

**INTERGOVERNMENTAL AGREEMENT
BETWEEN
THE CITY OF MESA AND PHOENIX MESA GATEWAY AIRPORT
AUTHORITY
FOR
INFORMATION TECHNOLOGY AND RELATED SERVICES**

This Agreement is made and entered into this 1st day of October, 2016 (“Execution Date”), by and between the City of Mesa, a municipal corporation of the State of Arizona (“Mesa”) and Phoenix Mesa Gateway Airport Authority, an Arizona joint powers airport authority (“PMGAA”) (“Agreement”). Mesa and PMGAA are each a “Party” and collectively, they constitute the “Parties.”

RECITALS:

WHEREAS, Mesa and PMGAA own and operate information technology consisting, in part, of data and information, infrastructure and equipment (including, without limitation, fiber optic cable and conduit), and hardware and software (collectively, “IT”), to provide services and carry out their respective missions;

WHEREAS, Mesa and PMGAA must periodically purchase IT and related services to install, operate and maintain their IT infrastructure;

WHEREAS, Mesa and PMGAA wish to enter into this Agreement for the cooperative use of Mesa and PMGAA IT and purchase of IT and related services to reduce their operations and capital costs;

WHEREAS, Mesa and PMGAA are authorized to enter into intergovernmental agreements for services or for the exercise of joint or common powers, pursuant to Arizona Revised Statutes §§ 11-951, *et. seq.*;

NOW, THEREFORE, in consideration of the promises, mutual covenants, and agreements contained herein, the sufficiency of which the Parties agree, the Parties agree as follows:

AGREEMENT:

Section 1. Term and Termination of Agreement

1.1 Term. This Agreement shall begin October 1, 2016, and end October 1, 2021, unless terminated or extended as provided herein (“Term”).

1.2 Termination.

1.2.1 Termination For Convenience. Mesa or PMGAA may terminate this Agreement by delivering written notice to the other Party. Such termination shall be effective on the date which is 30 days after receipt of such notice by the non-terminating Party.

1.2.2 Non-Appropriation. If either Party's performance under this Agreement depends upon an appropriation of funds by their respective governing bodies, and if either Party's governing body fails to appropriate the funds necessary for performance, the affected Party may provide written notice of this failure to the other Party and cancel this Agreement. Such written notice shall specify the effective date of cancellation. The Parties shall endeavor to give the other Party as much advance notice as possible of a cancellation for non-appropriation.

1.2.3 Conflict of Interest. This Agreement shall be subject to cancellation for conflict of interest pursuant to A.R.S. §38-511.

1.3 Extension. This Agreement may be extended for two subsequent terms of two (2) years each by mutual written agreement of the Parties. Such notice must be provided to the other Party not less than thirty (30) days prior to expiration of the current term. If both Parties agree to extend the extension, the Parties will confirm such extension by written correspondence.

1.4 Post-Termination.

1.4.1 Upon termination of this Agreement, each Party shall continue to own (i) all IT that the Party owned prior to this Agreement and shared with the other Party during the term of this Agreement, and (ii) all IT that was acquired by such Party pursuant to this Agreement and a Supplemental Agreement.

1.4.2 In the event that either Party has developed what is commonly referred to as "add ons", enhancements or improvements to that Party's own IT (individually and collectively, the "Add ons"), such Party shall possess all ownership rights to such Ad ons and the other Party agrees that it shall not attempt to exercise any rights at law, equity or the like, claiming any ownership interest in or financial remuneration or damages related to or coming from the Ad ons. In the event a Party has developed Add ons to the other Party's IT, _____ shall possess all ownership rights to such Ad ons and the other Party agrees that it shall not attempt to exercise any rights at law, equity or the like, claiming any ownership interest in or financial remuneration or damages related to or coming from the Ad ons. Upon request by the other Party, the Party claiming ownership of any Add ons, shall produce commercially reasonable

documentation to substantiate such claims of ownership. After production of such commercially reasonable documentation, if the Parties still disagree as to ownership of the Add ons, the Parties shall retain a mutually agreeable arbitrator who has substantiated intellectual property legal dispute experience to render a binding decision upon the Parties regarding ownership of the Ad ons in dispute.

- 1.4.3 Upon termination of this Agreement, the Party that owns IT that is shared with the other Party shall cooperate with and give adequate time for the other Party to acquire a suitable replacement, remove any shared portion including system or application, and/or work with the other Party to create and implement an action plan for the successful separation for the IT that will no longer be available to it. During the post-termination period, the Party that owns the IT will allow the other Party to continue to use the IT as necessary to carry on its operations and protect its stored electronic data and such Party expressly waives any rights, causes of action, damages or the like at law or in equity against the Party that does not own the IT for any allegations arising from the continued use, including but not limited to breach of contract; patent, copyright or trademark infringement or any damages alleged to have arisen therefrom .

Section 2. Joint Acquisition and Use of Surplus IT and Related Services

- 2.1 Mesa and PMGAA may jointly acquire or use their IT and related-services to the extent that either or both have IT or related-services available to share with the other Party. Mesa and PMGAA agree that they will explore and, if feasible, may acquire IT and related services for the subsequent IT activities. Such activities shall be confirmed in a writing signed by both Parties. The following are listed as examples only and are not intended to limit the potential IT or related services contemplated by this Agreement.

- 2.1.1 Cooperative purchasing of IT and related services.
- 2.1.2 Joint use of IT facilities and cooperative location of equipment.
- 2.1.3 Joint installation and use of connectivity and communications equipment, such as fiber optic cable.
- 2.1.4 Cooperative or shared services such as maintenance of equipment.
- 2.1.5 Joint utilization of systems or applications.
- 2.1.6 Shared research and development of IT and its cost efficient use.
- 2.1.7 Shared staff resources.

- 2.1.8 Cooperative or shared support including the potential creation of operating procedures.

Section 3. Supplemental Agreements

- 3.1 For each joint activity, Mesa and PMGAA will enter into a Supplemental Agreement, which shall be governed by and incorporate by reference all terms and conditions of this Agreement, and use either Exhibit A – IT Service Task Order, or Exhibit B – IT Shared Infrastructure Agreement attached hereto.
- 3.2 Supplemental Agreements that will require expenditures by either Party will include a budget and allocation of anticipated costs to the Parties. A Party shall not be obligated to pay costs in excess of its anticipated allocation without its written approval.
- 3.3 Supplemental Agreements that contemplate acquisition of IT will specify which Party will own the IT equipment during the term of this Agreement and after termination of this Agreement and whether a Party will be entitled to financial compensation if, after contributing to the acquisition of IT, the Party will lose ownership or use of the IT after termination of this Agreement.
- 3.4 All Supplemental Agreements made pursuant hereto will specify the obligations of each Party, and make reference to this Agreement. Depending on the nature of the obligations undertaken in a Supplemental Agreement, the Supplemental Agreement may require approval of the Mesa City Council or the PMGAA Board of Directors.
- 3.5 IT activities for shared services may be documented with an IT Service Task Order that incorporates the provisions in Exhibit A.
- 3.6 IT activities for shared use of IT equipment may be documented with an IT Shared Infrastructure Agreement that incorporates the provisions in Exhibit B.
- 3.7 If the Parties enter into a joint activity that involves access to confidential information, the Supplement Agreement concerning such joint activity will contain provisions to protect confidential information from disclosure or dissemination.

Section 4. Joint IT Activity Project Management and Records

- 4.1 Management. For each joint IT activity, Mesa and PMGAA will manage the project according to the following procedures:
- 4.1.1 Mesa and PMGAA shall designate in writing one person as the project leader, who will be an employee of Mesa or PMGAA and will be responsible for compliance with all procedures for the project (“Project Leader”). Any subsequent changes in the Project Leader

must be submitted in writing to the other Party, prior to effectuating a change in Project Leader.

- 4.1.2 The employer of the Project Leader will act as fiscal agent for the project.
 - 4.1.3 The Project Leader shall schedule periodic meetings to review progress of the project and any other project matters with representatives of the Parties.
 - 4.1.4 The Project Leader shall secure approval of the Parties including governing body approval(s), if necessary, for any expenditure in excess of the budget and for cost that varies from the allocation of costs specified in any Supplemental Agreement, as defined herein.
 - 4.1.5 The Project Leader shall create and deliver to the Parties a periodic report that tracks the project's performance and financial status of the project for both Parties' use. The report should contain all relevant project information, such as the project's scope, timeline, budget, including allocation of costs between the Parties, and current status of the project.
 - 4.1.6 The Project Leader shall annually create and deliver to the Parties an annual report summarizing the project, including a financial statement and expense report.
 - 4.1.7 When the project has ended, the Project Leader shall create and deliver to the Parties for approval a final report. The final report shall include a financial statement with a summary of allocated costs between the Parties and the disposition of all IT equipment and other assets. The project will end when the Parties indicate their approval of the final report.
- 4.2 Records. Each Party shall maintain accurate and complete accounting records and vouchers in support of all invoicing to the other Party in accordance with generally accepted accounting principles. Either Party, or its audit representatives, shall have the right at any reasonable time to inspect, copy, and audit the records, invoices, and their source documents. Said records shall be available for each Party's inspection and audit for a period of three years following the expiration, termination, or cancellation of this Agreement.

Section 5. Indemnification and Insurance

- 5.1 Indemnification. Each Party (the “Indemnifying Party”) shall, to the extent permitted by law, defend, indemnify, and hold harmless, jointly and severally, the other Party and each official, agent, or employee thereof (any such person being referred to herein as an “Indemnified Party”). This indemnity applies to any and all losses, claims, actions, judgments, damages, expenses (including reasonable attorney fees), or liabilities (“Liabilities”), joint or several, which the Indemnified Party may be subject to in law or in equity, but only to the extent that such Liabilities arise out of or are based upon the performance of this Agreement or a Supplemental Agreement. Where personal injury, death, or loss of or damage to property is the result of the joint negligence or misconduct of the Parties, each Party’s duty of indemnification will be in proportion to its allocable share of such joint negligence or misconduct.
- 5.2 Insurance. Each Party, at its cost, shall maintain comprehensive general liability insurance with limits of not less than \$2,000,000 per occurrence, insuring against all liability of said Party and its authorized representatives arising out of and in connection with said Party’s use or occupancy of the facilities. Said insurance shall include broad form contractual liability covering, without limitation, the liability assumed under the indemnification provisions of this Agreement. If the policy is to be written with an annual aggregate limit, that limit shall be not less than \$2,000,000. Comprehensive general liability shall name the other Party to this Agreement as an additional insured, a copy of which shall be provided at Agreement execution and thereafter to the either Party upon request. All insurance policies shall provide that the policies cannot be canceled, not renewed, or limited in scope of coverage or limits until and unless thirty (30) calendar days’ prior notice is given to the other Party.
- 5.3 Self-Insurance. Notwithstanding the provisions of Section 5.2, the obligations of Mesa and PMGAA, with respect to the insurance specified in this Section 5, may be satisfied by the existence of a self-insurance program containing the same coverage and elements specified herein with respect to third Party insurance.
- 5.4 Worker’s Compensation. Each Party shall maintain worker’s compensation insurance as required by statute and employer’s liability insurance in an amount not less than \$1,000,000 per occurrence, which may consist of self-insurance.

Section 6. Notices

- 6.1 Notices. All notices given, or to be given, by either Party to the other shall be given in writing, (i) by registered or certified mail, (ii) or overnight carrier (e.g. Federal Express), and shall be addressed to the Parties at the addresses hereinafter set forth, or at such other address as the Parties may designate by written notice. All notices if sent by certified or registered mail shall be deemed received upon actual receipt or (3) business days after deposit in the United States mail; if sent via overnight carrier, receipt shall be deemed effective (1) day after the sending thereof. Notices shall be addressed as follows:

To Mesa:

Joseph Sugihara
Assistant CIO
City of Mesa - ITD
City of Mesa
P.O. Box 1466
Mesa AZ 85211-1466

To PMGAA:

Doug Wirthgen
IT Director
PMGAA
5835 S. Sossaman
Mesa, AZ 85212

Section 7. General Provisions

- 7.1 Compliance with Federal and State Immigration Laws. Each Party agrees to comply with the Immigration Reform and Control Act of 1986 (IRCA), as amended, in performance under this Agreement and to permit the other Party or its agents to inspect personnel records to verify such compliance. The Parties shall ensure and keep appropriate records to demonstrate that all employees have a legal right to live and work in the United States.

Under the provisions of A.R.S. §41-4401, as amended, each Party hereby warrants to the other that it and each of its subcontractors ("Subcontractors") will comply with, and are contractually obligated to comply with, all federal immigration laws and regulations that relate to their employees and A.R.S. §23-214(A), as amended, (hereinafter "Contractor Immigration Warranty").

A breach of the Contractor Immigration Warranty shall constitute a material breach of this Agreement and shall subject the breaching Party to penalties up to and including termination of this Agreement at the sole discretion of the non-breaching Party.

Each Party retains the legal right to inspect the papers of the other Party or Subcontractor employee who works on this Agreement to ensure that the other Party or its Subcontractor is complying with the Contractor Immigration Warranty. Each Party agrees to assist the other Party in regard to any such inspections.

Either Party may, at its sole discretion, conduct random verification of the employment records of the other Party and any of Subcontractors to ensure compliance with Contractor Immigration Warranty. Each Party agrees to assist the other Party in regard to any random verification performed.

Neither Party nor any of its Subcontractors shall be deemed to have materially breached the Contractor Immigration Warranty if the Party or its Subcontractor establishes that it has complied with the employment verification provisions prescribed by sections 274A and 274B of the Federal Immigration and Nationality Act and the E-Verify requirements prescribed by A.R.S. §23-214, Subsection A, as amended,

- 7.2 Entire Agreement, Amendments. This Agreement represents the entire Agreement of the Parties with respect to its subject matter. This Agreement shall not be changed, modified, or rescinded, except through a writing signed by both Parties.
- 7.3 Governing Law, Forum. It is mutually understood and agreed that this Agreement will be governed by the laws of the State of Arizona, both as to interpretation and performance. Any action at law, suit in equity or judicial proceeding for the enforcement of this Agreement, or any provision thereof, will be instituted only in the courts of the State of Arizona.
- 7.4 Headings Not Controlling. Headings used in this Agreement are intended for convenience or reference only and shall not control or affect the meaning or construction of any provision of this Agreement.
- 7.5 Severability. In the event any term or provision of this Agreement is held to be invalid or unenforceable, the validity of the other provisions shall not be affected, and the Agreement shall be construed and enforced as if it did not contain the particular term or provision that is deemed to be invalid or unenforceable.
- 7.6 Nondiscrimination. Mesa and PMGAA agree to comply with all provisions of applicable federal, state, and local laws related to nondiscrimination, equal employment opportunity, and the Americans with Disabilities Act.
- 7.7 No Assignment. Neither Party shall assign or otherwise transfer this Agreement or its rights or duties hereunder without the prior written consent of the other Party. Any such assignment or other transfer, either voluntary or by operation of law, shall be void.
- 7.8 Approval by Parties. Before this Agreement shall become effective and binding upon the Parties, the appropriate governing authorities of each Party must approve it. In the event that such appropriate authority fails or refuses to approve this Agreement, it shall be null and void with no effect whatsoever.

- 7.9 Surviving Provisions. The obligations under Section 5.1 (Indemnification), Section 7.2 (Entire Agreement, Amendments), Section 7.3 (Governing Law, Forum), Section 7.4 (Headings Not Controlling), Section 7.5 (Severability), this Section 7.9 (Surviving Provisions), and any other Section, which reasonably should survive, shall survive expiration or other termination of this Agreement.
- 7.10 Force Majeure. Either Party shall be excused for delay or failure to perform its obligations under this Agreement, in whole or in part, when and to the extent that such delay or failure is a result of causes beyond the control and without the fault or negligence of the Party unable to perform. Such causes include, without limitation, acts of God, acts of the public enemy, acts of the United States government, fires, floods, epidemics, quarantine restrictions, or embargoes.

(Signatures on the following page)

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date first written above.

City of Mesa

Phoenix Mesa Gateway Airport Authority

By: _____
Christopher J. Brady
Its: City Manager

By: _____
J. Brian O'Neill, A.A.E.
Its: Interim Executive Director/CEO

STATE OF ARIZONA)
) ss.
County of Maricopa)

On this, the ____ day of _____, 2016, before me, Christopher J. Brady, City Manager of the City of Mesa, executed the foregoing document for the purpose therein confirmed.

Notary Public

My Commission Expires:

STATE OF ARIZONA)
) ss.
County of Maricopa)

On this, the ____ day of _____, 2016, before me, J. Brian O'Neill, Interim Executive Director/CEO PMGAA, executed the foregoing document for the purpose therein confirmed.

Notary Public

My Commission Expires:

PMGAA ATTORNEY DETERMINATION

The intergovernmental agreement between the City of Mesa, Arizona, and PMGAA, entitled Information Technology and Related Services, has been reviewed pursuant to A.R.S. § 11-952 by the undersigned PMGAA attorney who has determined that it is in proper form and is within the powers and authority granted under the laws of the State of Arizona to both Parties to the Agreement represented by the PMGAA attorney.

DATED this ____ day of _____, 2016

PMGAA Attorney

CITY ATTORNEY DETERMINATION

The intergovernmental agreement between the City of Mesa, Arizona, and PMGAA, entitled Information Technology and Related Services, has been reviewed pursuant to A.R.S. § 11-952 by the undersigned City of Mesa attorney who has determined that it is in proper form and is within the powers and authority granted under the laws of the State of Arizona to both Parties to the Agreement represented by the City of Mesa attorney.

DATED this ____ day of _____, 2016

City of Mesa Attorney