

**REPORT/RECOMMENDATION TO THE BOARD OF SUPERVISORS
OF SAN BERNARDINO COUNTY
AND RECORD OF ACTION**

March 12, 2024

FROM

BEAHTA R. DAVIS, Director, Regional Parks Department

SUBJECT

Agreement with the Worldpay, LLC for Merchant Solution Services

RECOMMENDATION(S)

Approve Bank Card Merchant **Agreement No. 24-197**, including non-standard terms, with Worldpay, LLC to provide merchant solutions services, in an amount not to exceed \$500,000, for a contract period of three years, from the later of the first day of the calendar month following execution of the Bank Card Merchant Agreement, or the first date the County receives services, and automatically renewing on a month-to-month basis, unless terminated or non-renewed by either party.

(Presenter: Beahta R. Davis, Director, 387-2340)

COUNTY AND CHIEF EXECUTIVE OFFICER GOALS & OBJECTIVES

Operate in a Fiscally-Responsible and Business-Like Manner.

FINANCIAL IMPACT

Approval of this item will not result in the use of Discretionary General Funding (Net County Cost). The Regional Parks Department's (Department) use of park fee revenue will fund the Bank Card Merchant Agreement (Agreement) in the not to exceed amount of \$500,000 for the three-year period. The Agreement amount will be based on the actual number of credit/debit card payments processed, which is based on a 2.39% interchange fee. Adequate appropriation and revenue have been included in the Department's 2023-24 budget and will be included in future recommended budgets.

BACKGROUND INFORMATION

The Department requires a merchant payment gateway for services allowing both customers and Department staff to complete transaction payments directly from the online reservation website. The Department began accepting electronic payments at all park facilities and online in October 2006.

In July of 2023, Department staff received notification that the current vendor, First Data Merchant Services, was transferring from its Payeezy operating system to Clover, a new system. On February 22, 2024, First Data Merchant Services provided notification that they would be eliminating services as of March 1, 2024. This cancellation of essential services required the Department to search for a new processing services company. The Department researched and found a platform run by Worldpay, LLC, that supports the current reservation system and provides the same services but offers better customer support.

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For customer convenience, Worldpay will accept all forms of payment, including those via credit cards, checking, and savings accounts. The Department cost includes a 2.39% interchange fee to process credit/debit card payments, and an optional \$2,500 fee for interactive voice response, if needed. Customers will not be charged to make payments online.

The Agreement is Worldpay's standard commercial contract, which includes terms that differ from the standard County contract and omits certain County standard contract terms. Worldpay is unwilling to negotiate these terms. The non-standard and missing terms include the following:

1. Governing law of the Agreement is the State of Ohio. Governing law for claim by or against the County directly or indirectly related to Automated Clearinghouse (ACH) services provided under the Agreement are governed by the State of Arizona.
 - The County standard contract requires California governing law.
 - Potential Impact: The Agreement will be interpreted under Ohio law. Any questions, issues or claims arising under this Agreement will require the County to hire outside counsel competent to advise on Ohio law, which may result in fees that exceed the total Agreement amount. Disputes regarding ACH services will be interpreted under Arizona law. Any questions, issues or claims arising under this Agreement will require the County to hire outside counsel competent to advise on Arizona law, which may result in fees that exceed the total Agreement amount.
2. There is no restriction on Worldpay's ability to assign the Agreement without notice to the County and without the County's approval.
 - The County standard contract requires that the County must approve any assignment of the contract.
 - Potential Impact: Worldpay could assign the Agreement to a third party or business with which the County is legally prohibited from doing business due to issues of Federal debarment or suspension and conflict of interest, without the County's knowledge. Should this occur, the County could be out of compliance with the law until it becomes aware of the assignment and terminates the Agreement. County Counsel cannot advise on whether and to what extent Ohio law may permit or restrict a party's right to assign without an express provision in the Agreement.
3. There is no provision in the Agreement addressing each party's responsibility for paying attorneys' fees.
 - The County standard contract requires each party to bear its own costs and attorney fees, regardless of who is the prevailing party.
 - Potential Impact: County Counsel cannot advise on, whether and to what extent, Ohio law may affect a party's requirement to pay the prevailing party's attorneys' fees and costs in a legal action where no specific provision is provided in the Agreement.
4. Worldpay limits its indemnification obligation to claims arising from its gross negligence or willful misconduct, and subject to its limitation of liability.
 - The County standard contract indemnity provision requires the contractor to indemnify, defend, and hold County harmless from third party claims arising out of the acts, errors or omissions of any person.

- Potential Impact: The limit of Worldpay's indemnification obligation means that any claim that is not caused by Worldpay's gross negligence, a significant deviation from the ordinary standard of care, or willful misconduct, intentional egregious behavior, are excluded from Worldpay's indemnification obligations.
5. The County must indemnify Worldpay for claims arising from: (a) the services; (b) County's processing activities; (c) County's business and customers; (d) any sales transaction; (e) noncompliance with operating regulations; (f) any data incident (including infiltration, hack breach, or violation of the processing system; (g) breach of the Agreement; (h) County's breach of the Sprout terms; and (i) the County's gross negligence, willful misconduct, or failure to comply with law related to the product. The County further agrees to indemnify Worldpay for any claim asserted against Worldpay by any assignee of any of County's present or future rights under the Agreement. The County agrees to indemnify Worldpay and its bank from all claims, including fines and penalties, resulting from the County's use of the tokenization service, storage of cardholder data and breach of the Tokenization Service Terms. The County agrees to indemnify Worldpay against claims arising from the County's use of the online reporting services system. In addition, the County agrees to indemnify Worldpay's third party processing and collection agent, Base Commerce, as well as FreedomPay and Upside Services, as third-party beneficiaries to the Agreement terms.
- The County standard contract does not include any indemnification or defense by the County of a contractor.
 - Potential Impact: By agreeing to indemnify Worldpay, the County could be contractually waiving the protection of sovereign immunity. Claims that may otherwise be barred against the County, time limited, or expense limited could be brought against Worldpay without such limitations and the County could be responsible to defend and reimburse Worldpay for costs, expenses, and damages, which could exceed the total Agreement amount. County Counsel cannot advise on, whether and to what extent, Ohio law may limit or expand this Agreement term.
6. The Agreement does not require Worldpay to meet the County's insurance standards as required pursuant to County Policies, 11-05, 11-07 and 11-07SP.
- County policy requires contractors to carry appropriate insurance at limits and under conditions determined by the County's Risk Management Department and as set forth in County policy and in the County standard contract.
 - Potential Impact: The County has no assurance that Worldpay will be financially responsible for claims that may arise under the Agreement, which could result in expenses to the County that exceed the total Agreement amount.
7. WorldPay limits its liability to the lesser amount of actual monetary damage or fees paid to Worldpay for the particular services for the three calendar months before the date of the relevant act, without any exceptions.
- The County standard contract does not include a limitation of liability.
 - Potential Impact: Claims could exceed the liability cap and the Agreement amount leaving the County financially liable for the excess. County Counsel cannot advise on, whether and to what extent, Ohio law may limit or expand the exclusion of limits to the extent prohibited by applicable law.

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8. The term of the Agreement is three years from the later of the first day of the calendar month following execution of the Agreement or the first date that the County receives services, thereafter, automatically renewing on a month-to-month basis unless terminated or non-renewed by either party by notice 60 days prior to the term expiration.
 - County Policies 11-05 and 11-06SP1 do not permit indefinite term or automatically renewing contracts except for end user license agreements, software/hardware licenses and subscriptions, and master service agreements or unless approved by the Board of Supervisors (Board).
 - Potential Impact: There is no end term to the Agreement and the County is indefinitely bound to the terms and conditions of the Agreement until terminated by Worldpay or the County gives notice not to renew at least 30 days prior to the renewal date or terminates prior to the end of a term with cause, or without cause with payment of an early termination fee.
9. There is no termination for convenience without penalty. If the County terminates the Agreement prior to the then current term or Worldpay terminates the Agreement for the County's breach, the County is liable for liquidated damages in the amount of the average monthly revenue payable to WorldPay in the three highest revenue calendar months in the prior 12 months multiplied by the number of months remaining in the term.
 - The County standard contract gives the County the right to terminate the contract, for any reason, with a 30-day written notice of termination without any obligation other than to pay amounts for service rendered and expenses reasonably incurred prior to the effective date of termination.
 - Potential Impact: Upon termination by Worldpay for County's breach or the County's termination for convenience, the County is required to pay an early termination fee of the greater of \$495 and the average monthly fees assessed multiplied by the number of months remaining in the current term, which could result in payment liability where no funds are available due to lack of allocation or loss of funding.
10. Venue for legal claims is in the state or federal courts located in Cincinnati, Ohio, or Hamilton County, Ohio. Venue for claims by or against the County directly or indirectly related to ACH services is in the state or federal courts located in Phoenix, Arizona, or Maricopa County, Arizona.
 - County Policy 11-05 requires venue for disputes in Superior Court of California, County of San Bernardino, San Bernardino District.
 - Potential Impact: Having a venue in Cincinnati or Hamilton County, Ohio may result in additional expenses that exceed the amount of the Agreement. Having a venue in Phoenix, Arizona, or Maricopa County, Arizona may result in additional expenses that exceed the amount of the Agreement.

The Department recommends approval of the Agreement, including non-standard terms, as this provider's services coincide with the Department's current reservation and online system.

Approval of this recommendation aligns with the County and Chief Executive Officer goals and objectives to operate in a fiscally-responsible and business-like manner by allowing the Department to receive payment for Board approved fees.

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PROCUREMENT

The Department obtained quotes from three providers: First Data Merchant Services, Worldpay, and Fidelity National Information Services, Inc. (FISGlobal). After interviews with current users of both Worldpay and FISGlobal were completed, the Department initially chose FISGlobal based on services and overall costs offered. During the selection process, the Department was informed that FISGlobal was purchased by Worldpay and decided to move forward with Worldpay.

REVIEW BY OTHERS

This item has been reviewed by County Counsel (Bonnie Uphold, Supervising Deputy County Counsel, 387-5455) on March 1, 2024; Finance (Elias Duenas, Administrative Analyst, 387-4052) on February 27, 2024; and County Finance and Administration (Valerie Clay, Deputy Executive Officer, 387-5423) on February 27, 2024.

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Record of Action of the Board of Supervisors
San Bernardino County

APPROVED (CONSENT CALENDAR)

Moved: Joe Baca, Jr. Seconded: Jesse Armendarez
Ayes: Col. Paul Cook (Ret.), Jesse Armendarez, Dawn Rowe, Curt Hagman, Joe Baca, Jr.

Lynna Monell, CLERK OF THE BOARD

BY 
DATED: March 12, 2024



cc: Parks - Davis w/agree
Contractor - c/o Parks w/agree
File - w/agree
CCM 03/12/2024