

Software Development Agreement
[Time and Materials Basis – Favors Customer]

THIS SOFTWARE DEVELOPMENT AGREEMENT is entered into as of the _____ day of _____, 20____, by and between _____, a _____ corporation, with its address at _____ (“Developer”), _____, a _____ corporation with its principal place of business at _____ (the “Customer”).

Witnesseth:

WHEREAS, Customer is desirous of retaining Developer to perform the software development services described in this Agreement for the support of Customer’s _____ business; and

WHEREAS, Developer desires to perform these services in accordance with the terms and conditions of this Agreement; and

WHEREAS, Developer represents and warrants that it possesses the qualifications and skills necessary to perform the software development services described in this Agreement; and

NOW, THEREFORE, Customer and Developer hereby agree as follows:

1. **Definitions.** The following terms shall have the following meaning when used in this Agreement:
 - a) “First Level Support” shall mean those support services provided by Customer to Customer’s own end users, including but not limited to a problem call-in help desk, the resolution and/or escalation of end-user problems with the System, and the distribution of all software error corrections, maintenance releases and enhancement updates provided by the Developer for the System, on a timely and effective basis.

b) "Second Level Support" shall mean those support services to facilitate basic support services to end users of Customer's _____ software, including, but not limited to:

- (i) the correction of reproducible problems;
- (ii) the diagnosis of problems that the Customer can not resolve; and
- (iii) the provision of a single copy of all applicable error corrections, maintenance updates and enhancement releases for the Software and Documentation, which the Customer will copy for distribution to the Customer's own end users.

c) "Taxes" shall mean all federal, state, local and other taxes, including sales, use, and property taxes, related to this Agreement or Customer's use of the Software, excluding taxes based on Developer's net income or personal property.

2. **Term.** Subject to Section 7, the term of this Agreement shall commence on the date set forth above, and continue for one (1) year. Thereafter, it shall continue on a year-by-year basis until terminated as provided herein.

3. **Services and System Development**

a) Developer Responsibilities

(i) *General.* In consideration of the fees described in Section 4, Developer will provide the Customer ongoing software development and consulting services in the following areas (collectively, the "Services"): The Developer will develop, maintain, customize, distribute and manage the system configuration; provide 24-hour emergency response; test; provide Second Level Support; and provide user and technical documentation for the Telecommunication Billing and Customer Care System (the "System"). In order to perform the Services, the Customer authorizes the Developer to build a team of personnel approximating the labor chart set forth in Exhibit A as soon as reasonable.

(ii) *Reports.* Developer shall deliver to Customer reports in the format set forth on Exhibit C on a weekly basis or as specified by Customer's project manager, which shall contain a description of the current status of the System, the personnel and their skill category working on the System, the progress towards assigned Customer objectives and the estimated progress to be made in the next week. Developer shall meet with the Customer monthly at a mutually agreed-upon location, or more often if requested by Customer, to discuss and report on the progress on the Services and the status of the System.

(iii) *Staffing Resources and Guarantee.* Customer reserves the right to approve all staffing decisions. Resources will be applied to Customer projects by the mutual agreement of the parties and such resources shall not be reassigned without the prior written approval of the Customer. Customer reserves the right to have any of Developer's personnel removed from Customer's projects for any reason that Customer deems necessary for quality and performance. Resources shall be applied exclusively to Customer projects, and will not be shared with other projects that Developer may support. Developer agrees that the failure to maintain the required staffing levels would be detrimental to the success of Customer's projects. In the event of a residual impact due to attrition of Developer's employees, Developer will provide the first three (3) months of each replacement's time free of charge, unless waived in writing by the Customer. Developer agrees that the loss of resources to other projects that Developer is managing or related companies (those with common ownership), for any reason, shall cause irreparable damage to Customer's projects, and Developer agrees to pay Customer liquidated damages equal to U.S. \$50,000 per consultant, per occurrence to Customer, unless waived by the Customer.

iv) *Insurance.* Developer shall provide adequate medical and accident insurance for all consultants supplied by Developer, whether working at the Developer's site or working internationally on Customer's projects. Adequate insurance shall also be carried by Developer to protect Customer-provided facilities, equipment and intellectual property present on the Developer's site.

b) Customer Responsibilities

(i) *General.* Unless otherwise agreed, Customer shall develop the business designs for the core product and for customization; manage relations with Customer's customers, First Level Support, and end-customer distribution; and provide Developer with access to Customer's network. The Customer shall be responsible for integration testing and configuration management during the Developer's training period. This training period shall not exceed six (6) months from the date of this Agreement.

(ii) *Training.* Customer shall provide Developer adequate training on the System and each customer specific configuration in order to facilitate the transfer of all technical and product knowledge from Developer to Customer. The performance of the consultants assigned by Developer to the project will be evaluated jointly by Customer and Developer after the initial three (3) month probationary period, and thereafter a billable skill level will be assigned with Customer's approval.

4. **Fees and Payment**

a) Rates. The Customer agrees that, for the term of this Agreement, it shall pay for the staffing levels, skill mix, and monthly labor rates as set forth in Exhibit A. The staffing levels may be adjusted in accordance with Section 5. The monthly rates set forth in Exhibit A shall be fixed for one (1) year from the date of this Agreement, and thereafter may be increased by no more than five percent (5%) per year upon ninety (90) days' prior written notice to the Customer. The rates set forth in Exhibit A include all compensation for holidays, vacations and sick time. All Developer consultants assigned to Customer's projects shall work a minimum of one hundred sixty (160) hours per month; partial months will be billed on a pro-rated basis based on one hundred sixty (160) hours per month.

b) Invoices. Developer shall provide Customer, on a monthly basis, an invoice with a labor report of the number and identity of personnel providing services to the Customer, their skill categories and billable rates as detailed in Exhibit A for such period, and all other billable amounts incurred during such period.

c) Travel Expense Reimbursement. Billings for Developer's travel expenses must be generated along with the labor and miscellaneous expenses monthly billings. All bills must be submitted with adequate documentation, including the prescribed travel authorization form, the travel expense report form, original receipts, reason for travel, and the Customer's project manager's written approval. Travel per diem rates will be determined by the Customer's project manager depending on the destination. Any visa requirements and expenses for Developer personnel will be approved, in advance, by Customer's project manager. Customer must approve all travel and miscellaneous expenses in advance.

d) Miscellaneous Expense Reimbursement. The Developer will bill the Customer on a monthly basis for travel and miscellaneous expenses. This covers all required purchases for the Developer to perform the services for the Customer, including but not limited to: hardware, software, network equipment, network line charges, third party hardware and software maintenance, equipment insurance, media tapes, shipping and mailing expenses, import taxes, supplies, carrier/mail, phone and visa expenses. Billings for all applicable taxes shall be generated as they are due.

e) Payments. Customer shall pay all undisputed invoices within forty-five (45) days of the receipt of such invoice. All payments shall be made by Customer to Developer in U.S. Dollars. All amounts due which are not in dispute and remain unpaid forty-five (45) days or more from the due date are subject to a monthly interest charge equal to one percent (1%) per month on the outstanding balance, provided such amount shall not exceed the maximum amount allowed by law.

5. **Change of Scope.** At any time during the term of this Agreement, Customer may require Developer to provide additional or reduced services as set forth below.

a) Submission of Request. Customer shall submit to Developer in writing all requests by Customer for any such modification of services which alters, amends, enhances, or adds to the services and/or time and/or place of performance (hereinafter referred to as "Modification/Change Request" or "Request"). Modifications to the staffing levels can be submitted at any time, and the Developer agrees to comply with these changes as soon as reasonable and subject to paragraph 3(c) of this Agreement. Customer will provide sixty (60) days' notice in the event of reduction in services.

b) Performance. Upon such authorization by Customer of the Modification/Change Request, Developer will implement such Request immediately. Developer shall not perform any services in advance of written authorization from Customer.

c) Binding Agreement. For the purposes of this Agreement, each Modification/Change Request duly authorized in writing by Customer and agreed to by Developer shall be deemed incorporated into and part of this Agreement, and each such Request shall constitute a formal amendment to this Agreement, adjusting fees and services as finally agreed upon for each authorized Modification/Change Request. In no event shall the services be deemed altered, amended, enhanced, reduced, or otherwise modified except through written authorization by Customer of a Modification/Change Request and acceptance by Developer, all in accordance with this Section 5.

6. **Warranty and Warranty Disclaimer**

a) Developer represents and warrants to Customer that all Services, work and deliverables to be performed hereunder shall be performed by qualified personnel in a professional and workmanlike manner, in accordance with the highest industry standards. All services shall be rendered to the good faith satisfaction of Customer.

b) Developer represents and warrants to Customer that Customer will receive good and valid title to all deliverables delivered by Developer to Customer under this Agreement, free and clear of all encumbrances and liens of any type.

c) Developer represents and warrants to Customer that neither Developer, in connection with performing the Services, nor the completed System will infringe any patent, copyright, trademark, trade secret or other proprietary right of any third party. Developer further represents and warrants to Customer that Developer will not use any trade secrets or confidential or proprietary information owned by any third party in performing the Services or developing the System. Developer further represents and warrants to Customer

that neither Developer nor any other company or individual performing Services pursuant to this Agreement is under any obligation to assign or give any work done under this Agreement to any third party.

d) Developer warrants that for sixty (60) days following the acceptance of the Services and System, the Services and System shall be free from defects in workmanship and materials and shall substantially conform to the specifications and performance standards, capabilities, characteristics, specifications, functions and other descriptions and standards applicable thereto as set forth in each Work Order. In the event that defects are discovered during the warranty period, Developer shall promptly remedy such defects at no additional expense to Customer.

e) Developer represents and warrants that any software development effort will be designed to be used prior to, during, and after the calendar year 2000 A.D., and that the System will operate during each such time period without error relating to date data, specifically including any error relating to, or the product of, date data which represents or references different centuries or more than one century.

Without limiting the generality of the foregoing, Developer further represents and warrants:

(i) That the software and System will not abnormally end or provide invalid or incorrect results as a result of date data, specifically including date data which represents or references different centuries, or more than one century;

(ii) That the software and System has been designed to ensure year 2000 compatibility, including, but not limited to, date data century recognition, calculations which accommodate same-century and multi-century formulae and date values, and date data interface values that reflect the century; and

(iii) That the software and System includes "year 2000 capabilities." For the purposes of this Agreement, "year 2000 capabilities" means the software and System:

(X) Will manage and manipulate data involving dates, including single-century formulae and multi-century formulae, and will not cause an abnormally-ending scenario within the application or generate incorrect values or invalid results involving such dates; and

(Y) provides that all date-related interface functionalities include the indication of century.

f) EXCEPT AS PROVIDED IN THIS AGREEMENT, THERE ARE NO EXPRESS OR IMPLIED WARRANTIES, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, RESPECTING THIS AGREEMENT, THE SYSTEM AND THE SERVICES.

g) Customer expressly acknowledges and agrees that (i) Developer does not warrant that the System will meet all of Customer's needs or that its operation will be uninterrupted or error-free; and (ii) Developer shall have no obligations for ensuring or perfecting its operation on or compatibility with any current or future version or release of any hardware, equipment or operating software or other software products which Customer may acquire or receive from any source, excluding Developer.

7. Termination and Effect of Termination

a) This Agreement may be terminated by either party upon written notice if the other party breaches any material term or condition of the Agreement and such breach remains uncorrected for thirty (30) days following receipt of written notice of such breach.

b) Customer may terminate this Agreement at any time, without cause, upon ninety (90) days' prior notification or payment to the Developer of amounts equivalent to the prior one (1) months' labor billing amounts.

c) In the event of a termination of this Agreement by the Developer without cause, prior to the end of the term of this Agreement, then the Customer may extend this Agreement beyond the Developer's stated date of termination for one hundred and eighty (180) days past the anniversary date at the rates currently in effect, and the Customer's obligations under Section 3(f) are hereby terminated.

d) Upon termination of this Agreement for any reason, the parties shall have no further obligations pursuant to the terms of the Agreement except as set forth in Sections 5, 8, 9, 11, 12, 13, 16, 17 and 25.

8. Covenants of Non-Competition, Confidentiality, Non-Solicitation

a) Covenant of Non-Competition. In consideration of the payments made by Customer to Developer herein, the Developer agrees not to develop, design, code, test or document a competing product. The Developer hereby covenants and agrees that it has no rights to market, distribute, sell or license any of the applications or deliverables being developed under this Agreement. Additionally, the Developer covenants and agrees that, without the prior written consent of the Customer, it will not enter into any discussions with any party with respect to the foregoing applications and deliverables for a period commencing on the date of this Agreement and terminating on that day which is the third anniversary of the acceptance by the Customer of the last deliverable

provided under this Agreement. Developer acknowledges and agrees that a breach of the covenant not to compete herein would result in irreparable harm to the Customer for which monetary damages would not be an adequate remedy. Accordingly, Developer agrees that the Customer will be entitled to injunctive relief, a decree of specific performance or other equitable relief to enforce Developer's obligations under this section. If any provision of this section shall be invalid, inoperative or unenforceable, it shall be as if such invalid, inoperative or unenforceable provision had never been contained herein and such provision were reformed so that it would be valid, operative and enforceable to the maximum extent possible.

b) Covenant of Non-Disclosure. Developer shall not, at any time during or after the term of this Agreement, in any manner, either directly or indirectly, divulge, disclose, or communicate to any person, firm, corporation or other entity, or use for its own benefit or for the benefit of any person, firm, corporation or other entity, and not for the benefit of the Customer, any information acquired from the Customer, its parent or subsidiaries, without the express prior written consent of an authorized executive officer of the Customer, as more fully set forth in a certain Proprietary Information Agreement between Customer and Developer dated _____, 20___. In addition, Developer shall ensure that Developer's employees, officers, directors, agents and representatives shall execute similar agreements protecting the Customer's proprietary information and agree to be bound by the terms and conditions contained therein.

c) Covenants of Non-Solicitation. Neither party will solicit, hire, contract with, or engage the employment of services for any of the other party's staff for a period of one (1) year following termination of this Agreement.

9. Deliverables

a) Completion or Termination. Developer shall upon completion or termination of this Agreement, or upon demand by the Customer, for whatever cause and without regard to whether the System has been completed, promptly return to the Customer any and all proprietary information together with any copies or reproductions thereof and destroy all material in its computers and other electronic files. Developer shall at such time provide the Customer with a certificate signed by an officer of the Developer certifying that all such proprietary information has been returned to the Customer or destroyed. Developer agrees to ensure that all Customer data will be erased from all forms of magnetic and electronic media using a method which ensures that it can not be recovered. Developer shall state in writing the method of data destruction and the date completed.

b) Ownership Notice. All work performed by the Developer under this Agreement shall contain the following copyright notice: "©[Customer] [year]. All Rights Reserved" and the following proprietary notice: "The information contained herein is proprietary [Customer] and shall not be

reproduced, copied in whole or in part, adapted, modified, or disseminated without the express prior written consent of [Customer]." These notices shall appear in human readable form on labels attached to containers for computer disks, tapes or similar media and at the beginning of all human readable works such as design documents, manuals, etc. The notices shall appear in human readable form at the beginning of all machine readable documents.

c) Cooperation by Developer. Should Customer or any of its agents or representatives seek to obtain letters, patent, trademarks or copyrights in any country of the world on all or part of the System, Developer agrees to cooperate fully without compensation in providing information, completing forms, performing actions and obtaining the necessary signatures or assignments required to obtain such letters, patent, trademarks or copyrights. In the event Customer shall be unable for any reason to obtain Developer's signature on any document necessary for any purpose set forth in the foregoing sentence, Developer hereby irrevocably designates and appoints each of Customer and its duly-authorized officers and agents as Developer's agent and Developer's attorney-in-fact to act for and in Developer's behalf and stead to execute and file any such document and to do all other lawfully permitted acts to further any such purpose with the same force and effect as if executed and delivered by Developer.

d) Developer's Proprietary Software Programs. Notwithstanding the provisions of Subsections 9a) and 9b) above, it is understood and agreed that Developer may, in its sole discretion, use its proprietary software programs in providing Services. If Developer uses any such proprietary software programs and so notifies Customer, Customer shall not market or in any way use such software programs as independent "stand-alone" programs without the express written consent of Developer, and Customer shall not acquire any proprietary rights to such programs.

10. **Involvement of Customer.** Customer shall have the option:

a) Upon serving a written notice to Developer at any time, to require Developer to accept Customer personnel as part of the development team. The parties hereto expressly agree that the Customer employees assigned to Developer as per this Section 10 shall not be considered to be employees/consultants of Developer. Developer shall, at all times, be responsible for any compensation, insurance, or other employment benefits to which such employees are, or may become entitled, and under no circumstances shall Developer be required to make payment of any kind to any such employee on Customer's behalf; and

b) At any time and without prior notice of any kind, to require Developer to provide Customer personnel unrestricted access to all aspects of the development process, including but not limited to meetings, conference calls, correspondence and source and object code, in order to observe and audit Developer's work.

11. **Rights in Work.** The parties acknowledge that any work performed by Developer for Customer is being created at the insistence of Customer and shall be deemed “work made for hire” under United States copyright law.

Customer shall have the right to use the whole work, any part or parts thereof, or none of the work, as it sees fit. Customer may alter the work, add to it, or combine it with any other work or works, at its sole discretion. Notwithstanding the foregoing, all original material submitted by Developer as part of the work or as part of the process of creating the work, including but not limited to programs, listings, printouts, documentation, notices, flow charts, and programming aids, shall be the property of Customer whether or not Customer uses such material. No rights are reserved by Developer.

All programs, specifications, documentation and all other technical information prepared by Developer in connection with the performance of its services hereunder will become and remain Customer’s sole property. Title to all material and documentation, including, but not limited to systems specifications, furnished by Customer to Developer or delivered by Customer into the Developer’s possession shall remain with Customer. Developer shall immediately return all such material or documentation within seven (7) days of any request by Customer or upon the termination or conclusion of this Agreement, whichever shall occur first.

Whenever an invention or discovery is made by Developer, either solely or in collaboration with others, including employees of Developer under or relating to this Agreement, the Developer shall promptly give Customer written notice thereof and shall furnish Customer with complete information thereon including, as a minimum, (1) a complete written disclosure of each such invention, and (2) information concerning the date and identity of any public use, sale or publication of such invention made by or known to Developer or of any contemplated publication by Developer. As used herein, the term (1) “invention” or “discovery” includes any art, machine, manufacture, design or composition of matter, or any new and useful improvement thereof where it is or may be patentable under the patent laws of the United States or of any foreign country; and (2) “made,” when used in relation to any invention or discovery, means the conception of the first actual or constructive reduction to practice of such invention.

Developer hereby grants, assigns, and conveys to Customer all right, title and interest in and to all inventions, works of authorship and other proprietary data and all other materials (as well as the copyrights, patents, trade secrets and similar rights attendant hereto) conceived, reduced to practice, authored, developed or delivered by Developer or its employees, agents, consultants, contractors and representatives either solely or jointly with others, during and in connection with the performance of services under this Agreement with Customer. Developer agrees that it will not seek, and that it will require its employees, agents, consultants, contractors and representatives not to seek patent, copyright, trademark, registered design or other protection for any rights in any such inventions, works or authorship, proprietary data or other materials. Developer shall have no right to disclose or use any such inventions, works of authorship, proprietary data or other materials for any purpose whatsoever

and shall not communicate to any third party the nature of or details relating to such inventions, works of authorship, proprietary data or other materials. Developer agrees that it shall do and that it shall require its employees, agents, consultants, contractors and representatives to do, at Customer's expense, all things and execute all documents as Customer may reasonably require to vest in Customer or its nominees the rights referred to herein and to secure for Customer or its nominees all patent, trademark, or copyright protection.

Developer's obligations under this Agreement shall survive expiration or termination of this Agreement and any amendments thereto. Furthermore, Developer irrevocably waives its moral rights in any work created, developed or delivered hereunder.

Developer agrees it will not disclose to any third party, without the prior written consent of Customer, any invention, discovery, copyright, patent, trade secret or similar rights attended hereto, made under or relating to this Agreement or any proprietary or confidential information acquired from Customer under this Agreement, including trade secrets, business plans and confidential or other information which may be proprietary to Customer.

Developer warrants and represents that it has or will have the right, through written agreements with its employees, to secure for Customer the rights called for in this Section. Further, in the event Developer uses any subcontractor, consultant or other third party to perform any of the services contracted for under this Agreement, Developer agrees to enter into and provide to Customer such written agreements with such third party, and to take such other steps as are or may be required to secure for Customer the rights called for in this Section. Developer further agrees to provide the names and addresses of all agents, contractors, consultants, representatives or other third parties who perform work on behalf of Developer under this Agreement.

12. **Indemnity.** Subject to the limitations contained in this Agreement, Customer agrees to indemnify and hold harmless Developer, and Developer agrees to indemnify and hold harmless Customer respectively, from any liabilities, penalties, demands or claims finally awarded (including the costs, expenses and reasonable attorney's fees on account thereof) that may be made by any third party for injuries, including death, to persons or damage to property resulting from the indemnifying party's gross negligence or willful acts or omissions or those of persons furnished by the indemnifying party, its agents or subcontractors or resulting from use of the software, and/or Services furnished hereunder. Customer agrees to defend Developer, at Developer's request, and Developer agrees to defend Customer, at Customer's request, against any such liability, claim or demand. Developer and Customer respectively agree to notify the other party promptly of any written claims or demands against the indemnified party for which the indemnifying party is responsible hereunder. The foregoing indemnity shall be in addition to any other indemnity obligations of Customer or Developer set forth in this Agreement.

13. **Intellectual Property Indemnification**

a) The following terms apply to any infringement or claim or infringement of any patent, trademark, copyright, trade secret or other proprietary interest based on the licensing, use, or sale of any software, software products and/or Services furnished to Customer under this Agreement or in contemplation hereof. Subject to the limitations contained in this Agreement, Developer shall indemnify Customer for any loss, damage, expense or liability, including costs and reasonable attorney fees that may result by reason of any such infringement or claim, except where such infringement or claim arises solely from Developer's adherence to Customer's written instructions or directions which involve the use of merchandise and items other than (1) commercial merchandise which is available on the open market or is the same as such merchandise, or (2) items of Developer's origin, design or selection; and Customer shall so indemnify Developer in such excepted cases. Each party shall defend or settle, at its own expense, any action or suit against the other for which it is responsible hereunder. Each party shall notify the other promptly of any claim of infringement for which the other is responsible, and shall cooperate with the other in every reasonable way to facilitate the defense of any such claim.

b) In addition, in the event an injunction or order shall be obtained against Customer's use of any item by reason of any such infringement allegation, or if the item is likely to become the subject of a claim of infringement or violation of any existing United States patent, trademark, copyright, trade secret or other proprietary right of a third party, Developer will, without in any way limiting the foregoing, at Developer's expense, either: (i) procure for Customer the right to continue using the item; or (ii) replace or modify the item so that it becomes non-infringing, but only if the modification or replacement does not adversely affect the functional performance or specifications for the item or its use by Customer.

c) In no event shall Customer be liable to Developer for any charges after the date that Customer no longer uses the item because of actual or claimed infringement.

d) Modification/Change Request and acceptance by Developer, all in accordance with this Section 13.

14. **Time.** Time is of the essence in the performance of Developer's duties under this Agreement, and timely implementation and development of the System is critical to Customer's business. Developer's implementation and development of the System shall be implemented in accordance with the Implementation Plan. In the event Developer fails to deliver any of the System in accordance with the dates set forth in the Implementation Plan ("Delivery Dates"), then Customer shall be entitled to a credit of One Hundred dollars (\$ 100) per day that the delivery of the System is delayed past the applicable Delivery Date. Monies becoming due to Customer hereunder shall be applied as a credit against future invoices submitted by Developer hereunder, or if there are no further invoices, then as a direct payment to Customer.

15. **Compliance with Laws.** Customer and Developer each shall comply with the provisions of all applicable federal, state, county and local laws, ordinances, regulations and codes, including, but not limited to, Customer's and Developer's obligations as employers with regard to the health, safety and payment of its employees, and identification and procurement of required permits, certificates, approvals and inspections in Customer's and Developer's performance of this Agreement.

Customer and Developer acknowledge that the Software and all related technical information, documents and materials are subject to export controls under the U.S. Export Administration Regulation. Customer and Developer will (i) comply strictly with all legal requirements established under these controls, (ii) cooperate fully with the other party in any official or unofficial audit or inspection that relates to these controls, and (iii) not export, re-export, divert, transfer or disclose, directly or indirectly, any Software or related technical information, document or material or direct products thereof to any country so restricted by the U.S. Export Administration Regulations, as modified from time to time, or to any national or resident thereof, unless Developer has obtained the prior written authorization of Customer and the U.S. Commerce Department and any relevant local government authority. Furthermore, Developer recognizes and agrees that concurrently with the execution of this Agreement, it shall provide Customer with a Letter of Assurance, substantially in the form of Exhibit D attached hereto.

16. **Choice of Law.** It is the intention of the parties hereto that this Agreement and the performances hereunder and all suits and special proceedings, arbitration, mediation or similar proceedings hereunder be construed in accordance with and under and pursuant to the laws of the State of California, excluding its principle of conflicts of laws.

17. **Arbitration.** Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association in Washington, D.C., and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

18. **Modification of Agreement.** No waiver or modification of this Agreement or of any covenant, condition, or limitation herein contained shall be valid unless in writing and duly executed by both parties, and no evidence of any waiver or modification shall be offered or received in evidence in any proceeding, arbitration, or litigation between the parties hereto arising out of or affecting this Agreement, or the rights or obligations of the parties hereunder, unless such waiver or modification is in writing, duly executed by both parties.

19. **Assignment.** Neither party may assign this Agreement in whole or in part without the written consent of the other party, which consent will not be unreasonably withheld. Developer may contract with other parties to provide services hereunder subject to Customer's prior written approval. This Agreement shall inure to the benefit of and be binding upon the successors and permitted assigns of the respective parties. Notwithstanding anything contained in this Section 19, Customer

may assign this Agreement to any entity which purchases all or substantially all of Customer's _____ business unit.

20. **Force Majeure.** Neither Developer nor Customer shall be liable for any delay in performance due to force majeure, including strikes, accidents, acts of God, or other delays beyond the control of such party. If timely completion of the System is prevented by any cause of force majeure, or any act of Customer then such failure or delay shall not constitute default.

21. **Notices.** All notices, demands, or other communications herein provided to be given or that may be given by any party to the other shall be deemed to have been duly given when made in writing and delivered in person, or upon receipt, if sent by international air courier (i.e., Federal Express or DHL) as follows:

Notices to Customer:

Attn: _____

Notices to Developer:

Attn: _____

with a required copy to:

or to such other address as the parties may provide to each other in writing from time to time.

22. **Independent Contractor.** Developer is and shall at all times be an independent contractor and shall not be deemed an employee or agent of Customer. Nothing in this Agreement is intended to, or shall be deemed to, constitute a partnership or joint venture between the parties.

23. **Purchase of Equipment.** Developer shall purchase certain equipment in order to perform the Services for which the cost will be reimbursed by the Customer. A preliminary list of such equipment and the price Customer shall reimburse Developer is set forth in Exhibit B. All equipment purchases must be approved in writing by the Customer prior to purchase. The Customer is responsible for all equipment costs required by the Developer to perform the services for the Customer, including but not limited to: computers, software, system level, databases, tools, office applications, network equipment, beepers, supplies, cabling, installation, shipping, import taxes and fees. Customer shall retain sole and exclusive ownership of such equipment. Developer shall follow Customer's policies on tagging such equipment. The Customer shall have the right to audit and/or conduct a physical inventory of all equipment which Customer has paid for or reimbursed Developer for at any time. Developer shall list Customer as the owner in all purchase documents.

24. **Forbearance - No Waiver.** Forbearance or neglect on the part of either party to insist upon strict compliance with the terms of this Agreement shall not be construed as or constitute a waiver thereof.

25. **Equitable Relief.** In the event Developer breaches, or threatens to breach any of the covenants expressed in this Agreement, the damages to Customer will be great and irreparable and difficult to quantify; therefore, Customer may apply to a court of competent jurisdiction for injunctive relief to restrain such breach or threat of breach, without disentitling Customer from any other relief in either law or equity. In the event that any or all of the covenants expressed herein shall be determined by a court of competent jurisdiction to be invalid or unenforceable, by reason of its geographic or temporal restrictions being too great, or by reason that the range of activities covered are too great, or for any other reason, these covenants shall be interpreted to extend over the maximum geographic area, period of time, range of activities or other restrictions to which they may be enforceable.

26. **Entire Agreement.** This Agreement and the Exhibits attached hereto contain the entire agreement between the parties and shall, as of the effective date hereof, supersede all other agreements, written and oral, between the parties relating to the subject matter hereof. Each of the parties hereto acknowledges that they have relied on their own judgment and the advice of counsel in entering into this Agreement.

IN WITNESS WHEREOF, Customer and Developer have executed this Software Development Agreement effective on the date first above written.

ATTEST:

[CUSTOMER]

By: _____ (SEAL)

ATTEST:

[DEVELOPER]

By: _____ (SEAL)

Exhibit A

Monthly Labor Rates

Skill Level	Cost/Hour (US\$)	Monthly Rate (US\$)
Project Manager		
MySQL DBA		
Back-End Programmer		
Front-End Programmer		
UI Designer		
Configuration Manager		
Testers		
Documentation		

Exhibit B

Equipment List

Prices are cost estimates only. Final pricing is dependent upon actual discounts that may be possible by Developer or Customer from each supplier.

Exhibit C

Weekly Status Report & Bimonthly Invoice Format

Weekly Status Report

The Weekly Status Report shall be addressed to the Customer project manager and shall contain the following information for each Customer project the Developer, or its staff, employees or assigns have performed any work on:

- ◆ Current Status of the Project
- ◆ Progress towards Customer objectives
- ◆ Estimated progress for the next week
- ◆ Personnel and skill level working on the project
- ◆ Issues

The Weekly Status Report shall be in PC-compatible Microsoft Word format, with 12-pitch, Arial font.

Copies of weekly time sheets shall be provided to the Customer project manager. These time sheets should designate, in the minimum, the Developer employee, the project he/she worked on, week ending date, skill level and daily hours.

Monthly Invoice

The Developer will provide the Customer with one invoice for services rendered on a monthly basis. This invoice will include all labor charges, travel and miscellaneous reimbursable expenses broken down by Customer project. The following supporting documentation will be required:

Labor Charges: A labor report of personnel providing services to the Customer, their skill categories and billable rates as detailed in Exhibit A for the billing period. Hours worked will be provided for the current period, year-to-date, and inception-to-date by project, skill category and employee, in that order.

Travel and Miscellaneous Expenses: All bills must be submitted with adequate documentation, including the prescribed travel authorization form, the travel expense report form, original receipts where possible, reason for travel, and the Customer project manager's written approval.

The invoice will be submitted by the 10th of every other month to the Customer project manager. The Customer project manager is responsible for getting all the requisite Customer approvals and submitting the invoice to the Customer Accounts Payable department for payment.

Exhibit D

Letter of Assurance