

**CITY OF EL PASO, TEXAS
AGENDA ITEM
DEPARTMENT HEAD'S SUMMARY FORM**

DEPARTMENT: Sun Metro

AGENDA DATE: June 14, 2011

CONTACT PERSON NAME AND PHONE NUMBER: Jay Banasiak, Director, Sun Metro 534-5810

DISTRICT(S) AFFECTED: ALL

SUBJECT:

That the City Manager be authorized to sign the Compressed Natural Gas: Fuel Dispensing Licensing Agreement by and between the City of El Paso and Jobe Materials, L.P., a Texas Limited Partnership, (hereinafter "Licensee") for use of the City's Compressed Natural Gas (hereinafter "CNG") refueling and dispensing facility and adjacent areas of to access the facility, for the purpose of a two day demonstration of CNG powered ready mix concrete trucks, and the fee to be paid by Licensee for such use is \$0.08 per gallon of fuel delivered.

BACKGROUND / DISCUSSION:

This agreement will allow JOBE Materials access to Sun Metro's fueling facility to fuel two demonstration vehicles which the City believes will serve a public purpose by encouraging the use of alternative energy, which should result in community-wide air quality benefits, not to mention possible economic development impacts provided by encouraging local CNG/LNG usage.

PRIOR COUNCIL ACTION:

The City has previously encouraged the promotion of alternate fuel usage and "green" programs, and the related development of alternative energy cluster business.

AMOUNT AND SOURCE OF FUNDING:

N/A – City will assess a fueling cost of \$.08/gallon.

BOARD / COMMISSION ACTION:

N/A

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

DEPARTMENT HEAD: _____

Information copy to appropriate Deputy City Manager

RESOLUTION

WHEREAS, the City Council of the City of El Paso finds that temporary incidental uses of its Compressed Natural Gas refueling and dispensing facility in compliance with the Federal Transit Administration rules that do not interfere with the primary use of the Premises, which is for the City public transportation bus system, and that allow the City to recover all costs related to the use, serve the municipal purpose of promoting and supporting use of alternative sources of energy.

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

That the City Manager be authorized to sign the Compressed Natural Gas: Fuel Dispensing Licensing Agreement by and between the City of El Paso and Jobe Materials, L.P., a Texas Limited Partnership, (hereinafter "Licensee") for use of the City's Compressed Natural Gas (hereinafter "CNG") refueling and dispensing facility and adjacent areas to access the facility, for the purpose of a two week demonstration of CNG powered ready mix concrete trucks, and the fee to be paid by Licensee for such use is \$0.08 per gallon of fuel delivered.

ADOPTED THIS _____ DAY OF _____ 2011.

CITY OF EL PASO

John F. Cook
Mayor

ATTEST:

Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:

APPROVED AS TO CONTENT

Kristen L. Hamilton
Assistant City Attorney

Jay Banasiak, Director
Mass Transit Department

STATE OF TEXAS)
)
COUNTY OF EL PASO)

**COMPRESSED NATURAL GAS: FUEL
DISPENSING
LICENSE AGREEMENT**

This Compressed Natural Gas: Fuel Dispensing License Agreement (the “Agreement”), is made and entered into on this ____ day of _____, 2011, by and between the **CITY OF EL PASO** (the “City”), by and through its Mass Transit Department a/k/a Sun Metro, and **Jobe Materials, LP**, a Texas Limited Partnership (“Licensee”). The City and the Licensee may be jointly referred to as the “Parties.”

WITNESSETH:

WHEREAS, Licensee desires use of the City’s Compressed Natural Gas (hereinafter “CNG”) refueling and dispensing facility and adjacent areas to access the facility, as more fully described below, hereinafter referred to as the “Premises”, for the purpose of a demonstration of CNG powered ready mix concrete trucks, which will last no longer than two weeks;

WHEREAS, the City Council finds that Licensee’s use of the Premises is incidental as required by the Federal Transit Administration (hereinafter “FTA”), the use does not interfere with the primary use of the Premises, which is for the City public transportation bus system, and all license fees paid by Licensee shall be used by the City to provide public transportation;

WHEREAS, the Licensee’s incidental use of the Premises serves the municipal purpose of promoting and supporting use of alternative sources of energy; and

WHEREAS, Licensee desires use of the Premises for refueling each of two demonstration vehicles up to two times in a two week period from June 20, 2011 through July 1, 2011.

NOW, THEREFORE, in consideration of the mutual benefits and promises contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. **LICENSE FOR USE OF THE PREMISES.** In return for the consideration described, the covenants set out herein to be kept by Licensee and other restrictions noted herein, the City does hereby grant to Licensee a License for the use of the Premises, as more fully described, to-wit:

Use of the CNG dispensing facility, which will be operated by the City, and the Premises located at 700 San Francisco Ave. #A, El Paso, Texas from June 20, 2011 through July 1, 2011 (hereinafter “Timeframe”) for refueling of two demonstration CNG powered ready-mix concrete trucks up to two times during the Timeframe.

2. **LICENSE FEE.** The fee for this license shall be \$0.08 per gallon of fuel delivered to the premises on behalf of Licensee. The license fee shall be paid to the Mass Transit Department of the City of El Paso not later than **two (2) days prior to the delivery of fuel to the Premises.** Failure to make such payment will result in cancellation of this Agreement.
3. **TERM OF THE AGREEMENT.** The term of this Agreement shall be from the date of full execution of this Agreement through July 31, 2011. Charges to be paid by Licensee as provided in this Agreement shall be for the cumulative period of **two weeks** throughout the term of this Agreement.
4. **TERMS AND CONDITIONS.**
 - A. Licensee agrees and covenants to keep the Premises in good repair and condition during the use for which this license is granted.
 - B. City Manager or a designee will coordinate with Licensee for delivery of fuel and distribution of CNG to Licensee. Licensee will purchase the appropriate fuel and will have distribution to the Premises coordinated with the City Manager or a designee. Licensee will coordinate with the City Manager or a designee for the timing for refueling of vehicles as needed for the demonstration of CNG powered ready mix concrete trucks so as not to interfere with the City's operation of the public transportation system.
 - C. Licensee agrees that it will comply with all applicable federal, state and local laws while using the Premises pursuant to this Agreement.
 - D. Refueling of Licensee vehicles may take place Monday through Friday from 7:00 am to 5:00 pm. Licensee may refuel two CNG powered ready-mix concrete trucks, and each vehicle may be refueled up to two times during the Timeframe by employees of the City of El Paso. Licensee must abide by all City procedures during such refueling.
 - E. It is agreed and understood between the parties that liability insurance is required for the use of the Premises. Such coverage must comply with the following minimum insurance coverage: **ONE MILLION AND 00/100 DOLLARS (\$1,000,000.00) per individual occurrence and TWO MILLION AND 00/100 DOLLARS (\$2,000,000.00) aggregate.** Further, Licensee agrees to include the City of El Paso, as owner of the Premises, as an additional insured. A copy of the insurance policy, or certificate, issued by an insurance company authorized and licensed to do business in the State of Texas and reflecting the coverage required herein, shall be furnished to the City **at least forty-eight (48) hours prior to the use of the Premises.** It is understood and agreed that failure to provide the required insurance fees or evidence of insurance coverage shall preclude the use of the Premises, as otherwise agreed herein. Licensee does hereby state and warrant that any entity providing services to Licensee fully complies with all workmen's compensation requirements in the State of Texas.

- F. This Agreement shall be effective as of the date this Agreement is fully executed by both parties. All proposals, negotiations, notices and representations with reference to matters covered by this Agreement are merged in this instrument, and no amendment or modification thereof shall be valid unless evidence in writing is signed by both parties. Admission to the Premises for the activities covered by this Agreement shall not be denied to any person on account of race, color, national origin or handicap, as provided in **Title VI of the Civil Rights Act of 1964, and Section 504 of the Rehabilitation Act of 1973, or any other applicable laws.**
- G. The person signing this Agreement, if done so on behalf of the Licensee, warrants that he/she has both the authority to do so and the authority to bind the Licensee to this Agreement and all the terms and conditions contained herein.

5. ALLOCATION OF RISK.

- A. **GOVERNMENTAL FUNCTION.** The Licensee expressly agrees that, in all things relating to this Agreement, the City is performing governmental functions, as defined by the Texas Tort Claims Act. The Licensee further expressly agrees that every act or omission of the City that, in any way, pertains to or arises out of this Agreement falls within the definition of governmental function. Accordingly, the Licensee further agrees that liability, if any, for damages for injury to or death of any person or for damage to any property, arising, if at all, out of or in connection with activities under this Agreement, shall be determined under the limited waiver of sovereign immunity contained in the Texas Tort Claims Act.
- B. **EXCLUSION OF INCIDENTAL AND CONSEQUENTIAL DAMAGES.** Independent of, severable from, and to be enforced independently of any other enforceable or unenforceable provision of this Agreement, **THE CITY WILL NOT BE LIABLE TO LICENSEE (NOR TO ANY PERSON CLAIMING RIGHTS DERIVED FROM LICENSEE'S RIGHTS) FOR INCIDENTAL, CONSEQUENTIAL, SPECIAL, PUNITIVE, OR EXEMPLARY DAMAGES OF ANY KIND -- including lost profits, loss of business, or other economic damage, and further including injury to property, mental anguish and emotional distress -- AS A RESULT OF BREACH OF ANY TERM OF THIS AGREEMENT, REGARDLESS OF WHETHER THE CITY WAS ADVISED, HAD OTHER REASON TO KNOW, OR IN FACT KNEW OF THE POSSIBILITY THEREOF.**
- C. **MAXIMUM AGGREGATE LIABILITY.** Independent of, severable from, and to be enforced independently of any other enforceable or unenforceable provision of this Agreement **IN NO EVENT SHALL THE CITY'S AGGREGATE LIABILITY TO THE LICENSEE (INCLUDING LIABILITY - TO ANY PERSON OR PERSONS WHOSE CLAIM OR CLAIMS ARE BASED ON OR DERIVED FROM A RIGHT OR RIGHTS CLAIMED BY LICENSEE), WITH RESPECT TO ANY AND ALL CLAIMS AT ANY AND ALL TIMES ARISING FROM OR RELATED TO THE SUBJECT MATTER OF THIS AGREEMENT, IN CONTRACT, TORT, OR**

OTHERWISE, EXCEED THE SUM OF ALL AMOUNTS ACTUALLY PAID BY LICENSEE TO THE CITY UNDER THE TERMS OF THIS AGREEMENT.

D. **INTENTIONAL RISK ALLOCATION.** The Licensee expressly and independently acknowledges that the provisions of this Agreement were negotiated to reflect an informed, voluntary allocation between the Licensee and the City of all risks (both known and unknown) associated with the transactions associated with this Agreement. The disclaimers and limitations in this Agreement are intended to limit the circumstances of liability. The remedy limitations, and the limitations of liability, are separately intended to limit the forms of relief available to the parties.

WITNESS THE FOLLOWING SIGNATURES on the day and year first written above.

THE CITY OF EL PASO:

Joyce A. Wilson
City Manager

APPROVED AS TO FORM:

Kristen L. Hamilton
Assistant City Attorney

APPROVED AS TO CONTENT:

Jay Banasiak, Director
Mass Transit Department

LICENSEE: JOBE MATERIALS L.P.

By: _____
Printed Name: Irene Epperson
Title: _____