

Agreement for Providing Cogsdale Customer Service Management Suite, Software and Implementation

This Agreement is entered into this 27 day of August 2010, by and between the City of Ocala, a Florida municipal corporation, located at 2100 NE 30th Avenue, Building B, Ocala, Florida 34470, herein referred to as "Client", or "City", and Cogsdale Corporation, a foreign corporation authorized to conduct business in the State of Florida, with its principal place of business located at 14 MacAleer Drive, Charlottetown, PEI Canada herein referred to as "Vendor."

WITNESSETH:

WHEREAS, the City of Ocala has solicited a Request for Proposal (RFP) under RFP 10-002 for Customer Service Management System (CSM) - Ocala Utility Services; and

WHEREAS, faithful adherence to RFP 10-002 and this Agreement with attachments is essential for providing the services solicited and for the satisfactory performance by the chosen vendor; and

WHEREAS, Cogsdale Corporation is the chosen vendor under RFP 10-002.

NOW THEREFORE, in consideration of the matters set forth above (which are incorporated herein by reference), the exchange of the mutual promises set forth herein,

1. Scope of Work.

- a. Vendor shall provide installation, project management, consulting, implementation, training, customization, and integration services as described and outlined in the Scope of Work attached hereto and incorporated herein as **Appendix B**.
- b. Vendor services are more particularly described in **Appendix C** – Cogsdale's proposal at page 30 and RFP 10-002-Project Objectives.

2. Acceptance.

- a. Services. All Services provided to Client pursuant to this Agreement shall be subject to approval, disapproval and acceptance by Client. If any of the Services are disapproved by Client, Vendor, at its own expense, shall promptly correct and/or re-perform, as required by Client, any such Services.
- b. Software.
 - i. Acceptance. Upon delivery of a Software module, Vendor will install, test, verify, and certify the Software module. Client will then test the Software module using a mutually agreed test based on the Statement of Work and user manuals. When Client agrees to place the Software module into a production environment, Client will use the Software module in a working environment for one hundred twenty (120) days. During this period, Client will report to Vendor in writing any defects. Resolution of the defects or Client's failure to report any

problems during this period will constitute the "Acceptance" of a Software module.

- ii. "Final Acceptance" is defined as the earlier of (i) Acceptance of all Software modules, Interfaces and Enhancements, including those performed for no additional cost; demonstrated by the successful completion of two bill cycles, which represents the successful running of all billing cycles through twice in the production environment. The City will notify Vendor in writing of any problems encountered during that time and Final Acceptance will be delayed until such time as they are corrected.
- iii. or (ii) ninety (90) days after Go-Live.

3. Compensation. The City shall pay Vendor for software and services rendered in accordance with the Investment Summary of the Vendor's Fee Proposal Pricing pursuant to the Schedule in **Appendix A.**

- a. Vendor's pricing will be a firm fixed price contract of \$765,877 and shall be paid to Vendor pursuant to the following schedule: Software Installation of new registration keys - 35% of total cost Detailed Walkthrough; - 5% of total cost Integrations - 10% of total cost; Configuration (setup) - 5% of total cost; Data conversion - 10% of total cost; Training - 5% of total cost; Final Acceptance (includes testing and Go-Live assistance) - 30% of total cost.
- b. In Lieu of the Performance Bond required in RFP 10-002, City shall retain 30% of total contract costs until final acceptance.
- c. Travel expenses shall be paid to the Vendor as incurred and shall not exceed \$80,000.00.
- d. No payments made under this Agreement shall be considered acceptance of the Software or Services, in whole or in part.
- e. Taxes. Client is tax-exempt as of the effective date of this Addendum. Cogsdale's invoices shall not charge Client for taxes.
- f. U.S. Dollars. All fees are listed in United States Dollars.

4. Method of Payment. Vendor shall issue invoices based on milestone completion as set forth above at paragraph 3(a).

- a. Services utilized in excess of those set forth in the Investment Summary and additional related services not set forth in the Investment Summary will be billed at the rate of \$135/hour for Junior Consultants; \$155/hour for Intermediate Consultants; \$175 for Senior Consultants; \$150/hour for Development Services plus travel expenses. Such additional services must be pre-approved in writing by both parties to this Agreement.
- b. Maintenance Fees. The Client shall pay Vendor a year one total of \$78,374, with an initial payment of \$10,625 due upon installation of the Software and the remaining balance of \$67,749 to be paid upon Go-Live. Following year one, Client will contract

directly with Cogsdale for future maintenance services at the rate of \$78,374 annually based off current list price calculated maintenance.

5. **Term.** This Agreement shall commence on _____ and remain in effect until final acceptance. Go Live shall be no later than 16 months from the signing of this Agreement.
6. **Non-Funding.** In the event sufficient budgeted funds are not available or are otherwise depleted, City shall notify the Vendor of such occurrence and contract shall terminate without penalty or expense to the City not to include travel expenses all ready incurred.
7. **Confidentiality of Information.** All information and data relating to City's business submitted by City to Vendor under this Agreement shall be treated as confidential by Vendor and shall not, unless otherwise required by law, be disclosed to any third party by Vendor without the City's written consent.
8. **Indemnification Clause.** Vendor shall indemnify and hold harmless the City and its elected officials, employees and volunteers from and against all claims, damages, losses and expenses, including legal costs arising out of or resulting from the performance of this contract, provided that any such claim, damage, loss or expenses is attributed to bodily injury, sickness, disease, personal injury or death, or to injury to or destruction of tangible property including the loss or loss of use resulting there from and is caused in whole or in part by any negligent act or omission of the Vendor. In no event shall Vendor be liable for any loss of profits, sales, business or any indirect, special, incidental or consequential damages incurred by either of the Parties arising from, related to, or in connection with this contract beyond the value of the contract. This limitation of liability shall apply regardless of whether any provisions of this contract have been breached. No member, director, commissioner or officer or employee of Vendor shall be charged personally or held contractually liable under any term or provision of this contract or because of any breach thereof. In no event shall either party be entitled to indirect, incidental, or consequential damages, including lost profits, based on any breach or default, or any negligence of the other party
9. **Additional Insured.** The "City of Ocala" shall be added to all third party coverage required by and provided for this contract as an "ADDITIONAL INSURED".
10. **Miscellaneous Insurance Provisions:**
 - a. Severability of Interests. Vendor shall arrange for its liability insurance to include, or be endorsed to include, a severability of interests / cross liability provision, so that the "City of Ocala" (where named as an additional insured) will be treated as if a separate policy were in existence, but without increasing the policy limits.
 - b. Insurance Requirements. These insurance requirements shall not relieve or limit the liability of the Vendor. The City does not in any way represent that these types or amounts of insurance are sufficient or adequate to protect the Vendor's interests or liabilities, but are merely minimums. No insurance is provided by the City under this contract to cover the Vendor.

c. Duplicate Coverage.

- i. Insurance required of the Vendor or any other insurance of the Vendor shall be considered primary and insurance or self-insurance of the Client shall be considered excess, as may be applicable to claims against the Client which arise out of this contract.
 - ii. Insurance written on a "Claims Made" form is not acceptable without Risk Management Department consultation.
 - iii. No work shall be commenced under this contract until the required Certificate(s) have been provided. Work shall not continue after expiration (or cancellation) of the Certificate and shall not resume until new Certificate(s) have been provided.
- d. Deductibles. Vendor's deductibles/self-insured retentions shall be disclosed to the City and may be disapproved by the latter. They shall be reduced or eliminated at the option of the City. The Vendor is responsible for the amount of any deductible or self-insured retention.
- e. Certificates. Vendor shall provide a Certificate of insurance, issued by a Contractor authorized to do business in the State of Florida and with an A.M. Best Contractor rating* of at least B+, showing the "City of Ocala" as an Additional Insured. Utility Services Purchasing Agent should be shown as the Certificate Holder, and providing for 30 day cancellation notice.

***Non-rated insurers must be approved by the City Risk Manager.**

- 11. Liability Insurance.** General liability insurance, with combined single limits of not less than \$200,000 per occurrence* shall be provided and maintained by the Vendor. The only aggregate limit acceptable is a "project aggregate" and the Certificate must show an appropriate endorsement (ISO CG2501 or equal)

If the Commercial General Liability form is used:

Coverage A - shall include premises, operations, products and completed operations, independent contractors, contractual liability covering this contract and broad form property damage coverage.

Coverage B - shall include personal injury.

Coverage C - medical payments, is not required.

If the Comprehensive General Liability form is used, it shall include at least:

Bodily Injury and Property Damage liability for premises, operations, products and completed operations, independent contractors, and property damage resulting from explosion, collapse or underground (XCU) exposures.

* Either in a single policy or in a combination of underlying and umbrella on excess policies.

- 12. Business Auto Liability.** Business Auto Liability insurance shall be provided by the Vendor with combined single limits of not less than \$200,000 per occurrence and is to include bodily injury and property damage liability arising out of operation, maintenance, or use of any auto including owned, non-owned and hired automobiles and employee non-ownership use.
- 13. Workers' Compensation.** Vendor shall purchase and maintain Workers' Compensation insurance for statutory requirements and employers liability limits of at least \$100,000 each accident and \$100,000 each employee \$500,000 policy limit for disease, and shall be responsible for ensuring that any subcontractor has statutory coverage. City need not be named as an Additional Insured, but a subrogation waiver endorsement is required.
- 14. Technical Errors and Omissions Insurance.** Technical Errors and Omissions insurance with an occurrence limit of not less than \$1,000,000 shall be required from the Contractor on all contracts. All contracts for such services shall require that the other party maintain this insurance for one year following the end of the contract.
- 15. Change Management.** Vendor or the City may submit a request for a change to the specifications, provided the change shall be made within the scope of this Agreement and will not result in a change in price to the City. If Vendor determines that any change will result in a price change to the City, it will be processed as a Change Order. Vendor or the City may submit a written Change Order to initiate a change to the Specifications that is not within the scope of this Agreement. The Change Order must include: (1) a description of the requested change; (2) the purpose for the change; (3) the priority of implementing the change; (4) the date or requested implementation; and (5) the signature of an authorized officer of the party requesting such change. Vendor will advise the City of the resultant impact of the Change Order on price and schedule within seven (7) days after Vendor's receipt of the Change Order, and the parties shall agree in writing upon the Change Order before any change described in it is implemented.
- 16. Software Customization.** All software customization will be undertaken using processes and procedures consistent with professional software development in accordance with Microsoft Dynamics partner standards. As part of this development process, Vendor will present development specifications to the City for approval before undertaking any development. Once approved, Vendor will deliver software consistent with these specifications and tested according to accepted quality assurance procedures on the agreed-to date. The City will retain the right to obtain a refund for customizations that do not comply with the agreed-upon specification.

The City agrees that any software developed as a customization under this agreement is the intellectual property of Vendor. Vendor agrees to keep any source code for any customization in escrow and will ensure that any customization does not negate or in any way adversely impact the terms of this Agreement or the Vendor Software License Agreement.

- 17. Data and System Access.** Vendor and the City agree that all data entered in the system become the property and responsibility of the City. Vendor will not extract or use the data

without the written consent of the City. Vendor agrees that the City can extract data for any purpose without notifying Vendor or having Vendor's consent.

Vendor will not use remote access tools (i.e. Live Meeting) to access the City's system without the City's authorization. The City agrees that withholding access to the system may result in delays or additional charges. Both the City of Ocala and Vendor agree to maintain current virus protections, passwords and security precautions according to industry standard

18. Default. This Agreement is critical to the City and the City reserves the right to immediately cancel either in whole or in part any portion of this Agreement due to failure of the Vendor to carry out any obligation, term, or condition of the Agreement. The City will issue a written notice of default effective immediately and not deferred by any interval of time. Default shall be considered to be any act or failure to act on the part of the Vendor including, but not limited to, any of the following:

- a. Vendor provides material that does not meet the specifications of the Agreement;
- b. Vendor fails to adequately perform the services set forth in the specifications of the Agreement;
- c. Vendor fails to complete the work required or furnish the materials required within the time stipulated in the Agreement; and
- d. Vendor fails to make progress in the performance of the Agreement and/or gives the City reason to believe that the Vendor will not or cannot perform to the requirements of the Agreement.

19. Remedies upon Default. City may resort to any single or combination of the following remedies:

- a. Cancel the Agreement;
- b. Reserve all rights or claims to damage for breach of any covenants of the Agreement;
- c. In case of default, the City reserves the right to purchase materials, or to complete the required work in accordance with the needs of the City. City may recover any actual excess costs from the Vendor by: (1) Deduction from an unpaid balance, or (2) Any other remedy as provided by law.

20. Assignment. This Agreement shall not be assigned by either party without prior written consent of the other party.

21. Reference to Parties. Each reference herein to the parties shall be deemed to include their successors, assigns, heirs, administrators, and legal representatives, all whom shall be bound by the provisions hereof.

22. Waiver. The failure or delay of any party at any time to require performance by another party of any provision of this Agreement, even if known, shall not affect the right of such party to require performance of that provision or to exercise any right, power or remedy

hereunder. Any waiver by any party of any breach of any provision of this Agreement should not be construed as a waiver of any continuing or succeeding breach of such provision, a waiver of the provision itself, or a waiver of any right, power or remedy under this Agreement. No notice to or demand on any party in any circumstance shall, of itself, entitle such party to any other or further notice or demand in similar or other circumstances.

- 23. Governing Law.** This Agreement is and shall be deemed to be a contract entered into and made pursuant to the laws of the State of Florida and shall in all respects be governed, construed, applied, and enforced in accordance with the laws of the State of Florida in the County of Marion County.
- 24. Severability of Illegal Provisions.** Wherever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law. Should any portion of this Agreement be declared invalid for any reason, such declaration shall have no effect upon the remaining portions of this Agreement.
- 25. Section Headings.** The section headings herein are included for convenience only and shall not be deemed to be a part of this Agreement.
- 26. Rights of Third Parties.** Unless expressly stated herein to the contrary, nothing in this Agreement, whether express or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any persons other than the parties hereto and their respective legal representatives, successors and permitted assigns. Nothing in this Agreement is intended to relieve or discharge the obligation or liability of any third persons to any party to this Agreement, nor shall any provision give any third persons any right of subrogation or action over or against any party to this Agreement.
- 27. Amendment.** The provisions of this Agreement may not be amended, supplemented, waived, or changed orally but only by writing making specific reference to this agreement signed by the party as to whom enforcement of any such amendment, supplement, waiver, or modification is sought. No amendment to this Agreement shall be effective except those agreed to in writing and signed by both of the parties to this Agreement.
- 28. Entire Agreement.** This Agreement, including attachments, and RFP 10-002 contains all agreements between the Parties. There are no other representations, warranties, promises, agreements or understandings oral, written or implied, among the Parties, except to the extent reference is made thereto in this Agreement.
- 29. Counterparts.** This Agreement may be executed in counterparts, each of which shall be an original and all of which all constitute the same instrument.
- 30. Notices.** All notices, certifications or communications required by this Agreement shall be given in writing and shall be deemed delivered when personally served, or when received, if by facsimile transmission with a confirming copy mailed by registered or certified mail, postage prepaid, return receipt requested addressed to the respective parties as follows

If to: **Vendor**

Cogsdale Corporation

Attn: Kelly Dawson, Chief Operating Officer

14 MacAleer Drive
Charlottetown, PEI, Canada
PH: 902-628-5741
FAX: 902-368-5960
E-Mail – kdawson@cogdale.com

If to: City of Ocala

Ocala Utility Services – Customer Service Center
Attn: Barbara Carnival
201 SE Third Street
Ocala, Florida 34471-2174
PH: 352-629-8337
FAX: 352-629-1381
E-Mail – bcarnival@ocalafl.org

Copy To:

Gilligan, King, Gooding & Gifford, P.A.
Attn: Attorney Eric P. Gifford
1531 SE 36th Avenue
Ocala, Florida 34471
PH: 352-867-7707
FAX: 352-867-0237
E-Mail – egifford@ocalalaw.com

- 31. Attorneys Fees.** If any civil action, arbitration or other legal proceeding is brought for the enforcement of this Agreement, or because of an alleged dispute, breach, default or misrepresentation in connection with any provision of this Agreement, the successful prevailing party or parties shall be entitled to recover reasonable attorney's fees, court costs, and all expenses even if not taxable as court costs (including without limitation, all such fees, costs and expenses incident to arbitration, appellate, bankruptcy and post-judgment proceedings), incurred in that civil action, arbitration or legal proceeding, in addition to any other relief to which such party or parties may be entitled. Attorney's fees shall include, without limitation, paralegal fees, investigative fees, administrative costs, and all other charges billed by the attorney to the prevailing party.
- 32. Jurisdiction and Venue.** Any civil action or legal proceeding arising out of or relating to this Agreement shall be brought only in the courts of record of the State of Florida in Marion County or the United States District Court, Middle District of Florida, Ocala Division. Each party consents to the exclusive jurisdiction of such court in any such civil action or legal proceeding and waives any objection to the laying of venue of any such civil action or legal proceeding in such court or the right to bring an action or proceeding in any other court. Service of any court paper may be affected on such party by mail, as provided in this Agreement, or in such other manner as may be provided under applicable laws, rules of procedures, or local rules.
- 33. Jury Waiver.** In any civil action, counterclaim, or proceeding, whether at law or in equity, which arises out of concerns, or relates to this Agreement, any and all transactions contemplated hereunder, the performance hereof of the relationship created hereby, whether sounding in contract, tort, strict liability, or otherwise, trial shall be to a court of competent jurisdiction and not to a jury. Each party hereby irrevocably waives any right it may have to a trial by jury. Any party may file an original counterpart or a copy of this Agreement with

any court, as written evidence of the consent of the parties hereto of the waiver of their right to trial by jury. Neither party has made or relied upon any oral representations to or by any other party regarding the enforceability of this provision. Each party has read and understands the effect of this jury waiver provision.

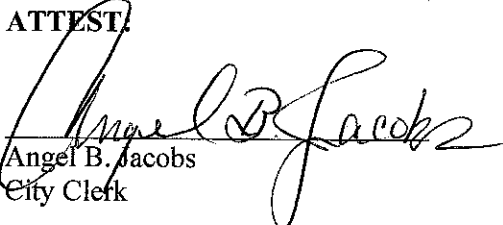
34. Time. Time is of the essence of all of the provisions and terms of this Agreement.

35. Force Majeure. Neither party shall be responsible for damages or delays caused by Force Majeure or other events beyond the control of the party and which could not reasonably have been anticipated or prevented. For purposes of this Agreement, Force Majeure includes, but is not limited to, adverse weather conditions, floods, epidemics, war, riot., strikes, lockouts, and other industrial disturbances; unknown site conditions, accidents, sabotage, fire loss of or failure to obtain permits, unavailability of labor, materials, fuel, or services, court orders, acts of God; acts, orders, laws, or regulations of the Government of the United States or the several states, or any foreign country, or any governmental agency. In the event Force Majeure occurs, the parties shall mutually agree on the terms and conditions upon which services shall be continued.

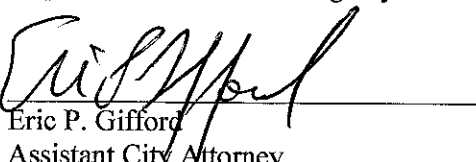
36. Merger Clause. This instrument, RFP 10-002, Vendor's Response Proposal to RFP 10-002 and all related attachments constitute the entire Agreement between the parties hereto with respect to the subject matter hereof. No course of prior dealings between the parties and no usage of trade shall be relevant or admissible to supplement, explain, or vary any of the terms of this agreement. Acceptance of or acquiescence in, a course of performance rendered under this or any prior agreement shall not be relevant or admissible to determine the meaning of this Agreement even though the accepting or acquiescing party has knowledge of the nature of the performance and opportunity to make objection. No representations, understandings, or agreements have been made or relied upon in the making of this Agreement other than those specifically set forth herein. This Agreement can only be modified in a writing signed by the parties hereto and their duly authorized agents.

IN WITNESS WHEREOF, the parties hereto have set their hands by their duly authorized agents on this 27 day of August 2010.

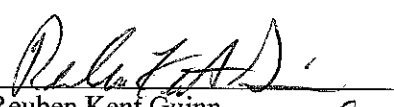
ATTEST:


Angel B. Jacobs
City Clerk

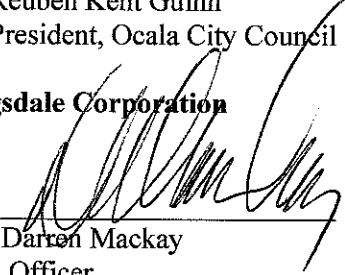
Approved as to form and legality:


Eric P. Gifford
Assistant City Attorney

CITY OF OCALA

By: 
Reuben Kent Guinn
President, Ocala City Council

Cogsdale Corporation

By: 
Darren Mackay
Officer

ACCEPTED BY CITY COUNCIL

July 6, 2010
DATE

OFFICE OF THE CITY CLERK

Attachments:

- 1) RFP 10-002
- 2) Cogsdale Response Proposal to RFP 10-002 and additional inquiry responses.
- 3) Appendix A – Pricing Schedule
- 4) Appendix B – Scope of Work
- 5) Appendix C – Project Plan