



## CITY COUNCIL STAFF REPORT

DATE: JUNE 1, 2016

CONSENT CALENDAR

SUBJECT: APPROVE ONE (1) ADDITIONAL YEAR TO ANNUAL SOFTWARE MAINTENANCE AGREEMENT FOR WEB BASED REGISTRATION FOR PROGRAMS AND FACILITY RENTALS

FROM: David H. Ready, City Manager

BY: Parks and Recreation

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### SUMMARY

The City's Recreation Division purchased and installed a third party web based registration system in 2006 that is hosted by The Active Network, LLC for the purposes of the programs, facility rentals and events that are conducted at the City's Park and Recreation locations. The system has been successfully operating and maintained over the past eight (8) years.

### RECOMMENDATION:

1. Approve a software maintenance and usage agreement in a form acceptable to the City Attorney for a one (1) year term with The Active Network, LLC for their web based registration, facility rentals, etc. proprietary system.
2. Authorize the City Manager to execute all necessary documents.

### STAFF ANALYSIS:

In 2006, the City entered into an agreement with The Active Network, LLC to install and operate their third party administrator web based software system for the purposes of streamlining and processing all registrations for the Parks and Recreation Department's recreational events. In order for the system to be properly maintained and updated, the city must enter into an annual software maintenance and usage agreement.

The annual software maintenance agreement is not a fixed annual cost agreement and the amount of the usage of the system determines the amount of the annual fees paid to The Active Network, LLC. As a result, the Parks and Recreation Department has reviewed the records of the past three (3) years. The monthly fees paid to The Active Network are based on the revenue generated through the web based system. The

ITEM NO. 2.K.

current rate is 1.5% of every dollar entered into the system for payments, and will remain unchanged for the term of the additional one-year extension.

FISCAL IMPACT:

Based on the past history and the estimated activity, the estimated cost is \$ 24,000. The cost of this contract is a budgeted expense and funds are allocated each year in the City's Recreation Division budget, General Fund Account No. 001-2510-42920, PC/Hardware & Software Maintenance.



VICKI OLTEAN  
Director



JAMES THOMPSON  
Chief of Staff/City Clerk



DAVID H. READY, Esq. Ph.D.  
City Manager

Attachments:  
Hosted Global Services Agreement

## Hosted Software License & Services Agreement

This Hosted Software License & Services Agreement ("Agreement") is made effective as of the last date set forth below ("Effective Date") and entered into between The Active Network, Inc., 10182 Telesis Court, San Diego, CA 92121 ("Active" or "we" or "us") and PALM SPRINGS PARKS & RECREATION ("you" or "your" or "Agency"). Active agrees to provide you the Services (as defined below) subject to the following terms and conditions:

1. **Services.** Active will provide you with access to certain of its hosted software products ("Products") as well as applicable related services and support ("Services") as are more particularly described in Exhibit A attached hereto, which identifies functionality, features, options and fees related to the Products and Services you have elected to receive. To assist us in the delivery of the Products and Services, you agree to provide us with certain information requested by us relating to your organization. Any and all software or hardware specified in Exhibit A and provided under this Agreement as part of the Products are deemed delivered F.O.B. origin, which for software will typically be an Active provided downloadable FTP link.

### 2. License to Intellectual Property/Promotion.

a) Active shall retain all right, title and interest in and to its Products and any underlying software, patents, copyrights, trademarks, service marks, logos and trade names worldwide ("Intellectual Property") subject to the limited license provided by this Agreement. You shall use the Intellectual Property only as provided, and shall not alter the Intellectual Property in any way, or act or permit action in any way that would impair Active's rights in its Intellectual Property. You acknowledge that your use of the Intellectual Property shall not create in you or any other person any right, title or interest in or to such Intellectual Property. Any goodwill accruing from the use of the Intellectual Property shall inure solely to the benefit of Active.

b) Active hereby grants to you a limited, non-exclusive, non-transferable license (i) to use the Products solely in accordance with Active's specifications, and (ii) to display, reproduce, distribute and transmit in digital form Active's name and logo in connection with promotion of the Products and/or Services as communicated to you by Active. You hereby grant to Active a limited non-transferable license to use, display, reproduce, distribute, modify and transmit in digital or printed form information provided by you relating to your organization, which may include your organization's name, trademarks, service marks and logo, in connection with the implementation and promotion of the Services for you and the promotion of your organization for your benefit.

c) You will make reasonable efforts to promote and encourage adoption of the Services and the availability of online registration, which may include displaying Active's name and logo in any newsletters, printed registration forms or mailings provided by you to prospective participants (e.g. by inserting the following statement in any online or print media related to your event or activity: "Online Registration Powered by Active.com").

d) Agency elects to receive notifications of free product, promotional items and giveaways through the Active program known as ActiveRewards. Active will offer the Agency (and for the purposes of clarification not to your users) opportunities for free product, promotional items and giveaways at your event(s) or facility(ies) as applicable, the exact manner and type of which will be mutually agreed upon by you and Active upon your acceptance of a particular program.

e) Agency understands that some of Active products may contain Active or third party promotions or offers to users and such offers will be made to individuals on an opt-in basis. Active (and any such third party) shall be responsible for administration and customer service issues on any such offer or promotion.

3. **Information Security.** Active collects certain information, including names, addresses, credit card information and other information required by you and for the delivery of the Products and Services, from individuals registering for your event or activity through the hosted website(s). Such information shall be stored on a secure remote server. You may access this information at any time by downloading it from our servers using your private password and "login" identifier. If you are unable to access your registrants' information through the event director portion of the hosted website, Active will make available such information to you via e-mail, fax or airmail upon request. You will be responsible for protecting the privacy

and security of any information that you retrieve from our servers and shall prevent any unauthorized or illegal use or dissemination of such information. All information collected by Active shall be jointly owned by Active and you.

4. **Privacy.** Each party shall comply with all applicable laws, regulations and guidelines governing online privacy, including Active's privacy policy as published on its website, in fulfilling its obligations hereunder and in collecting and using personal information about users of the hosted website.

### 5. Fees.

a) Active shall collect registration fees charged by you for individuals that register for your activities and events online through the hosted website and remit to you those sums to you bi-monthly unless otherwise indicated in Exhibit A, less Active's service fees provided as consideration for the Products and Services as set forth in Exhibit A. All fees due to Active as consideration for its delivered Products and Services are non-refundable. All registrations are calculated on a per single registrant per single event basis. If you have agreed to a minimum volume commitment in Exhibit A, Active also has the right to charge fees owed to it by you if your organization is not meeting its agreed volume commitments throughout each year and may collect those funds via invoice, or directly by netting them from any account balance you maintain with Active. Active may also reimburse itself for any credit card charge backs or overdue fees owed by you out of the registration fees it collects on your behalf and/or by debiting your account. All fees and prices listed on Exhibit A are in US Dollars unless otherwise specified. The prices listed are for the current version of the Products and include improvements and enhancements to the delivered version of the Products provided under this Agreement as available and provided you have maintained a current agreement with Active.

b) Products and Services prices may change for any new Products and Services as well as significant upgrades and updates that are not deemed by Active as supported version enhancements. Prices may be increased up to 5% annually to cover cost increases such as inflation and cost-of-living.

c) Unless you provide Active with a valid and applicable exemption certificate for your Agency, you will be solely responsible for, and will pay, any and all use, excise, sales or privilege taxes, duties, value added taxes, fees, assessments or similar liabilities however denominated chargeable by a governmental authority as a result of any service or deliverable provided under this Agreement, exclusive of taxes on Active's net income.

d) In the event you are entering into this Agreement and seeking the Services for the benefit of a third-party event or organization ("Third Party Beneficiary"), you agree as follows: (i) we may send registration fees collected by us directly to the Third Party Beneficiary, and (ii) you shall indemnify us for any claims, loss or expenses (including attorney's fees) brought by the Third Party Beneficiary that relate to or arise from your negligence, wrongdoing or lack of authority to act on behalf of such third party.

6. **Support and Service Fees.** Applicable support, training and professional services fees are more specifically described in Exhibit A. All Fees set forth in this Agreement and in Exhibit A that are not directly collected by Active as part of the registration fees will be due from you within 30 days of invoice date. Any Fees rendered later than this deadline shall accrue interest at the annual rate of 10% per annum. In the event of delay in paying a Fee, you shall reimburse Active for any legal fees incurred by Active in its collection efforts. Active, at its option, may debit from your account any overdue amounts owed by you to Active from funds collected by Active on your behalf.

7. **Disclaimer of Warranty/Limitation of Liability.** OTHER THAN AS CONTAINED IN THIS AGREEMENT, ACTIVE EXPRESSLY DISCLAIMS ANY WARRANTY THAT THE USE OF ITS PRODUCTS OR SERVICES WILL BE UNINTERRUPTED OR ERROR FREE OR THAT THE SPECIFICATIONS WILL MEET YOUR REQUIREMENTS. ALL PRODUCTS AND SERVICES OF ACTIVE ARE PROVIDED TO YOU ON AN "AS-IS" BASIS WITHOUT WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. ACTIVE SHALL NOT BE LIABLE FOR INDIRECT, INCIDENTAL, CONSEQUENTIAL, OR LOST PROFIT DAMAGES. ACTIVE'S TOTAL LIABILITY FOR ANY MATTER ARISING FROM OR RELATED TO THIS AGREEMENT IS LIMITED TO THE AMOUNT OF FEES ACTUALLY RECEIVED FROM YOU AS

CONSIDERATION FOR THE PRODUCTS AND SERVICES PROVIDED HEREUNDER.

8. Term and Termination. Unless expressly provided to the contrary in Exhibit A attached hereto, the term of this Agreement shall be for 3 years from the Go-Live Date of the Hosted Software, with automatic renewals for 3 year terms thereafter (each a "Renewal Term") until either party gives written notice to terminate this Agreement no less than 12 calendar months prior to the commencement of a Renewal Term. Either party may terminate this Agreement: (a) upon a material breach by the other party if such breach is not cured within thirty (30) days following written notice to the breaching party; or (b) where the other party is subject to a filed bankruptcy petition or formal insolvency proceeding that is not dismissed within thirty (30) days.

9. Representations and Warranties. Each party represents and warrants that it has the necessary and full right, power, authority and capability to enter into this Agreement and to perform its obligations hereunder; that it owns or controls the rights granted or licensed to the other party herein; that the execution and performance of its obligations under this Agreement will not violate any known rights of any third party, any contractual commitments or any applicable federal, state and local law or regulation; and that to its knowledge the marks, logos and intellectual property licensed to the other party herein do not violate the proprietary rights of a third party.

10. Exclusivity. Active will be the sole and exclusive provider of the Products and Services for the term of this Agreement. You further grant Active a right of first refusal to match or better any offer of similar products or services as provided by Active hereunder and if Active elects to exercise such option, you agree to procure such products or services from Active. You agree to promote Active as the preferred and exclusive provider of the Products and Services for your organization.

11. Indemnification. Each party shall indemnify and hold harmless the other party and its directors, officers, employees, affiliates and agents, against any third party claim, demand, cause of action, debt or proceedings (whether threatened, asserted, or filed) and all related damages, losses, liabilities, cost and expenses (including reasonable attorneys' fees), to the extent that: (i) it is based upon the indemnitor's breach of a representation, warranty or obligation hereunder; (ii) it arises out of the indemnitor's gross negligence or willful misconduct; or (iii) it is based upon the indemnitor's violation of any applicable federal, state or local law or regulation. You shall further indemnify and hold harmless Active against any claim or cause of action to the extent that it is based on injury or death to a person or damage to property resulting from the participation in an event or activity operated by you in connection with the Products and/or Services.

12. Dispute Resolution. The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement by negotiation between executives who have authority to settle the dispute. Any party may give the other party written notice of any dispute not resolved in the normal course of business. Within ten (10) business days after delivery of the notice, the receiving party shall submit to the other a written response. The notice and the response shall include (i) a statement of each party's position and a summary of arguments supporting that position, and (ii) the name and title of the executive who will represent that party and of any other person who will accompany the executive. Within five (5) business days after delivery of the disputing party's notice, the executives of both parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All reasonable requests for information made by one party to the other will be honored. The foregoing procedure shall not apply to either party's attempt to obtain provisional equitable relief in the form of an injunction or specific performance.

13. Miscellaneous. Any notices shall be in writing by fax or airmail. This Agreement is non-assignable without the consent of the other party, except that Active may without consent assign: (i) its rights to

receive payments; or (ii) the Agreement in connection with any sale of or any other transaction involving the transfer of more than fifty percent of its voting securities or assets. This Agreement shall be governed by the laws of the State of California. Any legal action or proceeding relating to this Agreement shall be instituted only in any state or federal court in San Diego County, California. This Agreement contains the entire understanding of the parties regarding the subject matter and can only be modified by a subsequent written agreement executed by both parties. Any 'click-wrap' agreement, terms of use, electronic acceptance or other terms and conditions which attempt to govern the subject matter of this Agreement that you might be required to acknowledge or accept before using an Active product are of no force and effect as between Agency and Active and are superseded by this Agreement. In any action or suit to enforce any right or remedy under this Agreement or to interpret any provision of this Agreement, the prevailing party shall be entitled to recover its costs, including reasonable attorneys' fees. Sections 2, 7, 9, 11 12 and 13 of this Agreement shall survive any termination or expiration of this Agreement. If one or more of the provisions of this Agreement for any reason shall be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement and this Agreement shall be construed as if such invalid, illegal or unenforceable provisions had never been contained in this Agreement. Neither this Agreement nor any attachment may be modified or amended except by the mutual written agreement of the parties. No waiver of any provision of this Agreement or any attachment shall be effective unless it is in writing and signed by the party against which it is sought to be enforced. Neither party will be deemed to be in default hereunder, or will be liable to the other, for failure to perform any of its obligations under this Agreement for any period and to the extent that such failure results from any event or circumstance beyond that party's reasonable control, including acts or omissions of the other party or third parties, natural disasters, riots, war, civil disorder, court orders, acts or regulations of governmental bodies, labor disputes or failures or fluctuations in electrical power, heat, light, air conditioning or telecommunications equipment or lines, or other equipment failure.

ACTIVE

By: \_\_\_\_\_

Date: \_\_\_\_\_

*CITY OF*  
PALM SPRINGS, PARKS & RECREATION

*David Ready*  
\_\_\_\_\_  
(Full Legal Name)

E-Mail \_\_\_\_\_

*[Signature]*  
\_\_\_\_\_  
(Signature)

*3200 E. Tahquitz Canyon*  
*Way*  
Address

*[Signature]*  
\_\_\_\_\_  
Print Name and Title

*Palm Springs, CA 92211*  
City, State and Zip

Checks payable to \_\_\_\_\_

Event URL (Web site) \_\_\_\_\_

Date *2/21/10*

Daytime Ph: \_\_\_\_\_

*COUNCIL ACTION*  
*2/21/10* *A6001*  
*# J.F.*

The Active Network  
 10182 Telesis Court,  
 1st floor  
 San Diego, CA, 92121,  
 United States

# Pricing Form

Quote#: 2448 - 1  
 Date: 01/25/2010  
 Expires: 04/25/2010

**Customer:**  
 Vicki Oltean  
 PALM SPRINGS PARKS &  
 RECREATION  
 PALM SPRINGS,RIVERSIDE

**Address:**

**Bill To:**  
 PALM SPRINGS PARKS &  
 RECREATION  
 401 S. Pavilion Way  
 PALM SPRINGS,RIVERSIDE  
 CA 92262  
 US

**Ship To:**  
 PALM SPRINGS PARKS &  
 RECREATION  
 401 S. Pavilion Way  
 PALM SPRINGS, RIVERSIDE  
 CA 92262  
 United States

**Sales Representative:**

**Payment Terms: 30 Net**

Line	Product	Units	Qty	Unit Price List (USD)	Unit Price Adj. (USD)	Unit Price Selling (USD)	Total Price List (USD)	Total Price Adj. (USD)	Total Price Selling (USD)	Total Charges (USD)
1.0	70179	Ea	1	0.00	0.00	0.00	0.00	0.00	0.00	0.00
2.0	70181 ActiveNet - Facility Reservation	Ea	1	0.00	0.00	0.00	0.00	0.00	0.00	0.00
3.0	70183 ActiveNet - Membership	Ea	1	0.00	0.00	0.00	0.00	0.00	0.00	0.00
4.0	70186 ActiveNet - Public Access	Ea	1	0.00	0.00	0.00	0.00	0.00	0.00	0.00

**Category Subtotal**

ActiveNet.SaaS.Online Transactions	Subtotal (Selling Price)	0.00
Tax	COUNTY (Rate 1.5% )	0.00
	STATE (Rate 7.25% )	0.00

**Total(USD)** **Included 0.00**

**Additional Information**

Customer shall pay TAN all fees for licensed software purchased hereunder upon delivery of the software.

Delivery of licensed software shall be deemed to have occurred upon TAN's email transmission to customer's designee of an FTP link permitting download of the software from TANs designated online site, or where delivered in the form of physical media, FOB Origin.

The start date for support and maintenance for implementations performed by TAN will be the first day of implementation of the licensed software or 90 days following the

delivery of the licensed software, whichever occurs first, and upon delivery of the licensed software for implementations performed by customer or a third party vendor.

Sales taxes, where applicable, are not included and prices are in the currency of the country of installation (subject to change without notice).

Hardware, operating system, 3rd party software and site preparation are not included unless otherwise noted.

On-site services are exclusive of airfare.

The software and manuals are available for download.

Onsite services billed in minimum 8 hour daily increments.

All hardware sales are final. Hardware is covered by standard manufacturer's warranty. Equipment that is defective upon arrival will be replaced. RMA process will apply for items after support has indicated there are no alternatives.

Customer must notify TAN in writing of any defective hardware within 7 days of its receipt. Any notices received after 7 days concerning defective hardware will be null and void and will not be accepted for return or replacement by TAN.

**Ongoing Fees**

Transactions entered directly by participants through the Website will be assessed the customary service fee charged by Active to online registrants ("Service Charge"), as described below. Transactions entered by a member of the Agency on behalf of a participant will be assessed a Service Charge equal to 1.5% for cash or check, and 3.75% for credit card transactions. Each online registrant will pay the event registration fee charged by Agency plus a Service Charge equal to 6.5% of the registration fee plus \$.50; with a minimum Service Charge of \$2.00. If the registration fee is between \$150-\$500, the Service Charge will be 3.5% plus \$5.00, and for fees above \$500, the Service Charge will be 2.5% plus \$10.00. We may change the Service Charge at any time and you agree to such change unless you provide us with written objection to such change within 30 days from the date such change is first implemented. We will be responsible for collecting all registration fees charged by you and all Service Charges assessed by us. All registration fees, except Service Charges, are your exclusive property. Any registration fees collected by us will be sent to you twice a month and Service Charges shall be retained by us. You shall guarantee and pay to Active a minimum aggregate Service Charge, whether through offline or online transactions, of \$750 per calendar quarter (the "Minimum Quarterly Service Charge"). You shall pay to Active the difference between such Minimum Quarterly Service Charge and the actual Service Charges collected by us during such quarter, which will be billed at the end of each quarter beginning from the date set forth below. Active shall not be responsible for processing or making any refunds. All credit card refunds processed will be assessed a \$.10 fee charged by Active to you. Active may reimburse itself for any credit card charge backs and associated fees out of registration fees collected by it. In the event such funds are not available, you agree to reimburse Active for any charge backs or refunds.

**Method of Payment**

Invoice or  Purchase Order Number: \_\_\_\_\_

Credit Card  
 Visa  MasterCard  American Express

Number: \_\_\_\_\_ Expiration Date: \_\_\_\_\_

I hereby Agree to pay the above quote with the stated method.

**PALM SPRINGS PARKS & RECREATION CITY OF**

Signature  \_\_\_\_\_  
Name \_\_\_\_\_

Title CITY MANAGER \_\_\_\_\_

Effective Date 10/12/10 \_\_\_\_\_

**APPROVED BY CITY COUNCIL**  
7/21/10 A6001  
Item 2.F.

End of Quote

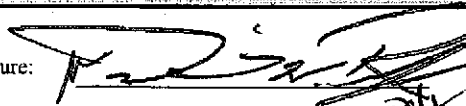
**PRODUCTS AND SERVICES AGREEMENT**  
**CONTRACT # 00021339**

CLIENT INFORMATION			
<b>ORGANIZATION FULL LEGAL NAME:</b>	City of Pam Springs	<b>ADDRESS:</b>	401 S. Pavilion Way PALM SPRINGS, CA 92262 USA
<b>CONTACT NAME:</b>	Vickie Oltean	<b>TELEPHONE:</b>	1 (760) 323-8272
<b>EMAIL:</b>	vicki.oltean@palmsprings-ca.gov	<b>FAX:</b>	
<b>EFFECTIVE DATE</b>	April 1, 2014		

OVERVIEW OF AGREEMENT		
This document ("Agreement") consists of this cover page, the attached terms applicable to all Products and Services, and the following Schedules and Exhibits (check all applicable Appendices)		
<input checked="" type="checkbox"/>	Appendix 1:	Hosted Software
<input type="checkbox"/>	Appendix 2:	Licensed Software; Support and Maintenance
<input type="checkbox"/>	Appendix 3:	Third Party Products
<input checked="" type="checkbox"/>		Schedule
<input checked="" type="checkbox"/>	Exhibit A:	Maintenance Exhibit

**NOTE:** If Client is tax exempt, certificate must be provided along with signed contract.

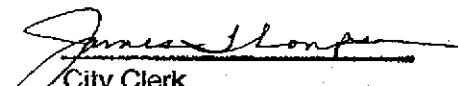
In consideration of the mutual promises and covenants contained in this Agreement, Client and Active hereby agree to be bound by this Agreement. By signing below, Client acknowledges and confirms that it has read this Agreement.

CLIENT	THE ACTIVE NETWORK, INC. ("ACTIVE")
Signature: 	Signature: _____
Name: <u>David H. Ready</u>	Name: _____
Title: <u>City Manager</u>	Title: _____
Date: <u>9/30/14</u>	Date: _____

The Active Network, Inc., 10182 Telesis Court, San Diego, California 92121  
 Telephone: (858) 964-3801, Fax: (858) 964-3978

Last revised November 7, 2013

982136.1 ATTEST:

  
 City Clerk

**APPROVED BY CITY MANAGER**  
*ntc \$15000.00 ABSSS*