

**FIRST AMENDMENT TO
SELF-SERVICE LUGGAGE CART AGREEMENT
BETWEEN
THE CITY OF SAN JOSE
AND
SMARTE CARTE, INC.**

This FIRST AMENDMENT TO SELF-SERVICE LUGGAGE CART AGREEMENT is entered into this ____ day of _____, 2017, by the CITY OF SAN JOSE, a municipal corporation of the State of California (‘‘City’’), and Smarte Carte, Inc., a Minnesota corporation authorized to do business in California (‘‘Concessionaire’’).

RECITALS

WHEREAS, on August 1, 2014, City and Concessionaire entered into an agreement entitled ‘‘NORMAN Y. MINETA SAN JOSE INTERNATIONAL AIRPORT SELF-SERVICE LUGGAGE CART AGREEMENT BY AND BETWEEN THE CITY OF SAN JOSE AND SMARTE CARTE, INC.’’ (‘‘Agreement’’); and

WHEREAS, City and Concessionaire desire to amend the Agreement to increase the Cart Fee compensation to \$850,000 and to add nondiscrimination requirements as required under federal law and regulations;

NOW, THEREFORE, effective upon execution, the parties agree to amend the Agreement as follows:

SECTION 1. SECTION 6, ‘‘COMPENSATION TO CONCESSIONAIRE FOR FIS FACILITY CARTS’’ is hereby amended and restated as follows:

“6 COMPENSATION TO CONCESSIONAIRE FOR FIS FACILITY CARTS

City agrees to compensate Concessionaire for FIS Facility Carts provided by Concessionaire during the Term of this Agreement at the rate of One Dollar (\$1.00) per cart used (the “Cart Fee”) for Year 1. The Cart Fee shall be adjusted in accordance with Section 6.2. The maximum total Cart Fee compensation the City will pay the Concessionaire under this Agreement shall not exceed Eight Hundred Fifty Thousand Dollars (\$850,000).

6.1 Monthly Invoice

No later than twenty calendar (20) days after the end of each month occurring after the Commencement Date, Concessionaire shall deliver to the City an invoice for the preceding month’s FIS Facility Cart activity (“Cart Fee Monthly Invoice”). The Cart Fee Monthly Invoice shall detail the total number of Carts provided to deplaning passengers in the FIS Facility, showing the starting Cart number and the ending Cart number and the total Cart Fee for that month due to Concessionaire. Subject to City review and approval, City shall pay the Cart Fee Monthly Invoice not later than 30 days after receipt.

6.2 Adjustments to Cart Fee

The Cart Fee shall be subject to the following increases on an annual basis from the Commencement Date for Years Two (2) through Seven (7) in accordance with the provisions set out below. For accounting purposes, the annual Cart Fee adjustment date shall be effective on the first day of a calendar month.

6.2.1 Annual Adjustment Date

The first Annual Adjustment Date for the Cart Fee shall occur 12 months after the first day of the first full calendar month occurring after the Commencement Date. Thereafter, this date shall serve as the Annual Adjustment Date.

The Cart Fee shall be increased annually by the Consumer Price Index (CPI) for all Urban Consumers, All Items, for the San Francisco-Oakland-San Jose Metropolitan Area (1982-84=100), as published by the Bureau of Labor Statistics of the U.S. Department of Labor. The change will be calculated based on the difference between the CPI in effect as of the calendar month fourteen (14) full months prior to the scheduled adjustment date and the CPI in effect two (2) months prior to the scheduled adjustment date.

In the event that the CPI is not published for the applicable month, the Base Figure shall be the latest CPI published as of the Commencement Date anniversary. Any such changes in rent or fees shall be calculated by City.

6.2.2 Adjusted Cart Fee

Once the CPI value has been determined as described above, the adjusted Cart Fee shall be effective as and from the Commencement Date anniversary, and until the next following Commencement Date anniversary.

SECTION 2. SECTION 34, entitled "GENERAL CIVIL RIGHTS PROVISIONS" is hereby added as follows:

The tenant/concessionaire/lessee and its transferee agree to comply with pertinent statutes, Executive Orders and such rules as are promulgated to ensure that no person shall, on the grounds of race, creed, color, national origin, sex, age, or disability be excluded from participating in any activity conducted with or benefiting from Federal assistance.

This provision obligates the tenant/concessionaire/lessee or its transferee for the period during which Federal assistance is extended to the airport through the Airport Improvement Program.

In cases where Federal assistance provides, or is in the form of personal property; real property or interest therein; structures or improvements thereon, this provision obligates the party or any transferee for the longer of the following periods:

(a) The period during which the property is used by the airport sponsor or any transferee for a purpose for which Federal assistance is extended, or for another purpose involving the provision of similar services or benefits; or

(b) The period during which the airport sponsor or any transferee retains ownership or possession of the property.

SECTION 3. SECTION 35, entitled "TITLE VI CLAUSES FOR COMPLIANCE WITH NONDISCRIMINATION REQUIREMENTS," is hereby added as follows:

(Source: Appendix A of Appendix 4 of FAA Order 1400.11, Nondiscrimination in Federally-Assisted Programs at the Federal Aviation Administration)

Compliance with Nondiscrimination Requirements. During the performance of the Agreement as amended, the Concessionaire, for itself, its assignees, and successors in interest (hereinafter referred to in this SECTION 35 as the "Concessionaire") agrees as follows:

1. **Compliance with Regulations:** The Concessionaire (hereinafter includes consultants) will comply with the **Title VI List of Pertinent Nondiscrimination Statutes and Authorities**, as they may be amended from time to time, which are herein incorporated by reference, set forth in SECTION 6 of this First Amendment, and made a part of the Agreement.
2. **Non-discrimination:** The Concessionaire, with regard to the work performed by it during the Agreement will not discriminate on the grounds of race, color, or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The Concessionaire will not participate directly or indirectly in the discrimination prohibited by the Acts and the Regulations, including employment practices when the Agreement covers any activity, project, or program set forth in Appendix B of 49 CFR part 21.
3. **Solicitations for Subcontracts, Including Procurements of Materials and Equipment:** In all solicitations, either by competitive bidding, or negotiation made by the Concessionaire for work to be performed under a subcontract, including procurements of materials, or leases of equipment, each potential

subcontractor or supplier will be notified by the Concessionaire of the Concessionaire's obligations under the Agreement and the Acts and the Regulations relative to Non-discrimination on the grounds of race, color, or national origin.

4. **Information and Reports:** The Concessionaire will provide all information and reports required by the Acts, the Regulations, and directives issued pursuant thereto and will permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the City or the Federal Aviation Administration to be pertinent to ascertain compliance with such Acts, Regulations, and instructions. Where any information required of the Concessionaire is in the exclusive possession of another who fails or refuses to furnish the information, the Concessionaire will so certify to the City or the Federal Aviation Administration, as appropriate, and will set forth what efforts it has made to obtain the information.

5. **Sanctions for Noncompliance:** In the event of Concessionaire's noncompliance with the Non-discrimination provisions of the Agreement the City will impose such Agreement sanctions as it or the Federal Aviation Administration may determine to be appropriate, including, but not limited to:

- a. Withholding payments to the Concessionaire under the Agreement until the Concessionaire complies; and/or
- b. Cancelling, terminating, or suspending the Agreement in whole or in part.

6. **Incorporation of Provisions:** The Concessionaire will include the provisions of paragraphs one through six in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Acts,

the Regulations and directives issued pursuant thereto. The Concessionaire will take action with respect to any subcontract or procurement as the City or the Federal Aviation Administration may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, that if the Concessionaire becomes involved in, or is threatened with litigation by a subcontractor, or supplier because of such direction, the Concessionaire may request the City to enter into any litigation to protect the interests of the City. In addition, the Concessionaire may request the United States to enter into the litigation to protect the interests of the United States.

SECTION 4. SECTION 36, entitled "TITLE VI LIST OF PERTINENT NONDISCRIMINATION AUTHORITIES," is hereby added as follows:

(Source: Appendix E of Appendix 4 of FAA Order 1400.11, Nondiscrimination in Federally-Assisted Programs at the Federal Aviation Administration)

During the performance of the Agreement the Concessionaire, for itself, its assignees, and successors in interest (hereinafter referred to in this SECTION 36 as the "Concessionaire" agrees to comply with the following non-discrimination statutes and authorities; including but not limited to:

- Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*, 78 stat. 252), (prohibits discrimination on the basis of race, color, national origin);
- 49 CFR part 21 (Non-discrimination In Federally-Assisted Programs of The Department of Transportation) Effectuation of Title VI of The Civil Rights Act of 1964);

- The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 U.S.C. § 4601), (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);
- Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. § 794 *et seq.*), as amended, (prohibits discrimination on the basis of disability); and 49 CFR part 27;
- The Age Discrimination Act of 1975, as amended, (42 U.S.C. § 6101 *et seq.*), (prohibits discrimination on the basis of age);
- Airport and Airway Improvement Act of 1982, (49 USC § 471, Section 47123), as amended, (prohibits discrimination based on race, creed, color, national origin, or sex);
- The Civil Rights Restoration Act of 1987, (PL 100-209), (Broadened the scope, coverage and applicability of Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms “programs or activities” to include all of the programs or activities of the Federal-aid recipients, sub-recipients and contractors, whether such programs or activities are Federally funded or not);
- Titles II and III of the Americans with Disabilities Act of 1990, which prohibit discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 U.S.C. §§ 12131 ñ

12189) as implemented by Department of Transportation regulations at 49 CFR parts 37 and 38;

- The Federal Aviation Administration's Non-discrimination statute (49 U.S.C. § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex);
- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which ensures non-discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations;
- Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, and resulting agency guidance, national origin discrimination includes discrimination because of limited English proficiency (LEP). To ensure compliance with Title VI, you must take reasonable steps to ensure that LEP persons have meaningful access to your programs (70 Fed. Reg. at 74087 to 74100);
- Title IX of the Education Amendments of 1972, as amended, which prohibits you from discriminating because of sex in education programs or activities (20 U.S.C. 1681 et seq).

SECTION 5. SECTION 37, entitled "OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970," is hereby added as follows:

ôThis Agreement incorporates by reference the requirements of 29 CFR Part 1910 with the same force and effect as if given in full text. Concessionaire must provide a work environment that is free from recognized hazards that may cause death or serious physical harm to the employee. The Concessionaire retains full responsibility to monitor its compliance and their subcontractor's compliance with the applicable requirements of the Occupational Safety and Health Act of 1970 (20 CFR Part 1910). Concessionaire must address any claims or disputes that pertain to a referenced requirement directly with the U.S. Department of Labor ñ Occupational Safety and Health Administration.ô

SECTION 6. SECTION 38, entitled ôFEDERAL FAIR LABOR STANDARDS ACT (FEDERAL MINIMUM WAGE),ôis hereby added as follows:

ôThis Agreement incorporates by reference the provisions of 29 CFR part 201, the Federal Fair Labor Standards Act (FLSA), with the same force and effect as if given in full text. The FLSA sets minimum wage, overtime pay, recordkeeping, and child labor standards for full and part time workers.

The Concessionaire has full responsibility to monitor compliance to the referenced statute or regulation. The Concessionaire must address any claims or disputes that arise from this requirement directly with the U.S. Department of Labor ñ Wage and Hour Division.ô

SECTION 7. SECTION 39, entitled ôDISADVANTAGED BUSINESS ENTERPRISES,ôis hereby added as follows:

ôContract Assurance (§ 26.13) - The Concessionaire or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the

performance of this Agreement. The Concessionaire shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT assisted contracts. Failure by the Concessionaire to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy, as the recipient deems appropriate.

Prompt Payment (§26.29) - The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than ten (10) days from the receipt of each payment the prime contractor receives from City. The prime contractor agrees further to return retainage payments to each subcontractor within ten (10) days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the City. This clause applies to both DBE and non-DBE subcontractors.

SECTION 8. All of the terms and conditions of the Agreement not modified by this First Amendment shall remain in full force and effect.

[remainder of page intentionally left blank]

WITNESS THE EXECUTION HEREOF on the day and year first written above.

“CITY”

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal
corporation of the State of California

KEVIN FISHER
Chief Deputy City Attorney

TONI J. TABER, CMC
City Clerk

Date: _____

“CONCESSIONAIRE”

SMARTE CARTE, INC.,
a Minnesota corporation authorized to do
business in California

Signature

Print Name

Title

Date

CORPORATE SECRETARY CERTIFICATE

This certificate shall be executed by the secretary or assistant secretary of the corporation.

I, _____ certify that I
Name of Secretary or Assistant Secretary

am the ☐ Secretary or ☐ Assistant Secretary of the corporation named in the

attached agreement; that _____
Name of Person that Signed Agreement

signed the agreement on behalf of the corporation as the _____
Title of Person that Signed the Agreement

of the corporation; and that the agreement was duly signed for and on behalf of

the corporation by authority of its Board of Directors, and is within the scope of its

corporate powers.

Signature of Secretary or Assistant Secretary

Corporate Seal

Date