

Sponsored by: Puto

**CITY OF MARATHON, FLORIDA
RESOLUTION 2005-020**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF
MARATHON, FLORIDA, APPROVING AN AGREEMENT WITH FLORIDA
KEYS AIRPORT INITIATIVE, INC., A NON-PROFIT ORGANIZATION,
FOR THE IMPLEMENTATION OF COMMERCIAL AIR SERVICE AT THE
MARATHON AIRPORT AND APPROPRIATING FUNDS**

WHEREAS, the City of Marathon (the "City") desires the ability to use the Marathon Airport (the "Airport") for commercial air services;

WHEREAS, the Florida Keys Airport Initiative, Inc., wishes to assist in the implementation of commercial air services at the Airport.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MARATHON, FLORIDA, THAT:

Section 1. The above recitals are true and correct and are incorporated herein by this reference.

Section 2. The Interlocal Agreement between the Florida Keys Airport Initiative, Inc., and the City of Marathon regarding implementation of commercial air services at the Marathon Airport, a copy of which is attached as Exhibit "A," together with such non-material changes as may be acceptable to the City Manager or his designee and approved as to form and legality by the City Attorney, is approved.

Section 3. The City Manager or his designee is authorized to execute the agreement on behalf of the City.

Section 4. This resolution shall take effect immediately upon its adoption.

PASSED AND APPROVED by the City Council of the City of Marathon, Florida, this 8th day of March, 2005.

THE CITY OF MARATHON, FLORIDA



John Bartus, Mayor

AYES: Bull, Mearns, Miller, Pinkus, Bartus
NOES: None
ABSENT: None
ABSTAIN: None

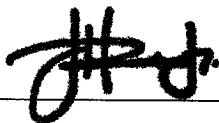
ATTEST



Cindy L. Ecklund, City Clerk

(City Seal)

APPROVED AS TO FORM AND LEGALITY FOR THE USE AND RELIANCE OF THE CITY
OF MARATHON, FLORIDA ONLY:



CITY ATTORNEY

AGREEMENT

THIS AGREEMENT is entered into this ____ day of March, 2005 (the "Effective Date") between the Florida Keys Airport Initiative, Inc., a Florida non-profit organization (hereinafter FKAI) and the City of Marathon, a municipal corporation organized and existing under the laws of the State of Florida (hereinafter CITY).

WITNESSETH:

WHEREAS, FKAI and CITY desire to enter into an agreement to provide for the promotion of commercial passenger air service to the Marathon Airport (the "Airport") in an amount not-to-exceed \$25,000.00.

NOW THEREFORE, in consideration of the mutual promises and covenants herein contained, it is agreed between FKAI and CITY as follows:

Section 1. Services. FKAI agrees to promote and obtain commercial passenger air service to the Airport through the use of, among other methods, financial incentives to commercial air carriers (the "Services").

Section 2. Payment. The CITY agrees to pay FKAI for the Services in a lump sum amount of \$25,000.00. FKAI agrees that no part of CITY funds will be used to fund the operating costs of FKAI but will be used solely to provide financial incentives to a commercial air carrier to commence and maintain commercial passenger air service at the Airport. FKAI agrees that if it is unsuccessful in persuading a commercial air carrier to commence commercial passenger air service at the Airport within two years from the Effective Date, FKAI will immediately return and refund the \$25,000 or any portion thereof paid by the City.

Section 3. Term.

- 3.1 This Agreement shall become effective upon execution by both parties and shall remain in effect for two years from the Effective Date (the "Expiration Date"), unless earlier terminated in accordance with Section 5 herein (the "Term").
- 3.2 The definition of "Term" shall include all renewal terms, if any.

Section 4. Subcontracts.

- 4.1 In providing the Services contemplated by this Agreement, the parties recognize that FKAI may subcontract with a third party(ies) to provide certain services.
- 4.2 Any third party contracts entered into between FKAI and any third party vendor shall not create any privity between the CITY and the third party, nor shall any third party vendor be considered a third party beneficiary of the rights of the CITY under this Agreement.

- 4.3 The FKAI shall be responsible for any violations of applicable state, federal, County or City laws, rules or regulations made by FKAI's vendor(s) in performing any services contemplated in this Agreement.
- 4.4 Any contracts with any subcontractors entered into by the FKAI shall include provisions for indemnification, insurance and customer service standards matching those provisions in this Agreement.

Section 5. Termination and Default.

- 5.1 In the event of any failure of compliance by either party hereto with any of its material obligations to the other party as provided for herein such action shall constitute a default under this Agreement.
- 5.2 Upon any such default, the non-defaulting party shall provide to the defaulting party a written Notice of such default, which Notice (a "Default Notice") shall state in reasonable detail the actions the defaulting party must take to cure the same.
- 5.3 The defaulting party shall cure any such default, within 30 days following the date of the Default Notice.
- 5.4 Notwithstanding the provisions of this Section, if any such default by the defaulting party remains uncured at the conclusion of any specified 30 day cure period, and if the nature of the defaulting party's obligations are such that more than 30 days is required to effect cure, then the defaulting party shall not be in default hereunder and the non-defaulting party shall not have the right to exercise its termination rights granted herein as a result of any such default, if the defaulting party commences cure within the applicable cure period and thereafter diligently pursues cure to completion of performance.
- 5.5 In the event the defaulting party fails to effect any required cure as provided for herein, the defaulting party shall be deemed to be in uncured default hereunder, and the non-defaulting party shall have the right, but shall not be obligated, upon written Notice to the defaulting party, to terminate this Agreement.
- 5.6 If such Notice is given, this Agreement shall terminate on the date set forth in the Notice and the parties shall be relieved of all rights and obligations hereunder, except for any rights and obligations that expressly survive termination.

Section 6. Indemnification.

- 6.1 To the extent permitted by law and subject to the provisions and monetary limitations of Section 768.28, Florida Statutes, FKAI does hereby agree to defend, indemnify and hold the CITY harmless from and against any and all liability, damages, costs or expenses (including reasonable attorneys' fees, costs, and expenses at both the trial and appellate levels) arising from the acts or omissions of FKAI, its officials, agents or employees, in connection with this Agreement.

Section 7. Notices.

7.1 All notices, requests, demands, elections, consents, approvals and other communications hereunder must be in writing (each such, a "Notice") and addressed as follows (or to any other address which either party may designate by Notice):

If to FKAI: David Rice
President FKAI
9400 Overseas Highway, Suite Z10
Marathon, FL 33050

With a copy to: June Helbling
Vice-President
11290 Overseas Highway
Marathon, FL 33050

If to CITY: Michael H. Puto
City Manager
City of Marathon
11045-55 Overseas Highway
Marathon, Florida 33050

With a copy to: John R. Herin, Jr., Esq.
City Attorney
Stearns Weaver Miller
Weissler Alhadeff & Sitterson, P.A.
150 West Flagler Street, Suite 2200
Miami, Florida 33130

Any Notice required by this Agreement to be given or made within a specified period of time, or on or before a date certain, shall be deemed to have been duly given if sent by certified mail, return receipt requested, postage and fees prepaid; hand delivered; facsimile; or sent by overnight delivery service.

Section 8. Insurance.

8.1 The CITY and FKAI agree to insure or self insure their respective interests in connection with personal injury, death and personal property damage to the extent each deems necessary or appropriate.

Section 9. Regulatory Powers.

- 9.1 Nothing contained herein shall be construed as waiving the CITY's regulatory approval or enforcement rights or obligations as it may relate to regulations of general applicability which may govern the Agreement.
- 9.2 Nothing herein shall be deemed to create an affirmative duty of the CITY to abrogate its sovereign right to exercise its police powers and governmental powers by approving or disapproving or taking any other action in accordance with ordinances, rules and regulations, federal laws and regulations and state laws and regulations.

Section 10. Authority.

- 10.1 The execution and delivery of this Agreement by both parties are within both parties' capacity and all requisite action has been taken to make this Agreement valid and binding on both parties in accordance with its terms.

Section 11. Attorneys Fees and Waiver of Jury Trial.

- 11.1 In the event of any litigation arising out of this Agreement, the prevailing party shall be entitled to recover its attorneys' fees and costs, including the fees and expenses of any paralegals, law clerks and legal assistants, and including fees and expenses charged for representation at both the trial and appellate levels.
- 11.2 In the event of any litigation arising out of this Agreement, each party hereby knowingly, irrevocably, voluntarily and intentionally waives its right to trial by jury.

Section 12. Governing Law.

- 12.1 This Agreement shall be construed in accordance with and governed by the laws of the State of Florida. Exclusive venue for any litigation arising out of this Agreement shall be in Monroe County, Florida, Middle Keys Division of the Circuit Court or the Southern District of Florida.

Section 13. Entire Agreement/Modification/Amendment.

- 13.1 This writing contains the entire Agreement of the parties and supercedes any prior oral or written representations. No representations were made or relied upon by either party, other than those that are expressly set forth herein.
- 13.2 No agent, employee, or other representative of either party is empowered to modify or amend the terms of this Agreement, unless executed with the same formality as this document.

Section 14. Access to Records and Audits.

- 14.1 The CITY shall, during the term of this Agreement and for a period of three (3) years from the date of termination of this Agreement, have access to and the right

to examine and audit any Records of FKAI or its subcontractors involving transactions related to this Agreement.

- 14.2 The CITY may cancel this Agreement for refusal by FKAI, or FKAI's subcontractor, to allow access by the CITY or its designee to any Records pertaining to work performed under this Agreement that are subject to the provisions of Chapter 119, Florida Statutes.
- 14.3 The term Records shall refer to any documents, books, data (electronic or hard copy), papers and financial records that result from FKAI or its subcontractors performance of the Services provided in this Agreement.
- 14.4 If the inspection or audit discloses that CITY funds paid to FKAI under this Agreement were used for a purpose not authorized by this agreement, including but not limited to, the operational costs of FKAI, then FKAI must refund the funds improperly spent with interest calculated pursuant to Section 55.03, Florida Statutes, with interest running from the date the CITY paid the improperly spent funds to FKAI. This paragraph will survive the termination of this Agreement.

Section 15. Nonassignability.

- 15.1 This Agreement shall not be assignable by either party unless such assignment is first approved by both parties.
- 15.2 The provisions of this Section shall not prohibit FKAI from utilizing the services of subcontractors to perform the Services contemplated in this Agreement.

Section 16. Severability.

- 16.1 If any term or provision of this Agreement shall to any extent be held invalid or unenforceable, the remainder of this Agreement shall not be affected thereby, and each remaining term and provision of this Agreement shall be valid and be enforceable to the fullest extent permitted by law.

Section 17. Independent Contractor.

- 17.1 FKAI and its employees, volunteers, agents, vendors and subcontractors shall be and remain independent contractor and not agents or employees of the CITY with respect to all of the acts and services performed by and under the terms of this Agreement. This Agreement shall not in any way be construed to create a partnership, association or any other kind of joint undertaking, enterprise or venture between the parties.

Section 18. Waiver.

- 18.1 The failure of either party to this Agreement to object to or to take affirmative action with respect to any conduct of the other which is in violation of the terms

of this Agreement shall not be construed as a waiver of the violation or breach, or of any future violation, breach or wrongful conduct.

Section 19. Funding.

19.1 The parties agree that the CITY's responsibility under this Agreement is to provide funding only. Accordingly, any subcontractors providing the Services are in privity with FKAI only and may not seek direct payment from the CITY, and that the CITY has no duty, liability or other obligation to such persons. FKAI agrees to include a sentence similar to the foregoing in all contracts entered into by FKAI for the Services.

Section 20. Applicable Laws.

20.1 In awarding contracts for the Services, FKAI agrees to abide by all applicable FKAI ordinances and state and federal laws.

Section 21. Survival of Provisions.

21.1 Any terms or conditions of this Agreement that require acts beyond the date of the term of the Agreement, shall survive termination of the Agreement, shall remain in full force and effect unless and until the terms or conditions are completed and shall be fully enforceable by either party.

Section 22. Counterparts.

22.1 This Agreement may be executed in several counterparts, each of which shall be deemed an original and such counterparts shall constitute one and the same instrument.

[THE REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK.]

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first written above.

FLORIDA KEYS AIRPORT INITIATIVE, INC.

BY: [Signature]

(SEAL)

ATTEST:

BY: Tamara Lundstrom
Notary



Tamara Lundstrom
My Commission DD039316
Expires July 04, 2005

THE CITY OF MARATHON, FLORIDA

[Signature]
John Bartus, Mayor

ATTEST:

[Signature]
Cindy L. Ecklund
City Clerk

(City Seal)

APPROVED AS TO FORM AND LEGALITY FOR THE USE AND RELIANCE OF THE CITY OF MARATHON, FLORIDA ONLY:

BY: [Signature]
CITY ATTORNEY