

# DRAFT

STATE OF TEXAS )  
 )  
COUNTY OF EL PASO )

## AGREEMENT

This Agreement entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2013, by and between the City of El Paso, a municipal corporation situated in El Paso County, Texas, hereinafter referred to as “City”, and SecureOrigins, Inc., a 100% owned subsidiary of TECMA and located in El Paso, El Paso, County, Texas, hereinafter referred to as “Contractor”.

### RECITALS

**WHEREAS**, the City Council of the City of El Paso has as its primary federal legislative agenda item the reduction of border crossing time for traffic across the City’s international bridges;

**WHEREAS**, enhanced border crossing time efficiencies could lead to growth in the maquiladora industry which in turn could translate to regional economic benefits;

**WHEREAS**, a successful reduction of border crossing time for commercial traffic across the City’s international bridges would serve as a model program for the rest of the nation’s land ports of entries;

**WHEREAS**, Contractor has developed Project 21, a technology-based tracking mechanism to enhance the efficient border crossing of commercial goods, and wishes to provide its services to the City for a second 90-day City-funded trial period, after the first 90-day City-funded trial period commencing on October 15, 2012 and ending January 14, 2013, did not achieve all of its intended deliverables;

**WHEREAS**, Contractor has been determined to be the sole source of said technology-based tracking mechanism, as provided by Texas Local Government Code Section 252.022(a)(7); and

**WHEREAS**, the City wishes to contract with Contractor in order to implement a second 90-day City-funded trial period to test Contractor’s technology-based tracking mechanism at the Ysleta-Zaragoza Port of Entry, on the terms and conditions set forth herein.

### WITNESSETH

The City and Contractor, for the consideration and mutual promises as herein, set forth agree as follows:

1.0 TERM.

The term of this Agreement shall begin on April 15, 2013, and shall expire on July 14, 2013. The term of this Agreement shall not be extended.

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## 2.0 CONTRACTOR RESPONSIBILITIES.

2.1 Contractor shall utilize Project 21, its technology-based tracking mechanism including Software-As-A-Service (“SaaS”), applied systems and C-TPAT best practices, to track the daily cross-border movement of C-TPAT commercial shipments by trucks certified in and participating in Project 21 and headed from Ciudad Juarez, Chihuahua to El Paso, Texas and from El Paso, Texas to Ciudad Juarez, Chihuahua over the Ysleta-Zaragoza Port of Entry.

2.1.1 Commercial trucks participating in the El Paso County Secure Border Trade Project shall not be counted as Project 21 participating trucks in this Agreement.

2.1.3 Commercial trucks using the Bridge of the Americas or any other port of entry other than the Ysleta-Zaragoza Port of Entry shall not be counted as Project 21 participating trucks in this Agreement.

2.2 Contractor shall meet or exceed the following deliverables:

2.2.1 The current number of CTPAT certified manufacturing operations (maquilas) certified in and participating in Project 21 is currently 13. Contractor shall increase that number to 16 by May 15, 2013, to 19 by June 15, 2013, and to 21 by July 14, 2013.

2.2.2 The current average daily number of commercial shipments of Project 21 certified and participating trucks using the Ysleta-Zaragoza Port of Entry shall be increased as follows:

2.2.2.1 The current average daily number of northbound (originating in Ciudad Juarez, Chihuahua and terminating in El Paso, Texas) commercial shipments is 212, based on the most recent biweekly report provided by SecureOrigins to the City. Contractor shall increase that number to 460 by May 15, 2013, to 500 by June 15, 2013, and to 600 by July 14, 2013. Northbound numbers shall be reported separately from southbound numbers.

2.2.2.2 The current average daily number of southbound (originating in El Paso, Texas and terminating in Ciudad Juarez, Chihuahua) commercial shipments is 212, based on the most recent biweekly report provided by SecureOrigins to the City. Contractor shall increase that number to 460 by May 15, 2013, to 500 by June 15, 2013, and to 600 by

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July 14, 2013. Southbound numbers shall be reported separately from northbound numbers.

2.2.3 The current average wait time at the Ysleta-Zaragoza Port of Entry for commercial shipments of Project 21 certified and participating trucks, from Mexican Aduanas to the United States Customs and Border Protection entrance is currently 40 minutes, and shall be reduced to an average of 35 minutes by May 15, 2013, to 30 minutes by June 14, 2013 and to 25 minutes by July 14, 2013. Northbound measurement for time monitoring purposes shall begin 1 kilometer before Mexican Aduanas and shall end at the United States Customs and Border Protection entrance.

2.2.3.1 Southbound measurement for time monitoring purposes shall begin 1 kilometer prior to the Zaragoza Port of Entry from either north on Loop 375 or west on Loop 375. The southbound measurement shall be provided for reporting purposes only, not as a deliverable.

2.3 Contractor shall provide on a bi-weekly basis to the Director of the City's International Bridges Department (the "Director") a report with data containing the deliverables and southbound time measurement set forth in Section 2.2.1 through 2.2.3 of this Agreement. Contractor shall certify that the submitted bi-weekly report does not contain data from trucks participating in the El Paso County Secure Border Trade Project or trucks using the Bridge of the Americas or any other port of entry that is not the Ysleta-Zaragoza Port of Entry.

2.3.1 In addition, Contractor shall include in the biweekly report the number of roundtrips by Project 21 certified and participating trucks carrying commercial shipments across the Ysleta-Zaragoza Port of Entry each day, originating in Ciudad Juarez, Chihuahua to El Paso, Texas and back to Ciudad Juarez, Chihuahua, with the goal of increasing the number from the current 1.9 roundtrips per day, to 2.3 roundtrips per truck per day by May 15, 2013, to 2.5 roundtrips per truck per day by June 14, 2013 and to 3 roundtrips per truck per day by July 14, 2013.

2.4 The first bi-weekly report shall be received by the Director on May 3, 2013. The last bi-weekly report shall be received by the Director no later than July 19, 2013. Failure to timely provide the City with the required reports described in Section 2.3 shall be deemed to be a material breach of this Agreement and shall be a basis for the City to terminate the Agreement in accordance with Section 10.

2.5 All reports and data shall be submitted to the City in a format that is compatible and readable with the City's IT system.

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- 2.6 If Contractor utilizes anything other than Project 21, or counts and reports on data for Project 21 commercial shipments at an international border crossing other than the Ysleta-Zaragoza Port of Entry during the 90-day effective period described in Section 1.0 to this Agreement, the City may terminate the Agreement pursuant to Section 10.

## 3.0 CITY RESPONSIBILITIES.

- 3.1 For the services rendered under this Agreement, City will pay to Contractor as set forth in Section 4, Compensation.
- 3.2 The City shall allocate the funding for this Agreement from the International Bridges revenues. The City Manager is authorized to make all appropriate transfers to the relevant International Bridges fund for this purpose.
- 3.3 All payments by the City under this Agreement are payable only out of current City revenues. In the event that funds relating to this Agreement do not become available, such as by City Council not appropriating the funds, the City shall have no obligation to pay or perform any services related herein to Contractor, except to the extent that Contractor has in good faith obligated any funds by contract with third parties prior to actual notice of non-appropriation, for the City's fiscal year during which time such funding is not available or appropriated. Should the City experience a funding unavailability, either party may choose to terminate the Agreement subject to Section 10.

## 4.0 COMPENSATION AND METHOD OF PAYMENT.

- 4.1 The total amount of compensation to Contractor by the City shall not exceed ONE HUNDRED NINETY-FIVE THOUSAND AND NO/100 Dollars (\$195,000) for the term of this Agreement, as set forth below.
- 4.2 The payments from the City to Contractor shall be split into equal amounts over the 90-day term.
  - 4.2.1 Except as provided in Section 4.5 to this Agreement, upon receipt of an appropriate invoice from Contractor to the Director, the first payment shall be made by the City to Contractor on May 20, 2013, in the amount of SIXTY-FIVE THOUSAND AND NO/100 DOLLARS (\$65,000).

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4.2.2 Except as provided in Section 4.5 to this Agreement, upon receipt of an appropriate invoice from Contractor to the Director, the second payment shall be made by the City to Contractor on June 20, 2013, in the amount of SIXTY-FIVE THOUSAND AND NO/100 DOLLARS (\$65,000).

4.2.3 Except as provided in Section 4.5 to this Agreement, upon receipt of an appropriate invoice from Contractor to the Director, the third payment shall be made by the City to Contractor on July 29, 2013, in the amount of SIXTY-FIVE THOUSAND AND NO/100 DOLLARS (\$65,000).

4.3 Contractor agrees that at no time shall it make a claim against the City for more than the compensation provided under the terms of this Agreement.

4.4 Payment is subject to the payment terms and conditions set forth in the Prompt Payment Act, Texas Government Code Section 2251.

4.5 Failure to fully achieve the monthly deliverables in Sections 2.2.1 through 2.2.3 shall be deemed to be a material breach of this Agreement and shall be a basis for the City to withhold from Contractor the corresponding monthly payment as described in Sections 4.2.1 through 4.2.3, and the City may terminate the Agreement in accordance with Section 10. Failure to timely provide the City with the required reports described in Section 2.3 is explained in Section 2.4 of this Agreement.

5.0 APPLICABLE LAWS. Contractor shall perform all services under this Agreement in accordance with all applicable local, state, and federal laws and regulations.

6.0 INDEPENDENT CONTRACTOR. Nothing contained herein shall be construed as creating the relationship of employer and employee between the City and Contractor. No partnership or joint venture is intended to be created by this Agreement, nor any principal-agent or employer-employee relationship between the parties or any of their officers, employees, agents or sub-consultants. As an independent contractor, each party understands and agrees that it will be responsible for its respective acts or omissions, and the other party shall in no way be responsible as an employer to the other party's officers, employees, agents, representatives or sub-contractors who perform any service in connection with this Agreement.

7.0 ASSIGNMENT/SUBCONTRACTORS. The services to be provided under this Agreement are specific to Contractor and shall not be assigned or delegated without the prior written consent of the City. Contractor will ensure that any subcontractor will comply with all applicable terms of this Agreement.

8.0 INDEMNIFICATION.

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**CONTRACTOR UNDERSTANDS AND AGREES THAT IT AND/OR ITS SUBCONTRACTOR(S) SHALL INDEMNIFY AND HOLD HARMLESS THE CITY AGAINST ANY AND ALL CLAIMS, DEMANDS, DAMAGES, COSTS AND EXPENSES, INCLUDING INVESTIGATION EXPENSES AND REASONABLE ATTORNEY FEES FOR THE DEFENSE OF SUCH CLAIMS AND DEMANDS, ARISING OUT OF OR ATTRIBUTED DIRECTLY OR INDIRECTLY TO THE NEGLIGENT, GROSS NEGLIGENT, INTENTIONAL, MALPRACTICE OR WILLFUL ACTS OR OMISSIONS OF CONTRACTOR, ITS AGENTS, SUBCONTRACTORS, EMPLOYEES, OR REPRESENTATIVES IN RENDERING THE SERVICES UNDER THIS AGREEMENT.**

- 8.1 Without modifying the conditions of preserving, asserting or enforcing any legal liability against the City as required by the City Charter or any law, the City will promptly forward to Contractor every demand, notice, summons or other process received by the City in any claim or legal proceeding contemplated herein.
- 8.2 In addition, Contractor shall promptly advise the City in writing of any claim or demand against the City or Contractor known to Contractor related to or arising out of Contractor's activities under this Agreement.
- 8.3 Contractor understands and agrees that it will 1) investigate or cause the investigation of accidents or occurrences involving such claim or demand; 2) negotiate or cause to be negotiated the claim or demand as Contractor may deem expedient; and 3) defend or cause to be defended on behalf of the City all suits for damages even if groundless, false or fraudulent, brought because of such claim or demands.
- 8.4 Contractor understands and agrees that it will pay all final judgments establishing liability of the City in actions defended by Contractor pursuant to this section along with all reasonable attorneys' fees and costs incurred by the City including interest at the rate specified in such final judgment accruing and premiums on any appeal bonds.
- 8.5 The City, at its election will have the right to participate in any such negotiations or legal proceedings to the extent of its interest without relieving Contractor of any of its obligations under this paragraph.
- 9.0 LIABILITY INSURANCE.

Contractor agrees it or its subcontractor will provide public liability insurance and property damage insurance naming the City as an Additional Insured in an amount no less than \$500,000 for each person and \$100,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property.

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- 9.1 Upon execution hereof, Contractor shall file with the City's Risk Manager a copy of the Certificate of Insurance showing that such insurance coverage is in effect during the terms of this Agreement.
- 9.2 Issuers of Policies. The issuer of any policy must have a certificate of authority to transact insurance business in the State of Texas. Each issuer must be responsible, reputable, and have financial capability consistent with the risks covered. Each issuer shall be subject to approval by the City's Risk Manager in his or her sole discretion as to conformance with these requirements.
- 9.3 Deductibles. A policy may contain deductible amounts only if the City's Risk Manager approves the amount and scope of the deductible. Contractor shall assume and bear any claims or losses to the extent of such deductible amount and waives any claim it may ever have for the same against the City, its officers, agents or employees.
- 9.4 Cancellation. Each policy must expressly state that it may not be canceled or non-renewed unless thirty (30) days advance notice of cancellation or intent not to renew is given in writing to the City's Risk by the insurance company. Contractor shall give written notice to the City's Risk Manager **within five (5) days** of the date upon which total claims by any party against Contractor reduce the aggregate amount of coverage below the amounts required by this Agreement.
- 9.5 Subrogation. Each policy must contain an endorsement to the effect that the issuer waives any claim or right in the nature of subrogation to recover against the City, its elected and appointed officials, officers, agents or employees.
- 9.6 Endorsement of Primary Insurance. Each policy must contain an endorsement that such policy is primary insurance, so long as it is customary in the industry and under Texas law for such insurance to be primary, to any other insurance available to the City, the Additional Insured, with respect to claims arising hereunder and that the insurance applies separately to each insured.
- 9.7 Liability for Premium. If any of the policies referred to above do not have a flat premium rate and such premium has not been paid in full, such policy must have a rider or other appropriate certificate of waiver sufficient to establish that the issuer is entitled to look only to Contractor for any further premium payment and has no right to recover any premiums from the City.
- 10.0 TERMINATION.
- 10.1 Either party may terminate this Agreement if the other is in default upon thirty (30) days written notice to the other party. The City or Contractor may terminate this Agreement for any cause upon thirty (30) days written notice to the other party.

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10.2 Termination shall be without prejudice to any obligation by one party to the other, which shall have accrued and be owing prior thereto.

10.3 It shall not be considered an act of default on the part of the City should the City withhold payment to Contractor in accordance with Section 4.5 of this Agreement.

11.0 NOTICES. All notices, communications and reports under this Agreement shall be hand-delivered or mailed, certified, return receipt requested, to the respective parties at the respective addresses shown below, unless and until either party is otherwise notified in writing by the other party with such notice not requiring a formal contract amendment:

**CITY:** City Manager  
City of El Paso  
PO Box 1890  
El Paso, Texas 79950-1890

With copy to:  
International Bridges Department, Director  
City of El Paso  
1001 S. Stanton Street  
El Paso, Texas 79901

**CONTRACTOR:**

SecureOrigins, Inc.  
Attn: Toby Spoon, President  
500 W. Overland Ave, Suite 320  
El Paso, Texas 79901

12.0 WAIVER. Action or inaction by either party regarding any default, breach or condition precedent shall not be construed as a waiver of any other default, breach or condition precedent or any other right hereunder.

13.0 PUBLIC RECORDS. Contractor understands that the City is subject to the Texas Public Information Act (the "Act") and that records received by the City from Contractor are subject to public disclosure, except as provided for in said Act.

14.0 ENTIRE AGREEMENT; MODIFICATION OR AMENDMENT. This Agreement contains all commitments and agreements of the parties hereto, and no verbal or other written

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commitment shall have any force or effect if not contained herein. This Agreement may be modified, amended, or supplemented only by a written instrument duly authorized and executed by both parties.

15.0 VENUE. The parties hereto agree that this Agreement shall be enforceable in El Paso, Texas, and if legal action is necessary to enforce it, exclusive venue shall lie in El Paso County, Texas.

16.0 CONTRACT INTERPRETATION. In interpreting the various provisions of this Agreement in a court of law, any court having jurisdiction shall apply the laws of the State of Texas to interpret the terms and provisions in this Agreement. Contract agrees to abide by the laws of the State of Texas in the furtherance of this Agreement.

17.0 SEVERABILITY. If any provision of this Agreement is found by a court of competent jurisdiction to be illegal, invalid, or unenforceable, the remainder of this Agreement will not be affected and in lieu of each provision which is found to be illegal, invalid or unenforceable, there will be added as part of this Agreement a provision which preserves the intention of the unenforceable provision, but which complies with the law.

18.0 CAPTIONS. The captions to the various paragraphs of this Agreement are for informational purposes only and shall not alter the substance of the terms and conditions of this Agreement.

19.0 BINDING AGREEMENT. The individual signing this Agreement for each of the parties acknowledges that he is authorized to do so and said individual further warrants that he or she is authorized to commit and bind that party to the terms and conditions of this Agreement.

*(Signatures appear on following page)*

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STATE OF TEXAS        )  
                                  )  
COUNTY OF EL PASO    )

## AGREEMENT

*(Signature Page)*

IN WITNESS WHEREOF, the parties have executed this Agreement in the City of El Paso to be effective on the date and year first above written.

### SECUREORIGINS, INC.

\_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: \_\_\_\_\_

### CITY OF EL PASO

\_\_\_\_\_  
Joyce A. Wilson  
City Manager

APPROVED AS TO FORM:

\_\_\_\_\_  
Josette Flores  
Assistant City Attorney

APPROVED AS TO CONTENT:

\_\_\_\_\_  
Said Larbi-Cherif, Director  
International Bridges Department