

# Resolution 2013-6

## RESOLUTION 2013-6

### Resolution To Adopt Contract for

### The Active Network Services together with "Exhibit A" Product Services

**WHEREAS**, OIPRD is a municipal corporation duly established pursuant to the laws of the State of Washington, RCW Chapter 36.69, as a park and recreation district, for the purpose of providing leisure time activities and recreational facilities for its residents, including managing indoor and outdoor recreational and educational programs;

**WHEREAS**, OIPRD has researched online service providers and collaborated with other park and recreation district to identify the most cost effective service provider that meets the needs of the organization; and

**WHEREAS**, the service provider is experienced with providing hosted software services for activity registration, facility reservation, program training, and program support, and is able to provide services in connection with OIPRD's needs, as set forth in this Agreement, and is willing and agreeable to provide such services upon the terms and conditions contained herein.

**NOW, THEREFORE BE IT RESOLVED** that the OIPRD Board of Commissioners adopt the Agreement for hosted software and services Between OIPRD and The Active Network together with Exhibit A, ActiveNet Service Consulting - Hosted according to promises and conditions set forth in the Agreement.

Adopted by the Board of Commissioners of Orcas Island Park and Recreation District.


DATED this 8<sup>th</sup> day of August 2013.

  
\_\_\_\_\_  
Jim Bredouw, Commissioner

  
\_\_\_\_\_  
Ian Lister, Commissioner

  
\_\_\_\_\_  
Vicki Vandermay, Commissioner

  
\_\_\_\_\_  
Bob Eagan, Chair, Commissioner

  
\_\_\_\_\_  
Martha Farish, Commissioner

## Hosted Software & Services Agreement

This Hosted Software & 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", "TAN" or "we" or "us") and Orcas Island Park and Recreation District ("you" or "your" or "Customer"). 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 electronic delivery.

### 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) Customer elects to receive notifications of free product, promotional items and giveaways through the Active program known as ActiveRewards. Active will offer the Customer (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) Customer 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. You are responsible for the security of the login identifier and for its use or misuse by your authorized users. 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) Customer agrees to pay the fees as more fully described in Exhibit A. For registration products, 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 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. All fees due to Active as consideration for its delivered Products and Services are non-refundable. 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 Customer, 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. The FEES DESCRIBED IN EXHIBIT A ARE ESTIMATES OF ANTICIPATED HOURS. HOURS USED IN EXCESS OF THESE WILL BE BILLED AT \$100/HOUR. IF FEWER THAN 59 HOURS ARE USED, AT OIPRD'S SOLE DISCRETION, THEY WILL EITHER NOT BE BILLED AT ALL OR WILL BE BILLED WITH THE BALANCE OF PAID, UNUSED HOURS AVAILABLE AS A FUTURE TRAINING CREDIT. 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 IN 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 Product" 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 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 Customer 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: \_\_\_\_\_

*Josie Donnelly*

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

Digitally signed

by Josie Donnelly

Date: 2011.12.22

11:33:07 -08'00'

#### CUSTOMER

Orcas Island Parks and Recreation

District

(Full Legal Name)

By: *Martha Farish*

(Signature)

Martha Farish, Chair

Print Name and Title

*Martha Farish*

*Chair*

The Active Network

Checks payable to

Date: November 29, 2011

mfarishster@gmail.com

E-Mail

PO Box 575

Address

Eastsound, WA 98245

City, State and Zip

Daytime Phone

360-376-3931

**EXHIBIT A**

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

**Date:** 12/19/10  
**Expires:** 02/27/11

**Customer:**

Martha Farish  
Orcas Island Parks & Recreation District  
Eastsound, San Juan

**Bill To:**

Orcas Island Park & Recreation District  
P.O. Box 575

**Ship To:**

Orcas Island Parks & Recreation District  
P.O. Box 575

Eastsound, San Juan  
US

Eastsound, San Juan  
WA 98245 United States

**Sales Representative:** Neal Block

**Payment Terms:** 30 NET

Line	Product	Units	Qty	Unit Price Selling (USD)	Total Price Selling (USD)
1.0	ActiveNet - Activity Registration	Ea	1	\$0.00	\$0.00
2.0	ActiveNet - Facility Reservation	Ea	1	\$0.00	\$0.00
3.0	ActiveNet - Public Access	Ea	1	\$0.00	\$0.00
4.0	Activity Registration Training	Hr	16	\$100.00	\$1,600.00
5.0	Facility Reservation Training	Hr	16	\$100.00	\$1,600.00
6.0	Public Access Training	Hr	12	\$100.00	\$1,200.00
7.0	General Settings	Hr	8	\$100.00	\$800.00
8.0	Project Planning	Hr	7	\$100.00	\$700.00

**Category Subtotal**

ActiveNet.SaaS.Online Transactions

Subtotal (Selling Price)

\$0.00



## Tax

COUNTY (Rate 1.3% )

\$0.00

STATE (Rate 6.5% )

\$0.00

Total(USD)

\$5,900.00

Transaction Fees

Transactions entered by a member of the Agency on behalf of a participant will be assessed a Service Charge equal to 2.0% for cash or check, and 4.5% for credit card transactions. Transactions entered directly through the website will be assessed the customary service fee charged by Active to online registrants ("Service Charge"), as described below. Each online registrant will pay the event registration fee charged by Agency plus a Service Charge equal to 6.5% plus \$.50, with a minimum Service Charge of \$2.00. 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. 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.

**"Go live date" begins the day after the first transaction is made in the live database**

**General**

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.

**Onsite Services**

Quoted prices for onsite services do not include airfare. If onsite services are required, economy airfare will be assessed and invoiced separately. Onsite services are billed in minimum, 8 hour daily increments.

**Method of Payment:**

*X Please send W9 to OIPRD, PO. Box 575  
Eastsound, WA 98245  
for payment.*

☒ Invoice Me

Purchase Order Number: \_\_\_\_\_

☐ Credit Card

Visa



MasterCard



American Express

Credit Card Number: \_\_\_\_\_

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

I hereby Agree to Pay above quote with the stated Method.

Customer Name: Orcas Island Park and Recreation District

Signature: \_\_\_\_\_

*Martha Fansh*

Name: \_\_\_\_\_

*Martha Fansh*

Title: \_\_\_\_\_

*Chair*

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

*See "Go live date" above.*

End of Quote