

CITY OF OAKLAND

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OAKLAND

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# AGENDA REPORT

TO: Sabrina B. Landreth  
City Administrator

FROM: Katano Kasaine  
Interim CIO & Treasurer

SUBJECT: Oracle R12 Project Status Update

DATE: February 1, 2016

City Administrator Approval  Date: 

## RECOMMENDATION

Staff Recommends That The City Council Receive A Status Report On The Project Related To The Re-Implementation Of The Oracle Systems And Adopt A Resolution Authorizing The City Administrator Or Designee To: (1) Purchase Hyperion Hardware And/Or Software, Licensing and Maintenance Services for the New City Budgeting System From Oracle Corporation In The Estimated Amount Of \$75,000.00; And (2) Enter Into A Contract with InnoFin Solutions, LLC To Provide Professional Services To Implement The New Municipal Budgeting System In The Estimated Amount Of \$879,000.00; And Waive The Advertising, Bidding And Request For Proposal/Qualifications ("RFP/Q") Competitive Selection Requirements For The Above Contracts

## EXECUTIVE SUMMARY

The City is currently in the process of re-implementing its Oracle system. This report will provide the current status of the project as requested by the City Council during the September 29, 2015 Special Finance and Management Committee meeting. Contracts have been finalized with respect to the infrastructure remediation and Oracle E-Business Suite ("EBS") re-implementation.

Staff recommends that the City Council approve a resolution to purchase the necessary hardware and/or software licenses from Oracle Corporation for the new municipal budgeting system – namely, Oracle Hyperion Planning ("Hyperion") – while waiving the competitive bidding requirements. In addition, Staff recommends that the City Council approve a resolution to award the contract related to the system implementation of Hyperion via a cloud platform to InnoFin Solutions LLC ("InnoFin"), also waiving the competitive bidding requirements.

## BACKGROUND / LEGISLATIVE HISTORY

The Oracle System re-implementation project ("Oracle Project") is underway to allow critical City operations such as payroll processing, financial management and reporting to continue. The Oracle Project is three pronged:

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Finance and Management Committee  
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- **Infrastructure Upgrade:** The first component consists of the upgrading of the City's outdated technology infrastructure to support the City's operations, including the re-implemented Oracle System.
- **EBS Re-implementation:** The second, and the most major, component consists of re-implementing the City's Oracle E-Business Suite ("EBS") from the current Oracle Release 11i to Oracle Release 12.
- **Municipal Budgeting System:** The third component consists of replacing the current Oracle Public Sector Budgeting System with a new public sector budgeting system, and scheduling the implementation of this portion in the same time frame as the Oracle R12 implementation in order to be able to facilitate the next full budget cycle on the new system.

Once complete, the Oracle Project will provide operational efficiencies throughout the City, including the automation of multiple manual processes (e.g., invoice approval), Self Service feature for employee benefit enrollments, enhanced tracking and management of grants, and improved financial and operational reporting capabilities.

In September 2015, Council approved Resolution No. 85825 C.M.S. awarding the contract to provide consulting, project management and functional design services for the Oracle Project to Horizon Projects Consulting Corp. ("Horizon"). The resolution also awarded the contract to implement the upgrades of the (1) City's technological infrastructure and (2) EBS system to BIAS Corporation ("BIAS"). Professional Service Agreements ("PSAs") were successfully executed by the City Administrator, as authorized by Council, in October 2015 and December 2015 for Horizon and BIAS, respectively.

Under the same Resolution No. 85825 C.M.S., Council also approved the implementation of a new municipal budgeting system, with AST Corporation ("AST") to provide the system implementation services. This contract award to AST, as with all of the contract awards under this resolution, was contingent upon successfully coming to an agreement by both the City and the contractor on the legal and operational terms and conditions of the contract. Contract negotiations with AST were not successful and Staff, working with the City Attorney's Office, made the determination that negotiations could not be completed within a reasonable timeframe without sacrificing the City's legal protections and remedies.

Due to the critical urgency of implementing the budgeting system in advance of the new budget cycle and the extremely limited universe of firms qualified/experienced to undertake such a project, Staff conducted an informal search for a system integrator ("SI") to implement Hyperion via a cloud solution. Of the top three firms that were vetted by Staff, InnoFin, an Oracle Gold Partner based in California, proved to be the most qualified, with the deepest experience in implementing the required Hyperion solution via cloud for municipal governments.

Hyperion will be a new budgeting platform for the City. As such, Hyperion software licenses will need to be purchased prior to the implementation by the SI. Therefore, Staff requests that the City Council authorize the City Administrator to enter into a contract with Oracle Corporation for the hardware/software purchase of the Hyperion platform.

*WAIVER OF RFP/Q COMPETITIVE SELECTION REQUIREMENTS*

Oakland Municipal Code (“OMC”) Section 2.04.050 requires advertising and competitive bidding for contracts for the purchase of supplies, equipment, and computer software and the award to the lowest responsible, responsive bidder if award is made. OMC Section 2.04.050 I.5 provides an exception to the advertising and competitive bidding requirement of the OMC upon a finding and determination by the City Council that it is in the best interests of the City to do so. Additionally, OMC section 2.04.051 requires a competitive request for proposals or request for qualifications selection process for award of contracts that exceed \$25,000 for professional service contracts and which are exempt from bidding under Section 2.04.050.1.1. However, OMC sections 2.04.050.I. and 2.04.051.B permit the City Council to waive advertising, competitive bidding and the request for proposals/qualifications processes upon finding that it is in the City’s best interest to do so. Staff recommends that it is in the City’s best interests to waive competitive bidding, advertising, and the RFP/Q process requirements for the purchase of Hyperion as well as the related system implementation given the tight timeframe as detailed above, the very limited number of contractors that are able to provide the software and system implementation services, as well as the mission critical nature of the project.

**ANALYSIS**

Key Contract Highlights

The PSAs for Horizon and BIAS were executed on October 28, 2015 and December 23, 2015, respectively. The PSA provides the legal framework for both contractors as it works towards the successful completion of the Oracle Project. As directed by Council and working closely with the City Attorney’s Office, every effort was made to protect the City’s legal and operational protections as Staff negotiated the PSAs. No contractor proposed revisions to the terms of the indemnification language were accepted by Staff or by the City Attorney’s Office. The limitation of liability as well as the liquidated damages clauses that were negotiated with both contractors provide reasonable and effective protections for the City throughout the life of the Oracle Project. Moreover, the termination provision allows the City to terminate the contracts “at any time for any reason” with a 60 day written notice to the contractors.

Key Project Highlights

The Oracle Project is fully underway. The following provides the current status and milestones that have been achieved to date:

- **Infrastructure Upgrade:** The first component of the Oracle Project – namely, the upgrade of the City’s technological infrastructure – is almost complete. The mid-term assessment report is scheduled to be delivered before February 5, 2016, bringing to a close the major immediate and mid-term deliverables. The only remaining element will be the on-going long term support, to be provided by BIAS, as the City moves towards the EBS upgrade.
- **EBS Re-Implementation:** The EBS upgrade is progressing as planned. Conference Room Pilot 1 (“CRP 1”) Workshops, which are meetings designed to provide the framework for the City’s operations moving forward, were completed in January 2016

with amazing turnout from many stakeholders across every business unit citywide. CRP1 sessions yielded the key strategic and business decisions that would need to be made (e.g., define, detail and document desired end-to-end business processes and workflows, identify gaps and areas of changes between the new system and the current system, identify the impact of the changes on the affected departments and individuals, etc.) across the multiple City business units in order to successfully deploy Oracle R12. All indications at this point are that Phase I of this project will “go-live” by October 2016.

- ***Municipal Budgeting System:*** The City's current public sector budgeting system is no longer supported by Oracle and will not be compatible with the EBS upgrade. As such, the City will need to purchase a new municipal budgeting platform. Staff has examined the new municipal budgeting system requirements and has determined that it is in the City's best interest to implement a “cloud” solution for the new Hyperion budgeting platform. A cloud basis system, once implemented, minimizes IT resources as any new features can be seamlessly adopted by the City, while eliminating the need for infrastructure investments to support the system.

Under Resolution No. 85825 C.M.S., Council authorized the award of contract to provide professional services to implement a new municipal budgeting system to AST. However, Contract negotiations with AST to implement the new municipal budgeting system did not progress as expected as AST sought numerous legal and operational concessions from the City. Moreover, since the original competitive selection process, Staff determined that a cloud platform should be pursued for the reasons listed above. To the best of Staff's knowledge, there are only a handful of system implementation companies that have successfully deployed Hyperion via cloud for public entities. Staff did an informal evaluation of three cloud system implementation companies with public sector cloud experience. After vetting their qualifications, Staff recommends that the Council give the City Administrator authority to award InnoFin the contract to implement Hyperion without a new competitive selection process as there are tight timing constraints as any new budgeting system needs to be fully deployed in advance of the next two-year budget cycle.

Innofin is an Oracle Gold Partner headquartered in Irvine, California, whose core focus is providing Enterprise Performance Management (process of monitoring performance across an enterprise with the goal of improving business performance) and Business Intelligence solutions. InnoFin has worked with numerous public sector clients throughout the United States, including the cities of Lexington, Kentucky, Atlanta, Georgia and Miami, Florida, as well the Port of Los Angeles.

**FISCAL IMPACT**

There is no further fiscal impact as monies have already been budgeted per Resolution No. 85825 C.M.S. The following show the firm, fixed bids of each contractor as currently negotiated:

<b>Oracle Project - Infrastructure and EBS</b>		
<b>Contractor</b>	<b>Role</b>	<b>Amount</b>
- Horizon	Project Management / Functional Design	\$ 1,500,000
- BIAS	Infrastructure Project & EBS System Implementation	9,723,174
<b>Total</b>		<b>\$ 11,223,174</b>

<b>Oracle Project - Budget</b>		
<b>Contractor</b>	<b>Role</b>	<b>Amount</b>
- Horizon	Project Management	\$ 265,000
- InnoFin	PBCS System Implementation	<i>estimated</i> 897,000
- Oracle	Hardware/Software Purchase	<i>estimated</i> 75,000
<b>Total</b>		<b>\$ 1,237,000</b>

**PUBLIC OUTREACH / INTEREST**

This item did not require any additional public outreach other than the required posting on the City's website.

**COORDINATION**

This report has been prepared by the Information Technology Department in coordination with the City Attorney's Office and the Controller's Bureau.

**SUSTAINABLE OPPORTUNITIES**

**Economic:** There are no economic opportunities associated with this report.

**Environmental:** Every effort will be made such that the energy efficiency and/or environmental impact will be considered during any necessary hardware and software purchases for this project.


**Social Equity:** Implementation of the projects will result in increased effectiveness of critical public safety, transparency of services and efficiency of City processes for Oakland's residents and community.

**ACTION REQUESTED OF THE CITY COUNCIL**

Staff requests that the City Council accept this status report on the project related to the re-implementation of the Oracle Systems and adopt a resolution approving the recommendations of the City Administrator to award a contract to Oracle Corporation for the purchase of Hyperion hardware and/or software, licensing and maintenance services in the estimated amount of \$75,000, and the contract to InnoFin Solutions, LLC, in the estimated amount of \$879,000 to provide professional services to implement a new municipal budgeting system, and waive the advertising, bidding And RFP/Q competitive selection requirements for the above contracts.

For questions regarding this report, please contact Katano Kasaine, Interim CIO/Treasurer, at (510) 238-2989. All fully executed professional services agreements are on file with the Office of the City Clerk.

Respectfully submitted,



KATANO KASAINÉ  
Interim CIO, ITD

Prepared by:  
Janet Salisbury, Project Manager  
Information Technology Department

Attachments (2):

- A: Professional Services Agreement for Horizon
- B: Professional Services Agreement for BIAS

**AGREEMENT TO PROVIDE  
PRODUCTS AND PROFESSIONAL SERVICES  
BETWEEN  
BIAS CORPORATION AND  
THE CITY OF OAKLAND**



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**EXHIBITS**

**Exhibit 1: Statement of Work for Infrastructure Remediation Project**

**Exhibit 2: Statement of Work for Oracle E-Business Suite**

**Exhibit 3: Statement of Work for Maintenance Support Services**

**Exhibit 4: Performance Bond Waiver**

**Exhibit 5: Contract Compliance Provisions**

1. Business Tax Certificate
2. Inspection of Books and Records/Right to Audit
3. Non-Discrimination/Equal Employment Practices
4. Americans with Disabilities (ADA Requirements)
5. Local, Small Business Enterprise Program (LSBE)
6. Other Applicable Ordinances
7. City of Oakland Campaign Contribution Limits
8. Insurance
9. Political Prohibition
10. Religious Prohibition

**Exhibit 6: City Schedules**

1. Schedule B-1 - Arizona Resolution
2. Schedule C-1\_P\_U\_V - Combined Form
  - a. Schedule C-1 - Compliance With The Americans With Disabilities Act
  - b. Schedule P - Nuclear Weapons Proliferation Ordinance
  - c. Schedule U - Compliance Commitment Agreement
  - d. Schedule V - Affidavit Of Non-Disciplinary Or Investigatory Action
  - e. Schedule D - Ownership, Ethnicity and Gender Questionnaire
3. Schedule E - Project Consultant Team Form
4. Schedule K - Pending Dispute Disclosure Form
5. Schedule M
  - a. Part A - Independent Employer Questionnaire - Vendor completed
  - b. Part B - Independent Employer Questionnaire - Requesting Department completed
6. Schedule N - Declaration Of Compliance With Living Wage Ordinance (Professional Services and Design Build Projects only)

7. **Schedule N-1 - Equal Benefits Declaration Of Nondiscrimination**
8. **Schedule O - Disclosure of Campaign Contributions Form**
9. **Schedule Q - Professional & Specialized Services Insurance Requirements**

This Agreement to provide Professional Services and Related Products, as set forth with specificity herein ("Agreement") is entered into as of the date when fully executed below between BIAS Corporation, a Georgia corporation located at 1100 Abernathy Road, Suite 950, Atlanta, GA 30328 ("Contractor") and the City of Oakland ("City"), a municipal corporation, One Frank H. Ogawa Plaza, Oakland, California 94612, (hereinafter referred to individually as "Party" or collectively as "Parties") who agree as follows:

## **RECITALS**

This Agreement is made with reference to the following facts and objectives:

- A. **WHEREAS**, the City Council has authorized the City Administrator to enter into contracts for professional or specialized services if the mandates of Oakland City Charter Section 902(e) have been met; and
- B. **WHEREAS**, Contractor is the developer or distributor of software products, hardware and/or provides related professional services ("Services"); and
- C. **WHEREAS**, the City is part of and provides information technology services to the various City departments, offices, and programs; and
- D. **WHEREAS**, the City wishes to acquire Contractor's Services as specifically set forth in this Agreement, including the Statement of Work ("SOW") attached hereto; and
- E. **WHEREAS**, the following Exhibits and Schedules are attached to and incorporated by reference into this Agreement:

<b>Exhibit 1</b>	<b>Statement of Work for Infrastructure Remediation Project</b>
<b>Exhibit 2</b>	<b>Statement of Work for Oracle E-Business Suite Upgrade</b>
<b>Exhibit 3</b>	<b>Statement of Work for Maintenance Support Services</b>
<b>Exhibit 4</b>	<b>Performance Bond Waiver</b>
<b>Exhibit 5</b>	<b>Contract Compliance Provisions</b>
<b>Exhibit 6</b>	<b>City Schedules</b>

**NOW THEREFORE, THE PARTIES TO THIS AGREEMENT COVENANT AND AGREE AS FOLLOWS:**

**1. Definitions**

- a. **"Acceptance"** as used herein shall mean the acceptance of Services by the City in writing in accordance as provided in Exhibits 1, 2 and 3 confirming that the Services, Milestones and Deliverables, as defined by these documents, comply in all material respects with the specifications.
- b. **"Acceptance Certificate"** as used herein shall mean the document substantially in the form of Attachment 1 to the IRP, EBS and MSS SOWs which the City shall issue to Contractor when Contractor satisfactorily completes the Testing and Acceptance provisions for Contractor's Deliverables, Milestones or Services; an Acceptance Certificate must accompany each invoice Contractor submits to the City.
- c. **"Breach"** as used herein shall mean a Party's unexcused failure to fully satisfy a material obligation under this Agreement.
- d. **"EBS"** as used herein shall mean the project related to the Oracle E-Business Suite applications upgrade.
- e. **"IRP"** as used herein shall mean the Infrastructure Remediation Project.
- f. **"MSS"** as used herein shall mean the Maintenance Support Services.
- g. **"Payment"** as used herein shall mean the City's payment to Contractor for Deliverables, Milestones or Services pursuant to an invoice accompanied by an Acceptance Certificate indicating the City has accepted the invoiced Deliverables, Milestones or Services as provided in the respective SOWs.
- h. **"Services", "Deliverables" and "Milestones"** are used herein, interchangeably, separately or combined, to mean the work Contractor is to perform and accomplish as set forth in the IRP, EBS and MSS SOWs.
- i. **"Software"** as used herein shall mean software Contractor provides to City in furtherance of its obligations hereunder, irrespective of whether it is software Contractor created or which Contractor has licensed from a third party.
- j. **"SOW"** as used herein shall mean Statement of Work.
- k. **"SOWs"** as used herein shall mean the collective IRP SOW (Exhibit 1), EBS SOW (Exhibit 2) and MSS SOW (Exhibit 3).

## **2. Priority of Documents**

In the event of conflicting provisions as between the following documents, except as otherwise expressly stated, the provisions shall govern in the following order: the Amendments to this Agreement in reverse chronological order, Change Notices (as defined in Section 12 of this Agreement) in reverse chronological order of adoption, this Agreement and its Exhibits. The Exhibits shall govern in numerical order as set out in this Agreement.

## **3. Conditions Precedent**

- a. Contractor must provide the City with the following before the Agreement will become effective:
  - (i) A copy of Contractor's City of Oakland Business Tax License which must be kept current for the duration of the Agreement and shall be attached to this Agreement as part of Exhibit 5;
  - (ii) A completed set of the City of Oakland Schedules which shall be attached to this Agreement as Exhibit 6; and
  - (iii) A copy of Contractor's Performance Bond which shall be attached to this Agreement as Exhibit 4 and incorporated herein by this reference. Bond requirement waived.
- b. This Agreement provides the terms and conditions and will govern the three (3) phases of work hereunder which may or may not be conducted simultaneously, as the Parties mutually agree. Each phase of work is defined by an independent SOW. Before this Agreement will become effective as to each phase, Contractor and the City must complete and agree upon the respective SOW for that phase (Exhibit 1 for IRP, Exhibit 2 for EBS and Exhibit 3 for MSS). Upon execution in full by both Parties, the respective SOWs shall be attached to this Agreement as an Exhibit and incorporated herein by this reference.

## **4. Statements of Work**

Contractor agrees to provide the Services specified in the respective SOWs, which, upon execution in full by the parties, will be attached to this Agreement and incorporated herein by this reference.

## **5. Initial Term**

The Initial Term of this Agreement shall start when it is executed in full by all Parties and end upon the satisfactory completion of all tasks set forth in the SOWs, and the provision of all Services and Deliverables called for hereunder, unless extended by the written Agreement of the Parties or sooner terminated as provided herein.

## **6. City Requirements for Project Deliverables**

- a. Contractor will be responsible for providing the Services and Deliverables set forth in the IRP SOW (Exhibit 1) which the City Authorizes. IRP will be a discrete project.
- b. Contractor will be responsible for providing the Services and Deliverables set forth in the EBS SOW (Exhibit 2) which the City Authorizes. EBS will be a discrete project.
- c. As set forth with specificity in the MSS SOW (Exhibit 3), Contractor will be responsible for providing on-going technical support on an as-needed basis. Each instance of MSS services will be set forth in an attachment to the MSS SOW (MSS Attachment) on the terms and conditions set forth in the respective Attachment. As such, each MSS Attachment will be a discrete project.
- d. Contractor's responsibilities shall include, but not be limited to, being solely responsible for coordinating the activities of all team members, and ensuring that the requirements of the respective SOWs are fulfilled to the City's satisfaction in accordance with this Agreement.
- e. The IRP and EBS Projects are comprised of discrete Milestones and Deliverables which Contractor must complete at a firm, fixed price for each, respectively, once City has Authorized Contractor to proceed. Some Milestones and Deliverables may call for the completion of several components or objectives. In each such case, Contractor must satisfactorily complete all the requirements for that Milestone or Deliverable before City will issue Contractor and Acceptance Certificate which Contractor will need to be paid for that Milestone or Deliverable.

## **7. Contractor Warranty and Indemnification of Services**

- a. In recognition of the City's reliance on its Services, Contractor warrants that its Services will be suitable for the purpose intended and fully meet the City's requirements. Subject to Section 14 (Limitation on Liability), Contractor agrees to fully indemnify the City for all liabilities, claims, losses, damages and expenses, including without limitation, reasonable attorney's fees, arising from any failure by Contractor in the performance of the Services as required hereunder.
- b. Contractor acknowledges that the City is a provider of public and municipal services to the public and residents of the City of Oakland and that the City's reliance on and use of Contractor's Deliverables will be vital to: (i) the business operations of the City; (ii) the orderly and efficient provision of public and municipal services by the City; and (iii) the health and safety of the City's residents; and therefore, that any unauthorized interruption of the City's business and operations could result in substantial liability to the City. In recognition of the City's status as a provider of such public and municipal services, Contractor warrants and represents that Contractor shall not at any time during the term of this Agreement and thereafter render the software, if any, unusable or inoperable, take possession of the Deliverables provided to the City by Contractor or Contractor's

subcontractors or in any way deliberately take actions limiting Contractor's liability under this Agreement. If Contractor takes any such actions, Contractor shall be liable, for and indemnify the City without limitation for all liabilities, claims, losses, damages and expenses, including reasonable attorney's fees, arising from Contractor's actions.

- c. The Services and Deliverables (i) will be free from defects in design, workmanship and materials, delivered to the City hereunder; and (ii) will conform in all material respects to the specifications set forth in the SOWs.
- d. Contractor represents that it will use all reasonable efforts, including appropriate testing, to ensure that Contractor does not introduce additional code to the software that results in viruses, contaminants, or other harmful code that may harm the City's financial system, City systems or other City software.
- e. Contractor represents that it owns or has the unencumbered right to license and/or assign to the City, as provided in this Agreement, the Deliverables and all results of Services delivered to the City hereunder, including all required Intellectual Property Rights therein.
- f. Contractor represents that it has the requisite experience, certifications, skills and qualifications necessary to perform the Services in: (i) a timely, competent, and professional manner, and (ii) accordance with applicable governmental requirements, statutes, regulations, rules and ordinances including, without limitation, applicable data privacy laws and regulations ("Law").
- g. EXCEPT FOR THE EXPRESS REPRESENTATIONS AND WARRANTIES MADE IN THIS AGREEMENT, THE CONTRACTOR MAKES NO REPRESENTATION, ACKNOWLEDGEMENT, CONDITION OR WARRANTY OF ANY KIND WHATSOEVER UNDER THIS AGREEMENT OR OTHERWISE, INCLUDING WITHOUT LIMITATION, ANY STATUTORY, EXPRESS, IMPLIED OR OTHER WARRANTIES OR ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE REGARDING ANY SERVICES, DELIVERABLE OR ANY OTHER PRODUCT DELIVERED TO THE CITY UNDER THIS AGREEMENT.

## **8. Payments**

- a. Upon performance and completion of the Services (as set forth in the respective SOW) which the City has previously Authorized (as defined in Section 8(b) of this Agreement), and the City's Acceptance (as defined in Section 9 of this Agreement) of those Services, Contractor will invoice the City. The invoice must be accompanied by an Acceptance Certificate (as defined in Section 9.3(b) of this Agreement) for the Services, Milestone or Deliverable being invoiced. For the IRP SOW, the City will retain 10% of Contractor's invoice until Contractor has satisfactorily completed all the requirements set forth in the IRP SOW. The City shall pay Contractor the 10% withheld amount of each invoice within sixty (60) days of the satisfactory completion of all Authorized IRP requirements.



All such payments from the City shall be in immediately available funds and in U.S. dollars. For the EBS SOW, the City will retain 10% of Contractor's invoice separately for Phase I and Phase II of the EBS Project. Once Contractor has satisfactorily completed all the Authorized requirements of each phase as set forth in the EBS SOW, the City shall pay Contractor the 10% withheld amount within sixty (60) days of the satisfactory completion of each phase of the EBS project.

- b. For the purposes of this Agreement:
  - (i) "Authorized" shall mean that the City has reviewed the proposed project plan ("Project Plan") with Contractor during the weekly meetings between the Parties as set out in the SOWs attached to this Agreement and has provided written approval to Contractor to continue providing the Services and Deliverables contemplated under the Project Plan.
  - (ii) "Acceptance" or "Accepted" shall mean that the City has reviewed the Authorized Services, Milestones or Deliverables upon Contractor's completion of same and accepted them, in writing, in accordance with Section 9 of this Agreement and as provided in the SOWs.
- c. Contractor acknowledges and agrees that the City shall have no obligation whatsoever to pay Contractor for any Services, Milestones or Deliverables performed which have not been Authorized by the City. Contractor also acknowledges and agrees that the City may, in its sole discretion, not Authorize Contractor to begin work on Services, Milestones or Deliverables that are set forth in the IRP and EBS SOWs. Contractor further acknowledges and agrees that the City shall have no obligation whatsoever to pay Contractor for any Services, Milestones or Deliverables it has not Accepted as provided herein (Section 9).

## **9. Acceptance**

- a. Unless otherwise agreed in writing, the Parties agree that:
  - (i) When Contractor completes each Authorized Deliverable ("Deliverable"), the City shall have five (5) Business Days, or such longer period of time as the Parties may agree upon or as is set out in the SOWs (the "Acceptance Period"), from the City's receipt of the Deliverable to review and either provide its Acceptance of the Deliverable and an Acceptance Certificate or written notice of its rejection setting out in detail the reasons why such Deliverable failed to be Accepted in accordance with Section 9.2(a) of this Agreement;
  - (ii) For each Deliverable, when corrective action is required by the City's written notice of deficiencies, Contractor shall have five (5) Business Days, or such longer period of time as the Parties may agree upon, to correct the deficiencies the City has identified as provided herein ("Corrective Action Period");

- (iii) For each Deliverable, Contractor shall be given at least two opportunities to correct the deficiencies identified by the City, unless the Parties otherwise mutually agree;
- (iv) Contractor shall correct any deficient s Deliverables for which the City has delivered written notice to Contractor as set out in Section 9.1(b) above such that the Deliverable complies with the requirements set out under this Agreement,
- (v) If Contractor fails to remedy a deficient Deliverable after both opportunities to remedy as set out in Section 9.1(d) above, then such failures shall constitute a material default of this Agreement; and
- (vi) Changes to Deliverables for which the City has provided Acceptance will be handled through the Change Notice process set out in Section 12 of this Agreement and Contractor will start no work on any change until the Parties have approved and executed any applicable Change Notice.
- (vii) Once the City accepts a Deliverable under the terms of this Section 9, including its subparts, the City will issue Contractor an Acceptance Certificate which must accompany Contractor's invoice to the City for that Deliverable.

b. For the purposes of this Agreement:

- (i) "Acceptance Criteria" means reasonable and objective criteria jointly established and agreed to in writing by the City and Contractor describing the criteria for the completion and acceptability of Deliverables all as more particularly set out in the SOWs;
- (ii) "Acceptance Certificate" means a certificate authorized and signed by the City indicating that the City has Accepted the specific Deliverable to which the Acceptance Certificate relates, and exemplar of which is provided as Attachment 1 to the respective SOWs.

**10. Proprietary or Confidential Information of the City**

- a. Confidentiality Obligations: Confidential Information shall mean all proprietary or confidential information disclosed or made available by the other Party pursuant to this Agreement that is identified as confidential or proprietary at the time of disclosure or is of a nature that should reasonably be considered to be confidential, and includes but is not limited to the terms and conditions of this Agreement, and all business, technical and other information (including without limitation, all human resources and payroll data, product, services, financial, marketing, engineering, research and development information, product specifications, technical data, data sheets, software, inventions, processes, training manuals, know-how and any other information or material), disclosed from time to time by the disclosing Party to the receiving Party, directly or indirectly in any manner whatsoever (including without limitation, in writing, orally, electronically, or

by inspection); provided, however, that Confidential Information shall not include the Content that is to be published on the website(s) of either Party.

- b. Each Party agrees to keep confidential and not disclose to any third party and to use only for purposes of performing or as otherwise permitted under this Agreement, any Confidential Information. The receiving Party shall protect the Confidential Information using measures similar to those it takes to protect its own confidential and proprietary information of a similar nature but not less than reasonable measures. Each Party agrees not to disclose the Confidential Information to any of its representatives except those who are required to have the Confidential Information in connection with this Agreement and then only if such representative is either subject to a written confidentiality agreement or otherwise subject to fiduciary obligations of confidentiality that cover the confidential treatment of the Confidential Information.
- c. Exceptions: The obligations of this Section 10 shall not apply if receiving Party can prove by appropriate documentation, where appropriate, that such Confidential Information
  - (i) was known to the receiving Party as shown by the receiving Party's files at the time of disclosure thereof;
  - (ii) was already in the public domain at the time of the disclosure thereof;
  - (iii) entered the public domain through no action of the receiving Party subsequent to the time of the disclosure thereof;
  - (iv) is or was independently developed by the Contractor without access to or use of the Confidential Information; or
  - (v) is required by law or government order to be disclosed by the receiving Party, provided that the receiving Party shall notify the disclosing Party in writing of such required disclosure as soon as reasonably possible prior to such disclosure, and use its commercially reasonable efforts at its expense to cause such disclosed Confidential Information to be treated by such governmental authority as trade secrets and as confidential.
- d. Contractor acknowledges that the City is subject to public disclosure laws and that the City will comply with Requests for Information ("RFI"), as it is required to do under the federal Freedom of Information Act, California Public Records Act, City of Oakland Sunshine Act or judicial or administrative court order. Contractor acknowledges that an RFI may pertain to any and all documentation associated with the City's use of Contractor' Services. Contractor further acknowledges that it is obligated to assist and cooperate with the City by producing all documentation that is responsive to the RFI so that the City may comply with its statutory obligations. The City agrees to give Contractor as timely written notice as possible of the RFI such that Contractor may oppose the RFI or exercise such other rights at law as Contractor believes it has. However, Contractor must produce all RFI responsive documents to the City and the City

will comply with the RFI unless, within the time frame established by the statute, judicial or court order under which the RFI is made, Contractor procures a Temporary Restraining Order or similar injunctive relief from a court or other tribunal of competent jurisdiction ordering the City not to comply with the RFI pending final determination of Contractor protest of the RFI. Contractor further agrees to accept the City's tender of defense and to defend the City and pay all the City costs of defense in any litigation brought against the City with respect to the City not complying with an RFI that Contractor protests and will hold the City harmless against any claims, attorneys' fees, damages, fines, judgments, or administrative penalties, which may arise from any such actions.

#### **11. Ownership of Results**

Any interest of Contractor or its Subcontractors, in specifications, studies, reports, memoranda, computation documents in drawings, plans, sheets, findings, test results, functional or technical design documents (soft or hard copy), programs, software code, testing or data scripts, Dataload upload sheets, APIs and configuration prepared by Contractor or its Subcontractors under this Agreement shall be assigned and transmitted to the City once Accepted by the City. However, Contractor may retain and use copies for reference and as documentation of its experience and capabilities.

#### **12. Change Notices**

- a. Upon fifteen (15) days' written notice to Contractor, the City shall have the right to request changes in the provision of any future Services and Deliverables under this Agreement by delivering to Contractor a change notice ("Change Notice"), provided that any and all such changes shall be subject to Contractor's written consent. Each Change Notice may specify changes to the Services and Deliverables the Contractor is to provide hereunder and the manner in which Contractor is to provide the Services. If any Change Notice causes an increase or decrease in the price or the time required for performance under this Agreement, an equitable adjustment jointly agreed upon by the City and Contractor shall be made and the Agreement shall be modified in writing accordingly.
- b. Change Notices issued under this Agreement must be accepted or rejected in writing by Contractor within ten (10) days of Contractor's receipt of its issuance. Notwithstanding as may be otherwise provided here in, if for any reason Contractor should fail to timely accept or reject a Change Notice in writing, such Change Notice shall be deemed accepted.

#### **13. Liquidated Damages for Contractor's Unexcused, Untimely Performance**

Contractor's failure to complete the Services and Deliverables, either individually or collectively, as set forth in the SOWs, within the time allowed will result in the City sustaining damages and the assessment by the City of Liquidated Damages.

a. Excusable Delays (Force Majeure)

If Contractor or the City experiences an Excusable Delay Event (e.g., City requests a delay for administrative purposes), Contractor or the City shall, within ten (10) days after first becoming aware of each such event, give written notice of the delay to the other Party and describe any impact the "Excusable Delay" may have upon the Schedule ("Notice of Excusable Delay"). If the foregoing Notice(s) are issued then Contractor shall be entitled to a day for day extension to the Schedule corresponding to the number of days of delay directly caused by the Excusable Delay.

b. Schedule of Liquidated Damages

The City and Contractor recognize that time is of the essence in the performance of this Agreement and that the City will suffer financial loss in the form of contract administration expenses (including project management and consultancy expenses), delay and loss of public use, if Contractor does not complete its Services and Deliverables within the respective times specified in this Agreement and in the SOWs, plus any extensions that are allowed in accordance with this Agreement. Contractor and the City agree that because of the nature of the Services as provided by this Agreement, it would be impractical or extremely difficult to fix the amount of actual damages incurred by the City because of the delay in completion or timely delivery of the Services. Accordingly, the City and Contractor agree that Contractor shall pay the City the following liquidated damages measures:

- (i) IRP and EBS Services and Deliverables: \$500.00 for each calendar day that expires after the time specified in the IRP SOW for Contractor to provide and for the City to accept the Deliverables specified in the IRP SOW, excluding all applicable Excusable Delays.
- (ii) IRP and EBS Milestones: \$1,000.00 for each calendar day that expires after the time specified in this Agreement for Contractor to complete the Milestone, Service or Deliverable set forth in this Agreement and to complete all of the Services, excluding all applicable Excusable Delays.
- (iii) The Schedule of Liquidated Damages for unexcused delays in providing Maintenance Support Services is as set forth in the MSS SOW Attachment (Exhibit 3).

c. Recovery of Liquidated Damages

If Contractor meets the final dates identified in the respective SOWs for completing the Services and Deliverables to be provided thereunder, then Contractor is eligible to recover and invoice City for of all prior penalties incurred under the specific SOW.

**14. Limitation on Liability**

- a. Either Party's liability to the other Party for any and all liabilities, claims or damages arising out of or relating to this Agreement, howsoever caused and regardless of the legal theory asserted, including breach of contract or warranty, tort, strict liability, statutory liability or otherwise, shall not, in the aggregate, exceed the value of \$5 million plus the total amount of fees already paid tied to this Agreement or \$12 million, whichever is lesser.
- b. In no event shall either Party be liable to the other for any punitive, exemplary, special, indirect, incidental or consequential damages (including, but not limited to, lost profits and lost business opportunities, loss of use or equipment down time, and loss of or corruption to data) arising out of or relating to this Agreement, regardless of the legal theory under which such damages are sought, and even if the Parties have been advised of the possibility of such damages or loss.
- c. This limitation of liability shall not apply to all actions, demands, or claims by any third party for death, bodily injury, damage to tangible property in connection with or arising under this Agreement, nor to any intentional misconduct, recklessness, or gross negligence or to Section 7.b. of Contractor's Warranty and Indemnification of Services, Contractor's Confidentiality (Section 10) and Indemnification (Section 16) obligations as set forth in this Agreement.

#### **15. Performance Bond**

Bond requirement waived.

#### **16. Indemnification**

##### a. Indemnification by Contractor

- (i) **General Indemnification.** Notwithstanding any other provision of this Agreement, Contractor shall indemnify, hold harmless, and (at the City's request with Counsel acceptable to the City), defend the City, its Council members, directors, officers, employees, agents, servants, and independent contractors (each of which persons and entities are collectively referred to herein as "Indemnitees") from any and all actions, causes of actions, claims, injuries (including, without limitation, injury to or death of an employee of Contractor or any of its structures), liabilities (of every kind, nature and description), losses, demands, debts, liens, obligations, judgments, administrative or regulatory fines or penalties, damages, (incidental or consequential) costs, expenses, and attorneys' fees (collectively referred to herein as "Actions") caused by or arising out of:
  - Breach of Contractor's obligations, representations or warranties under this Agreement;
  - act or failure to act in the course of performance by Contractor under this Agreement;

- any negligent (passive or active) or willful acts or omissions in the course of performance by Contractor under this Agreement;
  - any claim for personal injury (including death) or property damage to the extent based on the strict liability or caused by any negligent act, error or omission of Contractor; or
  - unauthorized use or disclosure by Contractor of Confidential Information as provided in Section 10 above.
- (ii) ***Proprietary Rights Indemnity.*** Contractor shall indemnify, defend, save and hold harmless Indemnitees from any and all Actions arising out of claims that the Software, infringes upon or violates the Intellectual Property Rights of others. If the Software will become the subject of an Action or claim of infringement or violation of the Intellectual Property Rights of a third party, the City, at its option shall require Contractor, at Contractor's sole expense to: (1) procure for the City the right to continue using the Software; or (2) replace or modify the Software so that no infringement or other violation of Intellectual Property Rights occurs, if the City determines that: (1) such replaced or modified Software will operate in all material respects in conformity with the then-current specifications for the Software; and (2) the City's use of the Software is not impaired thereby. Contractor's obligations under this Agreement will continue uninterrupted with respect to the replaced or modified Software as if it were the original Software.
- (iii) For the purposes of the indemnification obligations set forth herein, the term "Contractor" includes, without limitation, Contractor, its officers, directors, employees, representatives, agents, servants, sub consultants, and subcontractors.
- (iv) Contractor acknowledges and agrees that it has an immediate and independent obligation to indemnify and defend Indemnitees from any Action which potentially falls within this indemnification provision, which obligation shall arise at the time an Action is tendered to Contractor by the City and continues at all times thereafter, without regard to any alleged or actual contributory negligence of any Indemnitee. Notwithstanding anything to the contrary contained herein, Contractor's liability under this Agreement shall not apply to any Action arising from the sole negligence, active negligence or willful misconduct of an Indemnitee.
- (v) The City shall give Contractor prompt written notice of any Action and shall fully cooperate with Contractor in the defense and all related settlement negotiations to the extent that cooperation does not conflict with the City's interests. Notwithstanding the foregoing, the City shall have the right, if Contractor fails or refuses to defend the City with Counsel acceptable to the City, to engage its own counsel for the purposes of participating in the defense. In addition, the City shall have the right to withhold payments due Contractor in the amount of reasonable



defense costs actually incurred. In no event shall Contractor agree to the settlement of any claim described herein without the prior written consent of the City.

- (vi) All of Contractor's indemnification obligations hereunder are intended to apply to the fullest extent permitted by law (including, without limitation, California Civil Code Section 2782) and shall survive the expiration or sooner termination of this Agreement.
- (vii) Contractor's indemnification obligations hereunder shall not be limited by the City's insurance requirements contained in Schedule Q hereof, or by any other provision of this Agreement.

b. Indemnification by City

City shall defend, indemnify and hold Contractor, its Affiliates and its or their respective officers, directors, employees, suppliers, successors and permitted assigns, harmless from and against all Losses arising from, in connection with or relating to, third party claims, actions and/or allegations based upon:

- (i) the death of or injury to any individual, to the extent caused by City's tortious conduct; and
- (ii) damage to, or loss or destruction of, any real or tangible personal property to the extent caused by City's tortious conduct.

**17. Termination for Breach**

- a. ***Ensuing from Contractor's performance of either the IRP or EBS projects.*** If Contractor breaches any material obligation under this Agreement during its delivery of either IRP or EBS Services and fails to cure the breach within sixty (60) days of receipt of written notice from the City of said breach, the City may terminate the Agreement and at its option: (i) subject to the Limitation on Liability (Section 14), recover all direct damages it incurs as a result of Contractor's breach; (ii) require that Contractor repay the City all monies the City has paid Contractor under this Agreement; or (iii) retain the portion of Contractor's Deliverables that the City has accepted and paid Contractor for and complete performance of the Agreement with another vendor. In the event the City elects to complete performance of the Agreement with another vendor, Contractor shall remain liable for any increase in costs to the City of completing the Agreement in excess of the price the City would have paid Contractor for completing the Agreement.
- b. ***Ensuing from Contractor's performance of MSS.*** If Contractor breaches any material obligation under this Agreement during its delivery of MSS and fails to cure the breach within sixty (60) days of receipt of written notice from the City of said breach, the City may terminate the Agreement and recover all monies paid to Contractor for the Services associated with the uncured breach.

- c. ***Ensuing from City's obligations.*** Contractor may terminate this Agreement if the City breaches a material provision of the Agreement and does not cure the breach within sixty (60) days of written notice from Contractor of said breach. If Contractor issues a Notice of Breach of the Agreement ("Notice") to the City, the City reserves the right to direct Contractor to stop all work effective as of the date of Contractor's Notice and the Parties will negotiate what Contractor shall be paid for any work in progress which has been Authorized but not Accepted. However, if the Parties agree that Contractor shall continue working after giving the aforesaid Notice, the Parties shall negotiate the terms and conditions upon which such work will occur. If City cures the breach within the time allotted for said cure, the terms and conditions of Sections 8 (Payment) and 9 (Acceptance) shall govern regarding any work which was Authorized and Accepted or not, and take precedence over any agreement the Parties negotiated after Contractor gave Notice.
- d. ***Bankruptcy.*** Either Party may immediately terminate this Agreement if (i) the other Party files a petition for bankruptcy or has filed against it an involuntary petition for bankruptcy which is not dismissed within 60 days of its filing, (ii) a court has appointed a receiver, trustee, liquidator or custodian of it or of all or a substantial part of the other Party's property, (iii) the other Party becomes unable, or admits in writing its inability, to pay its debts generally as they mature, or (iv) the other Party makes a general assignment for the benefit of its or any of its creditors.
- e. ***Termination for convenience by the City.*** The City may terminate this Agreement for any reason at any time upon not less than sixty (60) days' prior written notice to Contractor. After the date of such termination notice, Contractor shall not perform any further services or incur any further costs claimed to be reimbursable under this Agreement, any Purchase Order, Change Order, or Change Notice without the express prior written approval of the City. As of the date of termination, the City shall pay to Contractor all Services provided and or Milestones accomplished which City has Accepted and for which City has not yet paid Contractor.
- f. ***Transition services after Termination.*** In connection with the expiration or other termination of this Agreement or the expiration of this Agreement, Contractor may provide transition services as requested by the City. Such transition services shall be subject to the pricing provided in this Agreement or any amendment thereto.

## **18. Dispute Resolution**

- a. If dispute or disagreement among the Parties arises with respect to either Party's performance of its obligations hereunder, or any provision of or interpretation of the Agreement, the Parties agree in good faith to attempt to resolve such dispute or disagreement (a "Dispute") prior to submitting the Dispute to mediation, arbitration or litigation in accordance with this Section 18. Such resolution efforts shall involve the City Administrator of the City of Oakland and an executive officer of Contractor, together with such other persons as may be designated by either Party.
- b. Any Party may commence said resolution efforts by giving a Notice of Dispute, in writing, to any other Party to the person or persons identified in Section 38 (Notices) herein. Such Notice shall include at least a description of the Dispute and any remedial action that the Party commencing the resolution procedure asserts would resolve the Dispute. Upon receiving such Notice, the Party against whom the Dispute is brought shall respond in writing within five (5) Business Days. The Parties shall then meet and confer in a good faith attempt to resolve the Dispute.
- c. If the Dispute has not been resolved within five (5) Business Days after the Subsection 18.b. notice is given, and unless the Party initiating the Dispute does not wish to pursue its rights relating to such Dispute or desires to continue the Pre-Mediation Dispute Resolution, then such Dispute will be automatically submitted to mediation. The mediation will be conducted in Alameda County by a single mediator selected by the Parties to the Dispute by mutual agreement or by the use of the Commercial Arbitration Rules of the American Arbitration Association for selecting an Arbitrator ("AAA RULES"). The Parties to the Dispute shall evenly share the fees and costs of the mediator. The mediator shall have twenty (20) Business Days from the submission to mediation to attempt to resolve such Dispute. If the Dispute is not resolved within that time period, the Parties will be entitled to pursue such matter by demanding arbitration under the AAA RULES or instituting litigation.

## **19. Commencement, Completion and Close-Out**

It shall be the responsibility of the Contractor to coordinate and schedule the work to be performed so that commencement and completion take place in accordance with the provisions of this Agreement.

Any time extension granted to Contractor to enable Contractor to complete the work must be in writing and shall not constitute a waiver of rights the City may have under this Agreement.

Should the Contractor not complete the work by the scheduled date or by an extended date, the City shall be released from all of its obligations under this Agreement.

Within ninety (90) days of completion of the performance under this Agreement, Contractor shall make a determination of any and all final costs due under this Agreement and shall submit a requisition for such final and complete payment (including without limitations any

and all claims relating to or arising from this Agreement) to the City. Failure of the Contractor to timely submit a complete and accurate requisition for final payment shall relieve the City of any further obligations under this Agreement, including without limitation any obligation for payment of work performed or payment of claims by Contractor.

## **20. Bankruptcy**

All rights and licenses granted to the City pursuant to this Agreement are, and shall be deemed to be, for purposes of Section 265(n) of the U.S. Bankruptcy Code, licenses of rights to "intellectual property" as defined under Section 101 of the U.S. Bankruptcy Code. In a bankruptcy or insolvency proceeding involving Contractor, the Parties agree that the City, as licensee of such rights, shall retain and fully exercise all of its rights and elections under the U.S. Bankruptcy Code, and the provisions thereof shall apply notwithstanding conflict of law principles. The Parties further agree that, in the event of the commencement of a bankruptcy or insolvency proceeding by or against Contractor under the U.S. Bankruptcy Code, the City shall be entitled to a complete duplicate of any such intellectual property, including the source code for Contractor's licensed software and software developed on behalf of the City in order to fulfill the Services and all embodiments of such intellectual property, to which the City would otherwise be entitled under this Agreement, and the same, if not already in the City's possession, shall be promptly delivered to the City (a) upon any such commencement of a bankruptcy proceeding upon written request therefore by the City, unless Contractor elects to continue to perform all of its obligations under this Agreement, or (b) if not delivered under (a) above, upon rejection of this Agreement by or on behalf of Contractor upon written request therefore by the City. If, in a bankruptcy or insolvency proceeding involving Contractor, the provisions of the U.S. Bankruptcy Code referenced above are determined not to apply, the City shall nevertheless be entitled to no less than the protection offered by the provisions of the U.S. Bankruptcy Code with respect to its entitlement to and rights to the use and possession of all intellectual property to which the City has been granted rights under this Agreement notwithstanding the bankruptcy or insolvency of Contractor.

## **21. Assignment**

Contractor shall not assign or otherwise transfer any rights, duties, obligations or interest in this Agreement or arising hereunder to any person, persons, entity or entities whatsoever without the prior written consent of the City and any attempt to assign or transfer without such prior written consent shall be void. Consent to any single assignment or transfer shall not constitute consent to any further assignment or transfer. In the event that Contractor assigns this Agreement in compliance with this provision, this Agreement and all of its provisions shall inure to the benefit of and become binding upon the Parties and the successors and permitted assigns of the respective Parties.

## **22. Agents/Brokers**

Contractor warrants that Contractor has not employed or retained any subcontractor, agent, company or person other than bona fide, full-time employees of Contractor working solely for Contractor, to solicit or secure this Agreement, and that Contractor has not paid or agreed

to pay any subcontractor, agent, company or persons other than bona fide employees any fee, commission, percentage, gifts or any other consideration, contingent upon or resulting from the award of this Agreement. For breach or violation of this warranty, the City shall have the right to rescind this Agreement without liability or, in its discretion, to deduct from the Agreement price or consideration, or otherwise recover, the full amount of such fee, commission, percentage or gift.

### **23. Publicity**

Any publicity generated by Contractor for the project funded pursuant to this Agreement, during the term of this Agreement or for one year thereafter, will make reference to the contribution of the City of Oakland in making the project possible. The words "City of Oakland" will be explicitly stated in all pieces of publicity, including but not limited to flyers, press releases, posters, brochures, public service announcements, interviews and newspaper articles.

City staff will be available whenever possible at the request of Contractor to assist Contractor in generating publicity for the project funded pursuant to this Agreement. Contractor further agrees to cooperate with authorized City officials and staff in any City-generated publicity or promotional activities undertaken with respect to this project.

### **24. Conflict of Interest**

#### **a. Contractor**

The following protections against conflict of interest will be upheld:

- (i) Contractor certifies that no member of, or delegate to the Congress of the United States shall be permitted to share or take part in this Agreement or in any benefit arising there from.
- (ii) Contractor certifies that no member, officer, or employee of the City or its designees or agents, and no other public official of the City who exercises any functions or responsibilities with respect to the programs or projects covered by this Agreement, shall have any interest, direct or indirect in this Agreement, or in its proceeds during his/her tenure or for one year thereafter.
- (iii) Contractor shall immediately notify the City of any real or possible conflict of interest between work performed for the City and for other clients served by Contractor.
- (iv) Contractor warrants and represents, to the best of its present knowledge, that no public official or employee of the City who has been involved in the making of this Agreement, or who is a member of a City board or commission which has been involved in the making of this Agreement whether in an advisory or decision-making capacity, has or will receive a direct or indirect financial interest in this

Agreement in violation of the rules contained in California Government Code Section 1090 et seq., pertaining to conflicts of interest in public contracting. Contractor shall exercise due diligence to ensure that no such official will receive such an interest.

- (v) Contractor further warrants and represents, to the best of its present knowledge and excepting any written disclosures as to these matter already made by Contractor to the City, that (1) no public official of the City who has participated in decision-making concerning this Agreement or has used his or her official position to influence decisions regarding this Agreement, has an economic interest in Contractor or this Agreement, and (2) this Agreement will not have a direct or indirect financial effect on said official, the official's spouse or dependent children, or any of the official's economic interests. For purposes of this paragraph, an official is deemed to have an "economic interest" in any (a) for-profit business entity in which the official has a direct or indirect investment worth \$2,000 or more, (b) any real property in which the official has a direct or indirect interest worth \$2,000 or more, (c) any for-profit business entity in which the official is a director, officer, partner, trustee, employee or manager, or (d) any source of income or donors of gifts to the official (including nonprofit entities) if the income totaled more than \$500 in the previous 12 months, or value of the gift totaled more than \$350 the previous year. Contractor agrees to promptly disclose to the City in writing any information it may receive concerning any such potential conflict of interest. Contractor's attention is directed to the conflict of interest rules applicable to governmental decision-making contained in the Political Reform Act (California Government Code Section 87100 et seq.) and its implementing regulations (California Code of Regulations, Title 2, Section 18700 et seq.).
- (vi) Contractor understands that in some cases Contractor or persons associated with Contractor may be deemed a "City officer" or "public official" for purposes of the conflict of interest provisions of Government Code Section 1090 and/or the Political Reform Act. Contractor further understands that, as a public officer or official, Contractor or persons associated with Contractor may be disqualified from future City contracts to the extent that Contractor is involved in any aspect of the making of that future contract (including preparing plans and specifications or performing design work or feasibility studies for that contract) through its work under this Agreement.
- (vii) Contractor shall incorporate or cause to be incorporated into all subcontracts for work to be performed under this Agreement a provision governing conflict of interest in substantially the same form set forth herein.

b. No Waiver

Nothing herein is intended to waive any applicable federal, state or local conflict of interest law or regulation

c. Remedies and Sanctions

In addition to the rights and remedies otherwise available to the City under this Agreement and under federal, state and local law, Contractor understands and agrees that, if the City reasonably determines that Contractor has failed to make a good faith effort to avoid an improper conflict of interest situation or is responsible for the conflict situation, the City may (i) suspend payments under this Agreement, (ii) terminate this Agreement, and/or (iii) require reimbursement by Contractor to the City of any amounts disbursed under this Agreement. In addition, the City may suspend payments or terminate this Agreement whether or not Contractor is responsible for the conflict of interest situation.

**25. Validity of Contracts**

The Oakland City Council must approve all Agreements greater than \$15,000. This Agreement shall not be binding or of any force or effect until signed by the City Administrator or his or her designee and approved as to form and legality by the City Attorney or his or her designee.

**26. Governing Law**

This Agreement shall be governed and construed in accordance with the laws of the State of California, without reference to its conflicts of laws principles. Any action or proceeding to enforce the terms of this Agreement shall be brought in the courts of Alameda County, Oakland, California and each Party agrees to waive any objections to personal jurisdiction and venue in the courts of Alameda County, Oakland, California.

**27. Headings**

Headings and captions used to introduce Sections and paragraphs of this Agreement are for convenience, only, and have no legal significance.

**28. Construction**

- a. Except as provided in Change Notices (Section 12) above, acceptance or acquiescence in a prior course of dealing or a course of performance rendered under this Agreement or under any Change Order, or Change Notice, shall not be relevant in determining the meaning of this Agreement even though the accepting or acquiescing Party has knowledge of the nature of the performance and opportunity for objection.
- b. The language in all parts of this Agreement and any Purchase Order, Change Order, or Change Notice, shall in all cases be construed in whole, according to its fair meaning, and not strictly for or against, either Contractor or the City regardless of the drafter of such part.



## **29. Waiver**

No covenant, term, or condition of this Agreement may be waived except by written consent of the Party against whom the waiver is claimed and the waiver of any term, covenant or condition of this Agreement shall not be deemed a waiver of any subsequent breach of the same or any other term, covenant or condition of this Agreement.

## **30. Independent Contractor**

### **a. Rights and Responsibilities**

It is expressly agreed that in the performance of the services necessary to carry out this Agreement, Contractor shall be, and is, an independent contractor, and is not an employee of the City. Contractor acknowledges and agrees that all of Contractor's employees and subcontractors are under the sole direction and control of Contractor and the City shall have no authority over or responsibility for such employees and subcontractors of Contractor. Contractor has and shall retain the right to exercise sole direction and supervision of the services, and full control over the employment, direction, compensation and discharge of all persons assisting Contractor in the performance of Contractor's services hereunder. Contractor shall be solely responsible for all matters relating to the payment of his/her employees, including compliance with social security, withholding and all other regulations governing such matters, and shall be solely responsible for Contractor's own acts and those of Contractor's subordinates and employees. Contractor will determine the method, details and means of performing the services described in Exhibit 1.

### **b. Contractor's Qualifications**

Contractor represents that Contractor has the qualifications and skills necessary to perform the services under this Agreement in a competent and professional manner without the advice or direction of the City. This means Contractor is able to fulfill the requirements of this Agreement. Failure to perform all of the services required under this Agreement will constitute a material breach of the Agreement and may be cause for termination of the Agreement. Contractor has complete and sole discretion for the manner in which the work under this Agreement is performed. Contractor shall complete and submit to the City, Schedule M-Independent Contractor Questionnaire, prior to the execution of this Agreement.

### **c. Payment of Income Taxes**

Contractor is responsible for paying, when due, all income taxes, including estimated taxes, incurred as a result of the compensation paid by the City to Contractor for services under this Agreement. On request, Contractor will provide the City with proof of timely payment. Contractor agrees to indemnify the City for any claims, costs, losses, fees, penalties, interest or damages suffered by the City resulting from Contractor's failure to comply with this provision.

d. Non-Exclusive Relationship

Contractor may perform services for, and contract with, as many additional clients, persons or companies as Contractor, in his or her sole discretion, sees fit.

e. Tools, Materials and Equipment

Contractor will supply all tools, except those tools, materials, equipment specified herein, if any, required to perform the services under this Agreement.

f. Cooperation of the City

The City agrees to comply with all reasonable requests of Contractor necessary to the performance of Contractor's duties under this Agreement.

g. Extra Work

Contractor will do no extra work under this Agreement without first receiving prior written authorization from the City.

**31. Attorneys' Fees**

If either Party commences an action or proceeding to determine or enforce its rights hereunder, the prevailing Party shall be entitled to recover from the losing Party all expenses reasonably incurred, including court costs, reasonable attorneys' fees and costs of suit as determined by the court.

**32. Counterparts**

This Agreement may be executed in any number of identical counterparts, any set of which signed by both Parties shall be deemed to constitute a complete, executed original for all purposes.

**33. Remedies Cumulative**

The rights and remedies of the City provided in this Agreement shall not be exclusive and are in addition to any other rights and remedies provided by law, including the California Uniform Commercial Code.

**34. Severability/Partial Invalidity**

If any term or provision of this Agreement, or the application of any term or provision of this Agreement to a particular situation, shall be finally found to be void, invalid, illegal or unenforceable by a court of competent jurisdiction, then notwithstanding such determination, such term or provision shall remain in force and effect to the extent allowed by such ruling

and all other terms and provisions of this Agreement or the application of this Agreement to other situation shall remain in full force and effect.

Notwithstanding the foregoing, if any material term or provision of this Agreement or the application of such material term or condition to a particular situation is finally found to be void, invalid, illegal or unenforceable by a court of competent jurisdiction, then the Parties hereto agree to work in good faith and fully cooperate with each other to amend this Agreement to carry out its intent.

**35. Access**

Access to the City's premises by Contractor shall be subject to the reasonable security and operational requirements of the City. To the extent that Contractor's obligations under this Agreement or any Purchase Order, Change Order, or Change Notice, require the performance of Services or Work by Contractor on the City's property or property under the City's control, Contractor agrees:

- a. to accept full responsibility for performing all Services or work in a safe manner so as not to jeopardize the safety of the City's personnel, property, or members of the general public; and
- b. to comply with and enforce all of the City's regulations, policies, and procedures including, without limitation, those with respect to security, access, safety and fire protection, the City's policy against sexual harassment, and all applicable state and municipal safety regulations, building codes or ordinances.

**36. Entire Agreement of the Parties**

This Agreement supersedes any and all Agreements, either oral or written, between the Parties with respect to the rendering of services by Contractor for the City and contains all of the representations, covenants and Agreements between the Parties with respect to the rendering of those services. Each Party to this Agreement acknowledges that no representations, inducements, promises or Agreements, orally or otherwise, have been made by said Party, or anyone acting on behalf of said Party, which are not contained in this Agreement, and that no other Agreement, statement or promise not contained in this Agreement will be valid or binding.

**37. Modification**

Any modification of this Agreement will be effective only if it is in a writing signed by all Parties to this Agreement.

**38. Notices**

If either Party shall desire or be required to give notice to the other, such notice shall be given in writing, via facsimile and concurrently by prepaid U.S. certified or registered postage, addressed to recipient as follows:

[City of Oakland] Katano Kasaine  
150 Frank H. Ogawa Plaza  
8<sup>th</sup> Floor, Suite 8211  
Oakland, CA 94612

cc: Celso Ortiz  
Deputy City Attorney  
1 Frank Ogawa Plaza, 6th Fl.  
Oakland, CA 94612

[Contractor] Bill Stephens  
1100 Abernathy Road  
Suite 950  
Atlanta, GA 30328

Any Party to this Agreement may change the name or address of representatives for purpose of this Notice paragraph by providing written notice to all other Parties ten (10) business days before the change is effective.

**39. Right to Offset**

All claims for money or to become due from the City shall be subject to deduction or offset by the City from any monies due Contractor by reason of any claim or counterclaim arising out of this Agreement or any Purchase Order, Change Order, or Change Notice or any other transaction with Contractor. To the extent that there are amounts due to the City and to a state or federal funding agency, and the amount of the offset is insufficient to pay such amount in full, the amount of the offset shall be prorated between the City and such state or federal funding agency in proportion to the amounts due them.

**40. No Third Party Beneficiary**

This Agreement shall not be construed to be an agreement for the benefit of any third party or parties, and no third party or parties shall have any claim or right of action under this Agreement

**41. Survival**

Sections (2, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 24, 26, 31, and 40) of this Agreement, along with any other provisions which by their terms survive, shall survive the expiration or termination of this Agreement.

**42. Time is of the Essence**

This Agreement requires Contractor's timely performance of its obligations under this Agreement. Therefore, time is of the essence in the performance of this Agreement.

**43. Authority**

Each individual executing this Agreement or any Purchase Order, Change Order or Change Notice, hereby represents and warrants that he or she has the full power and authority to execute this Agreement or such Purchase Order, Change Order or Change Notice, on behalf of the named Party such individual purports to bind.

SO AGREED:

City of Oakland,  
a municipal corporation

  
\_\_\_\_\_  
(City Administrator's Office) (Date) 12/23/15

  
\_\_\_\_\_  
(Department Head Signature) (Date) 12/23/15

Approved as to form and legality:

  
\_\_\_\_\_  
(City Attorney's Office Signature) (Date) 12/23/15

Contractor

DocuSigned by:  
  
\_\_\_\_\_  
(Signature) 12/23/2015  
4FA35F7288CF41C... (Date)

102-267107  
\_\_\_\_\_  
Business Tax Certificate No.

85825  
\_\_\_\_\_  
Resolution Number

**PROFESSIONAL SERVICES  
AGREEMENT  
BETWEEN THE CITY OF OAKLAND  
AND HORIZON PROJECTS CONSULTING CORP.**



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## EXHIBITS

- Exhibit 1**      **Statement of Work**
- Exhibit 2**      **Bill of Materials**
- Exhibit 3**      **Maintenance Agreement**
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**AGREEMENT TO PROVIDE  
PROFESSIONAL SERVICES AND RELATED PRODUCTS  
BETWEEN THE CITY OF OAKLAND  
AND Horizon Projects Consulting Corp.**

This Agreement to provide Professional Services and Related Products as applicable and as set forth with specificity herein ["Agreement"] is entered into as of the date when fully executed below between Horizon Projects Consulting Corp., a New York corporation ("Contractor") and the City of Oakland ("City"), a municipal corporation, One Frank H. Ogawa Plaza, Oakland, California 94612, who agree as follows:

**RECITALS**

This Agreement is made with reference to the following facts and objectives:

- A. **WHEREAS**, the City Council has authorized the City Administrator to enter into contracts for professional or specialized services if the mandates of Oakland City Charter Section 902(e) have been met; and
- B. **WHEREAS**, Contractor is the developer or distributor of software products, hardware and provides related professional services ["Services"]; and
- C. **WHEREAS**, City is part of and provides information technology services to the various City departments, offices, and programs; and
- D. **WHEREAS**, City wishes to acquire Contractor's Services as specifically set forth in this Agreement, including the Statement of Work ["SOW"] attached hereto and
- E. **WHEREAS**, the following Exhibits and Schedules are attached to and incorporated by reference into this Agreement:

<b>Exhibit 1</b>	<b>Statement of Work</b>
<b>Exhibit 2</b>	<b>Bill of Materials</b>
<b>Exhibit 3</b>	<b>Maintenance Agreement</b>
<b>Exhibit 4</b>	<b>Performance Bond</b>
<b>Exhibit 5</b>	<b>Contractor's RFP Proposal and Project Proposal Presentation</b>
<b>Exhibit 6</b>	<b>Contract Compliance Provisions</b>
<b>Exhibit 7</b>	<b>City Schedules</b>

**NOW THEREFORE, THE PARTIES TO THIS Agreement COVENANT AND AGREE AS FOLLOWS:**

**1. Definition**

- a. **"Acceptance"** as used herein shall mean the acceptance of Services by City in writing in accordance as provided in Exhibit 1, the Statement of Work ["SOW"] confirming that the Services and Deliverables comply in all material respects with the Specifications.
- b. **"Acceptance Certificate"** as used herein shall mean the document substantially in the form of Attachment 1 to the SOW which City shall issue to Contractor when Contractor satisfactorily completes the Testing and Acceptance provisions for Contractor's Deliverables or Services; an Acceptance Certificate must accompany each invoice Contractor submits to City;
- c. **"Payment"** as used herein shall mean City's payment to Contractor for Deliverables or Services pursuant to an invoice accompanied by an Acceptance Certificate indicating City has accepted the invoiced Deliverables or Services as provided in and Exhibit 1; "
- d. **"Special Circumstances"** as used herein means the post September 11, 2001 demands to develop and deploy a comprehensive technology interface that integrates key City of Oakland, Port of Oakland, and third party stakeholder systems that require the automation of primary safety and security related tasks and identification of specific countermeasures to various threat scenarios which are essential to enhanced safety and security of the City/Port environments as well as City of Oakland's current version of Oracle EBS (11.5.10) will no longer be supported by Oracle starting in November 2016. To ensure continuity and stability of City operations, the system must be upgraded to the latest version of the Oracle EBS (12.2.3 or later) no later than November 2016.;
- e. **OTHERS AS THE PARTIES DEEM APPROPRIATE, E.G. DELIVERABLES, SERVICES, SPECIFICATIONS, REQUIREMENTS, TECHNICAL TERMS;**

**2. Priority of Documents**

In the event of conflicting provisions as between the following documents, except as otherwise expressly stated, the provisions shall govern in the following order: the Amendments to this Agreement, Change Notices (as defined in Section 12 of this

Agreement) in reverse chronological order of adoption, this Agreement and its Exhibits. The Exhibits shall govern in numerical order as set out in this Agreement.

3. **Conditions Precedent**

a Contractor must provide City with the following before the Agreement will become effective:

- (1). A copy of Contractor's City of Oakland Business Tax License which must be kept current for the duration of the Agreement and shall be attached to this Agreement as part of Exhibit 5;
- (2). A completed set of the City of Oakland Schedules which shall be attached to this Agreement as Exhibit 5;
- (3). A copy of Contractor's Performance Bond which shall be attached to this Agreement as Exhibit 4 and incorporated herein by this reference.

[Waived]

b. Contractor and City must complete and agree upon and execute a Statement of Work before the Agreement will become effective and which shall be attached to this Agreement and incorporated herein by this reference.

4. **Statement of Work**

Contractor agrees to perform the services ("**Services**") and provide the deliverables ("**Deliverables**") specified in **EXHIBIT 1** the Statement of Work, which is attached to this Agreement and incorporated herein by this reference.

5. **Initial Term**

The Initial Term of this Agreement shall start when it is executed in full by all Parties and end upon the satisfactory completion of all tasks set forth in the SOW, and the provision of all Services called for hereunder, unless extended by the written Agreement of the Parties or sooner terminated as provided herein.

6. **City Requirements for Project Deliverables**

a. As is set forth with specificity in the Statement of Work [Exhibit 1], this Project will require Contractor to provide the Services necessary to complete the upgrade of the City's Oracle E-Business Suite ("EBS") and related infrastructure and systems including, analysis and assessment of hardware, operating systems, middleware, software and practices and development and implementation of an RFP for System Integrator.

b. This Project is part of the post September 11, 2001 demands to develop and deploy a comprehensive technology interface that integrates key City of Oakland, Port of Oakland, and third party stakeholder systems that require the automation of primary safety and security related tasks and identification of specific countermeasures to various threat scenarios which are essential to enhanced safety and security of the City/Port environments as well as City of Oakland's current version of Oracle EBS (11.5.10) will no longer be supported by Oracle starting in November 2016. To ensure continuity and stability of City operations, the system must be upgraded to the latest version of the Oracle EBS (12.2.3 or later) no later than November 2016. ["Special Circumstances"]

c. Contractor will be responsible for the entire Scope as set forth in Exhibit 1, the SOW, including, but not limited to being solely responsible for coordinating the activities of all team members, and ensuring that the Scope is fulfilled to the City's satisfaction in accordance with this Agreement.

d. Contractor must provide a turnkey solution for the Project per Schedule A (attached) at a firm, fixed price which shall, in no event, exceed \$100,000.

## **7. Contractor Warranty and Indemnification of Services**

a. In recognition of City's reliance on its Services and the Special Circumstances of this Project, Contractor warrants that its Services will be suitable for the purpose intended and fully meet City's Requirements. Subject to Section 14 [Limitation on Liability], Contractor agrees to fully indemnify City for all liabilities, claims, losses, damages and expenses, including without limitation, reasonable attorney's fees, arising from any failure by Contractor in the performance of the Services as required hereunder.

b. Contractor acknowledges that City is a provider of public and municipal services to the public and residents of the City of Oakland and that City's reliance on and use of Contractor's Deliverables will be vital to: (a) the business operations of the City; (b) the orderly and efficient provision of public and municipal services by the City; and (c) the health and safety of City's residents; and therefore, that any unauthorized interruption of City's business and operations could result in substantial liability to City. In recognition of City's status as a provider of such public and municipal services, Contractor warrants and represents that Contractor shall not at any time during the term of this Agreement and thereafter render the Software unusable or inoperable, take possession of the Deliverables provided to City by Contractor or Contractor's subcontractors or in any way deliberately take actions limiting Contractor's liability under this Agreement. If Contractor takes any such actions, Contractor shall be liable for and indemnify City for all liabilities, claims, losses, damages and expenses, including without limitation, reasonable attorney's fees, arising from Contractor's actions the Services and Deliverables (a) will be free from defects in design, workmanship and materials, delivered to City hereunder; (b) will conform in all material respects to the Specifications

- c. If applicable, Contractor represents that it will use all reasonable efforts, including appropriate testing, to ensure that the Software does not contain viruses, contaminants, or other harmful code that may harm the Software, City systems or other City software.
- d. If applicable, Contractor represents that it owns or has the unencumbered right to license and/or assign to City, as provided in this Agreement, the Deliverables and all results of Services delivered to City hereunder, including all required Intellectual Property Rights therein
- e. Contractor represents that it has the requisite experience, certifications, skills and qualifications necessary to perform the Services in: (i) a timely; competent, and professional manner, and (ii) accordance with applicable governmental requirements, statutes, regulations, rules and ordinances including, without limitation, applicable data privacy laws and regulations ("Law");

**f. EXCEPT FOR THE EXPRESS REPRESENTATIONS AND WARRANTIES MADE IN THIS AGREEMENT, THE CONTRACTOR MAKES NO REPRESENTATION, ACKNOWLEDGEMENT, CONDITION OR WARRANTY OF ANY KIND WHATSOEVER UNDER THIS AGREEMENT OR OTHERWISE, INCLUDING WITHOUT LIMITATION, ANY STATUTORY, EXPRESS, IMPLIED OR OTHER WARRANTIES OR ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE REGARDING ANY SERVICES, DELIVERABLE OR ANY OTHER PRODUCT DELIVERED TO THE CITY UNDER THIS AGREEMENT.**

8. **Payments.**

- a. Upon performance of the Services (as defined in Section 6 of this Agreement and in the Statement of Work) and the completion of each Deliverable (as defined in Section 6 of this Agreement and in the Statement of Work) which City has previously Authorized (as defined in Section 8(c) of this Agreement), and City's Acceptance (as defined in Section 8(c) of this Agreement) of that Deliverable, Contractor will invoice City for the Services and Deliverable. The invoice must be accompanied by an Acceptance Certificate (as defined in Section 9.3(b) of this Agreement) for the Services or Deliverable being invoiced. City will pay Contractor's invoice within thirty (30) days of City's receipt of Contractor's invoice. All such payments from the City shall be in immediately available funds and in U.S. dollars.



- b. For the purposes of this Agreement:
- (i) "Authorized" shall mean that the City has reviewed the proposed project plan ["Project Plan"] with Contractor during the weekly meetings between the Parties as set out in the Statement of Work attached to this Agreement as Exhibit 1 ("SOW") and has provided written approval to Contractor to continue providing the Services and Deliverables contemplated under the Project Plan.
  - (ii) "Acceptance" or "Accepted" shall mean that the City has reviewed the Authorized Services or Deliverables upon Contractor's completion of same and accepted them, in writing, in accordance with Section 14 of this Agreement and as provided in the SOW.

c. Contractor acknowledges and agrees that City shall have no obligation whatsoever to pay Contractor for any Services or Deliverables performed which have not been Authorized by the City as contemplated herein. Contractor further acknowledges and agrees that City shall have no obligation whatsoever to pay Contractor for any Services or Deliverables it has not Accepted as provided herein (Acceptance, Section 14).

## 9. Acceptance

9.1 Unless otherwise agreed in writing, the Parties agree that:

(a) When Contractor completes the Authorized Deliverable ("Deliverable"), the City shall have five (5) Business Days, or such longer period of time as the Parties may agree upon or as is set out in the SOW (the "Acceptance Period"), from the City's receipt of the Deliverable to review and either provide its Acceptance of the Deliverable and an Acceptance Certificate or written notice of its rejection setting out in detail the reasons why such Deliverable failed to be Accepted in accordance with Section 14.2 of this Agreement;

(b) For each Deliverable, when corrective action is required by the City's written notice of deficiencies, Contractor shall have five (5) Business Days, or such longer period of time as the Parties may agree upon, to correct the deficiencies City has identified as provided herein ["Corrective Action Period"];

(c) For each Deliverable, Contractor shall be given at least two opportunities to correct the deficiencies identified by the City, unless the Parties otherwise mutually agree;

(d) Contractor shall correct any deficient Deliverables for which the City has delivered written notice to Contractor as set out in subsection 14.1(b) above such that the Deliverable complies with the requirements set out under this Agreement,

(e) If Contractor fails to remedy a deficient Deliverable after both opportunities to remedy as set out in subsection 14.1(d) above, then such failures shall constitute a material default of this Agreement; and

(f) Changes to Deliverables for which the City has provided Acceptance will be handled through the Change Notice process set out at Section 12 of this Agreement and Contractor will start no work on any change until the Parties have approved and executed any applicable Change Notice.

9.2 Upon delivery by Contractor of any Deliverable and within the Acceptance Period, the City shall review such Deliverable to determine if such Deliverable meets the applicable Acceptance Criteria as set out in the SOW, and

(a) if such Deliverable meets the applicable Acceptance Criteria or is otherwise, used or acted upon by the City, the Deliverable will be deemed Accepted on such date unless City has given notice to Contractor that it needs to use or act upon the Deliverable in order to determine whether or not it is acceptable,

(b) if such Deliverable does not meet the applicable Acceptance Criteria, the City will provide written notice by no later than the end of the Acceptance Period to Contractor setting out reasonable particulars of any deficiency and Contractor will, within the Corrective Action Period, re-work the Deliverable to meet the applicable Acceptance Criteria, or

(c) if the City fails to provide written notice rejecting the Deliverable, or fails to respond to Contractor in writing by the end of the Acceptance Period, then the City will be deemed to have Accepted such Deliverable.

(d) Once the City Accepts a Deliverable under the terms of this Section 14, including its subparts, City will issue Contractor an Acceptance Certificate which must accompany Contractor's invoice to City for that Deliverable.

9.3 For the purposes of this Agreement:

a. "Acceptance Criteria" means reasonable and objective criteria jointly established and agreed to in writing by the City and Contractor describing the criteria for the completion and acceptability of Deliverables all as more particularly set out in the SOW;

b. "Acceptance Certificate" means a certificate authorized and signed by the City indicating that the City has Accepted the specific Deliverable or Service to which the Acceptance Certificate relates,

## **10. Proprietary or Confidential Information of the City**

10.1 Confidentiality Obligations. Confidential Information shall mean all proprietary or confidential information disclosed or made available by the other Party pursuant to this Agreement that is identified as confidential or proprietary at the time of disclosure or is of a nature that should reasonably be considered to be confidential, and includes but is not limited to the terms and conditions of this Agreement, and all business, technical and other information (including without limitation, all product, services, financial, marketing, engineering, research and development information, product specifications, technical data, data sheets, software, inventions, processes, training manuals, know-how and any other information or material), disclosed from time to time by the disclosing Party to the receiving Party, directly or indirectly in any manner whatsoever (including without limitation, in writing, orally, electronically, or by inspection); provided, however, that Confidential Information shall not include the Content that is to be published on the website(s) of either Party.

10.2 Each Party agrees to keep confidential and not disclose to any third party and to use only for purposes of performing or as otherwise permitted under this Agreement, any Confidential Information. The receiving Party shall protect the Confidential Information using measures similar to those it takes to protect its own confidential and proprietary information of a similar nature but not less than reasonable measures. Each Party agrees not to disclose the Confidential Information to any of its Representatives except those who are required to have the Confidential Information in connection with this Agreement and then only if such Representative is either subject to a written confidentiality agreement or otherwise subject to fiduciary obligations of confidentiality that cover the confidential treatment of the Confidential Information.

### **10.3 Exceptions.**

- a. The obligations of this Section 9 shall not apply if receiving Party can prove by appropriate documentation, where appropriate, that such Confidential Information (i) was known to the receiving Party as shown by the receiving Party's files at the time of disclosure thereof, (ii) was already in the public domain at the time of the disclosure thereof, (iii) entered the public domain through no action of the receiving Party subsequent to the time of the disclosure thereof, (iv) is or was independently developed by the Contractor without access to or use of the Confidential Information; (v) was provided to the Contractor by a third party who, to the best of the Contractor's knowledge, was not bound by any confidentiality obligation related to such Confidential Information; or (vi) is required by law or government order to be disclosed by the receiving Party, provided that the receiving Party shall (i) notify the disclosing Party in writing of such required disclosure as soon as reasonably possible prior to such

disclosure, (ii) use its commercially reasonable efforts at its expense to cause such disclosed Confidential Information to be treated by such governmental authority as trade secrets and as confidential.

10.4 Contractor acknowledges that City is subject to public disclosure laws and that City will comply with requests for information ("RFI"), as it is required to do under the federal Freedom of Information Act, California Public Records Act, City of Oakland Sunshine Act or judicial or administrative court order. Contractor acknowledges that an RFI may pertain to any and all documentation associated with City's use of Contractor's Services. Contractor further acknowledges that it is obligated to assist and cooperate with City by producing all documentation that is responsive to the RFI so that City may comply with its statutory obligations. City agrees to give Contractor as timely written notice as possible of the RFI such that Contractor may oppose the RFI or exercise such other rights at law as Contractor believes it has. However, Contractor must produce all RFI responsive documents to City and City will comply with the RFI unless, within the time frame established by the statute, judicial or court order under which the RFI is made, Contractor procures a Temporary Restraining Order or similar injunctive relief from a court or other tribunal of competent jurisdiction ordering City not to comply with the RFI pending final determination of Contractor protest of the RFI. Contractor further agrees to accept City's tender of defense and to defend City and pay all City costs of defense in any litigation brought against City with respect to City not complying with an RFI that Contractor protests and will hold City harmless against any claims, attorneys' fees, damages, fines, judgments, or administrative penalties, which may arise from any such actions

## 11. Ownership of Results

Any interest of Contractor or its Subcontractors, in specifications, studies, reports, memoranda, computation documents in drawings, plans, sheets prepared by Contractor or its Subcontractors under this Agreement shall be assigned and transmitted to the City. However, Contractor may retain and use copies for reference and as documentation of its experience and capabilities.

## 12. Change Notices

- (a) Upon fifteen (15) days' written notice to Contractor, City shall have the right to request changes in the provision of any future Deliverables under this Agreement by delivering to Contractor a change notice ("Change Notice"), provided that any and all such changes shall be subject to Contractor's written consent. Each Change Notice may specify changes to the Software Contractor is to provide hereunder and the manner in

which Contractor is to provide the Software, If any Change Notice causes an increase or decrease in the price or the time required for performance under this Agreement, an equitable adjustment jointly agreed upon by City and Contractor shall be made and the Agreement shall be modified in writing accordingly.

- (b) Change Notices issued under this Agreement must be accepted or rejected in writing by Contractor within ten (10) days of Contractor's receipt of its issuance. Notwithstanding as may be otherwise provided here in, if for any reason Contractor should fail to timely accept or reject a Change Notice in writing, such Change Notice shall be deemed accepted.

### **13. Liquidated Damages for Contractor's Unexcused, Untimely Performance**

Contractor's failure to complete the Work within the time allowed will result in the City sustaining damages and the assessment by City of Liquidated Damages.

#### **(a) Excusable Delays (Force Majeure)**

If Contractor or City experiences an Excusable Delay Event, Contractor or City shall, within ten (10) days after first becoming aware of each such event, give written notice of the delay to the other party and describe any impact the "Excusable Delay" may have upon the Schedule. If the foregoing Notice(s) are issued, or in the absence thereof from the City, then Contractor shall be entitled to a day for day extension to the Schedule corresponding to the number of days of delay directly caused by the Excusable Delay Event.

#### **b) Schedule of Liquidated Damages.**

City and Contractor recognize that time is of the essence in the performance of this Agreement and that City will suffer financial loss in the form of contract administration expenses (including project management and consultancy expenses), delay and loss of public use, if Contractor does not complete its Services and the Deliverables associated therewith within the respective times specified in this Agreement and in the SOW, plus any extensions that are allowed in accordance with this Agreement. Contractor and City agree that because of the nature of the Services as provided by this Agreement, it would be impractical or extremely difficult to fix the amount of actual damages incurred by City because of the delay in completion or timely delivery of the Services. Accordingly, City and Contractor agree that Contractor shall pay City the following liquidated damages measures:

- (i) Deliverables: \$500.00 for each calendar day that expires after the time specified in the Scope of Work for Contractor to provide and for City to accept the Deliverables specified in the SOW.

(ii) Milestones: \$1,000.00 for each calendar day that expires after the time specified in this Agreement for Contractor to complete the Milestone set forth in this Agreement and to complete all of the Services, excluding all "inexcusable delay" events

**14. Limitation on Liability**

(a) Either party's liability to the other party for any and all liabilities, claims or damages arising out of or relating to this Agreement, howsoever caused and regardless of the legal theory asserted, including breach of contract or warranty, tort, strict liability, statutory liability or otherwise, shall not, in the aggregate, exceed \$4Million or the total value of this Agreement, whichever is greater.

(b) In no event shall either party be liable to the other for any punitive, exemplary, special, indirect, incidental or consequential damages (including, but not limited to, lost profits, lost business opportunities, loss of use or equipment down time, and loss of or corruption to data) arising out of or relating to this Agreement, regardless of the legal theory under which such damages are sought, and even if the parties have been advised of the possibility of such damages or loss.

(c) This limitation of liability shall not apply to all actions, demands, or claims by any third party for death, bodily injury, damage to tangible property in connection with or arising under this Agreement, nor to any intentional misconduct, recklessness, or gross negligence or to Contractor's Confidentiality (Section 10) and indemnification (Section 16) obligations as set forth in this Agreement.

**15. Performance Bond [Waived]**

Prior to this Agreement being effective and binding on the City, Contractor shall file with City Clerk and with the City representative to whom Notices should be sent as is specified below in Section 38 ("Notices") a Corporate surety bond, in the form of a Performance Bond, in the penal sum of 100% of the total contract amount of this Agreement to guarantee both faithful performance of Contractor's Services and a source of revenue for the City to complete the Services under this Agreement should Contractor default or become insolvent. City's representative shall attach a copy of the Bond to this Agreement as Exhibit 4. Contractor must keep the Performance Bond current for the duration of this Project.

**16. Indemnification**

- (a) General Indemnification. Contractor shall indemnify, hold harmless, and (at City's request with Counsel acceptable to City), defend City, its Council members, directors, officers, employees, agents, servants, and independent contractors (each of which persons and entities are collectively referred to herein as "Indemnitees") from any and all actions, causes of actions, claims, injuries (including, without limitation, injury to or death of an employee of Contractor or any of its structures), liabilities (of every kind, nature and description), losses, demands, debts, liens, obligations, judgments, administrative fines, damages, (incidental or consequential) costs, expenses, and attorneys' fees (collectively referred to herein as "Actions") caused by or arising out of:
- (1) any grossly negligent (passive or active) or willful acts or omissions in the course of performance by Contractor under this Agreement,
  - (2) any claim for personal injury (including death) or property damage to the extent based on the strict liability or caused by any negligent act, error or omission of Contractor;
- (b) Proprietary Rights Indemnity. Contractor shall indemnify, defend, save and hold harmless Indemnitees from any and all Actions arising out of claims that the Software, infringes upon or violates the Intellectual Property Rights of others. If the Software will become the subject of an Action or claim of infringement or violation of the Intellectual Property Rights of a third party, City, at its option shall require Contractor, at Contractor's sole expense to: (1) procure for City the right to continue using the Software; or (2) replace or modify the Software so that no infringement or other violation of Intellectual Property Rights occurs, if City determines that: (A) such replaced or modified Software will operate in all material respects in conformity with the then-current specifications for the Software; and (B) City's use of the Software is not impaired thereby. Contractor's obligations under this Agreement will continue uninterrupted with respect to the replaced or modified Software as if it were the original Software.
- (c) For the purposes of the indemnification obligations set forth herein, the term "Contractor" includes, without limitation, Contractor, its officers, directors, employees, representatives, agents, servants, sub consultants, and subcontractors.
- (d) Contractor acknowledges and agrees that it has an immediate and independent obligation to indemnify and defend Indemnitees from any Action which potentially falls within this indemnification provision, which obligation shall arise at the time an Action is tendered to Contractor by City and continues at all times thereafter, without regard to any alleged or actual contributory negligence of any Indemnitee. Notwithstanding anything to the contrary contained herein, Contractor's liability under this

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Agreement shall not apply to any Action arising from the sole negligence, active negligence or willful misconduct of an Indemnitee.

- (e) City shall give Contractor prompt written notice of any Action and shall fully cooperate with Contractor in the defense and all related settlement negotiations to the extent that cooperation does not conflict with City's interests. Notwithstanding the foregoing, City shall have the right, if Contractor fails or refuses to defend City with Counsel acceptable to City, to engage its own counsel for the purposes of participating in the defense. In addition, City shall have the right to withhold payments due Contractor in the amount of reasonable defense costs actually incurred. In no event shall Contractor agree to the settlement of any claim described herein without the prior written consent of City.
- (f) All of Contractor's indemnification obligations hereunder are intended to apply to the fullest extent permitted by law (including, without limitation, California Civil Code Section 2782) and shall survive the expiration or sooner termination of this Agreement.
- (g) Contractor's indemnification obligations hereunder shall not be limited by the City's insurance requirements contained in Schedule B hereof, or by any other provision of this Agreement.

**17. Termination**

- (a) Termination for Breach. If Contractor breaches any material obligation under this Agreement and fails to cure the breach within 30 days of receipt of written notice from City of said breach, City may terminate the Agreement and, at its option: (i) subject to the Limitation on Liability (Section 14), recover all direct damages it incurs as a result of Contractor's breach; (ii) require that Contractor repay City all monies City has paid Contractor under this Agreement or (iii) retain the portion of Contractor's Deliverables that the City has accepted and paid Contractor for and complete performance of the Agreement with another vendor. In the event City elects to complete performance of the Agreement with another vendor, Contractor shall remain liable for any increase in costs to City of completing the Agreement in excess of the price City would have paid Contractor for completing the Agreement.
- (b) Contractor may terminate this Agreement if City breaches a material provision of the Agreement and does not cure the breach within 30 days of written notice from Contractor of said breach. In such event, Contractor will be entitled to payment for Deliverables which City has accepted in



accordance with the Testing and Acceptance provisions of this Agreement.

- (c) Bankruptcy. Either party may immediately terminate this Agreement if (i) the other party files a petition for bankruptcy or has filed against it an involuntary petition for bankruptcy which is not dismissed within 60 days of its filing, (ii) a court has appointed a receiver, trustee, liquidator or custodian of it or of all or a substantial part of the other party's property, (iii) the other party becomes unable, or admits in writing its inability, to pay its debts generally as they mature, or (iv) the other party makes a general assignment for the benefit of its or any of its creditors.
- (d) Termination for Convenience by City. City may terminate this Agreement for any reason at any time upon not less than sixty (60) days' prior written notice to Contractor. After the date of such termination notice, Contractor shall not perform any further services or incur any further costs claimed to be reimbursable under this Agreement, any Purchase Order, Change Order, or Change Notice without the express prior written approval of City. As of the date of termination, City shall pay to Contractor all undisputed amounts then due and payable under this Agreement.
- (e) Transition Services after termination. In connection with the expiration or other termination of this Agreement or the expiration of this Agreement, Contractor may provide transition services as requested by City. Such transition services shall be subject to the pricing provided in this Agreement or any amendment thereto.

## 18. DISPUTE RESOLUTION

a. If dispute or disagreement among the Parties arises with respect to either Party's performance of its obligations hereunder, or any provision of or interpretation of the Agreement, the Parties agree in good faith to attempt to resolve such dispute or disagreement (a "Dispute") prior to submitting the Dispute to mediation, arbitration or litigation in accordance with this Section 18. Such resolution efforts shall involve the City Administrator of the City of Oakland and an executive officer of Contractor, together with such other persons as may be designated by either Party.

b. Any Party may commence said resolution efforts by giving notice, in writing, to any other Party. Such notice shall include at least a description of the Dispute and any remedial action that the Party commencing the resolution procedure asserts would resolve the Dispute. Upon receiving such notice, the Party against whom the Dispute is brought shall respond in writing within five (5) Business Days. The Parties shall then meet and confer in a good faith attempt to resolve the Dispute.

c If the Dispute has not been resolved within five (5) Business Days after the Subsection 18.b. notice is given, and unless the Party initiating the Dispute does not wish to pursue its rights relating to such Dispute or desires to continue the Pre-Mediation Dispute Resolution, then such Dispute will be automatically submitted to mediation. The mediation will be conducted in Alameda County by a single mediator selected by the Parties to the Dispute by mutual agreement or by the use of the Commercial Arbitration Rules of the American Arbitration Association for selecting an Arbitrator ["AAA RULES"] The Parties to the Dispute shall evenly share the fees and costs of the mediator. The mediator shall have twenty (20) Business Days from the submission to mediation to attempt to resolve such Dispute. If the Dispute is not resolved within that time period, the parties will be entitled to pursue such matter by demanding arbitration under the AAA RULES or instituting litigation.

#### **19. Commencement, Completion and Close-out**

It shall be the responsibility of the Contractor to coordinate and schedule the work to be performed so that commencement and completion take place in accordance with the provisions of this Agreement.

Any time extension granted to Contractor to enable Contractor to complete the work must be in writing and shall not constitute a waiver of rights the City may have under this Agreement.

Should the Contractor not complete the work by the scheduled date or by an extended date, the City shall be released from all of its obligations under this Agreement.

Within thirty (30) days of completion of the performance under this Agreement, Contractor shall make a determination of any and all final costs due under this Agreement and shall submit a requisition for such final and complete payment (including without limitations any and all claims relating to or arising from this Agreement) to the City. Failure of the Contractor to timely submit a complete and accurate requisition for final payment shall relieve the City of any further obligations under this Agreement, including without limitation any obligation for payment of work performed or payment of claims by Contractor.

#### **20. Bankruptcy.**

All rights and licenses granted to City pursuant to this Agreement are, and shall be deemed to be, for purposes of Section 265(n) of the U.S. Bankruptcy Code, licenses of rights to "intellectual property" as defined under Section 101 of the U.S. Bankruptcy Code. In a bankruptcy or insolvency proceeding involving Contractor, the parties agree that City, as licensee of such rights, shall retain and fully exercise all of its rights and elections under the U.S. Bankruptcy Code, and the provisions thereof shall apply notwithstanding conflict

of law principles. The parties further agree that, in the event of the commencement of a bankruptcy or insolvency proceeding by or against Contractor under the U.S. Bankruptcy Code, City shall be entitled to a complete duplicate of any such intellectual property, including the source code for Contractor's Licensed Software which Contractor has placed in escrow as required under this Agreement and all embodiments of such intellectual property, to which City would otherwise be entitled under this Agreement, and the same, if not already in City's possession, shall be promptly delivered to City (a) upon any such commencement of a bankruptcy proceeding upon written request therefore by City, unless Contractor elects to continue to perform all of its obligations under this Agreement, or (b) if not delivered under (a) above, upon rejection of this Agreement by or on behalf of Contractor upon written request therefore by City. If, in a bankruptcy or insolvency proceeding involving Contractor, the provisions of the U.S. Bankruptcy Code referenced above are determined not to apply, City shall nevertheless be entitled to no less than the protection offered by the provisions of the U.S. Bankruptcy Code with respect to its entitlement to and rights to the use and possession of all intellectual property to which City has been granted rights under this Agreement notwithstanding the bankruptcy or insolvency of Contractor.

#### **21. Assignment**

Contractor shall not assign or otherwise transfer any rights, duties, obligations or interest in this Agreement or arising hereunder to any person, persons, entity or entities whatsoever without the prior written consent of the City and any attempt to assign or transfer without such prior written consent shall be void. Consent to any single assignment or transfer shall not constitute consent to any further assignment or transfer. In the event that Contractor assigns this Agreement in compliance with this provision, this Agreement and all of its provisions shall inure to the benefit of and become binding upon the parties and the successors and permitted assigns of the respective parties.

#### **22. Agents/Brokers**

Contractor warrants that Contractor has not employed or retained any subcontractor, agent, company or person other than bona fide, full-time employees of Contractor working solely for Contractor, to solicit or secure this Agreement, and that Contractor has not paid or agreed to pay any subcontractor, agent, company or persons other than bona fide employees any fee, commission, percentage, gifts or any other consideration, contingent upon or resulting from the award of this Agreement. For breach or violation of this warranty, the City shall have the right to rescind this Agreement without liability or, in its discretion, to deduct from the Agreement price or consideration, or otherwise recover, the full amount of such fee, commission, percentage or gift.

#### **23. Publicity**

Any publicity generated by Contractor for the project funded pursuant to this Agreement, during the term of this Agreement or for one year thereafter, will make reference to the contribution of the City of Oakland in making the project possible. The words "City of

Oakland" will be explicitly stated in all pieces of publicity, including but not limited to flyers, press releases, posters, brochures, public service announcements, interviews and newspaper articles.

City staff will be available whenever possible at the request of Contractor to assist Contractor in generating publicity for the project funded pursuant to this Agreement. Contractor further agrees to cooperate with authorized City officials and staff in any City-generated publicity or promotional activities undertaken with respect to this project.

**24. Conflict of Interest**

(a) Contractor

The following protections against conflict of interest will be upheld:

- (1) Contractor certifies that no member of, or delegate to the Congress of the United States shall be permitted to share or take part in this Agreement or in any benefit arising there from.
- (2) Contractor certifies that no member, officer, or employee of the City or its designees or agents, and no other public official of the City who exercises any functions or responsibilities with respect to the programs or projects covered by this Agreement, shall have any interest, direct or indirect in this Agreement, or in its proceeds during his/her tenure or for one year thereafter.
- (3) Contractor shall immediately notify the City of any real or possible conflict of interest between work performed for the City and for other clients served by Contractor.
- (4) Contractor warrants and represents, to the best of its present knowledge, that no public official or employee of City who has been involved in the making of this Agreement, or who is a member of a City board or commission which has been involved in the making of this Agreement whether in an advisory or decision-making capacity, has or will receive a direct or indirect financial interest in this Agreement in violation of the rules contained in California Government Code Section 1090 et seq., pertaining to conflicts of interest in public contracting. Contractor shall exercise due diligence to ensure that no such official will receive such an interest.

- (5) Contractor further warrants and represents, to the best of its present knowledge and excepting any written disclosures as to these matter already made by Contractor to City, that (1) no public official of City who has participated in decision-making concerning this Agreement or has used his or her official position to influence decisions regarding this Agreement, has an economic interest in Contractor or this Agreement, and (2) this Agreement will not have a direct or indirect financial effect on said official, the official's spouse or dependent children, or any of the official's economic interests. For purposes of this paragraph, an official is deemed to have an "economic interest" in any (a) for-profit business entity in which the official has a direct or indirect investment worth \$2,000 or more, (b) any real property in which the official has a direct or indirect interest worth \$2,000 or more, (c) any for-profit business entity in which the official is a director, officer, partner, trustee, employee or manager, or (d) any source of income or donors of gifts to the official (including nonprofit entities) if the income totaled more than \$500 in the previous 12 months, or value of the gift totaled more than \$350 the previous year. Contractor agrees to promptly disclose to City in writing any information it may receive concerning any such potential conflict of interest. Contractor's attention is directed to the conflict of interest rules applicable to governmental decision-making contained in the Political Reform Act (California Government Code Section 87100 et seq.) and its implementing regulations (California Code of Regulations, Title 2, Section 18700 et seq.).
- (6) Contractor understands that in some cases Contractor or persons associated with Contractor may be deemed a "City officer" or "public official" for purposes of the conflict of interest provisions of Government Code Section 1090 and/or the Political Reform Act. Contractor further understands that, as a public officer or official, Contractor or persons associated with Contractor may be disqualified from future City contracts to the extent that Contractor is involved in any aspect of the making of that future contract (including preparing plans and specifications or performing design work or feasibility studies for that contract) through its work under this Agreement.
- (7) Contractor shall incorporate or cause to be incorporated into all subcontracts for work to be performed under this Agreement a provision governing conflict of interest in substantially the same form set forth herein.

(b) No Waiver

Nothing herein is intended to waive any applicable federal, state or local conflict of interest law or regulation

(c) **Remedies and Sanctions**

In addition to the rights and remedies otherwise available to the City under this Agreement and under federal, state and local law, Contractor understands and agrees that, if the City reasonably determines that Contractor has failed to make a good faith effort to avoid an improper conflict of interest situation or is responsible for the conflict situation, the City may (1) suspend payments under this Agreement, (2) terminate this Agreement, (3) require reimbursement by Contractor to the City of any amounts disbursed under this Agreement. In addition, the City may suspend payments or terminate this Agreement whether or not Contractor is responsible for the conflict of interest situation.

**25. Validity of Contracts**

The Oakland City Council must approve all Agreements greater than \$15,000. This Agreement shall not be binding or of any force or effect until signed by the City Manager or his or her designee and approved as to form and legality by the City Attorney or his or her designee.

**26. Governing Law**

This Agreement shall be governed and construed in accordance with the laws of the State of California, without reference to its conflicts of laws principles. Any action or proceeding to enforce the terms of this Agreement shall be brought in the courts of Alameda County, Oakland, California and each party agrees to waive any objections to personal jurisdiction and venue in the courts of Alameda County, Oakland, California.

**27. Headings**

Headings and captions used to introduce Sections and paragraphs of this Agreement are for convenience, only, and have no legal significance.

**28. Construction**

- (a) Except as provided in Section 15 (b) above, acceptance or acquiescence in a prior course of dealing or a course of performance rendered under

this Agreement or under any Change Order, or Change Notice, shall not be relevant in determining the meaning of this Agreement even though the accepting or acquiescing party has knowledge of the nature of the performance and opportunity for objection.

- (b) The language in all parts of this Agreement and any Purchase Order, Change Order, or Change Notice, shall in all cases be construed in whole, according to its fair meaning, and not strictly for or against, either Contractor, City regardless of the drafter of such part.

## **28. Waiver**

No covenant, term, or condition of this Agreement may be waived except by written consent of the party against whom the waiver is claimed and the waiver of any term, covenant or condition of this Agreement shall not be deemed a waiver of any subsequent breach of the same or any other term, covenant or condition of this Agreement.

## **30. Independent Contractor**

### **(a) Rights and Responsibilities**

It is expressly agreed that in the performance of the services necessary to carry out this Agreement, Contractor shall be, and is, an independent contractor, and is not an employee of the City. Contractor acknowledges and agrees that all of Contractor's employees and subcontractors are under the sole direction and control of Contractor and City shall have no authority over or responsibility for such employees and subcontractors of Contractor. Contractor has and shall retain the right to exercise sole direction and supervision of the services, and full control over the employment, direction, compensation and discharge of all persons assisting Contractor in the performance of Contractor's services hereunder. Contractor shall be solely responsible for all matters relating to the payment of his/her employees, including compliance with social security, withholding and all other regulations governing such matters, and shall be solely responsible for Contractor's own acts and those of Contractor's subordinates and employees. Contractor will determine the method, details and means of performing the services described in **EXHIBIT 1**

### **(b) Contractor's Qualifications**

Contractor represents that Contractor has the qualifications and skills necessary to perform the services under this Agreement in a competent and

professional manner without the advice or direction of the City. This means Contractor is able to fulfill the requirements of this Agreement. Failure to perform all of the services required under this Agreement will constitute a material breach of the Agreement and may be cause for termination of the Agreement. Contractor has complete and sole discretion for the manner in which the work under this Agreement is performed. Contractor shall complete and submit to City, Schedule M-Independent Contractor Questionnaire, prior to the execution of this Agreement.

(c) Payment of Income Taxes

Contractor is responsible for paying, when due, all income taxes, including estimated taxes, incurred as a result of the compensation paid by the City to Contractor for services under this Agreement. On request, Contractor will provide the City with proof of timely payment. Contractor agrees to indemnify the City for any claims, costs, losses, fees, penalties, interest or damages suffered by the City resulting from Contractor's failure to comply with this provision.

(d) Non-Exclusive Relationship

Contractor may perform services for, and contract with, as many additional clients, persons or companies as Contractor, in his or her sole discretion, sees fit.

(e) Tools, Materials and Equipment

Contractor will supply all tools, except those tools, materials, equipment specified herein, if any, required to perform the services under this Agreement.

(f) Cooperation of the City

The City agrees to comply with all reasonable requests of Contractor necessary to the performance of Contractor's duties under this Agreement.

(g) Extra Work

Contractor will do no extra work under this Agreement without first receiving prior written authorization from the City.



**31. Attorneys' Fees**

If either party commences an action or proceeding to determine or enforce its rights hereunder, the prevailing party shall be entitled to recover from the losing party all expenses reasonably incurred, including court costs, reasonable attorneys' fees and costs of suit as determined by the court.

**32. Counterparts**

This Agreement may be executed in any number of identical counterparts, any set of which signed by both parties shall be deemed to constitute a complete, executed original for all purposes.

**33. Remedies Cumulative**

The rights and remedies of City provided in this Agreement shall not be exclusive and are in addition to any other rights and remedies provided by law, including the California Uniform Commercial Code.

**34. Severability/Partial Invalidity**

If any term or provision of this Agreement, or the application of any term or provision of this Agreement to a particular situation, shall be finally found to be void, invalid, illegal or unenforceable by a court of competent jurisdiction, then notwithstanding such determination, such term or provision shall remain in force and effect to the extent allowed by such ruling and all other terms and provisions of this Agreement or the application of this Agreement to other situation shall remain in full force and effect.

Notwithstanding the foregoing, if any material term or provision of this Agreement or the application of such material term or condition to a particular situation is finally found to be void, invalid, illegal or unenforceable by a court of competent jurisdiction, then the Parties hereto agree to work in good faith and fully cooperate with each other to amend this Agreement to carry out its intent.

**35. Access**

Access to City's premises by Contractor shall be subject to the reasonable security and operational requirements of City. To the extent that Contractor's obligations under this Agreement or any Purchase Order, Change Order, or Change Notice, require the performance of Services or Work by Contractor on City's property or property under City's control, Contractor agrees:

- (i) to accept full responsibility for performing all Services or work in a safe manner so as not to jeopardize the safety of City's personnel, property, or members of the general public; and

- (ii) to comply with and enforce all of City's regulations, policies, and procedures including, without limitation, those with respect to security, access, safety and fire protection, City's policy against sexual harassment, and all applicable state and municipal safety regulations, building codes or ordinances.

**36. Entire Agreement of the Parties**

This Agreement supersedes any and all Agreements, either oral or written, between the parties with respect to the rendering of services by Contractor for the City and contains all of the representations, covenants and Agreements between the parties with respect to the rendering of those services. Each party to this Agreement acknowledges that no representations, inducements, promises or Agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not contained in this Agreement, and that no other Agreement, statement or promise not contained in this Agreement will be valid or binding.

**37. Modification**

Any modification of this Agreement will be effective only if it is in a writing signed by all parties to this Agreement.

**38. Notices**

If either party shall desire or be required to give notice to the other, such notice shall be given in writing, via facsimile and concurrently by prepaid U.S. certified or registered postage, addressed to recipient as follows:

(City of Oakland)

**Katano Kasaine  
Treasurer  
City of Oakland  
150 Frank Ogawa Plaza, Suite 5330  
Oakland, CA 94612**

cc:

**Celso Ortiz  
Deputy City Attorney  
1 Frank Ogawa Plaza, 6<sup>th</sup> Fl.  
Oakland, CA 94612**

(Contractor)

**Lawson James  
Horizon Projects Consulting Corp.  
367 Avalon Gardens Drive  
Nanuet, NY 10954**

Any party to this Agreement may change the name or address of representatives for purpose of this Notice paragraph by providing written notice to all other parties ten (10) business days before the change is effective.

**39. Right to Offset**

All claims for money or to become due from City shall be subject to deduction or offset by City from any monies due Contractor by reason of any claim or counterclaim arising out of this Agreement or any Purchase Order, Change Order, or Change Notice or any other transaction with Contractor. To the extent that there are amounts due to the City and to a state or federal funding agency, and the amount of the offset is insufficient to pay such amount in full, the amount of the offset shall be prorated between the City and such state or federal funding agency in proportion to the amounts due them.

**40. No Third Party Beneficiary**

This Agreement shall not be construed to be an agreement for the benefit of any third Party or parties, and no third party or parties shall have any claim or right of action under this Agreement

**41. Survival**

Sections (2, 7, 8, 9, 10, 14, 15, 17, 26 and 40) of this Agreement, along with any other provisions which by their terms survive, shall survive the expiration or termination of this Agreement.

**42. Time is of the Essence**

The Special Circumstances of this Agreement require Contractor's timely performance of its obligations under this Agreement. Therefore, time is of the essence in the performance of this Agreement.

**43. Authority**

Each individual executing this Agreement or any Purchase Order, Change Order or Change Notice, hereby represents and warrants that he or she has the full power and authority to execute this Agreement or such Purchase Order, Change Order or Change Notice, on behalf of the named party such individual purports to bind.

**SO AGREED:**

City of Oakland,  
a municipal corporation

Contractor

Debraf Barner 7/24/15  
(City Administrator's Office) (Date)

[Signature] 6/10/15  
(Signature) (Date)

Katano Kamin 7-24-15  
(Department Head Signature) (Date)

28051023  
[Signature]  
Business Tax Certificate No.

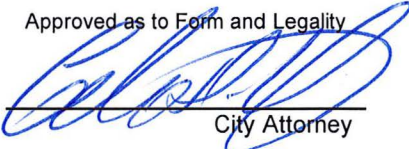
Approved as to form and legality:

[Signature] 7-24-15  
(City Attorney's Office Signature) (Date)

84579  
Resolution Number

FILED  
OFFICE OF THE CITY CLERK  
OAKLAND

Approved as to Form and Legality



City Attorney

2016 FEB 10 PM 5:14  
**OAKLAND CITY COUNCIL**

RESOLUTION NO. \_\_\_\_\_ C.M.S.

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**RESOLUTION:**

**AUTHORIZING THE CITY ADMINISTRATOR OR DESIGNEE TO: (1) PURCHASE HYPERION HARDWARE AND/OR SOFTWARE, LICENSING AND MAINTENANCE SERVICES FOR THE NEW CITY BUDGETING SYSTEM FROM ORACLE CORPORATION IN THE ESTIMATED AMOUNT OF \$75,000.00; AND (2) ENTER INTO A CONTRACT WITH INNOFIN SOLUTIONS, LLC TO PROVIDE PROFESSIONAL SERVICES TO IMPLEMENT THE NEW MUNICIPAL BUDGETING SYSTEM IN THE ESTIMATED AMOUNT OF \$879,000; AND WAIVE THE ADVERTISING, BIDDING AND REQUEST FOR PROPOSAL/QUALIFICATIONS (“RFP/Q”) COMPETITIVE SELECTION REQUIREMENTS FOR THE ABOVE CONTRACTS**

**WHEREAS**, the City's information technology infrastructure is the underlying foundation that ties multiple departments and agencies together and that provides mission-critical tools to the City workforce; and

**WHEREAS**, the City's current public sector budgeting system is obsolete and a new budgeting system must be implemented before December 2016 to facilitate the next full budget cycle; and

**WHEREAS**, OMC Section 2.04.050 requires advertising and competitive bidding for contracts for the purchase of supplies, equipment, and computer software and the award to the lowest responsible, responsive bidder if award is made; and

**WHEREAS**, OMC Section 2.04.050 I.5 provides an exception to the advertising and competitive bidding requirement of the OMC upon a finding and determination by the City Council that it is in the best interests of the City to do so; and

**WHEREAS**, OMC section 2.04.051 requires a competitive RFP/Q competitive selection process for award of contracts that exceed \$25,000 for professional service contracts and which are exempt from bidding under Section 2.04.050.1.1; and

**WHEREAS**, OMC sections 2.04.050.I. and 2.04.051.B permit the City Council to waive advertising, bidding and the RFP/Q competitive selection requirements upon finding that it is in the City's best interest to do so; and

**WHEREAS**, Oracle Hyperion Planning ("Hyperion") hardware and/or software purchases in the estimated amount of \$75,000 are necessary for the new municipal budgeting system; and

**WHEREAS**, staff requests that the Council waive the advertising, competitive bidding, and RFP/Q competitive selection requirements and authorize the City Administrator to purchase from Oracle Corporation the Hyperion hardware and/or software, licensing and maintenance services; and

**WHEREAS**, the City will require specialized professional services from a contractor in order to implement this new municipal budgeting system; and

**WHEREAS**, an informal request for qualifications were conducted with a limited universe of contractors given the time constraints and the mission critical nature of the system implementation, and

**WHEREAS**, staff recommends that the Council waive the advertising, competitive bidding, and RFP/Q competitive selection requirements and authorize the City Administrator to enter into a contract with InnoFin Solutions, LLC in the estimated amount of \$879,000 for the system integration services for the implementation of the new municipal budgeting system; and

**WHEREAS**, the Agenda Report accompanying this Resolution, staff has set forth the facts supporting waiver of the advertising, competitive bidding, and RFP/Q competitive process for the purchase of the Hyperion software, hardware, licensing and maintenance services from Oracle Corporation, and for the professional services contract with InnoFin Solutions, LLC; and now, therefore be it

**RESOLVED**, that the City Council finds and determines the forgoing recitals to be true and correct and hereby adopts and incorporates them into this Resolution; and be it

**FURTHER RESOLVED**, that pursuant to the Oakland Municipal Code Sections 2.04.050 I.5 and 2.04.051.B, the City Council hereby finds and determines that it is in the best interests of the City to waive the competitive bidding, advertising and the RFP/Q process requirements for the purchase of the hardware and/or software, licensing and maintenance services from Oracle Corporation, and for the professional services agreement with InnoFin Solutions, LLC; and be it

**FURTHER RESOLVED**, that pursuant to the Oakland Municipal Code Sections 2.04.050 I.5 and 2.04.051.B and for the reasons stated above and in the Agenda Report accompanying this Resolution, the City Council hereby finds and determines that it is in the best interests of the City to waive the competitive bidding, advertising and the RFP/Q process for the above contracts; and be it

**FURTHER RESOLVED**, that based on the recommendations of the City Administrator, the City Council approves award of contract to Oracle Corporation for the purchase of hardware and/or software, licensing and maintenance services, and the award of a contract to provide system integration services to InnoFin Solutions LLC in the estimated amount of \$879,000 for the new municipal budgeting system, and authorizes the City Administrator or designee to negotiate and enter into contracts with the above firms; and be it

**FURTHER RESOLVED**, that, consistent with standard procedure, should the City and selected firms not be able to reach an agreement as to contract terms within a reasonable timeframe, Council authorizes the City Administrator or designee to negotiate and enter into contracts while waiving the competitive bidding requirements with other qualified firms, without return to Council; and be it

**FURTHER RESOLVED**, that the Office of the City Attorney will approve the contracts as to form and legality and copies will be on file in the Office of the City Clerk.

IN COUNCIL, OAKLAND, CALIFORNIA, \_\_\_\_\_, 2016

**PASSED BY THE FOLLOWING VOTE:**

AYES – BROOKS, CAMPBELL WASHINGTON, GALLO, GUILLEN, KALB, KERNIGHAN, REID, AND PRESIDENT MCELHANEY

NOES –

ABSENT –

ABSTENTION –

ATTEST: \_\_\_\_\_  
LaTonda Simmons  
City Clerk and Clerk of the Council  
of the City of Oakland, California