

CITY COUNCIL AGENDA ITEM COVER MEMO

Agenda Item Number: _____

Meeting Type: Regular

Meeting Date: Mar 10, 2016

Action Requested By: Parking

Agenda Type: Resolution

Subject Matter:

Resolution authorizing the mayor to enter into an agreement with Ballparc, LLC for hardware and software licenses for use at all City of Huntsville event facilities.

Exact Wording for the Agenda:

Note: If amendment, Please state title and number of the original

Item to be considered for: Action

Unanimous Consent Required: No

Briefly state why the action is required; why it is recommended; what council action will provide, allow and accomplish and; any other information that might be helpful.

Associated Cost: _____

Budgeted Item: Not Applicable

MAYOR RECOMMENDS OR CONCURS: Yes

Department Head: Andi Wall for Tommy Brown

Date: Feb 29, 2016

ROUTING SLIP CONTRACTS AND AGREEMENTS

Originating Department: Parking Council Meeting Date: 3/10/2016

Department Contact: Cyndi Wall Phone # 256-427-6803

Contract or Agreement: Agreement

Document Name: Operator Service Agreement between City of Huntsville and Ballparc, LLC

City Obligation Amount:

Total Project Budget:

Uncommitted Account Balance:

Account Number:

Procurement Agreements

<u>Select...</u>	<u>Select...</u>
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Grant-Funded Agreements

<u>Select...</u>	Grant Name: <input style="width: 90%;" type="text"/>
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Department	Signature	Date
1) Originating		
2) Legal	<i>Mary C. Cates</i>	<i>3-9-2016</i>
3) Finance	<i>M. Dargatzis</i>	<i>3-9-16</i>
4) Originating		
5) Copy Distribution		
a. Mayor's office (1 copies)		
b. Clerk-Treasurer (Original & 2 copies)		

RESOLUTION NO. 16-_____

BE IT RESOLVED by the City Council of the City of Huntsville, Alabama, the Mayor be and he is hereby authorized on behalf of the City of Huntsville, a Municipal Corporation in the State of Alabama, to enter into an Operator Service Agreement with Ballparc, LLC, which substantially in words and figures similar to that certain document attached hereto and identified as "Operator Service Agreement between the City of Huntsville and Ballparc, LLC," consisting of six (6) pages and the date of March 10, 2016 appearing on the margin of the first page, together with the signature of the President or President Pro Tem of the City Council, a copy of said document being permanently kept on file on the Office of the City Clerk-Treasurer, of the City of Huntsville, Alabama.

ADOPTED this the 10th day of March, 2016.

President of the City Council of the
City of Huntsville, Alabama

APPROVED this the 10th day of March, 2016.

Mayor of the City of Huntsville,
Alabama

Operator Service Agreement

This Operator Service Agreement (the “**Agreement**”), effective as of March 10, 2016 (the “**Effective Date**”) is entered into by and between Ballparc, LLC, a Tennessee limited liability company having its principal place of business at 41 Peabody Street, Nashville, TN 37210 (“**Ballparc**”) and City of Huntsville an Alabama municipal corporation having its principal place of business at 308 Fountain Circle, Huntsville, AL 35801 (“**Customer**”, and together with Ballparc, the “**Parties**”, and each, a “**Party**”).

1. **Definitions.** Capitalized terms shall have the meanings set forth or referred to in this Section, or in the Section in which they first appear in the Agreement.
 - 1.1. “**Authorized Users**” means the employees of (or other persons designated by) Customer who are authorized to use the Licensed Software.
 - 1.2. “**Hardware**” means the components and equipment that Ballparc shall provide Customer pursuant to this agreement.
 - 1.3. “**Initial Term**” has the meaning set forth in **Section 11.1**.
 - 1.4. “**Renewal Term**” has the meaning set forth in **Section 11.1**.
 - 1.5. “**Term**” has the meaning set forth in **Section 11.1**.
 - 1.6. “**Licensed Software**” means the cloud-based Ballparc Event application provided to Customer for use with all hardware purchased pursuant to this Agreement.
 - 1.7. “**Documentation**” means user manuals, technical manuals and any other materials provided by Ballparc, in printed, electronic or other form, that describe the operation, use or technical specifications of the Licensed Software.
 - 1.8. “**Permitted Use**” means use of the Licensed Software by an Authorized User for the purpose of managing Customer’s parking operations.
 - 1.9. “**Confidential Information**” means any trade secret, know-how, invention, software program, application, documentation, schematic, procedure, contract, information, knowledge, data, process, technique, design, drawing, program, formula or test data, work in progress, engineering, manufacturing, marketing, financial, sales, supplier, customer, employee, investor, or business information, whether in oral, written, graphic or electronic form.
 - 1.10. “**Representatives**” means a Party’s and its successors’ and permitted assigns’ affiliates, employees, directors, partners, shareholders, agents, attorneys and third-party advisors.
2. **Hardware Purchase and Sale.** Subject to the terms and conditions of this Agreement, Ballparc shall sell to Customer, and Customer shall purchase from Ballparc: 5 Blue Bamboo P25-iM Bluetooth thermal printers with built-in magnetic stripe reader for \$229.00 each for a total of \$1145.00 plus applicable sales tax. After the Effective Date, Customer may purchase additional Hardware upon and subject to the same terms and conditions set forth herein.
3. **Terms of Hardware Ownership.**
 - 3.1. **Limited Warranty.** Ballparc shall be required to replace Hardware with technical defects during the Initial Term and any subsequent Renewal Term(s).
 - 3.2. **Discount on Future Upgrades.** Upon Ballparc’s implementation of a newer model of the Hardware, Ballparc shall be required to provide Customer with a discount on the list price of the newer model. The discount shall be equal to the Customer’s total purchase price, excluding any taxes, as outlined in Section 2 above.
4. **License Grant.** Subject to, and conditioned upon Customer’s compliance with, the terms and conditions of this Agreement, Ballparc hereby grants to Customer a non-exclusive, non-transferable, limited license to use the Licensed Software and Documentation during the Term.

President of the City Council of the
City of Huntsville, Alabama
Date: _____

5. Scope of Use.
 - 5.1. **Access.** Customer and its Authorized Users shall be permitted to use and run the Licensed Software.
 - 5.2. **Permitted Use.** Customer shall use the Hardware and Licensed Software solely for its Permitted Use, except as otherwise expressly provided in this Agreement.

6. Use Restrictions. Customer shall not, and shall not permit any Representatives or third parties to, in any manner:
 - 6.1. modify, alter, amend, fix, translate, enhance or otherwise create derivative works of the Hardware or Licensed Software;
 - 6.2. reverse engineer, disassemble, decompile, decode or adapt the Licensed Software, or otherwise attempt to derive or gain access to the source code of the Licensed Software, in whole or in part, except as and only to the extent this restriction is prohibited by law;
 - 6.3. remove, disable, or otherwise create or implement any workaround to, any security features contained in the Hardware or Licensed Software;
 - 6.4. remove, delete or alter any trademarks, copyright notices or other Intellectual Property Rights notices of Ballparc or its licensors, if any, from the Hardware or Licensed Software;
 - 6.5. copy the Licensed Software, in whole or in part;
 - 6.6. rent, lease, lend, sell, sublicense, assign, distribute, publish, transfer or otherwise make the Licensed Software available to any third party for any reason;
 - 6.7. use the Hardware or Licensed Software in violation of any federal, state or local law, regulation or rule;
 - 6.8. use the Hardware or Licensed Software for purposes of competitive analysis of the Licensed Software, the development of a competing software product or service or any other purpose that is to Ballparc's commercial disadvantage; or
 - 6.9. use the Hardware or Licensed Software in any other manner or for any other purpose or application not expressly permitted by this Agreement.

7. Delivery. Ballparc shall deliver the Hardware to Customer within seven (7) days of the Effective Date. Risk of loss shall pass to Customer upon delivery.

8. Fees.
 - 8.1. **License Fees.** In consideration of the rights granted to Customer under this Agreement, Customer shall pay to Ballparc a fee of \$139.00 per month for each of the five smartphone, tablet, or other mobile devices using the Licensed Software, in accordance with the terms of this **Section 8**. If the Term is renewed for any Renewal Term(s) pursuant to **Section 11.1**, Customer shall pay the then-current license fees that Customer charges for the Licensed Software during the applicable Renewal Term.
 - 8.2. **Payment Terms.** Ballparc shall provide Customer with an invoice for all fees due hereunder on a monthly basis. Payment shall be due upon Customer's receipt of such invoice on a net 30 basis. All payments hereunder shall be in US dollars.
 - 8.3. **Late Payment.** Customer shall notify Ballparc in writing of any dispute with any invoice (along with all relevant details regarding the dispute) within thirty (30) days from the date of invoice. Invoices for which no such timely notification is received shall be deemed accepted by Customer as true and correct. All late payments shall bear interest at the lesser of the rate of 1.5% per month or the highest rate permissible under applicable law, calculated daily and compounded monthly. In addition to all other remedies available under this Agreement or at law (which Ballparc does not waive by the exercise of any rights hereunder), Ballparc shall be entitled to suspend Customer's use of the Licensed Software if Customer fails to pay any amount when due hereunder and such failure continues for thirty (30) days following written notice thereof.
 - 8.4. **Taxes.** Customer shall be responsible for all sales, use and excise taxes, and any other similar taxes, duties and charges of any kind imposed by any federal, state or local governmental entity on any amounts payable by Customer hereunder; provided, that, in no event shall Customer pay or be responsible for any taxes imposed on, or with respect to, Ballparc's income, revenues, gross receipts, personnel or real or personal property or other assets.

9. **Ownership.** Customer acknowledges and agrees that the Licensed Software is being licensed, not sold, to Customer by Ballparc. Customer further acknowledges and agrees that it shall not acquire any ownership interest in the Licensed Software under this Agreement, and that Ballparc reserves and shall retain its entire right, title and interest in and to the Licensed Software and all intellectual property rights arising out of or relating to the Licensed Software except as expressly granted to Customer in this Agreement. Customer shall promptly notify Ballparc if Customer becomes aware of any possible third-party infringement of Ballparc's intellectual property rights arising out of or relating to the Licensed Software and fully cooperate with Ballparc in any legal action taken by Ballparc against third parties to enforce its intellectual property rights. Customer shall use commercially reasonable efforts to safeguard the Licensed Software (including all copies thereof) from infringement, misappropriation, theft, misuse or unauthorized access.

10. **Confidentiality.**

10.1. **Receiving Party Obligations.** Each Party acknowledges and agrees that they each may gain access to or become familiar with the other Party's Confidential Information. Except as set forth in **Section 10.2**, each Party, as the receiving Party of the other Party's Confidential Information, shall:

- (a) protect and safeguard the confidentiality of the disclosing Party's Confidential Information with at least the same degree of care as the receiving Party would protect its own Confidential Information, but in no event with less than a commercially reasonable degree of care;
- (b) not use the disclosing Party's Confidential Information, or permit it to be accessed or used, for any purpose other than to perform its obligations under this Agreement, or otherwise in any manner to the Disclosing Party's detriment;
- (c) not disclose any such Confidential Information to any person or entity, except to the receiving Party's Representatives who (1) need to know the Confidential Information to assist the receiving Party, or act on its behalf, in relation to the Purpose or to exercise its rights under the Agreement; (2) are informed by the receiving Party of the confidential nature of the Confidential Information; and (3) are subject to confidentiality duties or obligations to the receiving Party that are no less restrictive than the terms and conditions of this Agreement; and
- (d) be responsible for any breach of this Agreement caused by any of its Representatives.

10.2. **Required Disclosure.** The receiving Party may disclose the disclosing Party's Confidential Information pursuant to applicable federal, state or local law, regulation or a valid order issued by a court or governmental agency of competent jurisdiction, provided that the receiving Party shall first make commercially reasonable efforts to provide the disclosing Party with:

- (a) prompt written notice of such requirement so that the disclosing Party may seek, at its sole cost and expense, a protective order or other remedy; and
- (b) reasonable assistance, at the disclosing Party's sole cost and expense, in opposing such disclosure or seeking a protective order or other limitations on disclosure.

11. **Term; Termination.**

11.1. **Term.** This Agreement shall commence on the Effective Date and, unless terminated earlier pursuant to any of its express provisions, shall continue thereafter for a period of two (2) years (the "Initial Term"). Upon expiration of the Initial Term, the parties may, by mutual agreement renew this Agreement for one additional one-year term (the "Renewal Term" and together with the Initial Term, the "Term"). If the Term is renewed for the Renewal Term(s) pursuant to this **Section 11**, the terms and conditions of this Agreement during the Renewal Term shall be the same as the terms in effect immediately prior to such renewal, subject to any change in the amount of license fees payable hereunder by Customer during the applicable Renewal Term as set forth in **Section 8.1**.

11.2. **Termination.** Either Party may terminate this Agreement during the Term upon ninety (90) days prior written notice to the other Party.

11.3. **Effect of Termination.** The expiration or termination of this Agreement, for any reason, shall not release either Party from any liability to the other Party, including any payment obligation, which has already accrued hereunder. On the expiration or termination of this Agreement, for any reason, Customer shall immediately discontinue use of the Licensed Software.

11.4. Survival. The provisions of **Section 6** and **Section 8** through **Section 17** shall survive the expiration or earlier termination of this Agreement for any reason, provided that with respect to **Section 10**, each Party's obligations under this **Section 11.4**, shall survive the expiration or earlier termination of this Agreement for a period of one (1) year from the date of such expiration or termination, except for Confidential Information that constitutes a trade secret under any applicable law, in which case, such obligations shall survive for as long as such Confidential Information remains a trade secret under such law.

12. **Mutual Representations.** Each Party represents to the other Party that it:

12.1. is an entity duly organized and validly existing under the laws of its jurisdiction of organization;

12.2. is qualified and licensed to do business and in good standing in every jurisdiction where such qualification and licensing is required for purposes of this Agreement; and

12.3. has all necessary power and authority to negotiate, execute, deliver and perform its obligations under this Agreement.

13. **Indemnification for Intellectual Property Infringement.**

If a third party claims that the Licensed Software or Documentation infringes any patent, copyright, trade secret, or any similar intellectual property right, Ballparc will defend Customer against such claim at Ballparc's expense and will pay all damages that a court finally awards, provided that Customer promptly notifies Ballparc in writing of the claim, cooperates fully with Ballparc in the defense of any such claims, and allows Ballparc to control the defense thereof and/or any related settlement negotiations. If such a claim is made or appears possible, Ballparc will, at its option and expense, either: (i) procure for Customer the right to continue using the Licensed Software and/or Documentation; (ii) replace or modify the Licensed Software or Documentation so that it becomes non-infringing; or, (iii) if it is not possible or in Ballparc's sole discretion is not economically feasible for Ballparc to so procure such right or so replace or modify the Licensed Software, require the return of the Licensed Software and upon such return repay to Customer the unused portion of the applicable license fee. However, Ballparc shall have no obligation for any claim based on Customer's modification of the Software or Documentation or its combination, operation or use with any product, data or apparatus not specified or provided by Ballparc.

14. **Limitation of Liability.**

14.1. **No Consequential or Indirect Damages.** IN NO EVENT WILL THE LICENSOR OR ANY OF ITS REPRESENTATIVES BE LIABLE UNDER THIS AGREEMENT TO THE LICENSEE OR ANY THIRD PARTY FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL OR PUNITIVE DAMAGES, INCLUDING ANY DAMAGES FOR BUSINESS INTERRUPTION, LOSS OF USE, DATA, REVENUE OR PROFIT, WHETHER ARISING OUT OF BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, REGARDLESS OF WHETHER SUCH DAMAGES WERE FORESEEABLE AND WHETHER OR NOT THE LICENSOR WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

14.2. **Maximum Liability.** EXCEPT FOR THE INDEMNITY PROVISIONS SET FORTH IN SECTION 13 HEREIN, IN NO EVENT WILL THE LICENSOR'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER ARISING OUT OF OR RELATED TO BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, EXCEED THE TOTAL AMOUNT PAID TO THE LICENSOR PURSUANT TO THIS AGREEMENT IN THE YEAR PERIOD PRECEDING THE EVENT GIVING RISE TO THE CLAIM. THE FOREGOING LIMITATIONS SHALL APPLY EVEN IF THE LICENSEE'S REMEDIES UNDER THIS AGREEMENT FAIL OF THEIR ESSENTIAL PURPOSE.

15. **Governing Law; Jurisdiction.** This Agreement shall be governed by and construed in accordance with the internal laws of the State of Alabama without giving effect to any choice or conflict of law provision or rule (whether of the State of Alabama or any other jurisdiction) that would cause the application of Laws of any jurisdiction other than those of the State of Alabama. Any legal suit, action or proceeding arising out of or related to this Agreement or the matters contemplated hereunder shall be instituted in the federal courts of the United States or the courts of the State of Alabama in each case located in Madison County, Alabama, and each Party irrevocably submits to the jurisdiction of such courts in any such suit, action or proceeding and waives any objection based on improper venue or forum non conveniens. Service of process, summons, notice or other document by mail to such Party's address set forth herein shall be effective service of process for any suit, action or other proceeding brought in any such court. Customer shall

not withhold payment of any fees owing under this Agreement by reason of any set-off of any claim or dispute with Ballparc, whether relating to the quality or performance of the Licensed Software or otherwise.

16. **Notices.** All notices, requests, consents, claims, demands, waivers and other communications hereunder shall be in writing and shall be deemed to have been given on the day received by the other Party. Such communications must be sent to the respective parties at the addresses set forth on the first page of this Agreement.
17. **Miscellaneous.**
 - 17.1. **Force Majeure.** Neither Party shall be in default hereunder by reason of any failure or delay in the performance of its obligations hereunder where such failure or delay is due to any cause beyond its reasonable control, including strikes, labor disputes, civil disturbances, riot, rebellion, invasion, epidemic, hostilities, war, terrorist attack, embargo, natural disaster, acts of God, flood, fire, sabotage, fluctuations or non-availability of electrical power, heat, light, air conditioning or Customer equipment, loss and destruction of property or any other circumstances or causes beyond such Party's reasonable control.
 - 17.2. **Relationship of the Parties.** Nothing contained in this Agreement shall be construed as creating any agency, partnership, or other form of joint enterprise between the Parties. The relationship between the Parties shall at all times be that of independent contractors. Neither Party shall have authority to contract for or bind the other in any manner whatsoever.
 - 17.3. **Entire Agreement.** This Agreement, together with all exhibits attached hereto, constitutes the sole and entire agreement of the Parties with respect to the subject matter contained herein, and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, with respect to such subject matter. This Agreement may only be amended, modified or supplemented by an agreement in writing and duly executed by each Party hereto. In the event of a conflict between the terms, provisions and conditions contained in the body of this Agreement and the terms, provisions and conditions contained in the Exhibits to this Agreement, the term, provisions and conditions contained in the body of this Agreement shall prevail. In no event shall the provisions of any purchase order or any associated documentation used by Customer, constitute a binding agreement between the Parties or serve to modify the provisions of this Agreement, regardless of any failure of Ballparc to object to any purchase order or associated documentation.
 - 17.4. **Assignment.** Customer shall not assign any of its rights or delegate any of its obligations hereunder without the prior written consent of Ballparc. Any purported assignment or delegation in violation of this **Section 17.4** shall be null and void. No assignment or delegation shall relieve Customer of any of its obligations hereunder.
 - 17.5. **Waiver.** No waiver by any Party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the Party so waiving. No waiver by any Party shall operate or be construed as a waiver in respect of any failure, breach or default not expressly identified by such written waiver, whether of a similar or different character, and whether occurring before or after that waiver. No failure to exercise, or delay in exercising, any right, remedy, power or privilege arising from this Agreement shall operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege.
 - 17.6. **Severability.** If any term or provision of this Agreement is invalid, illegal or unenforceable in any jurisdiction, such invalidity, illegality or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction.
 - 17.7. **Headings.** The headings in this Agreement are for reference only and shall not affect the interpretation of this Agreement.
 - 17.8. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same agreement. A signed copy of this Agreement delivered by facsimile, e-mail or other means of electronic transmission (to which a signed PDF copy is attached) shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

