

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

DEPARTMENT: Streets and Maintenance

AGENDA DATE: April 16, 2019

CONTACT PERSON/PHONE: Richard Bristol, Director, 915-212-0151

DISTRICT(S) AFFECTED: All

STRATEGIC GOAL: NO. 7: Enhance and Maintain the City's Infrastructure Network

SUBJECT:

That the City Manager is authorized to sign an Operating and Maintenance Agreement by and between the City and the Greater El Paso Chamber of Commerce Foundation for the operating and maintenance of the Star on the Mountain from May 1, 2019 to April 30, 2024 for the program services in the amount not to exceed \$12,000 per year. Operating and Maintenance costs will be reimbursed in an amount not to exceed \$50,000 per year.

BACKGROUND / DISCUSSION:

The City owns the Star Mountain located on the south side of the Franklin Mountains and requires a program to operate the lighting, operation and maintenance of the Star. The approval of this agreement will allow for this program to continue through a partnership by and between the City and Chamber of Commerce. Under the proposed 5 year agreement, the Chamber will be responsible for the management, maintenance and operation services to the Star on the Mountain as well as administering the commemorative and donation component of this agreement. The City will pay the Chamber an administrative fee of \$1,000 per month for the Chamber's assistance with the program services and will reimburse the Chamber for operating and maintenance costs as described in the agreement. Reimbursable expenses are not exceed \$50,000 per year.

SELECTION SUMMARY

N/A

CONTRACT VARIANCE PREVIOUS CONTRACT:

N/A

PROTEST

☒ No protest received for this requirement.

COUNCIL REPRESENTATIVE BRIEFING:

Was a briefing provided? ☐ Yes or ☒ No
If yes, select the applicable districts.

- ☐ District 1
- ☐ District 2
- ☐ District 3
- ☐ District 4
- ☐ District 5

- ☐ District 6
- ☐ District 7
- ☐ District 8
- ☐ All Districts

PRIOR COUNCIL ACTION:

April 8, 2014 – Approval of maintenance agreement

AMOUNT AND SOURCE OF FUNDING:

\$12,000 Per annum Administrative Costs – General Fund
\$50,000 Reimbursable Expenses – General Fund

BOARD / COMMISSION ACTION:

N/A

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

DEPARTMENT HEAD:



RESOLUTION

WHEREAS, the City owns the Star on the Mountain (“Star”), which is located on the south side of the Franklin Mountains in El Paso, Texas on property leased by the City from 88 Investments, Inc.; and

WHEREAS, the City has contracted with the Greater El Paso Chamber of Commerce Foundation on May 1, 2011 to operate a program for the lighting, operation and maintenance of the Star on the Mountain, which contract expires on April 30, 2014; and

WHEREAS, the City desire to continue contracting with the Chamber of Commerce to provides such operation and maintenance services and the Chamber of Commerce is willing to continue to provide such services for an additional five (5) year period; and

WHEREAS, the City staff recommends that the City contract with the Chamber of Commerce pursuant to the terms stated in the Agreement; and

WHEREAS, on April 8, 2014 the City and the Chamber entered into an Operating and Maintenance Agreement for Star on the Mountain with El Paso Chamber of Commerce (“**First Agreement**”); and

WHEREAS, the First Agreement expires April 30, 2019; and

WHEREAS, the parties wish to enter in this Agreement to take effect immediately following the expiration of the First Agreement.

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

THAT the City Manager is authorized to sign a Operating and Maintenance Agreement by and between the City and the Greater El Paso Chamber of Commerce Foundation for the operating and maintenance of the Star on the Mountain from May 1, 2019 to April 30, 2024 for the program services in an amount not to exceed \$12,000 per year. Operating and Maintenance costs will be reimbursed in an amount not to exceed \$50,000 per year.

APPROVED this _____ day of _____, 2019.

CITY OF EL PASO:

Dee Margo
Mayor

ATTEST:

Laura D. Prine
City Clerk
(Signatures on the following page)

APPROVED AS TO FORM:



Omar A. De La Rosa
Assistant City Attorney

APPROVED AS TO CONTENT:



Richard Bristol, Director
Streets & Maintenance Department

STATE OF TEXAS)
)
COUNTY OF EL PASO) **OPERATING AND MAINTENANCE AGREEMENT
FOR STAR ON THE MOUNTAIN WITH
EL PASO CHAMBER OF COMMERCE**

This Operation and Maintenance Agreement ("**Agreement**") is made by and between the **CITY OF EL PASO** ("City") and **THE GREATER EL PASO CHAMBER OF COMMERCE FOUNDATION**, a Texas non-profit organization ("**Chamber**").

WHEREAS, the City is the owner of the Star on the Mountain, which is located on the south side of the Franklin Mountains in El Paso, Texas on property leased by the City from 88 Investments, Inc. (the "**Landlord**") pursuant to a lease agreement effective May 1, 2010, (the "**Lease Agreement**"); and

WHEREAS, the City has determined that it would be of benefit to the public to continue to operate a program for the lighting, operating and maintenance of the Star on the Mountain, including a commemorative and donation component that allows the Star to be lit every evening (all such activities hereinafter referred to as the "**Program**"); and

WHEREAS, the Chamber is willing and able to manage and operate the Program pursuant to the terms stated in this Agreement; and

WHEREAS, on April 8, 2014 the City and the Chamber entered into an Operating and Maintenance Agreement for Star on the Mountain with El Paso Chamber of Commerce ("**First Agreement**"); and

WHEREAS, the First Agreement expires April 30, 2019; and

WHEREAS, the parties wish to enter in this Agreement to take effect immediately following the expiration of the First Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, the parties hereto agree as follows:

1. **SERVICES**. The Chamber shall be responsible for the management, maintenance and operation services relating to the Star on the Mountain, including, but not limited to, the poles and all related infrastructure and the property under the Lease Agreement on which the Star on the Mountain is located (collectively, the "**Star**") and the operation and outreach/publicity for the commemorative and donation component regarding the nightly lighting of the Star (the "**Program Services**"). The Chamber shall solicit contributions and donations for the Program and perform such billing and collections appropriate to collect the funds that assist with the cost of lighting the Star for one or more evenings. In addition, the Chamber will provide publicity as well as producing and distributing certificates and Star pins for individuals and entities that contribute to the nightly lighting (the "**Participants**") and hosting other commemorative events as needed. Chamber employees will perform the Program Services. The Chamber shall be responsible for the hiring and training of appropriate staff, and for ensuring that the Program is adequately staffed during all Chamber business hours of operation. If the Operating Costs (as

hereinafter defined) exceed the Reimbursable Expenses in any calendar year during the term of this agreement (a “**Budget Shortfall**”), the Chamber shall be relieved of its obligation to operate the Star until such time as the funds are made available to the Chamber to operate the Star without a Budget Shortfall.

The City acknowledges that the El Paso Times (“**Times**”), as a community service, provides certain daily services related to the outreach/publicity and marketing of the Star and the Chamber will coordinate such services with the Times. In the event that the Times terminates such in-kind services and the Chamber is required to pay for such the outreach/publicity/marketing services, the City agrees such costs will, at City’s election, either 1) become Reimbursable Expenses (and to the extent necessary, amend the Agreement with regard to the Budget Shortfall); 2) City will directly pay the provider directly for such services; or 3) renegotiate with the Chamber to cover costs associated with the costs of such publicity services.

The Chamber shall provide publicity and acknowledgements for Participants. All Program information materials must have the prior approval of the City Manager.

During the term of this Agreement, the City reserves the right to light the Star for ten (10) nights at no cost to the City in honor of, or in commemoration of, City events, proclamations or other occasions designated by the City Manager and provide advance five (5) day notice to the Chamber, unless the parties otherwise agree. The Chamber will provide the same advertisements and acknowledgements in connection with the City’s Star honorees as it does for all other Participants in the Program.

The Chamber will provide the City with a monthly report of its services, including an accounting of contributions and donations.

The City will continue to keep the Lease Agreement in effect during the term of this Agreement.

2. **CONSIDERATION.** In consideration of the services to be performed by the Chamber, the City agrees to acknowledge the Chamber’s participation with the Program by naming the Chamber as a supporter of the Program in all Program publications. For the Program Services, the City shall pay the Chamber for administrative costs in the fixed amount of \$1,000 per month or \$12,000 per annum (“**Administrative Fee**”).

In addition, the City agrees to reimburse the Chamber for the following costs (“**Operating Costs**”) associated with the Program: 1) utilities to light the Star; 2) liability insurance; and 3) maintenance, repair, and replacement costs. Collectively, these costs will be referred to as the “Reimbursable Expenses.” Reimbursable Expenses required for the operation of the Program less those amounts offset by revenues collected by the Chamber shall not exceed \$50,000 each calendar year during the Term of this Agreement. The Chamber shall not be responsible for the payment of Operating Costs in excess of the Reimbursable Expenses during any calendar year during the term of this Agreement. If the Chamber anticipates that the Operating Costs may exceed the \$50,000 Reimbursable Expense limit, the Chamber shall notify the City of such Budget Shortfall.

The Chamber shall submit to the City itemized monthly statements for the Administrative Fee and Reimbursable Expenses that show any invoices for Reimbursable Expenses offset by an revenues (donations, fees, etc.) received by the Chamber to provide the Program Services. Copies of receipts, documentation of any and all donations and invoices paid to third parties in connection with the Program must accompany invoices. Payment to the Chamber shall be made thirty (30) days after receipt and approval of invoices by the City.

3. **TERM.** The term of this Agreement shall commence on the Effective Date and expire April 30, 2024, unless sooner terminated pursuant to the terms of this Agreement.

4. **INDEMNITY AND LIABILITY INSURANCE.** TO THE EXTENT COVERED BY INSURANCE REQUIRED TO BE MAINTAINED HEREUNDER, THE CHAMBER AGREES TO INDEMNIFY, DEFEND AND HOLD THE CITY HARMLESS AGAINST ANY AND ALL CLAIMS, DEMANDS, DAMAGES, COSTS, AND EXPENSES, INCLUDING INVESTIGATION EXPENSES AND REASONABLE ATTORNEY'S FEES FOR THE DEFENSE OF SUCH CLAIMS AND DEMANDS, ARISING OUT OF OR ATTRIBUTED DIRECTLY, OR INDIRECTLY TO THE OPERATION, CONDUCT OR MANAGEMENT OF THE CHAMBER'S ACTIVITIES RELATED TO THE PROGRAM, ITS USE OF ANY CITY REAL OR PERSONAL PROPERTY, OR FROM ANY BREACH ON THE PART OF THE CHAMBER OF ANY TERMS OF THIS AGREEMENT, OR FROM ANY ACT OR NEGLIGENCE OF THE CHAMBER, ITS AGENTS, CONTRACTORS, EMPLOYEES, SUBTENANTS, CONCESSIONAIRES, OR LICENSEES IN, ABOUT OR IN CONNECTION WITH ANY CITY REAL OR PERSONAL PROPERTY. IN CASE OF ANY ACTION OR PROCEEDING BROUGHT AGAINST THE CITY BY REASON OF ANY SUCH CLAIM, THE CHAMBER, UPON NOTICE FROM THE CITY, AGREES TO DEFEND THE ACTION OR PROCEEDING BY COUNSEL REASONABLY ACCEPTABLE TO THE CITY. NOTWITHSTANDING THE FOREGOING, IN NO EVENT SHALL THE CHAMBER BE LIABLE TO THE CITY PURSUANT TO THIS PROVISION FOR ANY AMOUNT IN EXCESS OF THE POLICY LIMITS OF ANY INSURANCE REQUIRED TO BE MAINTAINED HEREUNDER.

5. **INSURANCE.** The Chamber shall procure and maintain at its sole cost and expense during the Term of this Agreement commercial general liability insurance in the following amounts 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:

\$1,000,000.00 – Per Occurrence

\$1,000,000.00 – Products/Completed Operations-Occurrence

The Chamber shall maintain said insurance with a solvent insurance company authorized to do business in the State of Texas. Such policy or certificate shall provide that the insurance cannot be canceled or the amount of coverage changed without thirty (30) days prior written notice to the City.

Certificates of insurance shall be delivered to the City's Real Estate Manager at least ten (10) days prior to the effective date of this Agreement and shall name the City, its officers, agents, servants and employees as additional insureds.

In the event Chamber, or any agent of Chamber contract with a third party to make improvements to the Premises, Chamber shall provide City with notice at least 48 hours prior to the date the installation of the repairs or improvements and will provide the City with a certificate of insurance to evidence the fact Chamber and 88 Investments, Inc. are additional named insureds on the general liability policy.

6. **TERMINATION.** This Agreement shall be subject to termination by the City in the event the Chamber shall default in the performance of any of the covenants, conditions or agreements required herein to be kept and performed by the Chamber and such default continues for a period of thirty (30) days after receipt of written notice from the City to cure such default, unless during such thirty (30) day period the Chamber shall commence and diligently perform such action as may be reasonably necessary to cure such default.

This Agreement may be terminated by the Chamber in the event: (i) the City shall default in the performance of any of the covenants, conditions or agreements required herein to be kept and performed by the City and such default continues for a period of thirty (30) days after receipt of written notice from the Chamber to cure such default, unless during such thirty (30) day period the City shall commence and diligently perform such action as may be reasonably necessary to cure such default; (ii) the Lease Agreement is terminated by the Landlord; (iii) the City assumes the operation of the Star; or (iv) the City discontinues the Program.

In the event that the City discontinues the Program for any reason or assumes the responsibility for the operation of the Star, the City may terminate this Agreement upon thirty (30) days' written notice to the Chamber. Upon receipt of notice of termination from the City, the Chamber shall serve notice to any contractors or subcontractors of its termination of the Agreement and, to the extent possible, terminate all other activities, services and agreements that give rise to a Reimbursable Expense. Notwithstanding the termination of this Agreement by the City, the City shall be responsible for Reimbursable Expenses incurred by the Chamber that the Chamber could not avoid by exercise of reasonable diligence.

Failure of the City to declare this Agreement canceled upon the default of the Chamber shall not operate to bar or destroy the right of the City to cancel this Agreement by reason of any subsequent violation of the terms herein.

Upon termination of the Agreement for any reason or if the City assumes the responsibility for the operation of the Star, the Chamber will provide the City with a full accounting of activities and pending commitments, if any, related to the operation of the Program for a period not to exceed the twenty-four (24) month period preceding the termination of this agreement and the Chamber shall forward to the City a financial statement and any contributions or donations it has solicited for the Program.

Upon the termination of this Agreement for any reason the Chamber shall be released from all responsibility for the operation of the Program.

7. **RIGHT OF ENTRY AND INSPECTION.** The City's authorized representative shall have the right to enter upon the Chamber's offices and inspect the Chamber's business records related to the Program during the Chamber's business hours with ten (10) days written notice.

8. **GENERAL PROVISIONS.**

A. **SUCCESSORS AND ASSIGNS.** This Agreement, or any interest therein, is not assignable without the prior written consent of the City Council and the Chamber. All provisions of this Agreement shall extend to, bind and inure to the benefit not only of the City and the Chamber, but also their legal representatives, successors and assigns.

B. **NOTICES.** All notices provided for herein shall be sufficient if sent by certified or registered mail, return receipt requested, postage fully prepaid, addressed to the proper party at the following addresses:

CITY: City of El Paso
Attn: City Manager
P. O. Box 1890
El Paso, Texas 79950

COPY TO: City of El Paso
Attn: Chief Financial Officer
P. O. Box 1890
El Paso, Texas 79950

CHAMBER: The Greater El Paso Chamber of Commerce
Attention: David Jerome
10 Civic Center Plaza
El Paso, Texas 79901

or to such other addresses as the parties may designate to each other in writing from time to time.

C. **GOVERNING LAW.** The laws of the State of Texas shall govern the validity, performance, interpretation, and enforcement of this Agreement. Venue shall be in the courts of El Paso County, Texas.

D. **INDEPENDENT CONTRACTOR RELATIONSHIP.** Nothing herein shall be construed as creating a relationship of employer and employee between the parties hereto. The City shall not be subject to any obligations or liabilities of the Chamber incurred in the performance of this Agreement unless otherwise herein authorized. The City will provide no fringe benefits to the Chamber.

- E. **REPRESENTATIONS AND WARRANTIES.** The Chamber makes the following representations and warranties to the City as of the Effective Date.
- a. The Chamber represents and warrants to the City that the Chamber has all required licenses, permits, and expertise to perform the Services under this agreement.
 - b. The person signing this Agreement on behalf of the Chamber has the authority to sign this Agreement on behalf of the Chamber.
- F. **SEVERABILITY.** 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 the remainder of this Agreement, provided that the invalidity of such covenant, condition, or provision does not materially prejudice either the City or the Chamber in the respective rights and obligations contained in the valid covenants, conditions, or provision of this Agreement.
- G. **COMPLIANCE WITH LAWS.** Chamber shall comply with all applicable federal and state statutes, ordinances, administrative orders, rules or regulations, in addition to any local laws or ordinances relating to its activities and performance under this Agreement and shall procure all licenses and pay all fees or other charges as required, if applicable.
- H. **WAIVER.** Failure by either party on one or more occasions to exercise one or more of its rights hereunder shall not be construed as a waiver of such right or rights, and rights granted hereunder are in addition to those available under law and equity.
- I. **AUTHORIZATION TO ENTER AGREEMENT.** The individual signing this Agreement on behalf of the Chamber acknowledges that he or she is authorized to do so and said individual further warrants that he or she is authorized to commit and bind the Chamber to the terms and conditions of this Agreement.
- J. **HEADINGS.** The paragraph headings contained herein are for convenience in reference and are not intended to specifically define or limit the scope of any provision of this Agreement.
- K. **SURVIVAL OF CERTAIN PROVISIONS.** All provisions of this Agreement, which expressly or impliedly contemplate or require performance after the cessation, expiration, cancellation, or termination of this Agreement hereunder, shall survive such cessation, expiration or termination of this Agreement.
- L. **ENTIRE AGREEMENT.** This document contains all of the agreements between the parties and may not be modified, except by an agreement in writing signed by both parties.

STATE OF TEXAS)
)
COUNTY OF EL PASO) **OPERATING AND MAINTENANCE AGREEMENT
FOR STAR ON THE MOUNTAIN WITH
EL PASO CHAMBER OF COMMERCE**

IN WITNESS WHEREOF, the parties have hereunto agreed on the date first noted above.


CITY OF EL PASO:

Tommy González

City Manager

Date: _____

APPROVED AS TO FORM:



Omar A. De La Rosa
Assistant City Attorney

APPROVED AS TO CONTENT:



Richard Bristol, Director
Streets & Maintenance Department

**THE GREATER EL PASO CHAMBER
OF COMMERCE FOUNDATION**

By: _____

Name: _____

Title: _____