

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

DEPARTMENT: ANIMAL SERVICES

AGENDA DATE: 4/19/2016

CONTACT PERSON: KURT FENSTERMACHER, INTERIM DIRECTOR, ANIMAL SERVICES 842-1050

DISTRICT (S) AFFECTED: All

SUBJECT:

That the City Manager be authorized to sign a lease between Dr. Alvaro Medina, DVM and the City of El Paso for use of the City's Environmental Services vehicle #1118, license plate number 817 448 and VIN 1FCMF53S710A05496 as a spay/neuter van to be used to offer spay and neuter procedures, for an initial one year term, with the City's option of two consecutive one year extensions, in exchange for a minimum number of low cost spay and neuter procedures and the resulting reduction in the feral dog and cat population in the City of El Paso.

BACKGROUND / DISCUSSION:

City Council awarded contract 2014-196R to Dr. Alvaro Medina, DVM, for mobile spay and neutering services.

SELECTION SUMMARY:

N/A

PRIOR COUNCIL ACTION:

Council has awarded similar resolution for equipment lease on July 5, 2011 and June 10, 2014

AMOUNT AND SOURCE OF FUNDING:

Annual Amount: \$00.00 (1 year) with two-one year extensions
Department: Environmental Services Department
Account: 522150-3120-334-34050-P3450 Outside Contracts

BOARD / COMMISSION ACTION:

N/A

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

DEPARTMENT HEAD: _____
Name Signature Date

RESOLUTION

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

That the City Manager be authorized to sign the Equipment Lease Agreement by and between the City of El Paso with Dr. Alvaro Medina, DVM, for the City to lease to Dr. Medina a spay-neuter van for the purpose of providing the community with affordable mobile spay-neuter services.

CITY OF EL PASO

Oscar Leeser
Mayor

ATTEST:

Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM

Josette Flores
Assistant City Attorney

APPROVED AS TO CONTENT

Kurt Fenstermacher, Interim Director
Department of Animal Services

- 2.3 Lessee shall obtain and pay for all necessary licenses, permits, inspections and fees necessary for the lawful operation of said Equipment. Lessee shall maintain a safe driving record during the term of this Lease. Lessee shall possess the licensing and certification credentials necessary to provide animal sterilization services in conformance with surgical standards as dictated by the Texas Veterinary Medical Practices Act.
- 2.4 Lessee agrees that it shall be responsible for any loss or damage to the Equipment occurring during Lessee's lease of this Equipment in an amount not to exceed the market value of the Equipment, as determined at the time the loss or damage occurs. Should an incident occur in which damage is done to said vehicle during the Lease, the Lessee shall notify Lessor of the condition of the Equipment within 10 days of said incident.
- 2.5 Maintenance and Repairs. Lessee at its own cost and expense is responsible for major repairs to the Equipment, shall supply all parts and service required for such maintenance and shall not look to Lessor for any part of such cost and expense. The term "major repairs" shall include any repair to the Equipment not listed in Section 1.2 of this Lease.
- 2.6 Lessee agrees to keep Lessor and Equipment free from any lien, encumbrance or any other claim which may be asserted by any other third party.
- 2.7 Lessee shall furnish the Lessor's Director of Animal Services or designee with a written report detailing the spay/neuter services provided in the Equipment for a full calendar month, no later than the 5th day of each subsequent month, or the next business day if the 5th day of the month falls on a weekend or holiday observed by the City of El Paso. The first and last months of this Lease may contain a report on a partial month if this Lease is not in effect for a full calendar month for either of those two months. Each report shall include, but not be limited to the date, time and location of each spay/neuter procedure, number of spay/neuter procedures for the month, charge per surgery and number of City of El Paso voucher surgeries performed that month in the vehicle included in Attachment "A".
- 2.7.1 In the event that Lessor, by and through the City Manager or designee, disputes Lessee's monthly report, Lessor may audit said report and Lessee shall provide any and all accounting records necessary for the Lessor to perform said audit within five (5) days of a request for audit by Lessor, unless the 5th day falls on a weekend or holiday observed by the City in which case the audit must be performed on the following business day. Should the numbers derived by the Lessor's audit differ from Lessee's monthly reported numbers, the Lessor's numbers shall control.
- 2.7.2 In the event Lessee fails to provide Lessor's Director of Animal Services, or designee with the required written reports described in Section 2.7, said failure shall constitute an event of default and shall be grounds for termination of the Lease.

- 2.8 Lessee shall operate with sound business practices including purchasing, payroll management, inventory control, budgeting, financial reporting, and accounting for expenses and revenues according to generally accepted accounting principles.

ARTICLE III. CONDITION OF EQUIPMENT

- 3.1 Condition of Equipment. Lessee accepts Equipment in the condition in which it is transferred to Lessee. Lessee shall be responsible for any and all inspections of the Equipment prior to Lessee transporting the Equipment. Lessor makes no representations and warranties as to the condition of the Equipment and makes no guarantees as to its fitness for any particular purpose.

ARTICLE IV. CONSIDERATION

- 4.1 Lessor shall provide its Equipment for Lessee's use in exchange for the value of the spay/neuter procedures that Lessee shall conduct during the term of this Lease, which shall be a minimum of two hundred and forty (240) non-City-issued voucher procedures at the sterilization cost of EIGHTY AND NO/100 (\$80.00) per procedure. This non-monetary consideration, the reduction of the feral animal population and the enhanced protection of the health and safety of El Paso residents are deemed to constitute valuable consideration. Lessor shall not compensate Lessee for Lessee's spay/neuter services rendered under this Lease.

ARTICLE V. TRANSPORTATION COSTS

- 5.1 Lessee shall be responsible for all transportation costs of the Equipment from the City's Animal Services facility located at 5001 Fred Wilson Drive, El Paso, Texas 79906. Lessee shall not seek contribution from Lessor for any such costs.

ARTICLE VI. INSPECTION

- 6.1 Lessor shall have the right to request a status report on the condition of the Equipment, and Lessor shall provide said report to Lessor within five (5) days.
- 6.2 Lessor may also conduct safety and capacity inspections of the Equipment and Lessee's operations related to the Equipment at any reasonable time during the term of this Lease.

ARTICLE VII. TITLE TO EQUIPMENT

- 7.1 During the term and any extension of this Lease, Lessee acknowledges that the title of the Equipment shall at all times remain with the Lessor.

ARTICLE VIII. INDEPENDENT CONTRACTOR

- 8.1 The Parties are independent contractors. Nothing herein will be construed as creating the relationship of employer and employee between the Lessor and Lessee or between Lessor and the Lessee's employees. Lessor will not be subject to any obligations or liabilities of Lessee or his employees incurred in the performance of this contract unless otherwise herein authorized. Lessee is an independent contractor and nothing contained herein will constitute or designate the Lessee or any of its employees as employees as employees of the Lessor. Neither Lessee nor his employees will be entitled to any of the benefits established for Lessor's employees, nor be covered by Lessor's Workers' Compensation Program.

ARTICLE IX. INSURANCE AND INDEMNIFICATION

- 9.1 LIABILITY INSURANCE. Lessee, at its sole cost and expense shall, throughout the term of this Lease, provide and keep in force for the benefit of Lessor and Lessee, as their respective interests may appear, comprehensive general liability 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. These amounts are not a limitation upon the Lessee's agreement to indemnify and hold the Lessor harmless.
- 9.1.1 Lessee shall maintain said insurance with a solvent insurance company authorized to do business in Texas. The policy shall provide that the insurer will defend against all claims and lawsuits which arise and will pay any final judgment of a court of competent jurisdiction against the Lessor, its officers, agents, servants or employees and Lessee, his officers, agents, servants or employees. All policies shall name the City of El Paso, its officers, agents, servants, and employees as additional insureds to the full amount of the policy limits.
- 9.1.2 Lessee shall file a copy of the policy or certificate of liability insurance as herein set forth with the City Manager or designee prior to the sooner of five (5) days after the execution of this Lease or prior to the first spay/neuter procedure conducted in or with the Equipment pursuant to this Lease. Such policy or certificate shall provide that the insurance cannot be canceled or the amount of coverage changed without sixty (60) calendar days prior written notice to Lessor with ten (10) calendar days prior written notice as to non-payment of insurance policy premiums. Lessee shall provide Lessor with certificates evidencing renewal or replacement of said policy at least fifteen (15) calendar days prior to the expiration or cancellation of any such policy. Failure to keep the policy in full force

and effect throughout the term of the special privilege shall be grounds for termination of the Lease. Certificates of insurance that state that the insurer shall endeavor to give notice and/or that there shall be no liability for the failure to give the notice required herein shall not meet the requirements of this section.

9.1.3 Operation By Grantee Prohibited Upon Lapse, Suspension, Revocation, Cancellation or Reduction of Insurance Policy. Grantee shall not operate its service during any period for which:

9.1.3.1 its insurance lapses for any reason;

9.1.3.2 its insurance is suspended, revoked, or canceled; or

9.1.3.3 the amount of effective coverage of its insurance has been reduced below the minimum coverage amounts required by this franchise.

9.2 INDEMNITY. As a condition of this Lease, the Lessee or his insurer shall INDEMNIFY, DEFEND AND HOLD HARMLESS THE LESSOR, its officers, agents, servants and employees HARMLESS FOR AND AGAINST ANY AND ALL CLAIMS, CAUSES OF ACTION, LIABILITY, DAMAGES OR EXPENSE, (INCLUDING BUT NOT LIMITED TO ATTORNEY FEES AND COSTS) FOR ANY DAMAGE TO OR LOSS OF ANY PROPERTY, OR ANY ILLNESS, INJURY, PHYSICAL OR MENTAL IMPAIRMENT, LOSS OF SERVICES, OR DEATH TO ANY PERSON ARISING OUT OF OR RELATED TO THIS AGREEMENT. Without modifying the conditions of preserving, asserting, or enforcing any legal liability against the Lessor as required by the City Charter or any law, Lessor will promptly forward to Lessee every demand, notice, summons, or other process received by the Lessor in any claim or legal proceeding contemplated herein. Lessee will 1) investigate or cause the investigation of accidents or occurrences involving such injuries or damages; 2) negotiate or cause to be negotiated the claim as the Lessee may deem expedient; and 3) defend or cause to be defended on behalf of the Lessor all suits for damages even if groundless, false, or fraudulent, brought on because of such injuries or damages. Lessee shall pay all judgments in actions defended by Lessee pursuant to this section along with all attorney's fees and costs incurred by Lessor including interest accruing to the date of the payment by the Lessee, and premiums on any appeal bonds. Lessor, at its election will have the right to participate in any such negotiations or legal proceedings to the extent of its interest. Lessor will not be responsible for any loss or of damage to the Lessee's property from any cause.

ARTICLE X. TERM AND TERMINATION

10.1 Effective Date. The effective date of this Lease shall be April 12, 2016.

- 10.2 Term. The original lease term shall be begin on April 12, 2016 and end on April 11, 2016, and may be renewed for two (2) successive periods of one (1) full year each thereafter to begin on April 12th and ending on April 11th of each renewal period, upon Lessee's written notice of intent to renew the Lease sent to Lessor at least ninety (90) days prior to the end of the initial term or any renewal period, unless or until otherwise cancelled or terminated as provided for herein. The parties agree that if the price of the spay/neuter surgeries increases during the initial period or any renewal period, the number of surgeries required may change as well.
- 10.3 Termination for Convenience. This Lease may be terminated without cause, for the convenience of either party, upon thirty (30) days written notice to the other party.
- 10.4 Termination for Lessee's Default. If Lessee fails to comply with any provision of this Lease, the Lessor may terminate this contract for default. Termination shall be effected by serving a notice of intent to terminate the Lease setting forth the manner in which Lessee is in default.
- 10.4.1 If the default is due to Lessee's failure to comply with the provisions of Section 2.7 of this Lease, the Lessor must provide Lessee with written notice of the default, and must allow Lessee a 5-day cure period which shall begin on the date of the Lessee's receipt of said notice. If Lessee is not able to cure the default in that 5-day period, this Lease shall terminate at the end of the cure period.
- 10.4.2 If Lessee's default is due to anything other than Lessee's failure to comply with Section 2.7 of this Lease, Lessor must provide Lessee with written notice of the default, and must allow Lessee a 20-day cure period which shall begin on the date of Lessee's receipt of said notice. If Lessee is not able to cure the default in that 20-day period, this Lease shall terminate at the end of said cure period.
- 10.4.3 Lessor shall have the right to immediately terminate the Lease for default if Lessee violates any local, state, or federal laws, rule or regulations that relate to the performance of this Lease.
- 10.5 Termination for Lessor's Default. If Lessor fails to perform any of its duties under this contract, Lessee may deliver a written notice to the City Manager or designee, describing the default, specifying the provisions of the Lease under which Lessee considers the Lessor to be in default and setting forth a date of termination not sooner than ninety (90) days following receipt of said notice. Lessee at its sole option may extend the proposed date of termination to a later date. If Lessor fails to cure such default prior to the proposed date of termination, Lessee may terminate its performance under this Lease as of such date.
- 10.6 Return of Equipment. Upon conclusion or termination of this Lease, Lessee shall return the items listed as Fixed Equipment on Attachment "A" to

Lessor in good working condition, ordinary wear and tear excepted. Once the items listed as Expendable Equipment on Attachment "A" are no longer in good working condition, Lessee shall provide an accounting to Lessor indicating which of said items are no longer usable, and shall replace those items at no cost to Lessor. Items listed as Expendable Equipment that appear on an accounting in accordance with this paragraph and are replaced by Lessee, shall remain with Lessee upon conclusion or termination of this Lease.

- 10.7 Termination shall be without prejudice to any obligation by one party to the other, which shall have accrued and be owing prior to such termination. Upon termination of this Lease, Lessee shall deliver to the Lessor all reports and other materials related to this Lease created prior to the date of such termination.
- 10.8 Lessee agrees that he shall retain records relevant to this Lease for a period of three (3) years after termination of this Lease, and Lessor shall have the right to examine and copy any directly pertinent books, computer and digital files, documents, papers, and records of Lessee involving transactions relating to this Lease. Lessee agrees that Lessor shall have access during normal working hours to all necessary Lessee' facilities, and shall be provided adequate and appropriate workspace in order to conduct audits in compliance with the provisions of this section. Lessor shall give Lessee reasonable advance notice of intended audits. Lessor shall pay Lessee for reasonable costs of any copying that Lessor performs on Lessee's equipment or requests Lessee to provide.

ARTICLE XI. REMEDIES & FORCE MAJEURE

- 11.1 Rights and Remedies. The duties and obligations imposed by this Lease and the rights and remedies available herein, shall be in addition to and without limitation of any duties, obligations, rights and remedies otherwise imposed or available by law.
- 11.2 Force Majeure. If by reason of force majeure, either party hereto will be rendered unable wholly or in part to carry out its obligations under this Lease then such party will give notice and full particulars of such force majeure in writing to the other party within a reasonable time after occurrence of the event or cause relied upon, and the obligation of the party giving such notice, so far as it is affected by such force majeure, will be suspended for only thirty (30) days during the continuance of the inability then claimed, except as hereinafter provided, but for no longer period, and such party will try to remove or overcome such inability with all reasonable dispatch.
- 11.2.1 The term force majeure as employed herein, will mean acts of God, strikes, lockouts, or other industrial disturbances, acts of public enemies, orders of any kind of government of the United States or the State of Texas or any civil or military authority, insurrections, riots, epidemics, landslides, lightning, earthquake, fires, hurricanes, storms, floods, washouts, droughts, arrests, restraint of government and people, civil disturbances or explosions.

It is understood and agreed that the settlement of strikes and lockouts will be entirely within the discretion of the party having the difficulty, and that the above requirement that any force majeure will be remedied with all reasonable dispatch will not require the settlement of strikes and lockouts by acceding to the demands of the opposing party or parties when such settlement is unfavorable in the judgment of the party having the difficulty. If a party is unable to comply with the provisions of this contract by reason of force majeure for a period beyond thirty (30) days after the event or cause relied upon, then upon written notice after the thirty (30) days, the affected party shall be excused from further performance of this Lease.

ARTICLE XII. GENERAL PROVISIONS

- 12.1 Lessee may not assign, delegate, sell, transfer, sublet, pledge or otherwise encumber any interest in this Lease or the Equipment.
- 12.2 If any paragraph, statement, clause or provision of this Lease is construed or interpreted by a court of competent jurisdiction to be void, illegal or unenforceable, such decision shall affect only those paragraphs, statements, clauses or provisions.
- 12.3 The parties will strictly comply with all laws of the State of Texas along with any applicable provisions of Federal law or the City Charter or any ordinance of the City of El Paso, including but not limited to, the American with Disabilities Act, the Occupational Safety and Health Act or any environmental laws. Lessee further agrees that it, its employees, officers, agents and subcontractors will not engage in any employment practices that have the effect of discriminating against employees or prospective employees because of sex, race, religion, age, disability, ethnic background or national origin, or political belief or affiliation of such person, or refuse, deny, or withhold from any person, for any reason directly or indirectly, relating to the race, gender, gender identity, sexual orientation, color, religion, ethnic background or national origin of such person, any of the accommodations, advantages, facilities, or services offered to the general public by place of public accommodation.
- 12.4 The parties agree that the venue for any litigation arising from this Lease will lie in El Paso, El Paso County, Texas.
- 12.5 No amendment or modification of this Lease or any provision of this Lease shall be effective unless in writing and signed by both parties.
- 12.6 Additional Remedy for Health or Safety Violation. If the Lessor, by and through its City Manager or designee, determines that Lessee's default constitutes an immediate threat to the health or safety of City of El Paso employees or members of the public he may give written notice to Lessee of such determination giving Lessee a reasonable opportunity to cure the default which shall be a period of time not less than twenty-four (24) hours. If Lessee has not cured the violation within the time stated in the notice, the Lessor shall have the right to terminate the

Lease immediately.

- 12.7 Workers' Compensation. For the duration of this Lease and any extension hereof, Lessee shall carry Workers' Compensation and Employers' Liability Insurance in the amount required by Texas law.
- 12.8 The failure on behalf of either party at any time to require performance by the other party of any provision of this Lease, under no circumstances will affect the right of the respective party to require performance of that provision. Any waiver on behalf of either party of the non-performance of any provision of this Lease will not be considered as a waiver of continuing or future non-performance of any provision or as a waiver of any other right in accordance with this Lease.
- 12.9 Governing Functions. The parties expressly agree that in everything relating to this Lease, Lessor is performing governmental functions, as defined by the Texas Tort Claims Act.
- 12.10 Each party has had the opportunity to be represented by counsel of its choice in negotiating this Lease. This Lease shall therefore be deemed as to have been negotiated and prepared at the joint request, direction, and construction of the parties, at arms' length, with the advice and consultation of legal counsel, and will be interpreted in accordance with its terms without favor to any party.
- 12.11 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 listed 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: City Manager's Office
P.O. Box 1890
El Paso, Texas 79950-1890

COPY TO: City of El Paso
Department of Animal Services
Attn: Director
5001 Fred Wilson Drive
El Paso, Texas 79906

DR. MEDINA: Dr. Alvaro Medina, DVM
2053 Sun Chariot
El Paso, TX 79938

- 12.12 The article headings contained in this Lease are for reference purposes only, and shall not in any way control the meaning or interpretation of this Lease.
- 12.13 Entire Agreement. This Lease, including Attachment “A”, is the complete and exclusive agreement between the parties with respect to the subject matter of this Lease, superseding and replacing any and all prior agreements, communications, and understandings (both written and oral) regarding the subject matter of this Lease, all promises, representations, and understandings relative hereto being herein merged. No course of prior dealings between the parties and no usage of the trade will be relevant to supplement or explain any term used in this Lease.
- 12.14 Each person signing below represents that he or she has read this Lease in its entirety (including any and all Attachments); understands its terms; is duly authorized to execute this Lease on behalf of the party indicated below; and agrees on behalf of such party that such party will be bound by those terms.

(Signatures follow on next page)

THE STATE OF TEXAS §
 §
COUNTY OF EL PASO §

EQUIPMENT LEASE AGREEMENT

Signature Page

Executed on this _____ day of April, 2016.

CITY OF EL PASO

Tomás González
City Manager

DR. ALVARO MEDINA, DVM

Name Printed: Dr. Alvaro Medina, DVM

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

Josette Flores
Assistant City Attorney

Kurt Fenstermacher, Interim Director
Animal Services Department

ATTACHMENT "A"

EQUIPMENT

CITY VEHICLE #01118 DESCRIPTION: 2001 Winnebago Indus Adventure 30' (white)

MILEAGE: _____ LICENSE PLATE NO: 817 448

VIN: 1FCMF53S710A05496

Spay/Neuter Van Inventory

FIXED INVENTORY:

25 Stainless steel cages (8 double cages =16 + 9 small cages = 25)

1 Small fridge

1 Surgical table

1 Prep. table

1 Anesthesia machine (wall mount)

1 Surgical light

1 Mayo instrument stand

1 Drip bucket

1 Platform scale

EXPENDABLE INVENTORY:

10 Spay surgery packs (large *)

6 Spay surgery packs (small **)

1 Needle holder

1 towel clamp

1 Ovary hook

1 Scalpel handle

1 Mayo scissors

4 Rochester Carmal Forceps (*)

1 Mosquito forceps

4 Kelly Forceps Straight (**)

1 Thumb forceps