

RESOLUTION R-26-17

A RESOLUTION AUTHORIZING THE EXECUTION OF AN AGREEMENT WITH ONX US, LLC, FOR NETWORK INFRASTRUCTURE

WHEREAS, the City of Wheaton, DuPage County, Illinois is desirous to enter into an agreement for network infrastructure; and

WHEREAS, the City conducted a request for proposal process and received and reviewed nine submittals for network infrastructure; and

WHEREAS, it is determined by the City that the proposal received from ONX US, LLC, meets the City's needs; and

WHEREAS, it is necessary for the City to enter into an agreement with ONX US, LLC, for the purpose of providing network infrastructure.

NOW, THEREFORE, BE IT RESOLVED by the Mayor and City Council of the City of Wheaton, Illinois that the Mayor is hereby authorized to execute and the City Clerk is hereby directed to attest to a professional service agreement between the City of Wheaton and ONX US, LLC, Lisle, IL, for network infrastructure.

ADOPTED this 17th day of April 2017.


Mayor

ATTEST:


City Clerk

Roll Call Vote:

Ayes: Councilwoman Fitch
Councilman Prendiville
Councilman Rutledge
Mayor Gresk
Councilman Saline
Councilman Scalzo
Councilman Suess

Nays: None
Absent: None

Motion Carried Unanimously



This number must appear on
all invoices and documents.
No. C 36941

Agreement Between the City of Wheaton, Illinois
and ONX US, LLC
for Professional Services

Network Infrastructure

This Agreement is entered into by and between the City of Wheaton, an Illinois municipal corporation ("City"), 303 West Wesley Street, Wheaton, IL 60187, and ONX US, LLC ("Professional Service Provider"), 2200 Cabot Drive, Lisle, IL 60532.

WITNESSETH:

Whereas, the City has determined that it is strategic to hire a Professional Service to provide network infrastructure (hereinafter the "Work") consistent with the attached Exhibit A [Exhibit A is the Request for Proposal] which is incorporated herein and is fully set forth; and

Whereas, the Professional Service Provider has submitted a proposal attached Exhibit B [Exhibit B is the Proposal] for this work, and

Whereas, the City finds the proposal submitted by the Professional Service Provider meets the City's service requirements for the Work.

Now, therefore, for in consideration of their mutual promises, terms, covenants, agreements, and conditions recited in this Agreement, the City and the Professional Service Provider hereto do hereby agree as follows:

- 1. Scope of Service:** *The Recital paragraphs are incorporated herein as substantive terms and conditions of this Agreement and as representing the intent of the Parties. The Professional Service Provider shall furnish all labor, materials, and equipment to provide and perform the Work. The City acknowledges that the Professional Service Provider acts as a reseller of materials and equipment and that the original manufacturer of such materials and equipment is responsible to the City, the Professional Service Provider and third parties for all defects, breaches, liability, claims, damages, obligations, costs and expenses (whether legal or equitable) ("hereinafter "Claims") related to the manufacture, performance and functionality of the materials and equipment. The City agrees to look solely to the manufacturer of materials and equipment for all Claims arising from breach of manufacturer's warranty for materials and equipment. The Professional Service Provider agrees to transfer, assign or "pass through" to City any transferable warranty made to the Professional Service Provider by Supplier to the extent transferable and permitted by law.*

The Professional Service Provider represents and warrants that it shall perform the Work in a manner consistent with the level of care and skill customarily exercised by other Professional Service Providers under similar circumstances at the time of performance. The Professional Service Provider disclaims any warranty, express or implied, with respect to the Work, including but not limited to warranties of (A) merchantability, (B) of fitness for any particular purpose or use, (C) whether the use of the Works shall be uninterrupted or error free, (D) arising by any course of dealing, course of performance or usage of trade, (E) noninfringement or (F) title to software.
- 2. Compensation:** *The City shall compensate the Professional Service Provider according to the terms of the Professional Service Provider's proposal which is attached hereto as Exhibit B.*
- 3. Waivers of Lien:** *The City reserves the right to require waivers of lien before payment where the City deems it to be in its best interest to do so.*

4. **Term of Agreement:** *This Agreement shall become effective upon the latter of the date accepted and signed by the City and the date accepted and signed by the Professional Service Provider. It shall be in effect until the city deems the work complete and acceptable. This Agreement may be subject for renewal if Professional Service Provider maintains or reduces costs hourly rates.*
5. **Time is of the Essence:** *Time is of the essence in the performance of all the terms and conditions of this Agreement.*
6. **Additional Services:** *The Professional Service Provider shall provide only the Work specified in this Agreement and attached Exhibits. In the event the Professional Service Provider or the City determines that additional goods and/or services are required to complete the Work, such additional goods shall not be provided and/or such additional services shall not be performed unless authorized in writing by the City. Terms, frequency, and prices for additional services shall be confirmed in writing by the City and the Professional Service Provider.*
7. **Integration:** *The provisions set forth in this Agreement represent the entire agreement between the parties and supersede all prior agreements, contracts, promises, and representations, as it is the intent of the parties to provide for a complete integration within the terms of this Agreement. This Agreement may be modified only by a further written agreement between the parties, and no modification shall be effective unless properly approved and signed by each party. No course of conduct before, or during the performance of this Agreement, shall be deemed to modify, change or amend this Agreement.*
8. **Waiver:** *Any failure of either the City or the Professional Service Provider to strictly enforce any term, right, or condition of this Agreement whether implied or expressed, shall not be construed as a waiver of such term, right, or condition.*
9. **Compliance with Laws:** *The Professional Service Provider shall comply with all applicable federal, state, and local laws, rules, and regulations, and all City ordinances, rules and regulations now in force or hereafter enacted, in the provision of the goods and/or performance of the services required under this Agreement.*
10. **Freedom of Information Act:** *The Professional Service Provider shall, within ten (10) business days of the City's request, provide any documents in the Professional Service Provider's possession related to the Agreement which the City is required to disclose to a requester under the Illinois Freedom of Information Act. This provision is a material covenant of this Agreement. Professional Service Provider agrees to not apply any costs or charge any fees to the City regarding the procurement of records required pursuant to a FOIA request. Should Professional Service Provider request that City utilize a lawful exemption under FOIA in relation to any FOIA request thereby denying that request, Professional Service Provider agrees to pay all actual costs connected therewith (such as reasonable attorney's and witness fees, filing fee, and any other expenses) to defend the denial of the request. The defense shall include, but not be limited to, challenged or appealed denials of FOIA requests to either the Illinois Attorney General or a court of competent jurisdiction. Professional Service Provider agrees to defend, indemnify, and hold harmless City, and agrees to pay all costs connected therewith (such as reasonable attorney's and witness fees, filing fees and any other expenses) to defend any denial of a FOIA request by Professional Service Provider's request to utilize a lawful exemption to City.*
11. **Discrimination Prohibited:** *The Professional Service Provider shall comply with the provisions of the Illinois Human Rights Act, as amended, 775 ILCS 5/1-101 et seq. (1992 State Bar Edition), and with all rules and regulations established by the Department of Human Rights. The Professional Service Provider agrees that it will not deny employment to any person or refuse to enter into any contract for services provided for in this Agreement to be performed on its behalf on the basis of unlawful discrimination as defined in the Illinois Human Rights Act.*
12. **Status of Independent Consultant:** *Both City and Professional Service Provider agree that Professional Service Provider will act as an Independent Consultant in the performance of the Work. Accordingly, the Professional Service Provider shall be responsible for payment all taxes including federal, state, and local taxes arising out of*

the Professional Service Provider's activities in accordance with this Agreement, including by way of illustration but not limitation, federal and state income tax, social security tax, and any other taxes or license fees as may be required under the law. Professional Service Provider further acknowledges under the terms of this Agreement, that it is not an agent, employee, or servant for the City for any purpose, and that it shall not hold itself out as an agent, employee, or servant of the City under any circumstance for any reason. Professional Service Provider is not in any way authorized to make any contract, agreement, or promise on behalf of City, or to create any implied obligation on behalf of City, and Professional Service Provider specifically agrees that it shall not do so. City shall have no obligation to provide any compensation or benefits to Professional Service Provider, except those specifically identified in this Agreement. City shall not have the authority to control the method or manner by which Professional Service Provider complies with the terms of this Agreement.

13. Assignment; Successors and Assigns: Neither this Agreement, nor any part, rights or interests hereof, may be assigned, to any other person, firm or corporation without the written consent of all other parties. Upon approval of assignment, this Agreement and the rights, interests and obligations hereunder shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns.

14. Non-disclosure: During the course of the Work, each party ("Receiving Party") may have access to proprietary and confidential information including, but not limited to, methods, processes, formulae, compositions, systems, techniques, computer programs, databases, research projects, resident name and address information, financial data, and other data of the other party ("Disclosing Party"). The Receiving Party shall not use such information for any purpose other than described in this Agreement and Exhibits and shall not directly or indirectly disclose or disseminate such information to any third party without the express written consent of the Disclosing Party.

15. Hold Harmless and Indemnification: The Professional Service Provider shall defend, hold harmless, and indemnify the City, its directors, officers, employees, agents, and elected officials, in whole or in part from and against any and all third party liabilities, losses, claims, demands, damages, fines, penalties, costs, and expenses, including, but not limited to, reasonable attorneys' fees and costs of litigation, and all causes of action of any kind or character, except as otherwise provided herein, to the extent that such matter arises from either of the following:

- a) The Professional Service provider's breach of any term, provision, warranty, standard or requirement of this Agreement including, but not limited to, those provisions of this Agreement pertaining to the Professional Service Provider's services.*

In no event, other than for (i) breach of Section 16 (Patents), (ii) breach of Section 14 (Non-Disclosure), (iii) willful misconduct, or (iv) fraud or fraudulent misrepresentation, shall the Professional Service Provider's liability (whether based on contract, indemnity, warranty, tort, strict liability or otherwise) arising in connection with or under this Agreement exceed Five Hundred Thousand dollars (\$500,000.00).

The City shall in no event be entitled to, and the Professional Service Provider shall not be liable for, indirect, special, incidental or consequential damages of any nature, including, but not limited to, loss of profit, promotional and/or manufacturing expenses, overhead, injury to reputation and/or loss of customers or data.

16. Patents: The Professional Services Provider agrees to protect, defend, and save the City harmless against any demand for payment for the use of any patented material process, article ("Material"), or device that may enter into the manufacture and construction, or copyrighted material that form a part of the Work covered by the Agreement. The foregoing shall not apply and the Professional Service Provider shall have no obligation for any claim of infringement arising from: (a) any combination of the Material or Work with programs, equipment or hardware not supplied or approved in writing by Professional Service Provider, where such infringement would not have occurred but for such combination; (b) the adaptation or modification of the Material or Work, where such infringement would not have occurred but for such adaptation or modification; or (c) the use of the Material or Work in a manner for which it was not designated or intended or which is not permitted hereunder, where such infringement would not have occurred but for such use.

Notwithstanding the foregoing, this Section 16 shall only apply to Materials or Works created or provided by Professional Services Provider. The City acknowledges that the Professional Service Provider is a reseller of materials and equipment and, therefore, the original manufacturer's terms and conditions shall govern and control in the event of a conflict with this Agreement.

17. **Termination of Agreement:** The City may terminate this Agreement if the Professional Service Provider fails to cure any of its breach within thirty (30) days upon receipt of the written notice to the Professional Service Provider. In the event of termination, the City shall pay the Professional Service Provider for services performed as of the effective date of termination. The City shall have the right to terminate this Agreement, without cause, upon forty-five (45) days written notice to the Professional Service Provider. The Professional Service Provider shall be paid for all work performed in conformance with the Agreement through the effective date of the not for cause termination. The written notice required under this paragraph shall be either (i) served personally during regular business hours; (ii) served by facsimile data transmission during regular business hours, (iii) by e-mail or (iv) served by certified or registered mail, return receipt requested, addressed to the address listed in this Agreement with postage prepaid and deposited in the United States mail. Notice served personally and by facsimile data transmission shall be effective upon receipt, and notice served by the United States mail shall be effective three (3) business days after mailing.
18. **Cancellation for Unappropriated Funds:** The obligation of the City for payment to a Professional Service Provider is limited to the availability of funds appropriated in a current fiscal period, and continuation of the Agreement into a subsequent fiscal period is subject to appropriation of funds, unless otherwise authorized by law.
19. **Default.** In case of default by the Professional Service Provider, the City will procure articles or service from other sources and hold the Professional Service Provider responsible for any excess actual cost incurred as provided for in Article 2 of the Uniform Commercial Code, subject to the notice and cure right under Section 17. The City reserves the right to cancel the whole or any part of the Agreement if the Professional Service Provider fails to perform any of the provisions in the Agreement, fails to make delivery within the time stated, becomes insolvent, suspends any of its operations, or if any petition is filed or proceeding commenced by or against the Seller under any State or Federal law relating to bankruptcy arrangement, reorganization, receivership, or assignment for the benefit of creditors. The Professional Service Provider will not be liable to perform if situations arise by reason of strikes, acts of God or the public enemy, acts of the City, fires or floods.
20. **Force Majeure:** No party hereto shall be deemed to be in default or to have breached any provision of this Agreement as a result of any delay, failure in performance or interruption of services resulting directly or indirectly from acts of God, acts of civil or military disturbance, or war, which are beyond the control of such non-performing party.
21. **Notification:** All notification under this Agreement shall be made as follows:
- | | |
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| If to the Professional Service provider: | If to the City: |
| ONX US, LLC | City of Wheaton |
| Attn: Alexandra Pladys | Attn: City Clerk |
| 2200 Cabot Drive | 303 W. Wesley Street, Box 727 |
| Lisle, IL 60532 | Wheaton, IL 60189-727 |
| Fax # (630) 536-8842 | Fax # (630) 260-2017 |
| e-mail: Alexandra.Pladys@onx.com | e-mail: cityclerk@wheaton.il.us |
22. **Severability:** If any provision of this Agreement is held to be illegal, invalid, or unenforceable, such provision shall be fully severable, and this Agreement shall be construed and enforced as if such illegal, invalid, or unenforceable provision were never a part hereof; the remaining provisions hereof shall remain in full force and effect and shall not be affected by the illegal, invalid, or unenforceable provision or by its severance; and in lieu of such illegal, invalid, or unenforceable provision there shall be added automatically as part of this Agreement, a provision as

similar in its terms to such illegal, invalid, or unenforceable provision as may be possible and legal, valid and enforceable.

2.3. Recovery of Costs: In the event the City is required to file any action, whether legal or equitable, to enforce any provision of this Agreement, the City shall be entitled to recover all costs and expenses incurred as a result of the action or proceeding, including expert witness and attorney's fees, if so provided in any order of the Court.

2.4. Governing Law: This Agreement shall be governed by and construed in accordance with the laws of the State of Illinois, without giving effect to its conflict-of-laws rules. Exclusive jurisdiction for any litigation involving any aspect of this Agreement shall be in the Eighteenth Judicial Circuit Court, DuPage County, Illinois.

In Witness Whereof, the parties have entered into this Agreement this 17th day of April 2017.

City of Wheaton, an Illinois municipal corporation

By: Michael J. Jones Date: 4/17/17

Title: MAYOR

Attest:

Sharon Barrett-Hagen
Sharon Barrett-Hagen, City Clerk

ONX US, LLC

By: R. Udwin Date: April 24th 2017

Title: Technical Resource Manager - Robert Udwin

Attest:

