

## PO TERMS AND CONDITIONS FOR PURCHASE OF IT SOFTWARE

1. **INTRODUCTION:** The following terms and conditions apply to all purchases of software and products by or on behalf of the City unless specifically provided on the Purchase Order and/or incorporated by reference herein.
2. **TERM OF AGREEMENT:** Vendor will become effective upon Effective Date of the Purchase Order and will expire upon the Expiration Date printed on the front of this document and/or when all software and products have been received and accepted by the City in accordance with this agreement and the final payment is made.
3. **INCLUDED PARTIES:** Contractor will accept orders from and furnish the Products under this Agreement to any governmental agency or other public entity authorized to use the products pursuant to any interlocal or other such agreement, at prices not to exceed those prices specified in the published Agreement.
4. **PRICE AND PAYMENT**
  - 4.1 Invoices. Payment shall represent the full compensation for all Software and products provided by the Contractor. Undisputed invoices shall be due and payable on receipt within 30 days.
  - 4.2 Disputes and Interest. City shall notify Contractor of any disputed amount within twenty (20) business days of receipt of the applicable invoice by City's Representative. Contractor shall perform the duties in an efficient, competent and timely manner and exercise reasonable care, skill and diligence in the performance thereof.
5. **RISK OF LOSS:** The risk of loss for the Deliverables hereunder shall pass to City upon the completion of both (a) Delivery of that Deliverable to (i) the Designated Location; or (ii) another location owned or controlled by City and specified by City for such delivery, and (b) the signature of a person authorized to receive the delivery.
6. **CITY PROPERTY:** Unless otherwise specified, title to any Deliverable provided under this Agreement shall pass to City upon its acceptance of the Deliverable.
7. **REPRESENTATIONS AND WARRANTIES**
  - 7.1. Authority. Contractor represents and warrants that (i) Contractor has the power and authority to enter into and perform this Agreement, and all associated documents including, but not limited to, attachments and addendums collectively.
  - 7.2. Contractor Responsibility. For all such Deliverables, including, but not limited to, Software and Third Party Products provided by Contractor and/or under this Agreement, Contractor shall be the primary point of contact and shall be responsible for coordinating the delivery of all Deliverables to City and taking commercially reasonable action to cause Deliverables to conform to and be delivered as provided in the applicable warranty statement(s) or other documents attached hereto and incorporated herein by reference.
  - 7.3 Non-discrimination/Affirmative Action. The Contractor agrees not to discriminate against any employee or any other person in the performance of this Agreement because of race, creed, color, national origin, marital status, sex, age, disability or other circumstances as may be defined by federal, state or local law or ordinance, except for a bona fide occupation qualification.
8. **WARRANTY OF PERFORMANCE**
  - 8.1. For a period of 2 years from date of this Agreement Contractor warrants that the software will perform in accordance with the specifications and requirements contained in this Agreement. Contractor warrants to City that the deliverables will perform in accordance with the description of the functions and capabilities as described in Contractor's Documentation, provided that the deliverables are properly used in accordance with Contractor's instructions.
  - 8.2. Intellectual Property Rights. Contractor represents and warrants that: all Software provided to City does not and will not infringe any patents, copyrights, trademarks, or other intellectual property rights (including trade secrets), privacy or similar rights of any third party, nor has any claim (whether or not embodied in an action, past or present) of such infringement been threatened or asserted, nor is such a claim pending against Contractor (or, insofar as Contractor is aware, any entity from which Contractor has obtained such rights).
  - 8.3. Right to Sell. Contractor represents and warrants that it owns or has the absolute right to sell, license, or otherwise grant the rights in the Software conveyed to City herein, and that neither the Software nor any of its components (including any third party products), infringes any patent, copyrights, or other intellectual property right of, or misappropriates the trade secrets of, any person or entity.
  - 8.4. Compatibility. Contractor represents and warrants that the Software is compatible with City's computing environment, including network, and platforms, as described in this Agreement.
  - 8.5. Quiet Enjoyment. Contractor represents and warrants that the Software is the sole and exclusive property of Contractor or that Contractor is authorized to provide full use of the Software to the City as provided herein and that Software is not subject to any lien, claim, or encumbrance inconsistent with any of City's rights under this Agreement and that City is entitled to, and shall be able to enjoy quiet possession and use the Software without interruption by Contractor or its agents.
  - 8.6. Adequate Resources. Contractor represents and warrants that it has the resources, personnel, expertise and corporate infrastructure available to deliver the Software and meet any milestones and/or deadlines imposed by this Agreement.
  - 8.7. Product Condition. Contractor represents and warrants that unless otherwise specified, each Product delivered shall be delivered new and not as a "used, substituted, rebuilt, refurbished or reinstalled" Product.
  - 8.8. Specifications. Contractor represents and warrants that all Products provided by Contractor shall meet or exceed the specifications set forth in Contractor's informational materials or design specifications.
  - 8.9. Warranty of Product. These representations and warranties are in addition to any other warranties afforded by law.
9. **NOTIFICATION OF DEFECTS:** Contractor agrees to notify City in writing of all material defects in the Software, whether discovered by other parties or by Contractor, within ten (10) business days of their discovery and fix or replace the effective software within a commercially reasonable time. A

defect is considered material if it has the potential to delay or inhibit the primary functionality of the Software or if said defect has the potential to corrupt City data.

#### **10. REMEDY FOR NONCONFORMITY**

10.1 If the Software does not perform in accordance with description of the functions and capabilities as described in Contractor's Documentation said nonconformance will be considered a breach. The City shall notify Contractor, in writing, specifying in reasonable detail the reason for the claimed breach, as soon as practicable after discovery of the breach. Contractor shall then, at its own expense, replace, or make such corrections to the Software as necessary to cure the deficiency. Contractor shall notify City, in writing, when such corrections have been completed. If Contractor fails to replace or correct the nonconforming Software to City's reasonable satisfaction, then City may, at its option, notify Contractor that it intends to discontinue use of the Software and return all Software to Contractor. Upon return of the Software, Contractor shall refund all Software fees paid to Contractor under this Agreement.

#### **11. TERMINATION**

11.1 Grounds for Termination. City may terminate this Agreement upon thirty (30) days written notice. If Contractor is found to have breached a warranty under Section 10 of this Agreement, the PO shall terminate immediately and the City shall not be financially obligated for any costs associated with this Agreement and shall be reimbursed for any payments made. Additionally, in the event that Contractor is in default of a material obligation, which default remains uncured more than thirty (30) days after receipt of written notice of default, City, in addition to any other rights available to it under law or equity, may terminate this Agreement by giving written notice to Contractor. Contractor specifically shall be deemed in default if the Software continues to exhibit defects causing serious disruption of use and/or repeated periods of downtime, notwithstanding Contractor's remedial or maintenance efforts, over a continuous period of sixty (60) days.

11.2. Acts Of Insolvency. The City may terminate this Agreement by written notice to Contractor if Contractor or Subcontractor(s) becomes insolvent, makes a general assignment for the benefit of creditors, suffers or permits the appointment of a receiver for its business or assets, becomes subject to any proceeding under any bankruptcy or insolvency law whether domestic or foreign, or has been liquidated voluntarily or otherwise.

11.3 Bankruptcy or Failure to Provide Service. In the event Contractor or Subcontractor(s) shall cease doing business, shall be declared bankrupt or shall fail to perform its obligations under this Agreement, or if any software supplied to City is no longer protected by the laws respecting proprietary interests, then the license granted under this Agreement shall, at the option of City, terminate upon ten (10) days written notice from City, and all right, title, and interest in Software shall immediately be vested in City, without the payment of any compensation to Contractor.

**12. ENTIRE AGREEMENT:** This Agreement, together with any attachments and/or addenda, represents the entire and integrated Agreement between the parties hereto and supersedes all prior negotiations, representation or agreements, either written or oral. This Agreement may be amended, modified, or added to only by written instrument properly agreed to by both parties.

**13. NON WAIVER OF RIGHTS:** Any failure by the City to enforce strict performance of any provision of the Agreement will not constitute a waiver of the City's right to subsequently enforce such provision or any other provision of the Agreement.

**14. SEVERABILITY:** In the event that any clause of this Agreement is found by a court validly asserting jurisdiction to be invalid or otherwise unenforceable, that clause will be considered void to the extent it is contrary to the applicable law, but such a finding shall not affect the validity of any other clause of the Agreement, and the rest of the Agreement shall remain in full force and effect.

#### **15. DELAYS AND REMEDIES**

15.1 Termination of this Agreement shall not affect any right of action of either party prior to the termination being affected. All remedies shall be cumulative and may be exercised concurrently, or separately, which shall not be deemed to constitute an election of any one remedy to the exclusion of any other. In addition to any other remedy provided for herein, or at law or equity, City shall have the right to recover from Contractor all damages reasonably caused by default of any representation or warranty. Contractor shall not disable the Software in any fashion. Contractor's remedy is for monetary damages and does not include return of the Software. This paragraph shall not limit City's right to pursue any other remedy available to it in law, at equity or pursuant to this Agreement.

#### **16. DISPUTE RESOLUTION**

16.1. The parties desire, if possible, to resolve disputes, controversies and claims ("Disputes") arising out of this Agreement without litigation. To that end upon written notification of dispute by a party to the other, each party shall appoint a knowledgeable, responsible management representative to meet and negotiate in good faith to resolve any Dispute arising under this Agreement

16.2. If negotiations do not resolve the Dispute within sixty (60) days, the Dispute shall be submitted to the parties' respective legal departments for further action, and if not resolved after thirty (30) days, unless otherwise agreed, the matter shall be submitted to nonbinding mediation by a mediator mutually acceptable to the parties, or in the absence of such agreement, with Judicial Dispute Resolution, LLC. Such mediation shall be conducted pursuant to the rules and procedures of mediation promulgated by the American Arbitration Association.

16.3. Each party shall bear its own cost of these dispute resolution procedures. The parties shall equally share the fees of the mediation and the mediator.

**17. ATTORNEY'S FEES:** In the event any legal action is brought about by either party to enforce the terms of this Agreement, the non-prevailing party shall reimburse the prevailing party for all reasonable and applicable legal expenses including attorney fees and costs associated with the action.

**18. SALES, USE AND PROPERTY TAX:** City shall pay all applicable sales, use, value added and similar taxes to Contractor, and Contractor shall remit all such taxes, if imposed by local and/or state authorities on all software, software, and other taxable goods purchased by the City under this Agreement. All such taxes currently known to Contractor have been included in the Purchase Order Price.

**19. FORCE MAJEURE/EXCUSABLE DELAY:** Neither

party shall be responsible for failure to fulfill its obligations hereunder or liable for damages resulting from unforeseen circumstances, including but not limited to delay of carriers, complete or partial shutdown of plant, unavailability of software or software from suppliers, acts of God, war, riot or insurrection, embargoes, acts of government, civil or military authorities, catastrophe, fire, floods, strikes, shortages of transportation, or material acts of a public enemy, or the actions or omissions of the other party or its officers, directors, employees, agents, contractors or elected officials and/or other similar occurrences beyond the non-performing party's reasonable control.

## **20. COMPLIANCE WITH LAWS**

20.1. Contractor shall comply with all current federal, state, and local laws and ordinances applicable to the work performed under this Agreement, including where applicable Bellevue City Code.

20.2 Governing Law. The Agreement will be governed by the laws of Washington and its choice of law rules. The Contractor irrevocably consent to the exclusive personal jurisdiction and venue of the federal and state courts located in King County, Washington.

**21. PROBLEM NOTIFICATION:** Contractor will promptly notify City in writing of any events or circumstances that will affect Contractor's performance of its obligations under this Agreement, and/or Delivery of any Deliverable, or substantially delay completion of the Project.

## **22. INDEPENDENT CONTRACTOR RELATIONSHIP:**

Contractor and City intend that an independent contractor-client relationship will be created with this Agreement. City is interested only in the results to be achieved, and conduct and control of the work will lie solely with Contractor. Contractor shall not be considered an agent or employee of City for any purpose, and the employees of Contractor and are not entitled to any of the benefits that City provides for its employees.

## **23. INDEMNIFICATION**

23.1. Indemnification by City. City shall protect, defend, indemnify and save harmless Contractor, its successors and assigns together with its officers, directors, employees, and agents only from and against any and all liabilities, damages, costs, expenses, causes of action, claims, suits, proceedings and judgments (collectively "Claims") which they may incur or suffer or be put to by reason of or in connection with or arising from any breach, violation or nonperformance by City of any obligation contained in this Agreement or the Non-Disclosure Agreement to be observed or performed by City, or any wrongful act or negligence of City or its agents or employees which relates to this Agreement or the Non-Disclosure Agreement, howsoever arising.

23.2. Indemnification by Contractor. Contractor shall protect, defend, indemnify and save harmless City, its successors and assigns together with its officers, directors, employees, and agents only from and against any and all Claims which they may incur or suffer or be put to by reason of or in connection with or arising solely from any breach, violation or non-performance by Contractor of any obligation contained in this Agreement or the Non-Disclosure Agreement to be observed or performed by Contractor or any wrongful act or negligence of Contractor or its agents or employees which relates to this Agreement or the Non-Disclosure Agreement, howsoever arising.

23.3. Contractor shall protect, defend, indemnify, and save harmless City, its successors and permitted assigns together with its officers, directors, employees, and from and against any third party claim to the extent attributable to a violation of the warranty set forth under the heading "Intellectual Property Rights" in Section 9.2 of this Agreement. If any applicable infringement claim is initiated, or in Contractor's sole opinion is likely to be initiated or likely to be initiated, then Contractor shall have the option, at its expense, to:

- a) in addition to any other requirements of this section, modify or replace all or the infringing part of the Software so that it is no longer infringing, provided that the Software functionality does not change in any material adverse respect; or
- b) procure for City the right to continue using the infringing part of the Software.

## **24. CONFLICT OF INTEREST**

24.1 Contractor shall notify City of any potential conflict of interest resulting from the representation of or service to other clients. If such conflict cannot be resolved to City's satisfaction, City reserves the right to cancel the purchase order and to terminate this Agreement and is entitled to a refund of all monies paid under this Agreement.