

AGENDA

Port Freeport
Operations/Safety/Security Committee
Special Meeting
Wednesday, January 17, 2024, 4:30 pm - 5:30 pm
In Person & Videoconference - Administration Building - 1100 Cherry Street - Freeport

This meeting agenda with the agenda packet is posted online at www.portfreeport.com

The meeting will be conducted pursuant to Section 551.127 of the Texas Government Code titled "Videoconference Call." A quorum of the Operations, Safety & Security Committee, including the presiding officer, will be present at the Commissioner Meeting Room located at 1100 Cherry Street, Freeport, Texas. The public will be permitted to attend the meeting in person or by videoconference. The videoconference is available online as follows:

Join Zoom Meeting

<https://us02web.zoom.us/j/83132513704?pwd=bVMBcHdLRFFGbWFYb1FkM0s5OXRRZz09>

Meeting ID: 831 3251 3704

Passcode: 300967

Dial by your location

• 1 346 248 7799 US (Houston)

Meeting ID: 831 3251 3704

Find your local number: <https://us02web.zoom.us/u/kzkQXRCu9>

1. Committee Members: Santos (Chairman), Giesecke, Fratila
2. CONVENE OPEN SESSION in accordance with Texas Government Code Section 551.001, et. seq., to review and consider the following:
3. Roll Call.
4. Public Comment. (Public comment on any matter not on this Agenda will be limited to 5 minutes per participant and can be completed in person or by videoconference)
5. Public Testimony. (Public testimony on any item on this Agenda will be limited to 5 minutes per agenda item to be addressed per participant and can be completed in person or by videoconference. The participant shall identify in advance the specific agenda item or items to be addressed.
6. Discussion regarding Phillips 66 request for increase in vessel berthings.
7. Discussion regarding Port Rail Switcher Agreement.
8. Discussion regarding ProMiles Contract.
9. Discussion regarding City of Freeport MOU regarding radio communications.
10. Receive update regarding Port Security Grant.
11. EXECUTIVE SESSION in accordance with Subchapter D of the Open Meetings Act, Texas Government Code Section 551.001, et. seq., to review and consider the following:
 - A Under authority of Section 551.076 (Deliberation of Security Matters) for discussion regarding:
 1. Discussion regarding issues related to the deployment, or specific occasions for implementation of security personnel or devices or security audit and services.
12. RECONVENE OPEN SESSION:
13. Adjourn.

The Committee does not anticipate going into a closed session under Chapter 551 of the Texas Government Code at this meeting for any other items on the agenda, however, if necessary, the Committee may go into a closed session as permitted by law regarding any item on the agenda.

With this posted notice, Port Commissioners have been provided certain background information on the above listed agenda items. Copies of this information can be obtained by the public at the Port Administrative offices at 1100 Cherry Street, Freeport, TX.



Phyllis Saathoff, Executive Director/CEO
PORT FREEPORT

Participation is welcomed without regard to race, color, religion, sex, age, national origin, disability or family status. In accordance with Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, persons with disabilities needing reasonable accommodations to participate in this proceeding, or those requiring language assistance (free of charge) should contact the Executive Assistant no later than forty-eight (48) hours prior to the meeting, at (979) 233-2667, ext. 4326, email: bevers@portfreeport.com.

La participación es bienvenida sin distinción de raza, color, religión, sexo, edad, origen nacional, discapacidad o situación familiar. De acuerdo con el Título II de la Ley de Estadounidenses con Discapacidades y la Sección 504 de la Ley de Rehabilitación, las personas con discapacidades que necesiten adaptaciones razonables para participar en este procedimiento, o aquellas que requieran asistencia lingüística (sin cargo), deben comunicarse con el Asistente Ejecutivo a más tardar cuarenta -ocho (48) horas antes de la reunión, al (979) 233-2667, ext. 4326, correo electrónico: bevers@portfreeport.com.



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TO: Executive Director/CEO
Port Commissioners
Legal Counsel

FROM: Director of Business and Economic Development

DATE: January 17, 2024

SUBJECT: First Amended Agreement for Automated Permitting System

Enclosed please find a fully a draft First Amended Agreement for an Automated Permitting System between Port Freeport and ProMiles for the Committee’s awareness and for discussion. This draft agreement was prepared by Randle Law Office and is currently bring reviewed by ProMiles. Staff intends to recommend a final agreement for the Port Commission’s approval on January 25, 2024.

Port Freeport entered an Interlocal Agreement with the Texas Department of Transportation in August 2023. The Interlocal Agreement enables Port Freeport to issue Oversize Overweight permits for use of the OSOW corridor. We commonly refer to this as the Heavy Lift Corridor. The Interlocal Agreement stipulates “The Local Government (Port Freeport) shall utilize an automated permitting system that meets TxDOT’s permitting requirements for the issuance of oversize or overweight permits”. The automated permitting system is provided by ProMiles. This draft agreement sets forth the terms of ProMiles service.

[PORT COMMISSION](#)

[RAVI K. SINGHANIA](#), CHAIRMAN; [ROB GIESECKE](#), VICE CHAIRMAN; [BARBARA FRATILA](#), SECRETARY; [KIM KINCANNON](#), ASST. SECRETARY;
[DAN CROFT](#), COMMISSIONER; [RUDY SANTOS](#), COMMISSIONER; [PHYLLIS SAATHOFF](#), EXECUTIVE DIRECTOR/CEO

FIRST AMENDED AGREEMENT FOR AUTOMATED PERMITTING SYSTEM

BETWEEN

PORT FREEPORT

AND

PROMILES SOFTWARE DEVELOPMENT
CORPORATION

THE STATE OF TEXAS §
COUNTY OF BRAZORIA §

**FIRST AMENDED AGREEMENT FOR AUTOMATED
PERMITTING SYSTEM**

THIS FIRST AMENDED AGREEMENT FOR AUTOMATED PERMITTING SYSTEM (“First Amended Agreement”) is made and entered into on this the ___th day of _____, 2023, by and among PORT FREEPORT, of Brazoria County, Texas, a navigation district, a body politic, and a corporate and governmental agency of the State of Texas ("PORT FREEPORT"), and ProMiles Software Development Corporation, a domestic, for-profit corporation duly registered to transact business in the state of Texas ("PROMILES") Collectively, PORT FREEPORT and PROMILES may be referred to as the “Parties” and, each separately, as a “Party.”

RECITALS

WHEREAS, PORT FREEPORT, is authorized pursuant to Chapters 60 and 62 of the Texas Water Code to enter into contracts necessary or convenient for the operation or development of PORT FREEPORT and to enter into contracts in order to accomplish any district purpose or exercise any district power;

WHEREAS, on August 8, 2013, PORT FREEPORT has entered into a contract with the Texas Department of Transportation ("TxDOT") pursuant to Subchapter K, Chapter 623 of the Texas Government Code to issue permits for ocean containers based on the container manufacturer's maximum recommended net cargo weight limitations and to travel on the designated route (“Original Agreement”);

WHEREAS, the Original Agreement has been amended, first by the Interlocal Agreement executed on August 29, 2023, and second by the Amendment to Interlocal Contract, executed October 23, 2023, and as may be amended in the future (the Original Agreement, as amended and as may be amended from time to time, shall be hereinafter referred to as the "TxDOT Contract");

WHEREAS, the TxDOT Contract requires PORT FREEPORT to utilize an automated permitting system for the issuance of said permits;

WHEREAS, PROMILES agreed to provide a license for the automated permitting system software ("Software") required in the TxDOT Contract and all services required herein and to timely and properly complete all obligations related to the automated permitting system required in the TxDOT Contract as set forth therein and in the Agreement for Automated Permitting System, executed August 8, 2013 (“ProMiles Agreement”); and

WHEREAS, the Parties desire to amend the ProMiles Agreement as follows to delete provisions that are no longer needed and to specifically refer to the TxDOT Contract, as it may be amended from time to time, for all permit fees, rates, maps and routes. This First Amended Agreement shall supersede the Original Agreement in its entirety.

AGREEMENT

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained herein, the Parties hereto agree as follows:

I. Purpose

1.1 Purpose: The purpose of this agreement is to memorialize the agreement between **PORT FREEPORT and PROMILES** for **PROMILES** to provide an automated permitting system software acceptable by **TxDOT** and in conformance with the **TxDOT** Contract and attached hereto as Exhibit "A". Said **TxDOT** Contract, as it currently exists or is hereafter amended, is hereby incorporated by reference and all terms required of **PORT FREEPORT** therein shall hereby become the obligations of **PROMILES** in the performance of this agreement. In the event that there exists a conflict between any term, condition, or provision contained within this Amendment, and in any term, condition, or provision contained within the **TxDOT** Contract, the term, condition, or provision contained within this Tx DOT Contract shall control.

II. Port Freeport's Responsibilities

2.1 PORT FREEPORT shall be responsible for the following:

- a. Using the **PROMILES** software during the term of the **TxDOT** Contract;
- b. At the inception of the term for the **TxDOT** Contract, hosting a training event for users of the **PROMILES'** software;
- c. Acting in good faith to fulfill any requirement by **TxDOT** to maintain its authority to issue permits to vehicles subject to the Subchapter K, Chapter 623 of the Texas Transportation Code; and
- d. Provide any reasonable and necessary information and access in order for **PROMILES** to implement the Software.

III. ProMiles' Responsibilities

3.1 PROMILES Shall Issue Permits. **PROMILES** shall provide the Software necessary for **PORT FREEPORT** to issue permits for cargo carrying vehicles subject to Transportation Code, Chapter 623, Subchapter K, on the routes designated in and in accordance with the maps provided in the **TxDOT** Contract, and the terms of this agreement.

3.2 Collection of Permit Fees. **PROMILES** shall collect all permit fees and disburse same on a weekly basis to both **TxDOT** and **PORT FREEPORT** via electronic transfer and as specified in writing by **PORT FREEPORT**.

3.3 PROMILES Shall Utilize an Automated Permitting System Compliant with TxDOT Requirements. At all times **PROMILES** shall utilize software compliant with **TxDOT** requirements for automated permitting systems and compliant with the obligations set forth in the **TxDOT** Contract. **PROMILES** shall be responsible for ensuring that all applicable and required information necessary for the issuance of a permit is properly entered into the automated permitting system.

3.4 PROMILES Shall Collect Permit Data. **PROMILES** shall ensure that all permit data is accurately entered in the automated permitting system, and as said information is provided by the permit applicant, to enable the generation of automated management reports and to create a viable audit trail. **PROMILES** shall implement automated and electronic payment procedures and be responsible for ensuring that funds collected for the issuance of a permit are properly safeguarded and accounted for.

3.5 PROMILES Shall Provide Monthly Reports of Permits to TxDOT and PORT FREEPORT. **PROMILES** shall provide **TxDOT** and **PORT FREEPORT** with monthly reports (due by the 15th of each month) of all permits subject to this agreement in a form to be approved by **TxDOT** and/or **PORT FREEPORT** and further provide any other information required by **TxDOT**. **PROMILES** shall maintain electronic copies of all permits issued through the automated permitting system.

3.6 Agreement for PROMILES to Comply with Existing Laws. **PROMILES**, in executing this agreement, agrees to comply with all existing laws, statutes or regulations including but not limited to those pertaining to the permitting of vehicles subject to Transportation Code, Chapter 623, Subchapter K, or any administrative rules or requirements as they currently exist or are hereafter amended.

3.7 Training. **PROMILES** shall provide training to **PORT FREEPORT** and the users of the Software for the purposes of understanding and using the Software. Training shall be provided by **PROMILES** at no additional cost to **PORT FREEPORT** or users of the Software. Training shall be provided as reasonably necessary and at mutually agreeable dates and times, but in no event later than 30 days following the execution of this agreement by the Parties.

3.8 Support and Maintenance. **PROMILES** shall provide support and maintenance for the Software, and any updates thereof, for the term of this agreement or any renewals thereof and in order to use, maintain and enhance the Software. **PROMILES** shall provide toll free telephone or online assistance to **PORT FREEPORT** or users of the Software including but not limited to: clarification of functions and uses; guidance in operation; troubleshooting; and error verification and correction. Such assistance shall be provided twenty-four (24) hours per day, seven (7) days a week. Support and maintenance shall be provided by **PROMILES** at no additional cost to **PORT FREEPORT**.

3.9 Additional Requirements. PROMILES agrees to undertake any additional and reasonable requirements and assurances required by TxDOT or PORT FREEPORT related to the Software and in fulfillment of this agreement.

3.10 Collection and Fee Distribution: PROMILES shall collect all permit fees in the amount specified in the TxDOT Contract and distributing said fees as specified in the TxDOT Contract.

PROMILES and PORT FREEPORT represent and acknowledge that the permit fee includes all applicable taxes and fees associated with the performance of this agreement and shall be for the term of this agreement and any renewals thereof.

PROMILES and PORT FREEPORT represent and acknowledge that customers will have two payment options to purchase the permits.

1. Escrow Customers - Customer elects to post an escrow to purchase permits. The customer and users with appropriate administrative rights will be able to view the customer's escrow balance at any time. Escrows accounts will be established by the customer and deposited in a ProMiles designated escrow account. ProMiles will administer the escrow accounts as part of this agreement.
2. Credit Card Customers - Customer has the option to pay for the permits with an approved Visa, Master Card, American Express or Discover card. These customers will be charged for the permit plus ProMiles 5% convenience fee.

PROMILES shall forward payment to TxDOT and PORT FREEPORT electronically and in the manner directed by those entities in writing.

PROMILES understands the permit fee set forth in this agreement is the permit fee set forth in TxDOT Contract, as it exists or is hereafter amended. In the event TxDOT and PORT FREEPORT agree to amend the TxDOT Contract to reflect any change in permit fee, or any other change, PROMILES agrees said amendment shall automatically amend this agreement. In the event of any amendment to the TxDOT Contract, PORT FREEPORT shall give PROMILES written notice.

IV. Term and Termination

4.1 Term: This agreement shall commence on the date of signing and shall be in effect for a term of three (3) years. At the end of this term, and at the end of each successive term, this agreement shall be automatically renewed for a term of an additional thirty-six (36) months, unless terminated by either party by written notice given no less than sixty (60) days before the end of such period.

4.2 Termination Date: This agreement terminates on written notice by either party no less than sixty (60) days before the end of the primary term or any renewal term;

or by mutual written agreement signed by the Parties; or if the **TxDOT** Contract is terminated for any reason; or in the event **PORT FREEPORT** otherwise loses its authority to issue permits to vehicles subject to Subchapter K, Chapter 623, of the Texas Transportation Code; or the failure of either party to cure a breach of this agreement after ten (10) days written notice; whichever occurs first.

V. Price and Services Provided

5.1 In return for the Software, **PORT FREEPORT** agrees to pay **PROMILES** the fee specified in the **TxDOT** Contract per permit, which payment shall be deducted by **PROMILES** from the total permit fee as set forth in the **TxDOT** Contract.

5.2 In return for payment, **PROMILES** shall provide **PORT FREEPORT** with the following: any requirements set forth in this agreement; Software for the automated permitting system necessary to carry out and properly perform the **TxDOT** Contract; accept receipt of and disburse permit fees; hardware that includes sufficient storage capacity to maintain the system; backup servers necessary to retrieve lost data; procedures to avoid interruption of the Software services for any reason, including but not limited to acts of God; initial set up of the Software and any and all updates thereof; all programming necessary for the installation and use of the Software; communicating with **PORT FREEPORT** or its agents for all troubleshooting; maintaining records of all permitting transactions; reporting monthly to **TxDOT** and **PORT FREEPORT** all permitting transaction and monies derived therefrom; providing all training necessary to utilize the Software; and any other services reasonably necessary for the utilization of the Software and proper performance of the **TxDOT** Contract.

VI. License and Ownership of Software

6.1 **License.** **PROMILES** hereby grants to **PORT FREEPORT**, and its authorized users, the use of the Software in accordance with this agreement.

6.2 **Ownership of Licensed Material:** **PORT FREEPORT** acknowledges that the Software and its various modules are owned and titled exclusively to **PROMILES** and said ownership and title shall remain exclusively with **PROMILES**; **PORT FREEPORT** shall maintain ownership and title to all permitting information entered into automated permitting system by users, which information shall be provided to **PORT FREEPORT** upon demand.

VII. Source Code Escrow

7.1 Within thirty (30) days of system implementation, **PROMILES** shall, at its own expense, provide **PORT FREEPORT** a copy of the source code. **PROMILES** will provide **PORT FREEPORT** a new CD each quarter with the updated source code, the Source Code (as defined below) for the Software, including code for any Enhancements (as defined below) hereafter developed, and all technical and design documentation relating to such Source Code which would allow a reasonably competent software programmer to understand, use, support and modify such Source Code (collectively, the "Deposit").

PROMILES shall update the Deposit whenever an Enhancement is made available to **PORT FREEPORT**, but not less frequently than quarterly, such that at least on a quarterly basis the Deposit shall be complete and accurate as it relates to the then-current version of the Software. The Escrow Agreement shall have such other provisions as may be mutually agreeable.

"Source Code" means the program instructions for the Software licensed to **PORT FREEPORT** under this agreement in the form of source statements for the Software including, without limitation, in the form of electronic and printed human readable, mnemonic or English-like program listings.

"Enhancement" means any improvements, modifications, upgrades, updates, fixes, revisions and/or expansions to the automated permitting system software that **PROMILES** may develop or acquire and incorporate into its standard version of said software or which **PROMILES** has elected to make generally available to its licensees who are on a support and/or maintenance plan.

7.2 The Escrow Agreement shall provide that upon **PORT: FREEPORT's** written notice to the Escrow Agent that one of the following Release Conditions has occurred ("Notice of Release Condition"), the Escrow Agent shall deliver a copy of the Deposit to **PORT FREEPORT**, and a written notice to **PROMILES** that a "release" has been made under the Escrow Agreement (a "Release Notice"). A "Release Condition" shall mean the existence of one or more of the following events:

- a) **PROMILES's** commission of a breach of any material term or condition of this agreement;
- b) **PROMILES** breaches its obligations to update the Escrow as provided herein;
- c) Any of the representations and/or warranties set forth in the Escrow are untrue or incorrect when made, or become untrue or incorrect;
- d) **PROMILES's** failure to continue to do business in the ordinary course; or
- e) **PROMILES** voluntarily or is involuntarily placed in bankruptcy.

7.3 **PROMILES** shall have thirty (30) days following the date of the Release Notice to provide written notice to the Escrow Agent (with a copy to **PORT FREEPORT**) that it, in good faith, believes that the Release Condition did not occur or has been cured (a "Contrary Notice"), and if the Contrary Notice is not timely given, then **PROMILES** waives any right to contest the release of the Deposit to **PORT FREEPORT**. If **PROMILES** does provide the Contrary Notice within the required time period, then, notwithstanding such Contrary Notice, **PORT FREEPORT** shall continue to have the right to possess and use the Deposit as provided herein unless and until (a) **PROMILES** and **PORT FREEPORT** mutually agree in writing that the determination through the procedure set forth in this agreement by a court or mutually agreed arbitration, that the Release Condition did not occur or was cured within thirty (30) days following the date of the Release Notice. So long as the Notice or Release Condition was issued in good faith, **PORT FREEPORT** shall have no

liability to **PROMILES** for an incorrect Notice of Release Condition.

7.4 PORT FREEPORT's use of the Deposit is subject to the following terms and conditions:

- a) **PORT FREEPORT's** right to use the Deposit will be limited to the maintenance and support of the automated permitting system, including the development of Enhancements ("Permitted Use"). **PORT FREEPORT** may make up to three (3) copies of the Deposit as necessary for archival and backup purposes.
- b) Except when actually being utilized for its own use, the Deposit will be kept in a restricted, limited access area with access thereto limited to designated personnel (including subcontractors) who have a need to use the Deposit for **PORT FREEPORT'S** use.
- c) **PORT FREEPORT** may not remove or destroy any proprietary markings or proprietary legends placed upon or contained within the Deposit. **PORT FREEPORT** may not marker, sell, lend, rent, lease or otherwise distribute, or assign, sublicense or otherwise transfer any right in and to, the Deposit, except in connection with a permitted assignment and/or transfer of the software for the automated permitting system. In addition, **PORT FREEPORT** may not provide, disclose or otherwise make available the Deposit to any third party, except as provided herein, and except that copies of the Deposit may be kept at a third-party disaster or data recovery/use center and may be disclosed to subcontractors of **PORT FREEPORT** for its use.

7.5 PORT FREEPORT shall have the right to routinely verify that Escrow Deposits are current and in accordance with the terms of the agreement, or have a third party do so on its behalf.

VIII. Insurance and Indemnification

8.1 PROMILES also agrees to purchase and maintain throughout the term of this agreement and for one year following the discontinuation or non-renewal of this agreement, a policy or policies for technology/professional liability insurance and network security/data protection liability insurance (also called cyber liability) covering liabilities for financial loss resulting or arising from acts, errors, or omissions, in connection with the services provided or in support of services provided under this agreement, and including:

- a. intellectual property infringement arising out of software and/or content (with the exception of patent infringement and misappropriation of trade secrets);
- b. violation or infringement of any right of privacy, including breach of any and all state and federal security/privacy laws or regulations;
- c. data theft, damage, unauthorized disclosure, destruction, or completion, including without limitation, unauthorized access, unauthorized use, identity theft, theft of personally identifiable information or confidential corporate information in whatever form, transmission of a computer vims or other type

of malicious code; and participation in a denial of service attack on third party computer systems;

- d. with a minimum limit of \$1,000,000 for each and every claim and in the aggregate, which limit is subject to reasonable increase by **PORT FREEPORT** prior the commencement of any renewal of this Agreement. Required limits to be determined based upon the scope of work to be performed by **PROMILES**.

Such insurance must explicitly address all of the foregoing without limitation if caused by an employee of **PROMILES** or an independent contractor working on behalf of **PROMILES** in performing services under this Agreement. Such insurance must provide coverage for wrongful acts, claims, and lawsuits anywhere in the world.

Such insurance shall name **PORT FREEPORT** as an additional insured.

Data protection insurance must include contractual liability coverage for the indemnity requirement in this agreement for civil liability, regulatory investigations, and notification costs resulting from a breach of confidentiality or breach of security by or on behalf of **PROMILES**.

If **PROMILES** provides content for Internet web sites and/or any publications or media advertisements, the insurance shall include coverage for infringement of intellectual property rights, privacy infringement, advertising and content offenses, and defamation.

TO THE FULLEST EXTENT PERMITTED BY LAW AND REGARDLESS OF ANY DEGREE OF FAULT, OMISSION OR NEGLIGENCE, STRICT LIABILITY, STRICT STATUTORY LIABILITY, STRICT PRODUCTS LIABILITY OR NEGLIGENCE PER SE OF THE PARTIES INDEMNIFIED HERUNDER, PROMILES HEREBY ASSUMES ALL LIABILITY FOR, AND AGREES TO DEFEND, INDEMNIFY AND HOLD PORT FREEPORT, ITS OFFICERS, DIRECTORS, COMMISSIONERS, EMPLOYEES, AGENTS, ATTORNEYS, SUCCESSORS AND ASSIGNS (COLLECTIVELY, THE "INDEMNIFIED PARTIES"), HARMLESS FROM ALL CLAIMS, FINES, DAMAGES, LIABILITIES, LOSSES, COSTS, EXPENSES (INCLUDING WITHOUT LIMITATION REASONABLE ATTORNEYS' FEES AND COURT COSTS), PENALTIES, ASSESSMENTS, FINES, AND/OR INJUNCTIVE OBLIGATIONS RESULTING FROM PROMILES' FAILURE TO COMPLY WITH THIS AGREEMENT AND ASSERTED BY ANY THIRD PARTY, OR ASSERTED OR COMMENCED BY TXDOT, THE STATE OF TEXAS OR ANY OTHER AGENCY OR POLITICAL SUBDIVISION THEREOF WHICH MAY BE SUFFERED OR INCURRED AT ANY TIME BY THE INDEMNIFIEDPARTIES, ON ACCOUNT OF PROMILES' INTENTIONAL OR NEGLIGENT ACTS AND RESULTING IN ANY FAILURE TO COMPLY WITH THE TERMS OF THIS CONTRACT AND/OR THE TXDOT CONTRACT AS THOSE TERMS RELATE TO OR ARISE OUT OF THE AUTOMATED PERMITTING SYSTEM AND/OR ANY VIOLATION OF ANY APPLICABLE LAW, RULE, REGULATION, OR ORDER OF ANY GOVERNMENTAL AUTHORITY.

THE PARTIES RECOGNIZE AND UNDERSTAND THAT THE PURPOSE OF THIS INDEMNIFICATION IS FOR PROMILES TO PROVIDE FULL AND COMPLETE INDEMNIFICATION TO THE INDEMNIFIED PARTIES EVEN THOUGH THE INDEMNIFIED PARTIES MAY HAVE BEEN NEGLIGENT, NEGLIGENT PER SE OR MAY BE LIABLE UNDER THEORIES OF STRICT LIABILITY AND/OR STRICT PRODUCTS LIABILITY, INCLUDING SOLE CAUSE OR NEGLIGENCE; AND PROMILES'S INDEMNITY OBLIGATIONS ARE INTENDED TO AND WILL PROTECT THE INDEMNIFIED PARTIES AGAINST THE CONSEQUENCES OF THEIR OWN STRICT LIABILITY, FAULT, CONCURRENT, SOLE OR CONTRIBUTORY NEGLIGENCE.

IX. Representations and Acknowledgements by ProMiles

9.1 PROMILES makes the following representations and acknowledgements:

- a. PROMILES has substantial expertise in automated permitting systems and routing and has personnel with many years of experience in the permitting industry. This includes both development engineers and management personnel.
- b. PROMILES will provide automated permitting systems software acceptable to TxDOT's and PORT FREEPORT's standards.
- c. The automated permitting system will be fully web-based with intuitive and attractive interfaces. All aspects of the system will be available 24 hours a day, 7 days a week using high-availability software and hardware.
- d. All data will be stored in secure servers and will be backed up daily. PROMILES has a tested disaster recovery system that will allow PORT FREEPORT and users of the automated permitting system as soon as reasonably possible in the event of a disaster.
- e. PROMILES will customize its automated permitting system for use by PORT FREEPORT. PROMILES shall make all modifications necessary to implement Port Freeport permits, regulations, fees, and practices.
- f. PROMILES will keep clear, concise, and accurate records of all permits issued and all fees collected for said permits and provide said records to PORT FREEPORT or TxDOT upon reasonable notice and as required herein.
- g. PROMILES shall keep the automated permitting software made the basis of this agreement reasonably secure from theft, damage,

unauthorized disclosure, destruction, or corruption, including without limitation, unauthorized access, unauthorized use, identity theft, theft of personally identifiable information or confidential corporate information in whatever form, transmission of a computer virus or other type of malicious code; and participation in a denial of service attack on third party computer systems

9.2 Requests for Information. In addition to any other report required herein, **PROMILES** agrees that **PORT FREEPORT** has the right from time to time to request various information and records related to **PROMILES'** performance of this agreement, including but not limited to the daily backup and the disaster recovery system. **PROMILES** agrees to make available to **PORT FREEPORT** such information and records within ten (10) business days of written request. The intent of this provision is not only to allow **PORT FREEPORT** to ensure **PROMILES'** protection of data, but in the event **PROMILES** ceases to operate it will enable **PORT FREEPORT** to obtain any and all data necessary to continue performing the **TxDOT** Contract.

X. Default

10.1 Default: In the event of any breach of the provisions of this agreement, the non-breaching party shall give written notice of default. In the event said default is not remedied within ten (10) days from the date of written notice of default, the non-breaching party shall have the right to terminate this agreement. In the event of termination, the non-breaching party reserves the right to assert whatever remedies are available, in equity or at law, to collect any sums due hereunder, to enforce any provisions of this agreement, to collect damages for breach of contract or to effect or obtain any other available remedy.

10.2 Attorney's Fees: Should either party require the services of an attorney for the enforcement of this agreement, the breaching party agrees to pay reasonable attorney's fees and all costs of legal proceedings if it becomes necessary for the enforcement of this agreement.

XI. Not a Joint Venture

PORT FREEPORT and **PROMILES** are not, and shall never be considered as, joint venturers, partners or agents of each other, and none shall have the power to bind or obligate any other, except as set forth in this agreement.

XII. Conflicts of Interest

PROMILES acknowledges **PORT FREEPORT** is a governmental authority and, as such, **PORT FREEPORT** is firmly committed to making business decisions based solely on the objective evaluation of offers. **PORT FREEPORT's** business decisions can in no way be connected to or influenced by any relationship, gift, or thing of value. Moreover, because **PORT FREEPORT** is a governmental entity, certain laws set forth limitations of

relationships and gifts to certain governmental officers. **PROMILES** acknowledges, represents and warrants the following:

1. To the best of knowledge of the representative executing this agreement, **PROMILES** has not directly or indirectly paid, offered, promised to pay, contributed, or promised to contribute any money or any other thing of value or benefit (including employment, contracts or subcontracts relating to its business) to any Commissioner, official or employee of Port Freeport;
2. To the best of knowledge of the representative executing this agreement, no Commissioner, official or employee of Port Freeport has (directly or indirectly) solicited any such payment or contribution; and
3. **PROMILES** agrees to use best efforts to notify Port Freeport should it learn of any of the following:
 - a. a Commissioner, official or employee of Port Freeport or an affiliate of a Commissioner, official or employee of Port Freeport owns ten percent (10%) of the ownership of the **PROMILES** or ownership in the **PROMILES** with a fair market value of \$15,000 or more; or
 - b. a Commissioner, official or employee of Port Freeport or an affiliate of a Commissioner, official or employee of Port Freeport has an employment or other business relationship with the **PROMILES** that results in taxable income or receipt of something of value by a Commissioner, official or employee of Port Freeport or an affiliate of a Commissioner, official or employee of Port Freeport of \$2,500.00 or more during a twelve month period; or
 - c. a Commissioner, official or employee of Port Freeport or an affiliate of a Commissioner, official or employee of Port Freeport receives one or more gifts from the **PROMILES** that have a total value of more than \$250 in one 12-month period.

An “affiliate” of a person is (1) a family member of the person, related within the first degree by consanguinity or affinity, as defined by Subchapter B, Chapter 573 of the Texas Government' Code, or (2) an entity owned in whole or in part by the person or by a family member of the person related within the first degree by consanguinity or affinity.

The representations, warranties and certifications made in this Section are ongoing and will remain in effect for the term of this agreement. Should **PROMILES** learn of any violation of this provision, it shall use best efforts to notify Port Freeport by filing a written statement with the Secretary of the Port Commission through the office of the Executive Port Director.

XIII. Miscellaneous

13.1 Recitals. The “Recitals” set forth at the beginning of this Agreement are hereby acknowledged to be true and correct by the Parties and are incorporated into this Agreement.

13.2 Authority to Sign. The persons executing this agreement acknowledge and represent they have authority to enter into this agreement on behalf of their principal.

13.3 OPEN RECORDS ACT: NOTWITHSTANDING ANYTHING CONTAINED HEREIN, IT IS SPECIFICALLY UNDERSTOOD AND AGREED THAT PORT FREEPORT IS A GOVERNMENTAL ENTITY FORMED UNDER THE CONSTITUTION AND GENERAL LAWS OF THE STATE OF TEXAS AND WILL DISCLOSE ANY INFORMATION CONFIDENTIAL OR OTHERWISE RECEIVED BY IT AS FOLLOWS:

(1) TO THE EXTENT THAT ANY INFORMATION RECEIVED BY IT IS REQUIRED TO BE DISCLOSED UNDER ANY STATE OR FEDERAL LAW INCLUDING, BUT NOT LIMITED TO, THE "OPEN RECORDS ACT" ("PUBLIC INFORMATION ACT") AND/OR "THE OPEN MEETINGS ACT" OF THE STATE OF TEXAS.

(2) TO THE EXTENT ANY INFORMATION RECEIVED BY IT INVOLVES OR APPEARS TO INVOLVE ANY VIOLATION OR INTENDED VIOLATION OF ANY LAW OR REGULATION OF ANY LOCAL, STATE OR FEDERAL GOVERNMENT OR AGENCY THE SAME SHALL BE REPORTED TO THE APPLICABLE LAW ENFORCEMENT AGENCY FOR INVESTIGATION.

13.4 Integration: This agreement contains the entire agreement of the Parties, and no representation, inducement, promise or agreement, oral or otherwise, not embodied herein, shall be of any force or effect, and cannot be altered or amended except in writing and signed by all Parties hereto, unless otherwise provided herein. The Parties expressly disclaim reliance on any alleged representation, inducement, promise or agreement, oral or otherwise, not embodied herein.

13.5 Binding Effect: This agreement shall be binding upon, and inure to the benefit of, the Parties hereto, their successors and assigns.

13.6 Assignability: This agreement, or any interest hereunder, may not be assigned to without the written consent of the other party.

13.7 Texas Law to Apply: This agreement shall be governed by and construed in accordance with the laws of the State of Texas. If any provision of this agreement is held to be invalid, illegal or unenforceable in any respect by a court of competent jurisdiction, such holding shall not affect the validity of any other provision of this agreement which shall continue in full force and effect. The Parties hereby submit unconditionally and irrevocably to the jurisdiction of the state district courts of Brazoria County, Texas, for the enforcement of, the interpretation of, or any dispute arising out of or in conjunction with, this agreement as this agreement is fully performable in Brazoria County, Texas.

13.8 Rights and Remedies Cumulative: The rights and remedies provided by this Agreement are cumulative, and the use of any one right or remedy by either party shall not preclude or waive its right to use any or all other remedies. These rights and remedies are given in addition to any other rights the Parties may have by law, statute, ordinance, or otherwise.

13.9 Continuation of Service: In the event of any dispute arising out of this agreement PROMILES agrees it shall in good faith continue performance of this agreement unless otherwise waived in writing by PORT FREEPORT or the dispute has been fully and finally determined by a court of competent jurisdiction. In the event of any such dispute and continued performance by PROMILES, PORT FREEPORT shall be required to maintain payments of the permitting fee as set forth herein.

13.10 Notices: All notices required or permitted by this agreement, unless otherwise provided, shall be given by certified mail or registered mail at the following addresses:

PORT FREEPORT
Attn: Executive Director
200 W. Second St.,
Third Floor
Freeport, Texas 77541

With copy to:
The Randle Law Office
Attn: J. Grady Randle,
820 Gessner, Suite 1570
Houston, Texas 77024

ProMiles Software Development
Corporation Attn: Tony Stroncheck
1900 Texas Avenue
Bridge City, Texas 77611

[remainder of page intentionally left blank]

IN WITNESS WHEREOF, the Parties hereto set their hands and seals as of the date first written above.

PORT FREEPORT:

Date: November ____, 2023

By: _____
Phyllis Saathoff
Executive Director

ATTEST:

By: _____
Michaela Bevers, *Port Secretary*

PROMILES:

Date: November ____, 2023

By: _____
Name: _____
Title: _____

ATTEST:

By: _____
Name: _____