

City of South Daytona

Parks and Recreation

504 Big Tree Road • South Daytona, FL 32119 • 386/322-3070



MEMORANDUM

To: James L. Gillis, Jr., City Manager

From: Amy Zengotita, CPRP
Parks and Recreation Director

Re: Consideration of agreement with Earth Networks, Inc for the Lightning Detection and Alerting System

Date: June 16, 2021

AGENDA ITEM

Item # D19

Date: July 27, 2021

The South Daytona Citizen Alert Council presented a donation of \$3,499 to the South Daytona City Council on July 27, 2021 for the purpose of purchasing a Lightning Detection and Alerting System.

The funds will purchase two Alerting Systems which will be placed on the Youth Activity Building at 1700 James Street and at Reed Canal Park at 919 Reed Canal Road.

The contract is for five years with a one-time purchase price of \$3,499 (paid for by a donation from Citizens Alert) and a yearly annual user and maintenance fee of \$3,750 beginning in year two. The City is piggybacking a contract between Earth Networks, Inc and Citrus County BOCC. City Attorney Vose has reviewed the agreement and provided an addendum to the contract for Earth Networks, Inc which they have signed.

Staff requests that the City Council approve the expenditure of the Lightning Detection and Alerting System and authorize the City Manager to execute the contract with Earth Networks, Inc.



SEE WHAT
WE'RE UP TO!

EARTH NETWORKS ORDER FORM

12410 Milestone Center Drive,
Suite 300, Germantown, MD 20876

Customer Contact Information

Business Name:	City of South Daytona	Business Address:	504 Big Tree Rd
Contact Name:	Amy Zengotita		South Daytona, FL
			32119
Contact Phone:	(386) 322-3070	Contact Fax:	

Customer Billing Information (if different from above)

Business Name:		Business Address:	
Contact Name:			
Contact Phone:		Contact Fax:	

Earth Networks Contact Information

POC:	Neil Burkinshaw	Email Address:	nburkinshaw@earthnetworks.com
Contact Phone:	301-250-4143	Contact Fax:	301-258-5210

Schedule of Services

Product Name	Notes	Quantity	Unit Price	Total Price
Sferic Protect Basic Outdoor Alerting System w/ E-Horn, SfericMaps Gold 5 seats Sferic Mobile, , Lx Alerting Subscription Daily Weather Outlook Email, Online Weather Center Sferic Siren Notification Sign James Street Park And Reed Canal Park		2	\$1,500.00 Year 1 Per Park	\$3,000.00
Sferic Protect Basic One- Time Setup Fee		1	\$499.00	\$499.00

Initial Term of Contract:
5 years

Quotation valid through: June 15, 2021

Date of Original Signed Terms and Conditions:

Sub Total: \$3,499.00

Sales Tax: N/A

Grand Total: \$3,499.00

Remarks:

The customer agrees to payment terms of Net 30 unless otherwise documented. Late payment fees will be charged as one percent (1%) per month or part thereof will be charged for any payment that is more than 30 days late. The service(s) shall be for 5 years. The annual fee for these services following year one shall be \$3750/year subject to annual price increase of 0% for each year of the Term.

Installation and/or maintenance costs quoted above are valid for standard installations only. Any installation or maintenance work that requires non-standard equipment, materials, or regulatory expense may be subject to an additional charge. Furthermore, customer is responsible for providing all communication and electrical infrastructure. This quotation identifies the quantity of OAS units estimated for adequate coverage and has been agreed to by both parties as per (name and date of summary document). If additional units are required or desired after installation, they can be added for \$x per unit installed.

Please allow up to four to six weeks for delivery of hardware.

This order is subject to sales tax at time of invoicing.

This Order Form is subject to the terms and conditions attached hereto.

CUSTOMER:

EARTH NETWORKS:

By: _____

By: _____

Name: _____

Name: Neil Burkinshaw

Title: _____

Title: Senior Account Manager

Date: _____

Date: May 7, 2021

The Service (as described in the Order Form) is not a sale of goods, but rather a subscription and a license to a service which includes analytic content and data services (the "Services"). The Services may require hardware to be installed in order to function, and you hereby authorize Earth Networks or its designee to install any necessary hardware pursuant to the requirements herein. All right, title, and interest (including all intellectual property rights) in, and to the Services, hardware and any data or services provided (including all copies thereof) shall remain with Earth Networks.

1. Service and Support Contact Details. "We", "us" or "our" means Earth Networks, Inc., a Delaware corporation with its corporate offices located at 12410 Milestone Center Drive, Suite 300, Germantown, MD 20876. You may contact us by email at support@earthnetworks.com

2. Payment. You agree to payment terms per the Remarks section of the Order Form. Late payment fees will be charged as follows: (a) one percent (1%) per month or part thereof will be charged for any payment that is more than 30 days late: (b) Payment should be made to:

Earth Networks
Dept 0152, PO Box 120152
Dallas, TX 75312

3. Term and Termination. The Services shall have an initial term as specified on the Order Form. Unless otherwise specified on the Order Form, the Services shall automatically renew for successive 12 month terms, unless terminated by either party with at least 30 days written notice prior to the expiration of the then current term

4. Dispute. The parties agree that any dispute, other than those relating to payment, due and owing from you to us, arising out of or relating to this Agreement, shall be subject to binding arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association. The parties shall jointly request that an Arbitrator be appointed by the Alternative Dispute Resolution Administrator for the Circuit Court for Montgomery County, Maryland, to serve as the final arbiter of any dispute. Any award of the Arbitrator shall be enforceable in the applicable court for enforcement. Both parties agree that the finding of the arbitrator is binding and no other remedy, including legal remedies, is permitted.

5. Prevailing Wage Requirements. You agree that there are not state or local prevailing wage requirements that shall be applied to Earth Networks.

6. Data Rights. We retain all rights to data and/or video images (hereinafter "data") generated by the Earth Networks system(s). We grant you a limited license for use of such data, in connection with your internal business/educational purposes, but for no other purpose. We have exclusive rights for resale or to otherwise use data from the installed system(s). You and the users of hardware and/or software under this contract cannot provide access to third parties without our express written consent. Requests for access must be in writing to Earth Networks at our place of business. We grant you a royalty free license to use and disseminate data generated by the Earth Networks system for educational purposes, save and except that you are expressly prohibited from disseminating data to media outlets (such as TV stations, cable channels, radio stations, newspapers, and magazines). You are expressly prohibited from disseminating data from any other Earth Networks system.

7. Technical Requirements. You agree to connect, at your expense, the Earth Networks unit(s) to a dedicated, full-time Internet connection. You further agree to maintain the Earth Networks system in an operational mode at all times and to permit us authorized outside access to system data through the telecommunication line. Telecommunication line expense is solely your obligation. You agree to follow all procedures outlined in the Operations

Manual to ensure system access is maintained.

8. Representations. If any of the materials or parts fail impacting the availability of the Service, we will, at our election, either repair or replace them free of charge. This is the sole and exclusive remedy.

THE SERVICES AND DATA DISPLAYED THEREIN ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS. YOU ACKNOWLEDGES THAT WE ARE NOT RESPONSIBLE FOR THE ACCURACY OF ANY INFORMATION OR DATA CONTAINED IN THE SERVICES, AND WE SHALL NOT BE LIABLE FOR ANY LOSSES RESULTING FROM YOUR OR ANY AUTHORIZED USER'S RELIANCE ON ANY SUCH INFORMATION OR DATA UNDER ANY CIRCUMSTANCES.

9. Limitation of Liability. EARTH NETWORKS SHALL NOT HAVE ANY LIABILITY TO YOU OR ANY OTHER PERSON OR ENTITY FOR ANY DAMAGES ARISING FROM THIS AGREEMENT INCLUDING FOR ANY INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE, EXEMPLARY OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOSS OF REVENUE OR PROFIT, LOSS OF OR DAMAGE TO DATA OR OTHER COMMERCIAL OR ECONOMIC LOSS, WHETHER ARISING FROM CONTRACT, EQUITY, TORT (INCLUDING NEGLIGENCE OR STRICT LIABILITY) OR ANY OTHER THEORY OF LIABILITY, EVEN IF EARTH NETWORKS HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, OR IF THEY ARE FORESEEABLE. EARTH NETWORKS SHALL NOT BE RESPONSIBLE FOR CLAIMS BY ANY THIRD PARTY. The foregoing will apply to the full extent permitted by applicable law.

10. Lightning Disclaimer. Experience has shown that the resolution, timeliness, and format in which lightning data are presented within various displays and products, does not provide a total solution with regard to addressing concerns regarding the presence of convective activity and/or lightning and their potential impact on the safety of personnel and/or safeguarding of facilities, whether it be of immediate or short term concern. Interpretation and application of the data, as well as any comparative analysis and/or prognosis or similar activities done by any user, are done so solely at the user's risk and have not directly or indirectly been implied, condoned or recommended by us, and/or its data suppliers.

11. Title and Intellectual Property. The Service and/or methods used in association with the Service may be covered by one or more U.S. and international patents or pending patent applications. All right, title, and interest (including all intellectual property rights) in, and to under the Services, and any data or additional services provided (including all copies thereof) shall remain with Earth Networks.

12. Changes to the Service Terms. This contract shall not be varied in its terms or conditions by any oral Agreement or representation, but only by an instrument in writing properly executed by both parties except with respect to annual or periodic price adjustments as reflected on the Order Form.

13. Maintenance/Installation. Upon reasonable notice from us, you will provide access to the equipment for the purpose of supplying necessary maintenance and/or the installation. We reserve the right to remove hardware upon termination of the agreement

14. Non-Waiver of Rights. The failure of either party to insist upon strict performance of the terms and conditions of this Contract or to exercise any rights or remedies, shall not be construed as a waiver or its rights to assert any of same rights or to rely on any such terms or conditions at any time thereafter.

15. Governing Law and Venue. This Agreement

shall be governed by the laws of the State of Maryland without regard to its conflict of law provisions. The parties hereby submit and consent to the exclusive jurisdiction of Montgomery County, Maryland.

16. Attorney's Fees/Costs. In any action by a party to enforce its rights hereunder, the non-prevailing party shall pay the prevailing party's costs and expenses (including reasonable attorney's fees, collection costs & other arbitration costs).

17. Extraordinary Circumstances. Except for obligations of payment, neither party shall be liable for nonperformance caused by circumstances beyond their control, including but not limited to, work stoppages, floods, lightning and all other acts of God.

18. Breach. Either party may terminate this Agreement on breach by the other party of any material term or condition hereof 10 days after written notice is given to the breaching party by the non-breaching party if such breach is not cured.

19. Patent Indemnity. We will defend the you from, and pay for ultimate judgment or liability for infringement in the United States by equipment or operating system software ("Software") of any patent, trademark, trade secret, protected semiconductor chip mask work, or copyright if you promptly notify us in writing of any alleged infringement, allow us to defend, and cooperate. We are not responsible for any non-Earth Networks litigation expenses or settlements unless we agree to in writing. We are not liable for any infringement due to equipment or software being made or modified by you or requested specification or designs, or being used or sold in combination with equipment, software, or supplies not provided by us. IMPORTANT: WE MAKE NO OTHER EXPRESS OR IMPLIED WARRANTY OF NON-INFRINGEMENT AND HAS NO OTHER LIABILITY FOR INFRINGEMENT OR ANY DAMAGES THEREFROM. To avoid an infringement (even if not alleged) we may, at our option, at no charge to you, obtain a license to use, modify, or substitute an equivalent item for the infringing equipment or software.

20. Purchase Orders. Except for identifying goods, services or software ordered, prices and quantities, the terms and conditions contained or referenced in your purchase order or other ordering documents shall be of no force or effect.

21. Severability/Assignability. If any provision of this Agreement shall be held to be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and shall remain valid and enforceable. Neither party may assign this Agreement or any of its rights and obligations hereunder to any person, firm or corporation, without the prior written consent of the other, which consent shall not be unreasonably withheld, provided however that either party may assign this Agreement to a successor in interest as a result of a sale of all or substantially all of its stock or assets.

22. Entire Agreement. The terms and conditions contained or referenced in this Order Agreement are the complete and entire agreement between the parties respecting the subject matter of this Agreement.

Customer Signature and Date

CITY OF SOUTH DAYTONA, FLORIDA
STANDARD CONTRACT ADDENDUM

THIS STANDARD CONTRACT ADDENDUM is made and entered into this 27th day of May, 2021, by and between the CITY OF SOUTH DAYTONA, a Florida municipality, hereinafter referred to as the “City”, and Earth Networks, Inc., hereinafter referred to as “Contractor”, concerning that certain agreement entitled Outdoor Alerting System agreement dated May 27, 2021 (“Agreement”).

WITNESSETH:

WHEREAS, Section 119.0701, Fla. Stat., requires that certain public agency contracts must include certain statutorily required provisions concerning the contractor’s compliance for Florida’s Public Records Act; and

WHEREAS, Section 768.28, Fla. Stat., sets forth certain mandatory limitations on indemnification and liability for Florida public agencies; and

WHEREAS, Florida law requires that public agency contracts be subject to non-appropriation and thereby contingent upon appropriation during the public agency’s statutorily mandated annual budget approval process; and

WHEREAS, Section 448.095, Fla. Stat., imposes certain obligations on public agencies with regard to the use of the E-Verify system by their contractors and subcontractors.

NOW, THEREFORE, in consideration of the covenants set forth herein, the parties agree to this addendum as follows:

1. Amendment. This Addendum hereby amends and supplements the terms of the Agreement. In the event of a conflict between the terms of the Agreement and terms of the Addendum, the terms of the Addendum shall prevail.

2. Public Records Compliance. Contractor agrees that, to the extent that it may "act on behalf" of the City within the meaning of Section 119.0701(1)(a), Florida Statutes in providing its services under this Agreement, it shall:

- (a) Keep and maintain public records required by the public agency to perform the service.
- (b) Upon request from the public agency’s custodian of public records, provide the public agency with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in this chapter or as otherwise provided by law.
- (c) Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for

the duration of the contract term and following completion of the contract if the contractor does not transfer the records to the public agency.

- (d) Upon completion of the contract, transfer, at no cost, to the public agency all public records in possession of the contractor or keep and maintain public records required by the public agency to perform the service. If the contractor transfers all public records to the public agency upon completion of the contract, the contractor shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If the contractor keeps and maintains public records upon completion of the contract, the contractor shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the public agency, upon request from the City's custodian of public records, in a format that is compatible with the information technology systems of the City.
- (e) Pursuant to Section 119.0701(2)(a), Fla. Stat., **IF THE CONTRACTOR HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO THE CONTRACTOR'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS CONTRACT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT: James L. Gillis, Jr., City Manager, (386) 322-3014, lgillis@southdaytona.org, 1672 S. Ridgewood Ave., South Daytona, FL 32119.**

3. Public Records Compliance Indemnification. Contractor agrees to indemnify and hold the City harmless against any and all claims, damage awards, and causes of action arising from the contractor's failure to comply with the public records disclosure requirements of Section 119.07(1), Florida Statutes, or by contractor's failure to maintain public records that are exempt or confidential and exempt from the public records disclosure requirements, including, but not limited to, any third party claims or awards for attorneys' fees and costs arising therefrom. Contractor authorizes the public agency to seek declaratory, injunctive, or other appropriate relief against Contractor in Volusia County Circuit Court on an expedited basis to enforce the requirements of this section.

4. Compliance/Consistency with Section 768.28, Fla. Stat. Any indemnification or agreement to defend or hold harmless by City specified in the Agreement shall not be construed as a waiver of City's sovereign immunity, and shall be limited to such indemnification and liability limits consistent with the requirements of Section 768.28, Fla. Stat. and subject to the procedural requirements set forth therein. Any other purported indemnification by City in the Agreement in derogation hereof shall be void and of no force or effect.

5. Non-appropriation. City's performance and obligation to pay under this Agreement is contingent upon an appropriation during the City's annual budget approval process. If funds are not appropriated for a fiscal year, then the Contractor shall be notified as soon as is practical by memorandum from the City Manager or designee that funds have not been appropriated for continuation of the Agreement, and the Agreement shall expire at the end of the fiscal year for which funding has been appropriated. The termination of the Agreement at fiscal

year end shall be without penalty or expense to the City subject to the City paying all invoices for services rendered during the period the Agreement was funded by appropriations.

6. E-Verify Compliance. Contractor affirmatively states, under penalty of perjury, that in accordance with Section 448.095, Fla. Stat., Contractor is registered with and uses the E-Verify system to verify the work authorization status of all newly hired employees, that in accordance with such statute, Contractor requires from each of its subcontractors an affidavit stating that the subcontractor does not employ, contract with, or subcontract with an unauthorized alien, and that Contractor is otherwise in compliance with Sections 448.09 and 448.095, Fla. Stat.

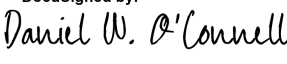
7. Venue and Jurisdiction. Notwithstanding any of other provision to the contrary, this Agreement and the parties' actions under this Agreement shall be governed by and construed under the laws of the state of Florida, without reference to conflict of law principles. As a material condition of this Agreement, each Party hereby irrevocably and unconditionally: i) consents to submit and does submit to the jurisdiction of the Circuit Court in and for Volusia County, Florida for any actions, suits or proceedings arising out of or relating to this Agreement.

8. Additional Terms. Notwithstanding any of other provision to the contrary, the parties agree as follows:

A. None.

IN WITNESS WHEREOF, the parties hereto have executed and delivered this instrument on the days and year indicated below and the signatories below to bind the parties set forth herein.

Contractor:

DocuSigned by:

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Print Name: Daniel W. O'Connell

Title: General Counsel

Company: Earth Networks, Inc.

City of South Daytona

Print Name: _____