsoever against Lessor but shall make its claim for compensation solely against the United States of America or the State of Texas, as the case may be.

14.10 ASSIGNMENT BY LESSOR OR OTHER SUCCESSORS IN INTEREST. Lessor may assign or otherwise convey its interest, rights, duties and/or obligations hereunder to any airport authority or other successor in interest. Lessor, airport authority or other successor in interest may assign, pledge or take other appropriate action with respect to this Agreement and their rights and interests hereunder for any purpose relating to the issuance of bonds or other revenue generating devices.

14.11 PARAGRAPH HEADINGS. The table of contents and the captions of the various articles and sections of this Agreement are for convenience and ease of reference only, and do not define, limit or augment the scope, context or intent of this Agreement or any part or parts of this Agreement.

14.12 CROSS REFERENCES. References in the text of this Agreement to articles, sections, or exhibits pertain to articles, sections, or exhibits of this Agreement, unless otherwise specified.

14.13 AUTHORIZATION TO ENTER AGREEMENT. Each of the persons executing this Agreement on behalf of Concessionaire warrants to Lessor that he/she has full right and authority to enter into this Agreement, and is authorized to do so. Upon Lessor's request, Concessionaire will provide evidence satisfactory to Lessor confirming these representations.

14.14 AGREEMENT MADE IN TEXAS. The laws of the State of Texas shall govern the validity, interpretation, performance and enforcement of this Agreement. Venue shall be in the courts in El Paso County, Texas.

14.15 NOTICES. All notices provided to be given under this Agreement shall be given by certified or registered mail, return receipt requested, postage fully prepaid, addressed to the proper party at the following addresses:

LESSOR:	City of El Paso 2 Civic Center Plaza El Paso, Texas 79901 Attn: City Manager
COPY TO:	Director of Aviation El Paso International Airport 6701 Convair Rd. El Paso, Texas 79925-1091
CONCESSIONAIRE:	Smarte Carte, Inc. 4455 White Bear Parkway St. Paul, Minnesota 55110

Any notice so given shall be deemed properly delivered, given, served, or received on the date shown on the return receipt for delivery, rejection, or undeliverable. Any party may change the address to which notices shall thereafter be given upon five (5) days prior written notice to all other parties in the manner set forth in this paragraph.

14.16 FORCE MAJEURE. No party to this Agreement is responsible to the other party for nonperformance or delay in performance of the terms and conditions herein due to acts of God, fire flood or other casualty events, acts of government, wars, riots, strikes,

work stoppage, accidents or interruptions in delivery systems in transportation, or other causes beyond the control of the parties.

14.17 TIME IS OF THE ESSENCE. Time is and shall be deemed of the essence in respect to the performance of each provision of this Agreement.

14.18 ATTORNEY'S FEES. If either party brings any action or proceedings to enforce, protect or establish any right or remedy under the terms and conditions of this Agreement, the prevailing party shall be entitled to recover reasonable attorney's fees, as determined by a court of competent jurisdiction, in addition to any other relief awarded.

14.19 CUMULATIVE RIGHTS AND REMEDIES. All rights and remedies of Lessor here enumerated shall be cumulative and none shall exclude any other right or remedy allowed by law. Likewise, the exercise by Lessor of any remedy provided for herein or allowed by law shall not be to the exclusion of any other remedy.

14.20 ENTIRE AGREEMENT. This Agreement, together with all exhibits attached hereto, constitutes the entire agreement between the parties hereto, and all other representations or statements heretofore made, verbal or written, are merged herein, and this Agreement may be amended only in writing and executed by duly authorized representatives of the parties hereto.

14.21 CONTRACT INTERPRETATION. Lessor and Concessionaire agree that this Agreement has been freely negotiated by both parties and that in any controversy, dispute or contest over the meaning, interpretation, validity or enforceability of this Agreement or any of its terms and conditions, there shall be no inference, presumption or conclusion drawn whatsoever against either party by virtue of that party having drafted this Agreement or any portion thereof.

14.22 INVALID PROVISIONS. In the event any covenant, condition, or provision herein contained is held to be invalid by any court of competent jurisdiction, the invalidity of any such covenant, condition, or provision shall in no way affect any other covenant, condition, or provision herein contained, provided that the invalidity of such covenant, condition, or provision does not materially prejudice either Lessor or Concessionaire in the respective rights and obligations contained in the valid covenants, conditions, or provisions of this Agreement.

14.23 FAMILIARITY AND COMPLIANCE WITH TERMS. Concessionaire represents that it has carefully reviewed the terms and conditions of this Agreement and is familiar with such terms and conditions and agrees to faithfully comply with the same to the extent to which said terms and conditions apply to its activities as authorized and required by this Agreement.

14.24 LIABILITY OF LESSOR. It is specifically understood and agreed that Lessor shall have no liability to Concessionaire for damage to or loss of any property of Concessionaire, its employees, agents, servants, subcontractors, independent

contractors, or patrons from any cause whatsoever. This right shall be cumulative to all rights provided herein and allowed by Law, to which Lessor may resort to cumulatively or in the alternative.

14.25 CONCESSIONAIRE AND SUBTENANT'S TRADE NAME. Concessionaire hereby represents and covenants that Concessionaire, and any subtenants, have full legal authority to use any Trade Name(s) and Trades Name(s) do not violate any law, rule, order or regulation of the federal, state, or municipal government or other duly constituted public authority or the rights of any third party. Concessionaire shall take all actions reasonably necessary to protect its authority to use Trade Name(s) throughout the term of this Agreement.

14.26 TAXES. Concessionaire shall be responsible for payment of any and all payroll taxes or other assessments attributable to the operation of Concessionaire's business, improvements or personal property located on the Concession Site regardless of ownership or title to same. **Concessionaire further indemnifies the City from all tax liability including but not limited to ad valorem real property taxes and personal property taxes that may arise in relation to Concessionaire's activities in furtherance of this Agreement.**

14.27 EFFECTIVE DATE. Regardless of the date signed, this Agreement shall be effective as of the Effective Date first noted on the Title Page.

IN WITNESS WHEREOF, the parties have hereunto set their hands this ___ day of _____, 2009.

CITY OF ELPASO

Joyce A. Wilson
City Manager

APPROVED AS TO FORM:

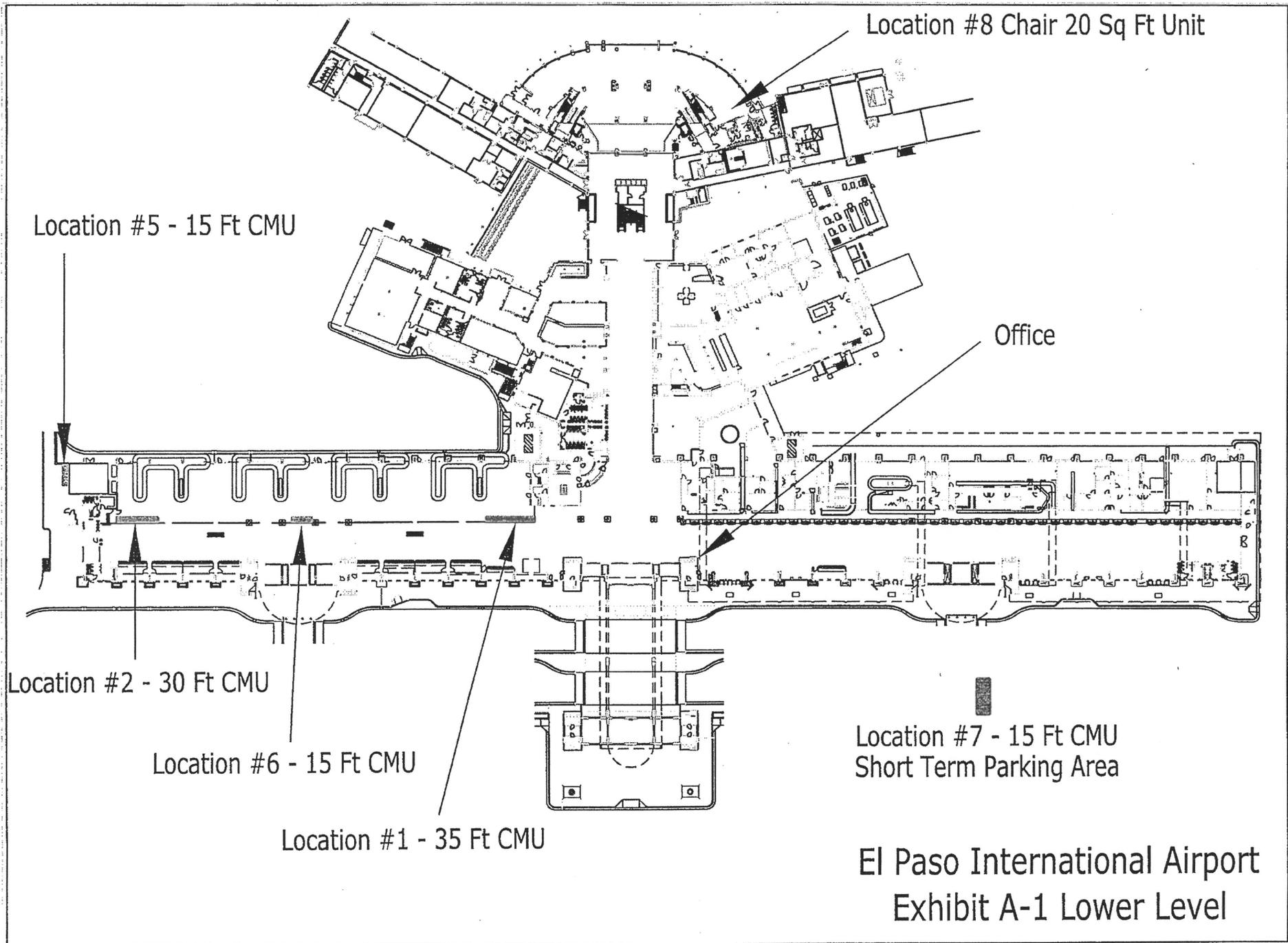


Cynthia Osborn
Assistant City Attorney

APPROVED AS TO CONTENT:



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



Location #8 Chair 20 Sq Ft Unit

Location #5 - 15 Ft CMU

Office

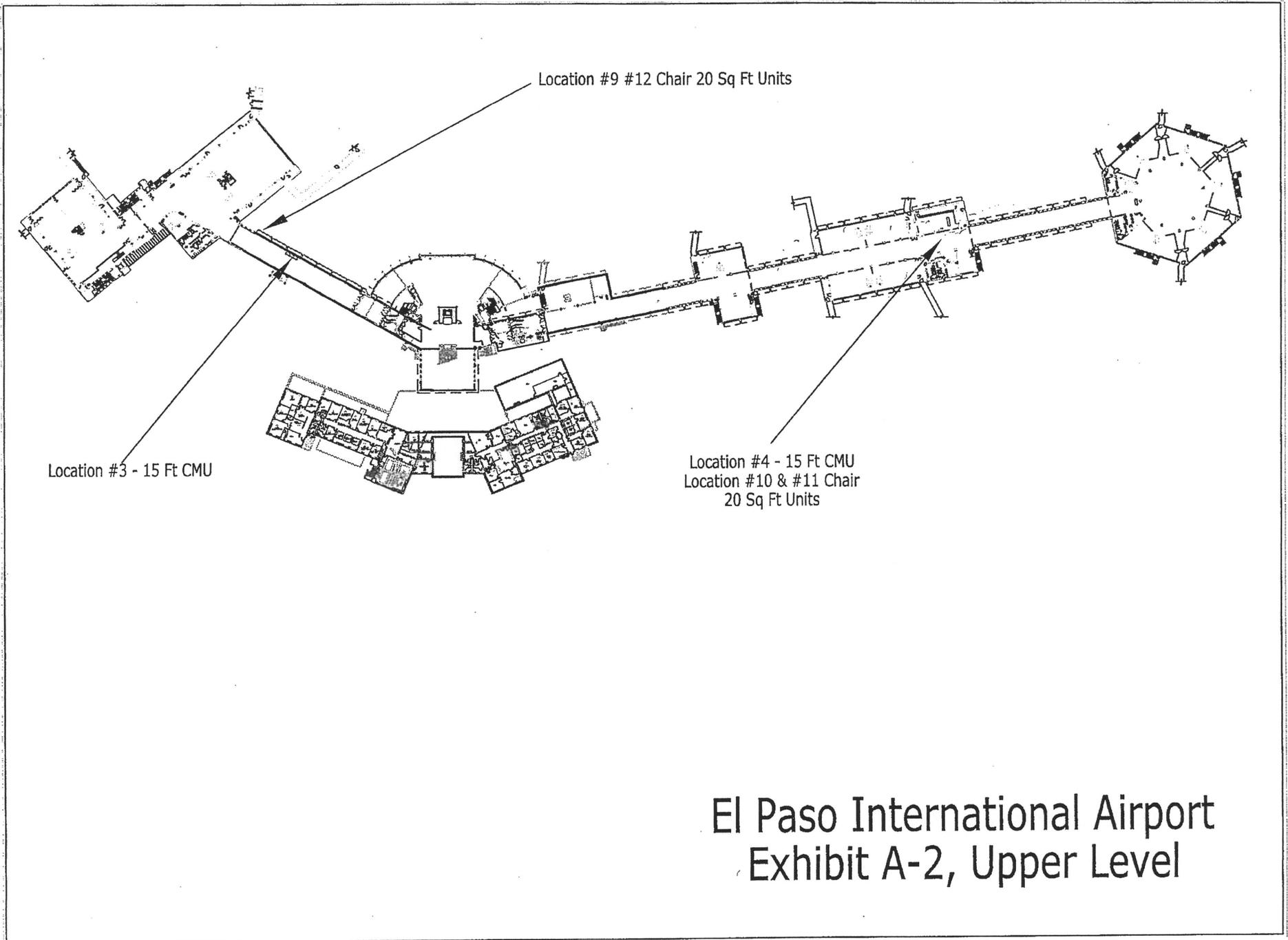
Location #2 - 30 Ft CMU

Location #6 - 15 Ft CMU

Location #7 - 15 Ft CMU
Short Term Parking Area

Location #1 - 35 Ft CMU

El Paso International Airport
Exhibit A-1 Lower Level



El Paso International Airport
Exhibit A-2, Upper Level