

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

**AGREEMENT BETWEEN THE CITY OF CHARLESTON
AND ABM PARKING SERVICES FOR
PARKING MANAGEMENT SERVICES**

THIS AGREEMENT is entered into this _____ day of _____, 20____ between the City of Charleston, a municipal corporation organized under the laws of the State of South Carolina (hereinafter referred to as “the City”), and ABM Parking Services, Inc. (hereinafter referred to as “Operator”).

WHEREAS, the City owns, controls and regulates off-street parking facilities, to include garages and lots, and also controls and regulates on-street parking with parking meters on certain streets; and

WHEREAS, the City owns, leases or manages the certain Garages and Lots as listed in Exhibit “A” of Schedule I, attached hereto (the “Garages”, “Lots”, collectively, “Garages and Lots”), and regulates on-street parking and off-street parking with parking meters at the locations the listed in Exhibits “B” and “C” of Schedule I (the “Parking Meters”); and

WHEREAS, the City has selected Operator to operate these Garages and Lots and to collect revenues from the Parking Meters for the benefit of the City.

NOW, THEREFORE, for and in consideration of the mutual promises, covenants and conditions stated herein, the parties agree as follows:

§1. SCOPE OF SERVICES

The parties agree that the Operator shall furnish the Parking Management Services in accordance with Solicitation #13-P002R and addenda 1, 2 and 3. All Schedules and attachments listed below are incorporated and made a part of this Agreement and constitute the Scope of Services, to wit:

Schedule I: Solicitation #13-P002R, to include all exhibits and addenda 1, 2 and 3 (the “Request for Proposal”)

Schedule II: Operator's Best and final Offer dated April 3, 2013

Schedule III: Operator's Proposal Response dated February 15, 2013.

To the extent of any conflict or inconsistency between the provisions of this Agreement and any provision of Schedule I, Schedule II or Schedule III, the provisions of this Agreement shall prevail first, followed by the provisions of Schedule I, followed by the provisions of Schedule II, followed by the provisions of Schedule III.

The Operator shall safely, diligently and in a professional and timely manner perform and provide the services encompassed by the Scope of Services. Operator acknowledges that the City is entitled to rely on the representations made by Operator in Schedules II and III in its undertaking and implementation of the Scope of Services.

The Operator agrees to promptly consult with the representative designated by the City regarding any maintenance, security or customer related issues that may arise during the term of this Agreement.

The Operator hereby warrants and represents to the City that it is competent and otherwise able to provide professional and high quality services as described herein to the City.

The Operator shall have a representative at every known meeting of the Special Events Committee so as to assure the provision of efficient parking during events that call for the utilization of the Parking Garages and Lots that are subject to this Agreement.

The Operator shall be responsible for maintenance and operation of the Garages and Lots identified in Schedule I, as well as any other facilities that may be added to this Agreement with the consent of both parties.

§2. CONTRACT TERM

The initial term of the Agreement shall be for five (5) years; provided however, if it deems it in its interest, the City may extend the term of this Agreement for additional terms of 1 or 2 years in duration, up to a total of four years in extensions. The term of this Agreement shall automatically extend on the fifth anniversary date of this Agreement for an additional 1-year term unless the City has provided 90 days written notice to the Operator of its election to extend the Agreement for a 2 year term. Extensions after the first extension shall be for 1 year, unless the City provides 90 days written notice that the extension is for 2 years. After the initial term, the Operator may elect not to extend the term by providing 120 days written notice to the City of its intent not to extend.

§3. COMPENSATION AND PAYMENT TERMS

This Agreement authorizes payments to be made in accordance with Schedule I, Request for Proposal, and Schedule II, Operator(s)' Best & Final Offer. The time and manner of payments will be governed by the provisions of Schedule I.

§4. WARRANTIES AND REPRESENTATIONS

- A. The Operator hereby represents and acknowledges that it is a licensed, bonded Operator capable of performing the work hereunder.
- B. All equipment, materials, and supplies provided by the Operator are to be *suitable models for the purpose intended*. When requested, the Operator shall furnish to the City for approval the name of the manufacturer, the model number, and other identifying data and information respecting the performance, capacity, nature and rating of the machinery, mechanical, and other equipment which the Operator contemplated incorporating in the Work.
- C. Operator warrants that its staff is knowledgeable about, and experienced in, providing the services specified in this Agreement and warrants that it will use its skill and attention to provide the above described services in a professional and timely manner.

§5. INDEMNIFICATION

The Operator expressly agrees to indemnify and save the City harmless from the following, but only to the extent caused by the negligence, fault or misconduct of Operator, its agents or employees in performance of the services under this Agreement: (1) any damage, liability, injury, loss or expense (whether for bodily injury or death or property damage or loss) that is suffered by the City and its employees or by any member of the public; (2) liabilities, penalties, demands, claims, lawsuits, losses, damages, costs, and expenses to the extent resulting from Operator's negligent performance of or default under this Contract. Such costs are to include defense, settlement, court costs and reasonable attorneys' fees incurred by the City and its employees. This promise to indemnify, to the extent triggered, shall include bodily injuries or death occurring to Operator's employees and any person directly employed by Operator (including without limitation any employee of any subcontractor), the City's employees, the employees of any other independent Operators, or to any member of the public. When the City submits notice pursuant to this Section, if Operator's duty to indemnify City is triggered hereunder, Operator shall promptly defend any aforementioned indemnified party. This obligation shall survive the suspension or termination of this Agreement. The limits of insurance coverage required herein shall not serve to limit this indemnity obligation. The recovery of costs and fees shall extend to those incurred in the enforcement of this indemnity.

Notwithstanding anything herein to the contrary, the parties each agree to notify the other of the receipt of any claims arising under this Agreement. It shall be the responsibility of the Operator to investigate all claims. The Operator shall provide to the City on a weekly basis, or on such other longer basis as the City may approve, a written status report on all claims.

§6. INSURANCE REQUIREMENTS

The Operator shall comply with all insurance requirements set forth herein.

The Operator, at its sole cost, will carry the following insurance policies. Insurance policies are to be with an A minus (A-), or better, rated companies authorized to do business in the City of Charleston acceptable to the City and certificates of insurance with the coverages described below shall be reasonably approved by the City.

Commercial General Liability Insurance with a combined single limit for bodily injury and property damage liability of at least \$2,000,000 per occurrence and *Garage Keeper's Legal Liability Insurance* with a combined single limit for bodily injury and property damage liability of at least \$3,000,000 per occurrence. The limit of liability for the Garage Keeper's Legal Liability Coverage must be sufficient, in the event of any loss triggering Operator's coverage, without proration of that loss, should the maximum possible number of automobiles be on or within the largest Garage covered by this Agreement when the loss occurs. A deductible or self insured retention may be applied to the claims under the Commercial General Liability and the Garage Keeper's Legal Liability Coverages in an amount not exceeding \$1,000,000; provided however, to the extent coverage by Operator's policy is triggered, all expenses for claims paid within the deductible or from self insured retention reserves shall be the sole responsibility of the Operator and shall not be deemed as part of an approved Operating Budget. To the extent coverage by Operator's policy is triggered, payment of the deductible or deductible under any other policy required shall be the sole responsibility of the Operator unless otherwise approved by the City. Such insurance shall cover, as a minimum, the following exposures:

- i. Fire and explosion
- ii. Theft of an entire car; and
- iii. Riot and civil commotion and malicious mischief and vandalism.

Umbrella liability insurance to supplement other required insurance with an annual aggregate of \$5,000,000.

Operator shall purchase and maintain a fidelity bond in an amount not less than \$1,000,000 which shall include coverage for City's property, money and securities in the care, custody or control of Operator or Operator's employees. Such insurance shall protect City from any dishonest or fraudulent acts of or by Operator's employees, any loss of money and securities by destruction, disappearance or wrongful abstraction and any loss occasioned by robbery or Operator or its employees. .

Worker's Compensation insurance in statutory limits with respect to all persons employed.

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The policies purchased by the Operator shall include the City of Charleston as an additional insured, but only to the extent indemnified pursuant to this Agreement and for claims arising out of the negligence, misconduct or other fault of Operator in the

performance of this Agreement. Certificates of insurance shall be submitted to the City. The policy or policies of insurance shall contain a provision prohibiting the insurer from canceling the policy or policies of insurance without notifying the City, in writing, at least thirty (30) days prior to cancellation.

§7 PERFORMANCE BOND

Operator shall post a Performance Bond, Irrevocable Letter of Credit, or in the alternative, a cash deposit in the amount of One Million (\$1,000,000.00) Dollars, to cover estimated costs to the City for non-fulfillment of the terms of the Agreement by Operator.

The Performance Bond shall be issued by a surety company authorized to do business in the State of South Carolina and shall be refundable at the termination of this Agreement, if all terms and conditions of this Agreement have been satisfied.

If the Performance Bond is on an annual coverage basis, renewal for each succeeding year shall be submitted to the City, thirty (30) days prior to the termination date of the then-current Performance Bond.

§8. GRATUITIES AND KICKBACKS

Gratuities. Operator acknowledges that it is unethical and unlawful for any person to offer, give or agree to give any employee or former employee of the City, or for any employee or former employee of the City to solicit, demand, accept, or agree to accept from another person a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, preparation or any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter pertaining to any program requirement of a contract or subcontract, or to any solicitation or proposal therefore.

Kickbacks. Operator acknowledges that is unethical and unlawful for any payment, gratuity, or offer of employment to be made by or on behalf of anyone under a contract with the Operator, or to hire any person associated with anyone under a contract with the Operator, as an inducement for the award of a subcontract or order that may be required by the Scope of Services.

§9. DEFAULT

The following shall be “Events of Default” under this Agreement, and the term “Event of Default” whenever used in this Agreement shall mean any one or more of the following events:

- (a) Failure by Operator to pay to the City when required any payment required to be paid under this Agreement, and such default is not rectified within five (5) business days after written notice thereof from the City to Operator.

- (b) Failure, after notice and a reasonable opportunity to cure in accordance with § 10 (Termination for Default), by Operator to perform, observe or comply with any other of the terms, covenants, conditions or provisions contained in this Agreement (other than as referred to in paragraph (a) of this Section).
- (c) If Operator shall file a voluntary petition seeking an “Order For Relief” within the meaning of the United States Bankruptcy Code, or if any such “Order For Relief” shall be entered with respect to Operator, or if Operator shall be adjudicated bankrupt or insolvent, or shall file any petition or other pleading seeking any reorganization, composition, readjustment, liquidation or similar relief for itself under any present or future law or regulation, or shall seek or consent to or acquiesce in the appointment of any trustee, receiver or liquidator of Operator, or of substantially all of the assets of Operator, shall make a general assignment for the benefit of creditors, or shall fail generally to pay its debts as they become due, or
- (d) If a petition or other pleading shall be filed against the operator seeking an “Order For Relief” within the meaning of the United States Bankruptcy Code, reorganization, composition, readjustment, liquidation or similar relief under any present or future law or regulation, and shall remain undismissed or unstayed for an aggregate period of sixty (60) days (whether or not consecutive).
- (e) Failure of the City to pay Operator’s undisputed invoices provided Operator has given the City written notice and a reasonable opportunity to cure.

§10. TERMINATION

For Convenience: The City reserves the right to terminate the contract with the Operator when it is in the best interest of the City, including, but not limited to non-appropriation of funds. If the contract is so terminated, the City shall provide the Operator with sixty (60) days written notice and shall compensate Operator for all necessary and reasonable direct costs of performing the services actually accomplished in accordance with this Agreement as of the date of termination. No other costs shall be allowed for a termination for convenience. No damages shall be allowed for a termination for convenience.

For Default: Of the Operator: If an Event of Default as described in §9 (a), (b), (c) or (d) occurs or the Operator fails to comply with the terms of this Agreement the City shall notify the Operator in writing of the specifics regarding such noncompliance. If the Operator fails to begin to cure the noncompliance within five (5) days after the notice, the City may terminate the contract by written notice to the Operator within thirty (30) days thereafter and Operator shall only be compensated for services actually completed prior to termination, Operator shall not be entitled to any costs or damages resulting from a termination under this section.

Of the City: If an Event of Default as described in § 9(e) occurs, Operator may terminate this Agreement.

No failure or delay by either party in exercising any right, remedy, power or privilege hereunder, nor any single or partial exercise thereof, nor the exercise of any other right, remedy, power or privilege shall operate as a waiver hereof or thereof. All rights, remedies, powers and privileges herein given or granted to the parties are cumulative, non-exclusive and in addition to any and all rights, remedies, powers and privileges that they may have or be given by reason of any law, statute, ordinance or otherwise at law or in equity.

In the event the City is required to incur legal expenses and/or court costs due to an Event of Default by Operator, Operator agrees to reimburse the City for reasonable legal expenses and/or court costs incurred as a result thereof.

§11. ASSIGNMENT

The City may at its sole discretion, sell, convey, lease, or otherwise transfer the Garages and Lots to another public entity for the purposes of carrying out the responsibilities of the City under this Agreement. In such event, and upon thirty (30) days prior written notice to Operator, said entity shall assume all rights and responsibilities of the City under this Agreement.

The Operator shall not assign in whole or in part its duties under this Agreement without the prior written consent of the City. The Operator shall not assign any money due or to become due to it under this Agreement without the prior written consent of the City.

§12. NOTICES

All notices required under this Agreement to either of the parties hereto shall be deemed properly given when deposited in the United States mail, either by registered or certified mail (postage prepaid) to:

To City of Charleston:

Joseph P. Riley, Jr.
Mayor
City of Charleston
PO Box 304
Charleston, SC 29402

To VENDOR:

Brian Bush
Regional Vice President
ABM Parking Services
1459 Hamilton Avenue
Cleveland, OH 44114

With copies to:

Legal Department
City of Charleston
50 Broad Street
Charleston, SC 29401

Procurement Division
City of Charleston
145 King Street, Suite 104
Charleston, SC 29401

The City and Operator, by notice given hereunder, may designate any further or different persons or addresses to which subsequent notices shall be sent.

§13. CHANGE ORDERS

No oral statement of any person shall modify or otherwise change, or affect the terms, conditions or specifications stated in this Agreement. No change to this Agreement shall be enforceable unless reduced to writing and signed by the party against whom enforcement is sought. Minor, nonsubstantive operational changes are not considered change orders, and may be implemented by the City when it deems it necessary to attain a more efficient delivery of the Scope of Services.

§14. ENTIRE AGREEMENT

This document and its Schedules and their respective exhibits and attachments constitute the entire Agreement between the parties hereto.

§15. GOVERNING LAWS

The laws of the State of South Carolina shall govern this Agreement. All litigation arising under this Agreement shall be litigated in the Circuit Court of the Ninth Judicial Circuit in Charleston County, South Carolina.

§16. LICENSE AND PERMITS

The Operator shall, without additional expense to the City, be responsible for obtaining all necessary licenses and permits required by the State of South Carolina, or the City of Charleston or any other authority having jurisdiction over the Scope of Services. Operator shall provide a copy of a valid City of Charleston Business License upon the signing of this Agreement.

§17. PUBLICITY RELEASES

Operator agrees not to refer to the award of this Agreement in any commercial advertising in such a manner as to state or imply that the products or services provided are endorsed or preferred by the City. The Operator shall not have the right to include the City's name in its published list of customers without prior approval of the City. With

regard to news releases, only the name of the City, type and duration of Contract may be used and then only with the prior approval of the City. The Operator also agrees not to publish, or cite in any form, any comments or quotes from the City's employees unless it is a direct quote from the Public Information Officer of the City.

§18. INDEPENDENT CONTRACTOR

Operator is an independent contractor and shall not be deemed an employee of the City of Charleston for any purpose whatsoever. The performance by Operator of any function, duty or responsibility as an agent of the City shall not in any manner affect the status of the Operator as an independent contractor under this Agreement. Operator acknowledges that it is the Operator's duty to verify the identity and eligibility of its employees and any subcontractors whose services it may use in performing the Scope of Services in accordance with IRCA, as amended. Operator further agrees to indemnify the City in accordance with Section 5 above if Operator fails to comply with IRCA, as amended.

§19. SEVERABILITY

If any clause, provision or section of this Agreement is deemed to be illegal or invalid by any court, the invalidity of such clause, provision or section shall not affect any of the remaining clauses, provisions or sections hereof, and this Agreement shall be construed and enforced as if such illegal or invalid clause, provision or section had not been contained herein.

§20. WAIVER OF CONTRACTUAL RIGHTS

The failure of either party to enforce any provision of this Agreement shall not be construed as a waiver or limitation of that party's right to subsequently enforce and compel strict compliance with every provision of this Agreement.

§21. COMPLIANCE WITH LEGAL REQUIREMENTS

All applicable Federal, State and local laws, ordinances, and rules and regulations of any authorities (including but not limited to any laws, ordinances or regulations relating to the South Carolina Department of Revenue) shall be binding upon the Operator throughout the pendency of this Agreement. The Operator shall be responsible for its compliance with any such applicable law, ordinance, rule or regulation, and shall hold the City harmless and indemnify the City to the extent of Operator's non-compliance as set forth in the Agreement.

§22. BACKGROUND CHECK

The City reserves the right to conduct criminal background checks on individuals assigned to this project, including the Operator, its employees, agents or subcontractors.

§23. South Carolina STATE AND LOCAL TAX

Except as otherwise provided, contract prices shall include all applicable state and local taxes.

If applicable, two percent (2%) income tax withholding shall be withheld from each and every payment pursuant to Section 12-9-310 of the South Carolina Code of Laws (1976, as amended) for certain out-of-state Operators, and such sums will be paid over to the South Carolina Department of Revenue and Taxation (the "SCDRT"). When and if the City receives an executed SCDRT Form I-312, Nonresident Taxpayer Registration Affidavit – Income Tax Withholding, such withholding shall cease.

Operator shall calculate that portion of the contract that is subject to South Carolina sales and/or use taxes (currently 8.5%), which amount shall be itemized and shown on all invoices, and shall be paid to the SCDRT by Operator. If Operator is a non-South Carolina company, the City will withhold said amount from all invoices and remit payment to the SCDRT, unless Operator furnishes the City with a valid South Carolina Use Tax Registration Certificate Number.

Operator shall indemnify and hold harmless the City for any loss, cost, or expense incurred by, levied upon or billed to the City as a result of Operator's failure to pay any tax of any type due by Operator for the services rendered and/or goods purchased pursuant to this Agreement.

§ 24. CITY'S LIABILITY LIMITED

No recourse shall be available to Operator for any claims, except fraud, gross negligence, and criminal violations, based on this Agreement against any officer or employee of the City, all such liability, if any, being expressly waived by Operator by Operator's acceptance of this Agreement.

§ 25. NO PARTNERSHIP

Nothing contained in this Agreement is intended or shall be construed to create a partnership or joint venture between the City, including any successors or assigns of the City, and Operator, including any successors or assigns of Operator.

§26. APPROVALS OF THE CITY

Any approvals required from the City shall be deemed given if provided by the Mayor or his designated City representative.

§27. THIRD PARTY BENEFICIARY

Nothing contained in this Agreement shall be construed to confer upon any other party, the rights of a third party beneficiary, except as may be otherwise specifically provided for herein.

§28. REPRESENTATIONS

Any representation, warranty, covenant or agreement made herein shall be deemed to be material and to have been relied upon by the party to whom it is made.

§29. FORCE MAJEURE

Either party shall be excused from performance under this Agreement and shall have no liability to the other party for any period it is prevented from performing any of its obligations, in whole or in part, as a result of material delay caused by the other party or by an act of God, war, terrorism, civil disturbance, court order, governmental action or natural disaster. If any of the above enumerated circumstances prevent, hinder or delay performance or are expected to hinder or delay performance of any party's obligations hereunder for more than ten consecutive (10) calendar days, either party may, at its option, terminate this Agreement as to the affected Garages, Lots or Parking Meters, without liability or penalty as of the date of written notice of termination. In the event this Agreement is only partially terminated, the budget and management fee shall be adjusted accordingly.

§30. NON-SOLICIATATION

Unless otherwise agreed to in writing by both parties, the parties agree that they will not solicit or hire as an employee or independent contractor an employee of the other while this Agreement is in effect. For purposes of this solicitation section, an “**employee**” means a current employee of Operator, who provides services directly or indirectly to the City or its affiliates, who is presented by Operator as available to provide services to the City or its affiliates, or who has otherwise communicated with the City on behalf of the Operator in connection with the provision of services.

IN WITNESS WHEREOF, the parties hereto, by their authorized representatives, have signed, sealed and delivered this Agreement at Charleston, South Carolina.

WITNESSES FOR THE CITY:

Name

Date: _____

Name

Date: _____

CITY OF CHARLESTON

By: _____

Joseph P. Riley, Jr.
Mayor

Date: _____

WITNESSES FOR OPERATOR:

Name

Date: _____

Name

Date: _____

ABM PARKING SERVICES

By: _____

Brian Bush
Regional Vice President

Date: _____