

**AGREEMENT**

Between

**THE CITY OF CLEVELAND**

And

**63663**

**THE ACTIVE NETWORK, INC.**

THIS AGREEMENT for professional services (the "Agreement") is made this 4<sup>th</sup> day of November, 2008, between the City of Cleveland ("City"), a municipal corporation of the State of Ohio, through its Director of Finance ("Director"), pursuant to the authority of Ordinance No. 341-08, passed by the Council of the City of Cleveland on April 7, 2008, and The Active Network, Inc., a Delaware corporation ("Consultant") located at 10182 Telesis Court, Suite 300, San Diego, CA 92121, through its duly authorized officer.

**RECITALS**

1. The City desires to supplement the regularly employed staff of the several departments of the City in order to obtain licensed software and professional services to provide services necessary to configure, install the software, and provide professional services for the implementation of a 311 Citizen Call Center ("Project") for the City of Cleveland, Department of Finance, Division of Information Technology and Services in accordance with the City's Request for Proposals (the "RFP"), attached hereto as Exhibit "A," and incorporated herein.
2. Consultant has proposed by its proposal dated May 16, 2008 ("Consultant's Proposal"), attached hereto as Exhibit "B," to furnish such professional services.
3. The City finds Consultant's Proposal acceptable and desires to purchase from and engage Consultant to supplement the staff of the several departments of the City and to furnish the services necessary, in accordance with Consultant's Proposal and the terms, conditions and provisions contained herein.

In consideration of the foregoing, the payments and the mutual agreements contained herein, the parties agree as follows:

**ARTICLE I. SERVICES OF CONSULTANT**

**A. General**

By execution of this Agreement, the City accepts and Consultant agrees to be bound by Consultant's Proposal (Exhibit "B") subject to any changes or modification that may be made in this Agreement. Consultant is hereby engaged to supplement the regularly employed staff of the of the City in order to provide services necessary to configure, install the software to be licensed from Consultant, and provide professional services for the implementation of a 311 Call Center for the City of Cleveland, Department of Finance, Division of Information Technology and Services. The services consist of a phased approach. Phases 1 through 8 will begin immediately upon a signed contract with the City and will provide a proof of concept through a pilot followed by a "soft launch" for the roll-out of the 311 Call Center whereby the initial deployment will be limited to the City's telephone exchange operation and one of the 4 core departments identified in the City's RFP. Phase 9 through 13 is expected to begin immediately upon the completion of Phase 8 and will consist of the integration of the 3 core remaining departments into the Consultant's software system. Each of these Phases being more fully described this agreement and the exhibits.

**B. Meetings**

Consultant shall meet with the City and such other personnel as set forth in the RFP and the statement of work (the "Statement of Work") and will provide a written status report on a no less than a weekly basis, as required by the City.

**C. Project Personnel and Management**

Each party shall designate and maintain a person as its Project Manager who shall serve as the primary point of contact with the other party for communications and cooperation in performance of services and achievement of the City's objectives. The Consultant's Project Manager is required to be on-site during certain periods of the pilot phase and additional department phases as more fully described in the Statement of Work attached as Exhibit "C." Each Project Manager shall be fully knowledgeable in the Project goals and execution. Consultant shall employ for this contract a core team consisting of personnel fully qualified to complete the contracted services as set forth in Statement of Work. Consultant agrees not to change the staff without written approval of the Director of Finance or his/her designee, unless the staff change is outside the control of Consultant. Consultant may supplement the core team from time to time with such other persons whose particular skills are needed to complete the contracted services fully and timely. The Project will be managed by the City's Core Team as set forth in Statement of Work.

**ARTICLE II.**

**ASSISTANCE OF THE CITY**

The City shall assist Consultant to the extent possible as necessary during the term of this Agreement. The City shall designate a representative(s) from the City staff who shall have authority to transmit instructions, receive information and enunciate City policies and decisions in a timely manner. The City shall provide access to and copies of all known documents related to the project at no cost to Consultant. Office and working facilities shall be provided Consultant on a space available basis only.

**ARTICLE III.**

**TERM**

The term of this Agreement shall begin upon execution of this Agreement and shall terminate one year after. The City reserves the right to a one-year option to renew exercisable by the Director of Finance and subject to acceptance of such renewal by Consultant.

**ARTICLE IV.**

**COMPENSATION**

**A. Amount**

Consultant agrees that the total compensation for services provided under this Agreement shall not exceed Six Hundred Seventy-Six Thousand Three Hundred and Eighty Dollars (\$676,380.00).

**B. Payment**

Compensation to Consultant shall be paid on basis of the Project Payment Schedule attached to this Agreement as Exhibit G.

In accordance with the Schedule G, the City shall pay Consultant after submission to and approval by the Director, or his/her designee, a verified billing itemizing the actual time and effort expended to the date of the billing and the amount of the billing less any prior payments. If the billing is not acceptable, the City shall inform Consultant within ten (10) days of submission as to the reasons and the corrective actions necessary, if any, to qualify the billing for approval.

**C. Acceptance**

No approval given or payment made under this Agreement shall be conclusive evidence of the acceptance of performance under this Agreement

either wholly or partially, and no payment made under this Agreement shall be construed to be an acceptance of deficient or unsatisfactory work.

**D. Time of the Essence**

1. All provisions of this Agreement relating to time of performance are of the essence of this Agreement. Therefore, Consultant shall perform all services required by this Agreement within the schedule for completion contained in the Amended Work Plan or any Amended Work Plan as agreed to in writing by the City Project Manager.

2. Intentionally deleted.

**E. Additional Services**

If the Consultant performs special or additional services which are outside the scope of term of this Agreement, the City shall not be obligated to pay for such services until the following conditions have been satisfied:

1. Submittal by Consultant to the Director or his/her designee of an estimate of cost and description of such services;
2. Approval by the Council of the City of Cleveland, if required.
3. Prior approval of the City's Board of Control of the modifications of this Agreement by the addition of such services and additional compensation beyond the base fee, if any;
4. If the additional services increase the total compensation under this Article IV, certification of such additional cost by the City's Department of Finance;
5. Written modification of the Agreement; and
6. Written notification to Consultant by the Director or his/her designee directing the Consultant to perform such services.

Consultant shall not be required to commence services on any additional services outside of the scope of services until the above conditions have been satisfied. Payment of any amounts under this section shall not constitute approval or endorsement of Consultant's judgment or services provided under this section.

**ARTICLE V.                    ASSIGNMENT PROHIBITED; SUBCONSULTANTS**

Consultant may not assign, transfer, convey, sell or pledge its rights or interest in this Agreement or any part thereof, or any right or privilege created by this Agreement, nor shall any subconsultant commence performance of any part of the services included in this Agreement, without first obtaining written consent of the City, as expressed by resolution of its Board of Control. Upon any attempt by Consultant to do otherwise, this Agreement shall immediately terminate. The Board of Control for the City has already approved the following subconsultant:  
ITC – The Institute of Technology.

Subconsulting or an assignment, if permitted, shall not relieve Consultant of any of its obligations under this Agreement. Any merger, or acquisition or a transaction in which more than fifty percent of its voting securities are transferred made by Consultant after the date of this Agreement, even if resulting in a change of name of the Consultant shall not be considered to be an assignment, transfer, conveyance, sale or pledge of its rights or interest under this Agreement.

Consultant shall be and remain solely responsible to the City for the acts or faults of any subconsultant and of such subconsultant's officers, agents and employees. As a prior condition to approval of a subconsultant, Consultant shall file a conformed copy of the applicable subcontract with the City. Consultant and any subconsultant shall jointly and severally agree that the City of Cleveland is not obligated to pay or to be liable for the payment of any sums due any subconsultant.

**ARTICLE VI.                    RIGHT TO INSPECT; RIGHT TO AUDIT BOOKS**

Any authorized representative of the City shall, at all reasonable times, upon reasonable notice and during normal business hours, have the right to inspect and examine the drawings, specifications and other contract documents at Consultant's office during the period of their preparation. Further, any authorized representative of the City shall, at all reasonable times, upon reasonable notice and during normal business hours, have the right to audit, inspect and examine the Consultant's accounting books and financial records directly relating to the Project, including, but not limited to, records of hours expended, personnel utilized, and records of payments made to subconsultants.

**ARTICLE VII.                 TAXES**

The City represents that it is exempt from all Ohio sales, use and excise taxes, and the City is not obligated to pay any taxes. The City shall prepare and deliver to Consultant all necessary tax-exempt certificates or other evidence of tax exemption.

**ARTICLE VIII. INDEMNIFICATION**

Consultant shall indemnify and save harmless the City and its respective officers, agents and employees from and against all suits or claims that may be based upon any injury to persons or property arising out of an error, omission or negligent act of Consultant or its subcontractor; and Consultant shall, at its own expense, defend the City in all litigation, pay all attorneys' fees, damages, court costs and other actual expenses arising out of such litigation or claims incurred in connection therewith; and shall, at its own expense, satisfy and cause to be discharged such judgments as may be obtained against the City, or any of its officers, agents or employees, arising out of such litigation. Such indemnification shall survive the term of this Agreement.

**ARTICLE IX. CONSEQUENTIAL DAMAGES**

Neither party shall be liable to the other for any indirect, special, incidental or consequential damages of any kind, including loss of profits, revenues, or business, use of data, or interruption of business, even if the party shall have been advised of the possibility of such damages, or for any claim against the other by any third party.

**ARTICLE X. WARRANTIES AND CONTROLLING LAWS/REMEDIES FOR NON-COMPLIANCE**

Consultant warrants that:

- A. Consultant has the right to enter into this Agreement and the performance of services under this Agreement shall not cause Consultant to knowingly be in violation of any foreign or U.S. federal, state or local law or regulation or of any contractual agreement previously entered into by Consultant.
- B. Consultant shall not without the written consent of the City utilize any firm or person (other than a principal, officer or regular employee of Consultant) in connection with the performance of the work under this Agreement.
- C. Consultant warrants that the services and products provided shall be in accordance with the requirements of this Agreement.
- D. Consultant expressly warrants that providing the City with the services under this Agreement, it has no reasonable belief that such services will in any way invalidate licenses given to the City by various software vendors, nor do they breach the confidentiality of such software, documentation, or related materials.

E. Consultant agrees to comply with all applicable local, state and federal laws, regulations, and orders relating to the services, including but not limited to fair and equal employment opportunity practices and policies.

F. Intentionally deleted.

**ARTICLE XI. INSURANCE REQUIREMENT**

Consultant and each of its Subconsultants shall, at their expense and at all times during the performance of services, maintain commercial general and professional liability insurance insuring themselves against the indemnification obligations undertaken in Article VIII, Indemnification above. Consultant shall require its Subconsultants to obtain insurance and shall be responsible for enforcement of its Subconsultant's obligation to obtain insurance, at limits appropriate to the exposures of the Subconsultant's work to satisfy the requirements hereunder. The policies shall be with companies authorized to do business in Ohio and rated "A-" or above by A.M. Best Company or equivalent. The Consultant's comprehensive general liability insurance policy shall: be occurrence type; name the City as an additional insured; have limits of not less than One Million Dollars (\$1,000,000.00) for any one incident; and be primary with respect to Consultant's general liability, notwithstanding any other insurance covering the City. Consultant's insurance policy shall include valuable papers coverage in the amount of One Hundred Thousand Dollars (\$100,000.00). The Consultant's professional liability insurance shall have limits of not less than Five Million Dollars (\$5,000,000.00) for any one incident, and if not written on an occurrence basis, shall be maintained for a period of not less than two (2) years following the completion of the Work.

The following special hazards shall be covered during the life of this contract by rider or riders to the policy or policies above required, or by separate policies of insurance in amounts as follows:

Business Automobile Liability insurance to cover each automobile, truck or other vehicle used in the performance of the contract in an amount not less than the combined limit of \$1,000,000.00 for bodily injury and property damage per occurrence.

Coverage for any and all damage to the Division of Information Technology's existing information technology system, including but not limited to, coverage for damage to the Division's local and wide

area network and loss of data integrity in an amount not less than \$1,000,000.00 per occurrence.

**A. Notice of Cancellation**

The insurance policy or policies, except for the professional policy, provided hereunder shall provide as follows:

“The Company agrees that ten (10) days prior to cancellation, restriction or material change in coverage or non-renewal of the insurance afforded by this policy, with respect to the Agreement involved, written notice will be sent to the certificate holder.”

The professional policy provided hereunder shall provide as follows:

“The Company agrees that ten (10) days prior to cancellation, non-renewal or reduction in limit by endorsement, of the insurance afforded by this policy, with respect to the Agreement involved, written notice will be sent to the certificate holder.”

In addition to the notification required of Consultant's insurance company, Consultant shall notify the City, in writing, by certified mail to the Director of Law of the City of Cleveland, immediately upon learning of cancellation or reduction of the insurance afforded by its policy.

**B. Copy of Insurance Policy**

Intentionally deleted.

**C. Certificate of Insurance**

Upon execution of this Agreement Consultant shall submit to the City a certificate(s) of insurance with respect to such policy or policies. Such certificate(s) shall contain the notification provision set forth in paragraph "A" above. If the additional insured endorsement required above is not available at the Agreement execution date, Consultant shall submit to the City a notation of the endorsement together with either a Binder or an Advice of Insurance with respect to such endorsement. Consultant shall also provide a copy of the endorsement naming the City as an additional insured under Consultant's commercial general liability coverage. The endorsement shall be submitted no later than thirty (30) days after the execution date hereof.



**D. Policy**

The policy or policies limit(s), certificate(s) required in paragraph C above shall, as to form, coverage and carrier, be satisfactory to the Director of Law. If at any time, the previously approved coverage or carrier on any policy becomes insufficient as determined by the Director of Law, or if the minimum limits become impaired by claims so that the amounts available are under the minimum amounts required by this Agreement, the Director of Law may require that Consultant shall, forthwith, provide a new policy meeting the requirements of the Director of Law.

**E. Limit of Liability**

The limits of insurance specified above shall in no way constitute the upper limits of liability for which Consultant is responsible under Article VIII, Indemnification above. However, if, for any other reason, Consultant becomes liable to City or any other party for direct or any other damages for any cause whatsoever, and regardless of the form of action (in contract or tort or otherwise), then the aggregate liability of Consultant to City and all other parties in connection with the products and services will be limited to an amount equal to twice the amount paid to Consultant hereunder, during the year giving rise to the liability. In any case City may not bring or initiate any action or proceeding against Consultant arising out of this Agreement or relating to any product or service provided hereunder more than two years after the relevant cause of action has arisen.

**ARTICLE XII.**

**STATE INDUSTRIAL COMPENSATION**

Consultant shall be required at all times during the term of this Agreement to subscribe to and comply with the Workers Compensation laws of the applicable state of employment and pay such premiums as may be required thereunder and to save the City harmless from any and all liability from or under said act. It shall also furnish, at the time of delivery of the Agreement and at such other times as may be requested by the City, a copy of the official certificate or receipt showing the payments referred to above.

**ARTICLE XIII.**

**SOCIAL SECURITY ACT**

Consultant shall be and remain an independent contractor with respect to all services performed under this Agreement and agrees to and does hereby accept full and exclusive liability for the payment of any and all contributions or taxes for social security, unemployment benefits, pensions and annuities now or hereafter imposed under any state or federal laws which are measured by the wages, salaries or other remuneration paid to persons employed by Consultant on

work performed under the terms of this Agreement as may be now or hereafter imposed under any state or federal law, and further agrees to obey all lawful rules and regulations and to meet all lawful requirements which are now or may be issued or promulgated under said respective laws by any duly authorized state or federal officials; and said Consultant also agrees to indemnify and save harmless the City of Cleveland from any such contributions or taxes or liability therefore.

**ARTICLE XIV. INTEREST OF CONSULTANT**

Consultant hereby certifies that beginning on the date the contract is awarded and extending until one year following conclusion of the contract, all persons identified in Ohio Revised Code Sections 3517.13(1)(3) and 3517.13(J)(3), as applicable, are in compliance with Ohio Revised Code Sections 3517.13(1)(1) and 3517.13(J)(1).

**ARTICLE XV. DEFAULT AND REMEDIES**

**A. Default**

A party may declare the other party to be in default of this Agreement upon the happening of any of the following events:

1. If a party fails to observe or perform any of the covenants or agreements to be observed or performed by it under the terms of this Agreement and such failure continues for a period of ten (10) business days after the defaulting party's receipt of written notice thereof from the non-defaulting party;
2. The filing, execution or occurrence of: (i) a petition or other proceeding by, or a finding against, Consultant for its dissolution, reorganization or liquidation, (ii) a petition in bankruptcy by Consultant; (iii) an adjudication of Consultant as bankrupt or insolvent; (iv) an assignment or petition for assignment for the benefit of creditors; or
3. If Consultant abandons or discontinues its operations for the City except when such abandonment or discontinuance is caused by fire, earthquake, war, strike or other circumstance beyond its control.
4. In the event Consultant defaults under section 2 above, City shall be entitled to receive a copy of the then current source codes to the licensed software provided there is a valid software maintenance agreement in place.

**B. Remedies**

Upon the happening of any one or more of the events as set forth in paragraph A of this Article, or upon any other default or breach of this Agreement, the non-defaulting party may, at its option, exercise concurrently or successively any one or more of the following rights and remedies:

1. Without waiving such default, to pay any sum required under this Agreement to be paid by Consultant to others than the City and which Consultant has failed to pay under the terms and conditions of this Agreement. Consultant shall repay to the City, on demand, any amount so paid by the City, with interest thereon at eight percent (8%) per annum from the date of such payment and all actual expenses connected therewith including all actual costs, actual damages, attorneys' fees and penalties;
2. Enjoin any breach or threatened breach by either party of any covenants, agreements, terms, provisions or conditions of this Agreement;
3. Sue for the performance of any obligation, promise or agreement devolving upon the defaulting party for performance or for direct damages for the nonperformance of this Agreement, all without terminating this Agreement; and/or
4. Terminate this Agreement.

**C. Rights and Remedies Not Exclusive**

All rights and remedies granted to either party herein and any other rights and remedies which the a party may have at law and/or in equity are hereby declared to be cumulative and not exclusive and the fact that the City may have exercised any remedy without terminating this Agreement shall not impair the City's rights to later terminate or to exercise any other remedy herein granted or to which it may be otherwise entitled.

**ARTICLE XVI. CANCELLATION**

The City may cancel this Agreement at any time with cause upon thirty (30) days written notice to Consultant of such intent when either the progress or results achieved under this Agreement are unacceptable to the City.

If this Agreement is canceled by the City prior to completion, Consultant, within ten (10) days, shall submit a certified final progress report of the percentage of work completed by the date of cancellation. The City shall pay Consultant for the work completed as certified in this statement; however, there shall be no reimbursement to the City that portion of the total fees paid allocated in Exhibit D as license fees. Notwithstanding any other provision of this Agreement, including the exhibits, all records, documents, materials and working papers prepared as part of the work under this Agreement shall become and remain the property of the City. Upon any such cancellation, Consultant shall turn over to the City all records, documents, working papers, computer disks of data and other materials which would be necessary, in the judgment of the City, to maintain continuity in progress of the work by another consultant but in no event would Consultant be required to turn over information containing trade secrets or protected intellectual property.

**ARTICLE XVII. NOTICE AND PAYMENTS**

All notices which may be proper or necessary to be served and payments to be made under this Agreement shall be sent by regular mail, postage prepaid, to the following addressees or to such other address as either party may hereafter designate for such purpose.

To the City:                    Director of Finance  
601 E. Lakeside Avenue  
Cleveland, Ohio 44114

To Consultant:                General Counsel  
Active Network  
10182 Telesis Court, Suite 100  
San Diego, CA 92121

**ARTICLE XVIII. EQUAL OPPORTUNITY**

This Agreement is a "contract", and Consultant is a "contractor" within the meaning of Chapter 187 of the Codified Ordinances of Cleveland, Ohio 1976. During the term, Consultant shall comply with all terms, conditions and requirements imposed on a "contractor" in the Equal Opportunity Clause, Section 187.11 C.O., attached as Exhibit "F" and made a part of this Agreement. A copy of such Clause shall be made a part of every subcontract or agreement entered into for goods or services, and shall be binding on all persons, firms and corporations with whom Consultant may deal.

**ARTICLE XIV. NONSOLICITATION**

During the term of the Contract Documents and for twelve (12) months after its expiration or termination, neither party will, either directly or indirectly, solicit for employment any employee of the other party who was assigned to the performance of the party's obligations under the Contract Documents or spent a substantial amount of their time in direct support the Contract Documents, unless the hiring party obtains the written consent of the other party. The foregoing restriction will not apply to general advertisements or solicitations. During such period, the City will not employ or contract (directly or indirectly) for the services of any of Consultant's personnel (other than through Consultant) for any project on which Consultant is engaged to perform services for the City.

#### **ARTICLE XV.**

#### **MISCELLANEOUS**

A. Consultant and City agree that no representation or warranties of any type shall be binding, unless expressly authorized in writing herein.

B. Nothing contained in this Agreement shall be deemed to constitute the City and Consultant as partners in a partnership or joint venture for any purpose whatsoever.

C. Both the City and Consultant agree to make every reasonable effort to resolve disputes as set forth in the City's RFP.

D. Both the City and Consultant agree that laws of the State of Ohio shall govern the interpretation of this agreement.

E. All terms and words used in this Agreement, regardless of the number and gender in which they are used, shall be deemed and construed to include any other number singular or plural, and any other gender, masculine, feminine or neuter, as the context or sense of this Agreement or any paragraph or clause herein may require, the same as if such words have been fully and properly written in the number and gender.

F. The headings of sections and paragraphs, if any, to the extent used herein are used for reference only, and in no way define, limit or describe the scope or intent of any provision of this Agreement.

G. In the event that any term(s) or provision(s) of this Agreement shall be held invalid, illegal or unenforceable, for any reason, by any court of competent jurisdiction, such invalidity, illegality or unenforceability should not affect any other term or provision of this Agreement and this Agreement shall be interpreted and construed as if such term(s) or provision(s) had never been contained herein, to the extent the same has been held to be invalid, illegal or unenforceable.

H. This Agreement may be executed in any number of counterparts, each of which, when so executed and delivered, shall be deemed an original, but such counterparts together shall constitute but one and the same instrument.

I. This Agreement may be amended upon mutual, written agreement of the parties.

J. This Agreement and the attached exhibits are intended to be read together as one cohesive document, however, in the event of any conflict of terms, the following order of precedence shall govern: 1) Ordinance No. 341-08; 2) the Equal Opportunity Clause; 3) the body of this Cover Agreement; 4) the Statement of Work; 5) the RFP; 6) Consultant's Fee Proposal; 7) Consultant's Product and Services Agreement and 8) Consultant's Proposal

The following attached documents are incorporated with and made a part of this Agreement:

1. Exhibit "A" – City's Request for Proposal
2. Exhibit "B" – Consultant's Proposal
3. Exhibit "C" – Consultant's Statement of Work
4. Exhibit "D" – Consultant's Fee Proposal
5. Exhibit "E" – Consultant's Product and Services Agreement
6. Exhibit "F" – Equal Opportunity Clause
7. Exhibit "G" – Project Payment Schedule
8. Ordinance No. 341-08

The parties have caused this instrument to be executed as of the date and year first above written.

**CITY OF CLEVELAND**

By: *Sharon Dumas*

Sharon Dumas  
Director of Finance

**THE ACTIVE NETWORK, INC.**

By: *[Signature]*  
Title: Chief Operating Officer

Social Security Numbers and Federal Identification Numbers have been redacted under State ex rel. Beacon Journal Publishing Co. v. Akron (1970), 70 Ohio St.3d 605.

Taxpayer Identification Number \_\_\_\_\_

The legal form and correctness of the within instrument are hereby approved.

**ROBERT J. TRIOZZI**  
Director of Law

By: *Steven Beeler*  
Steven Beeler  
Assistant Director of Law

Date: 11-14-05

The sum of \$676,300 Dollars required for this Contract was on Nov 12, 2005, and is at this date in the City Treasury or in process of collection, to the credit of 69400-157100-2100791 Fund and not appropriated for any other purpose.

*[Signature]*  
Director of Finance  
Entered by *[Signature]*  
Commissioner of Accounts  
*[Signature]*  
Appropriation Clerk