



ITEM # 20-0315

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WINDCAVE AGREEMENT FOR CITY OF SANTA FE PARKING DIVISION (500 MARKET STREET)	
DATED this 4 <sup>th</sup> day of February 2020	
<b>PARTIES</b>	
<b>WINDCAVE INC. (Windcave)</b> <b>Contact Details for Notices:</b> Physical Address: 8939 S. Sepulveda Blvd, Suite 520, Los Angeles, CA 90045 Postal Address: P.O. Box 45498, Los Angeles, CA 90045-0498 Email: contracts@windcave.com Phone: +1 310 670 7299 Fax: +1 310 670 7298	
CustID: 83350	
<b>CITY OF SANTA FE PARKING DIVISION (Customer)</b> <b>Contact Details for Notices:</b> Physical Address: 500 market Street Suite 200 Santa Fe, NM 87501 Postal Address: PO Box 909 Santa Fe, NM 87504-0909 Email: npcorreia@santafenm.gov Phone: 505-955-6611 Fax:	
<b>AGREEMENT</b>	
<ol style="list-style-type: none"><li>1. Windcave is a provider of real time payment processing solutions in the USA. Windcave has agreed to supply solutions to Customer in accordance with the terms and conditions set out in this Agreement.</li><li>2. This Agreement is structured in two parts, namely Part A (Specific Terms) and Part B (General Terms). Part A contains the specific terms relevant to each supply of solutions to Customer and may include one or more Schedules. Part B sets out Windcave's general terms and conditions which will apply to all supplies of solutions.</li><li>3. It is intended that further supplies of solutions may be made and will be governed by this Agreement by way of the parties signing a further Part A Schedule for each supply. The attached schedules, or any schedules completed and signed after the date of this Agreement but referring to this Agreement, are a part of this Agreement. All purchase orders between the parties are subject to this Agreement's terms.</li></ol>	
<b>EXECUTION</b>	
<b>SIGNED for and on behalf of WINDCAVE INC. by:</b>  Signature Brian Lundin General Counsel Name/Title 3/29/2020 Date	<b>SIGNED for and on behalf of CITY OF SANTA FE PARKING DIVISION by:</b>  Signature NOEL CORREIA / PARKING DIRECTOR Name/Title (Director / Authorized Signatory) 04/14/20 Date

**PART A – SPECIFIC TERMS****SCHEDULE 1 – SERVICES ACCESS ARRANGEMENT****1. SERVICES ACCESS ARRANGEMENT**

- (a) **Windcave:** Windcave grants to Customer a non-exclusive, non-transferable licence to use the Windcave Solution for the Term solely for the purposes of the Permitted Use. Customer must not sub-license, transfer, assign, rent or sell the Windcave Solution or the right to use the Windcave Solution.

**2. TERM**

- (a) **Commencement Date:** 03/01/2020, Such Commencement Date may be postponed in writing, at Windcave's sole discretion, until the date Windcave receives a copy of the Agreement countersigned by Customer.
- (b) **Initial Term:** 48 months beginning on the Commencement Date, unless earlier terminated under Part B, clause 12.
- (c) **Renewal Term:** 24 consecutive months, unless earlier terminated under Part B, clause 12, subject to automatic renewal pursuant to Part B, clause 2 if neither party gives three month's advance notice of nonrenewal..

**3. FEES**

- (a) **Establishment Fee:** \$99.00
- (b) **Minimum Monthly Fee:** \$1,250.00 per calendar month. Includes 25,000 Transactions per calendar month. Additional Transactions in each calendar month charged at the rate of \$0.05 per Transaction.
- (c) **Additional Fees:** Additional users to the Payment Manager can be set up, but will incur a one-time fee of \$30.00. If Windcave needs to configure or change additional electronic merchant numbers on the Windcave Host, there is a fee of \$100.00 per merchant account. Customer will be charged a \$5.00 SAP fee per calendar month charge per connected card reader for SCR200 and IPP350 devices.
- (d) .

**4. PAYMENT TERMS**

- (a) **Credit, Debit, or Automated Clearing House ("ACH"):** Customer will pay Windcave the Fees by credit card, debit card, or ACH on the dates specified below. Windcave will charge a \$20 fee for each payment made via alternative means.
- (b) **Date for Payment of Establishment Fee:** Customer will pay Windcave the Establishment Fee immediately when Windcave makes the Windcave Solution available to Customer.
- (c) **Date for Payment of Monthly Fees and Additional Fees:** Customer will pay Windcave the Monthly Fees and Additional Fees within 30 days of the date of Windcave's invoice for those Fees.

**5. SUPPORT SERVICES**

- (a) **Online Help and General Support:** Windcave will provide the Support Services to Customer as set out in Part B.
- (b)

**6. SPECIAL CONDITIONS**

- (a)

**7. EXECUTION**

The parties acknowledge and agree that this Schedule is governed by the Agreement between the parties containing Windcave's General Terms and Conditions.

DocuSigned by:

SIGNED for and on behalf of WINDCAVE INC. by:

*Brian Lundin*

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Signature

Brian Lundin General Counsel

Name/Title

3/29/2020

Date

SIGNED for and on behalf of CITY OF SANTA FE by:

*Jacob LaPorte Hill*

Signature

Name/Title (Director / Authorized Signatory)

Date

Attest:

*Yolanda Y. Vigil*

Yolanda Y. Vigil, City Clerk

Approved as to Form:

*Mary McCoy*

Senior Assistant City Attorney

Approved as to Budget:

Mary McCoy, Finance Director

## PART B – GENERAL TERMS & CONDITIONS

### 1. Definitions and Interpretation (Not all defined terms are applicable to all goods and services provided under the Agreement)

#### 1.1 Definitions: In this Agreement, unless the context indicates otherwise:

**Acquirer** means a bank or any financial institution or a card issuer of financial or non-financial transactions which receives and transmits Transactions via the Windcave Solution;

**Agreement** means this Agreement, including the Application Form, each of Part A and its Schedule(s) and Part B, and any attachments that may be agreed between the parties, as each may be amended in writing from time to time;

**Application Form** means Customer's online the Windcave Solution application form submitted to Windcave via the Windcave Website. Where no separate Part A is entered into, the Application Form will constitute Part A of this Agreement for the purposes of this Part B;

**Business Day** means any day of the week except Saturday, Sunday or a day on which banks are authorized or required to be closed in California;

**Chargeback** means the procedure by which a sales record or other indicia of a card transaction (or disputed portion thereof) is denied or returned to Acquirer or the card issuer after it was entered into the appropriate settlement network for payment, in accordance with the rules of Visa, MasterCard or a similar card association ("Rules"), for failing to comply with the Rules, including, without limitation by reason of cardholder disputes, the liability for which is Customer's responsibility and Customer agrees to pay.

**Commencement Date** means the commencement date recorded in Part A in one or more Schedules; Such Commencement Date may be postponed in writing, at Windcave's sole discretion, until the date Windcave receives a copy of the Agreement countersigned by Customer.

**Confidential Information** means, in relation to either party, any information:

- (a) relating to the terms of this Agreement;
- (b) relating directly or indirectly to research or development by, accounting for, or the marketing of, the business of that party or its suppliers or customers;
- (c) disclosed by that party to the other party on the express basis that such information is confidential; or
- (d) which might reasonably be expected by the other party to be confidential in nature;

**Customer** means the customer specified in this Agreement and where applicable includes its employees, contractors and agents.

**Default Interest Rate** means interest at the rate of 2% above the base lending rate charged by Windcave's bankers to Windcave from time to time;

**Delivery** takes place when the Customer receives the Goods from Windcave, or, in the case of returns, when the Goods arrive at Windcave's premises;

**Documentation** means any user, training or system manuals for the Windcave Solution (whether in printed or electronic form) which describes and provides guidance on the use of the Windcave Solution (or any aspect of the Windcave Solution);

**Emergency Support Services** means telephone support that Windcave may provide (but is not obligated to provide unless it agrees to do so in a separate written agreement) for emergency breakdowns resulting in repeated failures in the transmission of Transactions and is available 24 hours a day, seven days a week by calling 310 670 7299 outside of Support Hours. If applicable, Windcave will use reasonable efforts to respond to any emergency phone call within 30 minutes of receiving the support request;

**Fees** means and includes each of the fees detailed in the Schedule(s) contained in Part A;

**Goods** means the Goods and/or Devices (if any) recorded in Part A in one or more Schedules;

**Intellectual Property** means registered and unregistered trade marks (including logos and trade files), domain names, copyright, patents, petty patents, utility models, registered and unregistered designs, circuit layouts, rights in computer software, databases and lists, Confidential Information, software (whether in object code or source code), and all other rights anywhere in the world resulting from intellectual activity;

**Payment Manager** means Payline Portal which Customer is able to access by logging onto the Windcave Website with an assigned username and password;

**PCI Standards** means the Payment Card Industry standards, requirements and guidelines issued by the Payment Card Industry Data Security Council from time to time including the Payment Card Industry Data Security Standard PIN Entry Device requirements and guidelines, and the Payment Application Data Security Standard;

**Permitted Use** means the transmission to, and receipt from, an Acquirer of data relating to Windcave Supported Transactions and expressly excludes, without

limitation, use for the processing of transactions of, or for the benefit of, any person other than Customer;

**Security Standards** means each of:

- (a) any data protection or data security standards issued by an Acquirer which receives and accepts Windcave Supported Transactions from Customer; and
- (b) the PCI Standards;

**Software** means the software and other related Windcave products which:

- (a) form part of the Windcave Solution; and
- (b) is owned or licensed by or developed by, or on behalf of, Windcave and supplied to Customer, including all upgrades, updates, alterations and modifications and other changes to such software by or on behalf of Windcave from time to time, but excluding any third party software and firmware forming part of, or supplied with, the Windcave Solution;

**Special Conditions** means the special conditions (if any) recorded in Part A in one or more Schedules;

**Support Hours** means the period from 8am to 9pm (PST) on any Business Day and 9am to 5pm (PST) on non-Business Days;

**Support Services** means and includes:

- (a) Online Help: from time to time Windcave may display Frequently Asked Questions and Answers on the Windcave Website;
- (b) General Support: enquiries may be sent to: support@windcave.com or made by telephone to 310 670 7299. Windcave will respond to such enquiries during Support Hours;

**Term** means the Initial Term recorded in Part A in one or more Schedules in one or more Schedules and defined in clause 2(b);

**Tokenized Data** means data for which Windcave has substituted a sensitive data element with a non-sensitive equivalent that has no extrinsic or exploitable meaning or value; and

**Transaction** means a message pair consisting of a message relating to a Windcave Supported Transaction transmitted by Customer to an Acquirer through the Windcave Solution and a response to that message from the Acquirer to Customer through the Windcave Solution;

**Windcave** means Windcave Inc., a California corporation with offices in Los Angeles, California;

**Windcave Host** means the host server known as Windcave Host to which Customer may be connected using the Software and which is in turn linked to an Acquirer to enable Windcave Supported Transactions to be processed in real time;

**Windcave Logo** means the Windcave logo supplied (in electronic format) by Windcave to Customer (as may be updated from time to time by Windcave);

**Windcave Solution** means the solution provided by Windcave for the transmission of data relating to Windcave Supported Transactions between a Customer and an Acquirer, incorporating the Software and including access (via the internet) to the Windcave Host and the Support Services;

**Windcave Supported Transactions** means transactions from Customers:

- (a) accepting payment for goods and services by means of credit card, debit card, prepaid card, gift card or any other means of payment which Windcave agrees to support through the Windcave Solution from time to time;
- (b) accepting loyalty cards, rewards cards, points cards, discount cards or club cards; or
- (c) providing services in relation to the sale and use of any of the cards referred to in paragraphs (a) and (b) above including the issue of such cards and the crediting or debiting of value to such cards; and

**Windcave Website** means the website maintained by Windcave and accessible by Customer for viewing Transactions, data entry, refunding, report generating and other features related to Transactions.

#### 1.2 Interpretation: In this Agreement, unless the context indicates otherwise:

- (a) the singular includes the plural and vice versa;
- (b) clause and other headings are for ease of reference only and will not affect this Agreement's interpretation;
- (c) the term includes or including (or any similar expression) is deemed to be followed by the words without limitation;
- (d) references to a person include an individual, company, corporation, partnership, firm, joint venture, association, trust, unincorporated body of persons, governmental or other regulatory body, authority or entity, in each case whether or not having a separate legal identity;
- (e) any obligation not to do anything includes an obligation not to suffer, permit or cause that thing to be done;

- (f) all monetary amounts are stated exclusive of applicable taxes if any and in US dollars; and
- (g) in the event of any inconsistency between the terms of any of the following, they will have precedence in the descending order of priority set out below:
  - (i) Part A – Specific Terms and Schedules;
  - (ii) Part B – General Terms and Conditions;
  - (iii) The Application Form.

## 2. Term

- 2.1 Initial Term:** This Agreement commences on the Commencement Date and will continue for the Initial Term, unless earlier terminated under Part B, clause 12.
- 3.1 Fees:** Customer will pay Windcave the Fees without setoff or deduction within 30 days of the date of Windcave's invoice for those Fees.
- 3.2 Taxes:** Customer is responsible for all applicable taxes, or purchase or sale of goods and services (other than Windcave's income tax) assessed in connection with its use of the Windcave Solution and the provision of services under this Agreement. To the extent that any Fees paid by Customer under this Agreement exclude any taxes or duties payable in respect of the Goods or Services provided under this Agreement in the jurisdiction where the payment is either made or received; where any such taxes or duties are payable by Windcave, Customer agrees to pay to Windcave the amount of such taxes or duties in addition to any Fees owed under this Agreement. Notwithstanding the foregoing, you may have obtained an exemption from relevant taxes or duties as of the time such taxes or duties are levied or assessed. In that case, you will have the right to provide to Windcave with evidence of any such exemption information, in which case Windcave will use reasonable efforts to provide such invoicing documents as may enable you to obtain a refund or credit for the amount so paid from any relevant revenue authority if such a refund or credit is available.
- 3.3 Default Interest for Late Payment:** Subject to Part B, clause 3.4(c)(ii), After the thirtieth day from the date that written certification of acceptance is issued late payment charges shall be paid on the unpaid balance due on the contract to the Contractor at the rate of 1.5 % per month
- 3.4 Disputed Invoices:** Where Customer has reasonable grounds to dispute any portion of any amount invoiced by Windcave to Customer under this Agreement (disputed portion):
- (a) Customer will notify Windcave of such dispute and the grounds for such dispute within 5 Business Days of receiving the invoice;
  - (b) any undisputed portion of the invoice will remain payable on the due date for payment;
  - (c) provided that Customer has complied with clause 3.4(a), Customer will not be required to pay:
    - (i) the disputed portion until the parties' dispute has been resolved by agreement between the parties or in accordance with Part B, clause 19.2; or
    - (ii) any interest under clause 3.3 on the disputed portion unless the dispute is resolved with the effect that Customer is required to pay all (or part) of the disputed portion, in which case Customer will pay the interest on the disputed portion (or that part of that disputed portion) in accordance with clause 3.3. Interest will be payable from the date that payment would have been due under clause 3.1 but for the dispute until the date that disputed portion is paid to Windcave in full.
- 3.5 Termination and Suspension:** If Customer does not timely pay Fees due and owing pursuant to this Agreement, Windcave may terminate this Agreement under Part B, Clause 12.2. Alternatively, Windcave may temporarily suspend the provision of the Windcave Solution to Customer. Customer agrees that Windcave will have no liability for such termination or suspension.

## 4. Mutual Responsibilities

Each party represents and agrees:

- 4.1 Power and Authority:** that it has full power and authority necessary to validly enter into and perform all its obligations under this Agreement; and
- 4.2 Requirements:** to comply with the other party's reasonable security, confidentiality and operational requirements of which it has been given reasonable notice.

## 5. Customer Responsibilities

Customer represents and agrees that it

- 5.1 Suitability:** has made, and will continue to make, its own assessment of the suitability, adequacy, compatibility and appropriateness of the Windcave Solution for its purposes;

- 5.2 Comply with Instructions:** will comply with Windcave's restrictions, instructions and Documentation in relation to the use of the Windcave Solution, including those set out in this Agreement;
- 5.3 Use by Others:** will ensure that only authorized persons use the Windcave Solution and that the Windcave Solution is used only for the Permitted Use and as expressly authorized under this Agreement;
- 5.4 Responsibility for Use:** will accept all responsibility for the reliance on and use of the Windcave Solution by Customer and its employees, contractors and agents;
- 5.5 Obtain Equipment etc.:** will obtain and maintain all equipment, software and services needed to enable it to receive and use the Windcave Solution;
- 5.6 Accurate Customer Information:** that all information provided by Customer to Windcave in the Application Form is accurate and correct, and that Customer will notify Windcave in writing if such information changes or ceases to be accurate in any way;
- 5.7 Provide Sufficient Information:** will ensure that sufficient information is given to Windcave to enable Windcave to comply with its obligations under this Agreement and that such information is timely, complete and accurate;
- 5.8 Personal Information:** acknowledges that any personal information concerning Customer or its personnel which is provided to Windcave by or on behalf of Customer may be:
- (a) used by Windcave for the purpose of providing the Windcave Solution, the Support Services and any other services to Customer; and
  - (b) disclosed by Windcave to its affiliates and other services providers to enable Windcave to provide the Windcave Solution, the Support Services and any other services to Customer;
- 5.9 Notify of Third Party Infringement:** will immediately notify Windcave upon becoming aware of any third party infringing Windcave's Intellectual Property rights in any manner;
- 5.10 Responsible for Connecting to Windcave Host:** is responsible for all charges and costs associated with connecting to the Windcave Host to operate the Windcave Solution. Windcave will provide Customer with reasonable technical information and Software necessary to enable Customer to connect to the Windcave Host;
- 5.11 Requisite Review of Payline Portal:** Customer shall be required, on a daily basis, to review with due care Customer's payline portal, established by Windcave, to review Transactions for errors. If an error is discovered by Customer, Customer must notify Windcave in writing within three (3) Business Days of the date an error occurs; provided, that Windcave will have no liability or obligations of any kind with respect to errors that are not reported to Windcave within such three (3) Business Day period. In addition, Customer shall be required to, on a daily basis review with due care bank settlement files to ensure deposits occur without error. If an error is discovered by Customer, Customer must notify Windcave in writing within three (3) Business Days of the date an error occurs; provided, that Windcave will have no liability or obligations of any kind with respect to errors that are not reported to Windcave within such three (3) Business Day period. Windcave's liability under this Section 5.11 (Requisite Review of Payline Portal) of the Agreement is governed by, and fully subject to, the terms of Section 10 of this Agreement.
- 5.12 Comply with Law Generally:** will comply with all relevant laws in its use of the Windcave Solution and carrying out its obligations under this Agreement.
- 5.13 Improperly Deposited Funds:** will return funds that Windcave deposits in Customer's bank account(s) that do not rightfully belong to Customer ("Improperly Deposited Funds") without offset or delay. Customer will return all Improperly Deposited Funds to Windcave within five (5) calendar days of a written request to do so by Windcave. If Customer fails to comply with the terms of this Section, Windcave may immediately suspend services to Customer until Customer returns the Improperly Deposited Funds. Customer will be liable to Windcave for the Improperly Deposited Funds, and costs incurred by Windcave in recovering the Improperly Deposited Funds.
- 5.14 Return of Old Goods:** For Goods that Customer ceases using for the Permitted Use ("Unused Goods"), Customer will return such Unused Goods to Windcave within 30 calendar days. Unused Goods include, but are not limited to, Goods Customer has ceased using due to the Goods becoming obsolete, Goods that no longer operate, and Goods that are replaced per the warranty set forth in Part B, clause 7.3 of this Agreement. Customer will pay all shipping fees and costs associated with returning the Unused Goods to Windcave. Alternatively, instead of returning Unused Goods to Windcave, Customer may provide Windcave a secure destruction certificate evidencing that the Unused Goods were destroyed in compliance with the Security Standards within the same 30 calendar day period.

## 6. Windcave's General Responsibilities

Windcave agrees that it will:

- 6.1 **Good Faith:** comply with all relevant laws and co-operate with Customer (and Customer's service providers) in connection with the Windcave Solution;
- 6.2 **No Requirement to Decrypt Tokenized Data:** be under no obligation to decrypt and transmit Tokenized Data to Customer or any third party.

#### 7. Windcave Warranties

7.1 **Security Standards:** Windcave confirms that Windcave will throughout the term of this Agreement comply with the requirements of the Security Standards.

7.2 **Limitations on Warranties:** To the fullest extent permitted by law, except as expressly set out in this Agreement, Windcave disclaims and excludes all warranties, conditions, terms, representations or undertakings, whether express, implied, statutory or otherwise, including any condition or warranty of merchantability or fitness for a particular purpose. Windcave does not warrant that:

- the Windcave Solution, the Goods, the Software or the Documentation will meet Customer's requirements; or
- the Windcave Solution, the Goods, the Software and the Documentation will be uninterrupted or error free, or that all errors will be corrected; or
- that the Goods will be free of defects in design, materials or workmanship or will comply with any applicable equipment manufacturer's or software developer's specifications.

Customer understands and acknowledges that an authorization obtained through the Windcave Solution only confirms the availability of the cardholder's credit at the time of the authorization. It does not warrant that the person presenting the card is the rightful cardholder, nor is it an unconditional promise, guarantee or representation by Acquirer, processor or Windcave that a transaction is or will be deemed valid and not subject to dispute, debit or chargeback.

7.3 **Supply Warranty:** Windcave warrants that the Goods to be delivered under this Agreement will be free from defects in workmanship (labour and parts included, but transport excluded) during a warranty period commencing on the Commencement Date and concluding twelve (12) calendar months later ("Original Warranty Period"). As to repaired or exchanged Goods, during the Original Warranty Period here-above mentioned, the warranty period on the exchanged or repaired Goods shall expire at the conclusion of the Original Warranty Period. With respect to Windcave's supply warranty:

- Any defective Goods, under warranty, shall be replaced or repaired, free of charge, at Windcave's discretion (to the exclusion of compensation for any other damage), and the work shall be carried out at Windcave or its partner's or subcontractor's premises. Customer will pay the costs of transport of the Goods (including insurance) to Windcave.
- Windcave has the choice to repair the Goods with spare parts or new parts. The defective elements, repaired, will become the property of Windcave.
- The time when the Goods are repaired or unavailable during the warranty period will not give rise to an extension of the warranty period as set forth in this Section, subject to legal mandatory provisions.
- Customer must return warranted Goods that are replaced subject to this warranty back to Windcave within 30 calendar days of replacement Goods being shipped to Customer. Customer shall pay the shipping fees to return the old, warranted Goods back to Windcave.

7.4 **Exclusions to Supply Warranty:** Windcave will have no liability under the Supply Warranty described in Section 7.3 in respect of:

- Defects, breakdowns, or malfunctions due to failure to properly follow the installation process and instructions for use or an external cause to the Goods (including, but not limited to, shock, lightning fire, vandalism, malicious action, contacts with various liquids or vermin or water damage of any nature, and inappropriate electric voltage); or modifications to the Goods made without the written approval of Windcave; or a lack of every day maintenance (as described in the Documentation); or a lack of supervision or care; or improper storage or poor environmental conditions, particularly those related to temperature and hygrometry effects of variations of electric voltage from the electric network; or from the earth or repair work; or maintenance of the Goods by persons not authorized by Windcave;
- Damage due to insufficient or bad packaging of the Goods when returned to Windcave;
- Wear and tear from normal use of the Goods and accessories;
- Communication problems related to an unsuitable environment, including problems accessing the Internet, transmission faults, local network faults, and modification of the parameters of the relevant cellular network after sale of the Goods;

- Supply of new versions of Software. If, for example, Windcave produces new Software that is not necessary to fulfil its obligations under this Agreement, Windcave is not required to make such Software available to Customer;
- Malfunction due to the use of products or accessories that are non-compatible with the Goods;
- Goods returned to Windcave without Windcave's prior consent or that Windcave has not had an opportunity to troubleshoot;
- Defects, breakdowns, or malfunctions due to obstructing material being placed on or into the Goods. Examples of obstructing material include, but is not limited to, paper, plastic, and metal objects.

#### 8. Intellectual Property

All Intellectual Property rights in the Windcave Solution, the Goods, the Software, the Documentation and any work or thing developed or created by or on behalf of Windcave under or in connection with this Agreement (such work or thing being Developed Works), are exclusively owned by Windcave (or Windcave's licensors or suppliers). Customer acknowledges that there is no transfer of title, Intellectual Property rights or ownership of:

- the Windcave Solution, the Goods, the Software, the Documentation or any part thereof; or
- any Developed Works; to Customer under this Agreement and Customer will not dispute Windcave's (or Windcave's licensors or suppliers) ownership of the property referred to in this clause 8.

#### 9. Indemnity

#### 10. Liability

To the fullest extent permitted by applicable law:

10.1 **Remedy:** Subject to clauses 10.2 and 10.3, Customer's sole and exclusive remedy for breach of any warranty or of any of Windcave's obligations under this Agreement is (at Windcave's option) the supply or re-supply of the Windcave Solution, the Goods, the Software, or the Documentation or the refund or waiver of Fees for the relevant part of the Windcave Solution, the Goods, the Software, or the Documentation which is the subject matter of, or directly related to, the breach.

10.2 **Limitation:** In no event will Windcave's total liability to Customer under this Agreement for any one or more defaults as described in clause 10.1 exceed the amount paid by Customer to Windcave under this Agreement in the 3 months following execution of this Agreement.

10.3 **Exclusion:** In no event will Windcave be liable to Customer whether in contract, tort (including negligence) or otherwise in respect of any:

- punitive, incidental, indirect or consequential damages, damages for loss of profits, business interruption, loss of data, loss of goodwill, arising out of, or in connection with, this Agreement, in each case even if such party has been advised of the possibility of such damages;
- loss, damage, cost or expense suffered or incurred by Customer, to the extent this results from any act or omission by Customer; or
- any event described in Part B, clause 14 (Force Majeure).

#### 11. Commercial Purpose

It is expressly acknowledged and agreed by Customer that the Windcave Solution, the Goods, the Software and the Documentation are supplied to Customer for business and commercial purposes.

#### 12. Termination

##### 12.1 Termination Upon Notice:

- Windcave may terminate this Agreement at any time on not less than 3 months' prior written notice to Customer.
- Customer may terminate this Agreement at any time on not less than 3 months' prior written notice to Windcave, provided:
  - During the Initial Term, Customer will be liable for the Fees for the remainder of the Term, which, notwithstanding clause 3.1, shall be payable immediately on giving such notice;
  - During any Renewal Term, Customer will be liable for the Fees for the remainder of the Term, which, notwithstanding clause 3.1, shall be payable immediately on giving such notice.

12.2 **Termination for Cause:** Either party (the First Party) may terminate this Agreement at any time and with immediate effect by written notice to the other party (Second Party) if the Second Party:

- is in material breach of any of its obligations under this Agreement, and has failed to remedy the breach within 10 Business Days of receiving written notice from the First Party to remedy the breach; or
- goes into voluntary or involuntary bankruptcy or liquidation or has a receiver appointed; or
- is unable to pay its debts as they fall due.

**12.3 Breach of License Terms:** Without limiting clause 12.2, any use of the Windcave Solution, the Goods, the Software, or the Documentation by Customer for any purpose other than the Permitted Use, or any breach by Customer of the provisions of Part B, clause 16 will be deemed to be a material breach of this Agreement which is not reasonably capable of remedy.

**12.4 Consequences:**

- (a) Amounts owing at termination: If this Agreement is terminated by Windcave for cause prior to the expiry of the Term, Customer must pay the unpaid balance of the Fees due under this Agreement and the cost of Windcave's reasonable expenses resulting from Customer's breach of this Agreement.
- (b) Expiry or termination of this Agreement will not affect the rights or obligations of the parties which have accrued prior to or accrue on termination or which by their nature are intended to survive termination (including Part B, clauses 3, 5, 7, 8, 9, 10, this 12.4, 13, 16, 17 and 19, together with those clauses which are incidental to, and required in order to give effect to, those clauses).

**13. Confidentiality**

**13.1 Confidential Information:** Each party will maintain as confidential at all times, and will not at any time, directly or indirectly:

- (a) disclose or permit to be disclosed to any person;
  - (b) use for itself or to the detriment of the other party;
- any Confidential Information of the other party except as, and then only to the extent:

1. required by law;
2. that the information is already or becomes public knowledge, otherwise than as a result of a breach, by the receiving party, of any provision of this Agreement;
3. that the information is disclosed to the receiving party, without restriction, by a third party and without any breach of confidentiality by the third party;
4. that the information is developed independently by the receiving party without reliance on any of the Confidential Information of the other party;
5. authorized in writing by the other party; or
6. reasonably required by this Agreement (and, without limiting the effect of this clause, a party may disclose Confidential Information of the other party only to those of its officers, employees or professional advisers on a "need to know" basis, as is reasonably required for the implementation of this Agreement).

**13.2 Windcave's Intellectual Property:** Customer acknowledges and agrees that the computer programs, computer software, specifications, databases, images, designs, codes, and configurations, ("Software") contained in or utilized by the Equipment and Windcave's network are proprietary and confidential to Windcave and protected under United States copyright law. Customer shall not copy, modify, adopt, translate, merge, reverse engineer, decompile, or disassemble, the equipment or Software, or create any derivative works based on the Equipment, Windcave network or Software. Without limiting the effect of clause 13.1, Customer will treat information about Windcave's Intellectual Property as the Confidential Information of Windcave.

**14. Force Majeure**

**14.1** Customer acknowledges that Windcave relies on third-party providers in the delivery of its services, including, but not limited to, wireless data network providers, cellular radio service provided by third parties that is available only when within the operating range of cellular systems, and cellular service is subject to transmissions limitations and dropped or interrupted transmissions. Cellular service may be temporarily refused, limited, interrupted, or curtailed because of government regulations or orders, atmospheric and/or topographical conditions, and cellular system modifications, repairs, and upgrades. Customer agrees that Windcave shall not be liable for, and to hold Windcave harmless for any losses, damages, or business interruptions sustained as a result of interruptions caused by its wireless data network providers or any other third-party provider.

**14.2** Neither party (the "Affected Party") shall be liable for any default or delay in the performance of its obligations under this Agreement if and to the extent such default or delay is caused, directly or indirectly, by

- (a) fire, flood, elements of nature or other acts of God;
- (b) any outbreak or escalation of hostilities, war, riots or civil disorders in any country;
- (c) any act or omission of the other party or any government authority;
- (d) any labor disputes (whether or not employees' demands are reasonable or within the party's power to satisfy); or

- (e) the nonperformance by a third party for any similar cause beyond the reasonable control of such party, including without limitation, failures or fluctuations in telecommunications or other equipment such as described in clause 14.1.

**14.3** In any such event, the Affected Party shall be excused from any further performance and observance of the obligations so affected only for as long as such circumstances prevail and such party continues to use commercially reasonable efforts to recommence performance or observance as soon as practicable, provided that:

- (a) Notice: whenever the Affected Party becomes aware that such a result has occurred or is likely to occur, the Affected Party will, as soon as practicable, notify the other party by written notice accordingly;
- (b) Continued Performance: each party will continue to use commercially reasonable efforts to perform its obligations as required under this Agreement; and
- (c) No Deemed Acceptance of Extra Costs: neither party will be deemed to have accepted any liability to pay or share any extra costs which may be incurred by the other party in complying with this clause or otherwise resulting from such act, omission or failure; and
- (d) Charges: this clause 14 will not apply in respect of Customer's obligation to pay any charges or Fees payable under this Agreement.

**15. License**

**15.1 Grant of License:** Windcave grants to Customer a non-exclusive, non-transferable license to use the Windcave Solution, the Goods, the Software and the Documentation for the Term of this Agreement solely for the Permitted Use. Any other use or dealings with the Windcave Solution, the Goods, the Software or the Documentation without the prior written consent of Windcave will be a material breach of this Agreement. Except to the extent specifically authorized under this Agreement, Customer must not sub-license, transfer, assign, rent or sell any of the Windcave Solution, the Goods, the Software or the Documentation or the right to use the Windcave Solution, the Goods, the Software or the Documentation.

**15.2 Windcave Warranty:** Windcave warrants that Windcave has the right and authority to grant to Customer the license set out at clause 15.1, in accordance with the terms of this Agreement.

**16. Terms of Use**

**16.1 Adequacy:** Customer must satisfy itself as to the adequacy, appropriateness and compatibility of the Windcave Solution and/or the Goods for its requirements. Without limiting the foregoing, Customer acknowledges that it has not relied on any statements or representations on the part of Windcave as to performance or functionality, verbal or otherwise, except as expressly recorded in this Agreement.

**16.2 Windcave Logo:** If Customer uses a capture method for credit or debit card processing using a system which is not hosted by Windcave, Customer agrees to display the Windcave Logo in a readily visible position on the user interface of Customer's system where the credit or debit card data is captured. The Windcave Logo must not be altered or used for any other purpose without the prior written consent of Windcave.

**16.3 Compliance:** If Customer is not compliant with one or more of the Security Standards, Customer must not capture or store any credit or debit card number or expiry date locally on Customer's or a non-compliant third party's system.

**16.4 No Right to Copy, Alter or Modify:** Customer may make a reasonable number of copies of the Software for backup and disaster recovery purposes only. Except for such back-up copies, Customer must not, and must not permit any other person to, copy, reproduce, translate, adapt, vary, repair or modify all or any part of the Windcave Solution, the Goods, the Software or the Documentation by any means or in any form without Windcave's prior written consent.

**16.5 Permitted Use:** Customer may not:

- (a) use the Windcave Solution, the Goods, the Software or the Documentation for any purpose other than the Permitted Use; or
- (b) use the Software independently of the other components of the Windcave Solution unless Windcave has given prior written consent to do so.

If this Agreement is terminated, Customer's right to use the Windcave Solution, the Software and the Documentation will automatically terminate and Customer must immediately remove all copies of the Software from its system(s) and return the Windcave Solution, the Goods, the Software and the Documentation to Windcave.

**16.6 Reverse Engineering:** Customer must not, and must not permit any other person to, reverse assemble or decompile the whole or any part of the Software.

- 16.7 No Third Party Use:** Except as expressly provided for in this Agreement, the Customer must not provide, or otherwise make available, the Windcave Solution the Goods, the Software or the Documentation or any component thereof in any form to any person (a "Third Party") without the prior written consent of Windcave. If Windcave grants such consent, Customer must ensure that the Third Party complies with the provisions of clauses 8, 13, 15 and 16 (so far as those provisions relate to Customer) as if the Third Party were a party to this Agreement. Customer will be liable to Windcave for all acts or omissions of any Third Party in contravention of the provisions of clauses 8, 13, 15 and 16.
- 16.8 Installation:** Customer will be responsible for, and all bear all costs associated with, the installation, operation, maintenance and support of the Goods.
- 16.9 Windcave Testing Prior to Launch:** Prior to any permitted use of Windcave products and/or Software by Customer or any third party, Windcave shall be entitled to test all Windcave products and Software that Customer purchases, rents, or intends to use for at least seven (7) Business Days ("Pre-launch Testing"). Such Pre-launch Testing shall also entitle Windcave to at least three (3) Business Day to test transaction processing and settlement.
- 16.10 Labels:** Customer will not remove or deface any labels affixed by Windcave to the Goods. Customer will not affix any label to the Goods.
- 17. Rental/Loan of Goods**

Where Customer agrees to rent or borrow Goods from Windcave, the following terms and conditions apply:

- (a) **Ownership:** Legal and beneficial ownership of, and title to, the Windcave Solution, the Goods, the Software and the Documentation remains at all times with Windcave;
- (b) **Risk:** Customer will bear the risk of, and be responsible for, all loss (including theft) of or damage to, the Goods from the time that they are first delivered to Customer until the time that they are delivered back to Windcave;
- (c) **Maintain Goods:** Customer must take reasonable steps to avoid exposure of the Goods to excessive heat, dust and moisture, liquids and electrical and physical shock;
- (d) **License Terms:** Customer must comply with all manufacturer's license terms applicable to the Goods (as supplied with the Goods or otherwise notified by Windcave to Customer from time to time);
- (e) **Theft, Seizure, Loss, Damage, Repairs:** If for any reason the Goods are stolen, seized, lost, damaged or require repairs, Customer must immediately advise Windcave of the theft, seizure, loss, damage or repairs required. Customer must pay all costs and comply with Windcave's directions in connection with replacing or recovering the Goods, repairing any damage or the replacing of any parts (fair wear and tear excepted). Customer must continue to pay the Fees while the Goods are being replaced or repaired or, in the event of theft, seizure or loss, while the Goods are missing. Windcave will not be liable for any loss or damage in relation to the unavailability of the Goods;
- (f) **No Dealing or Modifying or Security Interests:** Customer must not sell, lend, lease, transfer, modify or otherwise deal with the Goods without first obtaining Windcave's written consent. Customer must not create, or allow to be created, a security interest over the Goods;
- (g) **Inspection:** Customer must allow Windcave to inspect the Goods at any time during normal business hours, provided that Windcave first gives Customer not less than 2 Business Days notice;
- (h) **Return of Goods:** When this Agreement ends (either by completion of the Term or by way of termination), Customer will, at Customer's expense, return the Goods, in good working order and undamaged condition (fair wear and tear excepted) to Windcave's place of business. If the Customer fails to return the Goods within 14 Business Days of the end of the Agreement, Customer will pay Windcave the fair value of the Goods as at the completion of the Term;
- (i) **Repossession:** If Customer does not return the Goods when required hereunder, Windcave may (subject to compliance with applicable law) enter any premises where Windcave reasonably believes that the Goods may be located and Customer will provide all reasonable authority and assistance to enable recovery of those Goods by Windcave. Customer will be liable to Windcave for costs incurred by Windcave in recovering the Goods; and
- (j) **Further supply:** The rental of Goods by Windcave to Customer does not guarantee Customer that Windcave will supply Goods beyond the Initial Term.

## 18. Windcave Support Services

- 18.1 Support:** Windcave will provide the Support Services to Customer.

- 18.2 Emergency Support Services and Other Services:** Windcave may make available the Emergency Support Services. If Customer requires Emergency Support Services and/or services additional to the Support Services Windcave may, if it agrees to provide those services to Customer, charge Customer for those services on a time and materials basis and on such other terms and conditions as may be agreed between the parties.
- 18.3 Alterations to Software:** Windcave may, at its sole discretion, alter, upgrade, update or change the Windcave Solution at any time during the Term of this Agreement. Customer acknowledges and agrees that, if Customer fails to promptly install all updates to any software forming part of the Windcave Solution supplied by Windcave in connection with this Agreement, Customer may be unable to process Transactions and that:
- (a) Windcave will not be liable to Customer under this Agreement in respect of such inability; and
  - (b) Windcave will be released from any obligation to supply the Support Services during any period which Customer has failed to install any such update.
- 18.4 Windcave Website:** Customer acknowledges and agrees that Windcave may, at its sole discretion, determine what information, data, features and functionality is made available to Customer via the Windcave Website. Customer agrees to comply with any terms that Windcave may specify in relation to Customer's use of the Windcave Website. In the event of any inconsistency between the terms and conditions of this Agreement and those on the Windcave Website, the terms and conditions of this Agreement will apply to the extent of that inconsistency. Windcave will supply user names and passwords to enable authorized users of Customer to access the Windcave Website. Customer must keep such user names and passwords secure and made known only to authorized users and will be responsible for all use of the Windcave Website through use of Customer's user names and passwords. If Customer breaches any term of this Agreement or the terms of use of the Windcave Website, Windcave may disable Customer's user names and passwords.
- 18.5 Refunds:** Customer authorizes Windcave to process repayment transactions to its patrons, who have previously made payment using Windcave solutions, on a one-to-one matching basis ("Refund Transactions"). Customer shall be solely responsible for auditing Refund Transactions and determining that a one-to-one match is made between a transaction and its matching Refund Transaction. Customer accepts all liability for Refund Transactions. Windcave shall not be liable for any losses or damages incurred as a result of a Refund Transaction.
- 19. General**
- 19.1 Entire Agreement:** This Agreement including all schedules hereto records the entire arrangement between the parties relating to all matters dealt with in this Agreement and supersedes all previous arrangements, whether written, oral or both, relating to such matters.
- 19.2 Disputes:** The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this Agreement. Any party may give the other party written notice of any dispute not resolved in the normal course of business. Within 15 days after delivery of the notice, the receiving party shall submit to the other a written response. The notice and response shall include with reasonable particularity (a) a statement of each party's position and a summary of arguments supporting that position, and (b) the name and title of the executive who will represent that party and of any other person who will accompany the executive. Within 30 days after delivery of the notice, the executives of both parties shall meet at a mutually acceptable time and place. If the parties fail to negotiate a resolution to a dispute within a reasonable time (not exceeding 20 Business Days from formal notice of the dispute being given by one party to the other), either party may require that the dispute be submitted to mediation. In such case:
- (a) the mediator will not be acting as an expert or as an arbitrator;
  - (b) the mediator will determine the procedure and timetable for the mediation; and
  - (c) the parties will share equally the cost of the mediation.
- All offers, promises, conduct and statements, whether oral or written, made in the course of the negotiation by any of the parties, their agents, employees, experts and attorneys are confidential, privileged and inadmissible for any purpose, including impeachment, in arbitration or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the negotiation.

Neither party may issue any legal proceedings (other than for urgent interlocutory relief) relating to any dispute, unless that party has first taken all reasonable steps to comply with the dispute resolution process above. All applicable statutes of limitation and defenses based upon the passage of time shall be tolled while the procedures specified in this clause 19.2 above are pending and for 15 calendar days thereafter. The parties will take such action, if any, required to effectuate such tolling.

- 19.3 **Waiver:** No waiver of any breach, or failure to enforce any provision, of this Agreement at any time by either party shall in any way limit or waive the right of such party to subsequently enforce and compel strict compliance with the provisions of this Agreement.
- 19.4 **Severance:** Any provision in this Agreement which is or becomes unenforceable, illegal or invalid for any reason shall be severed and shall not affect the enforceability, legality, validity or application of any other provision which shall remain in full force and effect.
- 19.5 **Assignment:** Windcave may assign all or any of its rights and obligations under this Agreement to any person without Customer's consent. Customer may not transfer or assign any of its liabilities or rights under this Agreement to any other person without Windcave's prior written consent (such consent will be unreasonably withheld, provided Windcave is satisfied as to the suitability of the assignee and Customer pays to Windcave its reasonable costs incurred in connection with the assignment).
- 19.6 **Amendment:** Except as expressly provided for in this Agreement, no amendment to this Agreement will be valid unless recorded in writing and signed by a duly authorized senior representative of each party.
- 19.7 **Governing Law and Jurisdiction:** This Agreement is governed by the laws of New Mexico. Subject to the terms of clause 19.2, the parties submit to the jurisdiction of the courts of the State of New Mexico in respect of all matters relating to this Agreement.
- 19.8 **Remedies:** The rights, powers and remedies provided in this Agreement are not exclusive of any rights, powers or remedies provided by law.
- 19.9 **Subcontracting:** Windcave may appoint subcontractors to perform any of its obligations under this Agreement.
- 19.10 **Counterparts and Copies:** This Agreement may be signed in any number of counterpart copies which, read together, will constitute one and the same document. Any facsimile copy of this agreement or copy of this agreement sent via email in PDF format (including any facsimile copy or copy sent via email in PDF format, of any document evidencing either party's signature of this agreement) may be relied upon by the other party as if it were an original copy. This Agreement may be entered into on the basis of an exchange of such facsimile or PDF copies.
- 19.11 **Notices:** Any notice or other communication to be given under this Agreement must be in writing and must be served by one of the following means and in respect of each is deemed to have been served as described:
- (a) By personal delivery – when received by the party.
  - (b) By post by registered or ordinary mail – on the second working day following the date of posting in the United States mail to the addressee's registered office.
  - (c) By email – when acknowledged by the party orally or by return email or otherwise in writing.
- The addresses for the parties for Notices shall be as set out on Page 1 of this Agreement or such other address as either party specifies by notice in writing to the other given in accordance with this clause 19.11.
- 19.12 **Conflicts:** In the event of any conflict or inconsistency between this Agreement and the terms of a purchase order made by Customer to Windcave, this Agreement shall govern and control.

## 20 TERMINATION

This Agreement may be terminated by the City upon 30 days written notice to the Windcave.

## 21 INDEMNIFICATION

WINDCAVE shall indemnify, hold harmless and defend the CITY from all losses, damages, claims or judgments, including payments of all attorneys' fees and costs on account of any suit, judgment, execution, claim, action or demand whatsoever arising from WINDCAVE's performance under this Agreement as well as the performance of WINDCAVE's employees, agents, representatives and subWindcave.

## 22 NEW MEXICO TORT CLAIMS ACT

Any liability incurred by the CITY in connection with this Agreement is subject to the immunities and limitations of the New Mexico Tort Claims Act, Section 41-4-1, et. seq. NMSA 1978, as amended. The CITY and its "public employees" as defined in the New Mexico Tort Claims Act, do not waive sovereign immunity, do not waive any defense and do not waive any limitation of liability pursuant to law. No provision in this Agreement modifies or waives any provision of the New Mexico Tort Claims Act.

## 23 APPLICABLE LAW; CHOICE OF LAW; VENUE

WINDCAVE shall abide by all applicable federal and state laws and regulations, and all ordinances, rules and regulations of the CITY of Santa Fe. In any action, suit or legal dispute arising from this Agreement, the WINDCAVE agrees that the laws of the State of New Mexico shall govern. The parties agree that any action or suit arising from this Agreement shall be commenced in a federal or state court of competent jurisdiction in New Mexico. Any action or suit commenced in the courts of the State of New Mexico shall be brought in the First Judicial District Court.

## 24 APPROPRIATIONS

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the CITY for the performance of this Agreement. If sufficient appropriations and authorization are not made by the CITY, this Agreement shall terminate upon written notice being given by the CITY to WINDCAVE. The CITY's decision as to whether sufficient appropriations are available shall be accepted by WINDCAVE and shall be final.

## 25 RELEASE

WINDCAVE, upon acceptance of final payment of the amount due under this Agreement, releases the CITY, its officers and employees, from all liabilities, claims and obligations whatsoever arising from or under this Agreement. WINDCAVE agrees not to purport to bind the CITY to any obligation not assumed herein by the CITY unless WINDCAVE has express written authority to do so, and then only within the strict limits of that authority.

## 26 INSURANCE

WINDCAVE shall maintain professional liability insurance throughout the term of this Agreement providing a minimum coverage in the amount required under the New Mexico Tort Claims Act. WINDCAVE shall furnish the CITY with proof of insurance of WINDCAVE's compliance with the provisions of this section as a condition prior to performing services under this Agreement.

## 27 THIRD PARTY BENEFICIARIES

By entering into this Agreement, the parties do not intend to create any right, title or interest in or for the benefit of any person other than the CITY and the WINDCAVE. No person shall claim any right, title or interest under this Agreement or seek to enforce this Agreement as a third party beneficiary of this Agreement.

- 28 **SEVERABILITY** In case any one or more of the provisions contained in this Agreement or any application thereof shall be invalid, illegal or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained herein and any other application thereof shall not in any way be affected or impaired thereby.



8939 South Sepulveda Boulevard, Suite 520, Los Angeles, CA 90045, USA

## Recurring Payment Authorization Form

### Here's How Recurring Payments Work:

You authorize regularly scheduled charges to your checking or savings account. You will be charged the total amount due on all invoices each billing period. A receipt for each payment will be emailed to you and the charge will appear on your bank statement as an "ACH Debit." You agree that no prior-notification will be provided unless the date or amount changes, in which case you will receive notice from us at least 7 days prior to the payment being collected.

### Please complete the information below:

The contracted party \_\_\_\_\_ and \_\_\_\_\_ authorizes Windcave Inc.  
(Company Name) (Customer ID)

to charge the bank account indicated below on the 20<sup>th</sup> or 30<sup>th</sup> of each month for full payment of goods and/or services invoiced.

### Business Billing Information

Billing Address \_\_\_\_\_

Phone# \_\_\_\_\_

City, State, Zip \_\_\_\_\_

Email \_\_\_\_\_

### Bank Details

☐

Checking

☐

Savings

Name on Acct \_\_\_\_\_

Bank Name \_\_\_\_\_

Account Number \_\_\_\_\_

Bank Routing # \_\_\_\_\_

Bank City/State \_\_\_\_\_

Bank Rep. \_\_\_\_\_ ( ) -



PRINT NAME \_\_\_\_\_

SIGNATURE \_\_\_\_\_

DATE \_\_\_\_\_

I understand that this authorization will remain in effect until I cancel it in writing, and I agree to notify Windcave Inc. in writing of any changes in my account information or termination of this authorization at least 15 days prior to the next billing date. If the above noted payment dates fall on a weekend or holiday, I understand that the payments may be executed on the next business day. For ACH debits to my checking/savings account, I understand that because these are electronic transactions, these funds may be withdrawn from my account as soon as the above noted periodic transaction dates. In the case of an ACH Transaction being rejected for Non-Sufficient Funds (NSF) I understand that Windcave Inc. may at its discretion attempt to process the charge again within 30 days, and agree to an additional \$35 charge for each attempt returned NSF which will be initiated as a separate transaction from the authorized recurring payment. I acknowledge that the origination of ACH transactions to my account must comply with the provisions of U.S. law. I certify that I am an authorized user of this bank account and will not dispute these scheduled transactions with my bank; so long as the transactions correspond to the terms indicated in this authorization form.



## City of Santa Fe FY20 Fiscal Impact Analysis (Non-Personnel Expenditures)

### General Information

Department Name:	Public Works	Department Name:	Public Works
Division Name:	Parking	División Name:	Parking

### Financial Information

Amount Requested:	\$16,673 including GRT	Munis Fund Number:	
Vendor Name:	Windcave Inc.	Munis Org Number:	5350455
Approved by Director?		Munis Object Code:	510310

### Expenditure Information

1. Describe the purchase of goods/services. Is this one-time or recurring? Please explain why this is the lowest cost option for this expenditure.

RECURRING, SOLE SOURCE - Under Agreement 19-0828 Mountain Parking Equipment (MPE) is installing a state-of-the-art Parking Access and Revenue Control System (PARCS) in all City owned garages. In order to utilize PARCS' credit card cashing functionality an agreement with a credit card processing gateway is needed. Windcave Inc. is the credit card processor certified by MPE to work with PARCS.

2. Please describe which legally required City service does this procurement support? Does this procurement provide support for compliance with City, State and Federal requirements? If yes, please explain.

The Parking Division is an enterprise fund operation expected to fund itself through revenues generated. If PARCS doesn't have credit card processing functionality, the Parking Division's ability to generate revenue from garage operations will be severely impacted.

3. Can these services be performed by City employees in your department or in other departments? If the answer is no, please explain.

No, these are electronic credit/debit card approval services. Windcave is the certified Clearing House vendor for MPE and the PARCS.

4. Would there be any adverse health, safety or economic implications if this expenditure was not approved? What impact will there be on the department and the City operations if this expenditure is not approved.

PARCS is a revenue control system for the City's parking garages. PARCS automates City garages and encourages the use of credit and debit cards for payments. This is a fundamental part of that revenue control and is expected to allow the City to capture more revenue from garage operations. Lacking the ability to process credit/debit cards would significantly impact City's ability to collect parking garage revenues.

5. If this purchase is not approved with City funds, what are alternative funding sources for the proposed expenditure? Does this duplicate efforts being provided by other governmental, for profit or non-profit entities?

This project is funded through an NMFA loan.

*Frank Dunaway*  
Frank Dunaway (Jun 29, 2020 08:24 MDT)

*Alexis Lotero*  
Alexis Lotero (Jun 25, 2020 15:17 MDT)

*Mary Mcay*

Procurement Office Signature

Budget Office Signature

Finance Director Signature

FW: Windcave Agreement

ROMERO, JOHN J <jjromero1@santafenm.gov>

Mon 4/20/2020 8:22 AM

To: Budget <Budget@santafenm.gov>

Cc: CORREIA, NOEL P. <npcorreia@santafenm.gov>; KNOWLES, MATTHEW P. <mpknowles@santafenm.gov>;  
OLGUIN, LORETTA S. <lsolguin@santafenm.gov>; FLUETSCH, BRADLEY J. <bjfluetsch@santafenm.gov>

1 attachments (131 KB)

FY20 Fiscal Impact Analysis, Windcave, 04.17.2020.pdf;

Good morning Budget,  
Please accept the attached FIA as approved by me. Thanks.

-John Romero  
Acting Public Works Department Director

---

From: CORREIA, NOEL P. <npcorreia@santafenm.gov>

Sent: Friday, April 17, 2020 3:37 PM

To: ROMERO, JOHN J <jjromero1@santafenm.gov>

Cc: KNOWLES, MATTHEW P. <mpknowles@santafenm.gov>; OLGUIN, LORETTA S.  
<lsolguin@santafenm.gov>

Subject: FW: Windcave Agreement

John,

I believe the FIA requires the department director to sign. The Windcave FIA is attached for your approval and signature.

After you approve and sign, please forward to Matt Knowles. Thank you very much.

noel..

---

From: KNOWLES, MATTHEW P. <mpknowles@santafenm.gov>

Sent: Friday, April 17, 2020 2:44 PM

To: CORREIA, NOEL P. <npcorreia@santafenm.gov>

Cc: OLGUIN, LORETTA S. <lsolguin@santafenm.gov>

Subject: Re: Windcave Agreement

Noel,

Done. Please see the attached document. If you could sign it and return it to me, I'll get it to Fran right away.

Thanks,



City of Santa Fe  
Summary of Contracts, Agreements, & Amendments

Section to be completed by department for each contract or contract amendment

1 FOR: ORIGINAL CONTRACT ☒ or CONTRACT AMENDMENT ☐

2 Name of Contractor Windcave Inc.

3 Complete information requested

☒ Plus GRT

☐ Inclusive of GRT

Original Contract Amount: \$15,000.00 Annually

Termination Date: N/A

☐ Approved by Council

Date: \_\_\_\_\_

☐ or by City Manager

Date: \_\_\_\_\_

Contract is for: Parking Access and Revenue Control System (PARCS) for municipal parking facilities.

Amendment # \_\_\_\_\_ to the Original Contract# \_\_\_\_\_

Increase/(Decrease) Amount \$ \_\_\_\_\_

Extend Termination Date to: \_\_\_\_\_

☐ Approved by Council

☐ or by City Manager

Date: \_\_\_\_\_

Amendment is for:  
\_\_\_\_\_

4 History of Contract & Amendments: (option: attach spreadsheet if multiple amendments)

☒ Plus GRT

☐ Inclusive of GRT

Amount \$ 15,000.00 of original Contract# \_\_\_\_\_ Termination Date: N/A

Reason: Provide credit card payment processing for PARCS for Railyard parking facilitie.

Amount \$ \_\_\_\_\_ amendment # \_\_\_\_\_ Termination Date: \_\_\_\_\_

Reason: \_\_\_\_\_

Amount \$ \_\_\_\_\_ amendment # \_\_\_\_\_ Termination Date: \_\_\_\_\_

Reason: \_\_\_\_\_

Amount \$ \_\_\_\_\_ amendment # \_\_\_\_\_ Termination Date: \_\_\_\_\_

Reason: \_\_\_\_\_

Total of Original Contract plus all amendments: \$15,000.00 Annually



City of Santa Fe  
Summary of Contracts, Agreements, & Amendments

5 Procurement Method of Original Contract: (complete one of the lines)

RFP# \_\_\_\_\_ Date: \_\_\_\_\_  
RFQ ☐ \_\_\_\_\_ Date: \_\_\_\_\_  
Sole Source ☒ \_\_\_\_\_ Date: \_\_\_\_\_ March 2, 2020

Other: The Parking Access and Revenue Control System requires this service for credit card functionality.

6 Procurement History: First year of 4 year contract  
example: (First year of 4 year contract)

Frank Dunaway  
Frank Dunaway (Jun 29, 2020 08:24 MDT)

Purchasing Officer Review

Comments or Exceptions: \_\_\_\_\_

7 Funding Source: Off-Street / Service Contracts BU/Line Item: 5350455 / 510310

Alexis Lotero  
Alexis Lotero (Jun 25, 2020 15:17 MDT)

Budget Officer Approval

Comments or Exceptions: \_\_\_\_\_

8 Any out-of-the ordinary or unusual issues or concerns:

(Memo may be attached to explain detail.)

9 Staff Contact who completed this form: Matthew Knowles

Phone # 955-6674

10 Certificate of Insurance attached. (if original Contract) ☒

Submit to City Attorney for review/signature

Forward to Finance Director for review/signature

Return to originating Department for Committee(s) review or forward to City Manager for review and approval (depending on dollar level).

To be recorded by City Clerk:

Contract # \_\_\_\_\_

Date of contract Executed (i.e., signed by all parties): \_\_\_\_\_

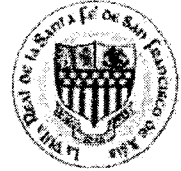
Note: If further information needs to be included, attach a separate memo.

Comments:

Financing for this project has been approved through a loan from New Mexico Finance Authority. Parking Division will pay back over a period of 48 months.



# City of Santa Fe, New Mexico



## SOLE SOURCE REQUEST AND DETERMINATION FORM

This sole source request form must be submitted to the City of Santa, Purchasing Division for authorization, determination and processing by the Chief Procurement Officer (CPO).

*Please ensure to complete this form in its entirety - (\*) must be completed.*

\*Date: 03/12/2020

\*Prepared By: Matt Knowles

\*Title: Contracts Administrator

\*Vendor Name: Windcave Inc.

\*Address: 8939 S. Sepulveda Blvd. Suite 520

\*City: Los Angeles

\*State: CA

\*Zip Code: 90045

\*Description of Goods/Service to be procured:

\*Estimated Cost:

\$16,000.00 Yearly

Term of Contract:

(One (1) year from award)

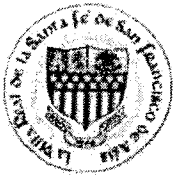
Four (4) years from award

\*Sole Source Request Justification Questions 1-4.

1. Explain the purpose/need of purchase. Ensure to include a thorough scope of work for the services, construction or items of tangible personal property (if this is an amendment request to an existing contract, attach current contract).

Under Agreement 19-0828 Mountain Parking Equipment (MPE) is installing PARCS in all City owned garages, starting with the Railyard garage. For patron convenience that system will feature multiple pay-stations where parking customers can pay for their parking with a credit card. That credit card functionality is provided using Windcave card scanners and only Windcave Inc. can serve as the processing gateway for transactions on these scanners. Additionally, only Windcave Inc. can provide the maintenance and software support.

In order to utilize PARCS' credit card cashing functionality an agreement with a credit card processor is needed for each garage. As detailed under H3.1 of 19-0828, Windcave Inc. is the credit card processor certified by MPE to work with PARCS, and Windcave's proprietary card scanners come pre-installed in the PARCS pay-stations.



# City of Santa Fe, New Mexico



2. Provide a detailed explanation of the criteria developed and specified by the department as necessary to perform and/or fulfill the contract.

☒ X

The contractor has affirmed sole source for the services, construction or items of tangible personal property (*Attach memo from vendor*). Provide documentation of due diligence for other possible vendors/contractors to provide the requested services/goods proved unsuccessful; or



Other: explanation of the reasons, qualifications, proprietary rights or unique capabilities (*unique and how this uniqueness is substantially related to the intended purpose of the contract*) of the prospective contractor that makes the prospective contractor the one source capable of providing the required professional service, service, construction or item(s) of tangible personal property. (Please do not state the source is the "best" source or the "least costly" source. Those factors do not justify a "sole source.") *Unique and how this uniqueness is substantially related to the intended purpose of the contract.*

3. Explain why other similar professional services, services, construction or item(s) of tangible personal property *cannot* meet the intended purpose of the contract.

Mountain Parking Equipment (MPE) is installing PARCS in all City owned garages, starting with the Railyard garage. That system will feature multiple pay-stations where parking customers can pay with a credit card. That credit card functionality is provided using Windcave card scanners and only Windcave Inc. can serve as the processing gateway for transactions on these scanners. Additionally, only Windcave Inc. can provide the maintenance and software support.

In order to utilize PARCS' credit card cashing functionality an agreement with a credit card processor is needed for each garage. Windcave Inc. is the credit card processor certified by MPE to work with PARCS, and Windcave's proprietary card scanners come pre-installed in the PARCS pay-stations purchased from TIBA through MPE.



# City of Santa Fe, New Mexico



## \*Approvals:

Based on the above facts, the City of Santa Fe Purchasing Officer has made the determination that the justification for a Sole Source procurement is in accordance with the State Procurement Code, Section 13-1-126 Sole source procurement., NMSA 1978 and shall be posted for a 30-day period prior to award.

*Fran Dunaway, CPO*

3/1/2020

Fran Dunaway, CPO  
Purchasing Officer for the  
City of Santa Fe

Date

Pursuant to the State Procurement Code, Section 13-1-126 Sole source procurement., NMSA 1978, the 30-day posting period of the Notice of Intent to Award this Sole Source request was met and no obligation to the award to the above referenced contractor were received. *This Sole Source determination will be valid for a period of one (1) year from the date of the award.*

*Fran Dunaway, CPO*

3/18/2020

Fran Dunaway, CPO  
Purchasing Officer for the  
City of Santa Fe

Date

## \*Required Attachments:

*\*Letter from Contractor acknowledging they are the only source (on their business letterhead and signed by the head of business or financial operations),*

*\*Quote from sole source Contractor*

*\*Agenda Item to be presented to City Council if over \$60,000 for Professional Services and \$60,000 for Goods and Non-Professional Services*

MONDAY, MARCH 9, 2020

City of Santa Fe Parking Division  
PO Box 809  
Santa Fe, NM 87504-0909

RE: PARCS Payment Technology Sole Source

To Whom It May Concern:

Windcave, located at 8939 South Sepulveda Boulevard Suite 520 Los Angeles, California 90045, is, to the best of my knowledge, the only company available to the City that can supply the attended and unattended card readers that are integrated with the TIBA PARCS equipment for service with the proposed locations offered by the City of Santa Fe, based on the requirements and capabilities set forth.

Each card reader is required to be Point-to-Point Encrypted Certified (P2PE), offering one of the highest levels of encrypted credit card security. This PCI security certification, in addition to the proprietary software application that runs the payment hardware, only function through the solution offered by Windcave, Inc. Other providers' hardware will not operate or connect to the Windcave gateway host. Therefore, the Windcave solution is the only vendor option offered through TIBA that will meet the City requirements.

The entire Windcave Solution includes Windcave manufactured card readers, and the Windcave developed proprietary software, certified to the TIBA PARCS equipment.

Windcave is a high growth, innovative global leader in payment technology. Established in 1997, Windcave has grown to span e-commerce, POS, attended and unattended payment gateway solutions across New Zealand, Australia, North America, Ireland, and the United Kingdom.

Over \$80 billion in transaction volume is processed via Windcave from 20,000+ merchants across the globe each year.

Thank you for the opportunity.

Sincerely,



Carlo Demiro, Senior Sales Executive



**RE: Agreement for Signature**

Carlo Delnero <Carlo.Delnero@windcave.com>

Tue 3/31/2020 5:30 PM

To: KNOWLES, MATTHEW P. <mpknowles@santafenm.gov>

Cc: CORRÊIA, NOEL P. <npcorreia@santafenm.gov>; OLGUIN, LORETTA S. <lsguin@santafenm.gov>; Kasey Wiles <kaseywiles@mtnpark.com>; Scott Souder <scottsouder@mtnpark.com>

1 attachments (736 KB)

2020-03-24 WindcaveUS\_CityofSantaFe500Market\_CAOSigned.pdf

**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Matt,

Attached is our signed version.

--  
Carlo Delnero  
Senior Sales Executive

 Windcave

T: +1 213 378 1190

D: +1 213 378 1198

E: Carlo.Delnero@windcave.com

W: www.windcave.com

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**From:** KNOWLES, MATTHEW P. <mpknowles@santafenm.gov>

**Sent:** Monday, March 30, 2020 3:34 PM

**To:** Carlo Delnero <Carlo.Delnero@windcave.com>

**Cc:** CORRÊIA, NOEL P. <npcorreia@santafenm.gov>; OLGUIN, LORETTA S. <lsguin@santafenm.gov>;

Kasey Wiles <kaseywiles@mtnpark.com>; Scott Souder <scottsouder@mtnpark.com>

**Subject:** Re: Agreement for Signature

Carlo,

Any luck with this?

Thanks,  
Matt

---

**From:** Carlo Delnero <[Carlo.Delnero@windcave.com](mailto:Carlo.Delnero@windcave.com)>  
**Sent:** Friday, March 27, 2020 4:31 PM  
**To:** KNOWLES, MATTHEW P. <[mpknowles@santafenm.gov](mailto:mpknowles@santafenm.gov)>  
**Cc:** CORREIA, NOEL P. <[npcorreia@santafenm.gov](mailto:npcorreia@santafenm.gov)>; OLGUIN, LORETTA S. <[lsolguin@santafenm.gov](mailto:lsolguin@santafenm.gov)>; Kasey Wiles <[kaseywiles@mtnpark.com](mailto:kaseywiles@mtnpark.com)>; Scott Souder <[scottsouder@mtnpark.com](mailto:scottsouder@mtnpark.com)>  
**Subject:** RE: Agreement for Signature

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Thanks for the reply Matt,

I will have back asap.

--  
Carlo Delnero  
Senior Sales Executive



T: +1 213 378 1190  
D: +1 213 378 1198  
E: [Carlo.Delnero@windcave.com](mailto:Carlo.Delnero@windcave.com)  
W: [www.windcave.com](http://www.windcave.com)

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**From:** KNOWLES, MATTHEW P. <[mpknowles@santafenm.gov](mailto:mpknowles@santafenm.gov)>  
**Sent:** Friday, March 27, 2020 12:20 PM  
**To:** Carlo Delnero <[Carlo.Delnero@windcave.com](mailto:Carlo.Delnero@windcave.com)>  
**Cc:** CORREIA, NOEL P. <[npcorreia@santafenm.gov](mailto:npcorreia@santafenm.gov)>; OLGUIN, LORETTA S. <[lsolguin@santafenm.gov](mailto:lsolguin@santafenm.gov)>; Kasey Wiles <[kaseywiles@mtnpark.com](mailto:kaseywiles@mtnpark.com)>; Scott Souder <[scottsouder@mtnpark.com](mailto:scottsouder@mtnpark.com)>  
**Subject:** Re: Agreement for Signature

Carlo,

The agreement has been approved as to form by the CAO. Once I have your signature on it I can send it to the Finance Department for their approval and then the City Manager's office for her signature. At that point we have an agreement that the City Clerk will execute.

Thanks,  
Matt

---

**From:** Carlo Delnero <[Carlo.Delnero@windcave.com](mailto:Carlo.Delnero@windcave.com)>  
**Sent:** Wednesday, March 25, 2020 6:39 PM  
**To:** KNOWLES, MATTHEW P. <[mpknowles@santafenm.gov](mailto:mpknowles@santafenm.gov)>  
**Cc:** CORREIA, NOEL P. <[npcorreia@santafenm.gov](mailto:npcorreia@santafenm.gov)>; OLGUIN, LORETTA S. <[lsolguin@santafenm.gov](mailto:lsolguin@santafenm.gov)>; Kasey Wiles <[kaseywiles@mtnpark.com](mailto:kaseywiles@mtnpark.com)>; Scott Souder <[scottsouder@mtnpark.com](mailto:scottsouder@mtnpark.com)>  
**Subject:** RE: Agreement for Signature

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Matt,

There is no signature from your side. Can you please sign so we can execute?

--  
Carlo Delnero  
Senior Sales Executive



T: +1 213 378 1190  
D: +1 213 378 1198  
E: [Carlo.Delnero@windcave.com](mailto:Carlo.Delnero@windcave.com)  
W: [www.windcave.com](http://www.windcave.com)

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**From:** KNOWLES, MATTHEW P. <[mpknowles@santafenm.gov](mailto:mpknowles@santafenm.gov)>  
**Sent:** Wednesday, March 25, 2020 1:47 PM  
**To:** Carlo Delnero <[Carlo.Delnero@windcave.com](mailto:Carlo.Delnero@windcave.com)>  
**Cc:** CORREIA, NOEL P. <[npcorreia@santafenm.gov](mailto:npcorreia@santafenm.gov)>; OLGUIN, LORETTA S. <[lsolguin@santafenm.gov](mailto:lsolguin@santafenm.gov)>; Kasey Wiles <[kaseywiles@mtnpark.com](mailto:kaseywiles@mtnpark.com)>; Scott Souder <[scottsouder@mtnpark.com](mailto:scottsouder@mtnpark.com)>  
**Subject:** Agreement for Signature

Carlo,

The agreement has come back from the City Attorney's Office. Please review, sign, and return it to me. Due to the COVID-19 health crisis, we are currently authorized to accept scanned and emailed copies of signatures, so please return it to me by email.

Also, we need to get the agreements for the other two garages in motion as soon as possible.

Thanks,

Matt Knowles  
Contracts Administrator  
City of Santa Fe Parking Division  
(505) 955-6674

Matt - Fiscal Impact  
needs Analysis  
Please send electronicall

to Budget (Alexis)

to Purchasing (Dan  
Bunawala)

APR 28 AM 9:24

Once summary of  
Contract, Procedure -  
ment checklist

✓ Fiscal Analysis  
Impact approved  
email to Fin. Dir.

# Windcave Complete Packet With FIA











## 04.28.2020

Final Audit Report

2020-07-01


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By:	Carolynn Roibal (cloibal@ci.santa-fe.nm.us)
Status:	Signed
Transaction ID:	CBJCHBCAABAAoVUiLgCIB8c67XGpPq9A1cmMS-NHcuW3

## "Windcave Complete Packet With FIA 04.28.2020" History

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-  Restricted visibility Document e-signed by Fran Dunaway (fadunaway@santafenm.gov)  
Signature Date: 2020-06-29 - 2:24:10 PM GMT - Time Source: server- IP address: 63.232.20.2
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2020-06-29 - 2:24:15 PM GMT
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Signature Date: 2020-07-01 - 7:12:26 PM GMT - Time Source: server- IP address: 63.232.20.2




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 Document emailed to Jarel LaPan Hill (jlapanhill@santafenm.gov) for signature


2020-07-01 - 7:12:32 PM GMT

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2020-07-01 - 7:32:39 PM GMT- IP address: 23.103.200.254

 Restricted visibility Document e-signed by Jarel LaPan Hill (jlapanhill@santafenm.gov)

Signature Date: 2020-07-01 - 7:33:37 PM GMT - Time Source: server- IP address: 63.232.20.2

 Signed document emailed to Fran Dunaway (fadunaway@santafenm.gov), Mary McCoy (mtmccoy@santafenm.gov), mpknowles@santafenm.gov, Alexis Lotero (aclotero@santafenm.gov), and 2 more

2020-07-01 - 7:33:37 PM GMT



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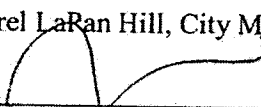




# City of Santa Fe, New Mexico

## memo

Date: February 28, 2020

To: Jarel LaRan Hill, City Manager

Via:   
Regina Wheeler, Public Works Department Director  
Noel Correia, Parking Division Director 

From: Matt Knowles, Contracts Administrator 

Subject: Request for approval of Professional Services Agreement – Windcave Inc.

---

### ITEM AND ISSUE:

The Parking Division is installing a state-of-the-art Parking Access and Revenue Control System (PARCS) in our Railyard garage. For patron convenience that system will feature multiple pay-stations where parking customers can pay for their parking with a credit card before exiting a garage. That credit card functionality will require the services of a system certified payment processor, Windcave Inc.

### BACKGROUND AND SUMMARY:

Under Agreement 19-0828 Mountain Parking Equipment (MPE) is installing a state-of-the-art Parking Access and Revenue Control System (PARCS) in all City owned garages, starting with the Railyard garage. In order to utilize PARCS' credit card cashiering functionality an agreement with a credit card processing clearinghouse is needed for each garage. As detailed under H3.1 of 19-0828, Windcave Inc. is the credit card processor certified by MPE to work with PARCS.

The total amount requested is \$15,100.00 the first year and \$15,000 annually in each of the following three years of a four year agreement, plus NMGR. Funds are budgeted in 5350455 / 510310 – Off-Street / Service Contracts.

### RECOMMENDED ACTION:

1. Approval of an agreement for \$15,000 annually in each of the following three years of a four year agreement, plus NMGR.

Attachments: Original Agreement with Attachments  
Contract Summary