



COUNTY OF EL PASO

OFFICE OF THE COUNTY AUDITOR

EDWARD A. DION, CPA, CIO
COUNTY AUDITOR
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500 EAST SAN ANTONIO STREET
EL PASO, TEXAS 79901-2407
(915) 546-2040
(915) 546-8172 FAX

07-49

July 29, 2008

Ms. Rosemary Neill
Director
Parks and Recreation/Ascarate Lake
801 East Overland
El Paso Texas 79901

Dear Ms. Neill:

A copy of a memorandum from Ms. Bertha Tafoya, internal auditor, dated July 29, 2008 is attached. This memorandum is a report on a review of the Kiss Concessionaire for July 2007 through June 2008. Our review was performed with objectivity and due professional care. I concur with the recommendations made by Ms. Tafoya.

If we can be of any assistance in this regard, please let us know.

Sincerely,

A handwritten signature in black ink, appearing to read "Edward A. Dion".

Edward A. Dion
County Auditor

EAD:BT:ya

Attachment

cc: The Honorable Anthony Cobos, County Judge
The Honorable Luis Sarinana, County Commissioner
The Honorable Veronica Escobar, County Commissioner
The Honorable Miguel Teran, County Commissioner
The Honorable Daniel R. Haggerty, County Commissioner
Ms. Maria Canales, Kiss Concessions



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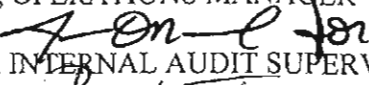
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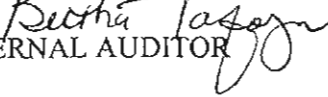
07-50

MEMORANDUM

TO: EDWARD A. DION, COUNTY AUDITOR 

THRU: TERESA MOLINAR, OPERATIONS MANAGER 

THRU: SYLVIA PACHECO, INTERNAL AUDIT SUPERVISOR 

FROM: BERTHA TAFOYA, INTERNAL AUDITOR 

DATE: JULY 29, 2008

SUBJECT: REVIEW OF KISS CONCESSIONAIRE AT ASCARATE PARK FOR JULY 2007 THROUGH JUNE 2008

A review of the contract with Kiss Concessions located at the Ascarate Park for July 2007 through June 2008 has been completed. The objective of this review was to ensure compliance with contract stipulations.

Scope and Purpose

The scope and purpose of the review consisted of:

1. Commission payments were reviewed to ensure that they were made in accordance with contract stipulations and that they were properly posted in the Financial Accounting Management Information System.
2. On-site visits were made to evaluate whether sales are being reported in accordance to contract stipulations.
3. The contract between Ms. Maria Canales/DBA Kiss Concessions and the County was reviewed to evaluate compliance.
4. Previous memoranda were reviewed for proper implementations of prior recommendations.

General

1. Observation: Commission payments submitted to the treasury division of the County Auditor's Office do not always include a sales report. Also, none of the commissions paid match the information reported in the RecWare cashiering system. See attached

report. As an example, a payment in the amount of \$304.45 for the 20 percent of the concessionaire's net sales for the month of July 2007 was received on September 4, 2007; however, the sales reported in RecWare for the month of July 2007 amounted to \$401.70. This office was not able to verify the accuracy of this or any other payments submitted because back-up documentation is not always submitted to this office

Corrective Action/Recommendation: It is recommended that commission payments include the required documentation as specified on the contract. It is further recommended that all sales be reported in the RecWare cashiering system. Also, the commission payments should be made in accordance to contract stipulations.

2. Observation: Several on-site visits have been made during hours of operation but the concession stand is always closed. Article IV, section 4.1 of the contract specifies that the Concessionaire shall provide food service and boat rentals at the premises Tuesday through Sunday throughout the year. Also, this section specifies that during the months of April through September, the concession stand must be open a minimum of 40 hours per week. Further, it appears that the lake concession stand is being utilized for storage.
Corrective Action/Recommendation: It is recommended that Ms. Canales comply with contract stipulations.
3. Observation: It appears that sales from the stand located inside the Ascarate swimming pool are not being reported to this office. Upon inquiry, a Kiss Concession's employee indicated that the stand's hours of operations are the same as the swimming pool.
4. Observation: While comparing the concessionaire's daily sales and the Ascarate swimming pool revenue which are reported in the RecWare cashiering system, it was noted that the swimming pool reported \$22,924 in revenue and the concessionaire reported zero sales for the same dates. See attached report. Also, it appears that the concessionaire was open for business only on June 1, June 8, and June 29, 2008, as per RecWare records.
5. Observation: While reviewing RecWare reports, it was noted that all receipts for May 31, 2008 were voided. It should be further noted that Ms. Canales enters transactions in the RecWare cashiering system at the end of the business day. Further, review of the voided transactions indicated that these transactions were entered in RecWare at 6:16 p.m. and void at 8:07 p.m. on June 1, 2008. It appears that the voids are due to donated goods, paddle boat, and canoe rides during the County's employee appreciation day. However, County employees from the Auditor's and the Communication's Department indicated they had paid for canoe and paddle boat rides.
6. An analysis comparing the sales reported by Lumar Enterprises and the sales reported by Kiss Concessions is attached. This analysis further supports the fact that Kiss Concessions may not be fully reporting the sales at Ascarate Park.

EDWARD A. DION

JULY 29, 2008

PAGE 2

7. Observation: Several attempts were made to contact Ms. Canales regarding the above listed issues, to no avail. Also, this office has constantly requested copies of revenue reports submitted to the state; however, she has not complied. Upon inquiry, personnel at the State Comptroller's Office indicated that the Texas Limited Sales, Excise and Use Tax permit issued to Maria Canales/DBA Kiss Concession was terminated by Ms. Canales. According to the State Comptroller's Office, Kiss Concessions has not filed a report with their office. See attached e-mail.

Corrective Action/Recommendation: As required on all County contracts, all businesses entering in a legal contract must have a state taxpayer number and report sales to the State. Since Maria Canales/DBA Kiss Concessions has not complied with County and State requirements, it is strongly recommended that the contract with Maria Canales/DBA Kiss Concessions be terminated.

Summary

Based on this review and review of previous memoranda, it appears that Ms. Canales continues to disregard the recommendations made by this office regarding contract compliance. Due to Ms. Canales ambiguous and deceiving business practices, it is therefore, once again recommended that the contract with Maria Canales/DBA Kiss Concessions be terminated immediately.

BT:ya

MARIA CANALES/DBA KISS CONCESSIONS - ASCARATE LAKE
 SALES AND COMMISSION PAYMENT HISTORY FOR APRIL 2007 THROUGH JUNE 2008

Reporting Month	Sales Per Report	Net Sales Per Report	Collections Per RecWare	Commission On Net Sales	Commission Payments	DW Number	Payment Due Date	Date Paid	Comment
Apr-07	None		0.00	0.00	175.00	07179913	5/30/2007	5/15/2007	DW indicates payment is for April but there is no back-up DW receipts for this month recorded and void on 5/18/07. No other sales.
May-07	None		-	-	117.33	07181901	6/30/2008	7/19/2007	Commission and Revenue documentation was not submitted
Jun-07	None		744.95	148.99					DW indicates payment is for July but there is no back-up
Jul-07	None		418.20	83.64	304.45	183329	8/30/2007	9/4/2007	Revenue is not reported in the RecWare cashing system.
Aug-07	None	971.86	206.15	41.23	182.37	184342	9/30/2007	10/5/2007	Commission and Revenue documentation was not submitted
Sep-07	None		63.00	12.60	0.00		10/29/2007		
Oct-07	None		0.00	0.00	0.00				
Nov-07	None		0.00	0.00	0.00				
Dec-07	None		0.00	0.00	0.00				
Jan-08	None		0.00	0.00	0.00				
Feb-08	None		373.75	74.75	0.00		3/29/2008		Commission and Revenue documentation was not submitted
Mar-08	1048.50	962.00	1048.50	193.72	192.40	08189714	4/30/2008	4/8/2008	Net of sales amount should be \$968.59, comm. Amt should be \$193.72
Apr-08	1845.70	1693.43	1845.70	341.01	338.69	08191033	5/30/2008	5/20/2008	Revenue is not being reported to the County. Ms. Canales had sales on 5-31-08 but she voided the receipts. County employees paid for canoe, paddle boat rides, and other items.
May-08	None		2145.40	429.08	0.00		6/30/2008	5/20/2007	
Jun-08	None		622.50	124.50	0.00		7/30/2008		
			\$ 6,723.20	\$ 1,300.53	\$ 1,017.91				

An average of \$113 is paid to the County by Kiss

Based on the sales information recorded in RecWare Ms. Canales makes approximately \$597 monthly. She also pays two employees one works at the pool and the other the ice cream truck. It is doubtful that if she is making this kind of money that she would still stay in business at Ascarate.

Ms. Canales informed Mayra Navarrete accounts clerk at Ascarate Park and this office that she reports yearly to the state comptroller, however, on July 23, 2008 I contacted Mr. Alvarado at the state comptroller's office and he indicated that Ms. Canales has never filed a report.

On July 28, 2008 this office received confirmation from the State Comptroller that Ms. Canales had acquired a taxpayer number and that she had later cancelled it because she was not going into business. The sales tax number she had provided to this office had been issued to Canales Racing & Upholstery. See attached e-mail.

**Reported Revenue From Kiss Concession Was Compared Revenue From Ascarate Swimming Pool
For May and June 2008**
Kiss concession stand inside the Ascarate Swimming Pool

Business Dates	Ascarate Swimming Pool	Kiss Concession Sales	Business Dates	Ascarate Swimming Pool	Kiss Concession Sales
5/24/2008	\$474	\$152	6/1/2008	\$1,438	\$238
5/25/2008	1204	594	6/3/08-6/7/08	3184	0
5/26/2008	1548	328	6/8/2008	1538	217
5/27/2008	190	0	6/10/08-6/28/08	18202	0
5/28/2008	248	0	6/29/2008	234	168
5/29/2008	312	0			
5/30/2008	254	0			
5/31/2008					
	<u>\$4,230</u>	<u>\$1,073</u>		<u>\$24,596</u>	<u>\$623</u>

* Fees waived for employee appreciation day
 ** Fees were waived for canoe race only. Everyone was charged for boat rides, water, etc.
 Ms. Canales charged for canoe rentals after the race ended. There are County employees that were charged for the rides. Also, receipted receipts for 5/31/08 were void at 8:00.

Ascarate Park Lake Concessionaire
Sales and Commission Comparison Fiscal Months April Through September 2006 and 2007

	Lumar* Net Sales	Lumar* Commissions Pd	Kiss** Net Sales	Kiss** Commissions Pd	Net Sales	Commissions
	<u>Lumar</u> <u>FY2006</u>	<u>FY2006</u>	<u>Kiss FY2007</u>	<u>FY2007</u>	<u>Difference</u>	<u>Difference</u>
* April	\$6,686	\$802	\$1,006	175	(5679)	(627)
* May	\$3,787	454	0	0	(3787)	(454)
* June	\$2,084	231	\$745	0	(1339)	(231)
* July	\$4,227	469	\$418	117	(3809)	(351)
* August	\$636	71	\$206	0	(430)	(71)
* September	\$53	6	\$63	304	10	299
Totals	\$17,473	\$2,033	\$2,439	\$597	(\$15,034)	(\$1,436)

Ascarate Park Lake Concessionaire
Sales and Commission Comparison Fiscal Months April Through June 2006 and 2008

	Lumar* Net Sales	Lumar* Commissions Pd	Kiss** Net Sales	Kiss** Commissions Pd	Net Sales	Commissions
	<u>Lumar</u> <u>FY2006</u>	<u>FY2006</u>	<u>Kiss FY2008</u>	<u>FY2008</u>	<u>Difference</u>	<u>Difference</u>
* April	\$6,686	\$802	\$1,846	\$192	(\$4,840)	(\$610)
* May	\$3,787	454	\$2,145	339	(1642)	(116)
* June	\$2,084	231	\$623	0	(1462)	(231)
Totals	\$12,557	\$1,488	\$4,614	\$531	(\$7,944)	(\$957)

Lumar's temporary contract started on April and ended on September 2006. Lumar's commission rate was 12 percent

Kiss contract became effective March 1, 2007 and their commission rate is 20 percent

*Partial or no documentation has been provided by Kiss Concessions

Bertha Tafoya

From: James More [James.More@cpa.state.tx.us]
Sent: Monday, July 28, 2008 7:12 AM
To: Bertha Tafoya
Cc: James More
Subject: Maria Canales

July 28, 2008

Bertha Tafoya
Internal Auditor
El Paso County Auditor's Office
BTafoya@Epcounty.com

Dear Ms. Tafoya:

This is in response to your request for information on Maria Canales, taxpayer number 3-20070-9869-5.

Thee Comptroller of Public Accounts received your written request for information on July 24, 2008. Your request has been assigned ID#5306532405 by this office.

Our record reflects that a Texas Limited Sales, Excise, and Use Tax Permit was issued to Maria Canales, 145 Anita Circle, El Paso, Texas 79905-3040. The outlet information was as follows:

Canales Racing & Upholstery	Kiss Concession
145 Anita Circle	145
Anita Circle	
El Paso, Texas 79905	El Paso, Texas
79905	

Also, our records reflects that this office was contacted and informed that she would not be going into business since the rent was too high. She never opened the business and consequently has filed no reports with this office.

If you have any questions or need further help, please write to the Comptroller of Public Accounts, Open Records Section, P. O. Box 13528, Austin, Texas 78711, fax correspondence to (512) 475-1610. You may call (800) 531-5441 ext 6-6057, toll free anywhere in the United States. If you're calling from a Telecommunication Device for the Deaf (TDD), the toll free number is (800) 248-4099, or in Austin 936-6057. My Austin number is 936-6057.

Sincerely,

James F. More
Open Records Section
Comptroller of Public Accounts

MANAGEMENT AGREEMENT

This Management Agreement (“Agreement”) is made and entered into this 12th day of February, 2007, by and between El Paso County (“County”), a political subdivision of the State of Texas, and Maria Rosario Canales d/b/a Kiss Concessions, (“Concessionaire”), who agree as follows:

ARTICLE I **PURPOSE OF THE AGREEMENT**

- 1.1 **Purpose of Agreement.** The Agreement sets forth the terms and conditions upon which County retains Concessionaire to manage and operate Food Service and Boat Rentals for the general public at Premises.
- 1.2 **Independent Contractor.** Concessionaire shall be an independent contractor and shall retain control over its employees and agents.
- 1.3 **Regulations and Access.** County will establish reasonable requirements for use and occupancy of the Premises and shall give Concessionaire written notice thereof. County’s authorized representatives shall have access to the Premises at all times.

ARTICLE II **DEFINITIONS**

- 2.1 **Accounting Period.** A calendar month, twelve (12) of which constitute an accounting year.
- 2.2 **Boat Rentals.** The rental and operation of paddleboats, canoes, and kayaks on or from the Premises.
- 2.3 **Food Service.** The preparation, service and sale of food, beverages, goods, merchandise and other items on or from the Premises.
- 2.4 **Gross Sales.** All sales of food, beverages, goods, merchandise and services in the Food Service and Boat Rental operation, to include catered events and all boat rental fees, plus sales and use taxes.
- 2.5 **Net Sales.** Gross Sales excluding sales and use taxes.
- 2.6 **Premises.** Ascarate Park located at 6900 Delta Drive, El Paso, Texas 79905. Premises does not include the golf course or restaurant at Ascarate Park.

ARTICLE III
TERM AND EXCLUSIVITY

- 3.1 Term of Agreement. The initial term of the Agreement is five (5) years, commencing on February 12, 2007, and continuing until February 11, 2012. County shall have the option to extend the initial term an additional five (5) year period by giving the Concessionaire sixty (60) days written notice.
- 3.2 Food Service & Boat Rental Exclusive. County grants Concessionaire the exclusive right to operate Food Service and Boat Rental on or from the Premises. This exclusive right, however, does not apply to providing food service during concerts or other special events or events sponsored by governmental or non-profit organizations as so designated by the County. The County reserves the right to provide or contract separately for food service during these designated events.

ARTICLE IV
RETAIL SALES PROGRAM

- 4.1 Location & Time. Concessionaire shall provide Food Service and Boat Rentals at the Premises Tuesday through Sunday throughout the year. During the months of April through September, Concessionaire guarantees a minimum of 40 service hours per week. Concessionaire will be given until May 1, 2007 to obtain permits, insurance, and anything else needed to be able to fully perform under this Agreement. Concessionaire will be expected to fully perform under this contract beginning May 1, 2007.
- 4.2 Food Services. Food Service at a minimum shall include the sale of food, candy, soft drinks, sport drinks, and water. During the months of April through September, Concessionaire will provide food service from both the concession stand and mobile units. During the months of October through March, Concessionaire will provide food service from the mobile units. Concessionaire shall provide its own vehicle for use throughout the park. Concessionaire shall not serve beer, wine, or any other alcoholic beverage. In addition, Concessionaire shall not serve any food or beverage in a glass container.
- 4.3 Boat Rentals. Concessionaire shall offer for rental to the general public the following: paddleboats, canoes, and kayaks. County shall provide Concessionaire with the paddleboats, canoes, and kayaks. Concessionaire shall purchase and maintain a small motorized craft suitable for use in emergency situations. Vendor must also provide an appropriate number of life jackets for adults and children for use during boat rentals.
- 4.4 Novelty Items. Concessionaire may also provide, rent, or sell novelty items such as kites, balloons, Frisbees, fishing tackle, and bait.

- 4.5 Retail Segment Prices. Prices charged for Food Service and Boat Rentals shall be reasonable as determined by Concessionaire and competitive with prices charged in comparable establishments in the geographic area of the Premises for products of like quality. All prices shall be presented to the Commissioner's Court for the County of El Paso annually for its approval.
- 4.6 Catering. Concessionaire may enter into catering agreements for events occurring on Premises. Prices for catering such events shall be established by mutual agreement of Concessionaire and the organization group, or person sponsoring the event.
- 4.7 Reports. Concessionaire shall prepare a statement of sales and commissions for each Accounting Period and shall submit such statement with commission payments due to County for such Accounting Period. Statement of sales and commissions shall be detailed, and shall be prepared using standard accounting practices, listing each commission category separately, number of customers served in each category and total sales in each category. Concessionaire shall supply with each statement a copy of register tapes, weekly reports and catering invoices. Concessionaire shall submit an annual statement to County within sixty (60) days of close of the Accounting Year. All reports shall contain a separate original statement, signed by the person responsible for the report attesting to the report's accuracy.
- 4.8 Electronic Reporting. Concessionaire agrees to use the County's RecWare software or any other software so designated by the County to electronically report sales and receipt funds to the County. Concessionaire acknowledges that submission of required reports in electronic format is for the convenience of both parties only, and does not relieve the Concessionaire from the responsibility of accurate record keeping. Furthermore, by accepting the required reports in electronic format, County **does not** waive any Right of Inspection and Audit, as set forth below. County may at any time, with or without notice, require additional supporting documentation. A separate **original** statement, signed by the person responsible for the report attesting to the electronic report's accuracy shall accompany the Commission Payment. Copies of the report will be forwarded to County's designated representative(s).
- 4.9 Record Keeping. Concessionaire shall retain copies of all financial records pertaining to Concessionaire Food Service and Boat Rentals at Premises for a minimum of two (2) years.
- 4.10 Right of Inspection and Audit. Concessionaire agrees that all financial records pertaining to Concessionaire Food Service and Boat Rentals shall be available for inspection and audit without notice by County.

ARTICLE V
EMPLOYEES

- 5.1 Concessionaire Management Employees. Concessionaire shall provide qualified management employees to operate the Food Service and Boat Rental and supervise all employees. Concessionaire shall have a manager on site during business hours.
- 5.2 Concessionaire Non-management Employees. All non-management Food Service and Boat Rental employees shall be Concessionaire Employees. Concessionaire shall consider County's employee policies and practices when establishing policies and practices for Concessionaire employees. Concessionaire shall provide adequate staff to maintain full operation during business hours. Concessionaire employees should be dressed appropriately preferably with identification to note the organization they represent.
- 5.3 Personnel Obligations. The parties hereto shall be solely responsible for employees on their respective payrolls, including responsibility for recruitment, employment, promotion, transfer, layoff and termination. Each party shall prepare and process the payroll for its employees and shall withhold and pay all applicable federal and state employment taxes and payroll insurance relating to its employees including any income, social security and unemployment taxes and workers' compensation costs and charges.
- 5.4 Agreement Not to Hire. County shall not, without Concessionaire's written consent, hire, make any agreement with, or permit the employment of, in any operation providing food service or boat rentals, any person who has been a Concessionaire management employee at Premises within the earlier of one (1) year after said employee terminates employment with Concessionaire or within one (1) year after termination of the Agreement. This provision shall survive termination of the Agreement.
- 5.5 Equal Opportunity and Affirmative Action Employer. Neither party shall discriminate because of race, color, religion, sex, age, national origin, disability, or status as a Vietnam veteran, as defined and prohibited by applicable law, in the recruitment, selection, training, utilization, promotion, termination, or other employment related activities concerning Food Service or Boat Rental employees. Concessionaire affirms that it is an equal opportunity and affirmative action employer and shall comply with all applicable federal, state and local laws and regulations including, but not limited to: Executive Order 11246 as amended by 11375 and 12086; 12138; 11625; 11758; 12073; the Rehabilitation Act of 1973, as amended; the Vietnam Era Veterans Readjustment Assistance Act of 1975; Civil Rights Act of 1964; Equal Pay Act of 1963; Age Discrimination in Employment Act of 1963; Age Discrimination in Employment Act of 1967; Immigration Reform and Control Act of 1986; Public Law 95-507; and any additions or amendments thereto.

ARTICLE VI
INVENTORIES, FACILITIES, EQUIPMENT AND MAINTENANCE

- 6.1 Concession Stand Equipment. County shall, at County's expense, provide Concessionaire with the necessary equipment for the concession stand. Concessionaire and County will inventory the equipment before Concessionaire takes possession of the equipment. Concessionaire will take reasonable and proper care of any equipment provided by County. Upon termination of the Agreement, Concessionaire shall surrender the equipment to County.
- 6.2 Concession Stand. County shall, at County's expense, provide a suitable concession stand for use by Concessionaire. Concessionaire shall take reasonable and proper care of the concession stand and return it to County at termination of the Agreement.
- 6.3 Sanitation. Concessionaire shall be responsible for usual and customary cleaning and sanitation of the Premises.
- A. Concessionaire shall be responsible for housekeeping and sanitation in food preparation, storage and serving areas. Concessionaire shall provide daily janitorial service for the Food Service and Boat Rental areas, to include the restrooms. Concessionaire shall provide necessary pest control, and transport refuse to designated refuse collection areas.
- B. County shall provide and maintain adequate fire extinguishing equipment for the Premises.
- 6.4 Maintenance. County shall provide the equipment and boats listed in sections 4.3 and 6.1 in good condition for Concessionaire's use during the term of the Agreement. Concessionaire shall maintain all the equipment and boats in good condition and repair at their own expense and shall surrender all equipment in good condition upon termination of the Agreement, normal wear and tear excepted. Concessionaire will be responsible for the cleaning of grease traps, vents, and vent filters. All property owned by the County shall remain the property of County.
- 6.5 Utilities. County shall be responsible for the cost of water utilities at Premises. Concessionaire shall be responsible for the cost of electric and gas utilities consumed in the operation of its business at Premises.
- 6.6 Condition of Premises and Equipment. The Premises and equipment provided by each party for use in the Food Service and Boat Rental operation shall be in good condition and maintained by Concessionaire to ensure compliance with applicable laws concerning building conditions, sanitation, safety and health. County agrees that any modifications or alterations to the workplace or the Premises (whether structural or non-structural) necessary to comply with the Americans with Disabilities Act or any other similar law shall be the responsibility of County and

shall be at the County's expense. Concessionaire shall take reasonable and proper care of the Premises and equipment under its custody and control and shall notify County of any known deficiencies.

ARTICLE VII
FINANCIAL ARRANGEMENTS

- 7.1 Commissions. Concessionaire shall pay County a commission of 20.0% of Net Sales on all sales including catering sales, concession stand food sales, boat rentals, merchandise sales, novelty sales or rentals, and traveling concession sales.
- 7.2 Commission Payments. Commission payments are to be made, without demand, within thirty (30) days after close of each Accounting Period. Commission payments are to be made to the Treasury Division, El Paso County Auditor, fourth floor, El Paso County Courthouse unless notified otherwise in writing.
- 7.3 Financial Offsets. A penalty of one percent, (1%) per month shall be assessed by the County against Concessionaire for Commission Payments in arrears.
- 7.4 Investment. Concessionaire shall invest \$20,000.00 into the premises as follows: an initial investment of \$2,000.00 or the cost of a small motor boat for water rescue events; an additional \$2,000.00 in year two; an additional \$5,000.00 each in years three and four; and an additional \$6,000.00 in year five.

ARTICLE VIII
GENERAL TERMS AND CONDITIONS

- 8.1 Taxes. Concessionaire shall bill and collect sales and use taxes, if applicable, on all meals and services rendered on or from the Premises. If the parties disagree as to taxability of any meals or services, Concessionaire shall promptly obtain a ruling from the appropriate governmental authority. Concessionaire shall indemnify County against any liability or assessment, including related interest and penalties, arising from a tax assessment and shall pay reasonable collection expenses, attorney's fees and costs incurred in connection with the enforcement of such indemnity. This provision shall survive termination of the Agreement.
- 8.2 Compliance with Law. Concessionaire shall comply with all applicable laws, ordinances, rules and regulations relating to Food Service sanitation, safety and health, and shall maintain all necessary licenses and permits, excluding any necessary liquor licenses and permits which shall be County's responsibility to obtain and maintain. County shall cooperate with Concessionaire to accomplish the foregoing.
- 8.3 Workers' Compensation Insurance. Each party shall maintain workers' compensation as required by state law covering all of its employees employed in connection with the Food Service and Boat Rental operation.

- 8.4 Comprehensive or Commercial Insurance. Concessionaire shall, as a Charge to the Food Service and Boat Rental operation, maintain during the term of the Agreement, Comprehensive or Commercial General Bodily Injury and Property Damage Liability Insurance in the Combined Single Limit of not less than One Million Dollars (\$1,000,000) for each occurrence, including, but not limited to, Personal Injury Liability, Broad Form Property Damage Liability, Blanket Contractual Liability and Products Liability, covering only the activities of Concessionaire under the Agreement and shall provide County with a certificate evidencing such policies. The insurance policies shall contain covenants by the issuing company that the policies shall not be canceled without thirty (30) days prior written notice. County shall be named as an additional insured under Concessionaire's policies of insurance.
- 8.5 Liability for Non-Concessionaire Approved Vendors. County understands that Concessionaire has entered into agreements with many vendors and suppliers of products which give Concessionaire the right to inspect such vendors' and suppliers' plants and/or storage facilities and require such vendors and suppliers to adhere to standards to ensure the quality of the products purchased by Concessionaire for or on behalf of County. County may, however, direct Concessionaire to purchase products from non-Concessionaire approved vendors. In such instances, for the mutual protection of County and Concessionaire, County will require each such vendor to obtain from a reputable insurance company acceptable to County and Concessionaire liability insurance (including products liability coverage) and contractual liability insurance in the amount of not less than One Million Dollars (\$1,000,000) for each occurrence naming County and Concessionaire as additional insureds. Said insurance shall not exclude the negligence of County or Concessionaire from coverage. A certificate evidencing such insurance shall be provided to County and Concessionaire upon the request of either party. County shall also require each such vendor to sign an indemnity certificate (acceptable to County and Concessionaire) in which such vendor shall agree to defend, indemnify, and hold harmless County and Concessionaire from and against all claims, liabilities, losses and expenses, including reasonable costs, collection expenses, and attorney's fees which may arise as a result of using such vendor's products, except when such liability arises solely as a result of the negligence of Concessionaire and/or County. County shall not require Concessionaire to use products from non-Concessionaire approved vendors until such insurance certificates and indemnity certificates have been provided.
- 8.6 **Indemnity. Concessionaire shall defend, indemnify and hold harmless County from and against all claims, liability, loss and expense, including reasonable collection expenses, and attorneys' fees, which may arise because of the acts or omissions of the Concessionaire, its agents or employees. This clause shall survive termination of the Agreement.**
- 8.7 Assignment. The Agreement may not be assigned by either party without the written consent of the other.

8.8 Notice. Any notice of communication required or permitted to be given hereunder shall be in writing and served personally, delivered by courier or sent by United States certified mail, postage prepaid with return receipt requested, addressed to the other party as follows:

To County: El Paso County Courthouse
Attention: County Judge
500 E. San Antonio, Room 301
El Paso, TX 79901

To Concessionaire: Kiss Concessions
Attention: Maria Rosario Canales, Owner
145 Anita Circle
El Paso, TX 79905

And/or to such other persons or places as either of the parties may hereafter designate in writing. All such notices shall be effective when received.

8.9 Catastrophe. Neither Concessionaire nor County shall be liable for the failure to perform its respective obligations hereunder when such failure is caused by fire, explosion, water, act of God, civil disorder or disturbances, strikes, vandalism, war, riot, sabotage, weather and energy-related closings, governmental rules or regulations, or like causes beyond the reasonable control of such party, or for real or personal property destroyed or damaged due to such causes.

8.10 Termination for Cause. If either party breaches a material provision hereof (“Cause”), the non-breaching party shall give the other party notice of such cause. If the cause is remedied within ten (10) days in the case of failure to make payment when due or thirty (30) days in the case of any other cause, the notice shall be null and void. If such cause is not remedied within the specified period, the party giving notice shall have the right to terminate the Agreement upon expiration of such remedy period. The rights of termination referred to in the Agreement are not intended to be exclusive and are in addition to any other rights available to either party at law or in equity.

8.11 Termination for Lack of Funding. The County may terminate this agreement at the end of any fiscal year during the term of this agreement if sufficient funds intended to satisfy the payment obligations of this agreement are not included in the adopted budget of El Paso County for the upcoming fiscal year.

8.12 Termination without Cause. Either party may terminate the Agreement at any time by giving at least sixty (60) days prior written notice.

- 8.13 Construction and Effect. A waiver of any failure to perform under the Agreement shall neither be construed as nor constitute a waiver of any subsequent failure. The article and section headings used herein are used solely for convenience and shall not be deemed to limit the subject of the articles and sections or be considered in their interpretation.
- 8.14 Severability. If any term or provision of the Agreement or the application thereof to any person or circumstance shall, to any extent or for any reason be invalid or unenforceable, the remainder of the Agreement and the application of such term or provision to any person or circumstance other than those as to which it is held invalid or unenforceable shall not be affected thereby, and each remaining term and provision of the Agreement shall be valid and enforceable to the fullest extent permitted by law.
- 8.15 Law and Venue. The substantive and procedural laws of the State of Texas, without regard to any otherwise applicable choice or conflict of laws provision, shall govern this agreement, and venue shall lie in El Paso County, Texas for any claims made under this agreement.
- 8.16 Amendments to Agreement. All provisions of the Agreement hereto shall remain in effect throughout the term thereof unless the parties agree, in a written document signed by both parties, to amend, add or delete any provision. The Agreement contains all agreements of the parties with respect to matters covered herein, superseding any prior agreements and may not be changed other than by an agreement in writing signed by the parties hereto.

IN WITNESS WHEREOF, the parties hereto have entered into the Agreement as of the date first signed or the first day of the Term, whichever is sooner.

ATTEST:

EL PASO COUNTY

County Clerk

By:

Anthony Cobos
County Judge

APPROVED AS TO FORM:

MARIA ROSARIO CANALES
D/B/A KISS CONCESSIONS

Assistant County Attorney

By:

Maria Rosario Canales
Owner