

City of Fayetteville Staff Review Form

2018-0768

Legistar File ID

1/15/2019

City Council Meeting Date - Agenda Item Only
N/A for Non-Agenda Item

Justin Clay

12/21/2018

PARKING MANAGEMENT (430)

Submitted By

Submitted Date

Division / Department

Action Recommendation:

Approving a resolution to waive the requirements of competitive bidding and to continue an existing software service agreement with PayByPhone through the year 2022 to provide mobile payment capabilities for parking consumers

Budget Impact:

Account Number	Fund
Project Number	Project Title
Budgeted Item? <u>NA</u>	Current Budget \$ -
	Funds Obligated \$ -
	Current Balance \$ -
Does item have a cost? <u>NA</u>	Item Cost
Budget Adjustment Attached? <u>NA</u>	Budget Adjustment
	Remaining Budget \$ -

V20180321

Purchase Order Number: _____

Previous Ordinance or Resolution # _____

Change Order Number: _____

Approval Date: _____

Original Contract Number: _____

Comments:



JANUARY 15, 2019

TO: Mayor and City Council

THRU: Don Marr, Chief of Staff

FROM: Justin Clay

DATE: December 21, 2018

SUBJECT: **Approving a resolution to waive the requirements of competitive bidding and to continue an existing software service agreement with PayByPhone through the year 2022 to provide mobile payment capabilities for parking consumers**

RECOMMENDATION:

Staff recommends approving a resolution to waive the requirements of competitive bidding and to continue an existing software service agreement with PayByPhone (formerly Verrus Mobile Technologies) through the year 2022 for providing consumers with easy and secure parking payment options using mobile web, smartphone, and smartwatch applications.

BACKGROUND:

In 2010, the City entered into a software service agreement with (then) Verrus Mobile Technologies to provide a pay-by-cell solution that allowed patrons visiting the Entertainment District to purchase parking and add additional time to their parking purchase, thus creating a more convenient payment method in addition to the parking pay station. A \$0.35 transaction fee is passed on to the consumer using this service. The \$0.35 transaction fee is recorded as revenue by the City and is then paid out monthly to the software service provider. The original contract also accounted for a monthly hosting fee to be paid by the City, but that fee was evaluated and removed after the first six (6) months per the terms of the contract. Verrus Mobile Technologies has since been acquired by PayByPhone, a subsidiary of Volkswagen Financial Services AG.

DISCUSSION:

With the adoption and convenience of mobile applications, the number of PayByPhone transactions has grown significantly over the years, increasing approximately 300% between 2014-2018 (from 14,000 transactions to 60,000 transactions) and accounting for approximately 17% of all Entertainment District transactions. This level of increase has resulted in an increase in corresponding transaction fees which will exceed \$20,000 for the first time in 2018, thus requiring City Council approval of this agreement.

The negative impact resulting from a disruption of service on consumers and merchants who promote this mobile payment feature would render competitive bidding impractical and unfeasible in this case. Staff therefore recommends waiving the requirements of competitive bidding for the continuation of this software service agreement. The terms of this contract do

allow for annual automatic renewals unless either party provides at least 30 days prior written notice of its intent not to renew the agreement.

BUDGET/STAFF IMPACT:

No budget or staff impact. The \$0.35 transaction fee is paid by the consumer, collected by the City as revenue and then paid out to PayByPhone monthly.

Attachments:

Verrus Technologies Original Contract & Supporting Documentation

City of Fayetteville Staff Review Form

**City Council Agenda Items
and
Contracts, Leases or Agreements**

n/a

City Council Meeting Date
Agenda Items Only

Sharon Waters
Submitted By

Parking Management
Division

Transportation Services
Department

Action Required:

Approval of an Agreement with Verrus Mobile Technologies for the processing of Pay-by-Cell transactions for the Entertainment District Parking Program.

\$ 500.00
Cost of this request

2130.9131.5315.00
Account Number

Project Number

\$ 500.00
Category / Project Budget

\$ -
Funds Used to Date

\$ 500.00
Remaining Balance

Entertainment Dist. Parking Program
Program Category / Project Name

Contract Services
Program / Project Category Name

Off-Street Parking
Fund Name

Budgeted Item

Budget Adjustment Attached

Ty 2 Huddy 8-4-10
Department Director Date

Previous Ordinance or Resolution # _____

Cheryl Kelly (see memo) 8-4-10
City Attorney Date

Original Contract Date: _____

Original Contract Number: _____

Paul A. Bender 8-4-2010
Finance and Internal Services Director Date

Received in City Clerk's Office 08-04-10A11:16 RCVD
Kim G.

Don Mar 8-4-10
Chief of Staff Date

Received in Mayor's Office
ENTERED
8/4/10
[Signature]

Leonard Jordan 8/4/10
Mayor Date

Comments:

CONTRACT REVIEW MEMO

To: Mayor Lioneld Jordan

Thru: Don Marr, Chief of Staff
Terry Gulley, Director of Transportation *T.M.*

From: Sharon Waters, Parking and Telecom Manager *SW*

Date: August 3, 2010

Subject: Approval of an Agreement with Verrus Mobile Technologies for the Processing of Pay-by-Cell Transactions

PROPOSAL:

City staff recommends the approval of an Agreement with Verrus Mobile Technologies for the processing of Pay-by-Cell transactions for the Entertainment District Parking Program. This Agreement will also provide register-by-phone services for the guests of residents living in the Entertainment District.

RECOMMENDATION:

Verrus Mobile Technologies provides a Pay-by-Cell solution that allows patrons visiting the Entertainment District to add additional money to their parking permit without the need of returning to their vehicle. This solution will also provide a convenient register-by-phone service for the guests that visit residents living in the Entertainment District.

BUDGET IMPACT:

The cost for the service is \$0.35 per transaction which is passed on to the consumer using this service. The cost to the City is \$100.00 per month, totaling an annual cost of \$1200.00; \$500 for the remaining 5 months in 2010.

FAYETTEVILLE

THE CITY OF FAYETTEVILLE, ARKANSAS

KIT WILLIAMS, CITY ATTORNEY
DAVID WHITAKER, ASST. CITY ATTORNEY



DEPARTMENTAL CORRESPONDENCE

LEGAL DEPARTMENT

MEMORANDUM

TO: LIONELD JORDAN, MAYOR
DON MARR, CHIEF OF STAFF
TERRY GULLEY, TRANSPORTATION DIRECTOR
SHARON WATERS, PARKING MANAGEMENT

CC: KIT WILLIAMS, CITY ATTORNEY

FROM: JASON B. KELLEY, ASST. CITY ATTORNEY

DATE: AUGUST 4, 2010

RE: PAY-BY-CELL AGREEMENT WITH VERRUS MOBILE TECHNOLOGIES

I have reviewed the proposed agreement with Verrus Mobile Technologies of Vancouver, BC, Canada for the provision of pay-by-cell services for the Dickson Street Entertainment District parking program. You need to be aware of the following concerning this proposed agreement:

✓ 1. The agreement is governed by the laws of the Province of British Columbia, Canada and establishes the courts of British Columbia, Canada as having exclusive jurisdiction for any court action related to the agreement. Further, in the agreement the City consents to personal and exclusive jurisdiction and venue in the courts of the Canadian province of British Columbia. I am not versed in Canadian law and cannot verify whether the proposed agreement is in conformance with the requirements of any Canadian law.

We can mark through & initial

✓ 2. The agreement requires the City to provide "adequate space at each parking facility" for a Verrus sign "to be hung and/or located near payment machines at parking facilities enabled by the Verrus PBC service." The signage must comply with "Appendix B" of the agreement which was not included in the reviewed packet material. Depending on this requirement, our city sign ordinance may be implicated. It is important to verify that we are not contractually obligating ourselves to signage which would violate our sign ordinance provisions.

Add sign ordinance

✓ 3. Indemnification is required in the agreement. Our office does not support the City agreeing to provide indemnification, as such may operate to waive our immunity.

8.2 OK protects both parties

✓ 4. Given the international nature of this agreement, it is important to have it clarified that the amounts payable by the City and the prices quoted are indicated in U.S. Dollars and not Canadian Dollars. Since the agreement is governed by Canadian law (British Columbia), the amounts quoted may be deemed Canadian Dollars by a Canadian court. Depending on the then-current rates of exchange, this could lead to a difference in the actual cost to the City in U.S. Dollars.

~~Appendix B~~

If there are any further questions on this matter, please contact me.

✓ 2.1 OK already states "US dollars"

Corrections to Agreement have been made by Sharon Waters.
Sharon Waters
8-4-10

COOPERATION AND SERVICE AGREEMENT

This Cooperation and Service Agreement (the "Agreement") is entered into as of 8-4-10 between Verrus Mobile Technologies Incorporated, a developer of enhanced mobile commerce solutions, a British Columbia corporation with its principal place of business at 201-1028 Hamilton Street, Vancouver, British Columbia, Canada ("Verrus") and City of Fayetteville a provider of parking services, with its head office at Fayetteville, AR ("Customer").

RECITALS

The objective between Verrus and Customer provided for in this Agreement is to provide wireless applications to enhance the payment process for parking at parking facilities and metered parking stalls owned and/or managed by Customer. Verrus' mobile commerce solutions will also provide Customer with an improved management information system, including real-time operation and transaction reports.

AGREEMENT

SECTION 1: THE VERRUS MOBILE TECHNOLOGIES PLATFORM AND APPLICATIONS

1.1 Verrus Mobile Technologies Parking Payment Application

Verrus agrees to roll out the Verrus Pay by Cell Phone service ("PBC") for use at Customer's managed and owned parking facilities agreed upon by Verrus and Customer, to pay for the use of those facilities through personal wireless devices (e.g., cellular telephones) ("Wireless Devices"), telematics or other wireless systems.

1.2 Verrus Management Information System

Verrus will operate and manage a software application for Customer that will provide real-time information and management reports on the transactions conducted utilizing the Verrus Parking Payment Application (the "Management Information System"). Verrus will host the Management Information System on its computer and network equipment. Customer will access the Management Information System through a browser-based program installed on Customer's computer hardware.

1.3 Computer, Networking and Telecommunication Systems

Verrus will own or possess, and will operate and maintain, all computer and networking hardware and software and data required to operate the Verrus PBC service as contemplated in this Agreement, other than Customer's existing computer and telecommunications systems.

1.4 Pay by Cell Phone Enforcement

Customer agrees to supply Wireless Devices to employees in the field to provide real time confirmation of validly parked vehicles.

SECTION 2: FEES AND PAYMENTS

2.1 Pricing and Payment

Customer agrees to pay the fees, as outlined in Appendix A. All amounts payable hereunder are exclusive of any and all taxes, and Customer is responsible for payment of such taxes. All prices are stated, and Customer shall pay, US dollars.


SECTION 3: EXCLUSIVITY

Customer agrees that Verrus will be the sole and exclusive provider of all wireless parking payment applications (using whatsoever technology) for Customer during the term of this agreement, including, but not limited to, all wireless payment applications employing Wireless Devices to pay for parking at only the specific Customer lots where Verrus is deployed.

SECTION 4: MARKETING, PROMOTION AND USER EDUCATION

4.1 Signage

Customer agrees to provide adequate space at each parking facility at which the Verrus PBC service is to be available for Verrus signage, with sign size and placement to be mutually agreed by Verrus and Customer. Customer agrees that signs will be hung and/or located near payment machines at parking facilities enabled with the Verrus PBC service.

All signage must comply with the City of Fayetteville sign ordinances. 
All signage must comply with the Verrus Consumer Branding Standards as outlined in Appendix B.

4.2 Marketing Events

Verrus may conduct on-site marketing events and campaigns for the System, whereby Verrus will inform parking lot consumers of the availability of the Verrus PBC as well as any promotions available with knowledge and approval of Customer which is not to be reasonably withheld.

4.3 Customer Training

Customer will, at its own expense, train its staff and employees, including patrollers, to operate the PBC and related applications and technology at each lot.

SECTION 5: PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

The parties shall cooperate with each other in protecting their respective trade names, designs, trademarks and other similar intellectual property rights from unauthorized use.

SECTION 6: TERM AND TERMINATION

6.1 Term and Renewal

This Agreement shall enter into force for a period of three consecutive years from the date signed unless earlier terminated in accordance with this Section 6.

The contract shall be automatically renewed annually on the anniversary of the termination date above unless either party gives the other party at least thirty (30) days prior written notice of its intent not to renew the Agreement

6.2 Termination

Should a party breach a material term and such breach remains uncorrected for thirty (30) days after receipt of a notice by the breaching party, the non-breaching party may, in addition to all other remedies available at law, terminate this Agreement by providing written notice to the breaching party, without further obligation; provided, however, that if the nature of the breach is such that it cannot be reasonably cured within such thirty (30) day period, the breaching party will not be deemed in default of this Agreement so long as such party commences efforts to effect a cure and is diligently pursuing such efforts. Provided, further, that if the breach is as a result of the non-payment of any fee,

the non-breaching party may terminate this Agreement if such breach remains uncorrected for ten (10) days after the breaching party's receipt of notice of such breach.

SECTION 7: REPRESENTATIONS AND WARRANTIES

7.1 Mutual Representations and Warranties

Each party represents and warrants to the other that:

- (i) it has the full corporate right and authority, and possesses all licenses, permits, authorizations and rights to intellectual property, necessary to enter into and perform this Agreement;
- (ii) its entry into and performance of this Agreement do not and will not conflict with or result in a breach or violation of any agreement or order by which it is bound; and
- (iii) this Agreement constitutes its legal, valid and binding obligations enforceable against it in accordance with the terms of this Agreement.

SECTION 8: DISCLAIMER, INDEMNIFICATION AND LIMITATION OF LIABILITY

8.1 Disclaimer

EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, VERRUS DOES NOT MAKE, AND HEREBY SPECIFICALLY DISCLAIMS, ANY REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, REGARDING THE VERRUS PBC SERVICES INCLUDING ANY IMPLIED WARRANTIES OF TITLE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT. CUSTOMER ACKNOWLEDGES THAT THE VERRUS PBC SERVICE AND SERVICES FURNISHED BY VERRUS UNDER THIS AGREEMENT (INCLUDING, WITHOUT LIMITATION, ANY SERVERS OR OTHER HARDWARE, SOFTWARE, APPLICATIONS AND ANY OTHER ITEMS USED OR PROVIDED BY VERRUS OR ANY THIRD PARTIES IN CONNECTION WITH PROVIDING ACCESS TO OR HOSTING ANY OF THE FOREGOING OR THE PERFORMANCE OF ANY SERVICES BY VERRUS UNDER THIS AGREEMENT) ARE PROVIDED BY VERRUS "AS IS".

8.2 Indemnification

Subject to Section 8.3, each party (the "Indemnifying Party") will defend, indemnify and hold harmless the other party (the "Indemnified Party") from and any against any and all third party claims, actions, losses (collectively, "Losses") resulting from or arising out of the Indemnifying Party's breach of any representation, warranty or other obligation set forth in this Agreement. The Indemnified Party shall not be entitled to be so indemnified unless it has given the Indemnifying Party prompt written notice of any Losses, afforded the Indemnifying Party the opportunity to assume sole control over the defence and settlement, if applicable, of the Losses, and provided the Indemnifying Party (at the Indemnifying Party's expense) all relevant information, assistance and authority to enable the Indemnifying Party to perform its obligations hereunder. The Indemnifying Party shall not settle any Losses without the Indemnified Party's written consent, which shall not be unreasonably withheld.

8.3 Limitation of Liability

IN NO EVENT SHALL ANY PARTY BE LIABLE FOR CONSEQUENTIAL, SPECIAL, INDIRECT OR INCIDENTAL DAMAGES, INCLUDING BUT NOT LIMITED TO ANY DAMAGES RESULTING FROM LOSS OF USE OR PROFITS ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, WHETHER IN AN ACTION BASED ON CONTRACT, TORT (INCLUDING NEGLIGENCE) OR ANY OTHER LEGAL THEORY, EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

SECTION 9: CONFIDENTIALITY

Neither party will disclose the other party's confidential or proprietary information (including this Agreement and any information provided by the other party that is confidentially maintained or proprietary or which derives value from not being generally known to persons who can obtain economic value from its disclosure or use) except:

- (i) with the other party's consent;
- (ii) to employees, agents and contractors who have a need to know in the discharge of their duties and who are subject to a contractual obligation to keep such information confidential that is at least as restrictive as this Agreement;
- (iii) when required to do so by law or by any binding rule, order or request.

Each party shall exercise reasonable commercial care in protecting the confidentiality of the other party's confidential information disclosed to it. The parties agree that an actual or threatened breach of this provision would result in irreparable harm to the party whose confidential information would be disclosed in breach, and shall entitle that party to temporary or permanent injunctive relief without proof of actual damages.

For purposes of this Section 10, the parties agree that confidential or proprietary information does not include any information that is (a) already known to the receiving party at the time of disclosure hereunder (other than from the other party hereto) as demonstrated by its written records; (b) now or hereafter becomes publicly known other than through acts or omissions of the receiving party, or anyone to whom the receiving party disclosed such information; (c) disclosed to the receiving party, by a third party, under no obligation of confidentiality to the disclosing party or any other party; or (d) independently developed by the receiving party without reliance on the confidential information of the disclosing party as shown by its written records.

SECTION 10: MISCELLANEOUS


10.1 Assignment

This Agreement shall be binding on the parties, their successors and their permitted assigns. Neither party may assign its rights or obligations under this Agreement without the consent of the other.

10.2 No Agency.

Each party, in all matters relating to this Agreement, will act as an independent contractor and independent employers. Except as otherwise expressly set forth herein, neither party will have authority and will not represent that it has any authority to assume or create any obligation, express or implied, on behalf of the other, or to represent the other as an agent, employee or in any other capacity. Nothing in this Agreement shall be construed to have established any agency, joint venture or partnership between the parties. Neither party shall make any warranties or representations on behalf of the other party.

10.3 Governing Law.

This Agreement, and all matters relating hereto, shall be governed in all respects by the laws of the Province of British Columbia, Canada, excluding the application of any conflict of laws principles and/or rules. The parties hereby agree that all disputes arising out of this Agreement shall be subject to the exclusive jurisdiction of and venue in the competent courts located in British Columbia, Canada, and consent to the personal and exclusive jurisdiction and venue of these courts. 

10.4 Severability.

In the event that any provision of this Agreement shall be unenforceable or invalid under any applicable law or be so held by applicable court decision, such unenforceability or invalidity shall not render this Agreement unenforceable or invalid as a whole, and, in such event, such provision shall be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law or applicable court decisions.

10.5 Attorney's Fees.

In any legal proceeding between the parties, the prevailing party shall be entitled to recover reasonable attorney's fees and expenses.

10.6 Force Majeure.

If performance hereunder is prevented, restricted or interfered with by any act or condition whatsoever beyond the reasonable control of a party, the party so affected, upon giving prompt notice to the other party, shall be excused from such performance to the extent of such prevention, restriction or interference.

10.7 Entire Agreement.

This Agreement, together with the Appendix attached to it, constitutes the entire agreement between the parties with respect to the subject matter hereof. This Agreement supersedes, and the terms of this Agreement govern, any prior agreements with respect to the subject matter hereof. This Agreement may not be modified, amended or any provision waived except by the parties' mutual written agreement.

10.8 No Waiver.

Failure by either party to enforce any provision of this Agreement (whether in any one or more instances) shall not be deemed a waiver of future enforcement of that or any other provision.

10.9 Notice.

Any notices hereunder provided to Verrus shall be given at the address specified below or at such other address as Verrus specifies in writing. Any notices hereunder provided to Customer shall be given at the address specified below or at such other address as Customer specifies in writing. Any notice or other communication required to be given hereunder by either party shall be deemed duly given (a) when personally delivered to the other party, or (b) on the date of receipt when such notice was mailed by certified mail, postage prepaid and return receipt requested, addressed to the other party at the address set forth above, or such other address as either party may designate by giving written notice to the other; or (c) on the date of receipt when such notice was sent by facsimile or e-mail to the other party; provided the sending party receives a written or electronic notice of receipt from the other party of the facsimile or e-mail.

10.10 Counterparts.

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall be taken together and deemed to be one instrument. The parties further agree that a signature transmitted via facsimile shall be deemed original for all purposes hereunder.

10.11 Captions.

The captions used in this Agreement are for convenience only and shall not affect in any way the meaning or interpretation of the provision set forth herein.

10.12 Trademarks, Trade Names, Logos.

Except as expressly provided in this Agreement, no trademark, trade name, logo, trade dress, copyright or license therein, or other intellectual property rights (collectively, "Intellectual Property") are conveyed by this Agreement. Each party reserves the right to approve in advance the use of its Intellectual Property by the other party in each and every instance. All Intellectual Property owned by either party shall remain the exclusive property of such party and shall be returned to such party promptly after the expiration of this Agreement.

10.13 Agreement Approval.

Each party hereby represents and warrants that all necessary corporate and/or governmental approvals for this Agreement have been obtained, and the person whose signature appears below has the authority necessary to execute this Agreement on behalf of the party indicated.


10.14 Sophistication of Parties.

Each party to this Agreement represents that it is a sophisticated commercial party capable of understanding all of the terms of this Agreement, that it has had an opportunity to review this Agreement with its counsel, and that it enters this Agreement with full knowledge of the terms of the agreement.

10.15 Customer's Conduct of Business Through Affiliates.

The parties acknowledge that Customer may carry out its business through affiliates. Customer agrees to cause its affiliates to take such actions and to execute such documents as may be reasonably required to give effect to this Agreement as though references to Customer in this Agreement were references to Customer and those of its affiliates through which it carries on the business of owning and operating parking facilities.

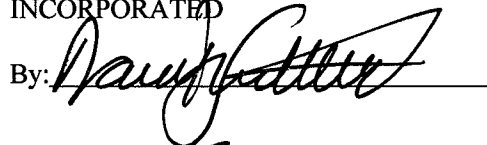
IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorised representatives.

By: 
Its: Lioneld Jordan

Notice Address:

113 W. Mountain St.
Fayetteville, AR 72701

VERRUS MOBILE TECHNOLOGIES
INCORPORATED

By: 
Its: DAVID SPITZER

Notice Address:

201 - 1028 Hamilton St.
Vancouver, British Columbia
Canada

APPENDIX A

Services to be Provided:

Pay by Cell Phone (PBC)

System will:

1. Register customers by phone or online who wish to pay for parking by cell phone.
2. Activate and collect payment via credit card for parking by cell phone in accordance with rates specified by the Customer.
3. Display payment status of license plate, space or meter number on internet capable handheld device such as cell phone, PDA or handheld computer.
4. Provide secure web based administration interface for rates control, management and accounting reports. Report data to be exportable via Excel CSV files

Pricing:

Monthly Fees due to Verrus

PBC hosting fee N/A

Per Transaction Charges to Verrus

PBC consumer pays \$0.35 / transaction

Credit Card Authorization charge (if applicable) N / A *

PBC Credit Card Internet gateway charge (if applicable) N / A

* NOTE: Customer's own credit card processing merchant account fees will apply

Verrus Promotional System for Residential Visitor Parking

Promotional system will allow:

1. Specific accounts – identified by their phone number
2. Specific locations – able to define specifically where the promotion is in effect
3. Discount levels – by flat fee, by percentage or even 100% off
4. Number of uses – the system will count & limit the number of uses based on any limit desired and time frame effective (e.g. monthly)

Pricing:

Monthly Fees due to Verrus

PBC hosting fee \$100 * / month

* NOTE: To be re-evaluated based on volume used after 6 months