



Legislation Details (With Text)

**File #:** 2020-324      **Version:** 1      **Name:**

**Type:** Consent      **Status:** Agenda Ready

**File created:** 5/18/2020      **In control:** City Council

**On agenda:** 6/2/2020      **Final action:**

**Title:** CONSIDER APPROVAL OF CONTRACT SERVICES AGREEMENT WITH ACTIVE NETWORK, LLC, FOR ONLINE REGISTRATION AND FACILITY RESERVATION SOFTWARE FOR THE COMMUNITY SERVICES DEPARTMENT (CITY COUNCIL)

**Sponsors:**

**Indexes:**

**Code sections:**

**Attachments:** 1. Exhibit 1 - File ID#2020-324 - Active Network LLC, 2. Exhibit 2 - Staff Report 4-2-19, 3. Exhibit 3 - Active Proposal

Date	Ver.	Action By	Action	Result
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**Report to Mayor and City Council**

Tuesday, June 02, 2020

Consent

**SUBJECT:**

**CONSIDER APPROVAL OF CONTRACT SERVICES AGREEMENT WITH ACTIVE NETWORK, LLC, FOR ONLINE REGISTRATION AND FACILITY RESERVATION SOFTWARE FOR THE COMMUNITY SERVICES DEPARTMENT (CITY COUNCIL)**

**I. SUMMARY**

With the recent COVID-19 pandemic effecting the overall operations of Community Services Department, it is more apparent that online registration is needed to help residents adhere to social distancing and contactless transactions. It will also improve communication via email, which can include updates on programs, refunds, and future marketing of events and programs.

ACTIVE Net is a cloud-based Registration and Facility Reservation software program provided by ACTIVE Network, LLC. The software enables reservations for park programs and facilities to be made and administered online.

The proposed contract (Exhibit 1) would provide the City with access to ACTIVE Net for an initial term of one year, with an option to extend for two additional one-year periods thereafter, in exchange for payment of initial setup costs of \$60,000 plus revenue-based fees in an amount not-to-exceed \$180,000 annually. The fees would be calculated as a

percentage (2.26% base fee + 0.5% or 3.0% processing fee) of the total registration costs that would otherwise be paid to the City by members of the community who book City classes, activities, events or facilities.

## **II. RECOMMENDATION**

Staff recommends that the Council take the following actions:

1. WAIVE the bidding requirements in Chapter 6 (“Purchasing System”) of Title II of the Carson Municipal Code, pursuant to Carson Municipal Code Section 2611(e) (“Sole Source Purchasing”); and
2. APPROVE the proposed Contract Services Agreement with Active Network, LLC (Exhibit 1) and AUTHORIZE the Mayor to execute the same.

## **III. ALTERNATIVES**

1. DO NOT APPROVE the recommendation.
2. TAKE another action the City Council deems appropriate.

## **IV. BACKGROUND**

The Department of Community Services (“Department”) has utilized a number of Recreation-related software programs to handle tasks that include program participant registration, facility reservations and Veterans SportsComplex membership management. The two programs currently used, Recpro and Recware, do not meet the needs of the Department, and equally so, Recware is obsolete and has not been supported by the vendor for over 8 years.

The Information Technology Department hosts and maintains the servers for the Recpro software in house for facility rentals. Should that server go out, the program would no longer be available and staff would have to resort to manually booking equipment. Connectivity limitations at park facilities and the corporate yard have led to long waits to register facility rentals and often failing to complete a rental if the network drops. This has led to an overall negative experience for the customer.

In 2012, when the City was informed that Recware would no longer be supported, staff recommended acquiring a web based software such as Active Net. It wasn’t pursued at the time because of concerns with an online processing fee and distrust by the then IT Director of programs like this one that were in the cloud. Since then, use of cloud-based software has become commonplace.

Our current practice for program registration is to manually record and track program rosters and payments. This system has led to errors in recording data and staff not having all the information available to them when a resident makes an inquiry about a specific program or facility. Often, only the person responsible for the program can answer

questions or confirm program information of facility availability. Additionally, using a manual system makes it difficult to ensure accountability and to oversee the work product of those who are responsible for inputting into the system.

To overcome these challenges and to initiate improvements that would make our program more efficient and provide an enhanced service to our clientele, especially by eliminating the need for face-to-face contact during the COVID-19 pandemic, staff seeks to acquire a cloud-based registration and facility reservation software-as-a-service program known as ACTIVE Net. The program is provided by ACTIVE Network, LLC (“Active”), in exchange for a portion of the fees collected from the proceeds of reservations made using the software, plus initial setup costs. ACTIVE Net is also compatible with the Tyler Munis software system the city is currently using. No new additional positions will be required, as the current staff can oversee and implement the program.

ACTIVE Net has been in existence for over twenty years and has the top data center standards and security for client information. There are over 180 clients in California that utilize ACTIVE Net including LA County who went live in March 2020. ACTIVE Net has been the pioneer in the industry with over fifteen years of Cloud based programing. This company prides itself on performance and stability.

The proposed Contract (Exhibit 1) is a one-year contract whereby the City would obtain access to the ACTIVE Net software service in exchange for initial setup costs of \$60,000 plus payment of fees to Active Net based on a percentage (2.26% base fee plus 3.0% processing fee if paying via credit card, or 0.5% processing fee if paying via electronic check) of proceeds derived from use of the software, not-to-exceed \$180,000 annually. The Agreement also contains options for the City to extend the term of the Agreement for two additional, one year extentions. At its meeting on April 2, 2019, the City Council approved the convenience fee charges for online payments be made by patrons.

If the agreement is approved, a setup/implementation period would ensue whereby the parties would work together to “Go Live,” or launch the software to full functionality for City staff and end users (City residents wishing to book reservations using the software). A schedule would be developed based on meetings between ACTIVE Net and City staff.

#### Prior Council Direction; Sole Source

On April 2, 2019, the City Council approved of City staff working with ACTIVE Net toward a contract for the implementation of ACTIVE Net (Exhibit 1). As part of that direction, the City Council approved the use of the “sole source” exception to the requirements of the City’s purchasing ordinance (CMC 2611(e)). Since the time of that approval, City staff has continued to search for other vendors that are capable of providing services comparable to ACTIVE Net, but has been unable to identify any such vendors. Staff has confirmed that the ACTIVE Net services are unique because of their quality, durability, availability and fitness for the particular use required by the Community Services Department. These services are unique and only available from ACTIVE Net. For these reasons and the reasons set forth in Exhibit 1, staff requests that the City Council renew/reaffirm its approval for the use of the sole source exception to the City’s purchasing ordinance as set forth in the recommendation.

#### Legal Issues

Contract negotiations between the City Attorney's office and ACTIVE Net were rigorous. Most issues were satisfactorily resolved, however some issues requiring City Council consideration remain. Staff is not concerned about these remaining issues as staff notes most software contracts have these limitations given the nature of the product (software).

ACTIVE Net has agreed to indemnify the City related to the services, but on narrower grounds than City generally requires. Specifically, ACTIVE Net's indemnification obligations are curtailed to exclude errors and omissions and to apply to other types of claims only to the extent they arise directly out of ACTIVE Net's negligent performance of the contracted services and not including any negligent failure to perform the services or its negligent performance of activities related to the services.

ACTIVE Net also requires City to indemnify it on a broad range of topics, including: **(1)** City's provision of materials, products, or services, as part of its obligations under the agreement, that infringe intellectual property rights of any third party; **(2)** unauthorized disclosures by City employees or third parties to whom City has granted access to "Participant Information" (defined as any information collected by Active from end users of the software, or any information uploaded by City into the software), except as required by law; **(3)** all City use of "Participant Information," except as required by law; **(4)** all City use of the software in violation of the agreement, *irrespective* of whether they result of negligence or willful misconduct of the City; **(5)** claims for death or injury of persons participating in City events operated in connection with use of the software; and **(6)** claims for refunds, reversals or chargeback requests submitted by end users, except those arising from Active Net's failure to comply with the Agreement or applicable law (although the agreement provides that Active will pay refunds or chargeback requests only where required by law, and may bill City for same; other such requests will be processed in accordance with the City's refund policy); and **(7)** for any City tax liabilities attributable to City's use of the software (e.g. sales taxes, if applicable). However, it should be noted that indemnification in favor of the consultant is more consistent with industry standard in software contracts, such as this, than in more traditional City contracts, such as construction contracts.

The agreement contains significant limitation of liability provisions (Section 5.5). Except for warranting that it will provide the services consistent with industry standards, make commercially reasonable efforts to ensure functionality and provide technical service in accordance with its "Advanced Support" service package, ACTIVE Net disclaims any implied warranties, including that: **(1)** the products are error-free or "bug"-free, accurate, secure, or reliable; **(2)** the products will operate without interruption; **(3)** all errors will be corrected; **(4)** the products will comply with any law, rule, or regulation, or will meet the City's requirements; or **(5)** the products are fit for any particular purpose of the City. Active also disclaims any liability for indirect consequential, punitive, exemplary, or special damages of City resulting from use of the software which arise from circumstances beyond ACTIVE Net's reasonable control. These provisions limit City's potential recovery of any damages that it may suffer from use of the software or services provided under the Agreement, including interference with City computer systems or interruption of City business. However, these provisions are mutual, in that the City is also granted these protections (though it already enjoys some of them, such as immunity from punitive damages, under state law). Additionally, such provisions are fairly standard in software service contracts.

Another issue relates to ACTIVE Net's refusal to agree to strict timing obligations in the

agreement. The City's standard provision is that "time is of the essence," but ACTIVE Net has insisted on changing that provision in Section 3.1 to "time is of material importance," and defining "default" in Section 7.2 to include only material violations of the Agreement. ACTIVE Net's intent behind these changes is to avoid triggering an immediate right of City to terminate the agreement and seek damages in the event ACTIVE Net fails to meet a deadline. This could affect City's remedies for enforcement of deadlines such as, without limitation, initial setup/implementation and provision of maintenance or support services. With respect to launch of ACTIVE Net to full functionality (i.e. "going live"), ACTIVE Net has eschewed specific deadlines in Exhibit D (the "Schedule of Performance") and instead required that the "go live" date and the progress deadlines leading up to it be agreed upon during the initial "project kickoff call" meeting between City staff and Active staff (which is to occur within a reasonable time of effectiveness of the agreement). However, the parties have negotiated a provision that failure of Active to meet any of the deadlines established during the "Project Kickoff Call" by more than 15 days would constitute a breach that would entitle the City to immediately terminate the agreement without triggering a termination fee (see below). It also bears noting that ACTIVE Net is strongly incentivized to "go live" in a timely fashion, because the bulk of ACTIVE Net's potential compensation under the agreement is registration fee-based and can only be earned after "go live" occurs.

Another issue is the removal of a standard provision of Exhibit A providing that "all work product is subject to review and acceptance by the City, and must be revised by the Consultant without additional charge to the City until found satisfactory and accepted by City." The effect is to dispose of the City's right to review Active's work and refuse to make payments if the work is not deemed satisfactory. In other words, City would be obligated to make payments regardless of its level of satisfaction with the services. However, the risks associated with removal of this provision are somewhat mitigated by the payment structure of the agreement, which provides for the initial \$60,000 in setup costs to be invoiced in four separate increments of \$15,000 each, on a quarterly basis, with the first such payment not being invoiced until the date of the first live operation of the ACTIVE Net program (i.e. the "Go Live Date").

Finally, the agreement provides for City to pay an early termination fee of \$20,000 if City attempts to terminate the agreement prior to expiration of its term for any reason other than a material default of ACTIVE Net. However, the risks to City associated with this provision are somewhat mitigated by the structure of the agreement's term (an initial one-year term followed by two optional one-year extension periods), which gives the City the opportunity to walk away from the agreement at the end of each contract year without being subject to the early termination fee.

## **V. FISCAL IMPACT**

No additional funding is requested at this time as the total appropriation of \$60,000.00 is available in the 2019-2020 adopted budget in Recreation Administration Account Number 101-90-950-101-6004.

## **VI. EXHIBITS**

1. Proposed ACTIVE Net Contract (pgs. 7-60)
2. City Council Staff Report dated April 2, 2019 (pgs. 61-63)
3. Active Net Proposal (pgs. 64-82)

Prepared by: Bobby Grove, Recreation Program Manager; City Attorney's Office.