

RESOLUTION NO. 17 - 2414

A RESOLUTION OF THE TOWN COMMISSION OF THE TOWN OF SURFSIDE, FLORIDA WAIVING THE BID PROCESS PURSUANT TO SECTION 3-13(6) OF THE TOWN OF SURFSIDE CODE OF ORDINANCES; AUTHORIZING THE TOWN MANAGER TO ENTER INTO A SOLE SOURCE CONNECT SERVICES AGREEMENT WITH BIG BELLY SOLAR, INC. FOR A TERM OF FIVE (5) YEARS EFFECTIVE APRIL 1, 2017 WITH SUBSEQUENT ONE (1) YEAR RENEWAL TERMS FOR THE SERVICE, INCLUDING SOFTWARE, EQUIPMENT, EQUIPMENT DELIVERY, INSTALLATION, CUSTOMER SERVICE AND EQUIPMENT MAINTENANCE, WARRANTY FOR DEFECTIVE PART REPLACEMENT AND REPAIR, SET UP AND TRAINING FOR TWELVE SOLAR TRASH AND RECYCLING COMPACTION CONTAINERS; APPROVING AND AUTHORIZING THE EXPENDITURE OF FUNDS IN THE AMOUNT OF \$15,040 FROM THE FISCAL YEAR 2016/2017 SOLID WASTE FUND, ACCOUNT NO. 403-4000-534-4403; PROVIDING FOR APPROVAL AND AUTHORIZATION; PROVIDING FOR IMPLEMENTATION; PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Town strives to save natural resources through reuse and energy conservation and is progressing toward further sustainability as a community by increasing our recycling program space; and

WHEREAS, the Town of Surfside has determined that Big Belly Solar, Inc. is the sole source provider to the Town of Surfside of solar powered trash/recycle compaction containers that include hardware and software with data collection and monitoring capability for waste and recycling operations (Exhibit "A"); and

WHEREAS, the Public Works Department budgeted \$15,040 in the 2016/2017 Fiscal Year Solid Waste operating budget Account No. 403-4000-534-4403 to lease combinations of trash/recycle compaction containers through Big Belly Solar, Inc.; and

WHEREAS, these containers will replace the concrete containers currently used in the Town's Business District and will be placed at street ends; and

WHEREAS, with the hardware and software installed in the compaction containers, the new containers will automatically notify the Town when they need to be emptied, creating a more efficient and effective system; and

WHEREAS, pursuant to Section 3-12 of the Town Code, after conducting a good faith review of available sources, due to the nature of the goods and services, and in receipt of a written request by the Department Head pursuant to Section 3-13(6) of the Town Code, the

Town Manager has recommended that it is in the Town's best interest to waive the Town's competitive bidding procedures as a sole source exemption; and

WHEREAS, the Town Commission of the Town of Surfside, Florida finds it is in the best interest of the Town to authorize the Town Manager to enter into the Agreement with Big Belly Solar, Inc. for a term of five (5) years effective April 1, 2017 with subsequent one (1) year renewal terms (Exhibit "B").

NOW THEREFORE, BE IT RESOLVED BY THE TOWN COMMISSION OF THE TOWN OF SURFSIDE, FLORIDA, AS FOLLOWS:

Section 1. Recitals. That the above and foregoing recitals are true and correct and are incorporated herein by reference.

Section 2. Approval and Authorization. The Town Commission hereby approves and authorizes the expenditure of funds in the amount of \$15,040 from the fiscal year 2016/2017 Solid Waste Fund, Account No. 403-4000-534-4403 and waives the bid process pursuant to Section 3-13(6) of the Town of Surfside Code of Ordinances and authorizes the Town Manager to enter into a sole source Connect Services Agreement with Big Belly Solar, Inc. for a term of five (5) years effective April 1, 2017 with subsequent one (1) year renewal terms for service, including software, equipment, equipment delivery, installation, customer service and equipment maintenance, warranty for defective part replacement and repair, set up and training for twelve solar trash and recycling compaction containers (Exhibit "B").

Section 3. Implementation. The Town Manager is hereby authorized to take any action which is necessary to implement the purpose of the Agreement and this Resolution.

Section 4. Effective Date. That this Resolution shall be effective immediately from adoption hereof.

PASSED AND ADOPTED this 10th day of January, 2017.

Motion by Commissioner Karukin,

Second by Commissioner Paul.

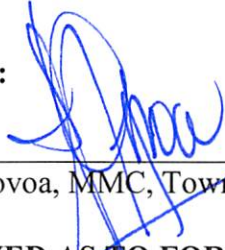
FINAL VOTE ON ADOPTION

Commissioner Daniel Gielchinsky	<u>yes</u>
Commissioner Michael Karukin	<u>yes</u>
Commissioner Tina Paul	<u>yes</u>
Vice Mayor Barry Cohen	<u>Absent</u>
Mayor Daniel Dietch	<u>yes</u>



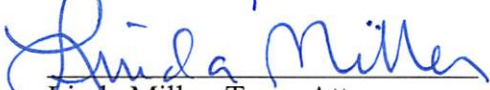
Daniel Dietch, Mayor

ATTEST:



Sandra Novoa, MMC, Town Clerk

**APPROVED AS TO FORM AND LEGAL SUFFICIENCY
FOR THE TOWN OF SURFSIDE ONLY:**



Linda Miller, Town Attorney



Town of Surfside
Public Works Department
9293 Harding Avenue – Surfside, Florida 33154
www.townofsurfsidefl.gov

MEMORANDUM

TO: Guillermo Olmedillo, Town Manager
FROM: Randy Stokes, Public Works Director *RS*
SUBJECT: Big Belly Sole Source
DATE: January 10, 2017

Public Works is currently utilizing concrete containers to service Downtown Harding. The Public Works Department collects these concrete containers on a daily basis. Public Works is in the process of working on a sole source agreement with Big Belly Solar Inc. to provide trash/recycle compaction containers. These containers are to replace the concrete containers currently used downtown and at various street ends. Purchasing Big Belly containers will allow Public Works to reduce their time emptying the concrete containers as these new ones will notify the Town when they need to be emptied, which is a more efficient and effective system. Big Belly Solar Inc., is the only company that offers solar powered trash/recycle compaction containers. Big Belly is the sole provider of Connect, a platform as a service (PaaS) solution, which includes patented Big Belly solar-powered compacting and non-compacting receptacle hardware and CLEAN monitoring software with data collection and monitoring capability for waste and recycling operations, as well as installation, inspection, training and other services. By utilizing this sole source provider to procure the Smart Waste and Recycling system receptacles will allow the Public Works to be more efficient and effective in trash removal.



Exhibit "B"

CONNECT SERVICES AGREEMENT

Agreement No.

TOWN	Full Legal Name: Town of Surfside		Town Contact:	Guillermo Olmedillo
	Billing Address: 9293 Harding Avenue Surfside, FL 33154 US		Billing Contact:	Frantza Duval
			Billing Phone:	(305) 861-4863 X205
			Billing Email:	fduval@townofsurfsidefl.gov
	Sales Tax Status:	xx Exempt (Attach Certificate)	TIN or FEIN:	
		<input type="checkbox"/> Non-Exempt		
	Insurance:	<input type="checkbox"/> Self-Insured		
	<input type="checkbox"/> Insurance Certificate Attached			
Shipping Address: 9293 Harding Avenue Surfside, FL 33154 US		Shipping Contact:	Randy Stokes	
		Shipping Phone:	(305) 861-4863 X236	
		Shipping Email:	rstokes@townofsurfsidefl.gov	

Connect Service Schedule

<p> System Software</p> <ul style="list-style-type: none"> CLEAN Management Console Licenses for Full Term CLEAN Mobile Software Licenses for Full Term <p> Equipment/Hardware</p> <ul style="list-style-type: none"> Custom Configuration as Detailed Below <p> Station Installation</p> <ul style="list-style-type: none"> On-Site Installation for Stations <p> Setup and Training</p> <ul style="list-style-type: none"> CLEAN Management Console Software Account Setup System Training & Onboarding <p> Equipment/Hardware Configuration</p>	<p> Automated System Monitoring</p> <ul style="list-style-type: none"> Automated System Diagnostics and Alerts <p> Cleaning and Inspection</p> <ul style="list-style-type: none"> Annual Comprehensive Station Cleaning Annual 21-Point Station Inspection <p> Warranty</p> <ul style="list-style-type: none"> Hardware Parts Warranty for Full Term (includes battery) <p> Customer Support</p> <ul style="list-style-type: none"> Customer Support Hotline and Trained Field Service Professionals
<p>12 Bigbelly + Smartbelly Double Stations</p>	

Service Fee: Total Monthly System Cost	\$1,764.00
3 Cases of Bigbelly Bags (Box of 50): One Time Fee	\$100.50
3 Cases of Smartbelly Bags (Box of 100): One Time Fee	\$147.00
Shipping: One Time Fee	\$5,513.00

This Service Agreement (the "Agreement"), made and entered into as of _____ (the "Effective Date"), by and between the Town of Surfside ("Town") and Big Belly Solar, Inc. ("Bigbelly", "Vendor") a Delaware corporation located at 150 A Street, Suite 103, Needham, MA 02494, and incorporates herein by reference the attached Terms and Conditions. Vendor and Town shall each be referred to herein as a "Party" and collectively the "Parties." The term of this agreement

shall be 60 Months (the "Term"). The payment terms of this Agreement are monthly in arrears ("Payment Terms"). This Agreement may be executed in counterparts, each of which shall be an original, but which together shall constitute one instrument. Intending to be legally bound, each of the parties has caused this Agreement to be executed by its duly authorized representative as of the date set forth above.

TOWN OF SURFSIDE:

By: The Town of Surfside _____

Printed Name: _____

Title: _____

Date: _____

BIGBELLY SOLAR, INC.

By: _____

Printed Name: _____

Title: _____

Date: _____



Consumer's Certificate of Exemption

DR-14
R. 04/11

Issued Pursuant to Chapter 212, Florida Statutes

85-8012740160C-2	06/30/2012	06/30/2017	MUNICIPAL GOVERNMENT
Certificate Number	Effective Date	Expiration Date	Exemption Category

This certifies that

TOWN OF SURFSIDE
9293 HARDING AVE
SURFSIDE FL 33154-3009

06/30/2012
06/30/2017-11-23

is exempt from the payment of Florida sales and use tax on real property rented, transient rental property rented, tangible personal property purchased or rented, or services purchased.



Important Information for Exempt Organizations

DR-14
R. 04/11

1. You must provide all vendors and suppliers with an exemption certificate before making tax-exempt purchases. See Rule 12A-1.038, Florida Administrative Code (F.A.C.).
2. Your *Consumer's Certificate of Exemption* is to be used solely by your organization for your organization's customary nonprofit activities.
3. Purchases made by an individual on behalf of the organization are taxable, even if the individual will be reimbursed by the organization.
4. This exemption applies only to purchases your organization makes. The sale or lease to others of tangible personal property, sleeping accommodations, or other real property is taxable. Your organization must register, and collect and remit sales and use tax on such taxable transactions. Note: Churches are exempt from this requirement except when they are the lessor of real property (Rule 12A-1.070, F.A.C.).
5. It is a criminal offense to fraudulently present this certificate to evade the payment of sales tax. Under no circumstances should this certificate be used for the personal benefit of any individual. Violators will be liable for payment of the sales tax plus a penalty of 200% of the tax, and may be subject to conviction of a third-degree felony. Any violation will require the revocation of this certificate.
6. If you have questions regarding your exemption certificate, please contact the Exemption Unit of Account Management at 800-352-3671. From the available options, select "Registration of Taxes," then "Registration Information," and finally "Exemption Certificates and Nonprofit Entities." The mailing address is PO Box 6480, Tallahassee, FL 32314-6480.

ATTACHMENT “A”
CONNECT SERVICE TERMS AND CONDITIONS

For purposes of this Attachment “A” the ‘Agreement’ shall mean the Connect Service Agreement signed by the parties. The meaning of capitalized and undefined terms appearing in these Terms and Conditions shall be as set forth in the Agreement unless otherwise indicated herein.

1.0 Definitions.

- 1.1 **Service.** The term “Service” means Connect by Bigbelly, including software, equipment, equipment delivery, installation, customer service and equipment maintenance, warranty for defective part replacement and repair, set up and training and any other features, products or services provided as part of and included under the terms of this Agreement.
- 1.2 **Equipment.** The term “Equipment” means station hardware and accessories provided by Bigbelly to Town for use with the Service.
- 1.3 **Software.** The term “Software” refers to CLEAN cloud-based software for use with mobile or desktop devices intended for use by Town with the Service.

2.0 Term of Agreement.

- 2.1 **Term.** The Term of this Agreement shall be 60 months and will commence on the date that all Equipment ordered pursuant to this Agreement has been delivered to the Town and received at Town’s receiving location. Upon expiration of the Term, the Town shall have the option to renew this Agreement for subsequent one (1) year renewal terms, unless earlier terminated in accordance with the provisions of this Agreement as stated herein. As used herein, “Term” shall mean the Initial Term and any applicable Renewal Terms. Except to the extent otherwise provided herein, the Term is non-cancelable.
- 2.2 **Renewal.** If Town elects to renew, Town must provide written notice to Bigbelly at least three (3) months prior to the expiration of the current term.

3.0 Fees Payable by Town.

Fees. In compensation for the Service described in this Agreement, Town agrees to pay the Service Fee specified in the Service Schedule and any fees payable for additional customization and/or services. Fees shall become payable on the date by which all the Equipment ordered pursuant to this Agreement has been delivered to the Town. Bigbelly shall submit invoices to Town during the term of this Agreement per the Payment Terms outlined in the Service Schedule. Town shall pay each invoice within forty-five days of the date due, pursuant to Section 218.74. All payments shall be made by check. Payments are subject to the Florida Local Government Prompt Payment Act, Section 218.70 to Section 218.80, Florida Statutes.

- 3.1 Late payments shall be subject to interest at the rate pursuant to the Florida Local Government Prompt Payment Act.
- 3.2 **Service Fee Prices.** Service Fee Prices are guaranteed for the first twenty-four (24) months of Service. Each year thereafter, Service Fee Prices will increase in the amount of 2.79%.

4.0 Obligations of the Parties.

4.1 Bigbelly’s Obligations

- (A) **Equipment.** Bigbelly will supply the Equipment identified in the Service Schedule on a rental basis to Town for the Term of the Agreement. The Equipment will be new.
- (B) **System Software.** The CLEAN Software License Agreement includes communication services and access to the CLEAN Management Console and CLEAN Mobile. Town’s use of the Software is subject to the CLEAN™ Software License Agreement.

- (C) Equipment Delivery. Bigbelly will deliver the Equipment at Town's expense to Town's receiving dock or to a location mutually agreed upon by the parties before the shipment. Bigbelly hereby warrants that its Equipment is:
- (a) good and merchantable, (b) free from defects and malfunctions, (c) free of liens, security interests or other encumbrances, (d) complies with all applicable laws, rules, regulations and orders, and (e) is fit for the purpose for which the Equipment is intended.
- (D) Station Installation. Bigbelly Equipment will be installed at mutually agreed upon locations, including semi-permanent attachment to the ground. Installation will be in accordance with the delivery and installation schedule agreed to by the parties.
- (E) Setup and Training. Bigbelly shall, at its expense, provide Town Equipment and Software setup and training. The parties shall agree upon the location and method of training.
- (F) Warranty - Defective Part Replacement and Repair. Replacement parts required due to manufacturer defects or workmanship will be provided by Bigbelly at no cost to Town. Replacement parts provided by Bigbelly may be new, refurbished or certified used. All other repairs and part replacements, including but not limited to, repairs or replacements required as a result of external trauma or damage (including but not limited to vehicle strikes or vandalism) are specifically excluded and must be repaired or replaced at Town's expense. Custom add-ons including vinyl wraps purchased by Town are not covered by this warranty and repair and replacement shall be at Town's expense, unless the damage is caused by Bigbelly or its employees, subcontractors or representatives, in which case any repair or replacement will be at Bigbelly's expense.
- (G) Town Support and Equipment Maintenance. Except for losses described in Section 5.2 below, Bigbelly will support the Town in the maintenance of the Equipment at its sole discretion and expense in order to optimize up time. Technical Town Support is available Monday through Friday, 7am to 7 pm EST to guide Town in troubleshooting, repair and replacement efforts and to assist with parts ordering. In addition, Bigbelly maintains a network of trained Field Service professionals available for dispatch upon Town request to investigate and resolve issues in the field.
- Equipment batteries will be provided at no cost to Town during the Term of the Agreement at Bigbelly's discretion, but no less frequently than necessary for the normal operation of the Equipment. If station operating conditions change such that insufficient sunlight is available for normal station operations (for example, Town moves station into storage and fails to switch off station or places station under awning), and as a result the equipment battery fails prematurely, battery will be replaced at Town expense.
- (H) Removal. Upon termination, Bigbelly will de-install and remove the Equipment at Town's expense. Equipment so removed shall be in operational condition and free of any damage for which Town is responsible pursuant to Section 5.2 below.
- (I) Subcontractor Services. Bigbelly may contract with third parties to provide the Service.

4.2 Town's Obligations

- (A) Town Information & Access. Town agrees that Bigbelly's ability to perform the Service under the Agreement in a timely manner is dependent upon access to Town's installation information and locations. Deadlines imposed by this Agreement shall be extended in the event that Town fails to provide such information and/or access in a timely manner.
- (B) Shipping. Town agrees to pay for shipping expenses and to provide an appropriate facility that can receive, inspect and stage all Bigbelly Equipment until the Equipment is installed.

- (C) Site Preparation. Town agrees to provide a poured concrete pad if the intended installation surface does not meet Bigbelly specifications. If Town's installation surface does not meet such specifications, any additional cost associated with Bigbelly's efforts to properly prepare the surface will be at Town's expense. It is the Town's responsibility to remove, at Town's expense, existing bins or any other items from the locations where Bigbelly stations will be installed.
- (D) Operational Safety. Town agrees to provide immediate notice to Bigbelly with respect to any damage or other event which causes the Equipment to pose a public safety issue or create unsafe operating conditions and Town shall take prompt action if necessary, to eliminate such public or operator safety issues. Town will promptly service or replace any Equipment that Town has identified as causing a public safety issue or creating unsafe operating conditions. If after applying best effort, Town cannot resolve the issue, Town will contact Bigbelly Town Service and Bigbelly will resolve the issue at Bigbelly's expense, unless unsafe operating condition is due to losses described in Section 5.2.
- (E) Automated System Monitoring & Customer Support Escalation - Town will respond to routine maintenance and repair issues they observe or are notified of via automated CLEAN alerts. Town will use best efforts to promptly resolve issues and may contact Bigbelly Customer Service to receive troubleshooting assistance and instructions for proper repair. If a replacement part is needed to resolve the issue, Town will contact Bigbelly Customer Service to request a part(s). If Town's best efforts do not resolve the issue, Town should contact Bigbelly Customer Service.

Town acknowledges that if a Bigbelly Field Service technician is dispatched and Bigbelly determines the issue is deemed reasonably fixable by Town (specifically a door left open or dirty trash sensor) or is due to damage as described in Section 5.2 below Bigbelly reserves the right to bill Town for incurred expense. Furthermore, if a replacement part is provided and Bigbelly determines that the original part failed due to Town misuse or abuse, Town is responsible for replacement cost per Section 5.2 below. (F) Cleaning & Inspection – Annual cleaning and inspection visits from Bigbelly are included during the Term of this agreement and one cleaning annually for each renewal term at no cost to Town. Town will use best efforts to maintain general cleanliness of equipment throughout the contract Term. If, after applying best effort to maintain equipment cleanliness, Town finds equipment needs a Bigbelly cleaning and inspection visit, Town may contact Bigbelly Town Support to request a cleaning and inspection visit. Additional cleaning and inspection visits that are not included in the terms of this agreement will be at Town's expense.

- (G) Insurance. During the term of this Agreement, Town will keep the Equipment insured against all risks of loss or damage in an amount not less than the replacement cost thereof, without deductible and without co-insurance. Town will also maintain for the term of this Agreement, comprehensive public liability insurance covering both bodily injury and property damage of at least \$1,000,000 per occurrence/\$2,000,000 annual aggregate and \$500,000 for property damage. Bigbelly and its assigns will be the sole named loss payee on the property insurance and additional insured on General Liability insurance. Town will pay all premiums for such insurance and must deliver proof of insurance coverage satisfactory to Bigbelly. If Town does not provide such insurance, it agrees that Bigbelly has the right, but not the obligation, to obtain such insurance and add an insurance fee to the amount due from Town, upon which Bigbelly may make a profit.
- (H) Equipment Relocation. Within five (5) business days following relocation of any Equipment, Town shall notify Bigbelly in writing of the specific location of such Equipment.

5.0 Equipment Rental Terms and Conditions.

5.1 Title To and Use of Equipment.

- (A) Title. As further set forth in Section 6.4 below, Bigbelly is and will at all times be the sole owner of the Equipment. Town shall not acquire any title or interest, legal or equitable, in the Equipment, other than the use rights set forth in this Agreement. In the event this Agreement is deemed to be disguised sale, Town hereby grants to Bigbelly a security interest in the Equipment (and all accessions thereto and substitutions therefore) and the proceeds thereof.
- (B) Use of Equipment. Town shall not use the Equipment for other than intended purposes. Town shall ensure safe operation of the Equipment by trained personnel. Town shall comply with all Bigbelly and governmental guidelines, laws, rules, regulations and ordinances applicable to the use and operation of the Equipment.
- (C) No Pledge. Town shall not pledge, lend, create a security interest in or permit any lien to attach to the Equipment or any part thereof or attempt in any other manner to dispose of the Equipment.
- (D) No Attachments. Town represents and warrants that the Equipment is, and shall at all times remain, fully removable personal property notwithstanding any affixation or attachment to real property or improvements. Town shall give Bigbelly immediate notice of any such attachment or other judicial process affecting the Equipment and shall immediately take all action necessary to remove such attachment and terminate the effect of such judicial process on the Equipment.
- (E) Equipment Inspection Rights. Bigbelly and its agents shall have the right to enter any premises where Equipment is located to inspect such Equipment at any time with reasonable advance written notice to Town.

5.2 Risk of Loss. From the time of delivery of Equipment by Bigbelly to Town until the Equipment is removed by Bigbelly, Town will bear the entire risk of whole or partial loss, theft, destruction or damage to the Equipment resulting from any causes other than Bigbelly's or its employees' or contractors' agents' actions or omissions with respect to the Equipment or defects, flaws or malfunctions in the Equipment, or requisition of the Equipment by any governmental entity, or expropriation or the taking of the Equipment by eminent domain or otherwise (collectively, "Loss"). Town will give Bigbelly written notice within 10 days of any Loss ("Loss Notice"). Except as provided in this section, no Loss will condition, reduce, or relieve Town's rental obligations, including its obligation to pay any fees pursuant to the Agreement and any Attachments thereto. If any Equipment is damaged but can be economically repaired, Town will immediately have the Equipment restored to good working order and condition by Bigbelly at Town's expense and Town agrees to immediately pay, on demand, all costs and expenses incurred in connection therewith. Upon the occurrence of any other kind of Loss or if the Equipment is not economically repairable, Town will, upon Bigbelly's demand, pay Bigbelly the replacement cost of the Equipment as solely determined by Bigbelly

6.0 General Terms and Conditions.

- 6.1 Taxes and Other Charges. Town is responsible for all taxes (including sales, use and personal property tax), fees, and assessments (collectively, "Taxes") that may be imposed by any governmental entity or taxing authority in connection with this Agreement or the Equipment or any amount due hereunder. Town will reimburse Bigbelly (or pay directly to the applicable taxing authority if instructed in writing by Bigbelly) for all such Taxes except to the extent Town is tax-exempt and has delivered to Bigbelly a valid and current tax exemption certificate as reasonably determined by Bigbelly.
- 6.2 Service. Town agrees that during the Term of the Agreement, it shall keep in effect the Service as defined in the Agreement. Unless otherwise agreed in a written amendment to this Agreement, Bigbelly or its subcontractors shall be the sole and exclusive suppliers of the Service.

- 6.3 Additions and Modifications of Equipment. Unless otherwise expressly agreed by an officer of Bigbelly in writing, Town shall not make any additions, alterations or modifications to the Equipment. Town shall not remove, cover or damage any Bigbelly logos or other identification markings on the Equipment.
- 6.4 Ownership Rights. The Equipment and Software contain intellectual property including but not limited to patented and unpatented inventions, trade secrets, know-how, and copyrights all of which is owned and will continue to be owned exclusively by Bigbelly and/or its licensors and Town will obtain no rights thereto other than the limited rights of use under this Agreement. Town acknowledges and agrees that all technology, materials, hardware, software, content and data of which the Equipment and Software is comprised or which is otherwise contained within or attached to, generated, collected or processed by the Equipment and/or Software is the sole and exclusive property of Bigbelly. Bigbelly hereby grants Town a royalty-free, non-exclusive, fully paid up right and license to use the Equipment, the Software, and any intellectual property rights therein as necessary for Town and its contractors to use the Equipment and Bigbelly Service consistent with the terms and conditions of the Agreement and these Terms and Conditions. Bigbelly reserves the right, at its sole cost and expense and subject to applicable governmental guidelines, laws, rules, regulations and ordinances, at any time upon notice to Town, to enhance or otherwise modify the Equipment and/or Software made available to Town under this Agreement, including but not limited to enhancements or modifications for the purpose of implementing Wi-Fi network capability to the Equipment, instituting mechanisms for data collection, processing and analysis. Bigbelly retains all media rights associated with signage, and Town agrees not to post signage and/or advertisements on the Equipment without written approval by Bigbelly. For avoidance of doubt, this does not prohibit Town from displaying messages solely on behalf of Town such as public service messages.
- 6.5 Termination.
- (A) Effect of Termination. Except as provided for in Section 6.7 below, any termination of the Agreement by Town, with or without cause, shall not relieve Town of its obligations to make any and all payments which obligations are absolute, unconditional, irrevocable, non-cancelable and subject to no right of set off, counterclaim, deduction, or defense.
- (B) Post Termination Duties / Surrender of Equipment. Upon the expiration or earlier termination or cancellation of the Agreement, Bigbelly shall remove the Equipment as described in Section 4.1 (H) above.
- 6.6 Indemnifications by the Parties.
- (A) Indemnity by Bigbelly. Bigbelly agrees to protect, defend, indemnify, save and hold harmless the Town of Surfside, all Departments, Agencies, Boards and Commissions, its officers, agents, servants and employees, including volunteers, from and against any and all claims, demands, expense and liability arising out of injury or death to any person or the damage, loss of destruction of any property which may occur or in any way grow out of any negligent act or omission of Bigbelly, its agents, servants, and employees, or any and all costs, expense and/or attorney fees incurred by the Town as a result of any claim, demands, and/or causes of action except of those claims, demands, and/or causes of action arising out of the acts or omissions of the Town of Surfside, all Departments, Agencies, Boards and Commissions, its officers, agents, servants and employees. Nothing in this indemnification is intended to act as a waiver of the Town's sovereign immunity rights, including those provided under section 768.28, Florida Statutes. This indemnification shall survive the expiration or termination of this Agreement. If the Town defends any claim, demand, cause of action, or lawsuit as described above, Bigbelly agrees to reimburse the Town for all expenses, attorney's fees, and court costs incurred in defending such claim, cause of action, or lawsuit.

- (B) **Indemnity by Town.** Subject to the limitations under section 768.28, Florida Statutes and without further waiving the state's sovereign immunity or extending its liability as provided therein, Town shall indemnify and hold Bigbelly and each of their directors, officers and employees, harmless, and defend Bigbelly and its representatives if it requests, as to all claims, liabilities, losses, damages and expenses brought against Bigbelly and/or its representatives because of any death, injury or damage to any person or property caused by or resulting from Town's negligence in operating or securing the Equipment.

6.7 **Default; Dispute Settlement; Governing Law.**

- (A) **Definition of Default.** The term "Default" means any of the following events: (i) Town fails to make any payment required under this Agreement within thirty days after the same shall have become due; (ii) Town or Bigbelly fails to perform any other obligation under this Agreement and such non-performance is not cured within thirty (30) days following notice or Town fails to provide insurance as required under this Agreement; (iii) Town defaults under any other Agreement with Bigbelly (iv) Town or Bigbelly becomes insolvent or makes an assignment for the benefit of its creditors; (v) a receiver, trustee, conservator or liquidator of Town or Bigbelly of all or a substantial part of such party's assets is appointed with or without the application or consent of such party; (vi) a petition is filed by or against Town or Bigbelly under any bankruptcy, insolvency or similar law; (vii) Town or Bigbelly violates or fails to perform any provision of either this Agreement; (viii) any warranty or representation made by either party herein proves to have been false or misleading when made; or, (ix) there is a material adverse change in Town's financial condition.
- (B) **Default by Town.** Upon the occurrence of a Default by Town, Bigbelly may do one or more of the following as Bigbelly in its sole discretion shall elect: (i) initiate Dispute Settlement procedures pursuant to subsection (D) herein to enforce performance by Town of the Agreement or to recover damages for the breach thereof; (ii) cause Town, at its expense, to promptly return the Equipment to Bigbelly at such place as Bigbelly designates in writing; (iii) by notice in writing to Town, cancel or terminate the Agreement, without prejudice to any other remedies hereunder; (iv) enter upon, or instruct its agents or assigns to enter upon, the premises of Town or other premises where any Equipment may be located and take possession of and remove all or any portion of such Equipment without liability to Town by reason of such entry or taking possession; (v) require Town to pay to Bigbelly immediately upon demand, in addition to all amounts then due under this Agreement, liquidated damages in the amount of the greater of (A) eighty percent (80%) of the remaining Service fees to become due during the Initial Term or (B) one year of Service fees, which amount, owing to the acknowledged difficulty in establishing a value for the unexpired Initial Term, the parties agree represents an agreed upon reasonable measure of damages and is not to be deemed a forfeiture or penalty; (vi) collect from Town all expenses incurred by Bigbelly in connection with the enforcement of any remedies, including all expenses of repossessing, storing, shipping, repairing and selling the Equipment and reasonable attorneys' fees; and (viii) exercise any other right or remedy available to Bigbelly under applicable law.
- (C) **Default by Bigbelly.** Upon the occurrence of a Bigbelly Default, Town may do one or more of the following as Town in its sole discretion shall elect; (i) initiate Dispute Settlement procedures pursuant to subsection (D) herein to enforce performance of the Agreement or recover damages for the breach thereof; (ii) cause Bigbelly, at its expense, to promptly collect the Equipment; (iii) by notice in writing to Bigbelly, cancel or terminate the Agreement, without prejudice to any other remedies hereunder; (iv) collect from Bigbelly all expenses incurred by Town in connection with the enforcement of any remedies, including all expenses of repossessing, storing, shipping, repairing and selling the Equipment and reasonable attorneys' fees; and (v) exercise any other right or remedy available to Town under applicable law.

(D) Dispute Settlement. In the event of any dispute arising due to a Default or with respect to the terms of the Agreement or obligations of the parties, the parties agree to discuss the dispute in an attempt to amicably resolve such dispute within 30 days of the date of a written notice of such dispute by one party to the other. Failing any such resolution, either party will be free to seek remedy through a court of competent jurisdiction.

(E) Continuation of Obligations. The occurrence of a dispute under or relating to the Agreement shall not relieve Bigbelly of, or change in any way, Bigbelly's obligation to provide the Service in accordance with the terms of the Agreement nor shall the occurrence of a dispute under or relating to the Agreement relieve Town of its obligations to make any and all payments described in the Agreement, including the Attachments, which obligations are absolute, unconditional, irrevocable, non-cancelable and subject to no right of set off, counterclaim, or deduction.

(F) Governing Law.

This Agreement shall be governed by and construed in accordance with the laws of the State of Florida. The venue of any claim, objection, or dispute arising out of the terms of this Agreement shall be in Miami-Dade County, Florida.

6.8 Assignment. Town may not assign this Agreement or any rights hereunder, or sublease or lend any Equipment without the prior written consent of Bigbelly. No assignment or sublease shall relieve Town of its obligations hereunder and Town shall remain primarily liable for such obligations. Any sale, assignment, transfer, encumbrance, delegation or sublease by Town not consented to by Bigbelly shall be void ab initio. Bigbelly may at any time assign to any person (an "Assignee") any interest in this Agreement in part or in whole or grant security interests in the Equipment and/or the Bigbelly's rights hereunder. In such event, all the provisions of this Agreement for the benefit of Bigbelly shall inure to the benefit of and be exercised by or on behalf of such Assignee, but the Assignee shall not be liable for or be required to perform any of Bigbelly's obligations to Town and Bigbelly shall retain such obligations. Town acknowledges that Assignee is providing financing for the Equipment only and agrees that (a) as between Town and Bigbelly, all of Town's payment obligations shall be absolute, unconditional and not subject to set-off, counterclaim, reduction, recoupment or other defense (b) it will not assert any defenses, set-offs, counterclaims or claims against any Assignee that Town may have against Bigbelly at any time; and (c) any such assignment shall not materially change Town's duties or obligations hereunder. Subject to the foregoing, the Agreement shall inure to the benefit of, and be binding upon, the successors and permitted assigns of the parties hereto.

6.9 Relationship of Parties. Bigbelly and Town are each independent entities and the relationship between Bigbelly and Town under the Agreement is not a joint venture, partnership, principal-agent, broker, sales representative or franchise relationship. Bigbelly has no authority to make any promise, commitment or agreement on Town's behalf, and Bigbelly will not represent to anyone that it does have such authority.

6.10 Notices. All notices shall be in writing and sent via U.S. certified mail return receipt requested. For purposes of this Agreement, unless changed by written notice, the mailing addresses of the parties shall be those set forth below:

For Town of Surfside:

Guillermo Olmedillo
Town Manager
9293 Harding Avenue
Surfside, Florida 33154
(305) 861-4863

For Bigbelly:

Eric Sockol
Chief Financial Officer
150 A Street, #103
Needham, MA 02494

- 6.11 **Force Majeure.** Any delay or failure of either party to perform its obligations (other than payment obligations) shall be excused if it is caused by an extraordinary event or occurrence beyond the control of the nonperforming party and without the nonperforming party's fault or negligence, such as acts of God, fires, floods, windstorms, explosions, natural disasters, wars and sabotage. Raw material or labor shortages are not force majeure events. Each party shall promptly notify the other of the reason for the delay and use its best efforts in curing such cause and shall take all action practicable to minimize the adverse impact of the delay on the other party.
- 6.12 **No Warranties.** Town hereby acknowledges that it has not entered into the Agreement including the Attachments in reliance upon any warranty or representation by any person or entity except for the warranties or representations specifically set forth therein.
- 6.13 **Use of Trade Names and Trademarks.** Neither party may use the trade name, service mark, logo or trademark of the other party for any purpose without previous permission in writing from the other party.
- 6.14 **Damages.** Unless otherwise provided in the Agreement, in no event shall Bigbelly, or its affiliates, shareholders, officers, directors, employees, agents, or representatives, or assigns be liable for lost revenue, lost profits, incidental, indirect or consequential damages, resulting from any aspect of the Service provided in connection with this Agreement. Bigbelly's maximum aggregate liability to Town in relation to or in connection with the Agreement will be limited to the total amount paid by Town to Bigbelly under the Agreement.
- 6.15 **Injunctive Relief.** If there is a breach or threat of a breach of the terms of the Agreement, the parties agree that compensation alone would not be an adequate remedy for the harm suffered by the non-breaching party, which harm would be immediate and irreparable. Therefore, if there is a breach or threatened breach, then the non-breaching party shall be entitled to seek injunctive relief to stop the breach or threatened breach. The rights and obligations of the parties under this provision survive the termination, cancellation, or expiration of the Agreement.
- 6.16 **Fiscal Funding.** This Section 6.16 is effective only if Town is a governmental entity, agency or authority. Town hereby represents and warrants to Bigbelly that: (a) Town is a municipality, a political subdivision of the State of Florida thereof as defined in Section 103 of the Internal Revenue Code and Treasury Regulations and Rulings related thereto (the "Code"); (b) If Town is incorporated, it is duly organized and existing under the Constitution and laws of its jurisdiction of incorporation and will do or cause to be done all things necessary to preserve and keep such organization and existence in full force and effect; (c) Town has been duly authorized by the Constitution and laws of the applicable jurisdiction and by a resolution of its governing body (which resolution, if requested by Bigbelly, is attached hereto), to execute and deliver the Agreement and to carry out its obligations hereunder; (d) All legal requirements have been met, and procedures have been followed, including public bidding, in order to ensure the enforceability of the Agreement; (e) The Equipment will be used by Town only for essential governmental or proprietary functions of Town consistent with the scope of Town's authority and will not be used in a trade or business of any person or entity, by the federal government or for any personal, family or household use. Town's need for the Equipment is not expected to diminish during the term of the Agreement; (f) Town has funds available to pay contracted Payments until the end of its current appropriation period, and it intends to request funds to make contracted Payments in each appropriation period, from now until the end of the term of the Agreement; and (g) The Town shall comply at all times with all applicable

requirements of the Code. If sufficient funds are not appropriated to make contracted payments under the Agreement (“Payments”), the Agreement shall terminate and Town shall not be obligated to make contracted Payments under the Agreement beyond the then-current fiscal year for which funds have been appropriated. Upon such an event, Town shall, no later than the end of the fiscal year for which contracted Payments have been appropriated, deliver possession of the Equipment to Bigbelly. If Town fails to deliver possession of the Equipment to Bigbelly, the termination shall nevertheless be effective but Town shall be responsible for the payment of damages in an amount equal to the portion of contracted Payments thereafter coming due that is attributable to the number of days after the termination during which the Town fails to deliver possession and for any other loss suffered by Bigbelly as a result of Town's failure to deliver possession as required. Town shall notify Bigbelly in writing within seven (7) days after the failure of the Town to appropriate funds sufficient for the payment of the contracted Payments, but failure to provide such notice shall not operate to extend the Agreement term or result in any liability to Town.

- 6.17 Entire Agreement. The Connect Services Agreement including Attachment “A” Connect Service Terms and Conditions constitute the entire agreement between the parties regarding its subject matter and supersede all prior agreements, oral and written, negotiations, commitments and writings, and may not be released, discharged, abandoned, changed or modified in any manner, orally or otherwise, except by an instrument in writing signed by a duly authorized representative of each party. Any purchase order or other ordering document issued by Town is for administrative purposes only and does not form part of this Agreement. If there is an inconsistency between or among the documents listed below, then the following order of precedence shall govern:
- (a) Attachment “A” Connect Service Terms and Conditions
 - (b) The Connect Services Agreement
- 6.18 Amendment; Modification; Waiver. No modification, amendment, waiver or release of any provision of the Agreement or any right, obligation, claim or cause of action arising under the Agreement shall be valid or binding unless in writing and duly executed by the party against whom enforcement is sought. No waiver by either party of any breach, or the failure of either party to enforce any of the terms and conditions of the Agreement, shall affect, limit or waive that party’s right to enforce and compel compliance with all terms and conditions of the Agreement or to terminate the Agreement as permitted by its terms. Any provision of this Agreement which for any reason may be held unenforceable in any one jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such unenforceability without invalidating the remaining provisions of this Agreement, and any such unenforceability in any one jurisdiction shall not render such provision unenforceable in any other jurisdiction. This Agreement may be executed in any number of counterparts and by different parties hereto or thereto on separate counterparts, each of which, when so executed and delivered, shall be an original, but all such counterparts shall together consist of but one and the same instrument.
- 6.19 Representations. Town hereby represents, warrants and covenants to Bigbelly that: (a) Town is organized and validly existing under the laws of the jurisdiction of its organization, with adequate power and capacity to enter into the Agreement and any other documents, instrument or agreement related to this Agreement; (b) The Agreement has been duly authorized, executed and delivered by Town and constitutes a valid, legal and binding agreement, enforceable in accordance with its terms, except to the extent that the enforcement of remedies therein provided may be limited under applicable bankruptcy and insolvency laws; (c) no approval, consent or withholding of objections is required from any governmental authority or instrumentality with respect to the entry into or performance by Town of the Agreement, except such as have already been obtained; (d) there are no suits or proceedings pending or threatened in court or before any regulatory commission, board or other administrative governmental agency against or affecting Town, which will have a material adverse effect on the ability of Town to fulfill its obligations and liabilities under the Agreement.

6.20 Public Records. Bigbelly acknowledges that the public shall have access, at all reasonable times, to certain documents and information pertaining to Town contracts, pursuant to the provisions of Chapter 119, Florida Statutes. Bigbelly agrees to maintain public records in Bigbelly's possession or control in connection with Bigbelly's performance under this Agreement and to provide the public with access to public records in accordance with the record maintenance, production and cost requirements set forth in Chapter 119, Florida Statutes, or as otherwise required by law. Big Belly shall ensure that public records that are exempt or confidential from public records disclosure requirements are not disclosed except as authorized by law.

6.21 Non-Discrimination. Bigbelly agrees that, in performing under this Agreement, it will not discriminate against any worker, employee or applicant, or any member of the public, because of race, creed, color, religion, age, sex, mental or physical disability unrelated to ability to perform, or national origin, or otherwise commit an unfair employment practice. Bigbelly shall take affirmative action to ensure that applicants are employed and that Towns are treated without regard to their race, creed, color, religion, age, sex, mental or physical disability unrelated to ability to perform, or national origin. Bigbelly shall ensure the same of any suppliers of materials or services, consultants and subcontractors, and all labor organizations furnishing skilled, unskilled and craft union skilled labor who may perform any such labor or services in connection with this Agreement.

Bigbelly will comply with Section 3-1.1 "Non-discrimination contract requirements; waiver" of the Town of Surfside Code. By entering into this Agreement with the Town, Bigbelly represents and affirms that Bigbelly is not currently engaged in, and will not engage in, a boycott as defined in Section 3-1.1 of the Town of Surfside Code of Ordinances.

6.22 Conflict of Interest. Bigbelly agrees to adhere to and be governed by the Miami-Dade County Conflict of Interest Ordinance; and by the Town of Surfside Ordinance, which are incorporated by reference herein as if fully set forth herein, in connection with the Agreement conditions hereunder.

Bigbelly covenants that it presently has no interest and shall not acquire any interest, directly or indirectly which should conflict in any manner or degree with the performance of the Services. Bigbelly further covenants that in the performance of this Agreement, no person having any such interest shall knowingly be employed by Bigbelly.

6.23 Severability. The Parties to this Agreement expressly agree that it is not their intention to violate any public policy, statutory or common law rules, regulations, or decisions of any governmental or regulatory body. If any provision of this Agreement is judicially or administratively interpreted or construed as being in violation of any such policy, rule, regulation, or decision, the provision, sections, sentence, word, clause, or combination thereof causing such violation will be inoperative (and in lieu thereof there will be inserted such provision, section, sentence, word, clause, or combination thereof as may be valid and consistent with the intent of the Parties under this Agreement) and the remainder of this Agreement, as amended, will remain binding upon the Parties, unless the inoperative provision would cause enforcement of the remainder of this Agreement to be inequitable under the circumstances.

6.24 Compliance with Laws. Bigbelly and the Town are responsible for complying with all applicable local, county, state, and federal laws, permitting and licensing requirements in the performance of the services provided as contained in this Agreement.

End of Attachment A.