

# **ATTACHMENT A**

## **SOFTWARE LICENSE AGREEMENT**

**BY AND AMONG**

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**[“COMPANY”]**

**AND**

**THE CITY OF TUCSON  
[“CITY”]**

**EFFECTIVE AS OF**

\_\_\_\_\_, 200

## **SOFTWARE LICENSE AGREEMENT**

**THIS SOFTWARE LICENSE AGREEMENT** (this “**License Agreement**”), is entered into as of \_\_\_\_\_, 200\_ (the “**Effective Date**”) by and among City of Tucson, a municipal government existing under the Laws of Arizona with its principle office located at 255 W. Alameda, Tucson, Arizona, 85701 (“**CITY**”) and \_\_\_\_\_ with its offices located at \_\_\_\_\_ (“**COMPANY**”). CITY and COMPANY are sometimes individually referred to as a “**Party**” and collectively as “**Parties**” throughout this License Agreement.

### **RECITALS**

**WHEREAS**, COMPANY and/or its Affiliates own or are authorized to license certain computer software programs and related documentation and the COMPANY is in the business of licensing such software programs and providing customization, development, implementation, maintenance and other support services with respect to such software programs to end user customers; and

**WHEREAS**, CITY has evaluated the software products described in Attachment A to the License Agreement (“**Products**”) and desires to obtain from COMPANY, and COMPANY has reviewed the City’s needs and represents and warrants that its Products meet these needs and COMPANY is willing to grant to CITY, a license to use the Products.

**NOW, THEREFORE**, for and in consideration of the mutual promises contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto agree as follows:

#### **1. DEFINITIONS**

1.1 The following capitalized terms shall have the meaning set forth below for all purposes of this License Agreement:

“**Affiliate**” means, at any time, and with respect to any Person, any other Person that at such time directly or indirectly through one or more intermediaries Controls, or is Controlled by, or is under common Control with, such first Person.

“**Agreement**” shall mean the entirety of the City of Tucson Request for Proposal No. \_\_\_\_\_, the COMPANY’s response thereto, and such additional documents and/or attachments as are referenced therein.

“**ASP**” means an application service provider providing another Person software-based application solutions that enables such other Person with transaction processing ability by remote access or other available means through the application software installed at such service provider’s site.

**“Attachment A”** means the document attached hereto and designated as “Attachment A”, entitled \_\_\_\_\_ and dated \_\_\_\_\_.

**“Authorized User(s)”** means, CITY, Permitted Affiliates, their respective employees, officers or agents (as may be permitted by CITY to access and use the Licensed Material in accordance with the provisions set forth in this License Agreement solely in relation to the services they provide to CITY).

**“BSP”** means a provider of business processing services, including management of the associated business process as a service bureau, using software based application solutions.

**“Claims”** means any and all claims, third party claims, counterclaims, complaints, demands, proceedings, actions, causes of action and suits, and investigations of any nature or kind whatsoever and howsoever arising, whether in law or in equity or pursuant to contract or statute, and whether in any court of law or equity or before any arbitrator(s) or other body, board or tribunal.

**“Company Deliverables”** shall mean the Products described in Attachment A in the version set forth therein and applicable Documentation described in Attachment A and additional documents or items which may be delivered by COMPANY to CITY in furtherance of COMPANY’S obligations pursuant to this Software License Unless specifically stated, reference to Company Deliverables shall not apply to any Third Party Components and CITY Deliverables included in Company Deliverables in accordance with this License Agreement or Attachment.

**“Confidential Information”** shall mean all business strategies, plans and procedures, proprietary information, methodologies, data and trade secrets, and other confidential information and materials of the disclosing party, its clients or other persons or entities with whom they do business that may be obtained by the receiving party from any source. Confidential Information of COMPANY includes Licensed Material, and all information relating to Licensed Material. Confidential Information of CITY includes such information as may be protected by law or other confidentiality agreements concerning third parties such as citizens, customers or prospective customers of CITY or any of its Affiliates.

**“Control”** means, in respect of any Person, the possession, directly or indirectly, of (a) the power to direct or cause the direction of the management and policies of that Person, and (b) ownership of more than fifty percent (50%) of the voting securities of such Person.

**“CITY Deliverables”** shall mean the items identified in this License Agreement and its attachments (if any) to be delivered by CITY or its agents to COMPANY and any other items identified as deliverable(s) from CITY in an applicable Statement of Work or as may be agreed between the Parties from time to time in writing that are required to be provided to COMPANY by CITY for preparation of a COMPANY Deliverable or performance of Services by COMPANY in accordance with this License Agreement.

**“CITY Material”** shall mean CITY Deliverables, CITY’s Confidential Information, documentation, programs, specifications, requirements, concepts, processes, inventions, work product, and any other Intellectual Property developed or owned or licensed by CITY, which

it provides to COMPANY in connection with this License Agreement, a Attachment or applicable Statement of Work. Notwithstanding the foregoing, CITY Proprietary Material shall not include the Licensed Material.

**“Derivative Works”** means works that are based upon or derived from proprietary material, including without limitation, a revision, modification, translation, abridgment, condensation, expansion, or any other form in which such material or any proprietary portion thereof may be recast, transformed, or adapted, and which, if prepared without authorization of the owner of the Intellectual Property Rights in such material would constitute an infringement of any such proprietary right.

**“Documentation”** shall mean the User Manual, Operations Manual, and Installation Manual, described in Attachment A as well as any supplements thereto.

**“Enhancement”** means any customization, modification, addition, revision, enhancement, improvement, and all Maintenance Services work result.

**“Intellectual Property Rights”** means all past, present, and future rights in or to Intellectual Property, which may exist or be created under the laws of any jurisdiction in the world, including but not limited to: (a) rights associated with works of authorship, including exclusive exploitation rights, copyrights, moral rights, and mask works; (b) trademark and trade name rights and similar rights; (c) trade secret rights and rights in relation to breach of confidence; (d) patents and industrial property rights; (e) other proprietary rights in Intellectual Property of every kind and nature; and (f) rights in or relating to registrations, renewals, extensions, combinations, divisions, and reissues of, and applications for, any of the rights referred to in subsections (a) through (e) of this sentence.

**“Intellectual Property”** means all algorithms, APIs, apparatus, circuit designs and assemblies, concepts, data, databases and data collections, database schema, designs, diagrams, documentation, drawings, flow charts, formulae, gate arrays, ideas and inventions (whether or not patentable or reduced to practice), know-how, materials, marketing and development plans, marks (including registered and unregistered trademarks and service marks, brand names, product names, logos, and slogans), methods, models, net lists, network configurations and architectures, photo masks, procedures, processes, protocols, schematics, semiconductor devices, software code (in any form including source code and executable or object code), specifications, subroutines, techniques, test vectors, tools, uniform resource identifiers, user interfaces, web sites, works of authorship, and other forms of technology and intellectual property.

**“License Agreement”** shall mean this Agreement.

**“License Fee”** means: (a) for the licensed Products listed in Attachment A, the fees described in Attachment C; and (b) if CITY and COMPANY agree to license additional programs or material under this License Agreement, the applicable additional license fee in accordance with the applicable amendment to Attachment C.

**“Licensed Material”** means collectively: (a) the Products in the version described in Attachment B to be delivered to CITY by COMPANY in accordance with this License Agreement, (b) Deliverables in the versions delivered to CITY in accordance with a Statement of Work executed under Attachment A, and (c) any Upgrades and Documentation thereof received by CITY pursuant to the Maintenance Services.

**“Losses”** means any and all damages, liabilities, obligations, losses, deficiencies, penalties, interest, assessments, charges, costs and expenses, including without limitation reasonable legal fees and disbursements, and court costs, but excluding indirect, consequential and punitive damages.

**“Maintenance Services”** means the maintenance and support services described in Attachment C for annual maintenance services pursuant to the License Agreement.

**“Object Code”** means computer programming code, routines and programs in machine executable form.

**“Permitted Affiliate”** means an Affiliate of CITY with respect to whose business CITY has obtained an Add-on License pursuant to Section 2(1)(b) of this License Agreement.

**“Permitted Site”** shall mean CITY’s premises identified and set out in the License Agreement, Request for Proposal or such other location owned or leased by or under the control of CITY that may be substituted or added in accordance with Section 2.4.

**“Person”** means any natural person, corporation, limited liability COMPANY, general partnership, limited partnership, proprietorship, other business organization, trust, union, association or Governmental Authority or any other legal entity.

**“Product(s)”** means the software product(s) or components described in Attachment A.

**“Request for Proposal” (“RFP”)** means the document published by the City defining its needs, requirements, and form of contract, and any amendments or clarifications subsequently published by the CITY on its public web site.

**“Services”** shall mean the professional services described in the License Agreement, or Request for Proposal including without limitation, customization, development, delivery and installation of the Company Deliverables, testing and implementation support, maintenance and other services related to the Licensed Material.

**“Statement of Work” or “SOW”** shall mean the portions of the License Agreement, or Request for Proposal that define the specifications and deliverables to be provided by the COMPANY.

**“Target Environment”** shall mean CITY’s production physical and logical environment as described in Attachment D.

**“Upgrade”** means any future releases of COMPANY’s Product included in the Licensed Material planned and developed by COMPANY, from time to time, for general distribution

to its customers of the Products who purchase or subscribe to the annual maintenance services for the Products.

“Use” means operating the Licensed Material in the internal business operations of the CITY, including the acts of installing, executing, processing, transmitting, transferring, loading and storing of data by Authorized Users in connection with the business of the CITY.

1.2 Other Defined Terms. All other capitalized terms used in this License Agreement not otherwise defined in Section 1.1 above shall have the meanings assigned in the part of the License Agreement in which they are defined.

### 1.3 Interpretations

1.3.1 Where any payment falls due for payment on a non-Business Day, then payment shall be made by the paying party on the next succeeding Business Day.

1.3.2 Reference to a person includes any individual, firm, body corporate, association (whether incorporated or not) and authority or agency (whether government, semi government or local).

1.3.3 The singular includes the plural and vice versa.

1.3.4 A reference to any documents or agreements (and, where applicable, any of their respective provisions) means those documents or agreements as amended, notated, supplemented or replaced from time to time providing they are amended, notated, supplemented or replaced in the manner envisaged in the relevant documents or agreements.

1.3.5 A reference to any statute, regulation, rule or other legislative provision includes any amendment to the statutory modification or re-enactment or, legislative provisions substituted for, and any statutory instrument issued under that statute, regulation, rule or other legislative provision.

1.3.6 Reference to a party includes that party's employees, agents and/or consultants.

1.3.7 The term “or” shall include the conjugate form so that where appropriate, the use of the term “or” should be interpreted as “and/or”.

1.3.8 In the event of any conflict between the provisions of this License Agreement and the provisions of the Schedules, Exhibits or Attachments hereto or the provisions of the License Agreement, or RFP, the provisions of this License Agreement shall prevail with respect to any matters relating to scope of license, ownership of Intellectual Property and Intellectual Property Rights, limitation of liability, warranties, indemnification and confidentiality obligations.

## 2. LICENSE

### 2.1 Grant of License.

- (a) Subject to the terms and conditions set forth in this License Agreement and payment of the applicable License Fees, effective upon the delivery by COMPANY to CITY of the Product, in return for payment of the License Fees and other charges agreed herein, COMPANY hereby grants to CITY and CITY hereby accepts, an irrevocable (except as provided in Section 11), non-exclusive, fully paid up (upon payment of the applicable License Fees), royalty free, non-transferable (except as specifically permitted under this License Agreement), right and license to Use and to permit its Authorized Users to Use the Licensed Material at Permitted Sites and on the Target Environment during the Term for CITY's and Permitted Affiliates business processes. The forgoing license does not (a) authorize installation of the Licensed Material at any site other than the Permitted Site(s), (b) permit access to and Use of the Licensed Material for any purpose other than as permitted under this License Agreement, or (c) permit access to and Use of the Licensed Material to any Person other than Authorized User. The License granted to the CITY is conclusively defined in this License Agreement and the relevant Appendices. Any extension or change of the contractual use of the License Material requires the COMPANY's prior written consent and authorization. CITY is responsible to ensure compliance with all license restrictions and other applicable terms and conditions of this License Agreement by each Authorized User. Any breach or non compliance of the terms and conditions of this License Agreement by any Authorized User shall be deemed to be a breach or non compliance by the CITY. The CITY will indemnify and defend the COMPANY in respect of any breach of this License Agreement by Authorized Users or in respect of any act (or failure to act) by the Authorized Users which would constitute breach of this License Agreement if carried out by the CITY.
- (b) Add-on License. The License granted herein does not authorize the Use of the Licensed Software for (a) processing any business of an Affiliates of CITY ("Affiliate's Business"), (b) the business of the CITY outside the United States and its protected territories ("Extra Territory Business") or (c) for additional business of CITY or an Affiliate resulting from or arising in connection with the acquisition by CITY or a permitted Affiliate of the assets or business of any other entity or merger of CITY or its permitted Affiliate with another entity ("Acquired Business"). Each Affiliate Business, Extra Territory Business and Acquired Business is referred to in this License Agreement as a "New Business." If at any time CITY desires that the COMPANY extend the license granted hereunder to permit a New Business to Use the Licensed Software, then, COMPANY and CITY will negotiate in good faith the terms and conditions and the additional license fee that would apply to an add-on license for each New Business. CITY agrees not to Use or permit a New Business to use the Licensed Software for processing the business of such New Business unless and until the COMPANY, CITY and the applicable New Business have executed an add-on license agreement ("Add-on License") and the applicable additional license fee ("Add-on License Fee") is paid to the COMPANY. COMPANY agrees that COMPANY's Add-on License Fee charged to CITY for each such Add-on License will not be higher than the license fee then charged to other customers of COMPANY. Upon

grant of an Add-on License by the COMPANY, CITY shall ensure that each permitted New Business will agree and abide by the terms and conditions of license hereunder. In any event, CITY assumes full responsibility for the actions or omissions of its permitted New Business with respect to the Use of the Licensed Software pursuant to the provisions of this License Agreement.

- (c) The licenses granted herein and the provisions of this License Agreement do not grant or convey to CITY any ownership rights, interest or title in or to the Licensed Material any Intellectual Property Rights therein nor do they permit CITY to make Derivative Works (other than by obtaining any Derivative Works from COMPANY under and in accordance with Attachment A) or to make copies of the Licensed Material except as specifically authorized under this License Agreement or with prior written permission of COMPANY. To the extent that Product and/or the Licensed Material consists of any software codes, such material, when delivered to CITY pursuant to this License Agreement, shall be delivered by COMPANY in Object Code form only and CITY shall not have any right or license with respect to the Source Code of the Product and/or the Licensed Material.

2.2 Customization and Maintenance Services. The Parties acknowledge and agree that this License Agreement and Attachment A are contemporaneous contracts requiring the CITY to obtain any and all services related to the Products and Licensed Material exclusively from the COMPANY, or such subsidiaries, contractors or resellers as may be specifically identified or approved by the COMPANY, unless otherwise agreed by COMPANY in a written amendment to this License Agreement. CITY hereby retains COMPANY, and COMPANY agrees to provide to CITY Services related to the customization, enhancement, implementation, maintenance and other services described in the Agreement. The CITY acknowledges that any modification, alteration, enhancement or customization to the Products or the Licensed Material may be carried out only by the COMPANY or with the prior written consent of and based on specific agreement with the COMPANY or licensor of the Product and no third party other than the COMPANY or the licensor of the Product or any party specifically authorized by them in writing may be allowed to do so. Before involving third parties in carrying out any modifications, alterations or enhancements to the Products, if permitted by the COMPANY, the CITY shall provide the COMPANY with a written, legally binding statement of the third party, whereby it assumes an undertaking towards the COMPANY and its licensors that it will observe the provisions of this Agreement.

2.3 Permitted Site(s) and Target Environment. The Licensed Material will be delivered and initially installed and maintained at the CITY's premises described in Appendix D ("Permitted Site"). CITY may, upon written advance notice to COMPANY, relocate the Licensed Material to another Permitted Site and may install or permit the installation of the Licensed Material at such new Permitted Site, provided that the Licensed Material shall not be installed in more than one Permitted Site at any given time. If CITY relocates the Licensed Material to a new Permitted Site, CITY will notify COMPANY of the address of the new Permitted Site. If the CITY desires to install or installs the Licensed Material in any additional Permitted Site for production purposes, the CITY



shall pay the COMPANY additional license fees, which shall be agreed between the parties.

2.4 CITY acknowledges and agrees that the Licensed Material is designed to operate only in the Target Environment as set out in the relevant Attachment D to the license Agreement and that Licensed Material may not operate, function or conform to Specifications if used on any system other than the Target Environment. Notwithstanding the above, COMPANY shall support and render installation assistance to the CITY for the implementation of the Licensed Material on virtual machines for the purposes of testing, staging, quality assurance, and/or training. It is a condition of this License that the Target Environment onto which all or part of the Licensed Software is copied, even for a short period, must be in the direct possession of the CITY and on the Permitted Site. Except as otherwise agreed in the relevant Appendix the Licensed Material may be transferred, upon written notice of one (1) month in advance to the COMPANY, to another Target Environment of like configuration as the Target Environment. The Target Environment and other permitted environments onto which all or part of the Licensed Material is stored or used must always be in a Permitted Site and in direct possession and control of CITY.

2.5 Permitted Environments. In addition to Use of the Licensed Material in the Target Environment in accordance with Section 2.3, CITY may separately install and Use the Licensed Material for the following purpose(s) and in the following environments:

- (a) disaster recovery, provided that such Use of the Licensed Material in a disaster recovery environment shall be limited to testing the readiness of the disaster recovery environment unless and until CITY's Target Environment becomes unavailable due to an event of Force Majeure, in which event CITY may use the Licensed Material in the disaster recovery environment for purposes agreed in this License Agreement subject to and in accordance with Sections 2.2, until such time CITY's Target Environment at the Permitted Site described in Section 2.4 is fully recovered;
- (b) testing, controlled staging, quality assurance and/or training installations, insofar as such installations are temporary or transitional in nature, are not used for production purposes, and otherwise comply with the provisions of section 2 of this Agreement.

CITY may also permit its technical and administrative personnel other than Authorized Users to access and Use the Licensed Material solely for administrative or technical support functions and not as part of production processing of live data

2.6 Documentation. COMPANY will deliver initial versions of Documentation for the Product to CITY in both hard copy and electronic forms at the time of delivery of the Product. Thereafter, COMPANY will deliver updated versions of the Documentation periodically as required in accordance with Attachment A.

- 2.7 Proprietary and Confidentiality Markings or Notices. The CITY shall retain all of the COMPANY's and/or its licensors' Logo, Trademark, Copyright notice and other proprietary markings or notice on the Licensed Material. CITY shall not; permit any Authorized Users or other persons to, remove, alter or otherwise render illegible any of COMPANY's Logo, Trademark, Copyright notice or other proprietary or confidentiality markings that may be placed on the Licensed Material or components thereof provided to CITY hereunder. The CITY shall include on all copies of all or part of the Licensed Material including the Documentation, a reproduction of the COMPANY's and/or its licensors' Logo, Trademark, Copyright notice and other proprietary markings or notice.
- 2.8 Restrictions on Copying. Copying of the Licensed Material is prohibited unless expressly authorized in this Agreement or the relevant Appendix or otherwise in writing by the COMPANY. CITY is responsible for controlling the original Licensed Material and any copies thereof and ensuring that the Use thereof is in accordance with the terms of this Agreement. CITY may make a reasonable number of additional copies as back up. All software and hardware equipment onto which all or part of the Licensed Material is copied must always be in a Permitted Site and in direct possession and control of CITY. CITY is responsible to include reproduction of all of COMPANY's copyright notice and other COMPANY proprietary markings on every copy of the Licensed Material made by or on behalf of CITY as they appeared in the Licensed Material. Copies which are no longer needed must immediately be destroyed. Except as provided in this Agreement, CITY shall not, nor permit others to, make copies of the Licensed Material.
- 2.9 Other Restrictions. Neither CITY nor any Authorized User is authorized to sell, license, sublicense, distribute, assign, transfer or distribute or timeshare the Licensed Material or otherwise grant any right under this Agreement to any third party, without the prior written consent of COMPANY. Any attempted sale, licensing, sublicensing, distribution, marketing, assignment or time sharing including by interactive cable or remote processing services or otherwise (except as provided in Section 14.6) shall be null and void. CITY is not entitled to, and shall not make or permit others to, reverse engineer, disassemble, de-compile, recreate, enhance or modify the Licensed Material or any part thereof and except as permitted the CITY is not authorized to create Enhancements to or Derivative Works of the Licensed Material or any portions thereof. The above notwithstanding, the CITY maintains rights to the software as defined under the software Escrow provisions.
- 2.10 Third Party Software. CITY acknowledges and agrees that the operation and contractual Use of the Licensed Material require the Target Environment and the use of other third party software products (not listed in Attachment B) in the versions as specified in the applicable Statement of Work or as otherwise agreed to by the Parties in writing. CITY shall be responsible for acquiring the Target Environment and all appropriate licenses from the manufacturers or their authorized dealers for such third party software products. The CITY shall be responsible for the choice, installation, use and maintenance of the Target Environment and any third party software not forming part of the Licensed Material, which is used in relation to the Licensed Material.

- 2.11 ASP and/or BSP Use. CITY shall not use or permit any other Person to use the Licensed Material to provide any ASP or BSP services. CITY shall not use the Licensed Material to provide services for processing any data or information or material to any third parties as a processing service unrelated to the regular business of CITY, whether as a service bureau or otherwise.
- 2.12 Exportation. The CITY shall have no right to use, ship or export directly or indirectly the Licensed Material for Use or any other purposes in any of the countries or territories to which the United States Department of Commerce or other United States government agency prohibits shipment or exportation without first obtaining the written permission of the COMPANY and - if necessary - of the appropriate United States government agencies. CITY warrants that it, its Affiliates and their employees shall obey all applicable laws and regulations of the United States and any other countries in which the Licensed Material is used.
- 2.13 Trademarks. CITY will have no rights in any trademarks or service marks or trade names adopted by the COMPANY and/or its licensors for the Licensed Material or any part thereof. The CITY agrees to reproduce the COMPANY's or its licensor's trademarks, service marks or trade names intact to all copies of the Licensed Material.
- 2.14 Infringement. Should the Licensed Material be used beyond the license set out in this Section 2, without prejudice to any other rights the COMPANY may have, the COMPANY shall be entitled terminate the License granted hereunder in respect of such Licensed Material, without prejudice to any other rights or remedies the COMPANY may have under this Agreement or otherwise. Notwithstanding the above, before any termination of the License granted herein, COMPANY shall give City written notice of the specific infringement claimed and thirty (30) days to cure or seek an agreement with COMPANY not to terminate the License, or, if necessary, an injunction or other judicial order, preventing the termination of this License Agreement and the License(s) granted hereunder.

### **3. DELIVERY AND TESTING OF THE LICENSED MATERIAL**

- 3.1 Delivery of the Licensed Material. The delivery of the Licensed Material shall be effected when the COMPANY transfers the appropriate data media to the CITY or transmits the Licensed Material by telecommunication facilities. This delivery must be acknowledged in writing by the delivery of a receipt via email or hard copy by the City in order for delivery to be effective. The data media are on loan to the CITY for the term of this Agreement. Partial deliveries are permitted. The Licensed Material shall be delivered in all parts to the CITY on the dates provided therefore in the Agreement. These dates shall be binding upon the COMPANY if an explicit statement to this effect is made in the Agreement. If the COMPANY has to wait for the CITY's assistance or if the COMPANY is otherwise prevented as a result of any act or omission on the part of the CITY from fulfilling the delivery obligation obligations under this Agreement, the COMPANY shall not have any liability resulting therefrom and the delivery date shall be deemed to be postponed by the duration of the impediment and a reasonable start-up period. The COMPANY shall inform the CITY of such impediments.

3.2 Choice, Installation and Use of the Licensed Material. Based upon the representations of COMPANY the CITY shall be responsible for choosing, installing and using the Licensed Material and for the results achieved therewith. The CITY is aware of the essential functional features of the Licensed Material and it is responsible for ensuring that the Licensed Material satisfies its requirements. When using the Licensed Material, the CITY shall observe the guidelines set down in the pertinent Documentation. The CITY agrees to install any Updates and New Versions of the Licensed Material in due time, but in any case not to exceed twelve months following the initial release date.

3.3 CITY Responsibilities: In addition to other responsibilities described as CITY responsibilities under this Agreement CITY agrees to:

- a. Provide to COMPANY personnel reasonable access to the Permitted Sites and Target Environment if the COMPANY requires such access for its work, including online access and authorizations therefore;
- b. Provide COMPANY personnel required computer time, data media, documentation, data, information and working resources required by the COMPANY for its work;
- c. Nominate and train the appropriate number of Authorized Users for managing the Help Desk;
- d. Insure that the Licensed Material is used in strict compliance with agreed guidelines and the guidelines set forth in the relevant Documentation concerning the Use of Licensed Material and maintain records of exceptional situations and program errors, timely notify any malfunction according to the agreed procedure.

3.4 The CITY undertakes to ensure that telecommunication lines are available and maintained between the CITY's designated Site and places of performance of Services by COMPANY or the COMPANY's central maintenance site as indicated in the applicable Statement of Work. The costs of those links and equipment and telecommunication costs shall be borne by the CITY. Any additional telecommunications expenses from the COMPANY's central maintenance site shall be borne by the COMPANY during the contractually agreed standby conditions for maintenance. If the COMPANY cannot have technically simple access to the Licensed Material by telecommunications facilities or if such is not permitted by the CITY, the latter shall be liable for the consequences thereof, especially any extra costs. The COMPANY shall have no liability or obligation for any failure of the COMPANY in complying with its maintenance obligations if such failure results due to failure of the telecommunication facilities or failure of the CITY to provide the telecommunication facilities. The COMPANY shall carry out its work on condition that the CITY has duly and fully fulfilled its obligations set out in this Section 3.

3.5 CITY's Obligation to Conduct Tests. Within reasonable limits, the CITY shall carefully test the Licensed Material supplied to it to ensure it can be used on the Target Environment before it begins to use the Licensed Material for processing its operations.

This shall also apply for parts of the Licensed Material which are supplied to the CITY as part of the warranty and maintenance services. The CITY shall also take reasonable precautions in case all or some of the Licensed Material supplied to it works incorrectly, such precautions being emergency procedures, data protection, regular back-up of data, virus checks, regular checks of results, etc. If the CITY uses the Licensed Material without test, such usage shall be deemed to be acceptance.

- 3.6 Acceptance. The Licensed Material shall for each module delivered (if in modules) be deemed to have been accepted one (1) month after delivery thereof to the CITY unless within that period the CITY makes a complaint to the COMPANY in relation to the Licensed Material by mail, fax or e-mail using the address and other communication information supplied in the agreement. Complete or partial commencement of the processing of its operations by the CITY using all or part of the any module of the Licensed Material shall be deemed to be immediate acceptance of all of that module's Licensed Material. Acceptance of one ore more modules of the Licensed Material shall not constitute or imply Acceptance of any other modules which have not been specifically Accepted.

#### **4. FEES, EXPENSES, TAXES, INVOICING AND PAYMENT**

- 4.1 License Fee. For the Products listed in Attachment B, CITY shall pay to COMPANY the License Fee in the amount and manner set forth in Attachment B. For any license fee applicable to additional programs or components agreed pursuant to an amendment of this Agreement, the applicable additional license fee shall be as set forth in such amendment.
- 4.2 Taxes. CITY shall be responsible for any sales, use, value added, service or other similar taxes that may be imposed by any applicable taxing jurisdictions upon CITY or COMPANY relating to the Product delivered hereunder or the License Fee payable therefore. COMPANY agrees to separately itemize such taxes on its invoices to CITY and to remit the tax amounts received from CITY to the appropriate taxing authority. COMPANY shall be solely responsible for any corporate taxes and income taxes based upon the income or revenue of COMPANY.
- 4.3 Invoices and Payment. COMPANY shall submit invoices for the License Fee upon delivery to CITY of the Product. Invoices shall be mailed to City of Tucson Finance Department/Accounts Payable Division, PO Box 27450, Tucson, AZ 85726-7450. Payment of invoices shall be made by CITY to COMPANY within 30 days following receipt of each such invoice.

#### **5. CERTAIN REPRESENTATIONS, WARRANTIES AND COVENANTS**

- 5.1 Mutual Representations, Warranties and Covenants. Each Party represents, warrants and covenants to the other that:
- (a) this Agreement constitutes the legal, valid and binding obligation of it, enforceable against it in accordance with its terms, except as such enforceability

may be limited by bankruptcy laws and other similar laws affecting creditors' rights generally and by general principles of equity;

- (b) the execution, delivery and performance of this Agreement by it does not and will not conflict with, or constitute a breach or default under, its charter documents or any agreement, contract, commitment or instrument to which it is a party; and
- (c) there is no action or proceeding pending or, in so far as it knows or ought to know, threatened in writing against it before any court, administrative agency or other tribunal that (i) could impact upon its right, power and authority to enter into this Agreement, to grant the rights and licenses granted by it to the other Party hereunder, or to otherwise carry out its obligations hereunder, or (ii) might have a material adverse effect on its business or condition, financial or otherwise that would materially impact a Party's ability to perform under this Agreement.

5.2 COMPANY's General Warranties and Covenants. COMPANY represents, warrants and covenants to CITY as follows:

- (a) COMPANY or its Affiliates own, and COMPANY is authorized to grant the rights and licenses to, the Licensed Material as set forth in this Agreement; and
- (b) COMPANY has not received any written notice or claim, and is not otherwise aware, that the Licensed Material and the Use thereof by CITY and the Authorized Users in accordance with this Agreement and the Documentation as contemplated hereunder, infringes or misappropriates, or would infringe or misappropriate the patent, copyright, trademark, trade secret or other Intellectual Property Rights of any third party.

5.3 COMPANY's Product Warranties and Covenants.

- (a) COMPANY represents and warrants that for a period of twelve (12) months from delivery of any copy of the Licensed Material to the CITY, (the "Warranty Period") the media in which the Licensed Material are delivered shall be free from defects in material and workmanship, assuming normal Use. The CITY may return any defective media to the COMPANY during this period for replacement free of charge.
- (b) COMPANY represents, warrants and covenants to CITY that, if properly used in the Target Environment in accordance with the Documentation and the terms and conditions of this Agreement, during the warranty period, if any, agreed and set forth in the Agreement (Warranty Period) the Product shall comply with, and achieve the performance and functionality in accordance with the Documentation. CITY agrees to promptly notify COMPANY in writing immediately upon discovery of any error or non-conformance of the Licensed Material. COMPANY will promptly correct or replace any error or defect in the Product reported by CITY during the Warranty Period without any additional charges to CITY for such correction or replacement.

- (c) The Licensed Material have been produced and distributed with strict procedures to protect them against viruses. If, in the CITY's opinion, there is a justified suspicion that a virus exists in his copy of the Licensed Material or if it finds a virus, the COMPANY shall assist the CITY in resolving the matter. If the COMPANY is responsible for the existence of the virus, it shall within a period of three (3) days from delivery of the copy by the COMPANY remove the virus from the Licensed Material or supply without charge a copy containing no virus. If the virus does not fall within the responsibility of the COMPANY, the CITY shall pay for the assistance provided by the COMPANY in keeping with the time and material and at the COMPANY's rates of charges valid from time to time.

5.4 CITY's Warranties and Covenants. CITY represents, warrants and covenants to COMPANY that:

- (a) CITY is responsible for selecting, installing, operating and using the Licensed Material as delivered by COMPANY and accepted by CITY and for the results achieved therewith. CITY shall also be responsible for the installation, use and maintenance of the Target Environment. CITY shall take reasonable precautions against loss of data due to any error or non-conformity in the operation or working of the Licensed material including without limitation, emergency procedures, data protection, regular back-up of data, virus checks, and regular checks of results.
- (b) The CITY is aware of the essential functional features of the Licensed Material. The CITY acknowledges that the Licensed Material has not been developed to meet the CITY's specific requirements and it is responsible for ensuring that the Licensed Material satisfies or meets its requirements. When using the Licensed Material, the CITY shall observe the guidelines set down in the pertinent Documentation. The CITY agrees to install any Updates, corrections and/or and New Versions of the Licensed Material in due time, but in any case not longer than twelve (12) months after the initial delivery date.

5.5 Warranty Disclaimers.

- (a) EXCEPT FOR THE EXPRESS REPRESENTATIONS AND WARRANTIES CONTAINED IN THIS AGREEMENT, NEITHER COMPANY NOR CITY MAKES ANY REPRESENTATIONS OR WARRANTIES TO THE OTHER, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. ALL OTHER REPRESENTATIONS AND WARRANTIES ARE HEREBY DISCLAIMED.
- (b) Further, COMPANY does not represents or warrants that any of its respective Deliverables provided under this Agreement functions without interruption and without error or that such Deliverable will operate in every combination desired by the other Party with any data, computer systems and programs of its choice or

that the remedying of one program error does not result in the occurrence of other program errors.

5.6 Warranty Limitations and Release. COMPANY shall be released from its warranty obligations under Sections 5.2 and 5.3, subject to Section 2.14, to the extent that any infringement, errors, fault or non-compliance arises due to circumstances for which COMPANY is not responsible, including without limitation: (a) modification of the Licensed Material after delivery to CITY, if such modification was not made or authorized by COMPANY; (b) use of the Licensed Material contrary to the Documentation provided by COMPANY; or (c) use of the Licensed Material other than in Target Environment or use of the Licensed Material in combination with products and systems not contemplated in the applicable Documentation or Specification; or (d) infringing element or defects contained in any CITY provided Material. Further, COMPANY shall not be considered to be in breach of the warranties to the extent that COMPANY offered to CITY a correction or Upgrade and CITY failed to implement such correction or Upgrade within the timeframe defined in section 5.4. In such cases, the work put in by the COMPANY in order to determine the cause of the fault and to remedy the fault shall be invoiced in accordance with the COMPANY's current rates of charges. This shall also apply to consequential services or supply of products in relation to such work, including but not limited to the delivery of a corrective code or a corrected version of the defective part of the Licensed Material or for instructions as to how the error can be avoided. The COMPANY shall also be released from its warranty obligations if the CITY does not complain of a program error promptly or does not put into productive operation a corrective code provided by the COMPANY in fulfillment of its warranty obligations or a correct Update or Version of the pertinent part of Licensed Material which it has supplied.

## 6. CONFIDENTIALITY

6.1 Obligations of Confidentiality. Each Party (in such capacity, the "**Receiving Party**") acknowledges and agrees to maintain the confidentiality of Confidential Information (as hereafter defined) of the other Party (in such capacity, the "**Disclosing Party**") provided by the Disclosing Party or otherwise received by the Receiving Party hereunder as allowed by State Statute. The Receiving Party shall not disclose or disseminate the Disclosing Party's Confidential Information to any Person or entity other than those directors, officers, employees, agents, subcontractors, Permitted Affiliates, Authorized Users of the Receiving Party who have a need to know it in order to assist the Receiving Party in performing its obligations, or to permit the Receiving Party to exercise its rights, under this Agreement unless required by State Statute or Court Order. In addition, the Receiving Party shall (a) take all reasonable steps to prevent unauthorized access to the Disclosing Party's Confidential Information; (b) not use the Disclosing Party's Confidential Information, or authorize other Persons or entities to use the Disclosing Party's Confidential Information, for any purposes other than in connection with performing the Receiving Party's obligations or exercising the Receiving Party's rights hereunder; (c) upon the request of the Disclosing Party and a reasonable opportunity to



comply, comply with any legal and/or regulatory requirements applicable to the Disclosing Party or its vendors regarding security and data protection (and in such cases, the Disclosing Party will reimburse the Receiving Party for the reasonable, actual additional costs, if any, incurred by the Receiving Party in complying with such requirements); and (d) promptly advise the Disclosing Party in the event it learns or suspects that any of the Disclosing Party's Confidential Information in the Receiving Party's possession has been revealed or improperly acquired by any third party, and shall assist the Disclosing Party in its efforts to retrieve the material and mitigate the effects of the exposure or loss. As used herein, "reasonable steps" means steps that a Party takes to protect its own confidential or proprietary information of a similar nature, which steps shall in no event be less than a reasonable standard of care.

## 6.2 RESERVED

Section 6.2 is intentionally left blank.

6.3 Exclusions. The provisions of this Article 6 respecting Confidential Information shall not apply to the extent, but only to the extent, that such Confidential Information: (a) is already known to the Receiving Party free of any restriction at the time it is obtained from the Disclosing Party; (b) is subsequently learned by the Receiving Party from an independent third party free of any restriction and without breach of this Agreement; (c) is or becomes publicly available through no wrongful act or omission of the Receiving Party; or (d) is independently developed by or for the Receiving Party without reference to or use of any Confidential Information of the Disclosing Party. Further, Receiving Party shall not be in breach for disclosure to the extent required pursuant to an applicable law, rule, regulation, government requirement or court order, or the rules of any stock exchange or self regulatory agencies (provided, however, that to the extent practicable and lawfully permitted, the Receiving Party shall advise the Disclosing Party of such required disclosure promptly upon learning thereof in order to afford the Disclosing Party a reasonable opportunity to contest, limit and/or assist the Receiving Party in crafting such disclosure).

6.4 Privacy Compliance. Notwithstanding any other provision of this License Agreement, to the extent Nonpublic Personal Information is disclosed to or otherwise obtained by COMPANY in connection with the matters contemplated by this Agreement, COMPANY will keep such Nonpublic Personal Information strictly confidential and strictly limit COMPANY's use thereof to the purposes contemplated by this Agreement. For the purposes of this provision, the term "**Nonpublic Personal Information**" is defined as any non-public personally identifiable information of an individual, including, but not limited to, CITY's or its Affiliates' customers or employees, including Authorized Users.

6.5 Receiving Party's Employees and Others. The Receiving Party shall take reasonable steps to advise its employees, agents, contractors, subcontractors, Authorized Users of the Receiving Party's obligations of confidentiality and non-use under this Article 6.

6.6 Return or Destruction of Confidential Information. Upon the Disclosing Party's written request at any time, including following the expiration or termination of this Agreement, the Receiving Party promptly shall cease to use the Confidential Information and return to the Disclosing Party, or destroy, all Confidential Information of the Disclosing Party provided under or in connection with this Agreement, including all copies, portions and summaries thereof, and shall provide the Disclosing Party with a written statement certifying that all such material has been returned or destroyed. Notwithstanding the foregoing sentence, if and to the extent the license and rights granted to the Receiving Party with respect to any Confidential Information survive the termination of this Agreement, Receiving Party may retain Confidential Information of Disclosing Party and use such information to the extent that such information is reasonably necessary in connection with Receiving Party's exercise of the license and rights as permitted under this Agreement; provided, however, that all such Confidential Information retained by the Receiving Party shall remain subject to the provisions of this Article 6 for so long as it is so retained. For greater clarity, COMPANY and CITY each acknowledges and agrees that nothing in this Article 6 shall entitle either party to require the other party to return, or cease Use of, any material (including, in the case of CITY, the Licensed Material) so long as the license granted to such party under this Agreement remains in effect, including by survival after termination of this Agreement to the extent such survival may be expressly provided hereunder. If requested by the Disclosing Party, the Receiving Party shall certify in writing its compliance with the provisions of this Section 6.6.

6.7 Lawful exercise of license or rights. Notwithstanding anything to the contrary in this Agreement as between the Parties, the title and ownership of Confidential Information shall remain exclusively with the Disclosing Party. Disclosure of Confidential Information of a Party to the other Party shall not be construed as a grant of any license or other rights in or to the Confidential Information except as specifically set forth in this Agreement. Nothing contained in this Article 6 is intended nor shall anything herein be construed as restricting either Party from lawfully exercising the rights and licenses granted to such Party under this Agreement and any such use, copying or disclosure made by a Party in exercise of such Party's license rights and subject to the restrictions applicable to the license shall not be considered as a breach of this Article 6.

6.8 Survival of obligations. The obligations under this Article 6 shall survive the termination of this Agreement.

6.9 Cumulative Remedies. Each Party shall have and may cumulatively exercise all rights at law or in equity for the protection of its Confidential Information, including obtaining an injunction enjoining the breach or threatened breach of this Article 6.

## **7. OWNERSHIP AND PROPRIETARY RIGHTS**

7.1 Product and the Licensed Material. CITY acknowledges and agrees that COMPANY does and will continue to own all Intellectual Property and Intellectual Property Rights in or attached to the Product and Licensed Material, including without limitation, in or attached to any Enhancement and Upgrades and any Derivative Works thereof even if

made by or on behalf of the CITY. Nothing contained herein shall be construed as a transfer, assignment or conveyance by COMPANY to CITY of the ownership, interest or title to the Intellectual Property or Intellectual Property Rights in or attached to the Licensed Material or any Enhancements, Upgrades or Derivative Works thereof. Subject to the provisions of this Agreement, CITY shall have the non-exclusive license and rights granted by COMPANY pursuant to Article 2 hereunder.

- 7.2 CITY Material. The ownership and title in any Intellectual Property and Intellectual Property Rights in or attached to any CITY Deliverables and CITY Proprietary Material that CITY provides to COMPANY in connection with the performance of Services or for incorporation in the Licensed Material shall remain with CITY and its applicable licensors and nothing contained in this Agreement is intended to nor shall be construed to effect any transfer of ownership rights or title of CITY or its licensors to COMPANY. To the extent any CITY Deliverables or CITY Proprietary Materials are used or incorporated in the Licensed Material, CITY hereby grants to COMPANY a non-exclusive, irrevocable, worldwide, fully paid up and royalty free right and license to use, copy, display, sublicense and distribute such material as part of Licensed Material and/or COMPANY's product(s) and to create Derivative Works thereof within any future Enhancement of or Upgrade to the Licensed Material, provided that such right and license shall exclude all Marks of CITY.
- 7.3 Trademarks. Nothing herein is intended to provide any Party any right to use or exploit any trademark, service mark, business name, trade dress or logo ("**Mark**") of the other Party, and neither Party shall utilize any such Mark of the other Party without the express written consent of the other Party unless it is obligated to reproduce such Mark under this Agreement.
- 7.4 COMPANY's Marketing Rights. Nothing in this License Agreement shall prevent COMPANY from transacting similar business either for itself or for any other Person or to offer same or similar products or services to any third parties.
- 7.5 Residual Knowledge. Nothing in this License Agreement is intended to prevent either Party from using the knowledge, skill and general experience gained by it or its employees in the performance of this License Agreement to the extent they are retained in the unaided memories of such Party's personnel. Such personnel's memory will not be considered to be unaided if such personnel makes reference to refresh his memory to documents containing Confidential Information belonging to the other Party or the Source Code of the other Party. Nothing contained in this Section 6.6 shall be construed as granting separate license to the Intellectual Property or Confidential Information by one Party to the other Party.
- 7.6 Ownership of Data. COMPANY acknowledges that all data related to this project (including but not limited to names, addresses, personal contact information of people involved in an incident; photographs; investigative materials; correspondence; identifying and tracking information; maps; and all other CITY records), either as provided initially by the CITY; in subsequent data transmittals; or as keyed, delivered, interfaced or otherwise created in the system, is the sole and exclusive property of the

CITY The COMPANY makes no claim on the data, and agrees to securely maintain the data, in such manner as is defined within this agreement; to freely release all data at the end of the agreement for any reason; and to permanently remove all data from their systems once the CITY has issued a written receipt for the data's return.

- (a) The COMPANY will make copies of all of the CITY's data within ten (10) days of receipt of the CITY's written request for such data. The data is to be delivered via electronic media, in a format mutually agreed upon by the CITY and the COMPANY. Proof of receipt of a request is constituted by the delivery acknowledgment provided by third party package handlers or by the US Postal Service. The CITY agrees to bear reasonable costs for extracting the data, not to exceed \$1,000 dollars.
- (b) If the COMPANY fails to deliver the data within ten (10) days of receipt of a request; or upon termination of the contract; or if the COMPANY fails to either securely maintain all data files while they are in possession of them, or to completely erase all the data from the COMPANY's possession after the data has been returned to the CITY upon termination of this agreement; then the COMPANY shall be liable for all costs, fees and damages incurred by the CITY as a result of the COMPANY's actions.

## **8. RESERVED**

Section 8 is intentionally left blank.

## **9. INDEMNIFICATION**

### **9.1 Infringement Indemnity by COMPANY.**

- (a) To the extent a Party becomes aware, such Party shall promptly and fully notify the other Party of any Claim by any third party asserting that the Use by CITY or an Authorized User of the Licensed Material infringes or is likely to infringe the Intellectual Property Rights of such third party. COMPANY will defend, indemnify and hold harmless CITY, Authorized Users, and CITY's directors, officers, employees and agents (collectively, "**CITY Indemnified Parties**") from any and all Losses arising from any such Claim, provided that COMPANY shall have no obligations to CITY or CITY Indemnified Parties under this Section 9.1 or Section 9.2 below.

### **9.2 Additional Obligation of COMPANY.** Subject to the forgoing provisions, in the event that any infringement Claim is initiated against COMPANY or a CITY Indemnified Party, or in COMPANY's sole opinion is likely to be initiated for the COMPANY is liable in terms of Section 9.1 above, then COMPANY shall have the option, at its expense, to either:

- (a) modify or replace the infringing part of the Licensed Material so that such part is no longer infringing, provided that the functionality and performance of the

Licensed Material continues to perform and operate at least in an equivalent manner and with equivalent functionality; or

- (b) procure for CITY, Permitted Affiliates, Authorized Users the right to continue using the infringing Licensed Material.

In either case, the COMPANY shall act as promptly as possible and in a manner which will avoid unreasonable disruption to CITY's operations. If neither of options (a) and (b) under Section 9.2 is reasonably possible or effective, COMPANY shall accept the return of the Licensed Material and terminate all rights and licenses granted to CITY under this Agreement and refund to CITY an amount equal to the unamortized balance of the License Fee paid by CITY under this Agreement, calculated on a straight line basis over a period of five years commencing on the Effective Date of this Agreement. The provisions of Section 9.1 and 9.2 state COMPANY's entire liability and CITY's sole remedies with respect to infringement.

### 9.3 CITY's Infringement Indemnity.

- (a) Subject to subsection 9.3(b), CITY shall defend, indemnify and hold harmless COMPANY and its directors, officers, employees and agents (collectively, "**COMPANY Indemnified Parties**") from and against any Losses arising from any third party Claim against one or more COMPANY Indemnified Parties in which it is alleged that the Use by COMPANY of any CITY Material in connection with this Agreement constitutes an infringement of or misappropriation of the Intellectual Property Rights of any third party, provided that CITY shall have no obligation to COMPANY and in such cases COMPANY shall defend, indemnify and hold the CITY Indemnified Parties harmless, to the extent such infringement Claim arises as a result of (i) modification of a CITY Material by or for COMPANY other than to perform the Services to be provided under this License Agreement, Attachments and Statement of Work or at the direction of CITY; (ii) use by COMPANY of the CITY Material other than in accordance with applicable documentation or instructions provided by CITY or use of the CITY Material by COMPANY in combination with products and systems not contemplated in this Agreement, a Statement of Work, the applicable Documentation or Specifications; (iii) COMPANY's failure to implement reasonable corrections, revisions or upgrades provided by CITY at CITY's cost, the use of which would have prevented any such Claim for infringement without materially impacting COMPANY's use of the CITY Material; or (iv) use of a CITY Material outside the scope of the Licensed Material or Services. CITY agrees not to perform actions which would result in a claim under the conditions in the preceding sentence.
- (b) Notwithstanding anything to the contrary herein, CITY makes no representation or warranty, and COMPANY expressly waives any obligation by CITY of indemnification, with respect to the use of a CITY Material by any Person other than COMPANY, and shall assume no liability with respect to any Claims or

Losses that may be made against or incurred by COMPANY, any COMPANY Indemnified Party or any other Person for the use of such materials beyond the Licensed Material provided to CITY hereunder or performance of the Services provided to CITY herein.

#### 9.4 **RESERVED**

Section 9.4 is intentionally left blank.

- 9.5 **Additional Provisions for Indemnification.** A Party seeking indemnification shall provide the other Party with prompt written notice of any Claim or Losses for which such Party is seeking or may seek indemnification hereunder (provided that the failure of the Party seeking indemnification to promptly notify the indemnifying Party hereunder shall not relieve the indemnifying Party of any liability with respect to the Claim or Losses, except to the extent the indemnifying Party demonstrates that the defense of the Claim or the avoidance or mitigation of any Losses is prejudiced by such failure). An indemnifying Party shall: (a) keep the other Party fully informed concerning the status of any litigation, negotiations or settlements of any such Claim; and (b) allow the other Party, at its own expense, to participate in such litigation, negotiations and settlements with counsel of its own choosing. The indemnified Party shall tender defense of the Claim to the indemnifying Party and provide reasonable cooperation (at the indemnifying Party's expense) and full authority to defend or settle the Claim. Notwithstanding the forgoing, neither Party shall have the right to settle any Claim without the prior written consent of the other Party if such settlement contains a stipulation to, or an admission or acknowledgement of, any wrongdoing (whether in tort or otherwise) on the part of the other Party. The indemnifying Party shall have no obligation to indemnify any amount in settlement agreed by the Indemnified Party unless the indemnifying Party agreed to such settlement.

### 10. **LIMITATION OF LIABILITY**

- 10.1 **SUBJECT TO THE SPECIFIC REMEDIES IF ANY SET FORTH IN THIS AGREEMENT WITH RESPECT TO ANY CLAIM CONCERNING PERFORMANCE OR NON PERFORMANCE OF THE LICENSED MATERIAL PURSUANT TO OR IN ACCORDNACE WITH THE TERMS OF THIS AGREEMENT AND THE DOCUMENTATION OR ANY CLAIM FOR BREACH OR DEFAULT OF THE COMPANY, THE CITY'S EXCLUSIVE REMEDY SHALL BE THE RECOVERY OF THE DIRECT DAMAGES ACTUALLY SUFFERED BY IT INCLUDING BUT NOT LIMITED TO ALL FEES PAID TO COMPANY.**
- 10.2 **GENERAL EXCLUSION.** EXCEPT WITH RESPECT TO BREACH OF THE LICENSE CONDITIONS AS SET FORTH IN SECTION 2, BREACH OF CONFIDENTIALITY OBLIGATIONS AS SET FORTH IN SECTION 6 AND INDEMNIFICATION CLAIMS FOR INFRINGEMENT AS SET FORTH IN ARTICLE 9, UNDER NO CIRCUMSTANCES SHALL EITHER PARTY HAVE ANY LIABILITY TO THE OTHER FOR LOSS OF OR DAMAGE TO REVENUES,

PROFITS, OR GOODWILL OR OTHER SPECIAL, INDIRECT, CONSEQUENTIAL, EXEMPLARY, INCIDENTAL OR PUNITIVE DAMAGES, WHETHER IN CONTRACT, TORT OR ANY OTHER THEORIES IN LAW OR EQUITY, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

- 10.3 Additional Liability Exception. The limitation of liability set forth in Section 10.2 shall not be applicable to liability for any unpaid fees due for the license under this Agreement.
- 10.4 Back up date. The CITY shall be responsible for daily backing up all data and databases used with the Licensed Material. The CITY assumes full responsibility for the use of the Licensed Material and any information entered, used and stored thereon, including, without limitation, protection of data from viruses, or any unintended modification, destruction or disclosure, and for the accuracy and integrity of the results. The COMPANY assumes no responsibility for CITY's negligence or failure to retain back up data at regular intervals or protect data from viruses, or any unintended modification, destruction, or disclosure of any data, software or other information.
- 10.5 The CITY acknowledges and agrees that the allocation of risk contained in this Section 10 is reflected in the fees and other charges under this Agreement and is a reasonable allocation of the risk between the parties.

## **11. TERM AND TERMINATION**

- 11.1 Term. The term of this License Agreement shall commence as of the Effective Date and shall continue to remain in effect until the expiration of the initial term running until the end of the calendar year which contains the fifth anniversary its effective date, unless and until it is terminated in accordance with the provisions of this Agreement (“**Term**”) and may be extended by the parties thereafter as per the procedure laid down below.
- 11.2 No later than one (1) year before the expiry of the initial term of the License Agreement the CITY may make a written request for extension of this Agreement by a further term of one (1) calendar year in return for payment of the applicable license and maintenance fee set down in the Appendix. Thereafter, the CITY may similarly request extension by further periods of one (1) calendar year, allowing one (1) month notice. The COMPANY may refuse extension only for a serious reason, i.e. if the COMPANY ceases to carry on its business or loses the license for distribution of the Licensed Material or the CITY commits any material breach of its obligations. Should the CITY fail promptly to extend the License Agreement, it shall end automatically upon the expiry of the then current term. The duration of the Appendices shall be determined by the arrangement made therein. In the absence of a special arrangement, the Appendices shall have the same duration as this License Agreement and shall be extended with it.

In every case, the termination of this License Agreement shall also occasion the termination of all its Appendices.

### 11.3 Termination for Material Breach.

11.3.1 In the event of a material breach of the provisions of the Agreement or this License Agreement by CITY, COMPANY may terminate this Agreement and all applicable licenses, upon written notice to the CITY, if the CITY fails to cure such breach within thirty (30) days following written notice thereof from COMPANY.

11.3.2 In the event of a material breach of the provisions of the Agreement or this License Agreement by COMPANY, CITY may terminate this Agreement and all applicable licenses, upon written notice to the COMPANY if the COMPANY fails to cure such breach within thirty (30) days following written notice thereof from CITY

11.4 Termination for Change of Control. In the event of a material change of ownership, control or business purpose by the COMPANY, the CITY shall at its sole discretion have the right to ascertain the ability of the new ownership to perform under the terms of this License Agreement. Such assessment shall include interviews discussions, and negotiations with the new ownership, and shall be completed in not more than 180 days from the time that the City is made aware of the change in ownership. Based on its assessment, the CITY shall either renew the License Agreement with the new owners under the then current terms, or if the CITY is unable to be satisfied that the terms and rights can be upheld by the new ownership, the CITY may seek such replacement of functionality ("replacement") as it believes serves its interest, such Replacement to be completed in not more than twelve (12) months. While the Replacement is in progress, CITY may continue to use the software, and for the period that the CITY continues to pay maintenance, receive the level of support provided under this License Agreement. At the end of the twelve month Replacement period, this License Agreement shall be terminated.

### 11.5 Effect of Termination:

- (a) In the event of termination of this Agreement for any reason whatsoever, the rights and licenses granted to the CITY will immediately terminate and the licensee will have no further right to use the software. Within thirty (30) days after the termination, CITY must return all the copies of the software, documentation and Confidential Information in its possession or control to the licensor, or permanently destroy or disable all such copies. If requested by the COMPANY, a duly authorized officer of the CITY will certify in writing to the licensor that the licensee has taken such action. The sole exception is the right of CITY to retain CITY'S data and the COMPANY shall grant CITY a limited licenses to use the associated schema for the database in which such data exists for the purposes of transition for a period not to exceed 12 months. CITY agreed to treat such Schema as the Confidential Information of COMPANY and shall not



disclose such schema to any third party without the prior written consent of COMPANY.

- (b) Termination shall be without prejudice to any other rights or remedies a party may be entitled to hereunder or at law and shall not affect any accrued rights or liabilities of either party nor the coming into force or continuation in force of any provision hereof which is expressly intended to come into force or continue in force on or after such termination.
- (c) In the event of this Agreement being determined by whichever party and for whatsoever reason, the CITY shall be liable to make payments of the entire amount due under this Agreement for the services rendered by the COMPANY up to the effective date of termination in terms of this Agreement.
- (d) Forthwith on the expiry or earlier termination of this agreement, each party shall, return to the other party all documents and materials and Confidential Information, belonging to the other party with regard to this Agreement, or shall at the option of the disclosing party destroy under written certification by an authorized officer of the other party all documents or materials in connection with this Agreement in a manner that the subsequent retrieval thereof is rendered impossible by any method

## **12. MISCELLANEOUS**

- 12.1 Default and Other Remedies. Nothing herein shall preclude either Party from seeking money damages or injunctive relief to prevent unauthorized use of the Licensed Material or CITY Proprietary Material in the event of a breach of this Agreement.
- 12.2 Remedies. Except as otherwise provided herein, no right or remedy herein conferred on or reserved to either Party is intended to be exclusive of any other right or remedy, and each and every right and remedy will be cumulative and in addition to any other right or remedy under this Agreement or under applicable law, whether now or hereafter existing.
- 12.3 Injunctive Relief and Special Performance. COMPANY and CITY agree that a breach by either of them of its obligations under Article 2, Article 5, Article 6 or Article 11 may cause irreparable harm which cannot be compensated in money damages. Accordingly, COMPANY and CITY each agree that in the event either Party breaches any of the provisions in Article 2, Article 5, Article 6, or Article 11 the other Party shall be entitled to seek injunctive relief or specific performance in addition to its other remedies.
- 12.4 Relationship of Parties. The relationship of the Parties shall be that of independent contractors. Any employee, subcontractor or agent of COMPANY who is assigned to provide Services under this Agreement shall remain at all times under the exclusive direction and control of COMPANY and shall not be deemed to be an employee, subcontractor or agent of CITY. Neither Party will represent that it has any authority to assume or create any obligation, express or implied, on behalf of the other Party, or to

represent the other Party as agent, employee, or in any other capacity, except as specifically provided herein.

#### 12.5 Binding Effect; Assignment.

- (a) This Agreement shall be binding on and inure to the benefit of the respective Parties and their permitted successors and assigns. Neither Party may sell, transfer or assign any right or obligation hereunder, except as expressly provided herein, without the prior written consent of the other Party. Any assignment in violation of this Section 12.4 shall be void.
- (b) CITY shall have the right to assign or transfer (including by merger or otherwise by operation of law) all of its rights, duties and obligations under this Agreement to (i) any entity that is an Affiliate of CITY in connection with an internal reorganization of the business of CITY; or (ii) a purchaser of all or substantially all of CITY's capital stock, assets and business involving the line of business that primarily utilizes the Licensed Material; provided that with respect to subsections (i) and (ii), the resulting assignment shall not expand the scope of the licenses granted hereunder. The foregoing assignment shall be valid only if (A) CITY provides prior written notice to COMPANY and (B) such assignee or transferee shall have expressly assumed in a written agreement with COMPANY, the rights, duties and obligations of CITY under this Agreement. No such assignment or transfer shall operate to release CITY of its duties or obligations under this Agreement, absent an express written release executed and delivered by COMPANY (it being understood and agreed that COMPANY shall not unreasonably withhold its consent to such a release if the assignee or transferee is the operator or successor to CITY's line of business involving the Licensed Material).
- (c) COMPANY shall have the right to assign or transfer (including by merger or otherwise by operation of law) its rights, duties and obligations under this Agreement with the consent of CITY. CITY agrees not to unreasonably withhold consent, subject to the terms of section 11.4.

12.6 No Waiver. Either Party's failure to exercise any right under this Agreement shall not constitute a waiver of any other terms or conditions of this Agreement with respect to any other or subsequent breach, or a waiver by such Party of its right at any time thereafter to require exact and strict compliance with the terms of this Agreement. In order to be effective, all waivers under this Agreement must be in writing and signed by the waiving Party.

12.7 Notices. All notices, as required by the contract, and other communications required under this Agreement shall be in writing and sent to the address stated below, or to such other address as shall be given by either Party to the other in writing, and shall be effective: (i) upon actual delivery if presented personally or sent by express overnight courier such as Federal Express (with a signature acknowledging receipt), or (ii) seven

days following deposit in the mail if sent by certified or registered mail, postage prepaid, return receipt requested.

If to COMPANY:

With a copy to:

If to CITY:

City of Tucson  
255 W. Alameda, 6<sup>th</sup> Floor  
Tucson, Arizona 85701  
Attention: Department of Procurement  
Telephone: 520-791-4217  
Facsimile: 520-791-4735

With a copy to:

City of Tucson  
IT Department  
481 W Paseo Redondo  
Tucson, Arizona 85701  
Attention: Contracts Administrator  
Telephone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_

Notwithstanding the foregoing, day-to-day communications between the Parties may be made by phone, facsimile transmission, e-mail or any other method agreed to by the Parties.

12.8 Applicable Law. This Agreement shall be governed by laws of the State of Arizona, without giving effect to the conflicts of law principles thereof.

12.9 Cooperation. Each Party to this Agreement agrees to execute and deliver all documents and to perform all further acts and to take any and all further steps that may be reasonably necessary to carry out the provisions of this Agreement and transactions contemplated thereby. Each Party shall perform its obligations hereunder acting in a fair and reasonable manner.

12.10 Headings. The various headings and subheadings in this Agreement are inserted for convenience only and shall not affect the meaning or interpretation of this Agreement or any provision hereof.

12.11 Severability. The invalidity of one or more phrases, sentences, sections, clauses or articles contained in this Agreement shall not affect the remaining portions of this

Agreement or any part thereof; and in the event that one or more phrases, sentences, sections, clauses or articles shall be declared void or unenforceable by any court of competent jurisdiction or by any government or regulatory agency, such provision will be deemed restated, in accordance with applicable law, to reflect as nearly as possible the original intentions of the Parties, and this Agreement shall be construed as if any such phrases, sentences, clauses and articles had not been inserted herein.

12.12 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

12.13 Enurement. This Agreement shall enure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns.

**IN WITNESS WHEREOF**, the Parties have caused this Agreement to be duly executed as of the day and year first written above.

**CITY OF TUCSON**

**[COMPANY NAME]**

By: \_\_\_\_\_

Name: Laura Jestings

Title: Contract Administrator

Date: \_\_\_\_\_

By: \_\_\_\_\_

Name:

Title:

Date: \_\_\_\_\_

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**Attachment A**  
**PRODUCT COVERED BY THIS AGREEMENT**

## **Attachment B**

**LICENSED MATERIALS (INCLUDING THIRD PARTY OR ANCILLARY SOFTWARE)**

**Attachment C**  
**MAINTENANCE AND SUPPORT AGREEMENT**



**Attachment D**  
**TARGET ENVIRONMENT**