

Services Agreement

This Services Agreement (this "**Agreement**"), dated as of April 30, 2021 (the "**Effective Date**"), is entered into by and between the City of Long Beach, a New York municipal corporation, with offices located at 1 West Chester Street, Long Beach, New York 11561 (the "**City**"), and US eDirect, a New York corporation, with offices located at 99 Powerhouse Road, Suite 207, Roslyn Heights, New York 11577 ("**Service Provider**"), (City and Service Provider, may be referred to collectively as "**Parties**", and each a "**Party**").

WHEREAS, Service Provider has the capability and capacity to provide certain Electronic Beach Passes and associated services as outlined in the City's Request for Proposals, dated October 20, 2020 services; and

WHEREAS, City desires to retain Service Provider to provide the said services under the terms and conditions hereinafter set out, and Service Provider is willing to perform such services;

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Service Provider and City agree as follows:

1. Services. Service Provider shall provide to the City an electronic beach pass solution (the "**Services**"), in accordance with the standards and requirements as set forth in the Request for Proposals for Services to Provide an Electronic Beach Pass Solution, dated October 20, 2020 ("**RFP**") and the Service provider's response thereto ("**RFP Response**"), attached hereto collectively as **Exhibit A**.

1.1 In the event of any conflict between the RFP, the RFP Response and this Agreement, the RFP shall prevail.

2. Service Provider Obligations. Service Provider shall:

2.1 Appoint representatives to the following positions after obtaining City's consent, which consent shall not be unreasonably withheld:

(a) A primary contact to act as its authorized representative with respect to all matters pertaining to this Agreement (the "**Service Provider Contract Manager**").

(b) A sufficient number of employees to perform the Services set out in the RFP and RFP Response, each of whose names, positions, and respective levels of experience and relevant licenses shall be set out in the respective Statement of Work (collectively, with Service Provider Contract Manager, "**Provider Representatives**").

2.2 Assign only qualified, legally authorized Provider Representatives to provide the Services.

2.3 Comply with all applicable laws and regulations in providing the Services.

2.4 Comply with all City rules, regulations, and policies of which it has been made aware, in its provision of the Services.

2.5 Maintain complete and accurate records relating to the provision of the Services under this Agreement in such form as City shall approve. During the Term (as defined in Section 7.1) and for a period of six years thereafter, upon City's written request, Service Provider shall allow City or City's representative to inspect and make copies of such records and interview Provider Representatives in connection with the provision of the Services; provided that City provides Service Provider with at least 10 business days advance written notice of the planned inspection, and any such inspection shall take place during regular business hours.

3. City Obligations. City shall:

3.1 Designate one of its employees or agents to serve as its primary contact with respect to this Agreement and to act as its authorized representative with respect to matters pertaining to this Agreement (the "**City Contract Manager**"), with such designation to remain in force unless and until a successor City Contract Manager is appointed, in City's sole discretion.

3.2 Require that the City Contract Manager respond promptly to any reasonable requests from Service Provider for instructions, information, or approvals required by Service Provider to provide the Services.

4. Fees and Expenses.

4.1 In consideration of the Services to be performed under this Agreement, the City shall pay to Service Provider as follows:

- (a) \$0.25 convenience fee for each daily pass sold through the platform;
- (b) \$1.00 convenience fee for every other pass sold through the platform;

4.2 All merchant fees will be paid by the City or compensated to the Service Provider by the City or passed on to the end customer as per the City's choice.

4.3 All fees specified in Article 4, shall be invoiced to the City monthly by the Service Provider.

5. Intellectual Property. The City acknowledges that the Service Provider retains ownership of its intellectual property rights in the software, services, and systems to be provided. The City is hereby granted a license to use Service Provider's intellectual property (e.g., source code), however, ownership of the software, documentation, and other intellectual property provided as part of the service remains exclusively vested in the Service Provider. The duration of the license is limited to the term of this Agreement for the purposes described in the RFP and this Agreement. Service Provider is providing the software, services, and systems to be provided exclusively by granting the City access to the Service Provider's platform hosted on servers.

owned or controlled by the Service Provider. Any use of the intellectual property in a manner inconsistent with this Agreement is unauthorized and constitutes a breach of this Agreement.

6. Confidentiality. All non-public, confidential, or proprietary information of the City ("**Confidential Information**"), including, but not limited to, any trade secrets, specifications, samples, patterns, designs, plans, drawings, documents, data, business operations, City lists, pricing, discounts, or rebates, disclosed by City to Service Provider, whether disclosed orally or disclosed or accessed in written, electronic, or other form or media, and whether or not marked, designated, or otherwise identified as "confidential," in connection with this Agreement is confidential, solely for Service Provider's use in performing this Agreement and may not be disclosed or copied unless authorized by City in writing. Confidential Information does not include any information that: (a) is or becomes generally available to the public other than as a result of Service Provider's breach of this Agreement; (b) is obtained by Service Provider on a non-confidential basis from a third party that was not legally or contractually restricted from disclosing such information; or (c) Service Provider establishes by documentary evidence, was in Service Provider's possession prior to City's disclosure hereunder. Service Provider shall maintain the Confidential Information with the same degree of care Service Provider uses to maintain its own Confidential Information, and, in all events, Service Provider shall maintain the Confidential Information with no less than commercially reasonable care. Upon City's request, Service Provider shall promptly return all documents and other materials received from City. City shall be entitled to injunctive relief for any violation of this Section. The Service Provider is responsible for ensuring that appropriate security measures, features, mechanisms, and assurances are in place to safeguard all of the City's information assets.

7. Term, Termination, and Survival.

7.1 This Agreement shall commence as of the Effective Date and shall continue thereafter for a period of three (3) years, with an option to renew at the sole discretion of the City, for two (2) additional one-year terms, based on the same terms and conditions, including user fees. Unless sooner terminated pursuant to Sections 7.2.

7.2 The Parties may terminate this Agreement, in whole or in part, at any time without cause, and without liability except for required payment for services rendered, and reimbursement for authorized expenses incurred, prior to the termination date, by providing at least 30 days' prior written notice to Service Provider.

7.3 Upon expiration or termination of this Agreement for any reason, Service Provider shall promptly:

(a) Deliver to City all documents, work product, and other materials, whether or not complete, prepared by or on behalf of Service Provider in the course of performing the Services for which City has paid.

(b) Return to City all City-owned property, equipment, or materials in its possession or control.

(c) Remove any Service Provider-owned property, equipment, or materials located at City's locations.

(d) Deliver to City, all documents and tangible materials (and any copies) containing, reflecting, incorporating, or based on City's Confidential Information.

(e) Provide reasonable cooperation and assistance to City in transitioning the Services to an alternate service provider.

(f) On a pro rata basis, repay all fees and expenses paid in advance for any Services which have not been provided.

(g) Permanently erase all of City's Confidential Information from its computer systems.

(h) Certify in writing to City that it has complied with the requirements of this Section 3.

7.4 The rights and obligations of the Parties set forth in this Section 7, Section 5, Section 6, Section 8, Section 9, Section 10, Section 12, Section 14, Section 21, and Section 22, and any right or obligation of the Parties in this Agreement which, by its nature, should survive termination or expiration of this Agreement, will survive any such termination or expiration of this Agreement, and with respect to Confidential Information that constitutes a trade secret under applicable law, the rights and obligations set forth in Section 6 hereof will survive such termination or expiration of this Agreement until, if ever, such Confidential Information loses its trade secret protection other than due to an act or omission of Service Provider or its affiliates and its or their employees, officers, directors, shareholders, partners, members, managers, agents, independent contractors, service providers, sublicensees, subcontractors, attorneys, accountants, and financial advisors.

8. Independent Contractor.

8.1 It is understood and acknowledged that the Services which Service Provider will provide to City hereunder shall be in the capacity of an independent contractor and not as an employee or agent of the City. Service Provider shall control the conditions, time, details, and means by which Service Provider performs the Services. The City shall have the right to inspect the work of Service Provider as it progresses solely for the purpose of determining whether the work is completed according to the applicable Statement of Work.

8.2 Service Provider has no authority to commit, act for or on behalf of the City, or to bind the City to any obligation or liability.

8.3 Service Provider shall not be eligible for and shall not receive any employee benefits from City and shall be solely responsible for the payment of all taxes, FICA, federal and state unemployment insurance contributions, state disability premiums, and all similar taxes and fees relating to the fees earned by Service Provider hereunder.

9. Indemnification. Service Provider shall indemnify, defend, and hold harmless the City and its officers, directors, managers, shareholders, members, partners, employees, agents, affiliates, successors, and permitted assigns (collectively, "**Indemnified Party**") against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs, or expenses of whatever kind, including attorneys' fees, fees, and the costs of enforcing any right to indemnification under this Agreement, and the cost of pursuing any insurance providers, incurred by Indemnified Party (collectively, "**Losses**"), relating to any claim of a third party or City arising out of or occurring in connection with Service Provider's negligence, willful misconduct, or breach of this Agreement. Service Provider shall not enter into any settlement without City's and/or Indemnified Party's prior written consent.

10. Remedies.

10.1 If the Service Provider violates any provision of this Agreement, the City shall, in addition to any damages to which it is entitled, be entitled to immediate injunctive relief against the Service Provider prohibiting further actions inconsistent with the Service Provider's obligations under this Agreement.

10.2 In the event Service Provider fails to satisfactorily perform any of the Services on a timely basis, the City shall have the right, without prejudice to any other rights or remedies it may have under this Agreement or any applicable Statement/Scope of Work, to take one or more of the following steps:

(a) Suspend Service Provider's right and obligation to complete its performance of the Services until such time as the Service Provider is able to demonstrate to City's reasonable satisfaction that it can satisfactorily meet its obligations under this Agreement;

(b) Itself provide and/or engage a replacement service provider to provide any or all of the delayed or unsatisfactory Services;

(c) Assign one or more of its representatives to supervise and work with the Service Provider to correct and mitigate the effects of the Service Provider's breach;

(d) Withhold payment of any amounts otherwise due to the Service Provider in a sufficient amount to set off against any damages awarded by a court of competent jurisdiction as a consequence of the Service Provider's breach.

10.3 To the extent a Party is required to seek enforcement of this Agreement or otherwise defend against an unsuccessful claim of breach, the unsuccessful Party shall be liable for all attorney's fees and costs incurred by the successful party to enforce the provisions of this Agreement to the fullest extent provided for by New York state law.

10.4 Except for a breach of Section 6, all rights and remedies provided in this Agreement are cumulative and not exclusive, and the exercise by either Party of any right or

remedy does not preclude the exercise of any other rights or remedies that may now or subsequently be available at law, in equity, by statute, in any other agreement between the Parties, or otherwise. Despite the previous sentence, the Parties intend that the Service Provider's exclusive remedy for City's payment breach shall be its right to damages equal to its earned but unpaid fees.

11. Compliance with Law. Service Provider is in compliance with and shall comply with all applicable Federal, State and Local laws, regulations, and ordinances. Service Provider has and shall maintain in effect all the licenses, permissions, authorizations, consents, and permits that it needs to carry out its obligations under this Agreement.

12. Insurance. For a period of two years after the Effective Date, Service Provider shall, at its own expense, maintain and carry insurance in full force and effect with financially sound and reputable insurers, that includes, but is not limited to, commercial general liability with limits no less than \$2,000,000 per occurrence and \$2,000,000 in the aggregate, including bodily injury and property damage and completed operations and advertising liability, which policy will include contractual liability coverage insuring the activities of Service Provider under this Agreement, and workers' compensation insurance to the extent required by law. Upon City's request, Service Provider shall provide City with a certificate of insurance from Service Provider's insurer evidencing the insurance coverage specified in this Agreement. The certificate of insurance shall name City as an additional insured. Service Provider shall provide City with 30 days' advance written notice in the event of a cancellation or material change in Service Provider's insurance policy. Except where prohibited by law, Service Provider shall require its insurer to waive all rights of subrogation against City's insurers and City or the Indemnified Parties.

If it shall have any employees providing services for City, Service Provider shall also provide workers' compensation insurance covering those employees in compliance with New York State Law and shall provide a certificate of insurance to City evidencing such coverage within 30 days of the effective date of this Agreement.

13. Entire Agreement. This Agreement, including and together with any related Statements of Work, exhibits, schedules, attachments, and appendices, 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, regarding such subject matter.

14. Notices. All notices, requests, consents, claims, demands, waivers, and other communications under this Agreement (each, a "Notice") must be in writing and addressed to the other Party at its address set forth below (or to such other address that the receiving Party may designate from time to time in accordance with this Section). Unless otherwise agreed herein, all Notices must be delivered by personal delivery, nationally recognized overnight courier, or certified or registered mail (in each case, return receipt requested, postage prepaid). Except as otherwise provided in this Agreement, a Notice is effective only (a) on receipt by the receiving Party; and (b) if the Party giving the Notice has complied with the requirements of this Section 14.

Notice to City: 1 West Chester Street
Long Beach, NY 11561
Attention: Corporation Counsel

Notice to Service Provider: 99 Powerhouse Road, Suite 207
Roslyn Heights, NY 11577
Attention: Andrew Davies

15. Severability. If any term or provision of this Agreement is found by a court of competent jurisdiction to be invalid, illegal, or unenforceable, 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.

16. Amendments. No amendment to, or modification of this Agreement is effective unless it is in writing, identified as an amendment to this Agreement and signed by an authorized representative of each Party.

17. Waiver. No waiver by any Party of any of the provisions of this Agreement shall be effective unless explicitly set forth in writing and signed by the Party so waiving. Except as otherwise set forth in this Agreement, 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.

18. Assignment. Service Provider shall not assign, transfer, delegate, or subcontract any of its rights or obligations under this Agreement without the prior written consent of the City. Any purported assignment or delegation in violation of this Section 18 shall be null and void. No assignment or delegation shall relieve the Service Provider of any of its obligations hereunder.

19. Successors and Assigns. This Agreement is binding on and inures to the benefit of the Parties and their respective successors and permitted assigns.

20. No Third-Party Beneficiaries. This Agreement benefits solely the Parties and their respective successors and permitted assigns and nothing in this Agreement, express or implied, confers on any third party any legal or equitable right, benefit, or remedy of any nature whatsoever under or by reason of this Agreement.

21. Choice of Law. This Agreement and all related documents including all exhibits attached hereto, and all matters arising out of or relating to the making or performance of this Agreement, whether sounding in contract, tort, or statute are governed by, construed in accordance with and enforced under the laws of the State of New York (including its statutes of limitations).

22. Choice of Forum. Each Party irrevocably and unconditionally agrees that it will not commence any action, litigation, or proceeding of any kind whatsoever against the other Party in any way arising from or relating to this Agreement, including all exhibits, schedules, attachments, and appendices attached to this Agreement, and all contemplated transactions, including, but not limited to, contract, equity, tort, fraud, and statutory claims, in any forum other than the courts of the State of New York sitting in Nassau County, and any appellate court thereof. Each Party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

23. Counterparts. This Agreement may be executed in counterparts, each of which is deemed an original, but all of which together are deemed to be one and the same agreement. Notwithstanding anything to the contrary in Section 14, a signed copy of this Agreement delivered by facsimile, email, or other means of electronic transmission is deemed to have the same legal effect as delivery of an original signed copy of this Agreement.


24. Force Majeure. No Party shall be liable or responsible to the other Party, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement, when and to the extent such Party's (the "Impacted Party") failure or delay is caused by or results from the following force majeure events ("Force Majeure Event(s)"): (a) acts of God; (b) flood, fire, earthquake, or explosion; (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest; (d) government order, law, or action; (e) embargoes or blockades in effect on or after the date of this Agreement; (f) national or regional emergency; and (g) other similar events beyond the reasonable control of the Impacted Party. Notwithstanding the foregoing, Service Provider's financial inability to perform, changes in cost or availability of materials, components or services, market conditions, or supplier actions or contract disputes will not excuse performance by Service Provider under this Section.

The Impacted Party shall give notice within 10 days of the Force Majeure Event to the other Party, stating the period of time the occurrence is expected to continue. The Impacted Party shall use diligent efforts to end the failure or delay and ensure the effects of such Force Majeure Event are minimized. The Impacted Party shall resume the performance of its obligations as soon as reasonably practicable after the removal of the cause. In the event that the Impacted Party's failure or delay remains uncured for a period of 10 consecutive days following written notice given by it under this Section, the other Party may thereafter terminate this Agreement upon 14 days' written notice, subject to the provisions of Section 7.


[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the Effective Date by their respective officers thereunto duly authorized.

THE CITY OF LONG BEACH

By 
Name: Donna M. Gayden
Title: City Manager

US EDIRECT

By 
Name: ANDREW DAVIES
Title: UP CLIENT SERVICES

Authorizing Resolution Detail: #57/21

EXHIBIT A

RFP and RFP RESPONSE