



Real Estate Assets Department
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ELECTRIQUETTE MOTOR CART COMP R402RD-089-A00

Document Type

LEGAL DOCUMENTS



Sub - Category

AGREEMENTS



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CITY OF SAN DIEGO CONCESSION AGREEMENT

THIS CITY OF SAN DIEGO CONCESSION AGREEMENT ("Agreement") is entered into by and between THE CITY OF SAN DIEGO, a California municipal corporation ("CITY"), and ELECTRIQUETTE MOTOR CART COMPANY, a California corporation ("CONCESSIONAIRE"), to be effective as of NOV. 2, 2015 ("Effective Date"), when signed by the parties and approved by the San Diego City Attorney.

RECITALS

WHEREAS, CITY issued a request for proposals ("RFP") to seek out proposers to provide a wicker cart concession operation similar to the wicker carts used during the 1915 Panama – California Exposition at Balboa Park, San Diego, CA 92101 ("Balboa Park"), and to provide the carts and the rental kiosks and storage facilities for the carts. The goal of the RFP was to identify a cart concession that will enhance visitor experience at Balboa Park.

WHEREAS, in its review of CONCESSIONAIRE's proposal, CITY determined that the proposal was responsive to the RFP and offered CITY best value, and that CONCESSIONAIRE would provide the services requested by CITY; and

WHEREAS, CITY and CONCESSIONAIRE desire to enter into an agreement to memorialize the RFP award and to establish terms and conditions for CONCESSIONAIRE's operation of the wicker cart concession.

FOR VALUABLE CONSIDERATION, the sufficiency and receipt of which is acknowledged, the parties agree as follows:

1. **Definitions.** As used in this Agreement, the following terms shall be defined as follows:
 - a. **"Concession Carts"** shall mean rechargeable, battery-powered electric wicker carts with a maximum speed of 3.5 mph that are replicas of the Osborne Electricquette wicker cart system operated in Balboa Park in 1915, and as substantially depicted on Exhibit "A" attached hereto.
 - b. **"Concession Locations"** shall mean the following locations in CITY's Balboa Park:
 - (1) The designated route of the Concession Carts ("Cart Route") as depicted on Exhibit "B" attached hereto.
 - (2) CONCESSIONAIRE-provided vehicle storage and work area located in two (2) approximately 8-foot by 20-foot storage containers allowing for the storage of vehicles in each container ("Storage Containers"), and as substantially depicted on Exhibit "C" attached hereto, to be located at three (3) contiguous parking spaces just west and south of the Reuben H. Fleet Science Center as depicted on

Exhibit "D" attached hereto ("Parking Area).

- (3) CONCESSIONAIRE-provided mobile rental kiosks modeled after the original 1915 Electriquette rental kiosks, as substantially depicted on Exhibit "E" attached hereto ("Rental Kiosk"), to be located at no more than two (2) locations in Balboa Park as shown on Exhibit "F" attached hereto.
- (4) An asphalt service pathway, not to exceed five (5) feet-wide, between the Parking Area and the Rental Kiosk on the east end of El Prado ("Service Pathway"), to be located and situated as depicted on Exhibit "G" attached hereto.
- (5) Other concession locations as may from time to time be designated and approved in writing by CITY.

For purposes of this Agreement, "Concession Locations" shall refer to all Concession Locations, individually and collectively, and all portions thereof.

Notwithstanding any of the foregoing, existing permitted Concession Locations may be changed at the reasonable discretion of CITY with thirty (30) days prior written notice to CONCESSIONAIRE.

- c. **"Concession Use"** shall mean: renting Concession Carts; operating and maintaining the Concession Carts, the Storage Containers, the Rental Kiosk(s), the Service Pathway, and the concession described herein; the sale of collateral, Concession Cart-related materials (participant photos, etc.); and such other uses as may be first approved by CITY in writing, and for no other purpose whatsoever.
- d. **"CONCESSIONAIRE's Address for Notices"** shall be:

**Electriquette Motor Cart Company
Attention: Sandor W. Shapery, President
402 West Broadway, Suite 1220
San Diego, CA 92101**

- e. **"Term"** shall mean three (3) years, commencing on Effective Date. "Agreement Year" shall mean each twelve (12)-month period during the Term. Either party may terminate this Agreement for any reason upon sixty (60) days written notice to the other party.
2. **Occupancy.** Subject to the terms and conditions of this Agreement, CITY hereby grants permission to CONCESSIONAIRE and its officers, employees, agents, guests, licensees, and contractors to enter upon and occupy the Concession Locations for the purpose of preparing the premises for use as specifically conditioned herein and thereafter solely for the Concession Use. Notwithstanding the foregoing, no Concession Carts may be operated under this Agreement until CITY is provided proof that all such carts are certified for compliance with this Agreement and all applicable laws and regulations.

3. Use of Concession Locations. CONCESSIONAIRE shall use the Concession Locations solely and exclusively for the Concession Use, and for no other purpose whatsoever without CITY's written consent in each instance. CONCESSIONAIRE shall continuously occupy and use the Concession Locations throughout the Term, and shall diligently and regularly furnish service to CITY and the public by conducting the Concession Use in a creditable manner in conformity with this Agreement and all applicable rules and regulations of CITY. CONCESSIONAIRE acknowledges that the Cart Route and the Service Pathway may be used by CITY and third-party park users, and that said areas shall not be exclusive to CONCESSIONAIRE.
4. Schedule of Operations. A regular schedule of days and hours of operation for the Concession Use shall be established by CONCESSIONAIRE to best serve the public as set forth in Exhibit "H" – Schedule of Days and Hours of Operation ("Schedule") attached hereto. Any changes in the Schedule shall be subject to the prior written approval of CITY. CONCESSIONAIRE shall comply with said Schedule, and all terms and conditions stated therein.
5. Concession Cart Rental Fees. A schedule of Concession Cart rental fees shall be established by CONCESSIONAIRE and shall be submitted to CITY on the Effective Date and thereafter annually on the anniversary of the Effective Date. All such fees shall be subject to CITY's reasonable review and consent, in each instance.
6. Rent.
 - a. Minimum Rent. The annual minimum rent established for the Term following the effect date of this Agreement is Twelve Thousand Dollars (\$12,000) ("Minimum Rent"). Minimum Rent shall be paid in twelve (12) equal monthly installments of One Thousand Dollars (\$1,000) each. If the annual minimum rent is greater than the annual percentage rent on an Agreement Year basis, then the annual minimum rent minus any percentage rent paid is required to be paid within thirty (30) days of the anniversary of that Agreement Year. It is the intent of this provision that CONCESSIONAIRE shall pay the annual Minimum Rent as a guarantee against the percentage rent requirement and that the greater of the two requirements, minimum or percentage, whichever occurs throughout the Term and Extension Terms, if any, shall prevail on an annual basis.
 - b. Minimum Rent Adjustment. Effective at the beginning of the first day of the second (2nd) Agreement Year of this Agreement, the annual Minimum Rent shall be eighty percent (80%) of the annual average of actual rents paid or accrued during the prior year preceding the adjustment date. It is acknowledged that such adjustments shall be calculated by CITY upon completion of payments due for the preceding rental period in order to determine the amount of the adjustment to be effective on the dates stated herein. Until such calculations are completed, CONCESSIONAIRE shall continue paying the annual Minimum Rent at the prior rate. Any additional rents determined by the adjustment to be due for the year

previously paid at the prior rate shall be paid to CITY within thirty (30) days following written notice or within thirty (30) days following the anniversary of that Agreement Year, whichever is later. IN NO EVENT SHALL ANY SUCH MINIMUM RENT ADJUSTMENT RESULT IN A DECREASE IN THE MINIMUM RENT REQUIREMENT IN EFFECT IMMEDIATELY PRIOR TO THE ADJUSTMENT DATE.

- c. Percentage Rent. CONCESSIONAIRE shall pay percentage rent, calculated on a calendar month basis and to consist of ten percent (10%) of the Gross Revenue (as defined below) resulting from the Concession Use ("Percentage Rent").
- d. Payment Schedule and Procedure. Within three (3) days of receiving Gross Revenue (as defined below), CONCESSIONAIRE shall notify CITY of such receipt and the following payment procedure shall commence. CONCESSIONAIRE shall pay the Minimum Rent on or before the last day of the calendar month following the calendar month in which the Gross Revenue was earned. Concurrent with each payment of Minimum Rent, CONCESSIONAIRE shall at the same time provide CITY with an accurate and correct statement, in a form selected by CITY, of all gross receipts derived or resulting from the Concession Use and all Percentage Rent accordingly due for the subject month. The statement shall be signed by CONCESSIONAIRE or its authorized agent attesting and warranting to the accuracy thereof.
- e. Gross Revenue. "Gross Revenue" as used in this Agreement, shall include all income resulting from the Concession Use from whatever source derived whether received or to become due; provided, however, Gross Revenue shall not include federal, state or municipal taxes collected from the consumer (regardless of whether the amount thereof is stated to the consumer as a separate charge) and paid over periodically by CONCESSIONAIRE to a governmental agency accompanied by a tax return or statement as required by law. Possessory interest taxes or other property taxes shall not be deducted by CONCESSIONAIRE in computing Gross Revenue. Gross Revenue shall not include refunds for goods returned for resale or refunds of deposits. The amount of such taxes and refunds shall be clearly shown on the books and records of CONCESSIONAIRE. The Percentage Rent shall be calculated and paid by CONCESSIONAIRE on the basis of Gross Revenue whether the revenue is received by CONCESSIONAIRE or by any subcontractor, permittee or licensee, or their agents, and all Gross Revenue received by any subcontractor, permittee, licensee or other party as a result of use or occupancy of the Concession Locations or the operation thereof shall be regarded as Gross Revenue of CONCESSIONAIRE for the purpose of calculating the Percentage Rent hereunder required to be paid by CONCESSIONAIRE to CITY, less credit card discounts or fees actually paid out to credit card companies, and except as may be otherwise specified by or pursuant to this Agreement.

7. Place of Payment. All amounts due under this Agreement shall be made payable to "City Treasurer" and delivered to the Office of the City Treasurer, Civic Center Plaza Building, 1200 Third Avenue, First Floor, San Diego, CA 92101, or mailed with an invoice to:

THE CITY OF SAN DIEGO
Office of the City Treasurer
P.O. Box 129030
San Diego, CA 92112-9030

8. Delinquent Payments. Minimum Rent and Percentage Rent shall be collectively referred to as "Monthly Rent." If CONCESSIONAIRE fails to pay Monthly Rent when due, CONCESSIONAIRE shall pay, in addition to the unpaid Monthly Rent, five percent (5%) of the delinquent Monthly Rent. If the Monthly Rent is still unpaid after fifteen (15) days past due, CONCESSIONAIRE shall pay an additional five percent (5%) (being a total ten percent (10%)), which is agreed by the parties to be appropriate to compensate CITY for the cost of servicing the delinquent account. In no event shall the charge for late payments of Monthly Rent be less than Twenty-Five Dollars (\$25). After thirty (30) days past due, unpaid amounts due CITY under this Agreement may be referred to the San Diego City Treasurer for collection, and shall be subject to San Diego Municipal Code section 22.1707, as may be amended from time to time. CONCESSIONAIRE shall pay to CITY any collection-referral fee and all other fees and charges plus interest as may then be charged by the San Diego City Treasurer under authority of the San Diego Municipal Code. Acceptance of late charges and any portion of the late payment by CITY shall neither constitute a waiver of CONCESSIONAIRE'S default with respect to late payment nor prevent CITY from exercising any other rights and remedies available at law or in equity. As required by law, CONCESSIONAIRE is hereby notified that a negative credit report may be submitted to a credit reporting agency if amounts due CITY are not paid when due.

9. Default and Remedies.

- a. Default. CONCESSIONAIRE shall be in default of this Agreement if any of the following occurs:
- i. CONCESSIONAIRE fails to make any payment required under this Agreement when due;
 - ii. CONCESSIONAIRE breaches any of its obligations under this Agreement, other than those requiring payment to CITY, and fails to correct the breach within thirty (30) days following written notice thereof from CITY, or if not curable within thirty (30) days, fails to commence to correct the breach within thirty (30) days and diligently pursue the cure to completion;
 - iii. CONCESSIONAIRE voluntarily files or involuntarily has filed against it any petition under any bankruptcy or insolvency act or law, and such proceeding is not dismissed within sixty (60) days thereafter;

- iv. CONCESSIONAIRE is adjudicated a bankrupt; or
 - v. CONCESSIONAIRE makes a general assignment for the benefit of creditors.
- b. Remedies. Upon CONCESSIONAIRE default, CITY may, deliver to CONCESSIONAIRE (or any person claiming rights through CONCESSIONAIRE) a thirty (30)-day written "Notice of Intent to Terminate" this Agreement. If CITY delivers such a "Notice of Intent to Terminate" and CONCESSIONAIRE (or the persons claiming rights through CONCESSIONAIRE) does not cure the default within the thirty-day period, CITY may, upon three (3) days prior notice delivered to CONCESSIONAIRE (or any person claiming rights through CONCESSIONAIRE) terminate this Agreement and all rights of CONCESSIONAIRE (and/or each person claiming rights through CONCESSIONAIRE) to the Concession Locations or to possession of the Concession Locations. Upon termination, CITY may enter and take possession of the Concession Locations, and may recover from CONCESSIONAIRE the sum of:
- (a) the worth at the time of award of any unpaid rent that was due at the time of termination;
 - (b) the worth at the time of award of the amount by which the unpaid rent that would have been earned after termination until the time of award exceeds the amount of rental loss, if any, that CONCESSIONAIRE affirmatively proves could have been reasonably avoided;
 - (c) the worth at the time of award of the amount by which the unpaid rent for the balance of the Term after the time of award exceeds the amount of rental loss, if any, that CONCESSIONAIRE affirmatively proves could be reasonably avoided;
 - (d) any other amount necessary to compensate CITY for all the detriment proximately caused by CONCESSIONAIRE'S breach and default, or that in the ordinary course of things, would be likely to result; and
 - (e) all other amounts in addition to or in lieu of those previously stated as may be permitted at law or in equity.

As used in clauses (a) and (b), above, the "worth at the time of award" is computed by allowing interest at the rate of ten percent (10%) per annum. As used in clause (c), above, the "worth at the time of award" is computed by discounting that amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus two percent (2%). As used in this section, the term "rent" shall include rent and any and all other amounts payable by CONCESSIONAIRE under this Agreement.

- c. Abandonment by CONCESSIONAIRE. If CONCESSIONAIRE abandons the Concession Locations, this Agreement shall continue in effect as long as CITY does not terminate this Agreement, and CITY may enforce all of its rights and remedies

under this Agreement, including without limitation the right to recover rent as it becomes due, plus damages.

- d. Waiver. Any waiver by CITY of a breach or default by CONCESSIONAIRE shall not be a waiver of any other breach or default. No waiver shall be valid and binding unless in writing and executed by CITY. CITY's delay or failure to enforce a right or remedy shall not be a waiver of that or any other right or remedy under this Agreement. The enforcement of a particular right or remedy for a breach or default shall not waive any other right or remedy for the same breach or default, or for any other or later breach or default. CITY's acceptance of any rents shall not be a waiver of any default preceding such payment. CONCESSIONAIRE acknowledges that the Concession Locations are part of publicly-owned property held in trust for the benefit of the citizens of CITY of San Diego, and that any failure by CITY to discover a breach or default, or take prompt action to require the cure of any breach or default, shall not result in an equitable estoppel, but CITY shall at all times, have the legal right to require the cure of any breach or default. CITY's acceptance of a partial payment of rent shall not constitute a waiver of the balance of the rent payment due.
10. Unauthorized Use Charge. CONCESSIONAIRE shall pay CITY one hundred (100%) of the gross receipts from any use of the Concession Locations that is not allowed by this Agreement, regardless of any related penalties charged CONCESSIONAIRE by competent governmental authorities. Such unauthorized use charge shall be payable to CITY within thirty (30) days after CONCESSIONAIRE receives such gross receipts. No unauthorized use charges shall satisfy or credit against any other rent obligations of CONCESSIONAIRE under this Agreement. The unauthorized use charge shall otherwise be considered "rent" under this Agreement, and shall be subject to all costs and penalties for delinquent payments hereunder. The existence of such unauthorized use charge and CITY's acceptance thereof shall not constitute authorization for the use in question, and shall not waive any of CITY's rights under this Agreement.
11. CITY's Right to Inspect and Audit. CONCESSIONAIRE shall keep all of its books of account, records and supporting documentation throughout the Term plus five (5) years. CONCESSIONAIRE shall make such books, records and documentation available for inspection and audit by CITY in one location within the County of San Diego. CONCESSIONAIRE shall maintain separate books and records related to CONCESSIONAIRE's possession, use and/or occupancy of the Concession Locations. Upon reasonable prior notice, CITY may inspect and audit the operation of CONCESSIONAIRE's business in connection with its possession, use and/or occupancy of the Concession Locations and all other business activities conducted on the Concession Locations, and all financial transactions in connection with CONCESSIONAIRE's possession, use and/or occupancy of the Concession Locations as CITY may deem necessary, in its sole discretion, to protect CITY's rights under this Agreement. If required by competent governmental authority, CONCESSIONAIRE shall promptly deliver to CITY, at CITY's reasonable request and at CONCESSIONAIRE's sole cost and expense, any and all data reasonably needed to fully comply with such authority's requirements

related to CONCESSIONAIRE's possession, use and/or occupancy of the Concession Locations and all other business activities conducted on the Concession Locations, and all financial transactions in connection with CONCESSIONAIRE's possession, use and/or occupancy of the Concession Locations. CITY's right to audit CONCESSIONAIRE's books and records shall terminate for each Agreement Year on the date five (5) years after the end of that Agreement Year.

- a. Audit Cost. The full cost of each CITY audit shall be borne by CITY, unless one or both of the following conditions exists, in which case CONCESSIONAIRE shall reimburse CITY for all costs of the audit:
 - i. For any given Agreement Year, if an audit reveals an underpayment of rent of more than five percent (5%), calculated as the difference between the rent reported as payable by CONCESSIONAIRE and the rent payable as determined by the audit; or
 - ii. CONCESSIONAIRE failed to maintain true, accurate and complete books, records, accounts and supporting source documents as required by this Agreement.
- b. Rent Deficiency and Overpayment. Any rent deficiency determined by the audit shall be delinquent rent, subject to all penalties and remedies provided to CITY for delinquent rent under this Agreement. CITY shall credit any overpayment determined by the audit, without interest, against future rents due under this Agreement. If no future rents are then due under this Agreement, CITY shall refund to CONCESSIONAIRE any overpayment determined by the audit, without interest, within sixty (60) days after CITY's certification of the audit.

12. Installation of Concession Improvements and Equipment.

For purposes of the following provisions, "CITY Contact" shall mean CITY's Park and Recreation Department District Manager (or designee), who currently is Michael Ruiz (619-235-1124) or Casey Smith (619-235-1115).

- a. Improvement Concepts. Notwithstanding any other provision herein, CITY approves the following improvements and installations to be done by CONCESSIONAIRE:
 - i. The Service Pathway;
 - ii. The two (2) Rental Kiosks;
 - iii. An electrical subpanel and meter, to be located on/at the main electric infrastructure on the Reuben H. Fleet Science Center building;
 - iv. An underground electrical line from the subpanel and meter, to the Storage Container charging facility(s); and
 - v. The Storage Containers,

all subject to and on condition that CONCESSIONAIRE submit to CITY Contact plan and design sheets showing construction specifications, precise locations, and other relevant information deemed necessary by CITY, and that CONCESSIONAIRE obtain all required permits and regulatory approvals. CITY reserves the right to impose conditions and require modifications and adjustments to all such materials, in CITY's sole discretion.

- b. Work Schedule. CONCESSIONAIRE shall contact CITY Contact a minimum of five (5) working days prior to the start date of any improvement or installation. At that time, CONCESSIONAIRE shall submit a work schedule to CITY Contact that includes a description of the work to be performed, the specific location of such work, and the dates and times of such work. CITY reserves the right to impose reasonable restrictions and scheduling conditions for any activities related to the improvements or installations, and no work shall commence without the prior verbal approval of the CITY Contact. Notwithstanding the foregoing, CONCESSIONAIRE shall notify CITY Contact a minimum of ten (10) working days prior to start of any work associated with the concession that may affect the use of any public access in any portion of Balboa Park.
- c. Pre-Construction Meeting. A minimum of five (5) working days prior to commencement of any work, CONCESSIONAIRE shall invite CITY Contact to a pre-construction meeting. This meeting shall establish points of contact, define means and methods of all improvements or installations, and coordinate CONCESSIONAIRE's work schedule with scheduled activities and Park and Recreation Department operations in and adjacent to the Concession Locations.
- d. Contingency. CONCESSIONAIRE must validate, to the satisfaction of CITY, that it has all the necessary funds plus a 5% contingency readily available to complete subject improvements and installation before beginning any such work.
- e. Security and Safety of Work Areas. CONCESSIONAIRE shall bear sole responsibility for the security and safety of work areas relating to any work performed under the direction of CONCESSIONAIRE. CONCESSIONAIRE shall be responsible for the maintenance, cleanup, and securing of the work areas, as appropriate, during and immediately following each day's work to ensure security and safety. CITY has no obligation to provide oversight of any improvements or installations or staffing or resources for the maintenance of the Concession Locations.
- f. Repair. CONCESSIONAIRE shall be responsible, at its sole cost and expense, for the repair or replacement of any damage caused by CONCESSIONAIRE's improvement or installation work. CONCESSIONAIRE shall comply with the direction of CITY Contact or other competent CITY staff with respect to the method of any repairs or replacement.

- g. Vehicular Traffic. All vehicular traffic shall be confined to concrete, asphalt or decomposed aggregate surfaces unless otherwise approved in writing by CITY Contact prior to the commencement of any improvement or installation work.
- h. Subcontractors. CONCESSIONAIRE shall provide to CITY Contact a list of all contractors and subcontractors, including name, address, email, fax and phone number. All construction work requiring a licensed contractor pursuant to the Contractors' State Licensing Laws (California Business & Professions Code sections 7000-7191) shall be done by contractors licensed within the State of California.
- i. Grading and Barriers. CONCESSIONAIRE shall not change the surface grade or construct any permanent barriers within the Concession Locations. Any violations shall be corrected by CONCESSIONAIRE at its sole expense to the satisfaction of CITY.
- j. Construction Guidelines. All new construction must comply with CITY design guidelines, regulations, California Building Code Title 24, and Americans with Disability Act standards. Any items that are not pre-approved or not to code will be rejected at the time of walk-through, and must be removed and/or corrected at CONCESSIONAIRE's expense. It is the responsibility of CONCESSIONAIRE to obtain the necessary permits prior to commencement of any work, to obtain any inspections required for the work involved and to ensure all work will adhere to all laws, rules, and regulations, including California Building Code Title 24, ADA, the latest edition of the Park and Recreation Department's *Consultant's Guide to Park Design and Development*, *San Diego Standard Drawings for Public Works Construction*, the *Standard Specifications for Public Works Construction* (Greenbook, 2009 edition), the 2012 City of San Diego "Whitebook" supplement to the Greenbook (Document No. PITS090110-1), City of San Diego regulations and other local agencies regulations. Additionally, all construction must comply with Balboa Park policies and the Secretary of the Interior's "Standards for the Treatment of Historic Properties" and "Guidelines for the Treatment of Cultural Landscapes."
- k. Final Walkthrough. CONCESSIONAIRE shall conduct a final walkthrough with CITY Contact to review and inspect all improvements and installations, in each instance, for compliance with this Agreement and with Park and Recreation Department standards. All items noted not to be in compliance with that certain *Consultant's Guide to Park Design and Development*, and any concerns identified by CITY Contact as being incomplete or unacceptable, shall be corrected to the satisfaction of CITY prior to final acceptance of the work that is performed.

13. Conduct of Concession.

- a. CONCESSIONAIRE and its employees shall at all times conduct themselves and the Concession Use in a professional, creditable, and competent manner.

CONCESSIONAIRE shall comply with all permitting requirements.
CONCESSIONAIRE shall thoroughly train all employees in their duties, all requirements of this Agreement, and all applicable rules and regulations of CITY.

- b. All CONCESSIONAIRE improvements, installations, operations, and activities under this Agreement shall be at CONCESSIONAIRE's sole cost and expense.
- c. Consistent with the concepts and provisions stated in CONCESSIONAIRE's RFP response, CONCESSIONAIRE shall do all of the following throughout the Term:
 - i. Develop and interface an audio player that can be rented as an adjunct to the Concession Cart experience allowing the passengers to learn the history and details of each landmark viewed along the Cart Route;
 - ii. Closely monitor customer experience on an ongoing basis in order to optimize customer enjoyment and education about Balboa Park and its history;
 - iii. Monitor Concession Cart utilization rates and trends, pricing strategies, and customer profiles to make operational adjustments to maximize the customer experience, perception of value, and to maximize revenues;
 - iv. Produce and sell collateral materials such as souvenir photographs of customers sitting in a Concession Cart and other CITY-approved takeaways to enhance and market the Concession Cart experience;
 - v. After CITY approval of materials, advertise other Balboa Park operations and give notice of Balboa Park events utilizing an 18-inch by 24-inch public service notice and advertising space to be provided on the back of each Concession Cart, and all in compliance with CITY's Sign Ordinance (San Diego Municipal Code section 142.1201 *et seq.*);
 - vi. Provide boundaries for the Cart Route through the use of a "geo-fencing" boundary control system developed by CONCESSIONAIRE;
 - vii. Provide and maintain the Service Pathway, on condition that it that require minimal or no grading and not disturb the adjacent landscaping, along with installing and maintaining a "For Park Vehicles Only" sign thereon to dissuade the public from using it;
 - viii. Provide a driver training program for all Concession Cart drivers, to minimize the possibility of harm people and property in Balboa Park, with the requirement that all drivers execute an acknowledgment of passing the training program and be certified by CONCESSIONAIRE as trained Concession Cart drivers; and

- ix. Require each driver of a Concession Cart to read and sign a "Rules of Operation" and indemnity agreement prior to operating a Concession Cart. The "Rules of Operation" shall be established by CONCESSIONAIRE, to adequately advise participants regarding all applicable rules and regulations, and to best ensure safe operations of the Concession Carts.
 - d. Any modification of any of the above operational or conceptual aspects shall be subject to prior review and written approval of CITY in each instance.
 - e. CONCESSIONAIRE acknowledges that the Concession Use and activities under this Agreement shall be conducted in accordance with the historic setting of CITY's Balboa Park. Accordingly, aesthetics, "feel," and other components of the Concession Use and activities under this Agreement shall, to the extent practicable, reflect 'period' and other cultural and historic details of Balboa Park, and all activity under this Agreement shall conform to Balboa Park policies and the Secretary of the Interior's "Standards for the Treatment of Historic Properties" and "Guidelines for the Treatment of Cultural Landscapes."
14. Special Event Restrictions. CONCESSIONAIRE may be restricted from its Concession Use up to a maximum of ten (10) special events to be held annually at Balboa Park. CITY shall provide CONCESSIONAIRE a minimum of fifteen (15) days prior written notice of such events.
15. Governmental Approvals. By entering into this Agreement, neither CITY nor CITY's City Council is obligating itself to CONCESSIONAIRE or to any governmental agent, board, commission or agency with regard to any other discretionary action relating to CONCESSIONAIRE's occupancy, use, development, maintenance or restoration of the Concession Locations. "Discretionary action" includes without limitation re-zonings, variances, environmental clearances and all other required governmental approvals.
16. CITY's Consent, Discretion. CITY's consent or approval under this Agreement shall mean the written consent or approval of CITY's Mayor, or his or her designee ("Mayor"), unless otherwise expressly provided herein or required by law. CITY's discretionary acts hereunder shall be made in the Mayor's discretion, unless otherwise expressly provided or required by law.
17. Holdover. Any holding over by CONCESSIONAIRE after the expiration or earlier termination of this Agreement shall not be considered a renewal or extension of this Agreement. The occupancy of the Concession Locations after the expiration or earlier termination of this Agreement shall constitute a month-to-month tenancy at will, and all other terms and conditions of this Agreement shall continue in full force and effect
18. CONCESSIONAIRE's Waiver. CONCESSIONAIRE expressly waives any claim against CITY and its elected officials, officers, employees, representatives and agents for any burden, expense or loss, financial or otherwise, which CONCESSIONAIRE incurs as a result of CITY's revocation or termination of this Agreement.

19. Restoration of Concession Locations. Except as otherwise provided in this Agreement, prior to the expiration or as soon as practicable after termination of this Agreement, CONCESSIONAIRE shall restore the Concession Locations to their condition on the Effective Date, normal wear and tear excepted. Any restoration work requires CITY review and approval.
20. Superior Interests. This Agreement is subject to all liens, encumbrances, covenants, conditions, restrictions, reservations, contracts, agreements and licenses, easements and rights-of-way pertaining to the Concession Locations, whether or not of record. CONCESSIONAIRE shall obtain all licenses and agreements from such third parties as may be or become necessary or reasonably advisable to allow its use of the Concession Locations, relative to any such superior interest. If CONCESSIONAIRE's use of the Concession Locations is or becomes inconsistent or incompatible with a preexisting, superior interest, CONCESSIONAIRE shall take such actions and pay all costs and expenses necessary to remove such inconsistency or incompatibility to the satisfaction of the holder of the superior interest.
21. Maintenance of the Concession Locations. CONCESSIONAIRE shall, at CONCESSIONAIRE's sole cost and expense and to CITY's satisfaction, maintain the Concession Locations in good order and repair and in a safe, healthy and sanitary condition at all times during the Term. CITY shall not be required to make any improvements or repairs to the Concession Locations. CONCESSIONAIRE shall keep the Concession Locations free and clear of rubbish, debris and litter at all times.
22. Inspection. CITY may at all times enter and inspect the Concession Locations.
23. Utilities. CONCESSIONAIRE shall pay for all utilities and service and installation charges in connection with CONCESSIONAIRE's use of the Concession Locations. CONCESSIONAIRE shall install all utilities underground.
24. Improvements/Alterations. Except as otherwise provided in this Agreement, CONCESSIONAIRE shall not construct any improvements, structures or installations on the Concession Locations or in Balboa Park, and shall not alter the Concession Locations, without the express written consent of CITY. Except as required by law, CITY shall not be obligated to make any repair or assume any expense for any improvements or alterations to the Concession Locations.

calculated on a per diem basis using the rental rate in effect just prior to the expiration or termination of this Agreement.

- e. CITY's Right to Acquire Personal Property. If CONCESSIONAIRE wants to dispose of any of its personal property used in its operations on the Concession Locations upon expiration or termination of this Agreement, CITY shall have the first right to acquire such personal property.
25. Reservation of CITY Rights. All gas, oil, mineral, and water rights shall remain vested in CITY throughout the term of the Agreement. CITY shall have the right to develop said rights and to enter upon the Concession Locations to repair, maintain, or establish municipal services and to grant easements for public utilities and services. However, CITY may not unreasonably interfere with CONCESSIONAIRE'S' rights under this Agreement and must reimburse CONCESSIONAIRE for any physical damage to the improvements caused by the exercise of the rights reserved by CITY. CITY shall have the right to deny access to the Concession Locations of any CONCESSIONAIRE employee, agent, or contractor for any conduct offensive to the general public.
26. Insurance. CONCESSIONAIRE shall obtain and maintain throughout the Term, at its sole cost and expense, all insurance required by this Agreement. CONCESSIONAIRE's liabilities under this Agreement, including without limitation CONCESSIONAIRE's indemnity obligations, shall not be deemed limited in any way to the insurance coverage required herein. CONCESSIONAIRE's maintenance of the required insurance coverage is a material consideration for this Agreement. Notwithstanding any provision of this Agreement to the contrary, if CONCESSIONAIRE fails to maintain or renew the insurance coverage required herein, or fails to deliver evidence of same to CITY, CONCESSIONAIRE shall be in default of this Agreement. CONCESSIONAIRE shall not modify any policy or endorsement thereto which increases CITY's exposure to loss. CONCESSIONAIRE shall obtain and deliver to CITY's Real Estate Assets Department a current certificate of insurance and relevant endorsements for (and subject to CITY's written approval of same):
- a. Commercial General Liability Insurance ("CGL") written on an *ISO Occurrence form CG 00 01 07 98* or an equivalent form providing coverage at least as broad which shall cover liability arising from any and all personal injury, including death, and property damage with limits of at least Two Million Dollars (\$2,000,000) per occurrence, subject to an annual aggregate of at least Four Million Dollars (\$4,000,000). There shall be no endorsement or modification of the CGL limiting the scope of coverage for either insured vs. insured claims or contractual liability. All defense costs shall be outside the limits of the policy;
 - b. Commercial Automobile Liability Insurance, providing coverage for all bodily injury, including death, and property damage on an *ISO form CA 00 01 12 90* or a later version of such form or an equivalent form providing coverage at least as broad for a combined single limit of at least One Million Dollars (\$1,000,000) per occurrence. Such insurance shall cover liability arising out of any vehicle

(including owned, hired, and non-owned vehicles) operated in performing any and all work pursuant to this Agreement; and

- c. Workers' Compensation Insurance, as required by applicable laws, for all of CONCESSIONAIRE's employees who are subject to this Agreement, with employers' liability coverage with a limit of at least One Million Dollars (\$1,000,000), and an endorsement that the insurer waives the right of subrogation against The City of San Diego and its elected officials, officers, employees, representatives and agents.
- 26.1 Additional Insureds. To the fullest extent allowed by law, including without limitation California Insurance Code section 11580.04, each policy must be endorsed to include as an insured "The City of San Diego and its elected officials, officers, employees, representatives and agents" with respect to liability arising out of: (a) ongoing operations performed by CONCESSIONAIRE or on CONCESSIONAIRE's behalf; (b) CONCESSIONAIRE's products; (c) CONCESSIONAIRE's work, including without limitation CONCESSIONAIRE's completed operations performed by CONCESSIONAIRE or on CONCESSIONAIRE's behalf; or (d) the Concession Locations.
- 26.2 Primary and Non-Contributory. Each policy must be endorsed to provide that the insurance afforded by Commercial General Liability policies is primary to any insurance or self-insurance of The City of San Diego and its elected officials, officers, employees, representatives and agents as respects operations of the named insured. Any insurance maintained by The City of San Diego and its elected officials, officers, employees, representatives and agents shall be in excess of CONCESSIONAIRE's insurance and shall not contribute to it.
- 26.3 Severability of Interest. Each policy must be endorsed to provide that CONCESSIONAIRE's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability and shall provide cross-liability coverage.
- 26.4 Qualified Insurer(s). Except for the State Compensation Insurance Fund, all insurance required by this Agreement shall only be carried by insurance companies with a rating of at least "A-, VI" by A.M. Best Company that are authorized by the California Insurance Commissioner to do business in the State of California, and that have been approved by CITY. CITY may accept insurance provided by non-admitted, "surplus lines" carriers only if the carrier is authorized to do business in the State of California and is included on the List of Eligible Surplus Lines Insurers (i.e., the LESLI list). All policies of insurance carried by non-admitted carriers shall be subject to all of the requirements for policies of insurance provided by admitted carriers described herein. Each insurer shall be subject to CITY's approval in each instance.

- 26.5 Deductibles/Retentions. All deductibles and self-insured retentions on any insurance policy are the sole responsibility of CONCESSIONAIRE and must be disclosed and acceptable to CITY at the time evidence of insurance is provided.
- 26.6 Continuity of Coverage. All policies shall be in effect on or before the first day of the Term, except "course of construction fire insurance" shall be in force on commencement of all authorized construction, and full applicable fire insurance coverage shall be effective upon completion of each insurable improvement. The policies shall be kept in force for the duration of the Term. At least thirty (30) days prior to the expiration of each insurance policy, CONCESSIONAIRE shall furnish a certificate(s) showing that a new or extended policy has been obtained which meets the requirements of this Agreement. CONCESSIONAIRE shall provide proof of continuing insurance at least annually during the Term and otherwise upon CITY's request. If insurance lapses or is discontinued for any reason, CONCESSIONAIRE shall immediately notify CITY and shall immediately obtain replacement insurance as soon as possible.
- 26.7 Modification. To assure protection from and against the kind and extent of risk existing with the Concession Use or the Concession Locations, CITY, at its discretion, may require the revision of amounts and coverage at any time during the Term by giving CONCESSIONAIRE thirty (30) days prior written notice. CONCESSIONAIRE shall also obtain any additional insurance required by CITY for new improvements, changed circumstances or CITY's reasonable re-evaluation of risk levels related to the Concession Use or the Concession Locations.
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- 26.8 Accident Reports. CONCESSIONAIRE shall immediately report to CITY any accident causing property damage or injury to persons on the Concession Locations or otherwise related to the Concession Use. Such report shall contain the names and addresses of the involved parties, a statement of the circumstances, the date and hour of the accident, the names and addresses of any witnesses, and other pertinent information.
- 26.9 Causes of Loss - Special Form Property Insurance. CONCESSIONAIRE shall obtain and maintain, at its sole cost, Causes of Loss - Special Form Property Insurance on all of CONCESSIONAIRE's insurable property related to the Concession Use or the Concession Locations in an amount to cover 100 percent (100%) of the replacement cost. CONCESSIONAIRE shall deliver to CITY a certificate of such insurance.
27. Indemnification and Hold Harmless. CONCESSIONAIRE shall protect, defend, indemnify and hold CITY and its elected officials, officers, employees, representatives and agents harmless from and against any and all claims asserted or liability established for damages or injuries to any person or property, including injury to CONCESSIONAIRE's officers, employees, invitees, guests, agents or contractors, which arise out of or are in any manner directly or indirectly connected with this Agreement or CONCESSIONAIRE's occupancy,

use, development, maintenance or restoration of the Concession Locations, and all expenses of investigating and defending against same, including without limitation attorney fees and costs; provided, however, that CONCESSIONAIRE's duty to indemnify and hold harmless shall not include any established liability arising from the gross negligence or intentional misconduct of CITY and its elected officials, officers, employees, representatives and agents.

28. Compliance with Laws. CONCESSIONAIRE shall at all times in operations under this Agreement and its use, occupancy, and maintenance of the Concession Locations comply with all applicable laws, rules and regulations and direction by competent governmental authorities, and all at CONCESSIONAIRE's sole cost and expense. At least annually, CONCESSIONAIRE shall deliver to City copies of all documentary evidence of such compliance received by or otherwise available to CONCESSIONAIRE (e.g., validation of periodic inspection of CONCESSIONAIRE's fire-suppression equipment in the Concession Locations).
29. California Public Records Act. CITY shall determine, in its sole discretion, whether this Agreement or any information provided by CONCESSIONAIRE pursuant to this Agreement is or is not a public record subject to disclosure under the California Public Records Act. CONCESSIONAIRE shall hold CITY and its elected officials, officers and employees harmless for CITY's disclosure of any such information in response to a request for information under the CPRA.
30. No Discrimination. CONCESSIONAIRE shall not discriminate in any manner against any person on account of race, color, religion, gender, sexual orientation, medical status, national origin, age, marital status or disability in CONCESSIONAIRE's use of the Concession Locations, including without limitation the provision of goods, services, facilities, privileges, advantages and accommodations, and the hiring and retention of employees and contractors.
31. Equal Opportunity. CONCESSIONAIRE shall comply with Title VII of the Civil Rights Act of 1964, as amended; Executive Orders 11246, 11375 and 12086; the California Fair Employment Practices Act; and all other related and applicable federal and state laws and regulations. CONCESSIONAIRE shall not discriminate against any employee or applicant for employment based on race, religion, color, ancestry, age, gender, sexual orientation, disability, medical condition or place of birth. CONCESSIONAIRE shall cause the foregoing provisions to be inserted in all of CONCESSIONAIRE's contracts for work related to this Agreement so that such provisions will be binding upon each of CONCESSIONAIRE's contractors. CONCESSIONAIRE shall fully cooperate with any investigation conducted by CITY pursuant to CITY'S Nondiscrimination in Contracting Ordinance (i.e., San Diego Municipal Code sections 22.3501-22.3517, as amended from time to time), and upon CITY's request CONCESSIONAIRE shall submit a current Workforce Report. CONCESSIONAIRE acknowledges that failure to comply with the requirements of this section and/or submitting false information in response to these requirements may result in termination of this Agreement and debarment from participating in CITY contracts for a period of not less than one (1) year.

32. Equal Benefits. CONCESSIONAIRE shall comply with San Diego Municipal Code sections 22.4301-22.4308, which require applicable parties to offer the same employment benefits to employees with spouses and employees with domestic partners. CONCESSIONAIRE shall certify that it will maintain such equal benefits throughout the term of this Agreement. CONCESSIONAIRE's failure to maintain equal benefits shall be a material breach of this Agreement.
33. Disabled Access Compliance. CONCESSIONAIRE shall comply with Title 24 of the California Code of Regulations (i.e., the "California Building Code"); the Americans with Disabilities Act of 1990 ("ADA"); and all other applicable state and federal laws and regulations enacted protecting the rights of people with disabilities. CONCESSIONAIRE's compliance shall include without limitation the following:
- a. CONCESSIONAIRE shall not discriminate against qualified persons with disabilities in any aspects of employment, including recruitment, hiring, promotions, conditions and privileges of employment, training, compensation, benefits, discipline, layoffs and termination of employment;
 - b. No qualified individual with a disability may be excluded on the basis of disability from participation in, or be denied the benefits of, services, programs or activities of CONCESSIONAIRE;
 - c. CONCESSIONAIRE shall post a statement addressing the requirements of the ADA in a prominent place at the work site;
 - d. Where required by law, CONCESSIONAIRE shall, at CONCESSIONAIRE's sole cost and in conformance with all applicable building codes and accessibility regulations, comply with applicable disabled-access requirements by making accessible any areas of the Concession Locations which deny access to disabled persons; and
 - e. CONCESSIONAIRE shall include language in each sublicense agreement, if any, indicating the sublicensee's agreement to abide by the foregoing provisions.

CONCESSIONAIRE and each of its sublicensees shall be individually responsible for their own ADA compliance program. CONCESSIONAIRE's failure to comply with the above requirements and/or submitting false information in response to those requirements shall be a default under this Agreement.

34. Drug-Free Workplace. CONCESSIONAIRE shall comply with CITY's Drug-Free Workplace requirements set forth in Council Policy 100-17, adopted by San Diego Resolution R-277952 and incorporated into this Agreement by this reference.
35. CITY Employee Participation Policy. CITY may unilaterally and immediately terminate this Agreement if CONCESSIONAIRE employs an individual who, within the twelve (12) months immediately preceding such employment did, in their capacity as a CITY officer or

employee, participate in negotiations with or otherwise have an influence on a recommendation made to the San Diego City Council related to the selection of CONCESSIONAIRE for this Agreement. It is not the intent of this policy that these provisions apply to members of the City Council.

36. Local Business and Employment. CONCESSIONAIRE acknowledges that CITY seeks to promote employment and business opportunities for local residents and firms in all CITY contracts. For work associated with this Agreement and to the extent legally possible, CONCESSIONAIRE shall use its best efforts to solicit applications for employment and bids and proposals for contracts from local residents and firms as opportunities occur. CONCESSIONAIRE shall use its best efforts to hire qualified local residents and firms whenever practicable.
37. CONCESSIONAIRE's Risk. CONCESSIONAIRE shall bear all risks and liability arising out of or in any manner directly or indirectly connected with CONCESSIONAIRE's use or occupancy of the Concession Locations and any damages to the improvements on, under or in the vicinity of the Concession Locations resulting directly or indirectly thereby.
38. No Nuisance. CONCESSIONAIRE shall not use the Concession Locations in any manner which creates a nuisance or unreasonably disturbs the quiet enjoyment of persons in and to the surrounding area.
39. Assignment and Sublicense. CONCESSIONAIRE shall not assign or sublicense any rights granted by this Agreement or any interest in this Agreement without CITY's written consent in each instance. Any assignment by operation of law shall automatically terminate this Agreement.
40. Signs. All signs and menu boards of CONCESSIONAIRE must comply with Balboa Park's design standards and other Balboa Park rules and regulations. Notwithstanding the foregoing, CONCESSIONAIRE shall not erect or display any banners, pennants, flags, posters, signs, menu boards, decorations, marquees, awnings or similar devices or advertising without CITY's prior written consent. If any such unauthorized item is found on the Concession Locations or anywhere within Balboa Park, CONCESSIONAIRE shall remove the item at its expense within twenty-four (24) hours after notice by CITY, or CITY may summarily thereafter remove the item at CONCESSIONAIRE's cost.
41. Encumbrances. Only with CITY'S prior written consent in each instance, which consent shall be in CITY'S sole discretion, and upon the condition that CONCESSIONAIRE apply any loan proceeds exclusively to Concession Locations and Concession Use, CONCESSIONAIRE may pledge its rights hereunder to secure its performance under the subject debt instrument.
 - a. Use of Loan Proceeds. A reasonable portion of such loan proceeds may be disbursed for payment of incidental costs associated with CONCESSIONAIRE's Concession Locations and Concession Use, including, but not limited to, the following: escrow charges; premiums for hazard insurance or other insurance or

bonds required by CITY; title insurance premiums; reasonable loan costs, such as discounts, interest, and commissions; and architectural, engineering, and attorney fees and other normal expenses incidental to such modification/work.

- b. Subsequent Encumbrances. After the initial modification/work is completed, as contemplated by this Agreement and to CITY'S satisfaction, if CONCESSIONAIRE proposes a subsequent encumbrance of its rights hereunder, then CITY'S consent thereto may be subject, in CITY'S sole discretion and without limitation, to increasing the rent to then-current market rates.
 - c. Acceptance of Approved Mortgagee or Beneficiary. Upon a foreclosure or transfer in lieu of foreclosure of a CITY-approved encumbrance, CITY shall accept the approved mortgagee or beneficiary as the "CONCESSIONAIRE" under this Agreement, with all rights and obligations thereof granted and imposed herein. Such mortgagee or beneficiary may assign its interest in this Agreement to its nominee if CITY deems, in its sole discretion, such nominee to be a reputable, qualified, and financially responsible person.
 - d. Encumbrance Approved by CITY. Any CITY-approved encumbrance shall be subject and subordinate to all of the terms, covenants, and conditions of this Agreement, and shall not be deemed to amend or alter any such term, covenant, or condition. CONCESSIONAIRE acknowledges that pursuant to City Charter section 225, each person having an interest in this Agreement shall be subject to CITY'S review and approval.
42. Liens. CONCESSIONAIRE shall at all times protect, defend, indemnify, and hold CITY harmless from and against any and all claims for labor or materials in connection with CONCESSIONAIRE's use, improvement, alteration, maintenance, or repair of Concession Locations, and all costs of defending against such claims, including, without limitation, reasonable attorney fees. If CONCESSIONAIRE's use, improvement, alteration, maintenance, or repair of the Concession Locations results in a lien or notice of lien being filed against the Concession Locations, CONCESSIONAIRE shall, within five (5) calendar days after such filing, either: (a) take all actions necessary to record a valid release of the lien; or (b) deliver to CITY a bond, cash, or other security acceptable to CITY in an amount sufficient to pay in full all claims of all persons seeking relief under the lien.
43. Taxes. CONCESSIONAIRE shall pay, before delinquency, all taxes, assessments and fees assessed or levied upon CONCESSIONAIRE or the Concession Locations during the Term, including the land and any buildings, structures, machinery, equipment, appliances or other improvements or property of any nature whatsoever erected, installed or maintained by CONCESSIONAIRE, or levied by reason of CONCESSIONAIRE's occupancy, use, development, maintenance or restoration of the Concession Locations, including without limitation licensing and Agreement costs and fees. CONCESSIONAIRE acknowledges that this Agreement may create a possessory interest subject to property taxation, and that CONCESSIONAIRE may be subject to the payment of taxes levied on that interest. CONCESSIONAIRE shall pay all such possessory interest taxes.

CONCESSIONAIRE's payment for such taxes, fees and assessments shall not reduce any payment due CITY.

44. Unavoidable Delay. If the performance of an act required by this Agreement is directly prevented or delayed by a cause beyond the reasonable control of the party required to perform the act, that party shall be excused from performing the act for a period equal to the period of the prevention or delay. This provision shall not apply to obligations to pay rent. The party claiming a delay shall notify the other party in writing within ten (10) days after the beginning of any claimed delay.
45. Hazardous Substances. CONCESSIONAIRE shall not allow the illegal installation, storage, utilization, generation, sale or re of Hazardous Substance or otherwise regulated substances in, on, under or from the Concession Locations. CONCESSIONAIRE and CONCESSIONAIRE's agents and contractors shall not install, store, utilize, generate or sell any Hazardous Substance on the Concession Locations without CITY's prior written consent. CONCESSIONAIRE shall, prior to initiating any operations, obtain all required agreements from applicable regulatory agencies, including without limitation the San Diego County Department of Environmental Health, local fire agencies, the San Diego County Department of Weights and Measures, the San Diego County Air Pollution Control District, and the San Diego Regional Water Quality Control Board. Installing, utilizing, storing, or any other presence of a Hazardous Substance includes boxes, bags, bottles, drums, cylinders, above or below ground tanks, equipment with tanks, or any other type of container, equipment or device which holds or incorporates a Hazardous Substance or hazardous waste.
 - a. Release. For all purposes of this Agreement, a "release" shall include without limitation any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or otherwise disposing of a hazardous substance.
 - b. Hazardous Substance. For all purposes of this Agreement, "Hazardous Substance" shall mean any substance listed by the Environmental Protection Agency or the State of California as a hazardous substance, and all types of petroleum-related substances and their chemical constituents.
 - c. Remediation. If CONCESSIONAIRE's occupancy, use, development, maintenance or restoration of the Concession Locations ("CONCESSIONAIRE's Operations") results in a release of a Hazardous Substance, CONCESSIONAIRE shall pay all costs of remediation and removal to CITY's satisfaction for unrestricted reuse of the Concession Locations, and in accordance with all applicable laws, rules and regulations of governmental authorities.
 - d. Removal. If CONCESSIONAIRE or CONCESSIONAIRE's contractor or agent has received approval and agreements to store, utilize, generate or install, or otherwise bring Hazardous Substances to the Concession Locations, CONCESSIONAIRE and/or CONCESSIONAIRE's contractor or agent shall

remove all Hazardous Substances in any type of container, equipment or device from the Concession Locations immediately upon or prior to the expiration or earlier termination of this Agreement. CITY reserves the right to conduct inspections of the Concession Locations and/or request documentation demonstrating the legal removal and/or disposal of the hazardous materials, wastes or other containers, equipment or devices from the Concession Locations. CONCESSIONAIRE shall be responsible for any and all costs incurred by CITY to remove any container, equipment or device requiring disposal or removal as required by this provision.

- e. Indemnity. CONCESSIONAIRE shall protect, defend, indemnify and hold CITY harmless from any and all claims, costs and expenses related to environmental liabilities resulting from CONCESSIONAIRE's Operations, including without limitation: (i) costs of environmental assessments; (ii) costs of regulatory remediation oversight; (iii) costs of remediation and removal; (iv) any necessary CITY response costs; (v) all fines, penalties or fees assessed by any regulatory agency; (vi) damages for injury to natural resources, CONCESSIONAIRE's officers, employees, invitees, guests, agents or contractors, or the public; and (vii) all costs of any health assessments or health effect studies.
- f. Notice of Release. If CONCESSIONAIRE knows or has reasonable cause to believe that a Hazardous Substance has been released on, from or beneath the Concession Locations, CONCESSIONAIRE shall immediately notify CITY and any appropriate regulatory or reporting agency pursuant to California Code of Regulations Title 19 and any other applicable laws or regulations. CONCESSIONAIRE shall deliver a written report thereof to CITY within three (3) days after receipt of the knowledge or cause for belief and submit any required written reports to regulatory or reporting agencies as required by regulation or law. If CONCESSIONAIRE knows or has reasonable cause to believe that such substance is an imminent release or is an imminent substantial danger to public health and safety, CONCESSIONAIRE shall take all actions necessary to alleviate the danger. CONCESSIONAIRE shall immediately notify CITY in writing of any violation, notice to comply, or notice of violation received or the initiation of environmental actions or private suits related to the Concession Locations.
- g. Environmental Assessment. Upon reasonable cause to believe that CONCESSIONAIRE's Operations resulted in any Hazardous Substance being released on, from or beneath the Concession Locations, CITY may cause an environmental assessment under regulatory oversight of the suspect area to be performed by a professional environmental consultant registered with the State of California as a Professional Engineer, Certified Engineering Geologist or Registered Civil Engineer. The environmental assessment shall be obtained at CONCESSIONAIRE's sole cost and expense, and shall establish what, if any, Hazardous Substances have more likely than not been caused by CONCESSIONAIRE's Operations on, in, from or under the Concession Locations, and in what quantities. If any such Hazardous Substances exist in quantities

greater than allowed by city, county, state or federal laws, statutes, ordinances or regulations, or require future restricted re-use of the Concession Locations, then the environmental assessment shall include a discussion of such substances with recommendations for remediation and removal necessary to effect unrestricted re-use and in compliance with those laws or statutes, and estimates of the cost of such remediation or removal. CONCESSIONAIRE shall cause, or if CONCESSIONAIRE fails to do so within a reasonable period of time, as determined by CITY in its sole discretion, then CITY may cause, the remediation and/or removal recommended in the environmental assessment such that unrestricted re-use of the Concession Locations and compliance with environmental laws and regulations are achieved, and CONCESSIONAIRE shall pay all costs and expenses therefor.

46. Water Quality Assurances. CONCESSIONAIRE shall, at its sole cost and expense, comply with all laws, rules, regulations and direction of competent governmental authority (including the San Diego Regional Water Quality Control Board) relating to water quality assurance and storm water management. CONCESSIONAIRE acknowledges and agrees that such legal requirements may change at any time and from time to time.
- a. NPDES. CONCESSIONAIRE shall comply with all applicable requirements of the National Pollutant Discharge Elimination System ("NPDES") Agreement in force on the Effective Date (i.e., Agreement No. R9-2013-0001), and any and all amendments thereto and all applicable succeeding NPDES Agreements.
 - b. Stormwater Management. CONCESSIONAIRE shall comply with all applicable requirements of the San Diego Municipal Code Chapter 4, Article 3, Division 3: Stormwater Management and Discharge Control (the "Stormwater Code"), and employ "Best Management Practices," as that term is defined by the Stormwater Code, and as approved by CITY, in its governmental capacity, under its Stormwater Management Program.
47. Waiver. The property constituting the Concession Locations is publicly owned and held in trust for the benefit of CITY's citizens. CITY's failure to insist upon the strict performance of any of CONCESSIONAIRE's obligations under this Agreement, in one or more instance, shall not be construed as a waiver of any such obligation, and the same shall remain in full force and effect. CITY's waiver of a default shall not be a waiver of any other default. Any waiver of a default must be in a writing executed by CITY to constitute a valid and binding waiver. CITY's delay or failure to exercise a right or seek a remedy shall not be deemed a waiver of that or any other right or remedy under this Agreement, at law, or in equity. The exercise of any particular right or the use of any particular remedy for any default shall not waive the use of any other right or remedy for the same default or for another or later default. CITY's acceptance of any rents shall not be a waiver of any default preceding the rent payment. CITY's failure to discover a default or take prompt action to require the cure of any default shall not result in an equitable estoppel, but CITY may at any and all times require the cure of the default.

48. Prevailing Wages. By signing this Agreement, CONCESSIONAIRE certifies that it is aware of the wage provisions described herein and shall comply with such provisions before entering onto the Concession Locations, or allowing any contractors or subcontractors to perform construction, alteration, demolition, repair or maintenance work within the Concession Locations. Pursuant to San Diego Municipal Code section 22.3019, construction, alteration, demolition, repair and maintenance work performed under this Agreement is subject to State prevailing wage laws. For construction work performed under this Agreement cumulatively exceeding \$25,000 and for alteration, demolition, repair and maintenance work performed under this Agreement cumulatively exceeding \$15,000, CONCESSIONAIRE and its contractors and subcontractors shall comply with State prevailing wage laws including, but not limited to, the requirements listed below.

a. Compliance with Prevailing Wage Requirements. Pursuant to sections 1720 through 1861 of the California Labor Code, CONCESSIONAIRE, its contractors and subcontractors, shall ensure that all workers who perform construction, alteration, demolition, repair or maintenance work under this Agreement are paid not less than the prevailing rate of per diem wages as determined by the Director of the California Department of Industrial Relations (DIR). This includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.

i. Copies of such prevailing rate of per diem wages are on file at CITY and are available for inspection to any interested party on request. Copies of the prevailing rate of per diem wages also may be found at <http://www.dir.ca.gov/OPRL/DPreWageDetermination.htm>.

CONCESSIONAIRE shall require its contractors and subcontractors to post a copy of the prevailing rate of per diem wages determination at each job site and shall make them available to any interested party upon request.

ii. The wage rates determined by the DIR refer to expiration dates. If the published wage rate does not refer to a predetermined wage rate to be paid after the expiration date, then the published rate of wage shall be in effect for the life of this Agreement. If the published wage rate refers to a predetermined wage rate to become effective upon expiration of the published wage rate and the predetermined wage rate is on file with the DIR, such predetermined wage rate shall become effective on the date following the expiration date and shall apply to this Agreement in the same manner as if it had been published in said publication. If the predetermined wage rate refers to one or more additional expiration dates with additional predetermined wage rates, which expiration dates occur during the life of this Agreement, each successive predetermined wage rate shall apply to this Agreement on the date following the expiration date of the previous wage rate. If the last of such predetermined wage rates expires during the life of this Agreement, such wage rate shall apply to the balance of the contract.

- b. Penalties for Violations. CONCESSIONAIRE and its contractors and its subcontractors shall comply with California Labor Code section 1775 in the event a worker is paid less than the prevailing wage rate for the work or craft in which the worker is employed.
- c. Payroll Records. CONCESSIONAIRE and its contractors and subcontractors shall comply with California Labor Code section 1776, which generally requires keeping accurate payroll records, verifying and certifying payroll records, and making them available for inspection. CONCESSIONAIRE shall require its contractors and subcontractors to also comply with section 1776. CONCESSIONAIRE's contractors and subcontractors shall submit weekly certified payroll records online via CITY's web-based Labor Compliance Program. CONCESSIONAIRE is responsible for ensuring its subcontractors submit certified payroll records to CITY.
 - i. In addition to submitting weekly certified payroll role records to CITY, CONCESSIONAIRE's contractors and their subcontractors shall also furnish the records specified in Labor Code section 1776 directly to the Labor Commissioner in the manner required in Labor Code section 1771.4.
- d. Apprentices. CONCESSIONAIRE and its contractors and subcontractors shall comply with California Labor Code sections 1777.5, 1777.6 and 1777.7 concerning the employment and wages of apprentices. CONCESSIONAIRE shall be held responsible for the compliance of their contractors and subcontractors with sections 1777.5, 1777.6 and 1777.7.
- e. Working Hours. CONCESSIONAIRE and its contractors and subcontractors shall comply with California Labor Code sections 1810 through 1815, including but not limited to: (i) restrict working hours on public works contracts to eight hours a day and forty hours a week, unless all hours worked in excess of 8 hours per day are compensated at not less than 1½ times the basic rate of pay; and (ii) specify penalties to be imposed on design professionals and subcontractors of \$25 per worker per day for each day the worker works more than 8 hours per day and 40 hours per week in violation of California Labor Code sections 1810 through 1815.
- f. Required Provisions for Subcontracts. CONCESSIONAIRE shall include at a minimum a copy of the following provisions in any contract they enter into with a contractors or subcontractor: California Labor Code sections 1771, 177.1, 1775, 1776, 1777.5, 1810, 1813, 1815, 1860 and 1861.
- g. Labor Code Section 1861 Certification. CONCESSIONAIRE in accordance with California Labor Code section 3700 is required to secure the payment of compensation of its contractors' and subcontractors' employees and by signing this Agreement, CONCESSIONAIRE certifies that "I am aware of the provisions of

Section 3700 of the California Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this Contract."

- h. Labor Compliance Program. CITY has its own Labor Compliance Program authorized in August 2011 by the DIR. CITY will notify CONCESSIONAIRE to withhold or cause to be withheld contract payments when payroll records are delinquent or deemed inadequate by CITY or other governmental entity, or it has been established after an investigation by CITY or other governmental entity that underpayment(s) have occurred. For questions or assistance, please contact CITY's Equal Opportunity Contracting Department at 619-236-6000.
 - i. CONCESSIONAIRE's Contractors and Subcontractors Registration Requirements. This project is subject to compliance monitoring and enforcement by the DIR. As of March 1, 2015, no contractor or subcontractor may be listed on a bid or proposal for a public works project unless registered with the DIR pursuant to Labor Code section 1725.5. As of April 1, 2015, a contractor or subcontractor shall not be qualified to bid on, be listed in a bid or proposal, or enter into any Contract for public work, unless currently registered and qualified to perform public work pursuant to Labor Code section 1725.5. By entering into this Agreement with CITY, CONCESSIONAIRE is certifying that he or she has verified that all contractors and subcontractors used on this public works project are registered with the DIR in compliance with Labor Code sections 1771.1 and 1725.5, and CONCESSIONAIRE shall provide proof of contractor and subcontractor registration to CITY upon request.
 - 1. A Contractor's inadvertent error in listing a subcontractor who is not registered pursuant to Labor Code section 1725.5 in a response to a solicitation shall not be grounds for filing a bid protest or grounds for considering the bid non-responsive provided that any of the following apply: (1) the subcontractor is registered prior to bid opening; (2) within twenty-four hours after the bid opening, the subcontractor is registered and has paid the penalty registration fee specified in Labor Code section 1725.5; or (3) the subcontractor is replaced by another registered contractor pursuant to Public Contract Code section 4107.
49. Accessibility Assessment. In accordance with California Civil Code section 1938, CITY hereby states that the Concession Locations have not been inspected by a Certified Access Specialist (CASp).
50. Cumulative Remedies. CITY's rights and remedies under this Agreement are cumulative and shall not limit or otherwise waive or deny any of CITY's rights or remedies at law or in equity.
51. Survival. Any obligation which accrues under this Agreement prior to its expiration or termination shall survive such expiration or termination.

52. Joint and Several Liability. If CONCESSIONAIRE is comprised of more than one person or legal entity, such persons and entities, and each of them, shall be jointly and severally liable for the performance of each and every obligation of CONCESSIONAIRE under this Agreement.
53. No Affiliation. Nothing contained in this Agreement shall be deemed or construed to create a partnership, joint venture or other affiliation between CITY and CONCESSIONAIRE or between CITY and any other entity or party, or cause CITY to be responsible in any way for the debts or obligations of CONCESSIONAIRE or any other party or entity.
54. Entire Agreement. This Agreement constitutes the entire agreement between the parties and supersedes any and all prior understandings, representations, warranties and agreements between them pertaining to this Agreement and CONCESSIONAIRE's occupancy, use, development, maintenance and restoration of the Concession Locations. Any modification, alteration or amendment of this Agreement shall be in writing and signed by all the parties hereto.
55. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed to constitute an original, but all of which, when taken together, shall constitute one and the same instrument.
56. Notices. Any notice required or Agreement to be given under this Agreement shall be in writing and may be served personally or delivered by United States mail, postage prepaid, and addressed to CONCESSIONAIRE at CONCESSIONAIRE's Address for Notices, and to CITY as follows:

THE CITY OF SAN DIEGO
Attention: Director, Real Estate Assets Department
1200 Third Avenue, Suite 1700 (MS 51A)
San Diego, California 92101
(619) 236-6020

57. Authority to Contract. Each individual executing this Agreement on behalf of another person or legal entity represents and warrants that they are authorized to execute and deliver this Agreement on behalf of such person or entity in accordance with duly adopted resolutions or other authorizing actions which are necessary and proper and under such legal entity's articles, charter, bylaws or other written rules of conduct or governing agreement, and that this Agreement is binding upon such person or entity in accordance with its terms. Each person executing this Agreement on behalf of another person or legal entity represents and warrants such entity is a valid, qualified corporation, limited liability company, partnership or other unincorporated association in good standing in its home state and that such entity is qualified to do business in California.
58. Acceptance of Concession Locations. By signing this Agreement, CONCESSIONAIRE represents and warrants that it has independently inspected the Concession Locations and

made all tests, investigations and observations necessary to satisfy itself as to the condition of the Concession Locations and its suitability for the Concession Use. CONCESSIONAIRE further represents and warrants that it is not relying on any representation by CITY as to the condition of the Concession Locations or its suitability for the Concession Use, and that CONCESSIONAIRE is relying solely on its own and independent inspections, tests, investigations and observations of the Concession Locations in entering into this Agreement. CONCESSIONAIRE accepts the Concession Locations in their current condition. CONCESSIONAIRE acknowledges and agrees that unless set forth in this Agreement, CITY has no obligation to improve, modify, repair, replace, alter, secure, or otherwise develop the Concession Locations at any time either prior to, on or after the Effective Date. CONCESSIONAIRE shall not hold CITY responsible for any defects in the Concession Locations. CONCESSIONAIRE accepts and assumes all risk of harm to all persons and property, including without limitation CONCESSIONAIRE's employees, from any defects in the Concession Locations, and shall be solely responsible therefor.

59. Payment Card Industry Certified.

- a. Contractor Certification. CONCESSIONAIRE shall certify that it shall implement and at all times maintain compliance with the most current of Payment Card Industry Data Security Storage (PCI DSS) standards regarding data security and will provide written confirmation to CITY annually. If during the Term of this Agreement, CONCESSIONAIRE undergoes, or has reason to believe that it will undergo, an adverse change in its compliance with the PCI DSS standards and/or other material payment card industry standards, CONCESSIONAIRE shall promptly notify CITY of such circumstances. In addition, CONCESSIONAIRE shall be required to provide appropriate payment card companies, acquiring financial institutions and their respective designees access to CONCESSIONAIRE's facilities and all pertinent records to conduct a review of CONCESSIONAIRE's compliance with the PCI DSS requirements.
- b. Data Security. CONCESSIONAIRE shall acknowledge responsibility for the security of cardholder data as defined within PCI DSS standards. CONCESSIONAIRE shall undergo independent third party quarterly system scans that audit for all known methods hackers use to access private information, in addition to vulnerabilities that would allow malicious software (i.e., viruses and worms) to gain access to or disrupt network devices. CONCESSIONAIRE shall provide reasonable care and efforts to detect fraudulent credit card activity in connection with credit card transactions processed during the performance of this Agreement. CONCESSIONAIRE shall acknowledge and agree that cardholder data may only be used for completing the services as described in this Agreement or as required by the PCI DSS standards or applicable law. CONCESSIONAIRE shall maintain and protect in accordance with all applicable laws and PCI DSS regulations the security of all cardholder data when performing the services.

- c. Notification Requirements. In the event of a breach, intrusion, or unauthorized access to cardholder data stored by or on behalf of CONCESSIONAIRE, CONCESSIONAIRE shall immediately notify CITY's Deputy Director, Chief Information Security Officer to allow the proper PCI DSS breach notification process to commence. CONCESSIONAIRE agrees to assume responsibility for informing all affected individuals in accordance with applicable law.
- d. Indemnity. CONCESSIONAIRE shall indemnify and hold harmless CITY, its officers, and employees from and against any claims, loss, damages, or other harm related to a data security breach or CONCESSIONAIRE's failure to maintain PCI DSS compliance standards.

IN WITNESS WHEREOF, this Agreement is executed to be effective as of the Effective Date.

ELECTRIQUETTE MOTOR CART COMPANY, a
California corporation

BY: _____

Name: SANDOR W. SHAPERY

Title: PRESIDENT

THE CITY OF SAN DIEGO, a California municipal
corporation

BY: _____

Cybele L. Thompson, Director
Real Estate Assets

Environmental Analysis Section Environmental Clearance:

This activity is categorically exempt from CEQA pursuant to
State CEQA Guidelines Sections 15301 (Existing Facilities), 15303
(New Construction), 15304 (Minor Alterations to Land) and 15331 -
Historical Resources Restoration/Rehabilitation).

Date: 10/27/15

BY: _____

Name: Melinda Hermann

Title: Senior Planner

Approved as to form this 2nd day of
November, 2015:

JAN I. GOLDSMITH, City Attorney

BY:

Name: Heather Ferbert

Title: Deputy City Attorney

Exhibit "A" – Wicker Cart Diagram

Exhibit "B" – Cart Route

Exhibit "C" – Storage Container Diagram

Exhibit "D" – Location of Storage Containers

Exhibit "E" – Rental Kiosk Diagram

Exhibit "F" – Locations of Rental Kiosks

Exhibit "G" – Service Pathway Diagram

Exhibit "H" – Schedule of Days and Hours of Operations

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Exhibit "A" – Wicker Cart Diagram

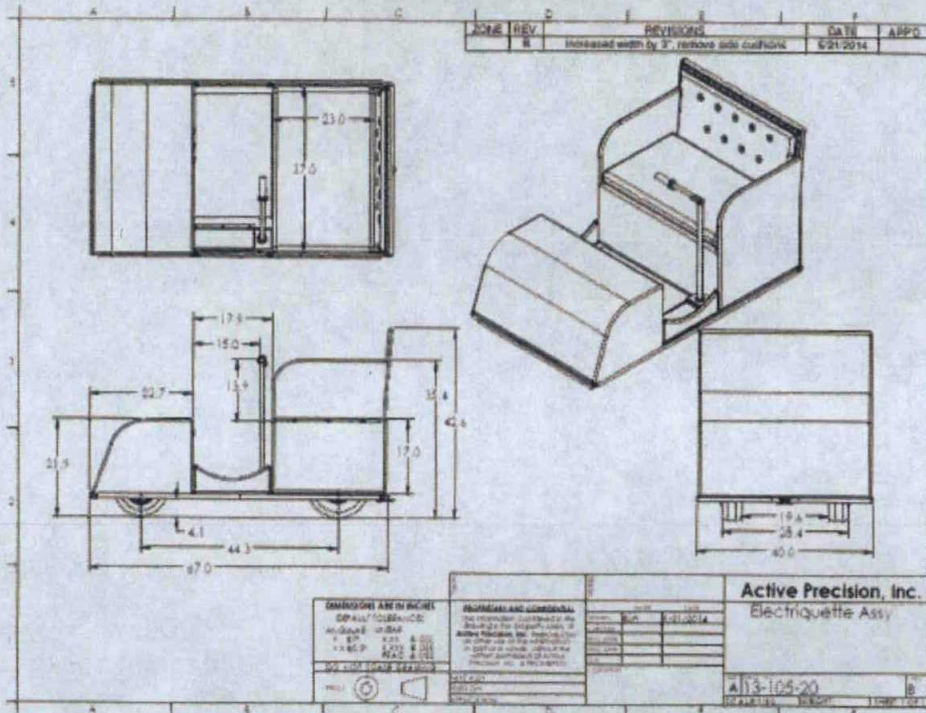


Exhibit "B" – Cart Route

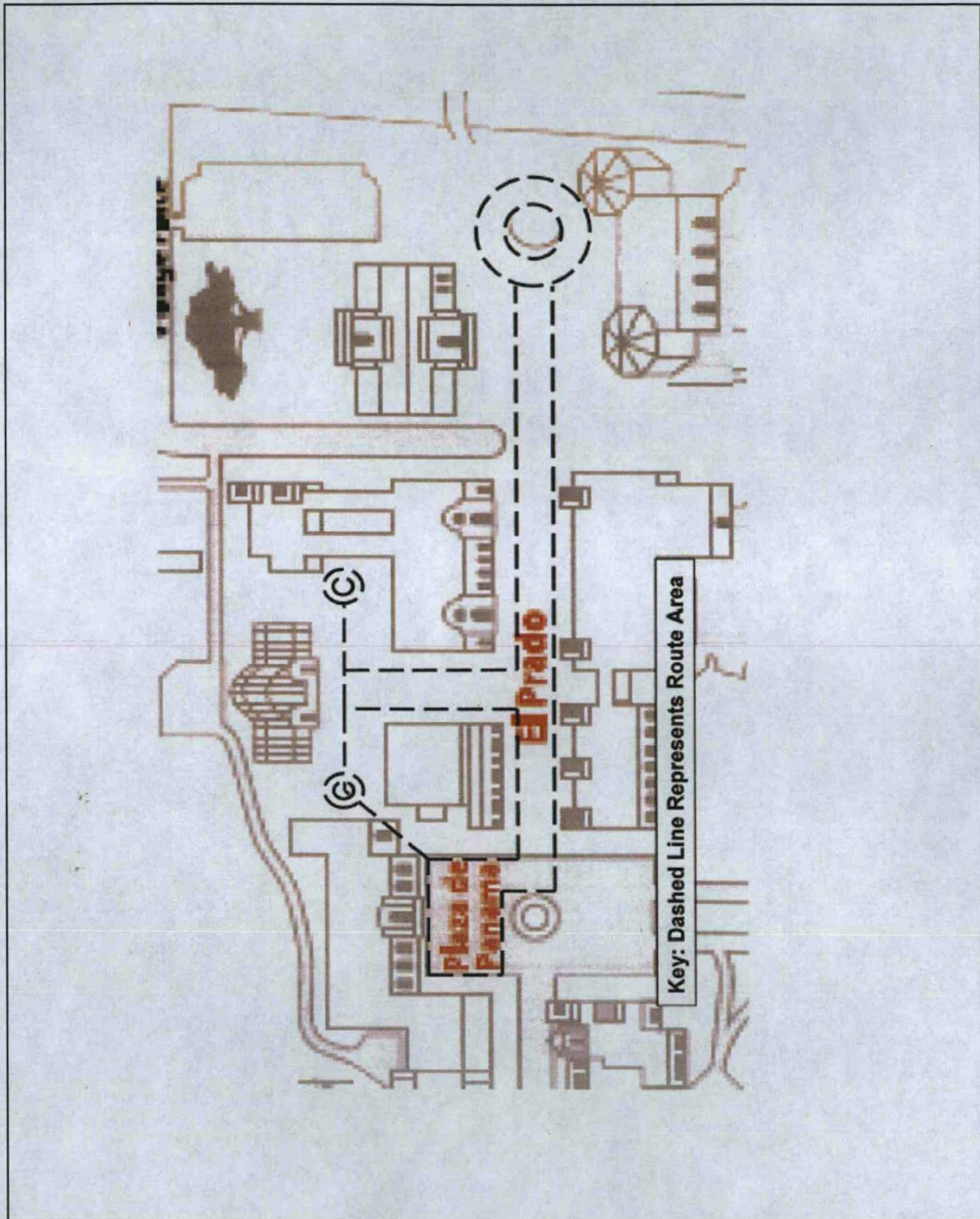


Exhibit "C" – Storage Container Diagram

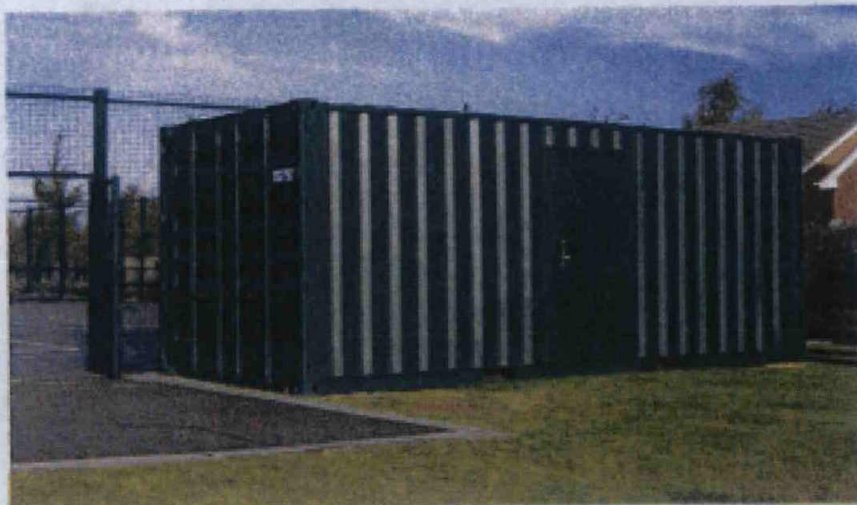
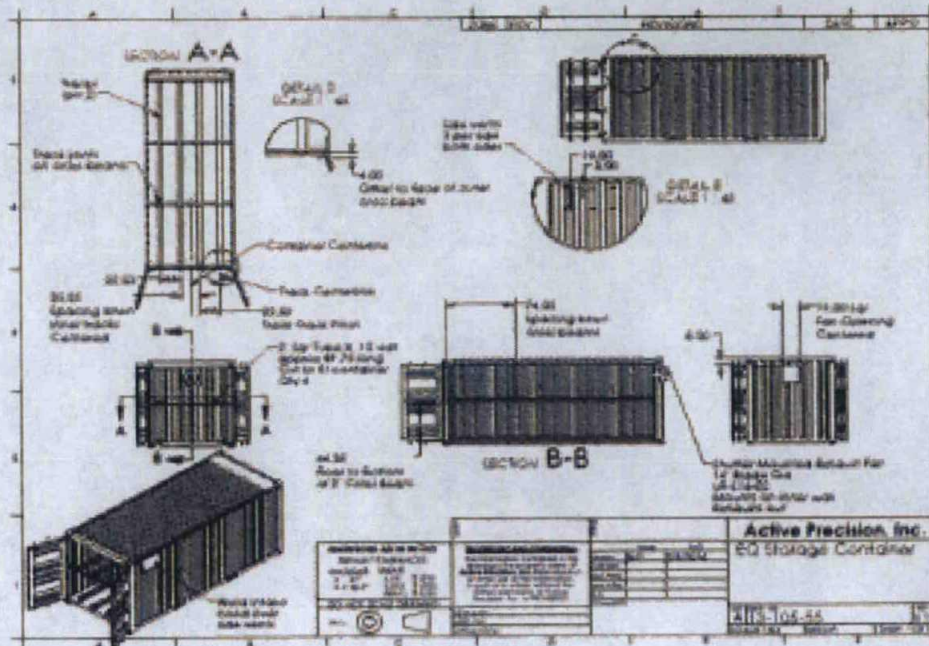
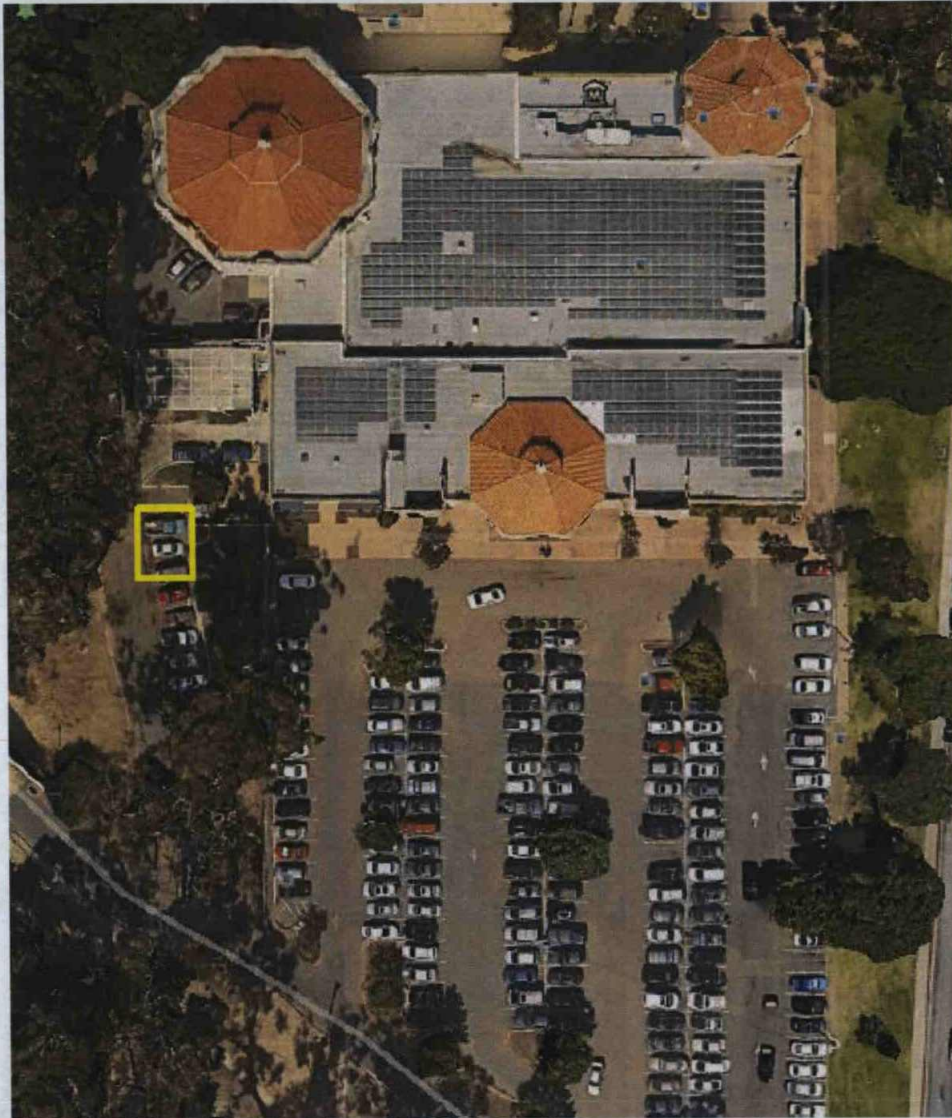


Exhibit "D" – Location of Storage Containers and Parking Spaces



Three parking spaces for Storage Containers

Exhibit "E" – Rental Kiosk Diagram



Exhibit "F" – Locations of Rental Kiosks



Exhibit "G" – Service Pathway Diagram



Exhibit “H” – Schedule of Days and Hours of Operations