

**AGREEMENT BETWEEN THE CITY OF MANOR
AND QWALLY, INC. FOR THE CREATION AND
MAINTENANCE OF A SMALL BUSINESS PORTAL**

THIS AGREEMENT (this "Agreement") made and entered into this _____, 2021 (the "Effective Date"), by and between THE CITY OF MANOR, TEXAS, (hereinafter "City") and Qwally, Inc., (hereinafter "Contractor"), a for profit company organized under the laws of the State of Delaware.

WHEREAS, the City desires an interactive software product to support local small businesses.

WHEREAS, the City has determined that Contractor's software product is uniquely and best qualified, and most cost advantageous to the City, and Contractor has agreed to provide such.

WITNESSETH, that this Contractor and the City, for the considerations stated herein, agree as follows:

ARTICLE 1. Scope of the Work; Term. The description, location, frequency and lump sum cost or unit price of the Services are as set out in **Exhibit A** (Scope of Services), which are attached to this Agreement and incorporated by reference herein. The term of this Agreement shall begin on the Effective Date and shall continue for one year (the "Initial Term") and automatically renew for additional one-year terms (each, a "Renewal Term"), unless either party requests termination in writing at least thirty (30) days prior to the end of the then-current term. Either party may terminate this agreement without cause upon ninety (90) days written notice to the other party.

ARTICLE 2. Software License: Contractor hereby grants the City a nonexclusive license to use the Software (hereinafter "Software as a Service", or "SaaS") for its internal business purposes, provided the City complies with the other restrictions set forth in this Agreement. Copies of the SaaS created or transferred pursuant to this Agreement are licensed, not sold, and the City receives no right, title, or interest in the SaaS or any copy thereof, except as expressly provided herein. Without limiting the generality of the foregoing, The City shall not: (a) modify, create derivative works from, distribute, publicly display, publicly perform, or sub-license the SaaS; (b) use the SaaS for service bureau or time-sharing purposes or in any other way allow third parties to exploit the SaaS; or (c) reverse engineer, decompile, disassemble, or otherwise attempt to derive any of the SaaS's source code or underlying ideas, algorithms, or organization of any SaaS. Contractor shall provide such services ("Services") as are required by any statement of work ("Statement of Work", or "SoW") in the form attached hereto as **Exhibit A** (Scope of Services). In the event of any conflict with a Statement of Work, the terms of the Statement of Work shall govern, but only to the extent such Statement of Work expressly

overrides this Agreement. The City and the Contractor may amend this Agreement from time to time by adding additional, mutually executed SoW's to this Agreement.

ARTICLE 3. Intellectual Property: The City acknowledges and agrees that Contractor owns and will continue to own all right, title and interest, including, without limitation, all intellectual property rights in and to any proprietary SaaS and documentation provided hereunder, including, any improvements, derivative works, upgrades, updates, error or bug fixes to such SaaS and documentation provided to the City in connection with this Agreement (the "SaaS"). The City further acknowledges and agrees that the City will have only the right to use the SaaS as set forth on **Exhibit B**, attached hereto and incorporated by reference. The City will not, directly or indirectly: (a) reverse engineer, decompile, disassemble or otherwise attempt to discover the source code, object code or underlying structure, ideas, knowhow or algorithms relevant to the Services or any SaaS; (b) modify, translate, or create derivative works based on the Services or any SaaS (except to the extent expressly permitted by Contractor or authorized within the Services); (c) use the Services or any SaaS for timesharing or service bureau purposes or otherwise for the benefit of a third; or (d) remove any proprietary notices or labels from the Services or SaaS.

ARTICLE 4. Services and Support: Subject to the terms of this Agreement, Contractor will use commercially reasonable efforts to provide City the Services in accordance with the Service Level Agreement.

ARTICLE 5. Payment and Invoicing. The City agrees to purchase an annual license for the sum of \$10,000.00. The City and Contractor, with the approval of City Council, will enter into a 1-year agreement to purchase the license. The license may be renewed on an annual basis one calendar year from the date of previous payment by City Council approval prior to the end of the previous 1-year agreement. All financial obligations of the City under this agreement or future agreements are contingent upon appropriation, budgeting, and availability of specific funds to discharge such obligations.

ARTICLE 6. Data Ownership Interest. The City retains ownership of the data collected and stored by Contractor in performance of this Agreement. Contractor agrees to provide City, in a recoverable and transferable method, such data when requested or upon termination of this Agreement. The City retains ownership of any pre-existing proprietary City information and data that may be provided to Contractor. Notwithstanding the foregoing, City grants Contractor a non-exclusive, transferable, perpetual, worldwide, and royalty-free license to use any data or information submitted by City to Contractor (the "Data") for the development of the SaaS or the provision of the SaaS and agrees that Contractor shall retain all right, title and interest in any aggregated and de-identified Data. Contractor may not use City branding or imply City endorsement of Contractor's product or experience without the express written consent of the City Council.

ARTICLE 7. Information and Materials: The City agrees to make available to Contractor any policies, documents and planning materials, pertinent City data or any other information in its possession or otherwise readily available, which has a direct bearing on the preparation of the site content.

ARTICLE 8. Review and Approval: The City shall, in a timely manner, review and approve all content before it is posted to the site. During configuration and operation of the SaaS, the Contractor shall submit content for City review, and the City shall timely review, provide comments, and approve such content. The City shall designate a point of contact for review of process flows, site content, wireframes, and other components of the site content that may be viewed by external parties. The City agrees that time is of the essence in this Agreement and any delays in connection with the City's obligations hereunder may impair Contractor's ability to provide the Services.

ARTICLE 9. Cooperative Competitive Sourcing: City acknowledges and agrees with Contractor that City's selection of Contractor may be acknowledged and used by other government entities to replace their respective competitive procurement selection processes for Request for Proposal (RFP) and Request for Qualifications (RFQ) purposes such that other government entities may contract with Contractor for the same or substantially similar product(s) or service(s) without undergoing a separate competitive procurement selection process. Terms, conditions, and prices of the contract executed with Contractor may be used by other government entities to contract with Contractor for the same or substantially similar product(s) or service(s) under either the same or a separate contract.

ARTICLE 10. Insurance: For the term of this Agreement, Contractor shall acquire and maintain, in full force and effect, Commercial General Liability Insurance coverage with minimum combined single limits of ONE MILLION DOLLARS (\$1,000,000) each occurrence and TWO MILLION DOLLARS (\$2,000,000) aggregate; automobile liability insurance with minimum combined single limits for bodily injury and property damage of not less than ONE MILLION DOLLARS (\$1,000,000) each occurrence and TWO MILLION DOLLARS (\$2,000,000) aggregate with respect to each of Contractor's owned, hired and/or non-owned vehicles assigned to or used in performance of the Services; and workers compensation, issued by a company licensed to provide insurance in Texas. Such policy shall name the City as an additional insured. Certificates of Insurance shall be completed by the Contractor's insurance agent as evidence that policies providing the required coverage, conditions, and minimum limits are in full force and effect, and shall be subject to review and approval by the City. Each certificate shall provide that the coverage afforded under the policies shall not be cancelled, terminated or materially changed until at least thirty (30) days prior written notice has been given to the City. The City reserves the right to request and receive a certified copy of any policy and any endorsement thereto.

ARTICLE 11. Breach of Contract: In the event of any breach or apparent breach by Contractor of any of its obligations under the terms of this Agreement, if Contractor fails to cure such breach within thirty (30) days of written notice from the City of such breach, the City has the right to terminate the Agreement without any liability. In the event of any breach or apparent breach of this Agreement by the City of any of its obligations under the terms of this Agreement, the Contractor has the right to suspend or terminate City's access to the SaaS. If the City fails to cure such breach within thirty (30) days of written notice from Contractor, the Contractor has the right to terminate the Agreement.

ARTICLE 12. Data Privacy and Security: Contractor shall exercise commercially reasonable efforts to prevent unauthorized exposure or disclosure of City Data. The Contractor shall safeguard the confidentiality, integrity and availability of City Information and comply with the following conditions:

The Contractor shall implement and maintain appropriate administrative and technical security measures to safeguard against unauthorized access, Data Breach, Exfiltration, disclosure or theft of Personal Data and Non-Public Data while providing services during the term of this Agreement. Such security measures shall include and not be limited to the prompt availability to and application of security-relevant Software upgrades, patches, service-packs, and hot fixes and be in accordance with recognized industry practice and not less stringent than the measures the Contractor applies to its own Personal Data and Non-Public Data of similar kind.

All Personal Data shall be encrypted at rest and in transit with controlled access. Unless otherwise stipulated, the Contractor is responsible for encryption of the personal data. Unless otherwise stipulated, the Contractor shall encrypt all Non-Public Data at Rest and Data in Transit. The City shall identify data it deems as Non-Public Data to the Contractor. The level of protection and encryption for all Non-Public Data shall be identified and made a part of this Agreement.

At no time shall any City Data be copied, disclosed or retained by the Contractor or any party related to the Contractor for subsequent use in any transaction that does not include the City. The Contractor shall not use any City Data collected in connection with the services performed under this Agreement for any purpose other than fulfilling those services.

ARTICLE 13. Additional Contract Provisions Required for Federal Awards: City may apply federal grant funds towards payment of Contractor. The additional contract clause provisions required by Appendix II to 2 CFR Part 200.

ARTICLE 14. Entire Agreement: This Agreement, including the Exhibits hereto and any SoWs, is the final expression of the agreement between the parties, and the complete and exclusive statement of the terms agreed upon, and shall supersede all prior negotiations, understandings or agreements. There are no representations, warranties, or stipulations, either oral or written, not contained herein.

ARTICLE 15. Governing Law and Venue: This Agreement shall be governed by the laws of the State of Texas, and the venue for any actions arising out of this Agreement shall be in Travis County, Texas. Both parties agree to waive any right to have a jury participate in the resolution of the dispute or claim, whether sounding in contract, tort or otherwise, between any of the parties or any of their respective affiliates arising out of, connected with, related to or incidental to this Agreement to the fullest extent permitted by law.

ARTICLE 16. Licenses, permits, etc.: Contractor shall obtain, at its own expense, all necessary professional licenses, permits, insurance, authorization and assurances necessary in order to perform its obligations under this Agreement.

ARTICLE 17. No Agency Relationship Created: Contractor, in the performance of its operations and obligations hereunder, shall not be deemed to be an agent of the City but shall be deemed to be an independent contractor in every respect and shall take all steps at its own expense, as City may from time to time request, to indicate that it is an independent contractor. City does not and will not assume any responsibility for the means by which or the manner in which the services by Contractor provided for herein are performed, but on the contrary, Contractor shall be wholly responsible therefore.

ARTICLE 18. Nondiscrimination: Contractor shall comply with all Federal, State and local laws concerning nondiscrimination.

ARTICLE 19. Limitation of Liability: Contractor's liability to the City or any indemnitees in the aggregate for any claim arising under or otherwise related to this Agreement shall be limited to the amounts paid to Contractor relating to such claim in the twelve months preceding such claim under this Agreement, as such may be amended from time to time. Contractor shall not be liable to the City for any special, punitive, indirect, incidental, or consequential damages of any nature.

ARTICLE 20. Assertion of Rights: Failure by either party to assert a right or remedy shall not be construed as a waiver of that right or remedy, nor shall such action or failure to act constitute approval of or acquiescence in a breach there under, except as may be specifically agreed in writing. No waiver of any provision of this Agreement shall be of any force or effect, unless such waiver is in writing, expressly stating to be a waiver of a specified provision of this Agreement and is signed by the party to be bound thereby. In addition, no waiver by either party hereto of any term or condition of this Agreement shall be deemed or construed to be a waiver of any other term or condition or subsequent waiver of the same term or condition and shall not in any way limit or waive that party's right thereafter to enforce or compel strict compliance with this Agreement or any portion or provision or right under this Agreement.

ARTICLE 21. Notices. Notice for the City shall be mailed to:
City of Manor - City Hall
Attn: City Manager
105 E. Eggleston St.
P.O. Box 387
Manor, TX 78653

Or Emailed to Debbie Charbonneau at dcharbonneau@cityofmanor.org

Notices to Contractor shall be mailed to:
Qwally, Inc.
419 Grand Court
Golden, CO 80401

Or emailed to Christopher Offensend at chris@qwal.ly

ARTICLE 22. Form 1295

Texas law and the City requires that business entities, as defined in Texas Government Code, Section 2252.908, who contract with the City complete the on-line of Form 1295 "Certificate of Interested Parties" as promulgated by the Texas Ethics Commission (<https://www.ethics.state.tx.us/filinginfo/1295/>). Form 1295 is also required for any and all contract amendments, extensions or renewals. Prior to any payment to Consultant hereunder, Consultant shall provide proof of submission to the City Secretary that the appropriate Form 1295 documentation has been submitted.

ARTICLE 23. Warranty: Contractor warrants to City that the Services will be performed with the degree of skill and care that is required by current, good and sound professional procedures and practices, and in conformance with generally accepted professional standards prevailing at the time the Services are performed so as to ensure that all Services performed are correct and appropriate for the purposes contemplated in this Agreement.

ARTICLE 24. Disclaimer of Warranties: This disclaimer of warranties or conditions, either express or implied, shall not contradict the aforementioned Article 12 of this Agreement concerning data privacy and security. It is understood that the Contractor shall use and exercise industry standards and commercially reasonable efforts to ensure adequate privacy and security protection for the SaaS users. The language below shall be construed to mean events that are outside the control, or so extreme in nature that the Contractor and its use of said industry standards and commercially reasonable efforts to provide adequate privacy and security protection would be sufficient but for such outside controlling or extreme events. CONTRACTOR DOES NOT REPRESENT THAT THE CITY'S USE OF THE SERVICE WILL BE SECURE, TIMELY, UNINTERRUPTED OR ERROR FREE, OR THAT THE SERVICE WILL MEET CITY REQUIREMENTS OR THAT ALL ERRORS IN THE SERVICE AND/OR DOCUMENTATION WILL BE CORRECTED

OR THAT THE SYSTEM THAT MAKES THE SERVICE AVAILABLE WILL BE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS OR THE SERVICE WILL OPERATE IN COMBINATION WITH OTHER HARDWARE, SOFTWARE, SYSTEMS OR DATA NOT PROVIDED BY CONTRACTOR OR THE OPERATION OF THE SERVICES WILL BE SECURE OR THAT CONTRACTOR AND ITS THIRD PARTY VENDORS WILL BE ABLE TO PREVENT THIRD PARTIES FROM ACCESSING DATA OR CITY CONFIDENTIAL INFORMATION, OR ANY ERRORS WILL BE CORRECTED OR ANY STORED DATA WILL BE ACCURATE OR RELIABLE. THERE ARE NO OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, THOSE OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. THE SERVICE IS PROVIDED TO THE CITY ON AN "AS IS" AND "AS AVAILABLE" BASIS, AND IS FOR COMMERCIAL USE ONLY. THE CITY ASSUMES ALL RESPONSIBILITY FOR DETERMINING WHETHER THE SERVICE OR THE INFORMATION GENERATED THEREBY IS ACCURATE OR SUFFICIENT FOR THE CITY'S PURPOSE.

ARTICLE 25. Amendments: The City may, from time to time, require changes in the scope of work to be performed hereunder. Such changes, including any increase or decrease in the compensation due Contractor, which are mutually agreed upon by and between the parties, shall be incorporated in written amendments to this agreement.

ARTICLE 26. Indemnification: To the fullest extent permitted by law, Contractor agrees to indemnify and hold harmless the City, its Council members, officials, officers, agents, employees, and volunteers (separately and collectively referred to in this paragraph as "Indemnatee") from and against all claims, damages losses and expenses (including but not limited to attorney's fees) arising out of or resulting from any negligent act, error or omission, intentional tort or willful misconduct, intellectual property infringement or breach of contract including failure to pay a sub-contractor, or supplier occurring in the course of performance of professional services pursuant to this Agreement by Contractor, its employees, sub-contractors, or others for whom Contractor may be legally liable ("Contractor Parties"), but only to the extent caused in whole or in part by the Contractor Parties. IF THE CLAIMS, ETC. ARE CAUSED IN PART BY CONTRACTOR PARTIES, AND ALSO IN PART BY THE NEGLIGENCE OR WILLFUL MISCONDUCT OF ANY OR ALL OF THE INDEMNITEES OR ANY OTHER THIRD PARTY, THEN CONTRACTOR SHALL ONLY INDEMNIFY ON A COMPARATIVE BASIS, AND ONLY FOR THE AMOUNT FOR WHICH CONTRACTOR PARTIES ARE FOUND LIABLE AND NOT FOR ANY AMOUNT FOR WHICH ANY OR ALL INDEMNITEES OR OTHER THIRD PARTIES ARE LIABLE.

It is mutually understood and agreed that the indemnification provided for in this section shall indefinitely survive any expiration, completion or termination of this Agreement.

ARTICLE 27. Miscellaneous Provisions:

a. This Agreement and all rights and obligations contained herein may not be assigned by Consultant without the prior written approval of the City. However, Contractor

shall have the right to employ such assistance as may be required for the performance of the project, including the use of subcontractors, which employment shall not be deemed an assignment of the Contractor's rights and duties hereunder.

b. In the event of litigation enforcing or interpreting the terms of this Agreement, the City shall be entitled an award of reasonable attorney fees and all costs of suit, including expert witness fees, court reporter fees and similar litigation expenses. Nothing in this section shall be deemed a waiver of any constitutional or statutory protections afforded to municipal governments under Texas law.

c. To the extent permitted by State law, no public official or employee shall be personally responsible for any liability arising under or growing out of this Agreement.

d. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

e. This Agreement and the rights, obligations and liabilities created hereunder shall be binding upon and inure to the benefit of the heirs, executors, administrators, legal representatives, successors, and assigns of each of the parties hereto, but no rights, obligations, or liabilities hereunder shall be assignable or delegable by Contractor without the prior written consent of the City. City may assign or delegate the rights, obligations, or liabilities created hereunder to its successor in interest without the consent of Contractor.

f. If any provision of this Agreement shall be held to be invalid or unenforceable for any reason, the remaining provisions shall continue to be valid and enforceable. If a court of competent jurisdiction finds that any provision of this Agreement is invalid or unenforceable, but that by limiting such provision it may become valid and enforceable, then such provision shall be deemed to be written, construed, and enforced as so limited.

g. All obligations by either party which expressly or by their nature survive the expiration or termination of this Agreement shall continue in full force and effect subsequent to and notwithstanding its expiration or termination and until they are satisfied in full or by their nature or within one year of termination, provided however that any obligations regarding protecting confidential information shall continue in perpetuity.

h. The terms, provisions, representations, and warranties contained in this Agreement that by their sense and context are intended to survive the performance thereof by either or both parties hereunder shall so survive the completion of performances and termination of this Agreement, including the making of any and all payments due hereunder.

i. This Agreement has been jointly negotiated by the parties and shall not be construed against a party because that party may have primarily assumed responsibility for the drafting of this Agreement.

j. To the extent this Agreement constitutes a contract for goods or services within the meaning of Section 2270.002 of the Texas Government Code, as amended, solely for purposes of compliance with Chapter 2270 of the Texas Government Code, and subject to applicable Federal law, Contractor represents that neither Contractor nor any wholly owned subsidiary, majority-owned subsidiary, parent company or affiliate of Contractor (i) boycotts Israel or (ii) will boycott Israel through the term of this Agreement. The terms "boycotts Israel" and "boycott Israel" as used in this paragraph have the meanings assigned to the term "boycott Israel" in Section 808.001 of the Texas Government Code, as amended.

k. To the extent this Agreement constitute a governmental contract within the meaning of Section 2252.151 of the Texas Government Code, as amended, solely for purposes of compliance with Chapter 2252 of the Texas Government Code, and except to the extent otherwise required by applicable federal law, Contractor represents that Contractor nor any wholly owned subsidiary, majority-owned subsidiary, parent company or affiliate of Contractor is a company listed by the Texas Comptroller of Public Accounts under Sections 2270.0201, or 2252.153 of the Texas Government Code.

l. To the extent the Agreement or this Addendum constitute a contract for goods or services within the meaning of Section 2274 of the Texas Government Code, as amended, solely for purposes of compliance with therewith, and subject to applicable Federal law, the Contractor represents that neither the Contractor nor any wholly owned subsidiary, majority-owned subsidiary, parent company or affiliate of Owner (i) boycotts energy companies or (ii) will boycott energy companies through the term of this Agreement. The phrase "Boycott Energy Companies" as used in this paragraph have the meanings assigned to the phrase "Boycott Energy Company" in Section 809.001 of the Texas Government Code, as amended.

m. To the extent the Agreement or this Addendum constitute a contract for goods or services within the meaning of Section 2274 of the Texas Government Code, as amended, solely for purposes of compliance with therewith, and subject to applicable Federal law, the Contractor represents that the Contractor and all wholly owned subsidiary, majority-owned subsidiary, parent company and affiliates of Owner do not, and will not for the duration of this agreement, have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association. The phrase "Discriminates Against a Firearm Entity or Firearm Trade Association" as used in this paragraph have the meanings assigned to the phrase "Discriminate Against a Firearm Entity or Firearm Trade Association" in Section 2274.001(3) of the Texas Government Code, as amended.

n. With the exception of the right to a trial by jury, which is waived in Article 15 herein, nothing in this Agreement shall be deemed to waive, modify or amend any legal defense available at law or in equity to either the City or the Contractor, nor create any legal rights or claim on behalf of any third party. Neither the Contractor nor the city waives, modifies, or alters any defenses and immunities provided under the laws of the State of Texas, the Texas Constitution, and the United States Constitution.

o. If any provision of this Agreement shall be held as a matter of law to be unenforceable, such unenforceability shall not affect the enforceability of the remainder of this Agreement.

ARTICLE 28. Signatures:

IN WITNESS WHEREOF, the parties to this Agreement have hereunto set their hand and seal; the Mayor of the City of Manor, acting under and by virtue of such office and with full authority, and the Contractor by such duly authorized officers or individuals as may be required by law.

[signature page follows]

CONTRACTOR,

_____, Its _____ (title)
On behalf of Contractor

_____ Date

CITY

Dr. Larry Wallace, Jr., Mayor

_____ Date

ATTEST:

Lluvia T. Almaraz, City Secretary

_____ Date

EXHIBIT A
Scope of Services

EXHIBIT B
Service Level Agreement