BOARD OF SUPERVISORS AGENDA ITEM REPORT
CONTRACTS / AWARDS / GRANTS

Requested Board Meeting Date: August 17, 2015
or Procurement Director Award ☐

Contractor/Vendor Name (DBA): Colossal Cave LLC

Project Title/Description:
Cooperative Management,Operation & Development Agreement for the Operation of Show Cave and Other Facilities within Colossal Cave Mountain Park

Purpose:
Operation of Show Cave & Other Facilities within designated areas of Colossal Cave Mountain Park

Procurement Method:
RFP

Program Goals/Predicted Outcomes:
Rehabilitation of Infrastructure, Sustain Operation of Natural Attraction, Develop new activities within historical scope of property

Public Benefit:
Colossal Cave Mountain Park will continue to operate

Metrics Available to Measure Performance:
Attendance Increase, Revenue Enhancement, Customer Service Feedback

Retroactive:

AUG 11 PM 03:39 PC CLK OF BD 423

Original Information

Document Type: CT Department Code: ED Contract Number (i.e.,15-123): 16*34

Effective Date: 08-17-2015 Termination Date: 08-31-2025 Prior Contract Number (Synergen/CMS): _____

☐ Expense Amount: $ _____ ☒ Revenue Amount: $ 20,000.00 annually w/revenue p

Funding Source(s): _____

Cost to Pima County General Fund: _____

Contract is fully or partially funded with Federal Funds? ☐ Yes ☒ No ☐ Not Applicable to Grant Awards

Were insurance or indemnity clauses modified? ☐ Yes ☒ No ☐ Not Applicable to Grant Awards

Vendor is using a Social Security Number? ☐ Yes ☒ No ☐ Not Applicable to Grant Awards

If Yes, attach the required form per Administrative Procedure 22-73.

Amendment Information

Document Type: _____ Department Code: _____ Contract Number (i.e.,15-123): _____

Amendment No.: _____ AMS Version No.: _____

Effective Date: _____ New Termination Date: _____

☐ Expense ☐ Revenue ☐ Increase ☐ Decrease Amount This Amendment: $ _____

Funding Source(s): _____

Cost to Pima County General Fund: _____

COB: 8-11-15
BOS: 8-17-15
Addendum

1/2 pgs(3)

Contact: Tom Moulton

Department: ED&T Telephone: 520-724-7353

Department Director Signature/Date: Thomas R Moulton 8/7/15

Deputy County Administrator Signature/Date: [illegible] 8-10-15

County Administrator Signature/Date: C. Ann Lacy 8/10/15

(Required for Board Agenda/Addendum Items)

CONTRACT
NO. CT-ED-1600000000000000034
AMENDMENT NO. _____
This number must appear on all invoices, correspondence and documents pertaining to this contract.

COOPERATIVE MANAGEMENT, OPERATION AND DEVELOPMENT AGREEMENT FOR THE OPERATION OF SHOW CAVE AND OTHER FACILITIES WITHIN COLOSSAL CAVE MOUNTAIN PARK

This Cooperative Management, Operation and Development Agreement ("the Agreement") is made effective as of August 17, 2015 by and between Pima County, a political subdivision of the State of Arizona ("County"), the Pima County Flood Control District, a special taxing district, ("District"), and Colossal Cave, LLC, an Arizona limited liability company ("Manager") for the purpose of operating Colossal Cave ("Show Cave"), an historic show cave attraction, and other activities within defined areas ("the Property") in Colossal Cave Mountain Park.

RECITALS

1. County and District are the owners of the real property known as Colossal Cave Mountain Park ("Park"). The Park is depicted in Exhibit "A" to this Agreement. The Property is depicted in Exhibit "B" to this Agreement.

2. Colossal Cave Preservation Park Historic District is listed in the *National Register of Historic Places*, and County wishes to maintain the historic integrity of this district and its contributing properties.

3. Manager is an Arizona Limited Liability Company organized for the purpose of operating the Show Cave and other activities within their designated areas as illustrated and described in *Property Location, Purpose and Scope of Activities* attached to this Agreement as Exhibit "C".

4. County, District and Manager wish to enter into this Agreement to allow Manager to operate, rehabilitate and develop the Property within the Park as a major natural attraction for Pima County and the region, attracting visitors to Pima County, and generating tangible economic impact and other benefits to the local economy.

5. County and the District are authorized, pursuant to A.R.S. § 11-932, to enter into agreements for the management and operation of County public parks and County is authorized, pursuant to A.R.S. § 11-254.04, to appropriate and expend County funds for and in connection with economic development activities.

AGREEMENT

Now, therefore, County, District and Manager, in consideration of the above recitals which are incorporated herein by this reference and the mutual covenants set forth herein, agree as follows:

1. Grant of License to Manage Property

County and District hereby grants to Manager specific rights to use, occupy and manage the Property, inclusive of site facilities located within designated areas for the term and purposes described in this Agreement. Manager agrees that it will operate, renovate, develop, manage and maintain the Property under the terms and conditions set forth herein. The scope of Manager's responsibilities and duties may be modified from time to time as the parties agree. Such modifications and the addition of amenities are contained within the Exhibits attached. The expenses of constructing and maintaining such additional amenities, and reasonable adjustments in Rent and other obligations, if any, may be allocated by written agreement of the parties.

Manager will take all reasonable measures to protect the scenic, cultural, ecological and aesthetic values of the Property and prevent native plant loss, damage to historical resources, alteration of archaeological features or soil erosion from improperly constructed or maintained developments, trails and public use areas.

1.1 Areas Not Granted to Manager

County and District reserve the right to manage the undeveloped areas of the Park outside of the Property. This reservation extends to all known and unknown cave and karst features inside and outside of the Show Cave. The foregoing notwithstanding, during the Term of this Agreement (including Renewal Terms and Additional Renewal Terms), Manager will have a right of first refusal to operate known or unknown cave and karst attractions adjacent to or within the boundaries of the Park or nearby land owned by County or District if such caves or karst attractions are considered for use and are held open to the public as show caves by County or District so long as this agreement is in effect and Manager is meeting all conditions thereof.

1.2 Condition of Property Upon Delivery

County and District will deliver the Property (including parking areas, restroom facilities, buildings and other improvements) in good and safe working order. All sanitary facilities will be in compliance with applicable health and safety laws and regulations. Any structures and facilities, including septic tanks, trailers, buildings, refuse dumps and the like, that are obsolete, unusable, or potentially hazardous to employees or the public will be removed at County expense.

County will additionally endeavor to provide adequate and ADA-compliant parking and restroom facilities to Manager for use with the Property as funds may become available. Such facilities will be provided on a "turn-key" basis.

Manager will construct, provide, operate and maintain personal property and all equipment necessary for the establishment and operation of the Property.

1.3 Manager's Deliverables

First Six Months

Manager will provide all of the following within the first six (6) months of the first year of operation for approval by County:

1) An overall operation plan of the Show Cave and other activities within the Property as outlined in Exhibit "C" including but not limited to, proposed type of cave tours, cave and campground hours, special events, a visitor safety plan that identifies priorities and methods for ensuring visitor safety. The plan must address emergency evacuation procedures and procedures for routine inspections.
2) A proposal identifying which days each year the Property will be closed to recreation, with specific information about what activities, if any, Manager would conduct or allow during those days.
3) A lighting plan that identifies any proposed changes in lighting within and outside the Show Cave.
4) Admission price plan for the attractions within the Property that may have a fee associated with the activity.
5) Manager and County will jointly prepare a waste management plan within the first six (6) months of the first year of operation that discusses what wastes are generated and how they will be disposed, with a checklist for self-audits and inspections. There will be no disposal of any waste in caves, over the known karst features, or over shallow groundwater areas. The plan will address remediation and prevention procedures for accidental discharges of waste.

First Two Years

Manager is responsible for providing the following within the first two (2) years of operation:

1) A recreation effects monitoring proposal for the Show Cave in conjunction with County. The object of this monitoring is to document and understand recreational impacts. Monitoring can be accomplished using photographs or other methods. Proper documentation of the location and frequency of cave monitoring will be required. Manager must consider the fragility of the cave and karst features and any disturbance that monitoring may cause.
2) A water supply operations plan developed in conjunction with County, for the facilities. The plan must include an inspection checklist and state the frequency of inspections.

3) A multi-year maintenance and repair plan with applicable long-range budgets **("**Maintenance Plan**")**. The Maintenance Plan will be substantially as set forth in Exhibit "D" and will include a priority list of major maintenance, site facility and rehabilitation improvement projects ("Projects"). County has the right to deny or refuse to allow any proposed Projects, and the Maintenance Plan will be adjusted accordingly. Both parties will work to identify park rehabilitation needs, and potential funding for those Projects, throughout the Term of this Agreement.

First Ten Years

Manager must meet the maintenance and repair commitments in the Maintenance Plan as as long as County agrees upon all work in advance and the work meets applicable regulations. Further, Manager is obligated to make property and facility improvements, as summarized in Exhibit "D", provided that County approves all such work in advance. County may, but is not obligated to, participate in maintenance and development projects financially or with in-kind services.

2. Term and Renewal

2.1 Initial Term

The initial term ("Term") of this Agreement will commence upon execution by County and District and extend through August 31, 2025.

2.2 Extension Options

Manager may extend the Term of this Agreement for an additional fifteen (15) years from and after expiration of the initial Term (the "Renewal Term"), provided that Manager is then in full compliance with all its obligations under this Agreement, including the terms of its Maintenance Plan (except that failure to complete a Project will be excused if the failure is caused solely by circumstances beyond Manager's control). Manager must exercise this option by giving County and District written notice of the exercise not more than two (2) years, nor less than one (1) year prior to the end of the initial Term.

The parties may mutually agree to extend this Agreement for an additional twenty-five (25) year period from and after expiration of the Renewal Term (the "Additional Renewal Term").

If Manager wishes to renew the Agreement for the Additional Renewal Term, Manager must so notify County and District in writing not more than two (2) years, nor less than one (1) year prior to the end of the Renewal Term. In that event, the parties will negotiate regarding the terms of any Agreement for the Additional Renewal Term.

3. Payments to County

Manager will pay County, without demand or right of offset, rent as follows:

3.1 Minimum Rent

Commencing effective September 1, 2015, Manager will pay to County as minimum rent twenty thousand dollars ($20,000.00) annually ("Minimum Rent"), payable in monthly payments of One Thousand, Six Hundred Sixty-Six ($1,666.00) commencing on September 1, 2015 and payable on the first of each month thereafter. On September 1, 2020, the annual minimum rent will be adjusted upward, and will be subsequently adjusted upward every five (5) years thereafter, based on the percentage increase, if any, in the Consumer Price Index-Urban (CPI-U) for the previous five (5) year period or fifteen percent (15%), whichever is less. The first adjustment will be effective on September 1, 2020 and will be based on CPI-U percentage increase from September 1, 2015 – August 31, 2020.

3.2 Percentage Rent

In addition to the Minimum Rent, Manager will pay percentage rent calculated using the following rates and benchmarks:

0%	on annual Gross Revenues up to $2,000,000
2%	on annual Gross Revenues from $2,000,000 to $3,000,000
4%	on annual Gross Revenues from $3,000,000 to $4,000,000
6%	on annual Gross Revenues from $4,000,000 to $5,000,000
8%	on annual Gross Revenues from $5,000,000 to $6,000,000
10%	on annual Gross Revenues from $6,000,000 and more

Percentage Rent benchmarks will not be subject to adjustment for the CPI-U.

For purposes of this Agreement, the term "Gross Revenues" means all income receipts from any source arising out of operations or activities conducted at the Property, whether such revenue is revenue directly to Manager or to any subcontractor of Manager or other person or entity receiving revenue for activities conducted at the Property with the consent of Manager, subject to the limitation herein below relating to the area subcontracted or used by third parties. It is the intent of the parties that "Gross Revenues" be interpreted as broadly as possible to include revenue derived from use of the Property regardless of the recipient of such revenue.

Gross Revenues do not include direct taxes charged on admissions or other monies collected for and paid to a taxing authority as sales or excise taxes and would not include normal charge-backs such as rebates to charities using the Property, refunds, returns, credit card fees or uncollected amounts or activities conducted or under the auspices of Pima County.

Within forty-five (45) calendar days after the end of each month, Manager will report to County all Gross Revenues and charge-backs. On or before forty-five (45) calendar days after the end of each quarter, beginning for the quarter ending September 30, 2015, Manager will pay to County the estimated Percentage Rent year-to-date based upon an estimate determined by annualizing Gross Revenues year-to-date. On or before July 31 of each year of this Agreement and on or before forty-five (45) calendar days after the termination of this Agreement, Manager will provide to County a reconciliation of the Percentage Rent due for the preceding calendar year and will pay any balance of Percentage Rent for that preceding year or will deduct any overpaid Percentage Rent from the next payment of Rent. Manager will require, as part of all contracts with any sub-contractor, or other entity or person using the Property, that such concessionaire, sub-contractor, or other entity or person using the Property report to Manager and to County Gross Revenues received from activities on the Property.

The Minimum Rent and Percentage Rent are collectively referred to herein as the "Rent".

4. Permitted and Required Activities

4.1 Operation of the Property

Manager will operate the Property in accordance with the specifications set forth in Exhibit "C", *Property Location, Purpose and Scope of Activities,* during the term of this Agreement.

Manager will be responsible for maintaining the Property as mutually agreed and outlined by the Maintenance Plan.

Manager will construct all such attractions and related improvements consistent with the *Maintenance Plan* and *New Renovation Projects and Capital Improvements* attached to this Agreement as Exhibits "D and "E" respectively. The parties may negotiate for additional projects and improvements on a case-by-case basis.

4.2 Conduct of Activities on the Property

Manager will determine the quantity and duration of cave tours, and special events on an annual basis.

Manager will conduct its activities, and ensure that its employees and all permissible users of the Property conduct their activities in a professional manner and in compliance with applicable standards of practice for natural resource park facilities and federal, state and local laws.

4.3 Right of Public to Access Park

Except for designated holidays, the Park will be open to the general public, except for gated attractions within the Property (including Show Cave), and designated and scheduled special and private events ("Special Events").

All utilization of the Property will be scheduled and approved by the County and County will respond to any request for approval within thirty (30) business days after Manager submits it to County. Failure of County to timely respond will be considered approval. Any utilization of areas outside of the Property footprint must be scheduled and approved by County at least thirty (30) calendar days in advance.

4.4 Fees

Manager may charge fees for use of the Show Cave and attractions and for Special Events and other uses of the Property under control of the Manager in amounts approved in advance by County. County will respond to requests for approval within sixty (60) calendar days after submittal. Failure of County to timely respond will be considered approval. Manager will accompany any fee adjustment request with a market study of comparable show caves, similar attractions and local attractions, and their fee structures, which Manager believes support the Manager's requested fees. Property fees must be at fair market value, but Manager may choose to set rates lower at Manager's discretion. All fees will be included in the calculation of Gross Revenue and applied by Manager in connection with the use, operation and improvement of the Property.

4.5 Alcohol

Manager may serve and sell alcoholic beverages for consumption on the Property provided Manager complies with applicable liquor laws and provides County with the required insurance set forth herein.

4.6 Signs

Manager may affix and maintain upon the Property such signs relating to activities and attractions located in the Property as Manager deems appropriate;

provided, however, that all signs utilized by Manager on or about the Property, whether visible from outside the Park or not, will at all times comply with applicable provisions of any applicable sign code (presently the *Pima County Sign Code*) and will be installed and maintained at Manager's sole cost. Any and all advertising signs placed by Manager on the Property will be immediately removed by Manager upon termination of this Agreement for any reason.

Any damage resulting from such removal will be repaired immediately by Manager at its sole cost. Manager will not remove any operational or safety signage from the Property except to maintain, repair or replace the signage.

Manager will pay for all costs of construction, erection, installation, maintenance and repair of any sign to be erected or installed or otherwise placed in the Property. Manager will, through coordination with County, identify the Park components thereof, in signs and in any of their written materials, as belonging to Pima County. Notwithstanding anything herein to the contrary, any signs requested by County and not otherwise required to be installed will be constructed and installed at County's expense.

5. Property Improvements

5.1 Planning, Engineering and Construction

Planning, engineering and construction will be necessary to rehabilitate, renovate and develop the Show Cave and other attractions located in the Property. Manager will develop all of the elements necessary for the County approved projects on the phases of construction on the site as defined in Exhibits "D" and "E" at Manager's sole cost and expense.

5.1.1 County and Manager may agree to share costs associated with construction, maintenance and repair of the Property or facilities located in the Property, in a manner different than that described in this Agreement if the parties determine that such cost sharing will be beneficial to both the Property and the general public, and such agreement is entered into in writing and signed by both parties. Projects that fall into this category will be handled on a case by case basis as they arise.

5.2 Consent of County Required

5.2.1 Manager may not make any improvements, alterations, additions, or changes to the Premises ("Alterations") involving an expenditure of more than $10,000.00 (the "Maximum Expenditure Amount"), without obtaining the prior written consent of:

5.2.1.1 The County Administrator or his designee if the cost of the Alterations is greater than $10,000.00 and less than $100,000.00; or

5.2.1.2 The County's Board of Supervisors if the cost of the Alterations is more than $100,000.00.

5.2.2 For any Alteration that costs more than the applicable "Maximum Expenditure Amount", Manager will provide County with prior written notice of the proposed Alterations (the "Notice of Alterations"). The "Notice of Alterations" must include plans and specifications for the Alterations. County has forty-five (45) calendar days after receipt of the "Notice of Alterations" to approve, amend, or reject the proposed Alterations. Failure of County to respond to the "Notice of Alterations" within forty-five (45) calendar days after receipt of the "Notice of Alternations" by County will be considered approval.

5.2.3 County will not unreasonably withhold consent to proposed Alterations; provided, however, it will be reasonable for County to withhold consent if, among other reasons, the Alterations:

5.2.3.1 Adversely affect the integrity of any structural, mechanical, or electrical system of any portion of the Premises or affect the integrity of the Premises or the Premises features or its infrastructure;

5.2.3.2 Result in County being required to perform any work that County could otherwise avoid or defer;

5.2.3.3. Result in an increase in the premiums for any hazard or liability insurance carried by County or result in an increased risk of liability or pose a safety hazard; or

5.2.3.4. Result in an increase in the demand for utilities or services (including wastewater treatment) that the County already provides to the Property.

5.2.3.5. Are located within the *Colossal Cave Preservation Park Historic District* and may require additional local, state or Federal approval.

5.3 No County Liability for Approval of Alterations

County's review of the plans and specifications is solely for the County's purposes and does not imply that the County has reviewed the plans and specifications for quality, design, laws, compliance or other like matters. Accordingly, notwithstanding that any construction drawings are reviewed by any County architects, engineers, or consultants, County has no liability whatsoever in connection therewith and is not responsible for any omissions or errors contained in any construction drawings, and Manager's indemnity set forth in the *Indemnification Clause* of this Agreement specifically applies to the construction drawings. County's review is to determine that the proposed Alterations are consistent with the purposes of this Agreement of providing recreational opportunities for the benefit of the people of Pima County within an historical and culturally sensitive Mountain Park.

5.4 Construction of Improvements

All improvements must comply with the *Pima County Uniform Building Code* and other laws, regulations and orders for any construction, whether of a permanent or a temporary nature, and Manager must obtain all applicable permits from regulatory agencies, including but not limited to the Pima County Development Services Department, the Pima County Flood Control District, State Historical Preservation Office and the State Fire Marshal, with such permits demonstrated through plans submitted for Pima County approval. Because Colossal Cave is listed in the *Colossal Cave Preservation Park Historic District Boundary National Register of Historic Places* (Exhibit F), any development or alternation within the Historic District and its contributing properties will require consultation with County and the State Historic Preservation Office in advance to avoid adverse effects to individual resources and to the Historic District as a whole.

All construction contracts must include an indemnification provision requiring the contractors to indemnify, defend and hold harmless Manager and County from all losses, claims, suits, demands, expenses, attorney's fees or actions of any kind or nature arising from the contractor's negligent or intentional acts, errors or omissions. Manager will cause said contractors to obtain insurance coverage of a type and amount acceptable to County and to name the Manager and County as additional insured with respect to liability arising out of the performance of said contracts. Within thirty (30) calendar days after completion of any buildings or improvements that exceed that Maximum Expenditure Amount, Manager will deliver to County a complete and reproducible set of the plans and specifications of the improvement or buildings as built.

5.5 Indemnification by Manager

Manager indemnifies, holds County and District harmless, and will defend County and District against liability for any damage to property or injury to persons occasioned by any construction by Manager on the Premises.

5.6 Property of County

Manager agrees that, upon construction or installation, any building, structure, or system on the Property, regardless of whether constructed or installed by Manager, becomes the property of County or District, as their interests in the Property may appear, except for those buildings, structures, or systems that can be readily removed by Manager and which have not become affixed to the Property, which will remain the property of Manager. Manager will repair or restore any real or other property damaged during the removal of any such buildings, structures, or systems. During the term of this Agreement, Manager will have the right to use improvements of any type on the Property unless otherwise limited by any provision of this Agreement.

6. Long Range Plan

County will be developing a *Natural Resource Management Plan* ("Management Plan") for the Park, which will be approved by County. County and Manager will cooperate to develop a long-range plan for the Park ("Plan") as part of the Management Plan. The Plan may include planned use and operation for other real property owned by County or District in the area of the Park. County and Manager anticipate that the Plan may provide the parties with opportunities for shared cost and benefits.

7. Repairs & Maintenance

7.1 Manager will, at Manager's sole cost and expense, keep the Property, including all buildings, improvements, and landscaping located thereon, and all exterior, interior, structural and mechanical components thereof, in good, clean, safe condition and repair.

Manager is not obligated to perform repairs or maintenance to the extent that such repairs or maintenance are required as a result of the sole negligence or intentional misconduct of County, its agents, employees, or contractors, which repairs and maintenance County will conduct at County's sole cost and expense. Manager will, at Manager's expense, make all repairs to the Property made necessary by reason of the negligence or intentional misconduct of Manager, its officers, directors, members, managers, employees, licensees, invitees, subcontractors, servants or agents, or for normal wear and tear incurred as a result of property operation in accordance with this agreement and public law.

7.2 Manager is responsible for proper disposal of all waste generated at the Property.

7.3 Repairs to mechanical systems, such as HVAC, must be performed promptly in order to minimize any waste of utilities or water. Notwithstanding anything herein to the contrary, County and Manager may agree to share costs associated with construction, maintenance and repair of the Property or facilities located in the Property, in a manner different than that described in this Agreement if the parties determine that such cost sharing will be beneficial to both the Property and the general public, and the parties enter into such an agreement in writing.

8. Obligation to Reconstruct

During the term of this Agreement, Manager will maintain fire and casualty insurance on all improvements located on the Property and all of Manager's personal property. In the event the Property or any portion thereof is damaged by fire or other perils, Manager will forthwith repair the damage, restoring the Property to the condition which existed prior to the casualty, in which event this Agreement will remain in full force and effect. If County and Manager determine that repair of the damage is not prudent in light of the existing use of the Property, Manager will use any insurance funds received by Manager for another purpose related to the Property as agreed to by the parties. In the event of any such casualty which damages Manager's furniture, fixtures and/or equipment at the Property, Manager will proceed with reasonable diligence to restore, repair or replace all of its personal property to the same condition which existed prior to the casualty. Manager will continue the operation of the Property to the extent practicable during any period of reconstruction or restoration.

9. Liens and Encumbrances

Manager will keep the Property free from any liens arising out of any work performed, materials furnished or obligations incurred by or on behalf of Manager. Notwithstanding the prohibition on liens on the Property itself, Manager may encumber Manager's interest in this Agreement for the construction of improvements on the Property and, to the extent required, County or District will execute any documents required by a lender in order to provide the lender with a security interest in Manager's right to use any improvements located on the Property pursuant to this Agreement. County and District will also execute consent, estoppel, non-disturbance and similar instruments reasonably requested by Manager's lenders; provided, however, County and District are not required to amend this Agreement or consent to additional notice or cure provisions as part of any such consent, estoppel, non-disturbance or similar instruments.