

METROPOLITAN EXPOSITION RECREATION COMMISSION

RESOLUTION NO. 16-29

For the purpose of selecting CAPS, LLC (CAPS) for Stagehand Payroll Services and authorizing the General Manager of Visitor Venues to execute a contract with CAPS on behalf of the Metropolitan Exposition Recreation Commission (MERC)

WHEREAS, Portland's Center for the Arts (P'5) utilizes certain stagehands from the IATSE union (the Union) for commercial shows and P'5 Presents that have been paid through Oregon Stagehands Inc. (OSI), a local payroll company; and

WHEREAS, OSI was the one local option for these services used by the Union but recently other vendors have entered the Portland market for these specialized services; and

WHEREAS, MERC staff issued a formal Request for Proposals (RFP) in accordance with MERC's Purchasing and Contracting Rules for Stagehand Payroll Services; and

WHEREAS, MERC staff received one proposal from CAPS; and

WHEREAS, CAPS has significant experience in the entertainment industry with successfully providing stage-related payroll services nationwide and in the Portland region; and

WHEREAS, the CAPS contract proposal will significantly reduce overhead costs to MERC that will allow MERC to continue to diversify revenue streams; and

WHEREAS, MERC staff recommend selecting CAPS for Stagehand Payroll Services at P'5.

BE IT THEREFORE RESOLVED as follows:

1. MERC selects CAPS, LLC as the successful proposer in response to the Request for Bids for Stagehand Payroll Services; and
2. MERC approves the contract with CAPS, LLC in the form substantially similar to the attached Exhibit A; and
3. MERC delegates authority to the General Manager of Visitor Venues to execute the contract on behalf of MERC.

Passed by the Commission on November 2, 2016.

Approved As to Form:

Alison R. Kean, Metro Attorney

By: _____

Nathan A. S. Sykes
Deputy Metro Attorney

Chair

Secretary/Treasurer

CAPS PAYROLL SERVICE AGREEMENT

This SERVICE AGREEMENT (“Agreement”), entered into between CAPS, LLC, a Delaware limited liability company (“CAPS”), with offices located at 10600 Virginia Avenue, Culver City, CA 90232, and

NAME: Metro Exposition Recreation Commission (MERC), an appointed commission of Metro, a municipal corporation (hereinafter “Company”)

ADDRESS: 600 N.E. Grand Avenue, Portland, OR 97232-2736

WHEREAS CAPS is a payroll service provider for the Sports and Entertainment industry (including stadiums, arenas, conventions centers, theatres and festivals); and

WHEREAS Company wishes to engage CAPS to exclusively supply payroll services for Company’s personnel in the job classifications listed on the attached Service Schedule (collectively “Covered Workers” and each individually a “Covered Worker”) in connection with production of one or more of Company’s projects (collectively the “Projects”), and CAPS wishes to supply the payroll services with respect to such Covered Workers, on the terms and conditions of this Agreement. CAPS shall be the sole and exclusive provider of payroll services to Company until the later of: (i) the completion of the Projects or (ii) the Term described in Paragraph 2, below.

NOW, THEREFORE, for the promises and consideration stated herein, Company and CAPS hereby agree as follows:

1. Engagement of CAPS:

1.1 Engagement: Company hereby engages CAPS to serve as “Employer of Record” of the Covered Workers on behalf of Company for purposes of workers’ compensation insurance and payroll processing. Company shall supply to CAPS all information and materials required and requested by CAPS (e.g., applicable union collective bargaining agreements, W-4s, W-9s, I-9s, time cards, deal memos, call sheets, production reports) to permit CAPS perform its obligations hereunder.

1.2 General and Administrative Services: In addition to the services to be provided by CAPS as the Employer of Record pursuant to Paragraph 1.1 above, CAPS shall perform general and administrative services in connection therewith, including without limitation, payroll tax (including, but not limited to, payroll withholdings and the payment of workers compensation and unemployment insurance premiums) and insurance administration.

1.3 Employee Acceptance and Control: It is expressly agreed by the parties hereto that within the scope of this Agreement, the status of CAPS is that of Employer of Record and “general employer” of the Covered Workers for the purposes only of providing workers’ compensation insurance, unemployment insurance administration, management of unemployment claims and payroll processing services. Company shall maintain sole and exclusive authority to hire, supervise, assign, direct, control, set the compensation of, and terminate the Covered Workers and thus having such authority, Company is and shall be deemed the common law employer and the “special employer” of all Covered Workers, as the terms “general employer” and “special employer” are understood for purposes of workers’ compensation statutes, liability for payment of wages to the Covered Workers and liability for negligence and any other wrongful acts or omissions arising out of or relating in any way to the Projects or the employment relationship between the Covered Workers and Company.

2. **Term:** This Agreement shall be effective as of the date it is executed or at such time Company first becomes obligated to process a payroll, whichever is earlier. The term shall continue so long as all parties are in full compliance with their obligations hereunder and have not elected to terminate the Agreement, where such termination is available under this Agreement.
3. **Relationship Between CAPS and Company:** It is expressly agreed by the parties hereto that within the scope of this Agreement, CAPS is at all times herein acting and performing its payroll and related services as an independent contractor. Except as otherwise expressly provided hereunder or approved in writing hereto, neither party shall assume or create any obligation or responsibility whatsoever on behalf of or in the name of the other party.
4. **Payroll Service Responsibilities**

4.1 Company's Obligations: Company agrees to promptly provide CAPS with the classifications, rates of pay, hours guaranteed, and any deal memos or other information reflecting compensation arrangements differing from and/or in addition to the minimum terms and conditions set forth in any collective bargaining agreements applicable to each Covered Worker. Company further agrees to provide CAPS, if requested by CAPS, with all call sheets, production reports and time cards for all Covered Workers on a weekly basis, with a copy of its Articles of Incorporation or other organizational documentation, and with all completed forms required by law (e.g., W-4, W-9, I-9). In order for Company to avoid late payment penalties, all payroll reports and approved time cards must be delivered to CAPS no later than Tuesday of the following week in which work was performed and, in the case of daily Covered Workers whose services have been terminated, immediately upon the layoff or termination of the affected Covered Worker(s). Company shall be solely responsible for any and all obligations (whether by collective bargaining agreement, personal agreement, statute or otherwise) with regard to any employees that do not constitute Covered Workers pursuant hereto, and/or for any Covered Workers for whom Company does not timely provide information or required documentation to CAPS. Notwithstanding anything herein to the contrary, CAPS reserves the right to refuse to process any payroll for which CAPS in its reasonable discretion determines it has not been provided with timely and accurate information by Company in order to process such payroll in compliance with applicable laws.

Company is responsible for compliance with the employer health coverage mandate with respect to the Covered Workers under Section 4980H of the Internal Revenue Code, and all reporting related thereto. No Covered Workers will travel or perform services outside the United States.

Company will delegate and maintain a representative who will be the primary point of contact for dealing with CAPS. Company may change its representative by giving written notice to CAPS and an indication of when such change will become effective. Company acknowledges that its designated representative shall act as the primary liaison with CAPS with respect to this Agreement and any services or solution CAPS may provide.

4.2 CAPS' Services: For the convenience of and at the specific request of the Company, Company desires to have CAPS become the designated "Employer of Record" and provide payroll services on behalf of Company for all Covered Workers. As the "Employer of Record" for the Covered Workers, CAPS shall be responsible for obtaining and maintaining during the term of this Agreement workers compensation insurance and unemployment insurance as required by applicable Oregon law (the "Required Insurance") and hereby assumes the Company's workers compensation and unemployment liabilities arising from the employment of the Covered Workers during the term of this Agreement to the extent covered by such Required Insurance. CAPS represents and warrants that it has obtained workers' compensation insurance and unemployment insurance coverage in compliance with Oregon law. Notwithstanding CAPS' provision of the Required Insurance, Company shall be solely and exclusively liable for payment of wages to the Covered Workers, and for any and all wrongful acts or omissions arising out of or relating in any way to the Projects or the

employment relationship between the Covered Workers and Company. For the avoidance of doubt, any and all liabilities, claims, demands, charges, grievances and/or obligations which are not insured under the applicable Required Insurance shall be the sole and exclusive responsibility of Company, unless failure to insure was caused solely by CAPS' material breach of its covenants or representations contained in this Agreement which has not been cured after written notice to CAPS and reasonable opportunity to cure. Company shall indemnify CAPS against any such liabilities and CAPS shall indemnify Company for any such liabilities in the manner specified in Paragraph 11 hereunder.

In accordance with the submission of all records described in Paragraph 4.1 and subject to its provisions, CAPS shall calculate and pay all wages, allowances, penalties, fees, fringe benefits, pension plan contributions, health plan contributions and/or other payments called for under any applicable statutes and/or collective bargaining agreement and/or individual agreements. CAPS will pay Oregon State unemployment insurance taxes and administer unemployment procedures. In addition, CAPS will calculate all employee withholdings of the Covered Workers and pay all taxes and related obligations imposed by applicable law or governmental or union regulations in connection with services of the Covered Workers hereunder, including without limitations, payment and withholdings for Social Security and Medicare taxes, unemployment insurance taxes, workers compensation and required disability insurance. CAPS shall also prepare and file any required returns and reports, including but not limited to quarterly or yearly employment tax returns and benefit plan contribution reports, but excluding reports related to mandated employer health coverage (including form 1095-C or other reports as may be required by IRS Sections 6065 and 6056) unless otherwise specified, in writing.

Company shall be liable to CAPS for any and all overpayments that may result from any incorrect information supplied by Company and Company shall promptly pay or reimburse CAPS for such overpayments. CAPS agrees to waive its workers' compensation insurer's right to recover against Company where allowed by law. CAPS shall be liable to Company for any mistakes caused solely by CAPS' material breach of its covenants or representations contained in this Agreement which has not been cured after written notice to CAPS and reasonable opportunity to cure.

4.3 Company's Obligation to Pay CAPS: Company shall reimburse CAPS for any and all payments made to and/or on behalf of the Covered Workers pursuant to any and all applicable laws, rules or regulations, collective bargaining agreement(s) and/or individual agreement(s), including but not limited to all wages, fringe benefits, statutory payments and Trust Fund contributions made with respect to such Covered Workers and/or pursuant to Paragraph 4.2 above or Paragraph 5.2 below. Company shall also pay to CAPS the processing and other fees for services performed in accordance with the attached SERVICE SCHEDULE. (Such fees do not purport to represent CAPS' actual costs.) Termination of this Agreement by either party hereto or this Agreement's expiration shall not relieve Company from its obligation to pay CAPS' fees as detailed on the Fee Schedule, and/or to reimburse CAPS for the amounts described above in this Paragraph 4.3 or for the settlement of any claims or grievances concerning the payment of wages, statutory payments, payroll taxes, union fringe benefits, or other Trust Fund payments, even if such obligation(s) may arise after the expiration or termination of this Agreement unless such termination is caused solely by CAPS' material breach of its covenants or representations contained in this Agreement which has not been cured after written notice to CAPS and reasonable opportunity to cure.. Company shall reimburse CAPS for any and all retroactive adjustments to statutory payments and payroll taxes as required by the respective taxing authorities unless such adjustments are caused solely by CAPS' material breach of its covenants or representations contained in this Agreement which has not been cured after written notice to CAPS and reasonable opportunity to cure.. Company shall reimburse CAPS for any late claim filing penalties incurred by CAPS arising as a result of Company's failure to comply with any obligation prescribed by applicable law or agreement, including but not limited to the obligations set forth above in Paragraph 4.1 of this Agreement. Company's obligation to pay CAPS is unconditional, and any claim of any type whatsoever that Company may have against CAPS under this Agreement or otherwise shall not excuse Company from that obligation to pay or constitute defense to or offset from that obligation to pay, except where caused solely by CAPS' material breach of its covenants or

representations contained in this Agreement which has not been cured after written notice to Caps and reasonable opportunity to cure.

4.4 Interest Charges: If Company fails to make any payment as and when due hereunder, interest charges may, at CAPS' sole option, accrue thereon from the date payment is due, at the rate of ten percent (10%) per year.

5. Employee Compensation:

5.1 Rates: The rates of compensation for Covered Workers shall be those set forth in written time cards, deal letters, memorandum agreements, contracts, collective bargaining agreements, or otherwise, as approved in writing by Company. Company shall provide CAPS with copies of all such writings pursuant to Paragraph 4.1 of this Agreement, and shall verify and be solely responsible for the accuracy of those writings and the information contained therein.

5.2 Travel and Living Expenses: Subject to the conditions set forth below, (subject to payment or reimbursement by Company pursuant to Paragraphs 4.1 and 4.3), CAPS shall pay or reimburse Covered Workers for travel, living expenses away from home, other per diem payments and any other reimbursable items as required by any applicable personal service agreement and/or collective bargaining agreement, and CAPS shall make all withholdings and related payments required by law and governmental and/or union regulations in connection therewith. In order to qualify for such payments, Company shall require the Covered Workers paid by CAPS pursuant to this Agreement to submit detailed documentary support of all travel, living expenses away from home, other per diem payments and any other reimbursable items, and Company shall maintain such records and supply copies of such support to CAPS if requested by CAPS. CAPS is performing its services pursuant to this paragraph as an accommodation to Company and any liabilities, including, but not limited to, any interest, taxes and penalties which arise in connection with payments pursuant to this paragraph shall be the sole responsibility of Company unless caused solely by CAPS' material breach of its covenants or representations contained in this Agreement which has not been cured after written notice to Caps and reasonable opportunity to cure..

5.3 Retroactive Changes: If any union, union-related organization, benefit plan, governmental, or administrative agency conducts any audit or assesses retroactive charges, interest, or penalties, CAPS shall promptly invoice Company for such amounts, and Company shall pay such amounts to CAPS as rendered within ten (10) business days. If it is later determined that such charges, interest, or penalties arose solely as a result of the fault of CAPS, then CAPS will reimburse Company for all such amounts.

5.4 Residuals or Royalties: Payment of any and all residuals or royalties arising out of or relating to Company Projects to any individual entity or organization are not covered under CAPS services and shall remain the exclusive obligation of the Company.

6. Unions: Company is or will become signatory to any collective bargaining agreement(s) applicable to the Covered Workers hereunder and warrants that it shall remain signatory to the collective bargaining agreement(s) during the term of this Agreement; and, hereby covenants to comply with the any applicable provisions of such collective bargaining agreement(s) with respect to the Covered Workers. To the extent there is an inconsistency between the terms of this Agreement and any applicable collective bargaining agreement(s), the collective bargaining agreement(s) shall prevail.

7. Strikes: The parties hereto acknowledge that the applicable collective bargaining agreements, if any, contain express or implied "no strike, no lockout" provisions and agree to comply with same. CAPS shall not be in breach of this Agreement if it declines to provide Covered Workers to Company to any location

where a strike, lockout, or labor dispute exists under circumstances where a Covered Worker would be legally privileged to withhold services.

8. Confidentiality:

8.1 Agreement Confidential: Subject to the limits of Oregon's Public Records Law, the parties agree that this Agreement and its terms, including any exhibits or schedules, are and shall be the Confidential Information (as defined below) of CAPS. Company may not disclose this Agreement, its terms, or any exhibit or schedule to any third party or person, except as may reasonably be required to enforce the terms of this Agreement, and/or to its attorneys, accountants, directors, parent organizations, tax authorities, appropriate elected and appointed officials, the applicable Union that has members paid under this Agreement, IATSE, Local 28 or as otherwise required by law, subject in all cases to any permitted third party or person being under the same obligation to keep the information confidential as called for in this Agreement. For the purposes of this Agreement, "Confidential Information" means information which has been or which may be disclosed, either orally or in writing, by one party ("Disclosing Party") to the other party ("Receiving Party") in confidence, that is marked "Confidential," or which is reasonably understood to be the proprietary or confidential information of the Disclosing Party, including, without limitation, information associated with or related to the information concerning any aspect of the business of the Disclosing Party or its affiliates, trade secrets, financial statements, business and marketing plans, business and technical data, pending or threatened litigation, prospective contractual relations, collection, tabulation, and analysis of data, computer programming methods, designs, specifications, plans, drawings and similar materials, programs, software, databases, inventions and works (whether or not eligible for legal protection under patent, trademark, or copyright laws), research and development, and/or work in progress. Notwithstanding the foregoing, Confidential Information does not include any information which (i) is or was in the public domain at the time communicated to the Receiving Party, or which becomes public through no fault of the Receiving Party; (ii) is or was obtained by the Receiving Party, with permission to disclose, from a third party not subject to a contractual, fiduciary or other duty not to disclose; (iii) has been independently developed by the Receiving Party, as shown by Receiving Party documentation; or (iv) was lawfully in the Receiving Party's possession free of any duty to the Disclosing Party before the date of disclosure to the Receiving Party by the Disclosing Party.

8.2 Confidentiality and Non-Disclosure: Each party agrees to preserve the confidentiality of all Confidential Information of the other party that is obtained in performance or connection with this Agreement, and shall not, without the prior written consent of the other party, disclose or make available to any person, or use for its own benefit or that of another person or entity other than as contemplated by this Agreement, any Confidential Information of the other party. Each party shall exercise the level of care it would exercise to safeguard its own Confidential Information concerning Confidential Information received from the other, provided that such efforts shall at least be reasonable. These restrictions do not apply to Confidential Information which a Receiving Party (i) is required by law or regulation to disclose, but only to the extent and for the purposes of such law or regulation; (ii) discloses in response to a valid order of a court or other governmental body, but only to the extent of and for the purposes of such order, and only if the Receiving Party first notifies the Disclosing Party of the order and permits the Disclosing Party to seek an appropriate protective order or move to quash or limit such order; or (iii) discloses with written permission of the Disclosing Party, in compliance with any terms or conditions set by the Disclosing Party regarding such disclosure.

9. Force Majeure: Either party's obligations under this Agreement shall be suspended during the duration of any events beyond either party's control, including but not limited to, acts of God, strikes, lockouts, breaches by a third party of its contractual obligations, suspension of production, and any event that prevents a party from performing under this Agreement. If CAPS or Company suspends all services supplied hereunder for a period in excess of five (5) business days, the non-suspending party may elect to terminate this Agreement

by written notice to CAPS, provided that on or before the effective date of termination, where Company is the party electing to terminate, it shall pay all amounts due and owing to CAPS up to the date and time of termination, and Company shall assume, in writing, all executory obligations which CAPS may have with respect to performing its obligations for Company under this Agreement.

10. Representations, Warranties & Covenants:

10.1 Company's Representations, Warranties & Covenants: Company represents, warrants and covenants that:

- a) Company retains the sole and exclusive authority to hire, supervise, assign, direct, control, set the compensation of, and terminate the Covered Workers. Accordingly, it being understood that Covered Workers are not the agents or employees of CAPS for any purpose, CAPS shall not be subject to any claims arising from, in connection with, or as a result of services supplied by CAPS hereunder or the product of any services provided to Company by any Covered Worker, or the use of such product in any medium anywhere in the world, except to the extent that such claims are due to acts or omissions by CAPS.
- b) Company has the right to enter into this Agreement and to perform its obligations hereunder.
- c) Company is self-insured for any applicable claims under this Agreement with comprehensive excess insurance for any claims that exceed One Millions Dollars (\$1,000,000.00) and Company shall also name CAPS as an additional insured on such policy and provide CAPS with a certificate demonstrating such coverage and further provide CAPS with prompt written notice of the termination of such policy.
- d) In the engagement by Company of any and all Covered Workers, the Company agree to comply with all applicable federal, state and local laws, rules, statutes and regulations, including, without limitation, those concerning the hiring of individuals authorized to work in the United States, wage payment, occupational safety and health, discrimination, retaliation or harassment based on race, religion, gender, age, sexual orientation physical disability, color, national origin and any other categories protected by applicable laws.
- e) Company agrees to use commercially reasonable efforts to protect the personally identifiable information of Covered Workers from unauthorized access or disclosure.
- f) INTENTIONALLY LEFT BLANK
- g) Company represents and warrants that any and all information provided to CAPS pursuant to this Agreement will be accurate and in compliance with applicable collective bargaining agreements, personnel service contracts and federal, state, and local laws and regulations.
- h) Company will permit CAPS to inspect and copy any and all records of Company, its subsidiaries, alter egos, affiliates and/or related entities that pertain or relate to any Covered Worker or this Agreement upon reasonable written notice to the other party.
- i) Company shall promptly provide CAPS with copies of any and all grievances, charges, claims or suits of any kind of which Company becomes aware relating in any way to any personnel working

on the Projects, including, but not limited to, the Covered Workers, that may impact the Services of CAPS under this Agreement.

- j) To the extent that Company is requested to do so by CAPS, Company will disseminate to all Covered Workers for whom workers compensation insurance and/or any other benefit programs has been provided any and all information and/or documentation provided to it regarding such benefit programs and will use its best efforts to see that such Covered Workers comply with the requirements of those programs. Notwithstanding the above, Company hereby acknowledges that CAPS is neither an employer nor a fiduciary under any employee welfare benefit plan offered or provided to any covered worker under the Employee Retirement Income Security Act (“ERISA”), or any state counterpart or derivative law. Company acknowledges and agrees that its damages, if any, arising from or related to acts or omission by CAPS in connection with the operation, administration and compliance with the terms of any and all employee welfare benefit plans offered or provided to any Covered Workers shall be limited to the actual monetary payments, penalties, fines and interest paid by Company to the affected Covered Worker[s], except where such damage is caused solely by CAPS’ material breach of its covenants or representations contained in this Agreement which has not been cured after written notice to CAPS and reasonable opportunity to cure.
- k) CAPS will provide access to the solution(s) identified on Exhibit C. Company hereby acknowledges and agrees that any CAPS solution shall be subject to the Remote Access Terms and Conditions set forth in Exhibit B, which are hereby incorporated into this Agreement as if set forth fully herein. Any right to use the software and system made available by CAPS shall be limited to the term of this Agreement.

10.2 CAPS Representations, Warranties and Covenants: CAPS hereby represents, warrants, and covenants that CAPS has the right to enter into this Agreement and has the ability to perform its obligations hereunder as provided for in CAPS response to the Request For Proposals issued by MERC.

- a) **CAPS:** In performance of its services under this Agreement, CAPS agrees to comply with all Federal and State local laws and regulations that regulate the performance of such services. CAPS shall not discriminate against its employees based on race, color, or national origin
- b) CAPS agrees to use commercially reasonable efforts protect the personally identifiable information of Covered Workers from unauthorized access or disclosure.
- c) CAPS will provide Company with copies of any documents or records of CAPS involved in the performance of this Agreement with reasonable written notice to the CAPS.

11. Indemnification: Subject to the limits of the Oregon Tort Claims Act and the Oregon Constitution where applicable, Company agrees to hold CAPS harmless and to indemnify and defend CAPS, its successors, licensees and assignees and representatives against any and all claims, demands, charges, grievances, unfair labor charges, arbitration claims, investigations, administrative actions, court actions, costs, expenses and liabilities, including reasonable legal fees and costs (collectively “Indemnification Liabilities”), instituted against Company and/or CAPS by any governmental agency or person or entity, including but not limited to any Covered Worker or other person working for or with Company (whether or not covered by this Agreement) and/or by any labor organization purporting to represent any such individual(s), which arise out of or relate in any way to (i) any breach of a representation or warranty of Company given to CAPS pursuant hereto, (ii) Company’s breach of any of its covenants arising under this Agreement, (iii) all liabilities arising out of or in connection with compliance with the employer coverage mandate under Section 4980H of the

Internal Revenue Code, and (iv) the employer-employee relationship between Company and any Covered Worker; other than workers compensation liabilities for which CAPS has expressly assumed liability pursuant to Paragraph 4.2 hereof, and which shall constitute the sole and exclusive liability assumed by CAPS hereunder except where such damage is caused solely by CAPS' material breach of its covenants or representations contained in this Agreement which has not been cured after written notice to CAPS and reasonable opportunity to cure. Company's duty to defend CAPS hereunder shall entitle CAPS to select its legal counsel, at reasonable rates given the nature of the action, it being acknowledged by Company and CAPS that in any action arising pursuant to this Paragraph 11, the respective interests of Company and CAPS may in some instances be in conflict. CAPS agrees to hold Company harmless and to indemnify and defend Company, its successors, licensees and assignees and representatives against any and all Indemnification Liabilities instituted against Company and/or CAPS by any governmental agency or person or entity, including but not limited to any person working for or with Company (whether or not covered by this Agreement) and/or by any labor organization purporting to represent any such individual(s), which arise out or are in connection with (i) any breach of a representation or warranty of CAPS given to Company pursuant hereto, (ii) CAPS's breach of any of its covenants arising under this Agreement and/or (iii) all liabilities for which CAPS has expressly assumed liability pursuant to Paragraph 4.2 hereof. CAPS duty to defend Company hereunder shall entitle Company to select its legal counsel, at reasonable rates given the nature of the action, it being acknowledged by CAPS and Company that in any action arising pursuant to this Paragraph 11, the respective interests of Company and CAPS may in some instances be in conflict. Notwithstanding anything herein to the contrary, any and all penalties, fines, settlements, judgments, awards, fees and/or costs shall be borne solely by Company, unless determined to be caused solely by CAPS' material breach of its covenants or representations contained in this Agreement which has not been cured after written notice to CAPS and reasonable opportunity to cure. .

12. **Limitation of Liability and Damages:** In no event shall either party be liable for any indirect, incidental, consequential, exemplary, or special damages arising out of or in any way connected with this agreement, whether in an action based upon contract, tort, or otherwise. Moreover, in no event shall CAPS or its third party licensor(s) be liable for any direct or indirect damages or loss due to (i) any Company materials; (ii) Company's results from the use of the services or software of CAPS; (iii) any damage to, or degradation or loss of, any other information, materials, or software of Company; or (iv) any matter beyond CAPS' reasonable control. Company's sole remedy for CAPS' liability regarding the performance of training, consulting, software support o, provided under this agreement or in conjunction with the software made available by caps shall be limited to the re-performance of any defective service provided by CAPS, or if re-performance is not available or practical, then a pro-rata refund of the fees paid to caps that are allocable to the defective service or software. Moreover, in no event shall the liability of CAPS or its third party licensors for matters described in (i), (ii), (iii), or (iv) exceed the fees paid by Company under this agreement during the prior twelve months for any and all claims hereunder by Company, regardless of the form of the action. The parties agree that the limitations in this section are a bargained for exchange and a material condition and premise of this agreement.
13. **Termination:** CAPS shall have the right to terminate its obligations under this Agreement without cause upon ninety (90) business days' written notification. CAPS shall also have the right to terminate its obligations under this Agreement if Company is in material breach of its obligations hereunder or under any applicable individual or collective bargaining agreement(s), and fails to cure such breach upon seven (7) business days' written notification thereof. Company shall have the right to terminate this Agreement upon three (3) days' written notice to CAPS, provided that Company makes full and timely payment to CAPS of all sums due to CAPS for services rendered and/or obligations accrued during the term of this Agreement and without set-off or reduction for any reason except a material breach of this Agreement.

14. **Survival of Certain Provisions**: Notwithstanding the termination or expiration of this Agreement, all of the indemnification covenants of the parties hereto set forth herein and all obligations of Company to pay CAPS all sums due CAPS hereunder shall survive such termination or expiration.
15. **Assignment**: Neither Company nor CAPS shall have the right to assign this Agreement without the written consent of the other, provided that CAPS may assign this Agreement to an affiliate or successor, or as part of a sale or assignment of all or substantially all of CAPS' assets.
16. **No Continuing Waiver**: No waiver by either party of any breach hereof shall be deemed a waiver of any preceding or succeeding breach hereof.
18. **Severability**: If any provision, or any part of this Agreement shall, for any reason, be held invalid, unenforceable, or contrary to public policy or any law, the legality, validity and enforceability of the remainder of this Agreement shall not be affected thereby.
19. **Governing Law**: This Agreement shall be deemed, made, construed and interpreted in accordance with the laws of the State of Oregon, without giving effect to that state's choice of law rules.
20. **Jurisdiction and Venue**: CAPS consents to the exclusive jurisdiction of the federal and state courts in the State of Oregon for the purpose of any lawsuit arising from or related to this Agreement, and Company and CAPS agree to Multnomah County as the exclusive venue for any such suit.
21. **Further Documents**: The parties hereby agree to execute and deliver all further documents that are reasonably necessary to effectuate the terms and conditions of this Agreement.
22. **Entire Agreement**: This Agreement (together with the schedules and exhibits (including the Remote Access Terms and Conditions of Exhibit B) attached hereto) sets forth the entire agreement of the parties, supersedes all prior and contemporaneous agreements, understandings, covenants and conditions relating to the subject matter hereof. This Agreement may not be changed, amended, modified, or supplemented except by a writing signed by CAPS and Company.
23. **Representation**: The relationship between the parties to this Agreement is and shall be that of independent contractors only and nothing in this Agreement shall be construed or used to create or imply any relationship of partners, joint venturers, or employer and employee between the parties. Company and CAPS each represent and warrant it was represented by its own separate and independent counsel in the negotiation and execution of this Agreement. Company nevertheless agrees that CAPS may use Company's name to disclose that it is a client of CAPS in CAPS's advertising and promotion. Except for the foregoing, neither CAPS nor Company shall issue any press release or other public statement regarding the subject matter hereof or otherwise use the other party's names, trademarks, service marks, logos, or trade dress unless the other party has previously approved it. Either party, however, may make such disclosure as may be required by applicable law.

BY SIGNING BELOW, EACH PARTY HEREBY ACKNOWLEDGES THAT IT HAS READ AND UNDERSTOOD ALL THE TERMS AND CONDITIONS OF THIS PAYROLL SERVICE AGREEMENT AND INTENDS TO BE BOUND THEREBY.

CAPS, LLC

By: _____

Its: _____

Date: _____

Metro Exposition Recreation Commission

By: _____

Its: _____

Date: _____

Date: _____

Name, Individually

SERVICE SCHEDULE

Venue & Event Production

Rates for 2016 as of January 1, 2016

<u>Employment Taxes:</u>	<u>Oregon</u>
FICA	7.65%
FUI ¹	0.60%
Supplemental FUI	0.00%
<u>SUI²</u>	<u>5.40% (\$35,700 ceiling)</u>
Total ³	13.65%

***Plus any locally mandated employer taxes

Workers' Compensation:⁴ Oregon

Crew & Guest Services	5.49%
Executive Officers/Clerical	1.53%

¹ Up to 1.5% may be refunded in December 2016 pending the States' repayment of loans to the Federal Unemployment Account.

² SUI rates subject to change.

³ Payroll is subject to additional jurisdictional employment taxes.

Note: The Workers' Compensation rates noted above are for non-hazardous work. Stunts, pyrotechnics, aircraft, watercraft or other hazardous activities are not covered unless approved in advance of the work by the CAPS Risk Management Department. Hazardous activities may be subject to a surcharge that impacts your project's budget.

Administrative Fee:

Two percent (2.00%) of gross wages or a minimum of ten dollars (\$10.00) per check, whichever is greater
Postage to be paid by Company on checks and stubs that are mailed

EXHIBIT B
REMOTE ACCESS TERMS & CONDITIONS

The following terms and conditions are a part of the CAPS Payroll Service Agreement by and between CAPS, LLC and the named Company (the "Agreement"). Any capitalized terms not defined herein shall have the meanings set forth in the Agreement.

NAME: **TYPE COMPANY NAME** (hereinafter "Company")

ADDRESS: **TYPE COMPANY ADDRESS**

1. **DEFINITIONS.** In addition to any other terms defined in the Agreement, the capitalized terms used in this Exhibit B will have the meanings set forth below.

1.1. "Authorized User(s)" means the following person or entities:

(a) Company's designated employee(s) given access by Company to the CAPS Solution; and

(b) If applicable, Company's designated agents, contractors, and subcontractors working on behalf of and given access by Company to the CAPS Solution.

1.2. "Derivative Works" mean any updates, suggestions, contributions, enhancements, improvements, additions, modifications, or derivative works.

1.3. "Documentation" means the user documentation and any other operating or reference manuals associated with the CAPS Solution, as is or may be supplied or provided by CAPS to Company, as well as any Derivative Works thereto.

1.4. "CAPS Solution" means the CAPS designated software application(s) or online solution, all of which shall be made available only in the form of compiled, executable object code. Unless otherwise noted, references to the CAPS Solution shall include the Documentation, associated API, interface, or portal, and resultant standard form reporting provided by CAPS to Company or any Authorized User(s) as well as any Derivative Works thereto (or to any part thereof).

2. **THE CAPS SOLUTION.**

2.1. Remote Access Grant.

(a) General. CAPS hereby grants to Company during the term of the Agreement, and Company hereby accepts from CAPS, a non-exclusive and non-transferable right and license, with a limited right to sublicense (as set forth below) the right, to access and use the CAPS Solution only for Company's internal business purposes, which shall exclude any uses or purposes other than accounting for Company, and only by Company's Authorized Users and subject at all times to the number of licenses purchased by Company or permitted by the Agreement. Unless otherwise noted, references to "Company" in the Agreement will include both Company and all Authorized Users. Except as otherwise agreed by CAPS, the foregoing access grant shall permit each Authorized User to print and download materials from the CAPS Solution on a single-use, single-copy basis and not for resale or further distribution, display, or transmission so long as any such copy(ies) includes any CAPS' proprietary or legal notices.

(b) Right to Sublicense. Subject to the terms and conditions of the Agreement, CAPS hereby grants to Company, during the term of the Agreement, and Company hereby accepts a limited right and license, on a non-exclusive, non-transferable basis, to enable Authorized Users that are not full-time employees (and who have been retained by Company as an agent, accountant, or contractor to use the CAPS Solution on behalf of Company in accordance with the Agreement) to access and use the CAPS Solution only for Company's internal business purposes, which shall exclude any uses or purposes other than the internal accounting for Company.

2.2. Restrictions. Except as expressly permitted herein, Company may not (i) copy, store, reproduce, transmit, distribute, display, rent, lease, sell, modify, alter, license, sublicense, or commercially exploit the CAPS Solution or any part thereof; (ii) reverse engineer, decompile, disassemble, translate or create any derivative work of the CAPS Solution, or any part thereof; (iii) access, link to, or use any source code from the CAPS Solution (or any part thereof); (iv) erase or

Initials: _____ _____
 CAPS Manager

remove any proprietary or intellectual property notice contained in or on the CAPS Solution, or any part thereof; (v) alter or modify any information displayed, transmitted or printed from the CAPS Solution; or (vi) use or permit use of the CAPS Solution for or by any person or entity (including Company's affiliates and subsidiaries) other than Company's Authorized Users. Moreover, except as permitted by CAPS, Company acknowledges that it has no right to sublicense any of its rights herein to another person or entity. Company acknowledges that exceeding the scope of the license herein, shall be a material breach of the Agreement and subject to the termination provisions set forth herein.

2.3. Availability. CAPS shall use commercially reasonable efforts to make the CAPS Solution accessible to Company through a CAPS designated online address, subject to required and emergency maintenance, failure of third-party networks and communications facilities, and events of force majeure for which CAPS will not be responsible. Any other specifics for access, including any registration requirements for Authorized Users, shall be set forth in the Agreement or online. The content layout, formatting, and arrangement of the CAPS Solution shall be designed by CAPS in its sole discretion. In the event that Company desires that CAPS modify the "look and feel" or standard delivery features of the CAPS Solution, the parties will mutually agree upon the provision of any related services and Company agrees to compensate CAPS for such services (as provided below).

2.4. Security. CAPS will employ the commercially reasonable security measures, using no less than industry standard security methodologies, to maintain the security of the CAPS Solution, including any Company data stored on the CAPS Solution.

3. **GENERAL COMPANY OBLIGATIONS**. Company acknowledges and agrees that successful implementation of the CAPS Solution shall require Company's reasonable and timely cooperation and that any failure to fulfill its obligations may cause delays in the fulfillment by CAPS of its obligations under the Agreement. Accordingly, Company acknowledges and agrees that CAPS will be relieved of its obligations under the Agreement to the extent that they are affected by Company's failure to fulfill its obligations under the Agreement. With regard to CAPS, Company's responsibilities, in addition to any other general obligations set forth in the Agreement, are as follows:

3.1. Delivery of Company Materials. In connection with implementation of the CAPS Solution for use by Company, Company shall provide to CAPS any necessary Company information or materials ("Company Materials") in a timely manner (as CAPS may request and the parties, together, may specify). Company shall also reasonably cooperate with CAPS in connection with the implementation of the CAPS Solution for use by Company and its Authorized Users and the delivery of any Company Materials by Company to the CAPS Solution. With respect to any Company Materials, Company must obtain (and acknowledges that it is responsible for obtaining) at its sole expense, and provide CAPS with reasonable proof thereof, all necessary consents, rights, permissions, and clearances required for CAPS to use the Company Materials for the purposes contemplated by the Agreement. In connection with delivering and providing CAPS with access to and use of the Company Materials, Company hereby grants to CAPS a non-exclusive right and license to copy, distribute, create derivative works from, display, modify, reformat, transmit, and otherwise use any Company Materials in connection with CAPS's obligations under the Agreement. CAPS reserves the right to refuse any Company Materials that do not meet CAPS's specification or guidelines, that do not arrive in a timely fashion, or that are otherwise likely to be considered infringing, objectionable, or in violation of law. If any portion of Company Materials cannot be integrated as required by the Agreement for the foregoing reasons, the Parties shall cooperate and mutually agree on alternatives (to the extent such Company Materials are required for CAPS to fulfill its obligations).

3.2. Assistance with Authorized Users. Company acknowledges and agrees that it is Company's responsibility to monitor its or any Authorized User's use of the CAPS Solution in compliance with these terms and conditions. Moreover, Company shall ensure that only Authorized Users have access to the CAPS Solution. In addition, Company shall keep CAPS reasonably informed as to any problems encountered with the CAPS Solution by any Authorized User and will communicate promptly in writing to CAPS any and all notices of problems, errors, or defects (and a reasonable description thereof) as well as any suggestions for improvements or corrections (with such suggestions for improvements or corrections becoming the sole and exclusive property of CAPS). Moreover, all Authorized Users given access to the CAPS Solution must agree to (i) abide by the terms and conditions of the Agreement and the End User License Agreement granting to each individual Authorized User the right to access and use the CAPS Solution in accordance with the Agreement ("EULA") (as such EULA is made available and as may be modified by CAPS from time to time), and (ii) restrict use of the CAPS Solution only for such Authorized User's internal business purposes and only as

permitted by the Agreement. Company acknowledges and agrees that Company shall be responsible and liable for any acts or omissions of its Authorized Users. Accordingly, Company acknowledges that any breach of the Agreement by Company's Authorized User(s) shall constitute a breach by Company.

3.3. Notice of Breach. If Company or any of its Authorized Users discover or are notified of a breach or potential breach of security or permissible use of personally identifiable information relating to the CAPS Solution, Company shall immediately: (i) notify CAPS of such breach or such potential breach and (ii) if the applicable information, data, or content from the CAPS Solution was in the possession or control of Company or its Authorized Users, including, without limitation, in instances where such possession or control was permitted or required by the Agreement, at the time of such breach or potential breach, Company shall immediately: (a) investigate such breach or such potential breach, (b) inform CAPS of the results of such investigation, and (c) assist CAPS in maintaining the confidentiality of such information. In addition to the foregoing, Company shall provide CAPS with any assistance reasonably necessary to enforce CAPS's rights and to enable CAPS to comply with any state or federal laws requiring the provision of notice of any security breach with respect to any personally identifiable information of the affected or impacted data subjects. Company acknowledges that CAPS has sole control over the timing, content, and method of providing any notification to any individuals (to the extent that CAPS maintains the relationship with such individuals). Company also agrees that it shall reimburse CAPS for all expenses associated with such notification if due to Company's breach of its obligations under the Agreement.

3.4. Hardware and the CAPS Solution Requirements. On a reasonable basis, CAPS shall furnish to Company information that pertains to the technical requirements for Company's use of the CAPS Solution under the Agreement and Company shall be solely responsible for obtaining, paying for all required third party software or hardware (and any licenses thereto) as necessary for access to the CAPS Solution.

3.5. Compliance with Laws. Both parties shall undertake all measures necessary to ensure that the use of the CAPS Solution complies in all respects with applicable laws, regulations, and other rules promulgated by governing authorities having jurisdiction over the Parties. In addition, Company shall not export, directly or indirectly, the CAPS Solution without first obtaining all required licenses and approvals from CAPS and the appropriate government agencies.

4. PROPRIETARY RIGHTS.

4.1. CAPS. The Agreement is not a sale of the CAPS Solution nor is it a transfer or assignment of any intellectual property rights in the CAPS Solution. Accordingly, Company acknowledges that CAPS and/or its licensors owns all right, title, and interest, including, without limitation, all intellectual property, in and to the CAPS Solution, and any related data, databases, database structure, procedures, and processes, programming code, HTML coding and design, interfaces, Web/portal pages, and any Derivative Works thereof or thereto. Any rights that Company may acquire by operation of law with respect to the CAPS Solution and any Derivative Works with respect to either the CAPS Solution are hereby assigned by Company to CAPS. Moreover, Company acknowledges and agrees that (i) the CAPS Solution includes unpublished, licensed works, and trade secrets; (ii) independent economic advantages are derived by CAPS from its ownership of the CAPS Solution; and (iii) the CAPS Solution is the confidential information of CAPS and subject to reasonable precautions to protect such information from unauthorized disclosure and use as well as any other obligations of confidentiality set forth in the Agreement. CAPS and all other names, logos, and icons identifying CAPS's products and services are proprietary marks of CAPS and/or its licensors and any use of such marks by Company shall inure to the benefit of CAPS and/or its licensors and any use of such marks without CAPS's prior written consent is strictly prohibited. CAPS reserves all other rights, title, and interests not expressly granted herein, and Company acknowledges and agrees that it shall not do anything to impair CAPS and/or its licensors rights in and to the CAPS Solution. Nothing herein, however, shall be construed as granting to CAPS any right of ownership in the data provided by Company.

4.2. Right to Monitor & Enforcement. Company acknowledges that CAPS reserves the right, at any time and without notice, to monitor compliance with the terms of the Agreement and to otherwise protect its rights in the CAPS Solution by utilizing security or other management technology and otherwise monitoring usage of the CAPS Solution, including, without limitation, by monitoring time, date, and access and implementing other controls, counters, passwords, user i.d.'s, and/or other devices or procedures. CAPS further reserves the right to suspend or terminate Company's and/or any Authorized User's access to the CAPS Solution if Company fails to comply with the terms and conditions of the

Agreement and/or the EULA. In such event, CAPS shall be relieved of its obligations under the Agreement during the period of suspension and shall not be found to be in breach of the Agreement for such relief. Moreover, Company acknowledges and agrees that any breach, threatened or actual, of any provision of these terms and conditions may cause irreparable injury to CAPS and that such injury would not be quantifiable in monetary damages alone. Accordingly, Company acknowledges and agrees that CAPS would not have an adequate remedy at law and shall otherwise be entitled, in addition to other available remedies, to seek and be awarded an injunction or other appropriate equitable relief from a court of competent jurisdiction restraining any breach, threatened or actual, of Company's obligations under these terms and conditions.

5. **WARRANTY DISCLAIMER.** THE CAPS SOLUTION IS PROVIDED "AS IS" AND "AS AVAILABLE," AND CAPS DISCLAIM ANY AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE. CAPS DOES NOT WARRANT, GUARANTEE, OR MAKE ANY REPRESENTATIONS REGARDING THE USE, OR THE RESULTS OF THE USE, OF THE CAPS SOLUTION (AND ANY ASSOCIATED INFORMATION, SOFTWARE, AND MATERIALS), SERVICES, AND/OR SUPPORT IN TERMS OF SUITABILITY, ACCURACY, TIMELINESS, RELIABILITY, CURRENTNESS, COMPLETENESS, FUNCTIONALITY, INTENDED PURPOSE, OR OTHERWISE. CAPS ALSO DOES NOT REPRESENT OR WARRANT THAT THE CAPS SOLUTION WILL OPERATE ERROR-FREE, UNINTERRUPTED, OR IN A MANNER THAT WILL MEET YOUR REQUIREMENTS. MOREOVER, CAPS SHALL NOT BE RESPONSIBLE FOR ANY UNAUTHORIZED USE OF OR ACCESS TO THE CAPS SOLUTION.

6. **DUTIES UPON TERMINATION.** Upon termination or expiration of the Agreement for any reason all rights and licenses granted hereunder to Company and any Authorized User shall immediately terminate and Company and all Authorized Users shall immediately return to CAPS all CAPS materials in its possession, custody, or control in whichever form held (including all copies or embodiments thereof). Upon request by CAPS, Company shall provide to CAPS, as soon as possible, an affidavit executed by an officer of Company certifying that Company and its Authorized Users have complied with all of their termination duties under the Agreement.

CAPS, LLC

By: _____

Date: _____

Its: _____

PRODUCTION COMPANY NAME

By: _____

Date: _____

Its: _____

Name, Individually

Date: _____

EXHIBIT C

CAPS Solution

Solution Name	Solution URL
Electronic Time Card	https://etc.capspayroll.com
C-PAS (CAPS Production Accounting System)	https://nextgen.capspayroll.com/NextGen/Account/Home
CAPS Pay	https://capspay.capspayroll.com
LAJit (Commercial Accounting Solution) LAJit Fee: \$2,500 per month. If the client reaches the \$1,000,000 in crew payroll annually, CAPS will refund the monthly fee	<a "="" href="https://lajit.west.capspayroll.com/">https://lajit.west.capspayroll.com/ <i>InsertCompanyNameHere</i> /Login.aspx

MERC STAFF REPORT

Agenda Item/Issue: Metropolitan Exposition and Recreation Commission approval of the contract and award to the lowest responsible proposer, CAPS LLC for Stagehand Payroll Services and delegate authority to the GM of visitor venues to execute the contract.

Resolution No: 16-29

Presented by: Jason Blackwell

Date: November 2, 2016

BACKGROUND: Portland's Centers for the Arts has a collective bargaining agreement with IATSE Local 28 covering stagehand workers. Besides the fifteen regularly employed department head stagehands, Portland's also utilizes relief heads, grips, riggers, and other stage-related positions on an event-driven basis. These workers are not employed by MERC and require regular payroll services from a third-party contractor outside MERC/Metro. Historically, MERC has used a 3rd party contractor for these services in order to streamline the administrative complexities associated with this particular workforce, especially as it relates to passing through costs to our clients on an event by event basis.

In the past, MERC has had only one local option for these services, but recently other vendors have entered the Portland market for these specialized services and staff chose to conduct a procurement process.

MERC Staff prepared and issued a Request for Proposal that included a detailed scope of work and schedule for payroll services. The scope of work is limited to services for workers covered by the terms and conditions of a collective bargaining agreement between MERC and IATSE Local 28 at Portland's facilities. The contractor will provide complete payroll services, including but not limited to workers' compensation and unemployment insurance and claims handling for workers. Payroll services also include all employer-related functions as required by the United States Federal Government, State of Oregon, and any local governmental jurisdictions. This includes the coordination of all appropriate deductions and reporting requirements for taxes, fees, etc. Contractor will also authorize and issue payments on behalf of workers to the responsible parties mutually agreed upon by MERC and IATSE 28 for 401(k) and Health and Welfare contributions.

With regards to workers, Contractor will provide and coordinate new worker on boarding paperwork and any other typical employer provided services. MERC will be responsible for supervision, hiring, training, scheduling, and termination of all workers. Contractor will issue regular payments to workers and applicable parties for benefit contributions as described above.

The RFP was issued in accordance with MERC's Purchasing and Contracting Rules and in compliance with Metro Policy and any and all state (ORS) requirements. The RFP was published on ORPIN and directed to three known potentially qualified bidders and on the Metro website. On May 26, 2016, one proposal was received from CAPS LLC. CAPS LLC has significant experience with successfully providing stage-related payroll services nationwide and in the Portland region. This new contract has a few relevant features that will support MERC business needs. MERC staff will be able to operate far more efficiently with timely and accurate completion of show settlement processes. The contract with CAPS includes a significant reduction of overhead costs to MERC that will allow us to continue to diversify revenue streams. MERC currently spends 27% in payroll taxes administrative fees. The CAPS proposal will reduce that to 21.14%. Staff anticipates saving more than \$30,000 in the first year of the agreement and the equivalent of hundreds of hours saved through business process improvements created by the new agreement.

No bids were received from a certified MWESB or FOTA area business.

FISCAL IMPACT: 3rd party payroll services are budgeted in FY17 at \$375,000 and given the increased event volumes, staff anticipates continued growth year over year.

RECOMMENDATION: Staff recommends that the Metropolitan Exposition and Recreation Commission, by Resolution No. 16-29, approve the contract award and written contract (attached hereto) with CAPS LLC, for Stagehand Payroll Services as detailed in the RFP and delegate authority to the General Manager of visitor venues to execute the contract.