

MCDANIEL SUPPLY COMPANY COMMISSARY SERVICE AGREEMENT

THIS COMMISSARY SERVICE AGREEMENT (the “**Agreement**”), is dated effective as of the 17th day of May, 20 16 (the “**Effective Date**”), by and between Effingham County Board of Commissioners, a political subdivision of the State of Georgia (the “**Principal**”), for the Effingham County Prison, located at 321 Hwy 119 South, Springfield, Georgia 31329 (the “**Facility**”), and McDaniel Supply Company, Inc., a Georgia corporation with a principal office located at 1275 East Cherry Street, Jesup, Georgia, 31546 (“**MSC**”). Each of the Principal and MSC is a “**Party**” to this Agreement and shall collectively be the “**Parties.**”

WHEREAS, MSC is in the business of providing commissary services and technologies to inmates on behalf of, and as an agent to, city, county, and state correctional facilities; and

WHEREAS, the Principal desires to avail itself of the commissary services offered by MSC for the purpose of providing materials and supplies to state or county inmates in accordance with the “**Legal Authority**” as applicable to the Facility provided in Section 13 below;

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and for the mutual benefits to be derived from this Agreement, the Parties, each intending to be legally bound, hereby agree as follows.

- 1. Appointment.** The Principal hereby appoints MSC as its exclusive supplier of commissary products and services for inmates of the Facility and MSC accepts and assumes such appointment.
- 2. Scope of Service.** MSC hereby agrees to perform all services (collectively, the “**Services**”) in accordance with the terms stated in the Request for Proposals No. 16-16-002 dated March 1, 2016 set forth in **Exhibit A**, attached hereto, and incorporated herein by reference (the “**Solicitation**”).
- 3. Premises.** The Principal hereby grants to MSC an exclusive, royalty-free, non-sublicensable license, which is irrevocable for the Term of this Agreement, to such space within the Facility necessary to allow MSC to provide Services in accordance with the Solicitation (the “**Premises**”). The Principal shall ensure that the Premises meet all applicable federal, state, and local laws, codes, and ordinances applicable to occupation of the Premises by a commercial operation including maintenance and repair of all structural elements thereof. The Principal covenants and agrees with MSC that so long as MSC keeps and performs all the covenants and conditions to be kept and performed by MSC under this Agreement, MSC shall have quiet, undisturbed, and continued possession of the Premises, free from all claims of any kind, nature,

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or description. The Principal shall provide MSC with sufficient and reliable security services for the Premises and utility services (including water, sewage, electricity, gas (as necessary), HVAC, and telephone within the Premises) (collectively, the “**Utilities**”), and shall maintain the Premises in good repair. The Principal shall reimburse MSC for any costs or expenses incurred by MSC to maintain or repair the Premises.

4. **Equipment.**

A. *MSC Obligations.* During the Term of this Agreement and in accordance with the Solicitation, MSC agrees:

- (i) to install all necessary equipment, materials, supplies, tools, labor, insurance, accessories and services necessary to provide the Services as well as any software to support such equipment (the “**Equipment**”);
- (ii) to provide standard maintenance, repair, or replacement of the Equipment, including on-site support during business hours, 24/7 telephone support, custom enhancements, and periodic updates as necessary to provide the Services, but not including custom programming services, training, or troubleshooting for any hardware or equipment not owned by MSC; and
- (iii) to maintain insurance in accordance with the guidelines provided in the Solicitation or, if none, in customary, commercially reasonable amounts.

B. *Principal Obligations.* During the Term of this Agreement and in accordance with the Solicitation, the Principal agrees:

- (i) to maintain reasonable security against unauthorized use of or damage to the Equipment and to discontinue use and notify MSC promptly in the event of any irregularities in the functioning of the Equipment. In the event that the Equipment suffers damage caused by an inmate of the Facility, said inmate’s account shall be charged for all expenses related to its repair; and
- (ii) to implement and maintain security measures with respect to any software installed by MSC (the “**Software**”) that effectively restricts access to the Software only to authorized users, and protects the Software from unauthorized use, alteration, access, publication, and distribution. In no event shall such security measures be less restrictive than those the Principal employs to safeguard its most confidential information. In the event of an actual or suspected breach of such security measures, the Principal shall notify MSC within 24 hours.

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C. *Proprietary Rights.* MSC retains all rights, title, and interest in the Equipment, including but not limited to, copyrights, database rights, and other neighboring rights, patents, trade secrets, trademarks, service marks, design rights, proprietary information rights and other intellectual property rights as may currently exist or may be developed by MSC anywhere in the world. The Principal shall not (i) copy (other than for back-up purposes), distribute, rent, lease or sublicense all or any portion of the Equipment; (ii) modify or prepare derivative works of any portion of the Equipment; (iii) use the Equipment in a computer-based services business or publicly display visual output of the Equipment, (iv) transmit any portion of the Equipment over a network, by telephone, or electronically using any means; or (v) reverse engineer, decompile or disassemble the Equipment. The Principal shall not change or remove any insignia or lettering on the Equipment and shall conspicuously identify each item of the Equipment by suitable lettering thereon to indicate MSC's ownership. The Principal shall keep the Equipment free from any and all liens and claims, and shall do or permit no act or thing whereby MSC's title or rights may be encumbered or impaired.

D. *Warranties; Damage.* MSC makes no representation, warranties, or conditions, express or implied, statutory or otherwise, other than those herein contained. Upon expiration or termination of the Agreement, the Equipment shall be returned unencumbered to MSC in the same condition as when received by the Principal, reasonable wear and tear resulting from proper use thereof alone excepted. To the extent permitted by state or local law, the Principal shall indemnify and hold MSC harmless against and from all loss, damage, expense or penalty arising from any claim or action on account of personal injury or damage to property occasioned by the unauthorized operation, use, handling, or transportation of the Equipment during the Term of the Agreement, but shall be credited with any amounts received by MSC from insurance.


5. **Commissions and Payments.**

A. *Payments.*

- i. Commissions. MSC agrees to pay the Principal a commission rate of 41.2% on gross sales less sales tax ("**Commissions**"). Commissions will not be paid on non-commissionable sales, including but not limited to, postage stamps, stamped envelopes, etc. Commissions will not be paid on any item the Principal wishes to sell below, at, or near cost. Commissions paid to the Principal shall be paid weekly or otherwise stated by the Principal and shall be delivered to the Principal by the 10th of the following month in which services were rendered.
- ii. Taxes. MSC agrees to pay all taxes, fees, and other assessments imposed by federal, state, local, and other governmental taxing authorities related to the sales and profits of MSC under this Agreement, except for any taxes based on MSC's net income.

B. *Inventory.* Subject to Section 18 below, all commissary inventory required to be provided by MSC pursuant to the Services shall be delivered by MSC to the Facility once a week with the weekday of such deliveries to be determined in good faith by both Parties

C. *Records; Audits.* MSC will maintain and keep on file all records of the Principal's sales for a period of 3 years from the Effective Date of this Agreement. MSC will provide the Principal with records of the Principals' annual sales for the Principal's previous fiscal year each July, and/or upon request. MSC will give the Principal or the Principal's authorized agent the opportunity to inspect such records which are directly relevant to the Principal's purchases. The cost of such audit or inspection will be at the expense of the Principal. The examination of records shall be conducted at the location where such records are maintained by MSC.


6. **Term.** This Agreement shall commence on the Effective Date and shall continue for an initial term of 36 months unless otherwise extended or terminated as provided herein. This Agreement shall automatically renew for successive terms of 1 year each, unless either Party notifies the other in writing, at least 60 days before the end of any term year of its election not to renew this Agreement. The initial 36-month term together with any 1-year renewal term shall compose the "**Term**" of this Agreement.

7. **Termination**

A. *Without Cause.* Notwithstanding anything to the contrary herein above or hereinafter set forth, this Agreement may be terminated by either Party at any time without cause or legal excuse by providing the other Party with 60 days' prior written notice of such termination or by mutual written agreement of the Parties.

B. *For Cause.* Notwithstanding anything to the contrary herein above or hereinafter set forth, this Agreement may be terminated immediately by either Party at any time upon written notice to the other in any of the following events:

- i. if the other Party shall commit any breach of the terms of this Agreement and shall not (in the case of a breach capable of being remedied) remedy such breach within 30 days after notice has been served on the breaching Party requiring the same to be remedied; or
- ii. if the other Party shall discontinue its business or have any license or permit required of the Party for the normal operation of its business or for the provision of the Services revoked or suspended for 31 days or more; or
- iii. if the other Party becomes insolvent or shall be made the subject of an administration order or a receiver of its assets shall be appointed or it shall go into liquidation (whether voluntary or otherwise) other than a voluntary

liquidation for the purposes of reconstruction and such status is not cured, discharged, or withdrawn within 90 days; or

- iv. if the other Party has court-established criminal or fraudulent conduct on the part of: (a) in the case of MSC, its officers, directors, or controlling shareholder(s); or (b) in the case of the Principal, its elected or appointed officials (including any officers or shareholders) in such a manner as to either directly or indirectly affect the operations of the Facility.

C. Such remedy of Termination is in addition to such other remedies as may be available by law or as otherwise stated in this Agreement.

8. Representations and Warranties.

A. *Both Parties.* Each Party represents and warrants that it: (i) has the full authority and the legal right to enter into this Agreement and perform its obligations hereunder, (ii) has taken all necessary action required to authorize the execution and delivery of this Agreement and the performance of its obligations, and (iii) will comply with all applicable laws, regulations, governmental requirements and standards related to the Services, including, without limitation, product safety laws.

B. *MSC.* MSC warrants that the commissary price list attached hereto as **Exhibit B** is subject to ordinary price increases due to market factors beyond the control of MSC.

C. *Principal.* The Principal represents and warrants that (i) the Facility is owned and/or exclusively operated by the Principal, (ii) the Principal is authorized to enter into this Agreement with respect to the Facility, and (iii) the undersigned is authorized to bind the Facility to this Agreement.

9. Indemnification.

A. *By MSC.*

- i. MSC shall indemnify the Principal against any loss, damage, injury or death caused by MSC's negligent acts or omissions or the negligent acts or omissions of MSC's agents or employees, or losses, damages, injuries or death caused by MSC's negligence and arising out of the consumption or use of the products and services sold or provided pursuant to the Solicitation; *provided, however*, that nothing contained herein shall require MSC to defend or indemnify the Principal for losses, damages, injuries or death arising out of the negligence of the Principal, its agents or employees.

- ii. MSC's obligation to hold the Principal harmless pursuant to the Agreement shall be dependent upon the Principal promptly notifying MSC in writing of any such claims or lawsuits against either MSC or the Principal, but in no event not no later than 30 days after the date the Principal first received notice of such claim or lawsuit, and, forwarded to MSC the summons, complaint and all other documents which relate to said claim or lawsuit no later than 30 days after the date the Principal was served with such documents. Failure of the Principal to notify MSC of any such claim or lawsuit within said 30 day period shall relieve MSC of any and all responsibility and liability under the Agreement to indemnify and hold the Principal harmless.

B. *By the Principal.*

- i. To the extent permitted by state or local law, the Principal shall indemnify MSC against any loss, damage, injury or death caused by the Principal's negligent acts or omissions or the negligent acts or omissions of the Principal's agents or employees, or losses, damages, injuries or death caused by the Principal's negligence and arising out of (a) the provision or maintenance or repair of the Premises or the Utilities; (b) the Principal's actual breach of this Agreement; or (c) negligent, acts or omissions of or by the Principal; *provided, however*, that nothing contained herein shall require the Principal to defend or indemnify MSC for losses, damages, injuries or death arising out of the negligence of MSC, its agents or employees.
- ii. The Principal's obligation to hold the MSC harmless pursuant to the Agreement shall be dependent upon MSC promptly notifying Principal in writing of any such claims or lawsuits against either the Principal or MSC, but in no event not no later than 30 days after the date the MSC first received notice of such claim or lawsuit, and, forwarded to the Principal the summons, complaint and all other documents which relate to said claim or lawsuit no later than 30 days after the date the MSC was served with such documents. Failure of MSC to notify the Principal of any such claim or lawsuit within said 30 day period shall relieve the Principal of any and all responsibility and liability under the Agreement to indemnify and hold MSC harmless.

C. Neither Party shall be liable to the other Party whether by reason of breach of contract, negligence or otherwise for any loss of profit, loss of business, liability to third Parties or for any indirect or consequential losses, even if the Party is informed of such potential losses in advance.

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10. Independent Contractor Status. It is mutually understood and agreed that MSC is engaged as an independent contractor and neither MSC nor the Principal are authorized to oblige the other Party or act in the name of the other Party other than as stated in this agreement and it is the intent of the Parties that (i) an independent contractor relationship be and is hereby established under the terms and conditions of the agreement, (ii) the employees of MSC are not nor shall they be deemed to be employees of the Principal, and (iii) the employees of the Principal are not nor shall they be deemed to be employees of MSC. Notwithstanding the foregoing, it is mutually understood and agreed that the establishment and/or management of lobby and booking kiosks and inmate commissary accounts, and the receipt of cash deposits thereto, is a service provided by MSC on behalf of the county for the purpose of providing materials and supplies to state or county inmates pursuant to the Legal Authority as applicable to the Principal provided in Section 13 below.

11. Notices; Invoices. Any notice, invoice, or other communication under this Agreement required hereunder shall be delivered in writing and shall be deemed to have been received: (a) when delivered by hand (with written confirmation of receipt); (b) when received by the addressee if sent by a nationally recognized overnight courier (receipt requested); (c) on the date sent by facsimile or e-mail of a PDF document (with confirmation of transmission) if sent during normal business hours of the recipient, or on the next Business Day if sent after normal business hours of the recipient; or (d) on the third day after the date mailed, by certified or registered mail, return receipt requested, postage prepaid. Such communications must be sent to the following addresses:

To MSC: McDaniel Supply Company
 1275 East Cherry Street
 Jesup, Georgia 31546

To the Principal: _____

 Effingham Board of Commissioners
 601 North Laurel Street
 Springfield, Georgia 31329

12. Governing Law. The laws of the State of Georgia (without giving effect to its conflicts of law principles) govern all matters, including tort claims, arising out of or relating to this Agreement, including, without limitation, its validity, interpretation, construction, performance, and enforcement. Notwithstanding any other provision of this Agreement, any disputes concerning any question of fact or law arising under this Agreement or any litigation or arbitration arising out of this Agreement, shall be tried in Effingham County, unless the Parties agree otherwise, or are otherwise required by law.

13. Legal Authority. The following legal authorities apply to this Agreement, as applicable to the Principal:

A. Georgia Code § 42-5-6, as amended from time to time;

14. Breach of Contract; Remedies. Upon breach of this Agreement by either Party, both Parties shall have all remedies available to them in equity and/or at law.

15. Assignment. This Agreement or any interest herein shall not be assigned, transferred, or otherwise encumbered, under any circumstances, by the Parties, without the prior consent of the other Party. However, the Agreement shall run with the Principal and its successors.

16. Modification of the Agreement. Notwithstanding any of the provisions of this Agreement, the Parties may agree to amend this Agreement. No alteration or variation of the terms of this Agreement shall be valid unless made in writing and signed by the Parties hereto. No oral understanding or agreement not incorporated herein shall be binding on any of the Parties hereto.

17. Waiver. Failure by either Party to enforce at any time or for any period of time the provisions of this Agreement shall not be construed as a waiver of such provisions, and shall in no way affect such Party's right to later enforce such provisions.

18. Force Majeure. If the performance of any obligation under this Agreement is prevented, restricted or interfered with by reason of war, revolution, civil commotion, act of terrorism, blockade, embargo, strike, law, order, proclamation, regulation, ordinance, demand, requirement, fire, flood, storm or other natural or man-made disaster or occurrence which is beyond the reasonable control of the affected Party, the affected Party will, upon giving reasonable notice to the other Party, be excused from performance under this Agreement for the duration of the force majeure condition; provided, however, that the affected Party will use commercially reasonable efforts to avoid or remove the cause of nonperformance and resume full performance under this Agreement.

19. Severability. Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction will, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction will not invalidate or render unenforceable such provision in any other jurisdiction. To the fullest extent permitted by applicable law, the Parties hereby waive any provision of law which renders any provisions hereof prohibited or unenforceable in any respect. If it is ever held that any restriction hereunder is too broad to permit enforcement of such restriction to its fullest extent, such restriction will be enforced to the maximum extent permitted by applicable law.

20. Headings; Counterparts. The section headings contained in this Agreement are solely for the purpose of reference, are not part of the Agreement of the Parties, and will not in any way affect the meaning or interpretation of this Agreement. This Agreement may be executed in any number of counterparts, each of which will be an original, but all of which together will constitute one instrument. This Agreement may also be executed with signatures sent via facsimile or email (in PDF format only), each of which will be deemed an original.

21. Entire Agreement. This Agreement, together with its Recitals and Exhibits, which are incorporated herein by reference, is the entire agreement between the Parties and supersedes all prior discussions, oral or written agreements, understandings and representations, whether verbal or written, with regard to its subject matter. The Parties acknowledge that they have not relied upon any statement, representation, prior or contemporaneous written or oral promises, agreements or warranties, except such as are expressed herein.

{Signatures appear on following page}

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IN WITNESS WHEREOF, the Parties by their duly authorized representatives have entered into this Agreement effective as of the Effective Date hereof.

PRINCIPAL: EFFINGHAM COUNTY BOARD OF COMMISSIONERS

Wendall A. Kessler
Signature

By: Wendall A. Kessler
Printed Name

Its: Chairman
Title

Notary Public:

Stephanie Johnson
Signed this 17th day of May, 2016
{Notary Seal}
MSC MCDANIEL SUPPLY COMPANY, INC.

Jerry D. McDaniel
Signature

By: Jerry D. McDaniel
Printed Name

Its: President/CEO
Title

Notary Public:

[Signature]
Signed this 20th day of May, 2015

