SOFTWARE LICENSE, IMPLEMENTATION AND SUPPORT

AND

MAINTENANCE AGREEMENT

BETWEEN

CITY OF GARDEN GROVE

And

_____ [Consultant]

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SOFTWARE LICENSE, IMPLEMENTATION AND SUPPORT AND MAINTENANCE AGREEMENT

THIS AGREEMENT made as of _____ day of _____, 2018.

BETWEEN:

CITY OF GARDEN GROVE
("Customer" or "City")

- and -

_____
("Consultant")

RECITALS

1.   The Consultant owns the Software (as defined below);

2.   The Customer wishes to (a) acquire a license to utilize the Software, (b) retain the Consultant to perform the Services (as defined herein), and (c) enter into a support and maintenance contract (Schedule "D").

3.   The Consultant wishes to (a) grant the Customer a license to utilize the Software, and (b) provide the Services to the Customer, all upon the terms and conditions set out in this Agreement.

      NOW THEREFORE, in consideration of the mutual covenants set out in this Agreement and for other good and valuable consideration (the receipt and sufficiency of which is hereby acknowledged), the parties agree as follows:

Article I -**INTERPRETATION**

1.1   **Definitions**

      Throughout this Agreement, except as otherwise expressly provided, the following words and expressions shall have the following meanings:

(a)   **"Agreement", "this Agreement", "the Agreement", "hereof", "herein", "hereto", "hereby", "hereunder"** and similar expressions mean this Software License, Implementation and Support and Maintenance Agreement, including all of its Schedules and all instruments supplementing, amending or confirming this Agreement, including Consultant's Proposal dated _____, incorporated herein by reference. All

references to **"Articles"** or **"Sections"** mean and refer to the specified Article or Section of this Agreement.

(b)   **"Change Order"** means any written documentation between the Customer and Consultant evidencing their agreement to change particular aspects of this Agreement.

(c)   **"Completion of Services"** means that the Software is fully operational and performing in conformity with the Specifications set out herein. For purposes of this Agreement, Completion of Services will be deemed to have occurred 45 days following the date which the Customer commences using the Software as its predominate computerized enterprise resources planning system.

(d)   **"Data Dictionary"** means a current and accurate identification of all fields contained in the Software database, consisting of table names, field names, field lengths and meaningful field content descriptions which will be supplied via _____[database system], on-line reference documentation, and _____ [list other sources of data/terms definitions].

(e)   **"Documentation"** includes, but is not limited to, user and technical manuals and publications, including updates, which describe the purpose and scope and facilitate the use of the Software including without limitation, screen and report layouts as well as field length and editing characteristics, product information, user manuals, instructions, maintenance release notes, Data Dictionary, or use guidelines made available by Consultant electronically or otherwise.

(f)   **"Designated Computer System"** shall mean the Customer's platform and operating system environment which is operating the Software, including any load-balancing, backup or disaster recovery systems.

(g)   **"Error"** means a defect that causes the Software not to function substantially in conformance with the Specifications.

(h)   **"License"** means the non-exclusive license granted to the Customer pursuant to Section 2.1 hereof, to configure and install the Software on the Customer's Designated Computer System to enable the Customer's users to access and use the Software.

(i)   "**Modifications**" mean any addition to, deletion from or change to the substance or the structure of the Software.

(j)   "**Project Statement of Work**" means the statement of work appended as Schedule "G" delineating, among other things, the Services that will be provided by Consultant to Customer pursuant to this Agreement, as such schedule may be amended or modified by mutual specific written agreement of the parties' respective representatives from time to time in accordance with the terms of this Agreement.

(k)   **"Required Programs"** has the meaning set out in Section 3.3(b) hereof.

(l)   **"Services"** has the meaning set out in Section 3.1 hereof.

(m)   **"Software"** means the program material in machine-readable or interpreted form, and may include, where appropriate, listings of either machine code or source code and related materials, including instructions and documentation provided by Consultant to Customer, including any such programs provided subsequent to this Agreement, and including all copies made by Customer. The Software to be provided by Consultant at the inception of this Agreement is identified on the attached Schedule A.

(n)   **"Source"** means the source language code of the Software written by the programmers thereof.

(o)   **"Specifications"** means the technical specifications for the Software as established herein and in the Documentation accompanying the Software.

(p)   **"System Software"** means the programs delivered with the Consultant's Software that are developed and maintained by another company other than the Consultant. Also referenced as third (3rd) party software.

(q)   **"Support and Maintenance Agreement"** has the meaning set out in Section 3.4 hereof.

(r)   **"Warranty Period"** means a period of twelve months from the date of Completion of Services, during which time the Consultant shall correct any errors or malfunctions reported to the Consultant by the Customer in accordance with Section 6.3 of this Agreement.

1.2   **Time of the Essence**

        Time shall be of the essence in and of this Agreement and every part hereof. Any extension, waiver or variation of any provision of this Agreement shall not be deemed to affect this provision and there shall be no implied waiver of this provision.

1.3   **Currency**

        Unless otherwise specified, all references to amounts of money in this Agreement refer to U.S. currency.

1.4   **Headings**

        The descriptive headings preceding Articles and Sections of this Agreement are inserted solely for convenience of reference and are not intended as complete or accurate descriptions of the content of such Articles or Sections. The division of this Agreement into Articles and Sections shall not affect the interpretation of this Agreement.

1.5   **Plurals and Gender**

The use of words in the singular or plural, or referring to a particular gender, shall not limit the scope or exclude the application of any provision of this Agreement to such persons or circumstances as the context otherwise permits.

1.6   **Schedules**

The Schedules described below and appended to this Agreement shall be deemed to be integral parts of this Agreement.

Schedule "A" -   Description of Software
Schedule "B" -   Implementation Process and Timetable
Schedule "C" -   Fee Structure and Payment Schedule
Schedule "D" -   Support and Maintenance Agreement
Schedule "E" -   Sample Change Order
Schedule "F" -   RFP – Consultant response to Customer
Schedule "G" -   Statement of Work
Schedule "H" -   System Software
Schedule "I" -   Hardware
Schedule "J" -   Software Not Selected

Article II -**SOFTWARE LICENSES**

2.1   **Grant of Licenses**

(a)   Subject to the terms and conditions of this Agreement, the Consultant hereby grants to the Customer a personal, perpetual, fully paid-up, non-exclusive, non-transferable right and license to use the Software on the Designated Computer System (the "License").

(b)   Any Software furnished by Consultant in machine-readable form may be copied in whole or in part by Customer for use on the Designated Computer System. Customer agrees that the original copy of all Software furnished by Consultant and all copies thereof made by Customer are and at all times remain the sole property of Consultant.

(c)   Within one (1) year after the Completion of Services, Customer may optionally license from Consultant any of the Software identified in Schedule J for the corresponding prices listed in Schedule J. After the expiration of the one (1) year period, prices for the Software identified in Schedule J are subject to change in Consultant's sole discretion.

2.2   **Term of License**

The License granted herein commence on the date of this Agreement and is of indefinite duration unless terminated pursuant to the terms hereof.

2.3   **Restrictions on Use**

(a)   Customer may not give away, rent, lease or otherwise sell, sublicense, distribute or transfer the License granted under this Agreement without the prior written consent of Consultant.

(b)   Consultant requires a separate License for each computer system or environment into which the Software or any portion thereof is read in machine-readable form for operation on such system or environment; provided, however, that the Software may be transferred and/or copied to a back-up or disaster recovery system, or to additional servers for internal testing or load balancing purposes only.

(c)   Within thirty (30) days after discontinuance or termination of the License for any reason (excluding breach by Consultant or activation of the Source Code Escrow), including termination resulting from a breach by the Customer beyond the applicable notice and cure periods as provided in this Agreement, Customer shall deliver to Consultant the Software and all copies thereof in whichever form, including partial copies which may have been modified by Customer or Consultant. Alternatively, the Software and other related materials may be disposed in accordance with written instructions from Consultant. Upon prior written authorization from Consultant, Customer may be permitted for a specific period after the termination of the License to retain one copy of certain materials identified in the written authorization for record purposes.

(d)   The Software and related materials supplied by Consultant are protected by copyright and trademark laws. Title, ownership rights and intellectual property rights in the Software and related materials supplied by Consultant remain with Consultant. Use of the Software and related materials supplied by Consultant is subject to the applicable copyright laws and the express rights and restrictions of this Agreement. Any rights not expressly granted herein are reserved. Customer may not remove any copyright, trademark or other proprietary notices from the Software and related materials supplied by Consultant.

2.4   **Derivation, Modification and Copyright**

(a)   The Customer agrees that it will not attempt to derive, or permit or help others to derive the source code relating to the Software or attempt to otherwise convert or alter the Software into human readable code. The Customer further agrees that it will not attempt to duplicate, or permit or help others to duplicate, the source code relating to the Software.

(b)   The Customer shall have no right to modify any of the Software supplied by the Consultant for Customer's use under this Agreement without the prior written approval and direction of the Consultant.

(c)   The Customer agrees that it will not, except as otherwise expressly provided in this Agreement or except as dictated by Customer's standard computer system's backup procedures and/or test environments, make or allow others to make copies or

reproductions of the Software or other proprietary information in any form. The Customer agrees that it will not copy or otherwise reproduce the Software.

2.5 **Ownership of Software and Confidential Information**

(a) The Customer acknowledges that the Software contains proprietary and confidential information of the Consultant which shall, at all times, remain the property of the Consultant. Through the grant of licenses pursuant to Section 2.1, the Customer is only entitled to use of the Software in accordance with the terms of this Agreement.

(b) The Customer will ensure that the Universal Copyright Convention symbol and other copyright and proprietary notices of the Consultant will remain on the Software in machine-readable form. The Customer will take the same care to safeguard the Software as it takes to safeguard its own confidential information and such care shall not be any less than would be taken by a reasonable person to safeguard its own confidential information.

(c) No third party, other than duly authorized agents or employees of the Customer authorized pursuant to the Licenses issued hereunder, shall have access to or use of the Software.

(d) In order to assist the Consultant with the protection of its proprietary rights with respect to the Software and to enable the Consultant to ensure that the Customer is complying with its obligations with respect to the proprietary nature and confidentiality of the Software, the Customer shall permit the Consultant to visit during normal business hours any premises at which the Software is used and shall provide the Consultant with access to such Software upon reasonable advance notice and in such a way as to not impede Customer's operations.

2.6 **Escrow**

(a) The Consultant shall keep a copy of the source code for the Software (the "Source") with a third-party escrow service provider selected by mutual agreement of both parties from time to time (the "Escrow Agent"). The parties shall agree on the Escrow Agent within sixty (60) days of the date of this Agreement, but in any event prior to the installation of the Software on the Designated Computer System.

(b) The Consultant hereby grants the Customer a contingent license, subject to the conditions of Sections 0 and 0 herein, to use the copy of the Source maintained by the Escrow Agent for support purposes only.

(c) The contingent license referred to in Section 0 shall only be available to the Customer to the extent that the Customer has a Support and Maintenance Agreement in effect with the Consultant immediately prior to the occurrence of any event specified in Section 0. If no such Support and Maintenance Agreement is in effect, the Customer may retain the licenses granted to it pursuant to Section 2.1, but will relinquish its rights to receive any updates or modification of the Software or continuing support from the Consultant. Furthermore, if no Support and Maintenance Agreement is in effect, the Customer will relinquish its rights to access

the Source upon the occurrence of any of the events specified in Section 0. To the extent that the Customer terminates its Support and Maintenance Agreement, the provisions in this Agreement respecting the use of the Software and the terms of the licenses granted hereby, will continue to apply following any such termination.

(e)   The contingent license granted pursuant to Section 0 shall, to the extent it remains available to the Customer, become exercisable if and when any of the following events occur:

(i)   the Consultant ceases to do business for any reason whatsoever;

(ii)   the Consultant fails or refuses to perform its obligations under this Agreement or provide the Customer with support for the Software pursuant to the Support and Maintenance Agreement (except as a result of a failure by the Customer to comply with its obligations under this Agreement or the Support and Maintenance Agreement), the Customer has issued written notice to the Consultant in respect of such failure or refusal pursuant to Section 10.3(a), and the Consultant has not cured the failure or refusal indicated in such written notice or issued a written notice of its own to the Customer disputing the default alleged by the Customer;

(iii)   the Consultant commits any act of bankruptcy within the meaning of the *U.S. Bankruptcy Act*, and fails to cure such act within 30 days of the commission of such act; and

(iv)   the Consultant institutes or has instituted against it bankruptcy, receivership, insolvency, reorganization, dissolution, liquidation or other similar proceedings under any federal or provincial laws and, in the case of any proceedings instituted against the Consultant, it fails to stay such proceedings or vacate or dismiss any order resulting therefrom within 60 days of the initiation of such proceedings or the issuance of such order, as the case may be.

(f)   The provisions of this Section 2.6, and the requirement of the Escrow Agent to perform its duties in accordance with this Section 2.6, shall be subject to the Customer executing any standard form documentation containing reasonable terms required by the Escrow Agent in connection with the performance of its duties and obligations hereunder.

2.7   **Ownership and Disposition of Documents**

The Customer shall be the exclusive owner of all materials and documents which were developed or prepared by the Consultant specifically for the Customer pursuant to this Agreement. All materials and documents which were developed or prepared by the Consultant for general use and which are not the copyright of any other party or publicly available, including educational materials, the Software and any other computer applications, shall continue to be the property of the Consultant.

<div align="center">Article III -**CONSULTING SERVICES**</div>

3.1   <u>**The Consultant's Services**</u>

In order to achieve the Completion of Services, the Consultant agrees, subject to the terms and conditions of this Agreement, to perform the following services (the "Services") for the Customer:

(a)   Oversee and implement the conversion from the Customer's existing software applications to the Consultant's Software substantially in accordance with the Statement of Work attached as Schedule "G" and the timetable attached hereto as Schedule "B".

(b)   Install the Software, perform necessary set up and configuration operations, perform initial testing and parallel testing in accordance with the Statement of Work attached as Schedule "G" and the timetable attached hereto as Schedule "B".

(c)   Provide the training substantially in accordance with the Statement of Work attached as Schedule "G" and the timetable attached hereto as Schedule "B".

   (i)   Customer is required to make copies of the training manuals required for the training classes either by photocopy or electronic duplication each of which is subject to the restrictions and obligations contained in this Agreement.

   (ii)   On-line reference documentation is delivered with each release. Customer may print this documentation solely for its internal use.

   (iii)   Cancellation of any on-site Services by Customer is allowed for any reason if done in writing more than fourteen (14) days in advance of such Services (excluding delays caused by Consultant or problems with Software). Cancellation by Customer with fourteen (14) days or less of scheduled on-site Services will be billed at fifty percent (50%) of the on-site fee, plus any non-recoverable costs incurred by Consultant due to advance scheduling of travel. Additionally, Customer hereby acknowledges that cancellation of on-site Services means that such on-site Services will be rescheduled as Consultant's then current schedule permits. Consultant is not responsible for any delay in Customer's project resulting from Customer's cancellation of training (unless caused by Consultant or Software problems).

3.2   <u>**Performance by Consultant**</u>

(a)   <u>Manner of Performance</u> -- The Consultant shall perform the Services in an efficient, competent and timely manner and exercise reasonable care, skill and diligence in the performance thereof.

(b)   Consultant's Discretion – Subject to the Consultant's obligations herein and the requirement that Customer's operations not be impeded, the Consultant shall determine in its sole discretion the manner and means by which the Services shall be performed.

(c)   Conduct on Customer's Premises -- The Services shall be performed with the Customer's full cooperation, on the premises of the Customer or, if agreed to by both parties, at an alternative location. The Consultant agrees, while working on the Customer's premises, to observe the Customer's rules and policies relating to the security thereof, access to or use of all or part of the Customer's premises and any of the Customer's property, including proprietary or confidential information.

(d)   Inquiries by Customer -- The Consultant shall respond expeditiously to any inquiries pertaining to this Agreement from the Customer.

3.3   **Performance by Customer**

(a)   Cooperation by Customer -- The Customer acknowledges that the success and timeliness of the implementation process shall require the active participation and collaboration of the Customer and its staff and agrees to act reasonably and cooperate fully with the Consultant to achieve the Completion of Services.

(b)   Required Programs. The Customer acknowledges that the use of the Software requires that the Customer obtain and install additional required software programs (the "Required Programs"), as detailed in the attached Schedule "A", and the Customer agrees that the acquisition of the Required Programs shall be at its sole cost and that the cost thereof is not included in the fees herein. The Customer further acknowledges that the operation of the Software requires the Customer's hardware to be of sufficient quality, condition and repair, and the Customer agrees to maintain its hardware in the appropriate quality, condition and repair at its sole cost and expense, in order to facilitate the achievement of Completion of Services.

(c)   Project Manager -- The Customer shall appoint a project manager (the "Project Manager") who shall work closely with the Consultant to facilitate the successful completion of the implementation process and who shall be responsible for supervising the staff of the Customer and their co-operation with and participation in such process.

(d)   Additional Customer Obligations

(i) Customer shall install all corrections and maintenance releases within a reasonable period of time of Customer's notification by Consultant of their availability. However, any fix or correction designated as "critical" by Consultant shall be implemented by Customer within thirty (30) days of notification to the Customer by Consultant of its availability.

(ii) Customer shall notify Consultant of suspected defects in any of the Software supplied by Consultant. Customer shall provide, upon Consultant request, additional data deemed necessary or desirable by Consultant to reproduce the environment in which such defect occurred.

(iii) Customer shall allow the use of online diagnostics on the Software supplied by Consultant to Customer, if required by Consultant during error diagnosis. Customer shall provide to Consultant, at Customer's expense, access to the Designated Computer System via the Customer's firewall to communications software (e.g. PC Anywhere, WebEx, Web Demo).

(iv) Customer shall ensure that its personnel are, at all times, educated and trained in the proper use of the Software in accordance with applicable Consultant manuals and instructions. If Customer's personnel are not properly trained as mutually determined by Consultant and Customer, Customer agrees that such personnel will be trained by Consultant or Customer within fifteen (15) days of determination. If Customer desires Consultant to perform the required training then Consultant shall be compensated in accordance with this Agreement.

(v) Customer shall establish proper backup procedures necessary to replace critical Customer data in the event of loss or damage to such data from any cause. Customer shall provide Consultant with access to qualified functional or technical personnel to aid in diagnosis and to assist in repair of the Software in the event of error, defect or malfunction.

(vi) Customer shall have the responsibility for:

(1) The performance of any tests it deems necessary prior to the use of the Software (however, Consultant will be responsible for adequate quality assurance testing of the Software to insure it conforms in all material respects with the Specifications prior to any testing by Customer).

(2) Assuring proper Designated Computer System installation, configuration, verification, audit controls and operating methods (assuming Consultant has provided clear requirements to Customer as to the necessary computer system minimum requirements for the Software to properly operate).

(3) Implementing proper procedures to assure security and accuracy of input and output and restart and recovery in the event of malfunction (assuming Consultant has provided clear instructions to Customer as to the necessary input, output, restart and recovery procedures unique to the Software).

(4) Timely upgrade and keeping current all third-party license, releases and/or Software products to meet the requirements of the Consultant Software as communicated from time to time by Consultant.

3.4   **Support and Maintenance Agreement**

(a)   **Maintenance**. Subject to the timely payment of the Maintenance and Support Fees, and except as otherwise provided in Schedule D ("Support and Maintenance Agreement"), during the Term of this Agreement Consultant shall provide Customer with Maintenance for the Software as follows:

(i)   such improvements, enhancements, upgrades, updates, new releases, and other changes to the Software, as and when made generally available for no additional fee by Consultant to its other customers under standard maintenance;

(ii)   updates to the Software if and as required to cause the Software to operate under Consultant-approved versions or releases of an operating system(s) or data base platform(s) within a reasonable time after the general release of such versions or releases;

(iii) updates to the Software if and as required to cause the Software to support business operations of Customer in a manner consistent with the provisions of California and other applicable law.

(iv)   use commercially reasonable efforts to correct any failure of the latest version of the Software to perform substantially in accordance with the functional performance specifications contained in the related Documentation, provided Consultant is given written notice of such failure and such failure can be recreated by Consultant or Customer (all such improvements, fixes, enhancements, upgrades, updates, and other changes to the Software being referred to as "Maintenance Releases"). Consultant will regularly provide Customer with a list of operating systems and database platforms that it supports, which will become a revision to Schedule D, provided however, should Consultant no longer support the operating system or database platform that Customer is using at the time Consultant issues such list, Consultant shall consult with Customer before removing such operating system or database platform from Schedule D and shall provide Customer with a plan that allows Customer to migrate its operating system or database platform to a later version of such system or platform supported by Consultant. Modifications shall be considered Maintenance Releases (a) in the event that Modifications are distributed by Consultant free of charge to customers other than Customer, excluding Modifications paid for by Customer, or (b) if Consultant requires Customer to install Modifications in order to receive or continue receiving a Maintenance Release(s) of the Software on less than twelve (12) months advance notice or (c) if Modifications are released by Consultant as a substitute for the Licensed Software and Consultant discontinues releases of or support for the Software on less than eighteen (18) months advance notice to Customer. Within ninety (90) days following installation of a

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Maintenance Release, Consultant will update all Documentation affected by the installation, which may be accomplished by the updating of Maintenance Release notes.

(b) **Agreement.** Concurrently with the execution and delivery of this Agreement, the Consultant and the Customer have entered into a support and maintenance agreement (the "Support and Maintenance Agreement") in the form of and on the terms set out in the attached Schedule "D" which shall apply in respect of the ongoing services and support to be provided by the Consultant to the Customer following the Completion of Services. Notwithstanding the ongoing application of the Support and Maintenance Agreement, the terms and conditions of this Agreement, insofar as they relate to the Software and the Documentation and the rights and obligations of the parties with respect thereto, shall continue to apply and the Support and Maintenance Agreement is not intended to, nor will it, apply to the exclusion of this Agreement. Consultant shall have no obligation under this Agreement to render any maintenance services or related services with respect to non-Consultant software, except as contracted for in writing with the Customer.

3.5 **Stages of Services**

For descriptive purposes, this provision is intended to set out the two stages pertaining to the Services and the ongoing support and maintenance of the Software. They are as follows:

(a) Start to Completion of Services – during this stage, all Services will be performed and the Software will be tested according to the acceptance criteria indicated in the Statement of Work attached as Schedule "G", and until the Customer is prepared to commit to the Software as its predominant computerized enterprise resources planning system.

(b) Support Phase – following the Completion of Services, for so long as a Support and Maintenance Agreement is in effect, the Consultant shall be required to correct any significant programming defects, errors and malfunctions, within Consultant's standard business practices and provide the Customer with any updates of, or Maintenance Releases of, the Software.

For greater certainty, during each of the above phases (subject only to the requirement that an effective Support and Maintenance Agreement is in place during the Support Phase), the Consultant will be required to correct any significant programming defects, errors and malfunctions, within Consultant's standard business practices, which may occur in respect of the Software.

3.6 **Bonds and Insurance.**

(a) Prior to commencement of Services, Consultant shall file with City surety, in the form of a performance bond, in the sum of 100% of the total contract price due

Consultant under this Agreement, to guarantee faithful performance by Consultant of its obligations herein. Sureties shall be satisfactory to City. Sureties on this bond shall be duly licensed to do business in the State of California and shall have an AM Best Company financial rating of A- Class VII or better. The Customer shall release the bond upon expiration of twelve (12) months from Completion of Services.

(b)   On or before beginning any of the services called for by any term of this Agreement, Consultant, at its own cost and expense, shall carry, maintain for the duration of the Warranty Period, and provide proof thereof that is acceptable to the City, the insurance specified below with insurers and under forms of insurance satisfactory in all respects to the City. Consultant shall not allow any subcontractor to commence work on any subcontract until all insurance required of the Consultant has also been obtained for the subcontractor. Insurance required herein shall be provided by admitted insurers in good standing with the State of California and having a minimum Best's Guide Rating of A- Class VII or better.

    (i)   Commercial General Liability coverage in an amount not less than one million dollars per occurrence ($1,000,000.00), combined single limit coverage for risks associated with the work contemplated by this agreement (claims made and modified occurrence policies are not acceptable). If a Commercial General Liability Insurance form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this agreement or the general aggregate limit shall be at least twice the required occurrence limit.

    (ii)   Automobile Liability coverage, including owned, hired and non-owned vehicles in an amount not less than one million dollars per occurrence ($1,000,000.00). Claims made and modified occurrence policies are not acceptable.

    (iii)   Worker's Compensation. If Consultant intends to employ employees to perform services under this Agreement, Consultant shall obtain and maintain, during the term of this Agreement, Worker's Compensation Employer's Liability Insurance in the statutory amount as required by State law.

(c)   Proof of Insurance Requirements/Endorsement. Consultant shall submit the insurance certificates, including the deductible or self-retention amount, and an additional insured endorsement naming City, its officers, employees, agents, and volunteers as additional insureds as respects each of the following: Liability arising out of activities performed by or on behalf of Consultant; products and completed operations of Consultant; or automobiles owned, leased, hired, or borrowed by Consultant. The coverage shall contain no special limitations on the scope of protection afforded City, its officers, employees, agents, or volunteers.

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(d)   Notice of Cancellation/Termination of Insurance. The above policy/policies shall not terminate, nor shall they be cancelled, nor the coverage reduced, until after thirty (30) days' written notice is given to City, except that ten (10) days' notice shall be given if there is a cancellation due to failure to pay a premium.

(e)   Primary Insurance. For any claims related to this Agreement, Consultant's insurance coverage shall be primary insurance as respects City, its officers, officials, employees, agents, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, agents, or volunteers shall by excess of the Consultant's insurance and shall not contribute with it.

(f)   If Consultant maintains higher insurance limits than the minimums shown above, Consultant shall provide coverage for the higher insurance limits otherwise maintained by the Consultant.

Article IV -HARDWARE

4.1   **Hardware**

Schedule I provides a list of recommended hardware, which the Customer will purchase through its own procurement process.

(i) Except as otherwise provided in this Agreement, Customer shall be responsible for the installation of the Hardware at Customer's location. If Customer desires Consultant to perform any installation not described in this Agreement, Consultant and Customer shall follow the procedures set out in this Agreement.

(ii) Consultant makes no warranties, express or implied, with respect to the Hardware, including, without limitation, their merchantability or fitness for a particular purpose. Any warranty Customer has with respect to the Hardware shall be solely provided by the manufacturer(s). Notwithstanding, except for manufacturer defects, Consultant warrants that the Hardware is capable of implementing the Software Licensed to Customer hereunder.

(iii) The parties agree that although this Agreement may contain estimated prices for the maintenance of the Hardware, Hardware maintenance shall be provided solely by the respective Hardware manufacturer(s) through separate agreements between Customer and the Hardware manufacturer(s). In no event shall Consultant be responsible for such Hardware maintenance.

Article V -SYSTEM SOFTWARE

5.1   **System Software**

This Article V shall only be applicable in the event any System Software is listed on Schedule H.

(a)   Consultant shall distribute to Customer the System Software which is listed on Schedule H, and Customer shall pay Consultant for the System Software in the amount of the purchase price(s) listed on Schedule H. Upon delivery of the System Software to Customer, Consultant shall invoice Customer for the System Software, and Customer shall pay for the same within thirty (30) days. Delivery of the System Software shall be deemed to have occurred: (i) on the date for which Consultant delivers Hardware to Customer with the System Software installed thereon, F.O.B. point of destination, provided that Customer shall pay the shipping charges, or (ii) the date on which Consultant installs the System Software on Customer's Hardware. Consultant and/or the System Software manufacturer(s) will provide Customer with one copy of the then current user documentation for use with the System Software.

(b)   Except as otherwise provided in this Agreement, Customer shall be responsible for the installation of the System Software at Customer's location. If Customer desires Consultant to perform any installation which is not described in this Agreement, Consultant and Customer shall follow the procedures set forth in this Agreement.

(c)   It is acknowledged by the parties hereto that the System Software provided by Consultant to Customer pursuant to this Agreement was developed and delivered to Consultant by one or more third party software companies and Consultant is distributing, sublicensing and/or reselling it to Customer. As such, Consultant makes no warranties, express or implied, with respect to the System Software, including, without limitation, their merchantability or fitness for a particular purpose. Any warranty Customer has with respect to the System Software shall be solely provided by the third-party software companies. Additionally, Customer acknowledges that its interest in the System Software may be in the nature of a license or sublicense with one or more of the third-party software companies which may: (i) require Customer to enter into one or more separate license agreements with such third-party software companies, and/or (ii) place restrictions on Customer's use of the System Software. Notwithstanding the foregoing, except for third party software companies defects, Consultant warrants that the System Software may be integrated with, and is capable of implementing the Software licensed to Customer hereunder. Consultant shall be responsible for such integration pursuant to the Services provided under Section 3.1(b).

(d)   The parties agree that although this Agreement may contain estimated prices for the annual maintenance of the System Software, any maintenance of the System Software shall be provided solely by the third-party software companies through separate agreements between Customer and such third-party software companies. In no event shall Consultant be responsible for such System Software maintenance.

<div align="center">Article VI -**REPRESENTATIONS AND WARRANTIES**</div>

6.1   **<u>WARRANTIES.</u>**

For so long as Customer installs or permits the installation of Maintenance Releases provided by Consultant in accordance with Support and Maintenance Agreement and is current in its Support and Maintenance payments to Consultant, the following warranties shall be in force and effect:

(a)   **Software Warranty.** Consultant hereby warrants and represents that, commencing on the date of Completion of Services, that:

      (i)   The Software, as installed and configured on Customer's systems, and subject to Maintenance Releases, will perform in accordance with and conform to the applicable Documentation in all material respects, and

      (ii)   The Software will operate effectively with the functionality of the software programs described in Schedule A.

      (iii)   This warranty is void if the Customer or any other third party changes or modifies the Software. Examples of such changes or modifications include, but are not limited to, data modifications from third party software (except for integrated System Software), the de-compiling and modifying of the source code, and tampering with the base set-up of the system.

(b)   **Virus Protection Warranty**. Consultant hereby warrants and represents that, any time the Software or any Maintenance Releases are delivered to Customer, whether delivered via electronic media or the Internet, no portion of the Software or Maintenance Releases, or the media upon which it is stored or delivered, will contain any computer programming code that damages or otherwise improperly affects data files or hardware without the knowledge or consent of the user, including but not limited to self-replicating and self-propagating program instructions commonly referred to as "viruses" or "worms" to the extent such viruses or worms are detectable by commercially available detection software. Consultant warrants that the Software shall be free from any back door, time bomb, drop dead-devise, or other software routing designed to disable a computer program automatically with the passage of time or under the positive control of persons other than the Customer's personnel.

(c)   **Support Services Warranty**. Consultant hereby warrants and represents that each of its employees, independent contractors or agents assigned to perform any Services or provide any technical assistance in configuration, development and implementation, training, use and related services under the terms of this Agreement shall have the skill, training, and background reasonably

<div align="center">20</div>

commensurate with the level of performance or responsibility required, so as to be able to perform in a competent and professional manner.

6.2   **Effect of Breach of Warranty, Generally**.

If, at any time during the Term of this Agreement, Consultant breaches any warranty under Section 6.1, Customer shall promptly notify Consultant in writing of such alleged breach of warranty. If the breach relates to the warranty under Section 6.1(a) or (b), then Consultant shall correct any such deficiency in the Software in accordance with the Service Level criteria set forth in Exhibit 1 of Schedule D.   If the breach relates to the warranty under Section 6.1(c), then Consultant shall promptly re-perform the nonconforming Services, until such time as the non-conformance is corrected or the Parties otherwise agree in writing. All work by Consultant to remedy or correct a breach of warranty shall be performed at Consultant's sole cost and expense. If after reasonable efforts Consultant is unable to correct any breach of warranty under Section 6.1, in the manner described in this section within thirty (30) days following notice of breach by Customer, and the resulting non-performance or deficiency materially affects the ability of Customer to utilize the Software, then Customer may terminate this Agreement immediately, subject to all remedies available at law or equity.

6.3   **Corrections**

The Consultant covenants that it will make corrections of program malfunctions which are reported in writing to the Consultant during the Warranty Period and which are necessary for the Software to conform to this Agreement. The Customer agrees to allow the Consultant the opportunity to make repeated efforts within a reasonable time to correct programming errors or malfunctions as warranted in this Agreement.

6.4   **Intellectual Property Rights**

(a)   **Warranty of Law**. Consultant hereby warrants and represents that to the best of Consultant's knowledge: (i) there is no claim, litigation or proceeding pending or threatened against Consultant with respect to the Software or any component thereof alleging infringement of any patent or copyright or any trade secret or any proprietary right of any person; (ii) the Software complies in all material respects with applicable laws, rules and regulations; (iii) Consultant has full authority to enter into this Agreement and to consummate the transactions contemplated hereby; and (iv) Consultant's performances under this Agreement are not materially impaired or prohibited by any other agreement to which Consultant is a party or by which it may be bound.

(b)   **Warranty of Title**. Consultant hereby warrants and represents that: (i) the Software is an original work of authorship and does not infringe the intellectual property rights of others; (ii) it has all rights, title or interest to the Software necessary to grant Customer the use rights herein; (iii) it has the right to grant to Customer the licenses granted hereunder and (iv) Consultant has and shall have

full authority to license all proprietary and/or third party software modules that are incorporated into the Software.

6.5   **Effect of Breach of Intellectual Property Rights.**

(a)   If the breach relates to the warranty under Section 6.4, then Consultant shall promptly: (i) procure for Customer the right to continue use of the Software at no additional charge to Customer, (ii) modify such Software to avoid any claimed infringement (provided that such modification does not adversely affect Customer's intended use of the Software) at no additional charge to Customer, or (iii) replace said Software with an equally suitable, compatible and functionally equivalent non-infringing software, including installation and configuration as required, at no additional charge to Customer. If none of the foregoing alternatives are reasonably available to Consultant, then Customer shall return the Software in question to Consultant and Consultant shall provide to Customer a refund of the Fees previously paid by Customer for such infringing Software, whereupon this Agreement shall terminate.

(b)   Furthermore, if promptly notified in writing of any action brought against the Customer based on a claim that the Software infringes intellectual property rights, such as a patent, copyright or trademark right of a third party, the Consultant will defend such action at its expense and will pay any and all fees, costs or damages that may be finally awarded in such action or any settlement resulting from such action, provided that the Customer shall permit the Consultant to control the defense of such action and shall not make any compromise, admission of liability or settlement or take any other action impairing the defense of such claim without the Consultant's prior written approval.

6.6   **No Other Warranties.**

(a)   EXCEPT AS PROVIDED IN THE REPRESENTATIONS AND WARRANTIES IN THIS ARTICLE VI ("REPRESENTATIONS AND WARRANTIES") AND IN THE OBLIGATIONS UNDERTAKEN BY CONSULTANT IN THIS AGREEMENT AND ITS EXHIBITS TO PROVIDE SOFTWARE THAT PERFORMS AS SPECIFIED IN THOSE PROVISIONS, (A) CONSULTANT DOES NOT WARRANT THAT THE SOFTWARE WILL MEET CUSTOMER'S REQUIREMENTS OR THAT THE OPERATION OF THE SOFTWARE WILL BE UNINTERRUPTED OR ERROR-FREE, AND (B) CONSULTANT DOES NOT MAKE, AND HEREBY EXPRESSLY DISCLAIMS, ANY REPRESENTATION OR WARRANTY OF ANY KIND WITH RESPECT TO THE SOFTWARE OR SERVICES OF CONSULTANT, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

(b)   Without limiting the generality of the foregoing, the Consultant does not represent or warrant and the Customer acknowledges that there are no further

representations or warranties that the functions contained in the Software will operate in the combinations which may be selected for use by the Customer or will meet the Customer's requirements and satisfy its intended results; or that any programming errors will be corrected after the Warranty Period, or any updates of, or modifications to, the Software will be made available to the Customer after the Warranty Period, in each case unless there is an effective Support and Maintenance Agreement in place after the Warranty Period in respect of the period of time during which any such programming errors require correction, or any updates of, or Maintenance Releases of, the Software, are developed by the Consultant and made available to the other licensees of the Software.

Article VII -FEES AND PAYMENTS

7.1 **Fees and Payments**

(a) The Customer agrees to pay the Consultant first year fees in an amount not to exceed _____ dollars ($_____) for all software and services as outlined in the fee structure and payment schedule in the attached Schedule "C". Included in this first-year amount is a contingency for extra work in the amount of $_____. In the event that extra work is needed beyond what is indicated in the Statement of Work in Schedule "G", a written authorization from the City is required prior to Consultant undertaking any extra work.

(b) During the term of this Agreement, Consultant shall, from time to time, deliver invoices to Customer. Each invoice delivered to Customer by Consultant shall be due and payable within 30 days of receipt thereof by Customer, unless Customer disputes the charges during that time. Customer shall not be required to pay any invoice in excess of the foregoing "not to exceed" amount for the first year, or the amounts in Schedule C for subsequent years, except pursuant to Change Orders duly processed as provided in this Agreement.

(c) Subject to Subsections 7.1(a) and (b), the Customer shall reimburse the Consultant for its direct expenses, including, but not limited to courier services, photocopying, faxing and reproduction, all reasonable travel costs including a travel time rate of $_____ per hour, meal expenses of not more than the greater of $_____ or the amount prescribed by the State where services will be delivered or federally if higher on a per diem basis (no receipts provided) and a mileage charge based on the current Internal Revenue Service recommended rate per mile, long distance telephone calls, and all other reasonable expenses incurred in the performance of the Consultant's duties.

(d) In the event Customer fails to pay all or any portion of an invoice on or before thirty (30) days after the date of the invoice, and Customer has not disputed the invoice, the invoice payment shall be considered past due. Customer further agrees, at the request of Consultant, to pay a late payment charge to Consultant at the rate of one percent (1%) per month, or at the maximum late payment charge

permitted by applicable law, whichever is less, on any unpaid amount for each calendar month (or fraction thereof) that such payment is past due; provided, however, that Consultant shall not assess the foregoing late payment charge if Customer has been late in paying Consultant on less than three (3) previous occasions within the last calendar year.

(e)   In the event Customer fails to pay all or any portion of an invoice on or before ninety (90) days after the date it becomes due, and Customer is not disputing the invoice, in addition to all other remedies Consultant has under this Agreement or otherwise, Consultant shall have the option to suspend or terminate all Services under this Agreement. Suspension or termination of any such Services shall not relieve the Customer of its obligation to pay its outstanding invoices, including any applicable late charges.

(f)   Consultant shall be responsible for paying all taxes, fees, assessments and premiums of any kind payable on its employees and operations. Any tax Consultant may be required to collect or pay upon the sale, use or delivery of the Software, Services or Support and Maintenance described in this Agreement shall be paid by Customer and such sums shall be due and payable to Consultant upon receipt of an invoice therefor. Any personal property taxes levied after delivery of the Software described in this Agreement shall be paid by Customer.

(g)   Most Favored Customer. If the Consultant's published or otherwise negotiated price for any Software for its most favored, similarly situated customers, is less than the price for such Software as set forth in this Agreement at any time between the effective date of this Agreement and the Completion of Services, then the Consultant shall immediately notify the Customer and the price for such Software shall automatically be deemed to be reduced to the lowest such published or otherwise established price during such period. If any such reduction occurs after payment for the Software by the Customer, the Consultant shall rebate the difference in price to the Customer within thirty (30) days after the change in price occurs.

7.2   **Change Orders**

With respect to any proposed changes to the Services defined by this Agreement that do not materially impact the scope of either party's work effort required under this Agreement, the parties will cooperate in good faith to execute Change Orders in respect thereof, and will not unreasonably withhold approval of such proposed changes. If either party causes or requests a change that, in the reasonable opinion of the other party, materially impacts the scope of the parties' work effort required under this Agreement, such as, but not limited to, changes in the allocation of the resources of the Customer and of the Consultant applied to a task, changes in completion schedules for individual tasks or for overall implementation, and changes in staffing that require a party to provide additional work hours, the other party may propose a change to cover the additional work effort required of it. Approval of any such proposed changes will not be unreasonably withheld (it being acknowledged that any such material

changes may require modifications to the consideration paid, and timelines governing, the Services), and any disputes regarding changes shall be handled initially by discussions between the parties which will be convened in good faith by the parties to resolve any such matters in dispute. A sample change order is presented in Schedule "E".

Article VIII -**REMEDIES AND LIABILITY**

8.1   **Remedies and Liability**

(a)   Termination of this Agreement shall not affect any right of action of either party arising from anything which was done or not done, as the case may be, prior to the termination taking effect.

(b)   The Customer and the Consultant recognize that circumstances may arise entitling the Customer to damages for breach or other fault on the part of the Consultant arising from this Agreement. The parties agree that in all such circumstances the Customer's remedies and the Consultant's liabilities will be limited as set forth below and that these provisions will survive notwithstanding the termination or other discharge of the obligations of the parties under this Agreement.

(i)   FOR BREACH OR DEFAULT BY THE CONSULTANT OR OTHERWISE IN CONNECTION WITH THIS AGREEMENT, INCLUDING A BREACH OF DEFAULT ENTITLING THE CUSTOMER TO RESCIND OR BE DISCHARGED FROM THE PROVISIONS OF THIS AGREEMENT AND WHETHER IN THE NATURE OF A BREACH OF CONDITION OR A FUNDAMENTAL BREACH, THE CUSTOMER'S EXCLUSIVE REMEDY, IN ADDITION TO ELECTING IF SO ENTITLED TO RESCIND OR BE DISCHARGED FROM THE PROVISIONS OF THIS AGREEMENT, SHALL BE PAYMENT BY THE CONSULTANT OF THE CUSTOMER'S DIRECT DAMAGES TO A MAXIMUM AMOUNT EQUAL TO, AND THE CONSULTANT SHALL IN NO EVENT BE LIABLE IN EXCESS OF, THE LESSER OF (X) THE FEES PAYABLE TO THE CONSULTANT PROVIDED FOR HEREIN, AND (Y) THE AMOUNT ACTUALLY PAID BY THE CUSTOMER UNDER THIS AGREEMENT UP TO AND INCLUDING THE DATE OF TERMINATION, PROVIDED THAT IF THIS AGREEMENT IS TERMINATED FOLLOWING EXPIRY OF THE WARRANTY PERIOD DAMAGES SHALL BE LIMITED TO (1) THE FEES ACTUALLY PAID BY CUSTOMER UNDER ANY CHANGE ORDERS AGREED BY THE PARTIES UNDER THIS AGREEMENT IN RESPECT OF WHICH THE SERVICES OR OTHER DELIVERABLES CONTEMPLATED BY SUCH CHANGE ORDERS HAVE NOT BEEN COMPLETED OR DELIVERED IN CONFORMITY WITH THE REQUIREMENTS OR STANDARDS SPECIFIED IN SUCH CHANGE ORDERS, (2) TO THE EXTENT A SUPPORT

AGREEMENT IS THEN IN EFFECT AND IS TERMINATED, ANY AMOUNTS WHICH MAY BE CLAIMED BY CUSTOMER UNDER THE SUPPORT AGREEMENT AND (3) ALL FEES PAID BY THE CUSTOMER BASED ON A FOUR (4) YEAR DEPRECIABLE LIFE OF THE SOFTWARE.

(ii) EXCLUDING CLAIMS FOR INFRINGEMENT UNDER SECTION 6.4, IN NO EVENT SHALL ANY DAMAGES INCLUDE, NOR SHALL THE CONSULTANT BE LIABLE FOR, ANY SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES EVEN IF THE CONSULTANT HAS BEEN ADVISED OF THE POSSIBILITY THEREOF. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, THE CONSULTANT SHALL NOT BE LIABLE FOR LOST PROFITS, LOST BUSINESS REVENUE, FAILURE TO REALIZE EXPECTED SAVINGS, OTHER COMMERCIAL OR ECONOMIC LOSS OF ANY KIND OR FOR ANY CLAIM WHATSOEVER AGAINST THE CUSTOMER BY ANY OTHER PARTY.

(iii) CLAUSES (i) AND (ii) SHALL APPLY IN RESPECT OF ANY CLAIM, DEMAND OR ACTION BY THE CUSTOMER IRRESPECTIVE OF THE NATURE OF THE CAUSE OF ACTION UNDERLYING SUCH CLAIM, DEMAND OR ACTION, INCLUDING, BUT NOT LIMITED TO, BREACH OF CONTRACT OR TORT.

8.2   **Intent**

The parties hereby confirm that the waivers and disclaimers of liability, releases from liability, limitations and apportionments of liability, and exclusive remedy provisions expressed throughout this Agreement shall apply even in the event of default, negligence (in whole or in part), strict liability or breach of contract of the person released or whose liability is waived, disclaimed, limited, apportioned or fixed by such remedy provision, and shall extend to such person's affiliates and to its shareholders, directors, officers, employees and affiliates.

8.3   **Remedies**

Where remedies are expressly afforded by this Agreement, such remedies are intended by the parties to be the sole and exclusive remedies of the Customer for liabilities of the Consultant arising out of or in connection with this Agreement, notwithstanding any remedy otherwise available at law or in equity.

<div align="center">Article IX **-INDEMNITY**</div>

9.1   **Indemnity**

Each party shall indemnify and save harmless the other, its successors and assigns together with its officers, directors, employees, agents and those for whom it is in law responsible, only from and against any and all liabilities, damages, costs, expenses, causes of

action, claims, suits, proceedings and judgments (collectively "Claims") which each party may incur or suffer or be put to by reason of or in connection with or arising from any breach, violation or non-performance by the other of any obligation contained in this Agreement to be observed or performed by the respective party, or any wrongful act or negligence of the respective party or its agents or employees which relates to this Agreement, howsoever arising. Each party acknowledges and agrees that this indemnity shall survive any termination of this Agreement.

Article X -GENERAL

10.1   **Force Majeure**

Neither party shall be liable for delay or failure in performance resulting from acts beyond the control of such party including, but not limited to, acts of God, acts of war or of the public enemy, riots, fire, flood, or other natural disaster, acts of government, strike, walkout, communication line or power failure, failure in operability or destruction of the Customer's computer (unless by reason of the negligence of a party to this Agreement) or failure or inoperability of any software other than the Software. Any applicable delivery schedule shall be extended by a period of time equal to the time lost because of any such delay.

10.2   **Confidentiality**

(a)   <u>Duty Owed to the Customer</u> -- The Consultant acknowledges that it may receive information from the Customer or otherwise in connection with this Agreement or the performance of the Services. Except for information in the public domain, unless such information falls into the public domain by disclosure or other acts of the Consultant or through the fault of the Consultant, the Consultant agrees:

   (i)   to maintain this information in confidence;

   (ii)   not to use this information other than in the course of this Agreement;

   (iii)   not to disclose or release such information except on a need-to-know only basis;

   (iv)   not to disclose or release such information to any third person without the prior written consent of the Customer, except for authorized employees or agents of the Consultant; and

   (v)   to take all appropriate action, whether by instruction, agreement or otherwise, to ensure that third persons with access to the information under the direction or control or in any contractual privity with the Consultant, do not disclose or use, directly or indirectly, for any purpose other than for performing the Services during or after the term of this Agreement, any material or information, including the information, without first obtaining the written consent of the Customer.

(b)   Duty Owed to the Consultant -- The parties agree that if the Customer shall breach any term of Section 2.5 of this Agreement entitled "Ownership of Software and Confidential Information", then the Consultant shall have the right to terminate this Agreement and the grant of licenses herein forthwith without giving notice as set forth in Section 10.3(b).

10.3   **Termination**

(a)   If the Consultant should neglect to perform the Services properly or otherwise fail to comply with the requirements of this Agreement, the Customer must notify the Consultant in writing of such default (a "Default Notice"). Upon receipt of a Default Notice, the Consultant must either correct the default at no additional cost to the Customer, or issue a written notice of its own disputing the alleged default, in either case within thirty (30) days immediately following receipt of a Default Notice. If the Consultant fails to correct the default, or issue a notice disputing the alleged default, in either case within thirty (30) days following receipt of the Default Notice, the Customer may terminate the part of this Agreement relating to the provision of Services and in such case will be responsible for payment to the Consultant of only that part of the fee earned by the Consultant for those Services performed up to the time of communication of such notice of termination to the Consultant. Disputes of alleged defaults shall be subject to the alternate dispute resolution provisions of Section 10.5.

(b)   If the Customer should fail to comply with its obligations under this Agreement, the Consultant must notify the Customer in writing of such default (a "Default Notice"). Upon receipt of a Default Notice, the Customer must correct the default at no additional cost to the Consultant, or issue a written notice of its own disputing the alleged default, in either case within thirty (30) days immediately following receipt of a Default Notice. If the Customer fails to correct the default, or issue a notice disputing the alleged default, in either case within thirty (30) days following receipt of the Default Notice, the Consultant may terminate the whole of this Agreement including the grant of license to the Software and in such case the Customer will be responsible for payment to the Consultant of only that part of the fee earned by the Consultant for that part of the Services performed in accordance with this Agreement up to the time of communication of such notice of termination to the Customer. Disputes of alleged defaults shall be subject to the alternate dispute resolution provisions of Section 10.5.

10.4   **Procedure on Termination**

If this Agreement is terminated prior to the Completion of Services, then within thirty (30) days following such termination, the Customer shall return the Software to the Consultant and shall certify, under the hand of a duly authorized officer of the Customer, that all copies of the Software or any part thereof, in any form, within the possession or control of the Customer have been returned to the Consultant. If this Agreement is terminated following the Completion of Services, then the Customer may retain the copy of the Software in its possession

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as of the Completion of Services but it shall not be entitled to any additional Licenses, nor will it receive updates of, or modifications to, the Software made by the Consultant. Finally, it will not be entitled to access the Source through exercise of the license granted pursuant to Section 2.6 of this Agreement except for default under Section 2.6(d). Notwithstanding the foregoing, the Customer will remain subject to the obligations imposed upon it pursuant to this Agreement with respect to the Software, including, but not limited to, such obligations relating to ownership of the Software and confidentiality.

10.5   **<u>Arbitration of Disputes</u>**

    (a)   The parties agree to submit any claim, controversy or dispute arising out of or relating to this Agreement or the relationship created by this Agreement to binding arbitration. The arbitration shall be conducted in Orange County, California, in accordance with California Code of Civil Procedure Sections 1208-1284.2, as amended as of the date of submission of the dispute ("Rules"), and as modified by this Section. To the extent there is a conflict between the provisions of this Section and the Rules, however, the provisions of the Section shall govern. By mutual written agreement, the parties may vary any of the provisions of this Section and the Rules, including modifications which designate an alternative dispute resolution procedure.

    (b)   As used herein, a "qualified arbitrator" means a party with at least ten (10) years' experience in resolving disputes in the Southern California area and ten (10) years of full time practice in commercial transactions, including the negotiation and review of commercial agreements. Within thirty (30) days after any party delivers written demand for arbitration, the parties shall meet and attempt to select, by mutual agreement, one (1) qualified arbitrator to act as the sole arbitrator of the dispute. If the parties cannot agree on an arbitrator within such thirty-day period, as such period may be extended by mutual agreement of the parties, then, within an additional thirty (30) days Consultant and Customer shall each designate up to three (3) qualified arbitrators and notify the other party in writing of the designations. The qualified arbitrators so designated within such thirty-day period shall constitute the "List of Arbitrators." If either Consultant or Customer fails to designate any qualified arbitrators within such thirty-day period, then the qualified arbitrators designated by the other party shall constitute the List of Arbitrators. Within thirty (30) days after the List of Arbitrators has been constituted, the parties shall meet and negotiate in good faith to select one (1) arbitrator from the List of Arbitrators to act as the sole arbitrator of the dispute. If the parties fail to select an arbitrator with such thirty-day period, such sole arbitrator shall be appointed from the List of Arbitrators by the Presiding Judge of the Superior Court of Orange County, California, upon written application of a party, provided such arbitrator shall meet the requirements set forth above in this Section.

    (c)   Discovery for the arbitration proceedings shall be conducted by the parties in accordance with the Rules, except to the extent otherwise provided in this Section.

The parties desire to provide for the expeditious resolution of disputes. Therefore, notwithstanding anything to the contrary set forth in the Rules, discovery conducted under the arbitration shall be limited as follows: (i) within twenty (20) days after selection of the arbitrator, the parties shall meet with the arbitrator at a mutually agreeable place and conduct a mutual exchange of documents relating to the dispute; and (ii) at such meeting the arbitrator shall have the right to order the production of any additional documents from any party and to specify the nature and extent of other discovery which the arbitrator determines is reasonably required, including, but not limited to, the taking of depositions or the obtaining of expert reports. If the arbitrator determines that expert witnesses are required, each party shall be entitled to designate such an expert(s) and the arbitrator may designate his/her own expert(s), as the arbitrator deems appropriate. The arbitrator shall have authority to set further discovery deadlines in order to facilitate the efficient conduct of arbitration.

(d)   A hearing shall be conducted by the arbitrator within ninety (90) days after selection of the arbitrator, unless the arbitrator determines that additional time is reasonably required. The parties shall submit such legal briefing or other statements of position as the arbitrator may request.

(e)   Within thirty (30) days after completion of the hearing, the arbitrator shall reach a written decision regarding the dispute and deliver the same to the parties. Upon the request of a party, the arbitrator shall issue a written opinion, a finding of fact and conclusions of law. The decision of the arbitrator shall become final ten (10) days after it is delivered to the parties and shall be binding on the parties, conclusive and non-appealable.

(f)   The arbitrator shall have the power and jurisdiction to resolve all disputes and order all remedies available under applicable law or equity, consistent with the provisions of this Agreement, including, without limitation, ordering specific performance; provided, however, that the arbitrator shall not have the power to grant any relief whatsoever to any third party. The arbitrator shall resolve the dispute in accordance with applicable substantive laws of the State of California.

(g)   The parties shall share equally the arbitrator's fee and costs, but each party shall bear its own attorneys' fees and other costs related to the presentation of its case.

(h)   Judgment upon arbitration award may be entered in, confirmed and enforced by, the Superior Court of the County of Orange, California.

(i)   To the fullest extent permitted by applicable law, the parties hereby waive any right to a trial by court or jury and agree that any dispute arising out of the interpretation or performance of this Agreement shall be resolved by arbitration conducted pursuant to this Section.

(j)   BY INITIALLING IN THE SPACE BELOW, YOU ARE AGREEING TO HAVE YOUR DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION HEREOF DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALLING IN THE SPACE BELOW, YOU ARE GIVING UP YOUR JUDICIAL RIGHT TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.

(k)   WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.

Consultant's initials _____   Customer's initials _____

10.6   **Accounts and Records**

The Consultant shall:

(a)   keep proper and detailed accounts in accordance with accepted accounting practices of all factors entering into the computation of the amounts payable pursuant to this Agreement; and

(b)   for a period of two years from the date of Completion of Services by the Consultant, preserve all accounts and other documentation relating to the Customer and keep them available for inspection by the Customer or its representative, at any time. The Consultant agrees that this obligation shall survive any termination of this Agreement.

10.7   **Addresses for Notice**

Any notice required or permitted to be given to any party to this Agreement shall be given in writing and shall be delivered personally, mailed by prepaid registered post or sent by facsimile to the appropriate address or facsimile number set out below. Any such notice shall be conclusively deemed to have been given and received on the day on which it is delivered or transmitted (or on the next succeeding business day if delivered or received by facsimile after 5:00 p.m. local time on the date of delivery or receipt, or if delivered or received by facsimile on a day other than a business day), if personally delivered or sent by facsimile or, if mailed, on the third business day following the date of mailing, and addressed, in the case of the Consultant, to:

_____
_____
_____
Attention: _____
Telephone: _____
e-mail: _____

and in the case of the Customer, to:

CITY OF GARDEN GROVE
11222 Acacia Prkwy.
Garden Grove, CA 92840
Attention: _____
Telephone: _____
e-mail: _____

Each party may change its particulars respecting notice, by issuing notice to the other party in the manner described in this Section 10.7.

10.8   **Assignment**

(a)   Consultant may not assign this Agreement or its interest therein without Customer's prior written consent, which Customer shall not unreasonably withhold. Any such assignment shall be subject to Assignee's agreeing to all terms and conditions of this Agreement.

(b)   This Agreement is not assignable by the Customer without the prior, express, written permission of the Consultant, which may not be unreasonably withheld. The licenses granted hereunder and the Software may not be sublicensed, assigned or transferred. Any assignment by Customer without the prior written consent of Consultant shall be void.

10.9   **Reorganizations**

The Customer acknowledges that the License fee set out in this Agreement has been established on the basis of the structure of the Customer at the date of this Agreement. To the extent that the Customer amalgamates, consolidates or undergoes any similar form of corporate reorganization or transition (a "Reorganization"), and the resulting entity (whether or not the Customer is the resulting or continuing entity) requires additional Licenses to support the system, the Consultant shall be entitled to receive, and the Customer shall pay, an additional License fee based on the then prevailing License fee in effect. The provisions of this Section 10.9 shall apply *mutatis mutandis* to any subsequent Reorganizations occurring following the first Reorganization. The provisions of this Section 10.9 shall not apply where the Customer undergoes a Reorganization involving only other Customers that have already purchased a License from the Consultant. For purposes of this Agreement, any corporate changes undergone by the Customer will be characterized as either an assignment, in which case Section 10.8 will

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apply, or a Reorganization, in which case Section 10.9 will apply, but it is not intended that Sections 10.8 and 10.9 will apply to any single sequence of events, if such application would result in a duplication of the fees provided for in those provisions.

10.10 **Binding Agreement and Enurement**

This Agreement shall be binding upon the parties hereto and their respective successors and assigns. This Agreement shall inure to the benefit of the parties hereto and their respective successors and permitted assigns.

10.11 **Entire Agreement**

This Agreement shall constitute the entire agreement between the parties hereto with respect to the matters covered herein. No other agreements, representations, warranties or other matters, oral or written, purportedly agreed to or represented by or on behalf of Consultant by any of its employees or agents, or contained in any sales materials or brochures, shall be deemed to bind the parties hereto with respect to the subject matter hereof. Customer acknowledges that it is entering into this Agreement solely on the basis of the representations contained herein.

10.12 **Section Headings**

Section and other headings in this Agreement are for reference purposes only, and are in no way intended to describe, interpret, define or limit the scope or extent of any provision hereof.

10.13 **Independent Contractor**

Customer engages Consultant under this Agreement solely as an independent contractor to perform Consultant duties which are described in this Agreement. Customer and Consultant expressly acknowledge and agree that Consultant is the independent contractor of Customer an nothing contained in this Agreement or which otherwise exists shall be construed by Customer, Consultant or any third person or entity to create a relationship of joint ventures, partners, or employer and employee.

10.14 **Governing Law**

This Agreement shall be governed by the laws of the State in which Customer is located and shall be deemed to have been entered into in that State for purposes of venue no matter where actually executed.

10.15 **Invalidity**

The invalidity or unenforceability of any provision or covenant contained in this Agreement shall not affect the validity or enforceability of any other provision or covenant herein contained and any such invalid provision or covenant shall be deemed to be severable.

10.16   **Waiver**

A term or condition of this Agreement may be waived or modified only by written consent of both parties. Forbearance or indulgence by either party in any regard shall not constitute a waiver of the term or condition to be performed, and either party may evoke any remedy available under the Agreement or by law despite such forbearance or notice.

10.17   **Counterparts**

This Agreement may be executed in counterparts (whether by facsimile signature or otherwise), each of which when so executed shall constitute an original and all of which together shall constitute one and the same instrument.

10.18   **RFP Response**

Consultant's response to Customer's RFP is attached hereto and incorporated herein as Schedule F. Customer acknowledges that Consultant, after it has been selected by Customer, re-evaluates its proposal relative to the Customer's RFP to determine if any updates or revisions are necessary. Any such updates and revisions are attached hereto as an exhibit and incorporated herein.

10.19   **Competitive Bid**

Customer has conducted a competitive evaluation and has concluded such efforts with this negotiated Agreement (including any addenda hereto); therefore, this Agreement may serve as the basis for similar agreements whereby other entities may contract separately with Consultant. Customer agrees that Consultant may disclose all or any portion of this Agreement to any of its current or prospective customers.

10.20   **Further Assurances**

The parties shall do all such things and provide all such reasonable assurances as may be required to consummate the transactions contemplated hereby, and each party shall provide such further documents or instruments required by any other party as may be reasonably necessary or desirable to affect the purposes of this Agreement and carry out its provisions.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF the parties hereto have duly executed this Agreement on the day and year first written above.

_____

Per: _____
Name:
Title:

Per: _____
Name: _____
Title: _____

CITY OF GARDEN GROVE

Per: _____
Name:
Title:

Attest:

_____
City Clerk

Approved as to form:

_____
City Attorney

Schedule "A" - Description of Software

Schedule "B" - Implementation Process and Timetable

Schedule "C" - Fee Structure and Payment Schedule

Schedule "D" - Support and Maintenance Agreement

This support and maintenance agreement (the "Support and Maintenance Agreement") between Consultant and Customer becomes effective upon the installation of the Software.

Unless otherwise defined herein, all defined terms used herein shall have the meaning ascribed to them in the Software License, Implementation and Support and Maintenance Agreement (the "Agreement").

1.   Subject to the terms and conditions of this Support and Maintenance Agreement, Consultant shall provide support and maintenance services which include revisions, updates and enhancements to the Software and related materials under the Agreement. The Consultant shall provide up to 18 months of support after the release of a new version of the software.

2.   Subject to the terms and conditions of this Support and Maintenance Agreement, Consultant shall provide software support via telephone and electronic mail, and site visits when necessary, consistent with the hours of operation, all as described in Exhibit 1 hereto and in effect as of the date hereof, as such services may, at the discretion of Consultant, be modified or supplemented from time to time (provided that any changes generally apply to all licensees of Consultant). To enable Consultant to provide effective support, the Customer will establish auto remote access based on remote access procedures compatible with Consultant's practices.

3.   In consideration for the support services specified in Section 2, Customer shall pay the Annual Support and Maintenance Fee of $_____, any required System Software Maintenance, and the Annual Escrow Fees as listed in Schedule C-_____. The Annual Support and Maintenance Fee will be billed annually in advance beginning on the anniversary of the Support and Maintenance Agreement. Consultant may change the Annual Support and Maintenance Fee from time to time. In addition to the Annual Support and Maintenance Fee, Customer shall reimburse Consultant for its direct expenses in providing support services pursuant to this Agreement, including, but not limited to:

    (a)   courier services, photocopying, faxing and reproduction services, all reasonable travel costs, including a travel time rate of $_____/hour, meal expenses of not more than the greater $_____ or the amount prescribed by the State where services will be delivered or federally if higher on a per diem basis (no receipts provided) and a mileage charge consistent with the Internal Revenue Service published guidelines, long distance telephone calls and all other reasonable expenses incurred in the performance of Consultant's duties hereunder.

    Consultant may update its reimbursement policies from time to time, in which case such updated policies shall apply for purposes of this Support and Maintenance Agreement, provided that such updated reimbursement policies must generally apply to all clients of Consultant.

4.   All support services provided by Consultant to Customer other than those specified in

Section 2 (such as, but not limited to, on-site support), shall be provided to Customer by Consultant at Consultant's then prevailing prices, hourly rates, policies and terms. For certainty, any updates of, or enhancements to, the Software will be made available to Customer free of charge (with respect to the actual updates or enhancements), but all services provided by Consultant with respect to such updates or enhancements will be subject to the Consultant's then-prevailing prices, hourly rates, policies and terms, meaning that such then-prevailing prices will apply to matters such as set-up and training relating to such updates or enhancements.

5.   All payments hereunder shall be in U.S. dollars and shall be net of any taxes, tariffs or other governmental charges.

6.   The initial term hereof shall be for one year beginning on the date set out above, and shall continue thereafter on an annual basis provided that Customer shall pay the then prevailing Annual Support and Maintenance Fee, unless terminated by either party upon giving to the other not less than 90 days' notice in writing prior to the end of the first year or any subsequent anniversary of such date. If the Support and Maintenance Agreement is terminated by Customer, it shall be entitled to retain the Software licensed to it as at the date of such termination, but it will relinquish its rights to receive upgrades of, or enhancements to, the Software, services for the Software, or access to the Source in escrow upon the occurrence of any event specified in Section 2.6(d) of the Agreement. For certainty, and without mitigating the application of the Agreement during the term of this Support and Maintenance Agreement, the terms and conditions of the Agreement relating to the license of the Software and the Documentation and the rights and obligations of the parties with respect thereto will continue to apply to Customer following the termination of this Support and Maintenance Agreement.

7.   Title to and ownership of all proprietary rights in the Software and all related proprietary information shall at all times remain with Consultant, and Customer shall acquire no proprietary rights by virtue hereof.

8.   Unless terminated pursuant to Paragraph 6 hereof, this Support and Maintenance Agreement shall remain in full force and effect except as terminated as follows:

(a)   If either party neglects or fails to perform, observe or cure within sixty (60) days of written notice of such failure to perform any of its existing or future obligations. If termination is for Consultant's breach, Customer shall be entitled to a pro-rata reimbursement of the Annual Support and Maintenance Fee, from the termination date.

(b)   If Customer attempts to assign this Agreement or any of its rights hereunder, or undergoes a Reorganization, without complying with the Agreement.

9.   Unless otherwise agreed to by the parties, all notices required hereunder shall be made in accordance with the provisions of the Agreement.

10.   Either party's lack of enforcement of any provision in this Support and Maintenance Agreement in the event of a breach by the other shall not be construed to be a waiver of

any such provision and the non-breaching party may elect to enforce any such provision in the event of any repeated or continuing breach by the other.

11. A valid contract binding the parties hereto shall come into being only upon execution of this Support and Maintenance Agreement by a duly authorized agent, officer or representative of both parties.

12. This Support and Maintenance Agreement is the exclusive statement of the entire support and maintenance agreement between Consultant and Customer. No change, termination or attempted waiver of any of the provisions hereof shall be binding unless in writing and signed by the party against whom the same is sought to be enforced.

13. The parties hereto agree that the terms and conditions contained herein shall prevail notwithstanding any variations on any orders submitted by Customer.

14. The particular provisions of this Support and Maintenance Agreement shall be deemed confidential in nature and neither Customer nor Consultant shall divulge any of its provisions as set forth herein to any third party except as may be required by law.

15. Termination of this Support and Maintenance Agreement shall not affect any right of action of either party arising from anything which was done or not done, as the case may be, prior to the termination taking effect.

16. The Customer and the Consultant recognize that circumstances may arise entitling the Customer to damages for breach or other fault on the part of the Consultant arising from this Support and Maintenance Agreement. The parties agree that in all such circumstances the Customer's remedies and the Consultant's liabilities will be limited as set forth below and that these provisions will survive notwithstanding the termination or other discharge of the obligations of the parties under this Support and Maintenance Agreement.

    (i)   FOR BREACH OR DEFAULT BY THE CONSULTANT OR OTHERWISE IN CONNECTION WITH THIS SUPPORT AND MAINTENANCE AGREEMENT, INCLUDING A BREACH OR DEFAULT ENTITLING THE CUSTOMER TO RESCIND OR BE DISCHARGED FROM THE PROVISIONS OF THIS SUPPORT AND MAINTENANCE AGREEMENT AND WHETHER IN THE NATURE OF A BREACH OF CONDITION OR A FUNDAMENTAL BREACH, THE CUSTOMER'S EXCLUSIVE REMEDY, IN ADDITION TO ELECTING IF SO ENTITLED TO RESCIND OR BE DISCHARGED FROM THE PROVISIONS OF THIS SUPPORT AND MAINTENANCE AGREEMENT, SHALL BE PAYMENT BY THE CONSULTANT OF THE CUSTOMER'S DIRECT DAMAGES TO A MAXIMUM AMOUNT EQUAL TO, AND THE CONSULTANT SHALL IN NO EVENT BE LIABLE IN EXCESS OF, THE AMOUNT OF FEES ACTUALLY PAID BY THE CUSTOMER TO THE CONSULTANT UNDER THIS SUPPORT AND MAINTENANCE AGREEMENT DURING THE THEN-CURRENT TERM OF THE SUPPORT AND MAINTENANCE

AGREEMENT UP TO AND INCLUDING THE DATE OF TERMINATION.

    (ii)   IN NO EVENT SHALL ANY DAMAGES INCLUDE, NOR SHALL THE CONSULTANT BE LIABLE FOR, ANY SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES EVEN IF THE CONSULTANT HAS BEEN ADVISED OF THE POSSIBILITY THEREOF. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, THE CONSULTANT SHALL NOT BE LIABLE FOR LOST PROFITS, LOST BUSINESS REVENUE, FAILURE TO REALIZE EXPECTED SAVINGS, OTHER COMMERCIAL OR ECONOMIC LOSS OF ANY KIND, OR FOR ANY CLAIM WHATSOEVER AGAINST THE CUSTOMER BY ANY OTHER PARTY.

    (iii)   CLAUSES (i) AND (ii) SHALL APPLY IN RESPECT OF ANY CLAIM, DEMAND OR ACTION BY THE CUSTOMER IRRESPECTIVE OF THE NATURE OF THE CAUSE OF ACTION UNDERLYING SUCH CLAIM, DEMAND OR ACTION, INCLUDING, BUT NOT LIMITED TO, BREACH OF CONTRACT OR TORT.

17. The parties hereby confirm that the waivers and disclaimers of liability, releases from liability, limitations and apportionments of liability, and exclusive remedy provisions expressed throughout this Support and Maintenance Agreement shall apply even in the event of default, negligence (in whole or in part), strict liability or breach of contract of the person released or whose liability is waived, disclaimed, limited, apportioned or fixed by such remedy provision, and shall extend to such person's affiliates and to its shareholders, directors, officers, employees and affiliates.

18. Where remedies are expressly afforded by this Support and Maintenance Agreement, such remedies are intended by the parties to be the sole and exclusive remedies of the Customer for liabilities of the Consultant arising out of or in connection with this Support and Maintenance Agreement, notwithstanding any remedy otherwise available at law or in equity.

19. This Support and Maintenance Agreement shall be governed by the laws of the State in which the Customer is located.

20. This Support and Maintenance Agreement may not be assigned by the Customer unless, concurrently with any such assignment, the Customer assigns its rights under, and complies with the provisions of the Agreement.

21. This Support and Maintenance Agreement shall be binding upon the successors and assigns of the parties and enure to the benefit of the successors and permitted assigns of the parties.

22. Time shall be of the essence of this Support and Maintenance Agreement.

23. The invalidity or unenforceability of any provision or covenant contained in this Support and Maintenance Agreement shall not affect the validity or enforceability of any other

provision or covenant herein contained and any such invalid provision or covenant shall be deemed to be severable.

24. The parties shall do all such things and provide all such reasonable assurances as may be required to consummate the transactions contemplated hereby, and each party shall provide such further documents or instruments required by any other party as may be reasonably necessary or desirable to effect the purposes of this Support and Maintenance Agreement and carry out its provisions.

25. This Support and Maintenance Agreement may be executed in counterparts (whether by facsimile signature or otherwise), each of which when so executed shall constitute an original and all of which together shall constitute one and the same agreement.

IN WITNESS WHEREOF, the Parties have executed this Support and Maintenance Agreement to be effective as of the date first written above.

CITY OF GARDEN GROVE _____

By: _____   By: _____
    Mayor   Name:
                                         Title:

By: _____
    City Clerk   By: _____
                                         Name: _____
                                         Title: _____

EXHIBIT 1

Standard Support and Maintenance Services – Standard Guidelines

These guidelines provide information on Consultant's standard support coverage, the services which are included as part of annual software support, a listing of call priorities, an outline of escalation procedures and other important details.

The services listed below are services that are included as part of your software support.

- 800 Toll Free Telephone support
- Software for Life
    - Guaranteed Support on the Software's existing applications for life
    - Cost effective upgrade solutions
- Scheduled assistance for installations, upgrades & other special projects (there may be charges depending on the Statement of Work)
- Technical troubleshooting & issue resolution
- E-mail support call logging and notification
- Free eSupport access 24 x 7 with the following on-line benefits:
    - Log & close calls
    - View & update calls
    - Update contact information
    - Access published documentation
    - Access available downloads
    - Access Support knowledge base
    - Participate in Discussion Forums
    - Report on metrics
- Standard software releases and updates
    - Defect corrections (as warranted)
    - Planned enhancements
    - State and/or Federal mandated changes (charges may apply depending on the Statement of Work)
    - Payroll regulated changes
    - Participation in BETA program
    - Release notes
- Limited training questions (15 minute guideline)
- Customer Care Program
    - Quarterly Newsletter with support tips
    - Technical support bulletins
    - Communication on new products and services
    - On-site visits (as required)
- Design review for potential enhancements or custom modifications
- Outstanding Calls Report with conference call (as required)
- Ability to attend the annual customer conference (attendance fees apply)

HelpDesk Hours

Standard hours of support are from 7:30 a.m. CST to 7:30 p.m. CST, Monday to Friday, excluding designated statutory holidays. Support is available from 7:30 p.m. CST through to 7:30 a.m. CST and is billable on an hourly basis. Support hours may vary by specific product line. Weekend assistance is available and must be scheduled in advance and in most cases is billable.

Call Priorities

In an effort to assign resources to incoming calls as effectively as possible, three types of call priorities, 1, 2 & 3, have been identified. A Priority 1 call is deemed by support staff to be an Urgent or High Priority call, Priority 2 is classified as a Medium Priority and Priority 3 is deemed to be a Low Priority. The criteria used to establish guidelines for these priorities are as follows:

Priority 1 – High

High priority issues consist of Errors for which there is no means of workaround, causing (i) unrecoverable "crashes" of the Software, (ii) ongoing unrecoverable loss or corruption of data or (iii) loss of essential Software functionality that prevents Customer processing for which there is no means of workaround. Examples of high priority issues include:

- System Down (Software Application, Hardware, Operating System, Database)
- Inability to process payroll checks
- Inability to process accounts payable checks
- Inability to process bills
- Program errors without workarounds
- Incorrect calculation errors impacting a majority of records
- Aborted postings or error messages preventing data integration and update
- Performance issues of severe nature impacting critical processes
- Hand-held interface issues preventing billing

Priority 2 – Medium

Medium priority issues consist of Errors that may be causing (i) ongoing recoverable loss or corruption of data for which there is no workaround, (ii) loss of essential Software functionality that prevents Customer processing that has a workaround, or (iii) loss of non-essential Software functionality that does not have a workaround. Examples of medium priority issues include:

- System errors that have workarounds
- Calculation errors impacting a minority of records
- Reports calculation issues
- Printer related issues (related to interfaces with the Software and not the printer itself)
- Security issues
- Hand-held issues not preventing billing
- Performance issues not impacting critical processes
- Usability issues

- Workstation connectivity issues (Workstation specific)

Priority 3 – Low

Low priority issues consist of Errors that may be causing (i) loss of non-essential Software functionality that has a workaround or (ii) difficulties in the user interface. Examples of low priority issues include:

- Report formatting issues
- Training questions, how to, or implementing new processes
- Aesthetic issues
- Issues with workarounds for large majority of accounts
- Recommendations for enhancements on system changes
- Questions on documentation

Response Times

Consultant will correct reported Errors in accordance with the following provisions. All time references below are clock hours or calendar days, unless otherwise specified.

1.   *Priority 1 Errors*

a.   Consultant will provide the customer with a telephone number for emergency support to be used by Customer at any time on a seven (7) day a week, twenty-four (24) hours a day basis to report Priority 1 Errors, if the customer chooses to pay an additional maintenance premium of 25% of annual maintenance each year, otherwise, the customer will be able to place a call for support anytime during the help desk hours (7:30 a.m. to 7:30 p.m. CST Monday through Friday, excluding holidays).

b.   Consultant will provide an initial response to all Priority 1 Errors within one (1) hour following the report of issue.

c.   Consultant will use commercially reasonable efforts to resolve Priority 1 Errors within twenty-four (24) hours or identify a mutually agreeable correction plan within twenty-four (24) hours following the report of Error.

2.   *Priority 2 Errors*

a.   The Customer shall use the standard call support center telephone number or web service for emergency support during normal business hours (7:30 a.m. to 7:30 p.m. CST, Monday through Friday, excluding holidays).

b.   Consultant will provide an initial response to all Priority 2 Errors within four (4) working hours following the report of the Error.

c.   Consultant will use commercially reasonable efforts to resolve Priority 2 Errors within seven (7) working days following the report of the issue.

3. *Priority 3 Errors*

      a.   The Customer shall use the standard call support center telephone number or web service for emergency support during normal business hours (7:30 a.m. to 7:30 p.m. CST, Monday through Friday, excluding holidays).

      b.   Consultant will provide the Customer a tracking number for all Priority 3 Errors within five (5) business days following the report of issue, and respond further as part of our normal online tracking system.

      c.   Consultant will use commercially reasonable efforts to resolve Priority 3 Errors by means of a future scheduled update or release, as mutually agreed.

Call Process

All issues or questions reported to support are tracked via a support call. Support analysts cannot provide assistance unless a support call is logged. The current process for logging calls includes the following: eSupport (via website), email, phone and fax.

- Each call must contain at a minimum: the Customer name, contact person, software product and version, module and/or menu selection, nature of issue, detailed description of your question or issue and any other pertinent information.

- The support system or one of the support analysts will provide the Customer with a call i.d. to track the issue and the call will be logged into a support tracking database.

- Each call will be stored in a queue and the first available support representative will be assigned to deal with the issue.

- As the support representative assigned to the call investigates the issue, the Customer will be contacted and advised as to where the issue stands and the course of action that will be taken for resolution. If the support analyst requires additional information, he/she will contact the Customer to obtain the information required.

- All correspondence and actions associated with a call will be tracked in the support database. At any time, if available to the Customer, the Customer may log onto the Consultant's website to see the status of each call.

- Once the call has been resolved, the Customer will receive an automated notification by email that the call has been closed. This email will contain the entire event history of the call from the time the call was created and leading up to the resolution of the call. The Customer also has the option of viewing both open and closed calls, if available to the Customer, via the Consultant's website.

- If the issue needs to be escalated to a development resource or programmer for resolution, the issue will be logged into a development tracking database and the Customer will be provided with a separate i.d. number to track the progress of the issue. At this time, the support call will be closed and replaced by the development i.d. number. The development i.d. number will remain open until the issue has been completely resolved. Issues escalated

to development will be scheduled for resolution and may not be resolved immediately depending on the nature and complexity of the issue.

- The Customer may contact the support department at its convenience for a status update on your development issues, or log onto the Consultant's website (if available to the Customer) to view issues on-line.

Escalation Process

In the event Consultant has been unable to provide either a permanent or a mutually acceptable temporary resolution within the applicable timeframes set forth in the Response Time Section above, Consultant will initiate the following escalation procedures. All procedures will be undertaken at Consultant's sole expense except where the issue is determined to be due to hardware malfunctions, utility failures, air conditioning malfunctions, System Software problems, communications malfunctions, environmental problems, user errors or any other cause outside Consultant's reasonable control, in which case Consultant may charge the Customer at the hourly rates as set forth in Schedule C, provided however, that Consultant shall have the unconditional obligation to take the actions described below even where Consultant and Customer may not agree on the cause of the problem or corresponding financial responsibility, subject to the resolution of the disagreement pursuant to Section 10.5 of the Agreement after the issue has been corrected. All time references below are clock hours or calendar days, unless otherwise specified.

1.   *Escalation Stage 1.*

a.   **Priority 1 Error**: If a Priority 1 Error is not corrected within twelve (12) hours following the report of the Error, the Support Representative attempting to correct the Error shall notify the Support Supervisor or Group Lead who will immediately become personally involved in resolving the problem, which will include a determination, in his/her reasonable discretion following consultation with the Customer, whether it is necessary to locate a Support Representative onsite at the Customer's location to correct the Error. Consultant will keep the Customer appraised of the status of its efforts to correct the Error at no less than four (4) hour intervals during standard business hours.

b.   **Priority 2 Error**: If a Priority 2 Error is not corrected within seven (7) days following the report of the Error, the Support Representative attempting to correct the Error shall notify the Support Supervisor or Group Lead who will immediately become personally involved in resolving the problem, which will include a determination, in his/her reasonable discretion following in consultation with the Customer, whether it is necessary to locate a Support Representative onsite at the Customer's location to correct the Error. Consultant will keep the Customer appraised of the status of its efforts to correct the Error at no less than daily intervals.

2.   *Escalation Stage 2*

a.   **Priority 1 Error**: If a Priority 1 Error has not been corrected after twenty four (24) hours since the initial report of Issue, Consultant will involve its Director of Support in directing the resolution of the problem, which will include a determination, in his/her reasonable discretion following consultation with the Customer, whether it is necessary to locate a Support Representative onsite at the Customer's location to correct the Error. Consultant will keep the Customer appraised of the status of its efforts to correct the Issue at no less than four (4) hour intervals during standard business hours.

b.   **Priority 2 Error**: If a Priority 2 Error has not been corrected after seven (7) days since the initial report of the Error, Consultant will involve its Director of Support in directing the resolution of the problem, which will include a determination, in his/her reasonable discretion following consultation with the Customer, whether it is necessary to locate a Support Representative onsite at the Customer's location to correct the Error. Consultant will keep the Customer appraised of the status of its efforts to correct the Issue at no less than daily intervals.

3.   *Escalation Stage 3.*

a.   **Service Level 1 Error**: If the Error has not been corrected after forty eight (48) hours since the initial report of the Error, Consultant will immediately assign its Vice President of Support or company CEO to directly oversee our efforts to remedy the Error, including, in his/her reasonable determination following consultation with the Customer, assigning a Support Representative to work onsite at the Customer's location, until such Error is resolved.

b.   **Service Level 2 Error**: If the Error has not been corrected after ten (10) days since the initial report of the Error, Consultant will immediately assign its Vice President of Support or company CEO to directly oversee its efforts to remedy the Error, including in his/her reasonable determination following consultation with the Customer assigning a Support Representative to work onsite at the Customer's location, until such Error is resolved.

c.   **Service Level 1 or 2 Errors**: If, at any time, after the specified periods above, the Error has not been corrected, Consultant will advise the Customer of the steps it intend to take to correct the Error and the corresponding schedule of such steps. Consultant will consider, in good faith, such measures that it has not taken to date, including without limitation, placement of company personnel onsite at the Customer and/or retention of third party technical services to resolve the Error at Consultant's own cost.

Failure to Correct Issues.

Customer shall be entitled to receive a ten percent (10%) reduction of the monthly maintenance fee for the affected software, up to a maximum of 100% of such fee for the current month, for each twenty four (24) hour period (excluding weekends and customer holidays) during which a Service Level 1 Error is not corrected seventy-two (72) hours following the report of the Error, provided however, such reductions shall not apply where the cause of the Error is not within Consultant's reasonable control, which includes hardware malfunctions, utility failures, air conditioning malfunctions, System Software problems, communications malfunctions, environmental problems, and issues due to errors by the Customer or third-party personnel.

Table of Service Level Requirements.

By way of example, but not by limitation, a compilation of the deadlines stated herein is included below for convenience of reference by the parties.

Service Level Required	Level 1 Error	Level 2 Error	Level 3 Error
	(time measured from initial report of Error to Consultant)		
Initial Response Due	1 hour	4 hours	5 days
Correction identified and a mutually agreeable correction plan will be developed within	24 hours	7 days	As mutually agreed
Escalation Stage 1 (Support Supervisor/Group Lead.)	12 hours	7 days	N/A
Stage 1 Status Report Intervals	*every 4 hours during standard business hours*	*daily*	N/A
Escalation Stage 2 (Dir. of Support)	24 hours	7 days	N/A
Stage 2 Status Report Intervals	*Every 4 hours during standard business hours*	*daily*	N/A
Escalation Stage 3 (VP of Support/CEO)	72 hours	10 days	N/A
Maintenance and Support Fee Reduction (10%/day to a max of 100% of the monthly fee for the affected application or module of software)	after 72 hours	N/A	N/A

Holiday Schedule

Below is a listing of statutory holidays. Please note that support services will be closed on designated days as outlined below.

New Year's Day   Closed
Schedule D
Memorial Day   Closed

Independence Day   Closed

Labor Day	Closed
Veteran's Day	Closed
Thanksgiving	Closed
Day after Thanksgiving Day	Closed
Christmas Eve	Early Closure
Christmas Day	Closed
Day after Christmas Day	Closed
New Year's Eve	Early Closure

Billable Support Services

The services listed below are services that are out of scope of the Support and Maintenance Agreement and are therefore considered billable services.

- Extended telephone training
- Forms redesign or creation (includes Bill Prints, Notice Prints and Letters)
- Setup & changes to hand-held interface or creation of new interface
- Setup of new services or changes to services (PAP, ACH, etc)
- File imports/exports - Interfaces to other applications, unless it is determined that the problem or support issue is substantially related to an interface written by Harris
- Refreshes, backups, restores, setting up test areas
- Setup of new printers, printer setup changes
- Custom modifications (reports, bills, forms, reversal of customizations)
- Setting up additional companies / agencies / tokens / general ledgers
- Data conversions / global modification to setup table data
- Database maintenance, repairs & optimization
- Extended Hardware & Operating System support
- Upgrades & support of third party software
- Installations / re-installations (workstations, servers)

Test Databases & Environments

Consultant supports customers in the maintenance of independent Test Environments for testing purposes. This allows customers the opportunity to test fixes, modifications, new business processes and/or scenarios without risking any potentially unwanted changes to the live environment. The creation of Test Databases & Environments is a billable service, quotations & incremental maintenance rates will be provided on request.

Connection Methods

To ensure Consultant can effectively support the Customer, a communication link is established and maintained between the parties' two sites. It is the Customer's responsibility to ensure the connection is valid at its location so that Consultant can connect to the Customer's site and resolve any issues. The supported methods of connection are: Direct internet, Virtual Private Network (VPN), Remote Access Server (RAS), Direct Connection (modem) and Terminal Services (a backup connection may be required for file transfers).

Change Order

(a)   Contact & General Information

Client _____   **Date** _____

Client
Contact   **Software**

Application _____

Client Email _____   _____

(b)   Description of Work

_____

Attachments: ☐

_____

(c)   Client Approval

000		$0.00
Chargeable Hours	**Rate**	**Amount**

000	000
Non-Chargeable Hours	**Total Hours**

_____   _____
Client Signature   **Date**

Consultant Signature   **Date**

Your signature serves as an acceptance of the "Amount" listed above as it relates to the description of work contained in this Change Order. Your signature also indicates you have reviewed and agree to the scope of work as detailed in any accompanying enclosures or attachments. This signed document indicates that you have provided all of the accurate information necessary to produce the work as stated in the above Change Order.

(d)   Internal Use Only

Customer #	Application #	Originated by #	PO#	0000000
_____	_____	_____		_____

Schedule "F"- RFP – Consultant proposal to Customer

Schedule "G" - Statement of Work

Schedule "H" - System Software

Schedule "I" - Hardware

(to be purchased by Customer)

Schedule "J" - Software Not Selected