

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

DEPARTMENT: Engineering Department
AGENDA DATE: July 15, 2008
CONTACT PERSON/PHONE: R. Alan Shubert, City Engineer Ext. No. 4423
DISTRICT(S) AFFECTED: 1
PROJECT NAME/SOLICITATION NO. First Amendment to the Interlocal Agreement between the City and the El Paso Community College

SUBJECT:

Discussion and action that the Mayor be authorized to sign a First Amendment to an Interlocal Agreement by and between the City of El Paso and the El Paso County Community College District, passed and approved May 22, 2007, to allow the El Paso County Community College District to construct the parking lot at the northwest campus and the City contribute to the costs an amount not to exceed one million dollars (\$1,000,000).

BACKGROUND / DISCUSSION:

The City of El Paso entered into an agreement with the El Paso Community College (EPCC) on May 22, 2007 to have joint use of the existing parking facility and a proposed 400 space expansion of the Northwest Campus. Under the original agreement, the City of El Paso was required to construct the 400 parking space expansion to the existing parking facility. However, under the request of EPCC in order to expedite the process, an amendment to the original agreement is proposed to have EPCC construct the 400 parking space expansion. EPCC has operational necessities that require them to have this build as soon as possible. They currently have a contractor on-site constructing other campus facilities. Furthermore, the construction of the parking facility will trigger the conveyance of the parcel needed to construct the second phase of the Westside Sports Complex, which is currently under design. The maximum amount of \$1,000,000 is under the estimated cost that City would have incurred should it had built it for EPCC.

PRIOR COUNCIL ACTION:

City Council entered into the original interlocal agreement on May 22, 2007.

AMOUNT AND SOURCE OF FUNDING:

The project is funded by 2000 Quality of Life Funds.

BOARD / COMMISSION ACTION:

N/A

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

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

DEPARTMENT HEAD:  _____  7/7/08
(Example: if RCA is initiated by Financial Services, 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 Mayor be authorized to sign a First Amendment to an Interlocal Agreement by and between the City of El Paso and the El Paso County Community College District, passed and approved May 22, 2007, to allow the El Paso County Community College District to construct the parking lot at the northwest campus and the City contribute to the costs an amount not to exceed one million dollars.

ADOPTED THIS _____ DAY OF _____, 2008.

THE CITY OF EL PASO

John F. Cook, Mayor

ATTEST:

Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:

Lupe Cuellar
Assistant City Attorney

APPROVED AS TO CONTENT:

R. Alan Shubert, P.E.
City Engineer

CITY CLERK DEPT.
08 JUL -7 PM 2:50

STATE OF TEXAS §
 § **FIRST AMENDED INTERLOCAL AGREEMENT**
COUNTY OF EL PASO §

This First Amended Interlocal Agreement (hereinafter "Agreement"), is entered into this _____ day of _____, 2008, by and between the City of El Paso, a home rule municipal corporation (hereinafter "the City") and El Paso County Community College District (hereinafter "EPCC").

WHEREAS, the City provides recreational services to the citizens of El Paso through the Department of Parks and Recreation; and

WHEREAS, the City is constructing a Westside Sports Complex ("Complex") on property west of the EPCC Northwest campus, and the City will need additional parking spaces off site; and

WHEREAS, the off-site parking for the Complex ("Project") will be on property which is owned by and under the jurisdiction of EPCC; and

WHEREAS, the Project is an improvement to be constructed by EPCC and paid for by the City, for the mutual benefit of both the City and EPCC; and

WHEREAS, both the City and EPCC have determined that the terms and considerations provided for herein are of mutual benefit and are fair, reasonable and the product of arms length negotiations; and

WHEREAS, it is necessary for the City and EPCC to enter into this Agreement concerning the construction of the Project and the use of EPCC's property for the off-site parking for the Complex; and

WHEREAS, the City and EPCC are authorized to enter into this Agreement under the provisions of Chapter 791, Texas Government Code; and

NOW, THEREFORE, THE CITY AND EPCC HEREBY ENTER INTO THIS FIRST AMENDED INTERLOCAL AGREEMENT UNDER THE FOLLOWING TERMS AND CONDITIONS:

This First Amended Interlocal Agreement shall supersede in its entirety, the original Interlocal Agreement entered into by and between the same parties on May 22, 2007.

1.0 ATTACHMENTS AND DEFINITIONS

1.1 The attachments listed herein and attached to this Agreement are incorporated herein by reference for all purposes as if set forth verbatim:

Attachment "A" The metes and bounds description for the parcel immediately north of the Complex owned by and under the jurisdiction of EPCC proposed for transfer of ownership to the City.

Attachment “B” The utility easement granted to the City by EPCC for wastewater purposes provided for in 5.3.

Attachment “C” The metes and bounds description of the area where parking improvements will be provided.

Attachment “D” Construction plans and specifications for improvements.

The following definitions shall apply throughout this Agreement:

“Bonds” mean the tax exempt bonds issued or to be issued by the City, certain proceeds of which are to be used to finance construction of the Project, and any bonds issued to refinance such bonds.

“CITY” means the City of El Paso, Texas, a governmental unit.

“Completion” means the execution, satisfaction and fulfillment of all terms and conditions of this agreement, including (1) inspection of the Project and approval of the Project by both parties after construction, and (2) the full and complete reimbursement by the City to EPCC of all expenses and costs of construction, incurred by EPCC in regard to the Project. This definition of completion, complete, or similar words shall include the requirement of full and complete reimbursement to EPCC in the manner aforesaid, regardless of whether the specific words used hereinafter in the Agreement are modified to include such reimbursement.

“EPCC” means the El Paso County Community College District, a governmental unit.

“Governmental Unit” means any state of the United States or a political subdivision thereof, but does not include the United States or any agency or instrumentality thereof.

“Person” means any individual, corporation, partnership, joint venture, association, joint stock company, trust, unincorporated organization or government or any agency or political subdivision thereof.

“Project” means the improvements provided for herein to be constructed by EPCC and paid for by the City, for the mutual benefit of the City and EPCC, on certain real property owned by EPCC (“Land”).

2.0 CONTRACTUAL RELATIONSHIP

2.1 The parties to this Agreement are independent contractors. Except as may be expressly and unambiguously provided in this Agreement, no partnership or joint venture is intended to be created by this Agreement, nor any principal-agent or employer-employee relationship between the parties or any of their officers, employees, agents or representatives.

2.1-1 As an independent contractor, EPCC understands and agrees that it will be responsible for its respective acts or omissions, and the City shall in no way be responsible as an employer to EPCC's officers, employees, agents or representatives who perform any service in connection with this Agreement.

2.1-2 As an independent contractor, the City understands and agrees that it will be responsible for its respective acts or omissions, and EPCC shall in no way be responsible as an employer to the City's officers, employees, agents or representatives who perform any service in connection with this Agreement.

2.2 EPCC acknowledges and agrees that it does not have, and will not attempt to assert, the authority to make commitments for or to bind the City to any obligation other than the obligations set forth in this Agreement. The City also acknowledges and agrees that it does not have, and will not attempt to assert, the authority to make commitments for or to bind EPCC to any obligation other than the obligations set forth in this Agreement.

2.3 The parties acknowledge and expressly agree that, in all things relating to this Agreement, the City and EPCC are performing governmental functions, as defined by the Texas Tort Claims Act. The parties hereby agree that the City and EPCC enter into this Agreement as governmental entities for the purpose of performing a governmental function.

3.0 SCOPE AND TERM OF AGREEMENT

3.1 Scope. The City will design and EPCC will construct, 400 parking spaces at the EPCC Northwest Campus, in compliance with El Paso Municipal Code requirements. The City will pay the cost of construction, not to exceed One Million and No/100 Dollars (\$1,000,000.00). Said amount includes the expenditure for security lighting, landscaping, and irrigation. However, EPCC's reimbursement for security lighting, landscaping, and irrigation shall not exceed \$65,000.00. All change orders and any amount over One Million and No/100 Dollars (\$1,000,000.00) must have prior written approval by the City Engineer. Payment by the City to EPCC shall be made on a monthly basis upon presentation by EPCC of a detailed invoice and accompanying summary and progress report and written approval by the City Engineer. After completion of the project, the City will maintain, repair, pay for utilities, and provide security, to the extent provided for in this agreement. In exchange, EPCC will convey a 20 acre tract of land described in Attachment "A", permit joint use of all EPCC Northwest Campus parking, provide a sewer easement to the City and authorize the City sewer tie-in to an existing EPCC sewer line as described in Attachment "B". EPCC construction of improvements shall be as described below. The City acknowledges that it shall not open the Westside Sports Complex to scheduled league or tournament play, nor have use of the parking lot, prior to completion of the project and reimbursement in full by the City to EPCC for the cost of construction of the parking lot.

3.1-1 Construction. Project construction includes parking lot improvements needed to provide for the movement and parking of four hundred (400) standard passenger vehicles. This area is as identified in Attachment "C" and shall be completed

as provided for in Attachment "D." Improvements include twelve security lights, landscaping, and irrigation. The location and type of security lights, landscaping, and irrigation shall be in accordance with the design provided by the City, as more fully described in Attachment "D." It is anticipated that such improvements will be completed by December 31, 2008. However, the City and EPCC acknowledge that EPCC will use its best efforts to complete the project as provided for herein, yet that delays may result.

3.1-2 Land Conveyance. Within 30 days of completion of the project, to include full and complete reimbursement to EPCC by the City of all expenses and costs of construction incurred by the college in regard to the Project, EPCC shall convey, by Special Warranty Deed to the City, approximately 20 acres, the location and description of which is more fully described in Attachment "A." EPCC shall specifically warranty that the land conveyed does not require environmental remediation. Should the land conveyed ever be sold by the City, the parties agree that each shall receive 50% of any profit therefrom to the extent permitted under Texas law. The City shall permit EPCC to retain a sewer easement in the area identified in Attachment "A", in a form approved by the City.

3.1-3 Construction Generally. The City and EPCC agree that the project shall be designed and constructed pursuant to Attachment "D" attached hereto. EPCC, and any contractors retained by EPCC, shall comply with all municipal regulations and the parameters provided for in Attachment "D."

The Construction contract for the project shall be administered by EPCC. The personnel required for all construction engineering and supervision shall be selected and directed by EPCC. EPCC shall require both a performance bond and a payment bond, each meeting Texas Government Code Chapter 2253 requirements. To the extent allowed by law, the City shall be named as an additional insured or beneficiary on the bonds and any insurance obtained by the contractor for the project. Improvements are completed for purposes of this Agreement when deemed completed by the El Paso City Engineer after consultation with and consideration of comments provided by EPCC. The determination of the completion of the Project by the City Engineer shall include the satisfaction of those requirements for completion set out in the definitions in Article 1 of this Agreement. Moreover, the City shall inspect the Project after construction, and either accept or reject same as being fit for the City's purposes, prior to determining completion. EPCC makes no warranty or representation, express or implied, as to the fitness for any particular purpose, merchantability or other condition of the Project or its other parking facilities, and the City, by its acceptance, agrees that the parking lots constructed as a part of the Project are fit for the City's intended use, and the Project parking construction, together with all additional parking at the North West Campus that is the subject of joint use, is accepted by the City as is, where is, without any warranty or representation whatsoever by EPCC.

3.2 Use Term and Certain General Use Provisions. The City shall obtain and retain joint non-exclusive use of all EPCC Northwest Campus parking areas. Joint use shall be for a period of forty (40) years and shall automatically renew for successive periods of ten years each thereafter unless or until otherwise cancelled or terminated as provided for herein. EPCC shall not enter into any joint use agreement with Canutillo I.S.D. or any

other entity regarding joint use that would reduce the City's ability to provide parking below a minimum of 400 spaces at any time except that the City Parks Director is authorized to reduce City required parking for specific individual dates and times when not in conflict with City use requirements.

3.2-1 During the term of the joint use of the Parking Areas described herein, neither party shall assign, sublet, mortgage or otherwise encumber its interest in such area without the prior written approval of the other party.

3.2-2 EPCC and the City agree that the project will not be used in a trade or business of a person or persons other than a Governmental Unit. All of the parking spaces are similar. Parking spaces will be made available on a first come, first served basis to the general public and as space permits, except that disabled parking shall be available in accordance with applicable law.

3.2-3 The City and/or EPCC will operate the project and neither has nor intends, during the maximum stated term of the Bonds, to engage the services of a private management company to oversee the project unless such services are rendered pursuant to a management agreement that comes within a safe harbor described in IRS Revenue Procedure 97-13.

3.2-4 EPCC shall not directly or indirectly take or permit the taking of any action which would result in the interest on the Bonds becoming taxable, the Bonds becoming private activity bonds as defined in section 103 of the Internal Revenue Code of 1986, as amended (the "Code"); or the interest on the Bonds becoming an item of tax preference under section 57(a)(5) of the Code.

3.3 Entry Granted. EPCC herein grants a right of entry to the City, to include its agents, employees, and contractors, onto any and all EPCC property necessary to access and work within the Project area and the area identified in Attachment "A."

4.0 **TERMINATION.** This Agreement may be terminated as provided herein.

4.1 Termination by Either Party. It is further understood and agreed by the City and EPCC that either party may terminate this Agreement in whole or in part. Such termination may be made for failure of one party to substantially fulfill its contractual obligations, pursuant to this Agreement, and through no fault of the other party. No such termination shall be made, unless the other party being terminated is granted (a) written notice of intent to terminate enumerating the failures for which the termination is being sought; (b) a minimum of **thirty (30) consecutive calendar days** to cure such failures; and (c) an opportunity for consultation with the terminating party prior to such termination. EPCC shall not be permitted to terminate this Agreement for failure of the City to comply with Sections 5.2 through 5.4. Additionally, any termination by EPCC shall in no way terminate any easement or joint use parking provided to the City pursuant to this Agreement.

4.2 Termination Payment. EPCC acknowledges that the City is going to finance the Project with bond proceeds and therefore, there will be certain restrictions on the transfer

and use of the Project as long as the Bonds remain outstanding. Notwithstanding anything herein to the contrary, in the event that EPCC terminates this Agreement or the City's use of the area is reduced by EPCC for any reason through no material fault of the City during the maximum stated term of the Bonds, EPCC shall pay to the City the amount required to defease all outstanding Bonds allocable to the Project (the "termination payment"), assuming that the outstanding Bonds will be called for redemption on the earliest date on which they may be redeemed at the option of the City, less 2.5% for each year (value of City's yearly benefit), following execution of this Agreement.

4.3 Termination Shall Not Be Construed as Release. Termination by either party shall not be construed as a release of any claims that the terminating party may be lawfully entitled to assert against the other party. Further, the terminated party shall not be relieved of any liability for damages sustained by the terminating party by virtue of any breach of this Agreement.

4.3-1 Except as otherwise provided herein to include but not limited to 5.3, all duties and obligations of the City and EPCC shall cease upon termination or expiration of this Agreement.

5.0 GENERAL PROVISIONS

5.1 Liability. This Agreement is not intended to alter or reallocate any defense or immunity authorized or available to either party by law.

5.1-1 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, neither party shall be liable to the other party (nor to any person claiming rights derived from such party's rights) for incidental, consequential, special, punitive, or exemplary damages of any kind - including lost profits, loss of business, and further including, mental anguish and emotional distress - as a result of breach of any term of this Agreement, regardless of whether the party was advised, had other reason to know, or in fact knew of the possibility thereof, except as expressly provided in Sections 5.1-2 and 5.2 below. Neither party hereto shall be liable to the other party or any third party by reason of any inaccuracy, incompleteness, or obsolescence of any information provided or maintained by the other party regardless of whether the party receiving said information from the other party was advised, had other reason to know, or in fact knew thereof.

5.1-2 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 EITHER PARTY'S AGGREGATE LIABILITY TO THE OTHER PARTY (INCLUDING LIABILITY TO ANY PERSON OR PERSONS WHOSE CLAIM OR CLAIMS ARE BASED ON OR DERIVED FROM A RIGHT OR RIGHTS CLAIMED BY THE OTHER PARTY), 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 AMOUNT OF CONSIDERATION ACTUALLY PAID OR PAYABLE BY THE ONE PARTY FOR**

CONSTRUCTION OF IMPROVEMENTS OR TO THE OTHER PARTY UNDER THE TERMS OF THIS AGREEMENT, SUBJECT TO SECTION 5.2 BELOW.

5.1-3 Intentional Risk Allocation. The City and EPCC each acknowledge that the provisions of this Agreement were negotiated to reflect an informed, voluntary allocation between them 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.

5.1-4 Sovereign Immunity. The City and EPCC reserve, and do not waive, their respective rights of sovereign immunity and similar rights and do not waive their rights under the Texas Tort Claims Act. No provision of this Agreement that imposes an obligation or restriction on either party not permitted by applicable law shall be enforceable.

5.1-5 Liability due to defects. Both the City and EPCC acknowledge that the improvements become the property of EPCC upon completion. However, by undertaking such ownership, EPCC does not waive, alter, or amend EPCC's immunity from third party claims arising from premises defects.

5.2 Maintenance, Utility, and Repairs. Both the City and EPCC herein accept certain maintenance, utility, and repair responsibilities as herein identified.

5.2-1 Maintenance. The City and EPCC agree that the City shall be responsible for general clearing of trash and debris in the parking lot area immediately following events and activities requiring City use of the parking area subject to this agreement. EPCC shall retain responsibility for additional clearing of trash and debris.

5.2-2 Repairs. EPCC shall keep the entire EPCC Northwest Campus parking area in good condition and repair at all times during the effective period of this Agreement except that the City shall repair damage to Project area when notified of substantial damage at any time provided that such damage is caused by the City or by the participants in a City sponsored event. EPCC shall notify the City of any such damage within seventy-two (72) hours of the incurrence of same. EPCC shall promptly remove any barriers, obstacles, impairments, or other hazards, natural or manmade, which limit or reduce the City's ability to jointly use the parking. Further, both parties agree to pay, in equal amounts, for any resurfacing when both Parties agree to such resurfacing.

5.2-3 Utility Usage. The City shall pay for electricity and water attributable to the security lighting and landscaping located in the Project area for the first year following completion of the Project and EPCC shall pay for all such costs incurred more than one year following completion of the Project. The City and EPCC agree that the City will attach such areas to the City meters in this regard.

5.3 Easement Granted: EPCC shall grant the City a permanent sewer easement in the manner and location provided for in Attachment "B." The City shall be permitted to permanently tie into EPCC sewer line at the point where such easement intersects with

the identified EPCC sewer line. The easement granted shall be permanent, continue after termination, and be subject to the following:

Easement is permitted for a maximum of 100 average cubic feet per second flow. Any additional flow shall require an amendment to the easement granted. The City will repair any and all stoppages, breaks, or other damage caused by its use of and tie into the EPCC sewer line in a timely manner, but shall not be responsible for such stoppages, breaks or other damaged caused by EPCC use thereof. It is understood, for purposes of this Agreement, that any stoppage, break, or other damage on the sewer line on the 20 acre tract from the property line between EPCC and the City complex and continuing downstream therefrom is caused by the City's use of the sewer line. The City shall not be liable for any loss of water or sewage back-up resulting from sewer damage.

5.4 Security. EPCC shall generally retain responsibility for providing security personnel within the joint use parking area. The City shall provide security for the joint use area immediately preceding, during, and following any City sponsored events that require use of the joint use parking area when the City determines a need for security personnel exists.

5.5 Amendments and Waiver. The parties may amend this Agreement at any time by mutual consent. Unless otherwise provided herein, this Agreement may be amended only by written instrument duly executed on behalf of the City (by authority of the City Council) and EPCC. No claim or right arising out of a breach of this contract can be discharged in whole or in part by a waiver or renunciation of the claim or right unless the waiver or renunciation is supported by consideration and is in writing signed by the aggrieved party.

5.6 Complete Agreement. This Agreement, together with the Attachment(s) attached hereto, constitutes the entire agreement between the parties relating to the terms and conditions of the Agreement. The parties expressly acknowledge and warrant that there exists no other written or oral understanding, agreements or assurances with respect to such matters except as are set forth herein. Unless expressly stated, this Agreement confers no rights on any person(s) or business entity(s) that is not a party hereto. This Agreement shall not be construed against or unfavorably to any party because of such party's involvement in the preparation or drafting of this Agreement.

5.7 Governing Law. This Agreement shall be construed and interpreted in accordance with the laws of the State of Texas, along with any applicable provisions of the federal law, the City Charter and/or any ordinance of the City of El Paso, and EPCC Board Policies.

5.8 Severability. All agreements and covenants contained in this Agreement are severable. Should any term or provision of this Agreement be declared invalid by a court of competent jurisdiction, the parties intend that all other terms and provisions of this Agreement should be valid and binding and have full force and effect as if the invalid portion had not been included.

5.9 Notices. All notices required or permitted hereunder shall be in writing and shall be deemed delivered when actually received via United States Postal Service post office or certified mail, return receipt requested addressed to the respective other party at the address provided below or at such other address as the receiving party may have theretofore prescribed by written notice to the sending party.

The initial addresses of the parties, which one party may change by giving written notice of its changed address to the other party, are as follows:

CITY: City of El Paso
Attention: Office of the City Manager
Two Civic Center Plaza, 10th Floor
El Paso, Texas 79901-1196

COPY TO: City of El Paso
Attention: City Engineer
Two Civic Center Plaza, 4th Floor
El Paso, Texas 79901-1196

EPCC: El Paso Community College
Attention: Vice President
P.O. Box 20500
El Paso, Texas 79998-0500

5.10 Warranty of Capacity to Execute Contract. The person signing this Agreement on behalf of EPCC warrants that he/she has the authority to do so and to bind EPCC to this Agreement and all the terms and conditions contained herein.

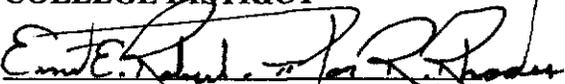
Each person signing below represents that he or she has read this Agreement in its entirety (including any and all Attachments); understands its terms; and agrees on behalf of such party that such party will be bound by those terms.

Executed this _____ day of _____, 2008.

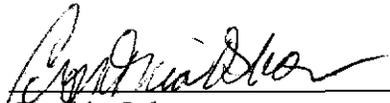
CITY OF EL PASO

John F. Cook,
Mayor

**EL PASO COUNTY COMMUNITY
COLLEGE DISTRICT**

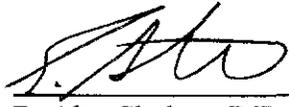

Richard M. Rhodes, President of the College

APPROVED AS TO FORM:



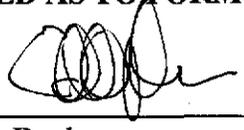
Cynthia Osborn
Assistant City Attorney

APPROVED AS TO CONTENT:



R. Alan Shubert, P.E.
City Engineer

APPROVED AS TO FORM:



Edward W. Dunbar
Attorney for EPCC

~~**APPROVED AS TO CONTENT:**~~

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Nanette Smejkal
Director, Parks & Recreation Department~~