

Contract No:

ATTACHMENT 3 – SOFTWARE AND SERVICE AGREEMENT

This Agreement is between the COUNTY OF HENNEPIN, STATE OF MINNESOTA, (“COUNTY”) A-2300 Government Center, Minneapolis, Minnesota 55487, on behalf of the Hennepin County Central IT, (“DEPARTMENT”) and Contractor, (“CONTRACTOR”).

The parties agree as follows:

1. TERM AND TOTAL COST OF THE AGREEMENT

CONTRACTOR agrees to furnish services to the COUNTY commencing upon execution hereof and continuing for XX years following Acceptance, unless cancelled or terminated earlier in accordance with the Default and Cancellation/Termination provisions of this Agreement.

The total cost of this Agreement, including all reimbursable expenses, shall not exceed \$xx.xx.

2. SOFTWARE, SUPPORT AND LICENSE

“Software” shall mean all computer programs, applications, utilities, middleware, third-party software, documentation, and other related technology as further described and specified in Exhibit 1 including all security devices, updates, major and/or minor enhancements, versions, releases, corrections, or any other modifications provided as part of this Agreement. CONTRACTOR shall execute any and all documentation to assign its rights to the COUNTY for any third-party software supplied by CONTRACTOR as part of this Agreement.

CONTRACTOR hereby grants to COUNTY a non-exclusive, non-transferable license during the term of this Agreement: (1) to use the Software in connection with COUNTY’s business in accordance with the Software’s functionality, and (2) to use, modify, configure and display a reasonable number of copies of the documentation related to the Software for archival, testing, disaster recovery and other emergency purposes. This license authorizes use by all COUNTY personnel and/or any individual or entity with whom COUNTY has a direct or indirect business or employee relationship. The rights granted to COUNTY pursuant to this section may be collectively referred to as the "License."

CONTRACTOR shall provide installation, maintenance, training and other support services pursuant to the service levels described and specified on Exhibit 1 (“Support”).

Support shall be performed pursuant to the milestone schedule along with the Implementation Plan set forth in Schedule 1.

All right, title and interest in all copyrightable material which CONTRACTOR may conceive or originate either individually or jointly with others, and which arises out of the performance of this Agreement, are the property of the COUNTY. CONTRACTOR shall assign to COUNTY all right, title, interests and copyrights of the copyrightable material. CONTRACTOR also agrees, upon request of the COUNTY, to execute all papers and perform all other acts necessary to assist the COUNTY to obtain and register copyrights in those materials. Where applicable, works for authorship created by CONTRACTOR for the COUNTY in performance of this Agreement shall be considered “works made for hire” as defined in the U.S. Copyright Act.

CONTRACTOR hereby warrants that, when legally required, CONTRACTOR shall obtain the written consent of both the owner and licensor to reproduce, publish, and/or use any material supplied to the COUNTY including, but not limited to, software, hardware, documentation, and/or any other item. CONTRACTOR further warrants that any material or item delivered by CONTRACTOR will not violate the United States Copyright Law or any property right of another.

3. TESTING AND ACCEPTANCE

COUNTY shall have the opportunity to test the Software in a non-production and/or production environment to ensure performance in accordance with COUNTY’s expectations and the Software descriptions and specifications set forth in Exhibit 1 (“Acceptance Testing Criteria”). COUNTY may, at any time, notify CONTRACTOR that the Software has been accepted (“Accepted” or “Acceptance”).

COUNTY will provide a detailed description of any Software component or functionality that does not conform with the descriptions and specifications (“Non-conformity”).

CONTRACTOR will correct a Non-conformity, at CONTRACTOR’s sole expense, within fifteen (15) days of receiving the Non-conformity notice. COUNTY shall then test the corrected Software. If COUNTY has not notified CONTRACTOR of a Nonconformity in the corrected Software within 90 days after the date the corrected software is installed, the Software shall be deemed to be “Accepted.” Use of Software during the testing period shall not constitute acceptance.

If CONTRACTOR is unable to correct a Non-conformity within the fifteen (15) day period: (1) COUNTY may extend the correction period to a mutually agreeable date; (2) COUNTY may require further modification of the Software by CONTRACTOR, at CONTRACTOR’s sole expense, so that the Software will be acceptable; (3) the Parties may mutually agree upon an appropriate adjustment to the fees; or (4) COUNTY may

immediately terminate this Agreement and receive a full refund of all monies paid with respect to the Non-conforming Software plus any other costs related to the Nonconforming Software including, but not limited to, amounts paid for installation, Support and the costs of removing and returning the Software. COUNTY's election herein, for a Non-conformity and/or failure to cure the Non-conformity, shall not affect its right to terminate this Agreement or any other remedies the COUNTY is entitled to.

4. PAYMENT FOR SERVICES

COUNTY shall pay CONTRACTOR the amounts for Software and Support set forth in Schedule 1. As indicated in the following provisions, CONTRACTOR shall present an invoice in the manner provided by law governing COUNTY's payment of claims and/or invoices. Payment shall be made within thirty-five (35) days from receipt of the invoice.

Upon Acceptance of the Software pursuant to the terms herein, CONTRACTOR shall invoice COUNTY for the services payment set forth in Schedule 1.

Upon COUNTY's approval of completed Support services, CONTRACTOR shall invoice COUNTY for the Support services payments, if any, set forth in Schedule 1.

COUNTY shall not be required to pay any amounts, costs or fees due to COUNTY's upgrade or reconfiguration of the computers or servers with which COUNTY uses the Software, nor shall COUNTY be charged a fee for a transfer of the Software to another computer or server.

5. WARRANTIES

CONTRACTOR warrants that it is the lawful owner of the Software or, to the extent it is not the lawful owner, that it has all rights necessary to license the Software to COUNTY. CONTRACTOR warrants that the Software shall not violate or in any way infringe any patent, patent application, copyright, trade secret, trademark, trademark application, or other proprietary or intellectual property rights ("Intellectual Property Rights").

CONTRACTOR represents and warrants to COUNTY that the Software shall perform in accordance with the descriptions and specifications in this Agreement: (1) for 180 days after Acceptance of the Software; and (2) at all times during any Support and/or maintenance period.

CONTRACTOR represents and warrants that the Software and the media used to distribute it are free of: (1) code that may disrupt, damage, or interfere with COUNTY's use of its computers, systems and/or telecommunications, e.g., malicious code, viruses, etc.; and (2) devices that are capable of automatically or remotely stopping the Software from operating, e.g., passwords, fuses, time bombs, etc.; or (3) other harmful code. CONTRACTOR also represents and warrants to COUNTY that it has developed and engineered its Software without any "back doors" or "trap doors" which allow for application code access bypassing any security features.

CONTRACTOR, for itself and CONTRACTOR Personnel, agrees to comply with all of COUNTY's requirements in relation to the security of the COUNTY computing environment, facilities and otherwise including but not limited to installation and use of antivirus and firewall software per COUNTY standards on any computing device connecting to the COUNTY's network facilities. CONTRACTOR shall ensure that all personnel, including but not limited to employees, contractors or other personnel, agree, in writing, to protect and keep private and secure access passwords and to not release passwords to any unauthorized individual. CONTRACTOR agrees to be responsible for any and all damages resulting from (a) unauthorized use of access password(s) by any authorized or unauthorized individual, or (b) any virus transmitted to COUNTY computer systems due to CONTRACTOR's failure to maintain antivirus software at its most current level.

CONTRACTOR will not alter or disable any hardware or software security programs residing on COUNTY's hardware or systems. CONTRACTOR will not allow unauthorized traffic to pass into COUNTY's computers, systems, networks or facilities. If CONTRACTOR does allow unauthorized traffic to pass into COUNTY's networks, COUNTY may immediately terminate said access in addition to any other remedies that COUNTY may have under this Agreement. CONTRACTOR will immediately notify COUNTY of any actual or suspected security breach.

CONTRACTOR represents and warrants that it will provide competent individuals with the skills, knowledge, and training necessary to perform Support and related services for COUNTY under this Agreement. Said individuals will perform such Support and related services in a diligent and professional manner, in strict compliance with all performance specifications, and in accordance with generally accepted industry standards.

COUNTY will have the right to remove any CONTRACTOR personnel in its sole discretion. COUNTY also has the right to ask that specific employees or personnel be assigned to the project.

Unless expressly set forth otherwise, each of the foregoing warranties is continuous in nature and will be deemed provided by CONTRACTOR on the effective date hereof, and through the pendency of this Agreement. Nothing herein shall limit or modify any other right or remedy available to the COUNTY under this Agreement, law, statute, rule, and/or equity.

In the event COUNTY purchases physical equipment ("Hardware"), on CONTRACTOR's configuration and/or recommendation, from a third party, CONTRACTOR warrants that the Hardware is compatible with the Software.

CONTRACTOR further acknowledges, whether COUNTY purchases Hardware from CONTRACTOR or from a third party on CONTRACTOR's configuration and/or recommendation, COUNTY has relied upon the expertise of CONTRACTOR in the determination of the required Hardware components to effectively satisfy the specifications and requirements of this Agreement. As such, CONTRACTOR assumes

full responsibility and financial risk to insure that all required Hardware components are included in the design and architecture, whether or not such Hardware components are provided by CONTRACTOR or others, including but not limited to CONTRACTOR's indemnification obligations herein. In the event that any Hardware required to operate or maintain the Software in accordance with the requirements in this Agreement is missing or is proven to be incompatible with the Software design, such proof being evidenced by elimination of any error by the removal or replacement of the offending Hardware component, CONTRACTOR shall provide the missing or replace the incompatible Hardware component at no additional cost to the COUNTY.

COUNTY shall be relieved from all risks of loss or damage to Software, Hardware, and/or all documentation during periods of transportation and installation and during the entire time the Software, Hardware and/or documentation are in the possession of COUNTY. CONTRACTOR shall not be responsible for loss or damage to commodities, equipment, software and/or documentation occasioned by negligence of COUNTY or its employees.

6. PROFESSIONAL CREDENTIALS

CONTRACTOR agrees to provide all information requested by the COUNTY to facilitate the verification of educational and professional credentials from primary sources. CONTRACTOR agrees to undergo a review of professional credentials as requested by the COUNTY during the term of this Agreement.

7. INDEPENDENT CONTRACTOR

CONTRACTOR shall select the means, method, and manner of performing the services. CONTRACTOR shall not be considered to be either a temporary or permanent employee of the COUNTY. CONTRACTOR acts as an independent contractor and acquires no tenure rights or any rights or benefits of Workers' Compensation, Re-employment Compensation, medical and hospital care, sick and vacation leave, severance pay, retirement benefits, or any other right or benefit offered to COUNTY employees.

CONTRACTOR shall select the means, method, and manner of performing the services. Nothing is intended or should be construed as creating or establishing the relationship of a partnership or a joint venture between the parties or as constituting CONTRACTOR as the agent, representative, or employee of the COUNTY for any purpose. CONTRACTOR is and shall remain an independent contractor for all services performed under this Agreement. CONTRACTOR shall secure at its own expense all personnel required in performing services under this Agreement. Any personnel of CONTRACTOR or other persons while engaged in the performance of any work or services required by CONTRACTOR will have no contractual relationship with the COUNTY and will not be considered employees of the COUNTY. The COUNTY shall not be responsible for any claims that arise out of employment or alleged employment under the Minnesota Unemployment Insurance Law or the Workers' Compensation Act

of the State of Minnesota on behalf of any personnel, including, without limitation, claims of discrimination against CONTRACTOR, its officers, agents, contractors, or employees. Such personnel or other persons shall neither require nor be entitled to any compensation, rights, or benefits of any kind from the COUNTY, including, without limitation, tenure rights, medical and hospital care, sick and vacation leave, workers' compensation, unemployment compensation, disability, severance pay, and retirement benefits.

8. NON-DISCRIMINATION AND AFFIRMATIVE ACTION

A. In accordance with the COUNTY's policies against discrimination, CONTRACTOR agrees that it shall not exclude any person from full employment rights nor prohibit participation in or the benefits of, any program, service or activity on the grounds of race, color, creed, religion, age, sex, disability, marital status, sexual orientation, public assistance status, or national origin. No person who is protected by applicable Federal or State laws against discrimination shall be subjected to discrimination.

B. In accordance with Hennepin County Board Resolution, if this Agreement is for a sum over \$100,000 or is one of several current contracts with CONTRACTOR totaling more than \$100,000 or is amended to exceed \$100,000, then CONTRACTOR agrees to abide by the COUNTY's Non-discrimination and Affirmative Action requirements for COUNTY contractors including, but not limited to, the following:

(B1) Affirmative Action Plan. CONTRACTOR shall:

(i) develop an Affirmative Action Plan within thirty (30) days after contract execution and submit the Initial Workforce Analysis (CC399), pursuant to B2 below, to the Hennepin County Purchasing/Contract Services Division (P/CS); or

(ii) submit evidence of a current approved Affirmative Action Plan (AAP) from another governmental jurisdiction, as approved by P/CS, and submit an Annual Workforce Analysis (CC400) (the Initial Workforce Report is not required), pursuant to B2 below, to P/CS; or

(iii) be granted an exemption for one of the following reasons:

1. Contract is for emergency or life safety related purchases;
2. CONTRACTOR has no facilities and has no more than one employee operating within the geographic boundaries of Hennepin County;
3. CONTRACTOR had an average of thirty (30) or fewer fulltime/benefit-earning employees during the twelve (12) months

preceding the submission of the bid, request for proposal or execution of contract;

4. Pursuant to Hennepin County Board policy, the County Administrator or designee granted an exemption.

CONTRACTOR shall keep the AAP current and available for review by the COUNTY during the term of this Agreement and any extensions. CONTRACTOR agrees that COUNTY has the right to visit CONTRACTOR's site(s) for the purpose of determining compliance with these requirements. AAPs must include the following elements:

1. EEO Policy Statement;
2. Identification of a person responsible for EEO Coordination;
3. Harassment policy statement;
4. Initial Workforce Analysis (Form CC399);
5. Identification of the specific steps CONTRACTOR will take to achieve or maintain a diverse workforce and ensure nondiscrimination;
6. List of recruitment sources; and
7. A plan for dissemination of CONTRACTOR's AAP and policy.

(B2) Workforce Analysis/Reports. CONTRACTOR shall:

(i) submit an Initial Workforce Analysis (Form CC399) to P/CS within five (5) business days after contract execution. If CONTRACTOR fails to submit the Initial Workforce Analysis as indicated herein, COUNTY may withhold payment until CONTRACTOR complies.

(ii) if a P/CS review of CONTRACTOR's Initial Workforce Analysis determines there is under-representation of women and/or racial minorities based on local SMSA labor force availability data, CONTRACTOR shall identify measures to correct the deficiencies. If the deficiencies are not corrected to COUNTY's satisfaction, COUNTY may require CONTRACTOR to demonstrate that good faith efforts have been made to correct them or may exercise other remedies as provided herein.

(iii) at the end of each calendar year, submit an Annual Workforce Report (CC400) to P/CS for review.

- C. If CONTRACTOR fails to demonstrate good faith efforts to correct any identified non-discrimination and Affirmative Action deficiencies and/or fails to submit requested reports or information required by the COUNTY and/or has engaged in discriminatory practices, the COUNTY may consider this a violation of this Agreement and may exercise any remedies available to it in law or in equity, including, but not limited to, cancellation or termination of this Agreement.

9. INDEMNIFICATION AND INSURANCE

- A. If the Software or Support become, or in COUNTY's opinion may become, the subject of any claim, suit or proceeding for infringement of any Intellectual Property Rights or is held or otherwise determined to infringe any Intellectual Property Rights, CONTRACTOR will, at its expense, defend, indemnify and hold harmless COUNTY from any liability, judgment, claim, cause of action, suit, proceeding, costs, fees, and expenses including reasonable attorney's fees. CONTRACTOR shall (1) keep COUNTY informed of, and consult with COUNTY in connection with, the progress of any litigation or settlement; and (2) not settle any claim without COUNTY's written consent if such settlement arises from or is part of any criminal action, suit or proceeding or contains a stipulation, admission or acknowledgement of any liability or wrongdoing on the part of COUNTY. If a claim may endanger or disrupt COUNTY'S quiet use and enjoyment of the Software, CONTRACTOR shall, at CONTRACTOR's sole expense, achieve the following results in the listed order of preference: (1) secure for COUNTY the right to continue using the Software; or (2) replace or modify the Software to make it non-infringing without degrading its performance or utility; or (3) refund all monies paid by COUNTY to CONTRACTOR under the Agreement, for any Software functionality or for any Support or services that COUNTY is unable to use. As consistent with other remedies throughout this Agreement, the above remedies shall be in addition to any other right or remedy available to the COUNTY under this Agreement, law, statute, rule, and/or equity.
- B. CONTRACTOR agrees to defend, indemnify, and hold harmless the COUNTY, its officials, officers, agents, volunteers and employees from any liability, claims, causes of action, judgments, damages, losses, costs, or expenses, including reasonable attorney's fees, resulting directly or indirectly from any act or omission of CONTRACTOR, a subcontractor, anyone directly or indirectly employed by them, and/or anyone for whose acts and/or omissions they may be liable in the performance of the services required by this Agreement, and against all loss by reason of the failure of CONTRACTOR to perform any obligation under this Agreement.
- C. With respect to the services provided pursuant to this Agreement, CONTRACTOR agrees at all times during the term of this Agreement, and beyond such term when so required, to have and keep in force the following insurance coverages:

	Limits
1. Commercial General Liability on an occurrence basis with contractual liability coverage:	
General Aggregate	\$2,000,000
Products—Completed Operations Aggregate	2,000,000
Personal and Advertising Injury	1,500,000

Each Occurrence—Combined Bodily Injury and Property Damage	1,500,000
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2. Workers' Compensation and Employer's Liability:

Workers' Compensation	Statutory
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If CONTRACTOR is based outside the State of Minnesota, coverage must comply with Minnesota law. In accordance with Minnesota law, if CONTRACTOR is a sole proprietor, it is exempted from the above Workers' Compensation requirements. In the event that CONTRACTOR should hire employees or subcontract this work, CONTRACTOR shall obtain the required insurance.

Employer's Liability. Bodily injury by:

Accident—Each Accident	500,000
Disease—Policy Limit	500,000
Disease—Each Employee	500,000

3. Professional Liability— Per Claim	1,500,000
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Aggregate	2,000,000
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The professional liability insurance must be maintained continuously for a period of two years after the expiration, cancellation or termination of this Agreement.

D. An umbrella or excess policy over primary liability insurance coverages is an acceptable method to provide the required insurance limits.

The above establishes minimum insurance requirements. It is the sole responsibility of CONTRACTOR to determine the need for and to procure additional insurance which may be needed in connection with this Agreement. Upon written request, CONTRACTOR shall promptly submit copies of insurance policies to the COUNTY.

CONTRACTOR shall not commence work until it has obtained required insurance and filed with the COUNTY, a properly executed Certificate of Insurance establishing compliance. The certificate(s) must name Hennepin County as the certificate holder and as an additional insured for the liability coverage(s) for all operations covered under the Agreement. If the certificate form contains a certificate holder notification provision, the certificate shall state that the insurer will endeavor to mail the COUNTY thirty (30) day prior written notice in the event of cancellation/termination of any described policies. If CONTRACTOR receives notice of cancellation/termination from an insurer,

CONTRACTOR shall fax or email a copy of the notice to the COUNTY within two business days.

CONTRACTOR shall furnish to the COUNTY updated certificates during the term of this Agreement as insurance policies expire. If CONTRACTOR fails to furnish proof of insurance coverages, the COUNTY may withhold payments and/or pursue any other right or remedy allowed under the contract, law, equity, and/or statute. The COUNTY does not waive any rights or assume any obligations by not strictly enforcing the requirements set forth in this section.

CONTRACTOR waives all rights against COUNTY, its officials, officers, agents, volunteers, and employees for recovery of damages to the extent that damages are covered by insurance of the CONTRACTOR.

- E. **Duty to Notify.** CONTRACTOR shall promptly notify the COUNTY of any claim, action, cause of action or litigation brought against CONTRACTOR, its employees, officers, agents or subcontractors, which arises out of the services contained in this Agreement. CONTRACTOR shall also notify the COUNTY whenever CONTRACTOR has a reasonable basis for believing that CONTRACTOR and/or its employees, officers, agents or subcontractors, and/or the COUNTY, might become the subject of a claim, action, cause of action, criminal arrest, criminal charge or litigation arising out of and/or related to the services contained in this Agreement. Failure to provide the notices required by this section is a material violation of the terms and conditions of this Agreement.

10. DATA AND DATA PRACTICES

For purposes of these data ownership provisions, "Data" shall mean any information or data in any format or media, electronic or otherwise, that is collected, created, received, maintained or disseminated by COUNTY, that is provided by, through or on behalf of COUNTY, its personnel, clients or affiliates, that is acquired by CONTRACTOR or CONTRACTOR personnel by virtue of access to COUNTY premises, personnel, clients, data or computers, or that is otherwise acquired in the course of performing under this Agreement.

Except as expressly provided herein, CONTRACTOR shall acquire no right, title or interest in any Data. CONTRACTOR acknowledges and agrees that Data must be used, controlled and safeguarded in compliance with the terms of this Agreement including but not limited to the provisions of the Minnesota Government Data Practices Act and the Health Insurance Portability and Accountability Act. CONTRACTOR agrees that neither the CONTRACTOR, nor any CONTRACTOR personnel, agents, employees, or subcontractors shall use, disclose or otherwise make available any Data during the term of this Agreement or at any time thereafter except as required to perform services for COUNTY hereunder or as required by law or with COUNTY's express written consent.

CONTRACTOR shall comply with the terms of the Non-Disclosure Agreement, attached as Exhibit 2 and incorporated by this reference.

CONTRACTOR, its officers, agents, owners, partners, employees, volunteers and subcontractors shall abide by the provisions of the Minnesota Government Data Practices Act, Minnesota Statutes, Chapter 13 (MGDPA), and all other applicable state and federal laws, rules, regulations and orders relating to data privacy or confidentiality, which may include the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and/or the Health Information Technology for Economic and Clinical Health Act (HITECH), adopted as part of the American Recovery and Reinvestment Act of 2009.

CONTRACTOR acknowledges and agrees that classification of data as trade secret data will be determined pursuant to applicable law and, accordingly, merely labeling data as “trade secret” does not necessarily make it so. If CONTRACTOR creates, collects, receives, stores, uses, maintains or disseminates data because it performs functions of the COUNTY pursuant to this Agreement, then CONTRACTOR must comply with the requirements of the MGDPA as if it were a government entity, and may be held liable under the MGDPA for noncompliance. CONTRACTOR agrees to promptly notify the COUNTY if it becomes aware of any potential claims, or facts giving rise to such claims, under the MGDPA. The terms of this section shall survive the expiration, cancellation or termination of this Agreement.

11. RECORDS – AVAILABILITY/ACCESS

Subject to the requirements of Minnesota Statutes Section 16C.05, Subd. 5, CONTRACTOR agrees that the COUNTY, the State Auditor, or any of their authorized representatives, at any time during normal business hours, and as often as they may reasonably deem necessary, shall have access to and the right to examine, audit, excerpt, and transcribe any books, documents, papers, records, etc., which are pertinent to the accounting practices and procedures of CONTRACTOR and involve transactions relating to this Agreement. CONTRACTOR shall maintain these materials and allow access during the period of this Agreement and for six (6) years after its expiration, cancellation, or termination.

Also, in accordance with Medicare requirements under Section 952 of the Omnibus Reconciliation Act of 1980 (PL 96-499) as well as any final regulations relating thereto as may be promulgated by the Secretary of the U.S. Department of Health and Human Services (the “Secretary”), and to the extent that the requirements are applicable to this Agreement, CONTRACTOR shall, while this Agreement is effective and until the expiration of four (4) years after furnishing of any services, make available, upon written request to the Secretary, or the Comptroller General of the United States (the “Comptroller General”), or any of their authorized representatives, a copy of this Agreement and books, documents and records of CONTRACTOR as are necessary to certify the nature and extent of the costs incurred by CONTRACTOR for the services furnished. If CONTRACTOR carries out any of the duties hereunder through a subcontractor, with a value or cost of \$10,000 or more over a twelve (12) month period,

CONTRACTOR shall require subcontractor to make available upon written request to the Secretary or Comptroller General any such books, documents and records.

12. SUCCESSORS, SUBCONTRACTING AND ASSIGNMENTS

- A. CONTRACTOR binds itself, its partners, successors, assigns and legal representatives to the COUNTY for all covenants, agreements and obligations contained in the contract documents.
- B. CONTRACTOR shall not assign, transfer or pledge this Agreement and/or the services to be performed, whether in whole or in part, nor assign any monies due or to become due to it without the prior written consent of the COUNTY. A consent to assign shall be subject to such conditions and provisions as the COUNTY may deem necessary, accomplished by execution of a form prepared by the COUNTY and signed by CONTRACTOR, the assignee and the COUNTY. Permission to assign, however, shall under no circumstances relieve CONTRACTOR of its liabilities and obligations under the Agreement.
- C. CONTRACTOR shall not subcontract this Agreement and/or the services to be performed, whether in whole or in part, without the prior written consent of the COUNTY. Permission to subcontract, however, shall under no circumstances relieve CONTRACTOR of its liabilities and obligations under the Agreement. Further, CONTRACTOR shall be fully responsible for the acts, omissions, and failure of its subcontractors in the performance of the specified contractual services, and of person(s) directly or indirectly employed by subcontractors. Contracts between CONTRACTOR and each subcontractor shall require that the subcontractor's services be performed in accordance with the terms and conditions specified herein. CONTRACTOR shall make contracts between CONTRACTOR and subcontractors available upon request.
- D. CONTRACTOR shall notify the COUNTY in writing if another person/entity acquires, directly or indirectly, more than 50 percent of the voting power of the shares entitled to vote for directors of CONTRACTOR. Notice shall be given within ten (10) days of such acquisition and shall specify the name and business address of the acquiring person/entity. The COUNTY reserves the right to require the acquiring person/entity to promptly become a signatory to this Agreement by amendment or other document so as to help assure the full performance of this Agreement.

13. MERGER AND MODIFICATION

- A. The entire Agreement between the parties is contained herein and supersedes all oral agreements and negotiations between the parties relating to the subject matter. All items that are referenced or that are attached are incorporated and made a part of this Agreement. If there is any conflict between the terms of this

Agreement and referenced or attached items, the terms of this Agreement shall prevail.

- B. Any alterations, variations, modifications, or waivers of provisions of this Agreement shall only be valid when they have been reduced to writing as an amendment to this Agreement signed by the parties. The express substantive legal terms contained in this Agreement including but not limited to the License, Payment Terms, Warranties, Indemnification and Insurance, Merger and Modification, Default and Cancellation/Termination or Minnesota Law Governs may not be altered, varied, modified or waived by any change order, implementation plan, scope or work, development specification or other development process or document.

14. DEFAULT AND CANCELLATION/TERMINATION

- A. If CONTRACTOR fails to perform any of the provisions of this Agreement or so fails to administer the work as to endanger the performance of the Agreement, it shall be in default. Unless CONTRACTOR's default is excused by the COUNTY, the COUNTY may upon written notice immediately cancel or terminate this Agreement in its entirety. Additionally, failure to comply with the terms of this Agreement shall be just cause for the COUNTY to delay payment until CONTRACTOR's compliance. In the event of a decision to withhold payment, the COUNTY shall furnish prior written notice to CONTRACTOR.

- B. Upon cancellation or termination of this Agreement:

- 1. At the discretion of the COUNTY and as specified in writing by the Contract Administrator, CONTRACTOR shall deliver to the Contract Administrator copies of all writings so specified by the COUNTY and prepared by CONTRACTOR in accordance with this Agreement. The term "writings" is defined as:

Handwriting, typewriting, printing, photocopying, photographing, facsimile transmitting, and every other means of recording, including electronic media, any form of communication or representation, including letters, works, pictures, drawings, sounds, or symbols, or combinations thereof, not including CONTRACTOR's proprietary software.

- 2. The COUNTY shall have full ownership and control of all such writings. CONTRACTOR shall have the right to retain copies of the writings. However, it is agreed that CONTRACTOR without the prior written consent of the COUNTY shall not use these writings for any purpose or in any manner whatsoever; shall not assign, license, loan, sell, copyright, patent and/or transfer any or all of such writings; and shall not do anything which in the opinion of the COUNTY would affect the COUNTY's ownership and/or control of such writings.

- C. Notwithstanding any provision of this Agreement to the contrary, CONTRACTOR shall remain liable to the COUNTY for damages sustained by the COUNTY by virtue of any breach of this Agreement by CONTRACTOR. Upon notice to CONTRACTOR of the claimed breach and the amount of the claimed damage, the COUNTY may withhold any payments to CONTRACTOR for the purpose of set-off until such time as the exact amount of damages due the COUNTY from CONTRACTOR is determined. Following notice from the COUNTY of the claimed breach and damage, CONTRACTOR and the COUNTY shall attempt to resolve the dispute in good faith.
- D. The above remedies shall be in addition to any other right or remedy available to the COUNTY under this Agreement, law, statute, rule, and/or equity.
- E. The COUNTY's failure to insist upon strict performance of any provision or to exercise any right under this Agreement shall not be deemed a relinquishment or waiver of the same, unless consented to in writing. Such consent shall not constitute a general waiver or relinquishment throughout the entire term of the Agreement.
- F. The COUNTY may be cancelled/terminated this Agreement with or without cause upon thirty (30) day written notice.
- G. If this Agreement expires or is cancelled or terminated, with or without cause, by either party, at any time, CONTRACTOR shall not be entitled to any payment, fees or other monies except for payments duly invoiced for then delivered and Accepted Deliverables pursuant to the terms expressly set forth in Exhibit 1 of this Agreement. In the event CONTRACTOR has performed work toward a Deliverable that COUNTY has not Accepted at the time of expiration, cancellation or termination, CONTRACTOR hereby expressly acknowledges and agrees that CONTRACTOR shall not be entitled to any payment for said work including but not limited to incurred costs of performance, termination expenses, profit on the work performed, other costs founded on termination for convenience theories or any other payments, fees, costs or expenses not expressly set forth herein.

15. CONTRACT ADMINISTRATION

In order to coordinate the services of CONTRACTOR with the activities of DEPARTMENT so as to accomplish the purposes of this Agreement, (Name and Title of Contract Manager), or his or her successor ("Contract Administrator"), shall manage this Agreement on behalf of the COUNTY and serve as liaison between the COUNTY and CONTRACTOR.

16. SURVIVAL OF PROVISIONS

Provisions that by their nature are intended to survive the term, cancellation or termination of this Agreement include but are not limited to: SERVICES TO BE PROVIDED (as to ownership of property); INDEPENDENT CONTRACTOR; INDEMNIFICATION; INSURANCE; DATA PRACTICES; RECORDSAVAILABILITY/ACCESS; DEFAULT AND CANCELLATION/TERMINATION; PROMOTIONAL LITERATURE; and

MINNESOTA LAW GOVERNS.

17. COMPLIANCE AND NON-DEBARMENT CERTIFICATION

- A. CONTRACTOR shall comply with all applicable federal, state and local statutes, regulations, rules and ordinances currently in force or later enacted.
- B. If the source or partial source of funds for payment of services under this Agreement is federal, state or other grant monies, CONTRACTOR shall comply with all applicable conditions of the specific referenced or attached grant.
- C. CONTRACTOR certifies that it is not prohibited from doing business with either the federal government or the State of Minnesota as a result of debarment or suspension proceedings.

18. SUBCONTRACTOR PAYMENT

As required by Minnesota Statutes Section 471.425, Subd. 4a, CONTRACTOR shall pay any subcontractor within ten (10) days of CONTRACTOR's receipt of payment from the COUNTY for undisputed services provided by the subcontractor. CONTRACTOR shall pay interest of ~~44~~1-1/2 percent per month or any part of a month to the subcontractor on any undisputed amount not paid on time to the subcontractor. The minimum monthly interest penalty payment for an unpaid balance of \$100.00 or more is \$10.00. For an unpaid balance of less than \$100.00, CONTRACTOR shall pay the actual penalty due to the subcontractor. A subcontractor who prevails in a civil action to collect interest penalties from a prime contractor must be awarded its costs and disbursements, including any attorney's fees, incurred in bringing the action.

19. PAPER RECYCLING

The COUNTY encourages CONTRACTOR to develop and implement an office paper and newsprint recycling program.

20. NOTICES

Any notice or demand which must be given or made by a party under this Agreement or any statute or ordinance shall be in writing, and shall be sent registered or certified mail. Notices to the COUNTY shall be sent to the County Administrator with a copy to the DEPARTMENT at the address given in the opening paragraph of the Agreement. Notice to CONTRACTOR shall be sent to the address stated in the opening paragraph of the Agreement or to the address stated in CONTRACTOR's Form W-9 provided to the COUNTY.

21. CONFLICT OF INTEREST

CONTRACTOR affirms that to the best of CONTRACTOR's knowledge, CONTRACTOR's involvement in this Agreement does not result in a conflict of interest with any party or entity which may be affected by the terms of this Agreement. CONTRACTOR agrees that, should any conflict or potential conflict of interest become known to CONTRACTOR, CONTRACTOR will immediately notify the COUNTY of the conflict or potential conflict, specifying the part of this Agreement giving rise to the conflict or potential conflict, and will advise the COUNTY whether CONTRACTOR will

or will not resign from the other engagement or representation.

22. PROMOTIONAL LITERATURE

CONTRACTOR agrees, to the extent applicable, to abide by the current Hennepin County Communications Policy (available upon request). This obligation includes, but is not limited to, CONTRACTOR not using the term “Hennepin County” or any derivative in any promotional literature, advertisements of any type or form or client lists without the express prior written consent of a DEPARTMENT Director or equivalent.

23. MINNESOTA LAWS GOVERN

The Laws of the State of Minnesota shall govern all questions and interpretations concerning the validity and construction of this Agreement and the legal relations between the parties and their performance. The appropriate venue and jurisdiction for any litigation will be those courts located within the County of Hennepin, State of Minnesota. Litigation, however, in the federal courts involving the parties will be in the appropriate federal court within the State of Minnesota. If any provision of this Agreement is held invalid, illegal or unenforceable, the remaining provisions will not be affected.

24. OTHER PROVISIONS

CONTRACTOR has developed and owns a method of delivering the encrypted email service through Internet accessible means called One World that is based on CONTRACTOR’s Software. CONTRACTOR’s business exploiting One World includes the development of software that is used in implementing secure encrypted email and the provision of an encrypted email service using such software. This is the Service that is the subject matter of this Agreement. All such software, including the OneWorld Software, are proprietary to CONTRACTOR and COUNTY does not obtain ownership of any software under this Agreement. COUNTY owns all data that is processed by the CONTRACTOR’s service. For clarity, the following, without limitation, are included in the property of COUNTY:

- (i) the content of the COUNTY’s emails and personal logs;
- (ii) the encryption keys (both public and private) used to encrypt and decrypt emails of COUNTY’s users;
- (iii) COUNTY’s user profiles; and
- (iv) the trade-marks, if any, of COUNTY used in connection with the services.

The COUNTY and the CONTRACTOR mutually acknowledge that they do not expect that CONTRACTOR will conceive or originate, either individually or jointly with others, any copyrightable material in the course of the performance of this Agreement on a “work made for service” basis. All copyrightable work related to the Software or otherwise created by CONTRACTOR in the course of operating the services will be the intellectual property of CONTRACTOR.

The details of the Software and the documentation that relates to the Software are confidential business information of CONTRACTOR. Subject to any MGDPA or freedom of information obligations of COUNTY, COUNTY will use reasonable efforts to maintain the Software and documentation of CONTRACTOR confidential.

COUNTY does not have the right to reverse engineer, disassemble, decompile, unlock, recreate, copy, license, sublicense, create derivative software from, sell, rent, lease, loan, distribute, transfer or otherwise deal with the Software or the services enabled by the Software or any part thereof. COUNTY does not have the right to operate a service bureau based on or using the Software or services and all use of the Software and services shall be for and in pursuance of COUNTY's own business.

COUNTY ACKNOWLEDGES THAT THE QUALITY OF THE CONTRACTOR'S SERVICES DEPEND IN PART ON THE INTEGRITY OF THE INTERNET AND COUNTY'S OWN INFORMATION TECHNOLOGY SYSTEMS. CONTRACTOR DOES NOT WARRANT THAT THE CODES, PROGRAMS, SYSTEMS AND/OR DESIGNS DEVELOPED, SUPPORTED AND MAINTAINED PURSUANT TO THIS AGREEMENT WILL OPERATE UNINTERRUPTED OR ERROR FREE.

Limitation of Liability. Notwithstanding anything herein to the contrary, neither party shall have any liability to the other party or any third party for special, incidental, indirect, exemplary or consequential damages (including but not limited to, loss of profits or goodwill, downtime, damage to or replacement of software or data) arising from claims based in warranty, contract, tort (including negligence), strict tort, or otherwise, even if such other party has been advised of the possibility of such damage. Except for CONTRACTOR's indemnification obligations, CONTRACTOR's total liability for damages arising hereunder shall not exceed all Fees paid or payable by COUNTY to CONTRACTOR during the Term of this Agreement.

Force Majeure. Neither party shall be liable to the other for any delay or failure to perform due to fire, flood, earthquake, acts of God, acts of war, riots, civil disorder, strikes, lock-outs, telecommunications outages or labor disruptions or any other cause whether similar or dissimilar beyond its reasonable control (a "Force Majeure Event"). Upon the occurrence of a Force Majeure Event, the non-performing party shall be excused from any further performance of those of its obligations pursuant to this Agreement that are affected by the Force Majeure Event only for so long as such Force Majeure Event continues and such party continues to use commercially reasonable efforts to recommence performance whenever and to whatever extent possible without delay. The party delayed by a Force Majeure Event shall immediately notify the other party by telephone (to be confirmed in writing) of the occurrence of a Force Majeure Event and describe in reasonable detail the circumstances causing the Force Majeure Event. Performance times shall be considered extended for a period of time equivalent to the time lost because of any such delay.

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COUNTY APPROVAL

Reviewed by the County
Attorney's Office

COUNTY OF HENNEPIN
STATE OF MINNESOTA

Date:

BY: _____
Christopher O. Gran, Purchasing Manager

CONTRACTOR –

Contractor warrants that the person who executed this Agreement is authorized to do so on behalf of Contractor as required by applicable articles, bylaws, resolutions or ordinances.*

By:

Printed Name:

Printed Title:

Date:

*CONTRACTOR shall submit applicable documentation (articles, bylaws, resolutions or ordinances) that confirms the signatory's delegation of authority. This documentation shall be submitted at the time CONTRACTOR returns the Agreement to the County. Documentation is not required for a sole proprietorship.