

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

**DEPARTMENT:** Financial Services Department

**AGENDA DATE:** November 3, 2009

**CONTACT PERSON NAME AND PHONE NUMBER:** Carmen Arrieta-Candelaria [(915) 541-4011]

**DISTRICT(S) AFFECTED:** All

**SUBJECT:**

**APPROVE** a resolution / ordinance / lease to do what? **OR AUTHORIZE** the City Manager to do what? **Be descriptive of what we want Council to approve. Include \$ amount if applicable.**

That the City Manager be authorized to sign a Tenth Amendment to the Facility Management and Tourism Agreement between the City of El Paso and SMG to amend the Agreement in order to comply with IRS regulations related to private management and public facilities financed with tax-exempt bonds.

**BACKGROUND / DISCUSSION:**

**Discussion of the what, why, where, when, and how to enable Council to have reasonably complete description of the contemplated action. This should include attachment of bid tabulation, or ordinance or resolution if appropriate. What are the benefits to the City of this action? What are the citizen concerns?**

The attached amendment revised various terms related to the payment structure of the agreement between the City and SMG, hereafter referred to as the "Agreement". This amendment was requested by the City's bond counsel in order to bring the Agreement in compliance with IRS regulations related to private management and public facilities financed with tax-exempt bonds. In addition, the amendment will also address minor issues related to the current contract that have been mutually agreed to by both parties annually in a letter of understanding.

While the agreement was originally in compliance, amendments related to additional performance measures and the food and beverage services allowed more than 50% of the total compensation received by SMG to be incentive based. Additionally, the termination for convenience clause was removed. The original management fee for food and beverage services (added in the sixth amendment) was set at 5% of Gross Food and Beverage services; this has been eliminated and instead incorporated into the base and incentive fee. An increase to the annual fee of \$65,000 has been incorporated, 50% into the Base Fee and 50% into the Incentive Fee. The fee of \$65,000 is based on 5% of \$1.3M in gross revenue expected for FY 2008/09. As a part of the Adjusted Base fee, this portion will increase based on the CPI or 5% annually, whichever is less. The amendment also returns to the agreement a termination for convenience clause which originally existed; this clause is another requirement of the IRS regulations. There is no additional costs associated with the changes proposed.

**PRIOR COUNCIL ACTION:**

**Has the Council previously considered this item or a closely related one?**

The last amendment was approved by Council on December 5, 2006.

**AMOUNT AND SOURCE OF FUNDING:**

**How will this item be funded? Has the item been budgeted? If so, identify funding source by account numbers and description of account. Does it require a budget transfer?**

N/A

**BOARD / COMMISSION ACTION:**

**Enter appropriate comments or N/A**

\*\*\*\*\*REQUIRED AUTHORIZATION\*\*\*\*\*

**DEPARTMENT HEAD:**

*Carmen Arrieta-Candelaria*

(If Department Head Summary Form is initiated by Purchasing, client department should sign also)

*Information copy to appropriate Deputy City Manager*

## RESOLUTION

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

That the City Manager be authorized to sign a Tenth Amendment to the Facilities Management and Tourism Agreement between the City of El Paso and SMG to clarify the amounts and calculations used for determining the fixed fees and incentive fees paid under the agreement, to revise the definition of facility, and clarify the provisions regarding termination of the agreement for convenience.

APPROVED this 3<sup>rd</sup> day of November 2009.

CITY OF EL PASO:

\_\_\_\_\_  
John F. Cook  
Mayor

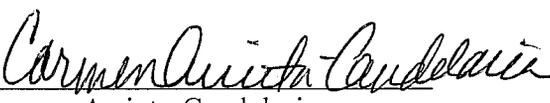
ATTEST:

\_\_\_\_\_  
Richarda Duffy Momsen  
City Clerk

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Elaine S. Hengen  
Senior Assistant City Attorney

APPROVED AS TO CONTENT:

  
\_\_\_\_\_  
Carmen Arrieta-Candelaria  
Chief Financial Officer

STATE OF TEXAS  
COUNTY OF EL PASO

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§  
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TENTH AMENDMENT TO FACILITY  
MANAGEMENT AND TOURISM AGREEMENT

This Tenth Amendment to the Facility Management and Tourism Agreement (this "*Amendment*") is made this \_\_\_\_\_ day of \_\_\_\_\_, 2009, by and between City of El Paso, a municipal corporation organized and existing under the laws of the State of Texas ("*City*" or "*Operator*"), and SMG, a Pennsylvania general partnership and the successor in interest to LMI/HHL, LTD., d/b/a Leisure Management International (the "*Manager*").

**WHEREAS**, the City and the Manager entered into a Facility Management and Tourism Agreement regarding the management of the City of El Paso Convention Center and Visitor's Bureau effective as of March 12, 1998;

**WHEREAS**, such Management Agreement has been amended nine separate times on June 18, 2002, October 24, 2002, October 24, 2003, July 27, 2004, October 19, 2004, July 5, 2005, November 1, 2005, September 19, 2006 and December 5, 2006; (the original Management Agreement and such amendments are herein collectively referred to as the "Management Agreement");

**WHEREAS**, the City and Manager desire to amend the Management Agreement to make certain additional changes to such agreement;

**NOW, THEREFORE**, in consideration of the mutual covenants and agreements hereinafter set forth, the parties hereby agree to amend the Management Agreement as follows:

**Section 1.** Article 1 of the Management Agreement is hereby amended by deleting the definition of "Facility" and inserting in its place the following:

"Facility" or "Facilities" shall mean collectively the Convention Center, Abraham Chavez Theatre, the Convention and Visitors Bureau, the Plaza Theatre Performing Arts Centre, Visitor's Center(s) operated by Manager, McKelligon Canyon Amphitheatre and Pavilion, Arts Festival Plaza and any other facilities of the Operator which are managed by the Manager.

**Section 2.** Section 8.1 of the Management Agreement, entitled "**Annual Management Fees,**" is hereby amended to include the following paragraph at the end of said section:

Effective as of September 1, 2008 Operator shall pay Manager \$65,000 ("**Food and Beverage Fixed Fee**"); as the Manager is responsible for providing food and beverage services at Facility through its affiliate SMG F&B. New Adjusted Base plus Food and Beverage Fixed Fee shall equal "**Total Fixed Fees**". Thereafter, the annual adjustments set forth in this Section 8.1 shall only apply to New Adjusted Base.

**Section 3.** Section 8.2 of the Management Agreement and Section 4 of the July 27, 2004 Amendment, entitled "**Incentive Fees,**" shall be amended to read as follows:

“Incentive Fees,” Manager shall be entitled to an annual incentive fee for each Fiscal Year during the Term of the contracted calculated as follows:

(i). Group One

- (a). 35% of the New Adjusted Base in the event that Operating Revenue exceeds the budgeted operating revenue.
- (b). 20% of the New Adjusted Base if Operating Expenses are less than Budgeted Operating Expenses.
- (c). 10% of the New Adjusted Base if the Hotel Occupancy Tax Revenue is greater than the previous Fiscal Year.
- (d). 10% of the New Adjusted Base if Manager demonstrates quality service to clients based on exit surveys. A minimum average of 3, based on a 5 point scale, demonstrates quality service to clients.
- (e). The following percentage of the New Adjusted Base based on the combined number of **Ticketed Patrons** in the Abraham Chavez Theatre and Plaza Theatre Performing Arts Centre as evidenced by ticket manifests, turnstile counts and/or drop counts:

| <u>Ticketed Patrons</u> | <u>Percentage</u> |
|-------------------------|-------------------|
| 0-25,000                | 0%                |
| 25,001-55,000           | 2%                |
| 55,001-80,000           | 4%                |
| 80,001-105,000          | 8%                |
| 105,001-130,000         | 12%               |
| 130,001-155,000         | 16%               |
| 155,001+                | 20%               |

- (f). The following percentage of the New Adjusted Base if there are the following **Days of Activity** in the Philanthropy Theatre during a fiscal year:

| <u>Days</u> | <u>Percentage</u> |
|-------------|-------------------|
| 0-29        | 0%                |
| 30-59       | 2%                |
| 60-89       | 4%                |
| 90-119      | 6%                |
| 120-149     | 8%                |
| 150+        | 10%               |

- (g). The following percentage of the New Adjusted Base if there are the following **Special Consideration for Non-Profit Organization Days of Activity** (to include all Facilities):

| <u>Days</u> | <u>Percentage</u> |
|-------------|-------------------|
| 0-25        | 0%                |
| 26-50       | 2%                |
| 51-75       | 4%                |
| 76-100      | 6%                |
| 101-125     | 8%                |
| 126+        | 10%               |

- (h). Individual performance measures (a), (c), and (d), detailed above, shall be pro-rated in the event the performance measure is not achieved fully, so long as a minimum of 80% of the individual performance measure has been achieved.
- (i). In the event Operating Expenses exceed Budgeted Operating Expenses, the amount of incentive fee earned under individual performance measure (b) detailed above shall be reduced on a pro-rata basis, with no incentive fee being earned under (b) if operating expenses exceed budgeted operating expenses by more than 5%. (For example, if operating expenses exceed budgeted operating expenses by 2.5%, which is ½ of the 5%, the incentive fee earned under (b) would be 10%, which is ½ of the maximum 20% available under (b).)
- (ii). Group Two
- (a). Food and Beverage Gross Revenue Incentive Fees. MANAGER shall receive incentive fee of 5% of gross food and beverage revenue in excess of \$1,300,000 per fiscal year.
- (iii). Group One incentive fees cannot exceed the New Adjusted Base Fee. Group Two incentive fees cannot exceed Food and Beverage Fixed Fee.
- (iv). The Incentive Fees determined pursuant to this Section 8.2 shall be payable to Manager within 30 days after Operator's receipt of an invoice from Manager accompanied by the audited fiscal statements.
- (v). No later than one hundred twenty (120) days after the end of each Fiscal Year, Manager shall furnish Operator an external auditor's report regarding the above performance measures. All costs incurred in complying with this audit shall be Operating Expenses and Manager's obligation to provide such audited reports to Operator shall be contingent upon inclusion of funding in budget for same.

**Section 4.** Section 3 Article (iv) of the July 5, 2005 Amendment, beginning "SMG F&B shall be entitled..." shall be deleted in its entirety.

**Section 5.** Section 8 of the Management Agreement is hereby amended by inserting the following as a new Section 8.3:

8.3 Cap on Performance Based Incentive Payments. Notwithstanding anything herein to the contrary, (i) the Total Fixed Fees set forth in Section 8.1 shall comprise at least 50% of all compensation received by the Manager or any of its affiliates from or with respect to the use, operation and/or management of the Facility in any Fiscal Year, and (ii) the aggregate of all of Manager's performance based incentive payments payable pursuant to Section 8.2 or otherwise and any other compensation payable to the Manager or any of its affiliates from or with respect to the use, operation and/or management of the Facility shall not exceed fifty percent (50%) ("Incentive Payment Cap") of the total compensation earned and paid to Manager or its affiliates with respect to the use, operation and/or management of the Facility in any Fiscal Year. In the event such performance based incentive payments exceed the Incentive Payment Cap, the performance based incentive payments shall be reduced to an amount equal to the Incentive Payment Cap.

An independent certified public accountant ("CPA"), mutually acceptable to the Manager and the Operator, shall make an annual certification in writing to the Operator that the Manager is in compliance with this Section no later than one hundred twenty (120) days after the end of each Fiscal Year. Such written certification shall be an Operating Expense. The Manager shall cooperate with the CPA and make its and its affiliates books and records reasonably available to the CPA in order for the CPA to conduct the necessary due diligence to make such certification.

Section 10.2 of the Management Agreement, entitled "Termination for Convenience" is hereby amended and restated to read as follows:

"Prior to September 1, 2010 and notwithstanding anything hereto to the contrary, and pursuant to Rev. Proc. 97-13, Operator may terminate this Agreement, in whole or in part, by giving ninety (90) days prior written notice to Manager. Manager will be paid the costs and expenses incurred by Manager with respect to the Facility, including, Management Fees for work performed up to the effective date of termination. Manager will promptly submit any such payment and reimbursement claims to Operator for prompt payment. If either Party has any property in its possession belonging to the other Party, the party in possession shall account for same, and dispose of it in the manner the other party directs.

Beginning September 1, 2010, Operator may terminate Agreement, in whole or in part, at the end of any fiscal year during the term by giving ninety (90) days prior written notice to Manager. Manager will be paid the costs and expenses incurred by Manager with respect to the Facility, including, Management Fees for work performed up to the effective date of termination. Manager will promptly submit any such payment and reimbursement claims to Operator for prompt payment. If either Party has any property in its possession belonging to the other Party, the party in possession shall account for same, and dispose of it in the manner the other party directs."

**Section 6.** The Management Agreement is hereby amended by adding the following as a new Section 12.23:

12.23 Compliance with Rev. Proc. 97-13. The parties agree and acknowledge that they intend that this Agreement comply in all respects with Internal Revenue Service Revenue Procedure 97-13, relating to management agreements for bond-financed property. Notwithstanding anything herein to the contrary, if the Internal Revenue Service makes a final determination that any portion of the Agreement does not meet a safe harbor set forth in Rev. Proc. 97-13, those provisions that do not comply will be automatically amended retroactively to be in compliance with Rev. Proc. 97-13.

**Section 7.** All sections of the Management Agreement not specifically amended herein shall remain in full force and effect.

*[Execution page follows]*

IN WITNESS WHEREOF, the parties hereto have executed this Amendment as of the date first noted above.

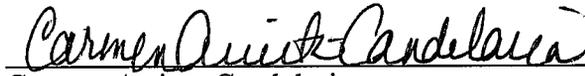
THE CITY OF EL PASO

\_\_\_\_\_  
Joyce A. Wilson  
City Manager

APPROVED AS TO FORM

  
\_\_\_\_\_  
Elaine S. Hengen  
Senior Assistant City Attorney

APPROVED AS TO CONTENT:

  
\_\_\_\_\_  
Carmen Arrieta-Candelaria  
Chief Financial Officer

SMG, a Pennsylvania general partnership

  
\_\_\_\_\_

Name: John F. Burns  
Title: Chief Financial Officer