

CITY CLERK
ORIGINAL

C-10597
01/14/2016

SERVICES AGREEMENT

THIS AGREEMENT made the 14 day of January, 2016 (the "Effective Date") is

BETWEEN:

Linko Technology Inc. ("Linko") of 4251 Kipling Street, Suite 220, Wheat Ridge, Colorado 80033

AND:

City of Glendale (the "Customer") of 5901 N. Glen Harbor Blvd., Glendale, AZ 85307

BACKGROUND

- A. Linko operates the online application described in Schedule A (the "Application").
- B. The Customer wants to use the Application and receive the services described in Schedule B (the "Services") in respect of data the Customer provides to the Application (the "Customer Data").
- C. Linko is willing to provide the Services on the terms and conditions of this Agreement.

AGREEMENT

The parties hereby enter into this agreement which is comprised of this Cover Sheet and the following Schedules:

<u>Schedule No.</u>	<u>Description of Schedule</u>
A	Particulars
B	Services and Service Levels
C	Terms and Conditions

The parties executed this agreement as of the Effective Date.

LINKO TECHNOLOGY INC.

by: Michael Connolly
Signature of Authorized Signatory

its: VICE PRESIDENT
Title of Authorized Signatory

CITY OF GLENDALE

by: [Signature]
Signature of Authorized Signatory

its: Acting City Manager
Title of Authorized Signatory

ATTEST:
Darce McCreath for
City Clerk

Approved as to form

[Signature]
City Attorney

SCHEDULE A
PARTICULARS

Application	
Description	The Application is the Hosted-Linko™ Pretreatment and FOG Software.
Users	Access to the Application is limited to the following number of Users: Five (5) Named User Logins
Term	
Commencement Date	The Commencement Date for the Services is February 1, 2016
Initial Term	The Initial Term of the agreement is 5 years, starting on the Commencement Date
Fees	
Initial Setup Fee	The Initial Setup Fee is \$8,745 plus applicable taxes. Fee includes moving Linko software from on-premise installation to hosted environment, activation of Remote Inspector module for five (5) users, implementation including three (3) custom forms, user training and system testing
Annual Fee	The Annual Fee is \$7,095 plus applicable taxes
Credits	A credit of \$141 will be applied to the first invoice of this project to reimburse client for the pro-rated amount of previously collected annual support fees.
Hourly Rates	The Hourly Rates are \$205 per hour plus applicable taxes
Payment Terms	The Initial Setup Fee and the first year's Annual Fee are due within 45 days after Linko issues an invoice for those amounts. Thereafter, the Annual Fee for each subsequent year is due in advance on the anniversary of the Commencement Date. All other amounts are due within 45 days after Linko issues an invoice for those amounts.
Contacts	
Primary Contact for the Customer	Lee Robinson, Pretreatment Program Manager 623-930-4779
Primary Contact for Linko	Dave Stadelmann; Client Services Manager 303-952-0021

SCHEDULE B

SERVICES

PART 1 – HOSTING SERVICES

- 1.1 **Services.** Linko will do the following, commencing on the Commencement Date:
- (a) establish an account in the Application for the Customer, and assist the Customer to upload its data into the Application (the “**Implementation Services**”);
 - (b) host the Application, or arrange for the Application to be hosted, and made available online for the Customer’s use pursuant to the terms of this agreement and any applicable end user licence agreement (the “**Hosting Services**”).

PART 2 – MAINTENANCE AND SUPPORT SERVICES

- 2.1 **Technical Support.** Linko will:
- (a) provide technical support for the Application from 8:00 AM to 5:00 PM PST, Monday to Friday excluding holidays, via telephone; and
 - (b) provide a non-emergency email address for the Customer to submit technical reports and questions to Linko.
- 2.2 **System Maintenance.** Linko will perform maintenance on the Application as needed. Whenever possible, scheduled maintenance will occur between on Fridays between 6:00PM and 10:00PM Pacific Time.

PART 3 – PRODUCT UPGRADES AND UPDATES

- 3.1 Linko may provide software upgrades and updates to the Application from time to time.

PART 4 – OTHER SERVICES

- 4.1 If the Customer requests any changes to the Services or the Application, Linko will estimate the cost of those changes and any timeline adjustments that will be necessary as a result of those changes. If the Customer wishes to proceed with those changes, the Customer will agree in a written, signed, change order to pay for those costs and accept those timeline changes. If such a change order is not delivered to Linko within a reasonable time requested by Linko, then the change request will not be implemented.
- 4.2 Any other work the Customer requests that is not covered by this agreement will be performed by Linko at the Hourly Rate set out in Schedule A, pursuant to a written Statement of Work signed by both parties.

PART 5—SERVICE LEVELS

Linko will use commercially reasonable efforts to provide the Application in accordance with the following:

5.1 **Precautions.** Use of the following precautions to enhance uptime:

- (a) Fault-tolerant storage devices;
- (b) Daily full database backups;
- (c) 24/7 monitoring of server availability;
- (d) Maintenance and periodic testing of a disaster recovery plan including hardware spares and data recovery;
- (e) Minimized use of scheduled downtime periods and maintenance windows; and
- (f) Use of a high reliability co-location facility that meets SSAE 16 standards (formerly SAS 70) with a minimum 99.95% uninterrupted transit-to-the-internet guarantee, on-site emergency backup power; multiple Tier One upstream Internet backbone providers; Redundant internal network devices; 24/7 internal network monitoring.

5.2 **Availability.** Available 99.95% of each month, as defined below.

- (a) “**Available**” means the Linko servers for the Application are accessible from the Internet and the Application is open for use in accordance with this Agreement, except during the Weekly Maintenance Window and any Scheduled Downtime, and excluding any downtime caused by the failure of third party vendors, the Internet in general, the Customer or its equipment, disaster recovery activities, or any emergency or force majeure event.
- (b) “**Scheduled Downtime**” means scheduled downtime to perform maintenance, backup, and upgrade functions. Scheduled Downtime will not exceed 4 hours per calendar month and will be scheduled on the first Tuesday of every month between 6:00PM and 10:00PM PST.
- (c) “**Unavailability**” means the number of minutes by which the Application failed to meet the 99.95% availability target. For example, if the Application should have been Available for 6000 minutes in a month but was only available for 5595 minutes, then the Unavailability for that month would be 5 minutes.
- (d) “**Weekly Maintenance Window**” means the window during which time the Application may be unavailable to allow Linko to perform system maintenance, backup, and upgrade functions for the Service as follows:
 - (i) Fridays: 6:00PM – 10:00PM PST
 - (ii) Weekends: Any time

5.3 Service Level Credits. If the Application is not Available in a particular calendar month in accordance with the above availability target, the Customer will be entitled to a service level credit calculated as follows:

$$\text{Credit} = \frac{\text{Unavailability in the month}}{\text{total minutes in the month}} \times \text{Monthly Subscription Fee Equivalent}$$

The "Monthly Subscription Fee Equivalent" is a prorata amount of the Annual Fee that applies to the month in question.

The credits obtained in the prior year will be applied "automatically" to the following year's Annual Fee. Credits will be the Customer's sole and exclusive remedy in the event of any failure to meet the above service levels.

SCHEDULE C

TERMS AND CONDITIONS

PART 1 - APPLICATION

1.1 **Access.** Subject to the terms and conditions of this agreement, Linko hereby grants to the Customer a non-exclusive, revocable licence to access and use the Application in accordance with the terms and conditions of this agreement, for the Customer's own internal business purposes only. The Customer must comply with this Agreement, any Acceptable Use Policy provided by Linko, and applicable laws when using the Application and Services.

1.2 **Registered Users.** The Customer's license to use the Application entitles Customer to designate a limited number of registered users (each a "User") as listed in Schedule A. The Customer must ensure that each User complies with this Agreement. Each User will be assigned a login identification which will include a username and password (a "Login ID"). The Customer is responsible for all access to the Application and use of the Service by Users, whether or not Customer has knowledge of or authorizes such use.

1.3 **Security.** The Customer must keep all Login IDs confidential, and must ensure that all appropriate user and security settings have been selected in the Application. The Customer must not allow any third party other than the Users to access or use Login IDs. The Customer is solely responsible and liable for all activity conducted through its account in connection with the Application. If the Customer becomes aware of or reasonably suspect any security breach, including any loss, theft or unauthorized disclosure or use of its password or account, the Customer must immediately report the actual or suspected security breach to Linko.

1.4 **Third Party Authorization.** If some or all of the Customer Data will be posted or provided to the Application or Linko by a third party (including a laboratory), then prior to allowing that third party to post or provide the data, the Customer must cause the third party to sign and return to Linko a Third Party Authorization document in a form provided by Linko.

1.5 **Data Formats.** The Customer must ensure that the Customer Data complies with current data format requirements specified by Linko from time to time. Failure to do so may result in the rejection of the data, and may also result in the failure of the Application and Services in respect of that data. Linko does not review Customer Data for accuracy or proper formatting.

1.6 **Restrictions.** The Customer must not:

- (a) reverse engineer, de-compile, hack, disable, disrupt, interfere with, disassemble, copy, rent, lease, loan, sell, distribute, decrypt, reassemble, modify, supplement, translate, adapt or enhance, or create derivative works from any of the Application or the hardware or software used to provide the Application or Services;
- (b) attempt to access any data, information or content of any third party through the Application, except as authorized by Linko;

- (c) upload to or transmit from Application any content or anything else that (if reproduced, published, transmitted or used) may:
 - (i) be defamatory, threatening, abusive, harassing, hateful, obscene, pornographic, harmful or invasive of anyone's privacy, or excessively violent,
 - (ii) violate any law including intellectual property, privacy or other laws; or
 - (iii) give rise to civil or other liability;
- (d) upload to or transmit from the Application any data, file, software or link that contains or redirects to a virus, Trojan horse, worm or other harmful component;
- (e) interfere with the Services or any third party's use of the Application;
- (f) access the Application by any means other than through the interface that is provided by Linko; or
- (g) authorize or encourage any third party to do any of the above.

1.7 **No Other Rights.** All rights not expressly granted in this agreement are reserved by Linko. For clarity, nothing in this agreement will be construed as granting the Customer any ownership, security, right in any intellectual property, or other rights in or relating to any or all of the Application.

PART 2– SERVICES

2.1 **Services.** Provided that the Customer complies with its obligations under this agreement, Linko will provide the Services to the Customer. Linko may use third party contractors to provide some or all of the Services. The Services may be provided using servers and other equipment located in the United States and/or Canada.

2.2 **Restriction.** The Customer must not resell, transfer or otherwise provide any of the Services or the Application to any third party.

2.3 **Cooperation.** The Customer will cooperate with Linko in a timely manner as required for Linko to provide the Services, and will give Linko all required information and access to the Customer's premises and equipment as and required by Linko to provide the Services.

2.4 **Linko Employees/Contractors.** The Customer will not directly or indirectly at any time during the term of this agreement or for 12 months thereafter:

- (a) induce or encourage any employee or contractor of Linko to leave his or her employment or engagement with Linko; or
- (b) employ, attempt to employ, assist any person to employ, or retain as a consultant or contractor, any employee or contractor or former employee or contractor of Linko; without Linko's prior written consent.

PART 3 – FEES

3.1 **Fees.** The Customer will pay all Fees as and when described in Schedule A. Linko may increase the Annual Fee upon 30 days' notice to the Customer but no more than 3% above the Annual Fee charged in the previous year provided no changes to the software configuration have occurred. Any software configuration changes during the Term may affect the Annual Fee and will be specified in a quotation for approval.

3.2 **Expenses.** The Customer will reimburse Linko for all expenses reasonably incurred by Linko in connection with providing any services to the Customer, within 30 days after receiving Linko's invoice for those expenses.

3.3 **Interest.** The Customer will pay simple interest on all overdue amounts at a rate of 18% per year or the maximum rate permitted by law, whichever is less, calculated from the date payment was due until the date payment of all overdue amounts is made in full.

PART 4 – CONFIDENTIALITY & PROPRIETARY RIGHTS

4.1 **Confidentiality.** Each party will (and will cause its employees and agents to) keep the other party's Confidential Information strictly confidential, and will not: (a) use it or take any benefit from it except as required to perform or receive the Services, or (b) disclose it to anyone unless the other party consents or unless the recipient is required by law or court order to do so. In this agreement, "**Confidential Information**" means all information, data and financial information relating to the business, commercial strategies, pricing, personnel, customers, products or services of a party (the "discloser") but excludes any information that the other party (the "recipient") proves:

- (a) was lawfully in the recipient's possession before receiving it from the discloser,
- (b) is provided in good faith to the recipient by a third party without breaching any rights of the discloser or any other party, or
- (c) is or becomes generally available to, or accessible by, the public through no fault of recipient.

4.2 **Customer Data.** As between the parties, the Customer solely owns the Customer Data. Linko may manipulate, format, copy, display, transmit and otherwise use that data as necessary to perform its obligations under this agreement and to provide the Services to the Customer. The Customer represents and warrants to Linko that the Customer has obtained all consents required under privacy laws and other applicable laws for Linko to collect, use and disclose the Customer Data as permitted above. Linko may also provide statistical information to third parties and may include Customer's Data in that information, provided that the information is aggregated and does not include personally identifying information. Linko reserves the right to establish (and notify the Customer of) a maximum amount of memory or other computer storage and a maximum amount of Customer's Data that Customer may post, store, or transmit on or through the Service.

4.3 **Application and Services.** As between Linko and Customer, all intellectual property rights (past, present and future) in and to the Application, and all technology, deliverables and other work product

created in connection with the Services, are and will remain vested solely in Linko. Linko may, but is not required to, create any new releases, upgrades, enhancements or other modifications of or to, the Application at any time.

Any supplemental software code, documentation, or other material provided to Customer as part of the Services, whether in written or digital format, will be considered part of the Application and subject to the terms and conditions of this agreement. With respect to information Customer provides to Linko as part of the provision of Services by Linko, Customer agrees that Linko may use such information for its business purposes, including for product support and development, on the condition that Linko not utilize such information in a form that personally identifies Customer.

PART 5– TERM AND TERMINATION

5.1 **Term.** This agreement will commence on the Effective Date and continue for the Initial Term described in Schedule A unless terminated as described below.

5.2 INTENTIONALLY OMITTED

5.3 **Termination for Cause.** Either party may terminate this agreement for cause if the other party materially breaches the agreement and fails to remedy the breach within 30 days after receiving the other party's written notice of the breach. Neither party may terminate this agreement for convenience. The agreement may be cancelled under A.R.S. § 38-511.

5.4 **Termination for Insolvency.** Either party may terminate this agreement immediately by delivering written notice of termination to the other party if:

- (a) the other party becomes insolvent or voluntarily or involuntarily bankrupt;
- (b) a petition in bankruptcy against the other party is not dismissed within 90 calendar days of filing;
- (c) a receiver, assignee or other liquidating officer is appointed for all or substantially all of the other party's business;
- (d) the other party makes an assignment in bankruptcy or an assignment for the benefit of creditors;
- (e) the other party ceases to carry on its business in the normal course (or threatens to cease carrying on its business in the normal course); or
- (f) the City of Glendale pretreatment program provide in writing that its budget cannot support the financial requirement of the annual hosting fee;
- (g) if any resolution is passed or order made or other steps taken for the winding up, liquidation or other termination of the existence of the party, or for the amalgamation or merger of the party with another entity.

5.5 **Effect of Termination.** Upon termination of this agreement for any reason:

- (a) the Customer will immediately cease all use of the Application;
- (b) the Customer will have no further access to its account in the Application;
- (c) the Customer will pay Linko all unpaid amounts owing to Linko;
- (d) at the Customer's request and expense, Linko will return to the Customer all of the Customer Data, provided that Customer requests the return of that data within 30 days after termination; The cost to export the data is the hourly rate noted in Schedule A, not to exceed six (6) hours and requires that a suitable environment is provided by client in order to install the Linko software and migrate the data to this environment and
- (e) Linko may delete all the Customer Data from the Application after the agreement has been terminated for at least 60 days.

PART 6 – REPRESENTATIONS AND WARRANTIES

6.1 **Mutual Representations and Warranties.** Each party represents and warrants to the other, in respect of itself, that it has the requisite capacity to enter into and be bound by this agreement and to fulfill its obligations to the other party on the terms and conditions set forth in this agreement.

6.2 **Additional Linko Warranty.** Linko warrants that the Service will conform to the descriptions set out in this Agreement and will be performed in a professional manner. The Customer's sole remedy for a breach of this warranty will be for Linko to re-perform the Service in compliance with the above warranty.

PART 7 – INDEMNIFICATION

7.1 **Customer Indemnity.** The Customer will indemnify and hold Linko and its employees, directors, officers, agents and affiliates harmless from and against all losses, claims, actions, damages and costs (including legal fees) of any kind or nature which may arise out of:

- (a) the breach of any term of this agreement by the Customer or any of its employees, contractors or agents;
- (b) any representation or warranty made by the Customer being untrue;
- (c) the negligence or misconduct of the Customer or any of its employees, contractors or agents; and
- (d) any damage resulting from Customer's use of the Application or the Services, except to the extent caused by Linko.

7.2 **Linko Indemnity.** Linko will indemnify and hold the Customer and its employees, directors, officers, agents and affiliates harmless from and against losses, claims, actions, damages and costs (including legal fees) of any kind or nature which may arise out of:

- (a) the breach of any term of this agreement by Linko or any of its employees, contractors or agents;
- (b) any representation or warranty made by Linko being untrue; and
- (c) the negligence or misconduct of Linko or any of its employees, contractors or agents.

PART 8 - LIMITATION OF LIABILITY

8.1 Disclaimer. Except for the representations and warranties in Part 6, the Application and the Services are provided "as is" and "as available". Linko disclaims all terms, conditions, guarantees, representations and warranties (express, implied, statutory and otherwise), in respect of the Application and the Services, including those of merchantability, non-infringement, title, quality and fitness for a particular purpose. Without limiting the foregoing, Linko makes no representation or warranty that: (i) the Application and the Services will meet customer's requirements, (ii) the Application and the Services will be uninterrupted, timely, secure or error-free, (iii) the results that may be obtained from the use of the Application and the Services will be accurate or reliable.

8.2 Limitation of Liability. The Customer uses the Application and the Services at its own risk. Linko will not be liable for any loss in connection to the use of, or inability to use the Application and the Services, including any loss to the Customer's Data. To the maximum extent permitted by applicable law, and without limiting the previous sentence, Linko will not be liable for any indirect, consequential, incidental, special, punitive or exemplary damages whatsoever in connection with the Application or the Services, including damages for loss of revenues, profits, goodwill or data. No claim, regardless of form, may be made or action brought by either party more than one year after the basis for the claim becomes known to the party asserting it.

8.3 Maximum Liability. If, despite the above limitations, Linko becomes liable to the Customer in respect of the Application and the Services or a combination of the foregoing, that liability will be limited to the fees the Customer paid to Linko for its use of the Application in the 12 months prior to the event giving rise to the liability.

PART 9 – GENERAL

9.1 Reference. Linko may refer to the Customer as a customer in Linko's promotional materials, including on Linko's website, and may use the Customer's name and logo for that purpose. Linko may also place a link from its website to the Customer's website.

9.2 Law and Courts. The agreement and each of the documents contemplated by or delivered under or in connection with this agreement are governed exclusively by, and will be enforced, construed and interpreted exclusively in accordance with, the laws applicable in Arizona. All disputes under this agreement will be resolved by the courts of Arizona in Maricopa County; however, nothing in this section prohibits either party from obtaining an injunction against the other party in any other jurisdiction.

9.3 Severability. Each provision of this agreement is severable. If any provision of this agreement is or becomes illegal, invalid or unenforceable in any jurisdiction, the illegality, invalidity or unenforceability

of that provision will not affect the legality, validity or enforceability of the remaining provisions of this agreement, or of that provision in any other jurisdiction.

9.4 **Assignment.** The Customer must not assign this agreement or its rights or obligations under this agreement to any third party, except with the prior written consent of Linko

9.5 **Enurement.** This agreement enures to the benefit of and binds the parties and their respective successors and permitted assigns.

9.6 **Notice.** All notices and other communication that the parties give each other in connection with this agreement must be in writing and will be deemed given if delivered by hand, double registered mail, or fax to the recipient at its address set out on the first page of this agreement or at such other address or telecommunication number of which the party gives the other notice. Proof of delivery in that manner will constitute proof of receipt.

9.7 **Waivers.** No waiver of any provision of this agreement is binding unless it is in writing and signed by all the parties to this agreement except that any provision which does not give rights or benefits to particular parties may be waived in writing, signed only by those parties who have rights under, or hold the benefit of, the provision being waived if those parties promptly send a copy of the executed waiver to all other parties. No failure to exercise, and no delay in exercising, any right or remedy under this agreement will be deemed to be a waiver of that right or remedy. No waiver of any breach of any provision of this agreement will be deemed to be a waiver of any subsequent breach of that provision or of any similar provision.

9.8 **Force Majeure.** Neither party will be liable for any delay, interruption or failure in the performance of its obligations if caused by acts of God, war (declared or undeclared), fire, flood, storm, slide, earthquake, power failure, inability to obtain equipment, supplies or other facilities not caused by a failure to pay, labour disputes, or other similar event beyond the control of the party affected which may prevent or delay such performance. If any such act or event occurs or is likely to occur, the party affected shall promptly notify the other, giving particulars of the event. The party so affected shall use reasonable efforts to eliminate or remedy the event.

9.9 **Further Assurances.** Before and after the Effective Date, each party will promptly execute and deliver all further documents and take all further action reasonably necessary or appropriate to give effect to the provisions and intent of this agreement and to complete the transactions contemplated by this agreement.

9.10 **Independent Parties.** This agreement does not and will not be construed to create any partnership or agency whatsoever as between Linko and the Customer, and neither party will, by reason of any provision herein contained, be deemed to be the partner, agent or legal representative of the other of them nor have the ability, right or authority to assume or create, in writing or otherwise, any obligation of any kind, express or implied, in the name of or on behalf of the other of them.

9.11 **Third Parties.** Customer's correspondence or dealings with third parties through the Service are solely between Customer and such third parties. Linko will not responsible or liable for any loss or damage of any sort incurred as the result of any such dealings.

9.12 **Remedies Cumulative.** The rights and remedies under this agreement are cumulative and are in addition to and not in substitution for any other rights and remedies available at law or in equity or otherwise. No single or partial exercise by a party of any right or remedy precludes or otherwise affects the exercise of any other right or remedy to which that party may be entitled.

9.13 **Survival.** Section 5.5, and Part 4, Part 7, Part 8 and Part 9 of this Schedule C will survive termination of this agreement.

9.14 **Counterparts.** This agreement and all documents contemplated by or delivered under or in connection with this agreement may be executed and delivered in any number of counterparts with the same effect as if all parties had all signed and delivered the same document and all counterparts will be construed together to be an original and will constitute one and the same agreement.

9.15 **Amendments.** No amendment, supplement, restatement or termination of any provision of this agreement is binding unless it is in writing and signed by each party to this agreement at the time of the amendment, supplement, restatement or termination.

9.16 **Entire Agreement.** This agreement, the settlement agreement and all documents contemplated by or delivered under or in connection with this agreement or the Settlement agreement, constitute the entire agreement between the parties with respect to the subject matter of this agreement and supersede all prior agreements, negotiations, discussions, undertakings, representations, warranties and understandings, whether written or oral, express or implied, statutory or otherwise.

9.17 Contractor complies with A.R.S. § 23-214 and agrees to comply with the requirements of A.R.S. § 41-4401.