

Contract Number SBCTC 2012-13-001

For a

Learning Management System

between the

**Washington State Board for Community
& Technical Colleges**

and

Instructure, Inc.

Effective Date: _____
[Add Effective Date]

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CONTRACT NUMBER SBCTC 2012-13-001

**For a
Learning Management System**

PARTIES

This Contract ("Contract") is entered into by and between the state of Washington, acting by and through the State Board for Community & Technical Colleges, an agency of Washington State government ("Purchaser" or "SBCTC") located at 1300 Quince St. SE, Olympia, WA 98501, and Instructure, Inc., a corporation licensed to conduct business in the state of Washington ("Vendor" or "Instructure"), located at 9020 South Sandy Parkway, Suite 300 Sandy, Utah 84070 for the purpose of providing a Learning Management System (LMS).

RECITALS

The state of Washington, acting by and through SBCTC, issued a Request for Proposals (RFP) dated December 12, 2011, (Exhibit A) for the purpose of purchasing a fully hosted Learning Management System to replace the current ANGEL LMS.

Instructure submitted a timely Response to SBCTC's RFP (Excerpts from Instructure's Response are included as Exhibit B).

The Purchaser evaluated all properly submitted Responses to the above-referenced RFP and has identified Instructure as the Apparently Successful Vendor (ASV).

The Purchaser has determined that entering into a Contract with the Vendor will meet Purchaser's needs and will be in Purchaser's best interest.

NOW THEREFORE, Purchaser awards to Instructure this Contract, the terms and conditions of which shall govern Vendor's furnishing to SBCTC a hosted Learning Management System. This Contract is not for personal use.

IN CONSIDERATION of the mutual promises as hereinafter set forth, the parties agree as follows:

1. Definition of Terms

The following terms as used throughout this Contract shall have the meanings set forth below.

"Authorized Purchaser" shall mean all members of the Washington Institutions of Public Higher Education (WIPHE) consortium.

"Business Days and Hours" shall mean Monday through Friday, 8:00 a.m. to 5:00 p.m., Pacific Time, except for holidays observed by the state of Washington.

"Confidential Information" shall mean information that may be exempt from disclosure to the public or other unauthorized persons under either chapter 42.56 RCW or other state or federal statutes. Confidential Information includes, but is not limited to, names, addresses, Social Security numbers, e-mail addresses, telephone numbers, financial profiles, credit card

information, driver's license numbers, medical data, law enforcement records, agency source code or object code, agency security data, or protected student information.

"Contract" shall mean this document, all schedules and exhibits, Statements of Work, and all amendments hereto.

"Effective Date" shall mean the first date this Contract is in full force and effect. It may be a specific date agreed to by the parties; or, if not so specified, the date of the last signature of a party to this Contract.

"Exhibit A" shall mean the RFP.

"Exhibit B" shall mean Excerpts from Instructure's Response.

"Price" shall mean charges, costs, rates, and/or fees charged for the Services under this Contract and shall be paid in United States dollars.

"Product(s)" shall mean any Vendor-supplied equipment, Software, and documentation.

"Proprietary Information" shall mean information owned by Vendor to which Vendor claims a protectable interest under law. Proprietary Information includes, but is not limited to, information protected by copyright, patent, trademark, or trade secret laws.

"Purchased Services" or **"Services"** shall mean those Services and activities provided by Vendor to accomplish routine, continuing, and necessary functions as set forth in this Contract or the attached Master Subscription Services Agreement (MSSA).

"Purchaser" shall mean the Washington State Board for Community & Technical Colleges (SBCTC), any division, section, office, unit or other entity of Purchaser or any of the officers or other officials lawfully representing Purchaser.

"Purchaser Business Manager" shall mean the person designated by Purchaser who is assigned as the primary contact person whom Vendor's Account Manager shall work with for the duration of this Contract and as further defined in the section titled **Purchaser Business Manager**.

"Purchaser Contract Administrator" shall mean that person designated by Purchaser to administer this Contract on behalf of Purchaser.

"Purchaser Contracting Officer" shall mean the person to whom signature authority has been delegated in writing. This term includes, except as otherwise provided in this Contract, an authorized representative of the Purchaser Contracting Officer acting within the limits of his/her authority.

"RCW" shall mean the Revised Code of Washington.

"RFP" shall mean the Request for Proposals used as a solicitation document to establish this Contract, including all its amendments and modifications, Exhibit A hereto.

"Response" shall mean Vendor's Response to Purchaser's RFP for a Learning Management System, Exhibit B hereto.

"SBCTC" shall mean the same as Purchaser.

"Schedule A: *Authorized Services and Price List*" shall mean the attachment to this Contract that identifies the authorized Services and Prices available under this Contract.

“Schedule B: Master Subscription Services Agreement” shall mean the attachment to this Contract that provides additional terms and conditions for the Services provided.

“Software” shall mean the object code version of computer programs licensed pursuant to this Contract. Software also means the source code version, where provided by Vendor. Embedded code, firmware, internal code, microcode, and any other term referring to software residing in the equipment that is necessary for the proper operation of the equipment is not included in this definition of Software. Software includes all prior, current, and future versions of the Software and all maintenance updates and error corrections.

“Specifications” shall mean the technical and other specifications set forth in the RFP, Exhibit A, and any additional specifications set forth in Vendor’s Response, Exhibit B.

“Subcontractor” shall mean one not in the employment of Vendor, who is performing all or part of the business activities under this Contract under a separate contract with Vendor. The term “Subcontractor” means Subcontractor(s) of any tier.

“Vendor” shall mean Instructure, its employees and agents. Vendor also includes any firm, provider, organization, individual, or other entity performing the business activities under this Contract. It shall also include any Subcontractor retained by Vendor as permitted under the terms of this Contract.

“Vendor Account Manager” shall mean a representative of Vendor who is assigned as the primary contact person whom the Purchaser [Project or Business] Manager shall work with for the duration of this Contract and as further defined in the section titled **Vendor Account Manager**.

“Vendor Contracting Officer” shall mean the person to whom signature authority has been delegated in writing. This term includes, except as otherwise provided in this Contract, an authorized representative of Vendor Contracting Officer acting within the limits of his/her authority.

“Work Product” shall mean data and products produced under this Contract including but not limited to, discoveries, formulae, ideas, improvements, inventions, methods, models, processes, techniques, findings, conclusions, recommendations, reports, designs, plans, diagrams, drawings, software, databases, documents, pamphlets, advertisements, books, magazines, surveys, studies, computer programs, films, tapes, and/or sound reproductions, to the extent provided by law.

Contract Term

2. Term

2.1. Term of Contract

- a) This Contract’s initial term shall be four (4) years, commencing upon the Effective Date.
- b) This Contract’s term may be extended by three (3) additional one (1) year terms, provided that the extensions shall be at Purchaser’s option and shall be effected by Purchaser giving written notice of its intent to extend this Contract to Vendor not less than thirty (30) calendar days prior to the then-current Contract term’s expiration and Vendor accepting such extension prior to the then-current Contract term’s expiration. The total term of this Contract shall not exceed seven (7) years. No change in terms

and conditions shall be permitted during these extensions unless specifically agreed to in writing.

- 2.2. Participation by Authorized Purchasers. The term of any Agreement for Services by any Authorized Purchasers under this Contract and any related MSSA shall not exceed the term of this Contract.

3. Survivorship

All license and purchase transactions executed and Services provided pursuant to the authority of this Contract shall be bound by all of the terms, conditions, Prices and Price discounts set forth herein, notwithstanding the expiration of the initial term of this Contract or any extension thereof. Further, the terms, conditions and warranties contained in this Contract that by their sense and context are intended to survive the completion of the performance, cancellation or termination of this Contract shall so survive. In addition, the terms of the sections titled **Overpayments to Vendor; Ownership/Rights in Data; Vendor's Commitments, Warranties and Representations; Protection of Purchaser's Confidential Information; Section Headings, Incorporated Documents and Order of Precedence; Publicity; Review of Vendor's Records; Patent and Copyright Indemnification; Vendor's Proprietary Information; Disputes; and Limitation of Liability** shall survive the termination of this Contract.

Pricing, Invoice and Payment

4. Pricing

- 4.1. Vendor agrees to provide the Services at the Prices set forth in Schedule A. No other Prices shall be charged by Vendor for implementation of Vendor's Response.
- 4.2. Prices may not be increased during the initial term of the Contract.
- 4.3. If Vendor reduces its Prices for any of the Services during the term of this Contract, Purchaser shall have the immediate benefit of such lower Prices for new purchases. Vendor shall send notice to the Purchaser Contract Administrator with the reduced Prices within fifteen (15) Business Days of the reduction taking effect. Vendor shall send updated Prices to the Purchaser.
- 4.4. Vendor agrees that all the Prices, terms, warranties, and benefits provided in this Contract are comparable to or better than the terms presently being offered by Vendor to (1) any other comparable consortium governmental entity and (2) purchasing under a single contract with 200,000 FTE or less under similar terms. If during the term of this Contract Vendor shall enter into contracts with such entity providing greater benefits or more favorable terms than those provided by this Contract, Vendor shall be obligated to provide the same to Purchaser for the remaining unpaid term of this Contract (including any extension) and for any subsequent purchases.

5. Taxes

- 5.1. Purchaser will pay sales and use taxes, if any, imposed on the Services acquired hereunder. Vendor must pay all other taxes including, but not limited to, Washington Business and Occupation Tax, other taxes based on Vendor's income or gross receipts, or

personal property taxes levied or assessed on Vendor's personal property. Purchaser, as an agency of Washington State government, is exempt from property tax.

- 5.2. Vendor shall complete registration with the Washington State Department of Revenue and be responsible for payment of all taxes due on payments made under this Contract.
- 5.3. All payments accrued on account of payroll taxes, unemployment contributions, any other taxes, insurance, or other expenses for Vendor or Vendor's staff shall be Vendor's sole responsibility.

6. Invoice and Payment

- 6.1. Vendor will submit properly itemized invoices to SBCTC Accounts Payable at PO Box 42495 Olympia, WA 98504-2495. Invoices shall provide and itemize, as applicable:
 - a) Purchaser Contract number SBCTC 2012-13-001;
 - b) Vendor name, address, phone number, and Federal Tax Identification Number;
 - c) Description of Services provided;
 - d) Date(s) that Services were provided, including number of hours worked (if applicable);
 - e) Vendor's Price for Services;
 - f) Net invoice Price for each Service;
 - g) Applicable taxes;
 - h) Other applicable charges;
 - i) Total invoice Price; and
 - j) Payment terms including any available prompt payment discounts.
- 6.2. Payments shall be due and payable after delivery of Services and within thirty (30) calendar days receipt of properly prepared invoices, whichever is later.
- 6.3. Incorrect or incomplete invoices will be returned by Purchaser to Vendor for correction and reissue.
- 6.4. The Purchaser Contract number SBCTC 2012-13-001 must appear on all bills of lading, packages, and correspondence relating to this Contract.
- 6.5. Purchaser shall not honor drafts, nor accept goods on a sight draft basis.
- 6.6. If Purchaser fails to make timely payment, Vendor may invoice Purchaser one percent (1%) per month on the amount overdue or a minimum of one dollar (\$1). Payment will not be considered late if payment is deposited electronically in Vendor's bank account or if a check or warrant is postmarked within thirty (30) calendar days of acceptance of the Services or receipt of Vendor's properly prepared invoice, whichever is later.

7. Overpayments to Vendor

Vendor shall refund to Purchaser the full amount of any erroneous payment or overpayment under this Contract within thirty (30) days' written notice. If Vendor fails to make timely refund, Purchaser may charge Vendor one percent (1%) per month on the amount due, until paid in full.

Vendor's Responsibilities

8. Intentionally Omitted.

9. Site Security

While on Purchaser's premises, Vendor, its agents, employees, or Subcontractors shall conform in all respects with physical, fire, or other security regulations.

10. Vendor Commitments, Warranties and Representation

Any written commitment by Vendor within the scope of this Contract shall be binding upon Vendor. Failure of Vendor to fulfill such a commitment may constitute breach and shall render Vendor liable for damages under the terms of this Contract. For purposes of this section, a commitment by Vendor includes: (i) Prices, discounts, and options committed to remain in force over a specified period of time; and (ii) any warranty or representation made by Vendor in its Response or contained in any Vendor or manufacturer publications, written materials, schedules, charts, diagrams, tables, descriptions, other written representations, and any other communication medium accompanying or referred to in its Response or used to effect the sale to Purchaser.

11. Protection of Purchaser's Confidential Information

- 11.1. In addition and without prejudice to Vendor's obligations under Sections 3(a) and 4 of Schedule B: *Master Subscription Services Agreement*, Vendor acknowledges that some of the material and information that may come into its possession or knowledge in connection with this Contract or its performance may consist of information that is exempt from disclosure to the public or other unauthorized persons under either chapter 42.56 RCW or other state or federal statutes ("Confidential Information"). Confidential Information includes, but is not limited to, names, addresses, Social Security numbers, e-mail addresses, telephone numbers, financial profiles, credit card information, driver's license numbers, medical data, law enforcement records, agency source code or object code, agency security data, or information identifiable to an individual that relates to any of these types of information. Vendor agrees to hold Confidential Information in strictest confidence and not to make use of Confidential Information for any purpose other than the performance of this Contract, to release it only to authorized employees or Subcontractors requiring such information for the purposes of carrying out this Contract, and not to release, divulge, publish, transfer, sell, disclose, or otherwise make the information known to any other party without Purchaser's express written consent or as provided by law. Vendor agrees to release such information or material only to employees or Subcontractors who have signed a nondisclosure agreement, the terms of which have been previously approved by Purchaser. Vendor agrees to implement physical, electronic, and managerial safeguards to prevent unauthorized access to Confidential Information.
- 11.2. Immediately upon expiration or termination of this Contract, Vendor shall, at Purchaser's option: (i) certify to Purchaser that Vendor has destroyed all Confidential Information; or (ii) return all Confidential Information to Purchaser; or (iii) take whatever other steps Purchaser requires of Vendor to protect Purchaser's Confidential Information.
- 11.3. Purchaser reserves the right to monitor, audit, or investigate the use of Confidential Information collected, used, or acquired by Vendor through this Contract. The monitoring, auditing, or investigating may include, but is not limited to, salting databases.

- 11.4. Violation of this section by Vendor or its Subcontractors may result in termination of this Contract and demand for return of all Confidential Information, monetary damages, or penalties.

Contract Administration

12. Legal Notices

- 12.1. Any notice or demand or other communication required or permitted to be given under this Contract or applicable law shall be effective only if it is in writing and signed by the applicable party, properly addressed, and either delivered in person, or by a recognized courier service, or deposited with the United States Postal Service as first-class mail, postage prepaid, to the parties at the addresses provided in this section.

To Vendor at:

Instructure, Inc.
9020 South Sandy Pkwy., Suite 200
Sandy, UT 84070

Attn:
Legal Department

Phone: 801-869-5079

Fax:

E-mail: howard@instructure.com

To Purchaser at:

State of Washington
SBCTC

Attn: Connie Broughton
1300 Quince St. SE
PO Box 42495
Olympia, WA 98504-2495
Phone: 360-704-4334
Fax:
E-mail: cbroughton@sbctc.edu

- 12.2. Notices shall be effective upon receipt or four (4) Business Days after mailing, whichever is earlier. The notice address as provided herein may be changed by written notice given as provided above.
- 12.3. In the event that a subpoena or other legal process commenced by a third party in any way concerning the Services provided pursuant to this Contract is served upon Vendor or Purchaser, such party agrees to notify the other party in the most expeditious fashion possible following receipt of such subpoena or other legal process. Vendor and Purchaser further agree to cooperate with the other party in any lawful effort by the other party to contest the legal validity of such subpoena or other legal process commenced by a third party.

13. Purchaser Business Manager

Purchaser shall appoint Connie Broughton who will be the Purchaser Business Manager for this Contract and will provide oversight of the activities conducted hereunder. Purchaser Business Manager will be the principal contact for Vendor concerning business activities under this Contract. Purchaser shall notify Vendor, in writing, when there is a new Purchaser Business Manager assigned to this Contract.

14. Vendor Account Manager

Vendor shall appoint an Account Manager for Purchaser's account under this Contract who will provide oversight of Vendor activities conducted hereunder. Vendor's Account Manager will be the principal point of contact for Purchaser concerning Vendor's performance under this

Contract. Vendor shall notify Purchaser Contract Administrator and Purchaser Business Manager, in writing, when there is a new Vendor Account Manager assigned to this Contract. The Vendor Account Manager information is:

Vendor Account Manager: Travis Cornes

Address: 9020 Sandy Parkway, Suite 200, Salt Lake City, UT 84070

Phone: 801.869.5000

Fax: 888.213.3894

E-mail: travis@instructure.com

15. Section Headings, Incorporated Documents and Order of Precedence

- 15.1. The headings used herein are inserted for convenience only and shall not control or affect the meaning or construction of any of the sections.
- 15.2. Each of the documents listed below is, by this reference, incorporated into this Contract as though fully set forth herein.
 - a) Schedule A,
 - b) SBCTC RFP dated December 12, 2011;
 - c) Exhibit B - Excerpts from Vendor's Response to SBCTC RFP dated January 19, 2012;
 - d) Vendor's MSSA;
 - e) The terms and conditions contained on Purchaser's purchase documents, if used; and
 - f) All Vendor or manufacturer publications, written materials and schedules, charts, diagrams, tables, descriptions, other written representations and any other supporting materials Vendor made available to Purchaser and used to effect the sale of Services to Purchaser.
- 15.3. In the event of any inconsistency in this Contract, the inconsistency shall be resolved in the following order of precedence:
 - a) Applicable federal and state statutes, laws, and regulations;
 - b) Sections of this Contract;
 - c) Schedule A;
 - d) SBCTC RFP dated December 12, 2011;
 - e) Vendor's MSSA;
 - f) Exhibit B – Excerpts from Vendor's Response to SBCTC RFP dated January 19, 2012;
 - g) The terms and conditions contained on Purchaser's order documents, if used; and
 - h) All Vendor or manufacturer publications, written materials and schedules, charts, diagrams, tables, descriptions, other written representations and any other supporting materials Vendor made available to Purchaser and used to effect the sale of Services to Purchaser.

16. Entire Agreement

This Contract sets forth the entire agreement between the parties with respect to the subject matter hereof and except as provided in the section titled **Vendor Commitments, Warranties and Representations**, understandings, agreements, representations, or warranties not contained in this Contract or a written amendment hereto shall not be binding on either party. Except as provided herein, no alteration of any of the terms, conditions, delivery, Price, quality, or Specifications of this Contract will be effective without the written consent of both parties.

17. Authority for Modifications and Amendments

No modification, amendment, alteration, addition, or waiver of any section or condition of this Contract or the MSSA attached to this Contract shall be effective or binding unless it is in writing and signed by Purchaser and Vendor Contracting Officers. Only Purchaser Contracting Officer shall have the express, implied, or apparent authority to alter, amend, modify, add, or waive any section or condition of this Contract or the MSSA on behalf of Purchaser.

18. Independent Status of Vendor

In the performance of this Contract, the parties will be acting in their individual, corporate or governmental capacities and not as agents, employees, partners, joint venturers, or associates of one another. The parties intend that an independent contractor relationship will be created by this Contract. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purpose whatsoever. Vendor shall not make any claim of right, privilege or benefit which would accrue to an employee under chapter 41.06 RCW or Title 51 RCW.

19. Governing Law

This Contract shall be governed in all respects by the law and statutes of the state of Washington, without reference to conflict of law principles. The jurisdiction for any action hereunder shall be exclusively in the Superior Court for the state of Washington. The venue of any action hereunder shall be in the Superior Court for Thurston County, Washington.

20. Subcontractors

Vendor may, with prior written permission from Purchaser Contracting Officer, which consent shall not be unreasonably withheld, enter into subcontracts with third parties for its performance of any part of Vendor's duties and obligations. In no event shall the existence of a subcontract operate to release or reduce the liability of Vendor to Purchaser for any breach in the performance of Vendor's duties. For purposes of this Contract, Vendor agrees that all Subcontractors shall be held to be agents of Vendor. Vendor shall be liable for any loss or damage to Purchaser, including but not limited to personal injury, physical loss, harassment of Purchaser employee, or violations of the **Patent and Copyright Indemnification, Protection of Purchaser's Confidential Information, and Ownership/Rights in Data** sections of this Contract occasioned by the acts or omissions of Vendor's Subcontractors, their agents or employees. The **Patent and Copyright Indemnification, Protection of Purchaser's Confidential Information, Ownership/Rights in Data, Publicity and Review of Vendor's Records** sections of this Contract shall apply to all Subcontractors.

21. Assignment

- 21.1. With the prior written consent of Purchaser Contracting Officer, which consent shall “not be unreasonably withheld”, Vendor may assign this Contract including the proceeds hereof, provided that such assignment shall not operate to relieve Vendor of any of its duties and obligations hereunder, nor shall such assignment affect any remedies available to Purchaser that may arise from any breach of the sections of this Contract, Statements of Work, or warranties made herein including but not limited to, rights of setoff.
- 21.2. Purchaser may assign this Contract or Statements of Work to any successor public agency, commission, board within the political boundaries of the state of Washington, provided that such assignment shall not operate to relieve Purchaser of any of its duties and obligations hereunder.

22. Publicity

- 22.1. The award of this Contract to Vendor is not in any way an endorsement of Vendor or Vendor’s Services by Purchaser and shall not be so construed by Vendor in any advertising or other publicity materials.
- 22.2. Vendor agrees to submit to Purchaser, all advertising, sales promotion, and other publicity materials relating to this Contract and Services furnished by Vendor wherein Purchaser’s name is mentioned, language is used, or Internet links are provided from which the connection of Purchaser’s name therewith may, in Purchaser’s judgment, be inferred or implied. Vendor further agrees not to publish or use such advertising, sales promotion materials, publicity or the like through print, voice, the World Wide Web, and other communication media in existence or hereinafter developed without the express written consent of Purchaser *prior* to such use.
- 22.3. Either Party may use the other Party’s name and logo (except for the State seal) in advertising, sales promotion, and other publicity materials relating to this Contract, without royalty, provided that this Contract and the relationship between the parties is not misrepresented.

23. Review of Vendor’s Records

- 23.1. Vendor and its Subcontractors shall maintain books, records, documents and other evidence relating to this Contract, including but not limited to Minority and Women’s Business Enterprise participation, protection and use of Purchaser’s Confidential Information, and accounting procedures and practices which sufficiently and properly reflect all direct and indirect costs of any nature invoiced in the performance of this Contract. Vendor shall retain all such records for six (6) years after the expiration or termination of this Contract. Records involving matters in litigation related to this Contract shall be kept for either one (1) year following the termination of litigation, including all appeals, or six (6) years from the date of expiration or termination of this Contract, whichever is later.
- 23.2. All such records shall be subject at reasonable times (and during normal Vendor business hours) and upon prior notice to examination, inspection, copying, or audit by personnel so authorized by the Purchaser’s Contract Administrator and/or the Office of the State Auditor and federal officials so authorized by law, rule, regulation or contract, when

applicable, at no additional cost to the State. During this Contract's term, Vendor shall provide access to these items within Thurston County. Vendor shall be responsible for any audit exceptions or disallowed costs incurred by Vendor or any of its Subcontractors.

- 23.3. Vendor shall incorporate in its subcontracts this section's records retention and review requirements.
- 23.4. It is agreed that books, records, documents, and other evidence of accounting procedures and practices related to Vendor's cost structure, including overhead, general and administrative expenses, and profit factors shall be excluded from Purchaser's review unless the cost or any other material issue under this Contract is calculated or derived from these factors.

24. Right of Inspection

Vendor shall provide right of access to its facilities to Purchaser, or any of Purchaser's officers, or to any other authorized agent or official of the state of Washington or the federal government, at all reasonable times (during normal Vendor business hours), in order to monitor and evaluate performance, compliance, and/or quality assurance under this Contract.

General Provisions

25. Patent and Copyright Indemnification

- 25.1. Vendor, at its expense, shall defend, indemnify, and save Purchaser harmless from and against any claims against Purchaser that any Product or Work Product supplied hereunder, or Purchaser's use of the Product or Work Product within the terms of this Contract, infringes any patent, copyright, utility model, industrial design, mask work, trade secret, trademark, or other similar proprietary right of a third party worldwide. Vendor shall pay all costs of such defense that a court finally awards or that are included in a settlement approved by Purchaser provided that Purchaser:
 - a) Promptly notifies Vendor in writing of the claim, but Purchaser's failure to provide timely notice shall only relieve Vendor from its indemnification obligations if and to the extent such late notice prejudiced the defense or resulted in increased expense or loss to Vendor; and
 - b) Cooperates with and agrees to use its best efforts to encourage the Office of the Attorney General of Washington to grant Vendor sole control of the defense and all related settlement negotiations.
- 25.2. If such claim has occurred, or in Vendor's opinion is likely to occur, Purchaser agrees to permit Vendor, at its option and expense, either to procure for Purchaser the right to continue using the Product or Work Product or to replace or modify the same so that they become noninfringing and functionally equivalent. If use of the Product or Work Product is enjoined by a court and Vendor determines that none of these alternatives is reasonably available, Vendor, at its risk and expense, will take back the Product or Work Product and provide Purchaser a refund of any prepaid and unused fees.
- 25.3. Vendor has no liability for any claim of infringement arising solely from:
 - a) Vendor's compliance with any designs, specifications or instructions of Purchaser;

- b) Modification of the Product or Work Product by Purchaser or a third party without the prior knowledge and approval of Vendor; or
- c) Use of the Product or Work Product in a way not specified by Vendor;

unless the claim arose against Vendor's Product or Work Product independently of any of these specified actions.

26. Save Harmless

Vendor shall defend, indemnify, and save Purchaser harmless from and against any claims, including reasonable attorneys' fees resulting from such claims, by third parties for any or all injuries to persons or damage to property of such third parties arising from intentional, willful or negligent acts or omissions of Vendor, its officers, employees, or agents, or Subcontractors, their officers, employees, or agents.

27. Insurance

- 27.1. Vendor shall, during the term of this Contract, maintain in full force and effect, the insurance described in this section. Vendor shall acquire such insurance from an insurance carrier or carriers licensed to conduct business in the state of Washington and having a rating of A-, Class VII or better, in the most recently published edition of *Best's Reports*. In the event of cancellation, non-renewal, revocation or other termination of any insurance coverage required by this Contract, Vendor shall endeavor to provide written notice of such to Purchaser within thirty (30) Business Days of Vendor's receipt of such notice. Failure to buy and maintain the required insurance may, at Purchaser's sole option, result in this Contract's termination.
- 27.2. The minimum acceptable limits shall be as indicated below, with no deductible for each of the following categories:
 - a) Umbrella policy providing excess limits over the primary policies in an amount not less than \$1 million;
 - b) Professional Liability Errors and Omissions, conditioned upon subsection 27.3 below, and coverage of not less than \$1 million per occurrence/\$1 million general aggregate; and
 - c) Crime Coverage conditioned upon subsection 27.3 below, and coverage of not less than \$1 million single limit per occurrence and \$1 million in the aggregate, which shall at a minimum cover occurrences falling in the following categories: Computer Fraud; Forgery; Money and Securities; and Employee Dishonesty.
- 27.3. For Professional Liability Errors and Omissions coverage and Crime Coverage, Vendor shall: (i) continue such coverage for six (6) years beyond the expiration or termination of this Contract, naming Purchaser as an additional insured and providing Purchaser with certificates of insurance upon written request.
- 27.4. Vendor shall pay premiums on all insurance policies. Such insurance policies shall name Purchaser as an additional insured on all general liability, automobile liability, and umbrella policies. Such policies shall also reference this Contract number SBCTC 2012-13-001 and shall have a condition that they not be revoked by the insurer until forty-five (45) calendar days after notice of intended revocation thereof shall have been given to Purchaser by the insurer.

- 27.5. All insurance provided by Vendor shall be primary as to any other insurance or self-insurance programs afforded to or maintained by the State and shall include a severability of interests (cross-liability) provision.
- 27.6. Vendor shall include all Subcontractors as insured under all required insurance policies, or shall furnish separate certificates of insurance and endorsements for each Subcontractor. Subcontractor(s) shall comply fully with all insurance requirements stated herein. Failure of Subcontractor(s) to comply with insurance requirements does not limit Vendor's liability or responsibility.
- 27.7. Vendor shall furnish to Purchaser copies of certificates of all required insurance within thirty (30) calendar days of this Contract's Effective Date, and copies of renewal certificates of all required insurance within thirty (30) days after the renewal date. These certificates of insurance must expressly indicate compliance with each and every insurance requirement specified in this section. Failure to provide evidence of coverage may, at Purchaser's sole option, result in this Contract's termination.
- 27.8. By requiring insurance herein, Purchaser does not represent that coverage and limits will be adequate to protect Vendor. Such coverage and limits shall not limit Vendor's liability under the indemnities and reimbursements granted to Purchaser in this Contract.

28. Industrial Insurance Coverage

Prior to performing work under this Contract, Vendor shall provide or purchase industrial insurance coverage for its employees, as may be required of an "employer" as defined in Title 51 RCW, and shall maintain full compliance with Title 51 RCW during the course of this Contract. Purchaser will not be responsible for payment of industrial insurance premiums or for any other claim or benefit for Vendor, or any Subcontractor or employee of Vendor, which might arise under the industrial insurance laws during the performance of duties and services under this Contract.

29. Licensing Standards

Vendor shall comply with all applicable local, state, and federal licensing, accreditation and registration requirements and standards necessary in the performance of this Contract. (See, for example, chapter 19.02 RCW for state licensing requirements and definitions.)

30. Antitrust Violations

Vendor and Purchaser recognize that, in actual economic practice, overcharges resulting from antitrust violations are usually borne by Purchaser. Therefore, Vendor hereby assigns to Purchaser any and all claims for such overcharges as to goods and Services purchased in connection with this Contract, except as to overcharges not passed on to Purchaser resulting from antitrust violations commencing after the date of the bid, quotation, or other event establishing the Price under this Contract.

31. Compliance with Civil Rights Laws

During the performance of this Contract, Vendor shall comply with all federal and applicable state nondiscrimination laws, including but not limited to: Title VII of the Civil Rights Act, 42 U.S.C. §12101 *et seq.*; the Americans with Disabilities Act (ADA); and Title 49.60 RCW, Washington Law Against Discrimination. In the event of Vendor's noncompliance or refusal to

comply with any nondiscrimination law, regulation or policy, this Contract may be rescinded, canceled, or terminated in whole or in part under the **Termination for Default** sections, and Vendor may be declared ineligible for further contracts with Purchaser.

32. Severability

If any term or condition of this Contract or the application thereof is held invalid, such invalidity shall not affect other terms, conditions, or applications which can be given effect without the invalid term, condition, or application; to this end the terms and conditions of this Contract are declared severable.

33. Waiver

Waiver of any breach of any term or condition of this Contract shall not be deemed a waiver of any prior or subsequent breach. No term or condition of this Contract shall be held to be waived, modified, or deleted except by a written instrument signed by the parties.

34. Vendor's Proprietary Information

Vendor acknowledges that Purchaser is subject to chapter 42.56 RCW and that this Contract shall be a public record as defined in chapter 42.56 RCW. Any specific information that is claimed by Vendor to be Proprietary Information must be clearly identified as such by Vendor. To the extent consistent with chapter 42.56 RCW, Purchaser shall maintain the confidentiality of all such information marked Proprietary Information. If a public disclosure request is made to view Vendor's Proprietary Information, Purchaser will notify Vendor of the request and of the date that such records will be released to the requester unless Vendor obtains a court order from a court of competent jurisdiction enjoining that disclosure. If Vendor fails to obtain the court order enjoining disclosure, Purchaser will release the requested information on the date specified.

Disputes and Remedies

35. Disputes

- 35.1. In the event a bona fide dispute concerning a question of fact arises between Purchaser and Vendor and it cannot be resolved between the parties, either party may initiate the dispute resolution procedure provided herein.
- 35.2. The initiating party shall reduce its description of the dispute to writing and deliver it to the responding party. The responding party shall respond in writing within five (5) Business Days. The initiating party shall have five (5) Business Days to review the response. If after this review a resolution cannot be reached, both parties shall have five (5) Business Days to negotiate in good faith to resolve the dispute.
 - a) If the dispute cannot be resolved after five (5) Business Days, a Dispute Resolution Panel may be requested in writing by either party who shall also identify the first panel member. Within five (5) Business Days of receipt of the request, the other party will designate a panel member. Those two panel members will appoint a third individual to the Dispute Resolution Panel within the next five (5) Business Days.
 - b) The Dispute Resolution Panel will review the written descriptions of the dispute, gather additional information as needed, and render a decision on the dispute in the shortest practical time.
 - c) Each party shall bear the cost for its panel member and share equally the cost of the third panel member.
- 35.3. Both parties agree to be bound by the determination of the Dispute Resolution Panel.
- 35.4. Both parties agree to exercise good faith in dispute resolution and to settle disputes prior to using a Dispute Resolution Panel whenever possible.
- 35.5. Purchaser and Vendor agree that, the existence of a dispute notwithstanding, they will continue without delay to carry out all their respective responsibilities under this Contract that are not affected by the dispute.
- 35.6. If the subject of the dispute is the amount due and payable by Purchaser for Services being provided by Vendor, Vendor shall continue providing Services pending resolution of the dispute provided Purchaser pays Vendor the amount Purchaser, in good faith, believes is due and payable, and places in escrow the difference between such amount and the amount Vendor, in good faith, believes is due and payable.

36. Attorneys' Fees and Costs

- 36.1. If any litigation is brought to enforce any term, condition, or section of this Contract, or as a result of this Contract in any way, the prevailing party shall be awarded its reasonable attorneys' fees together with expenses and costs incurred with such litigation, including necessary fees, costs, and expenses for services rendered at both trial and appellate levels, as well as subsequent to judgment in obtaining execution thereof.
- 36.2. In the event that the parties engage in arbitration, mediation or any other alternative dispute resolution forum to resolve a dispute in lieu of litigation, both parties shall share equally in the cost of the alternative dispute resolution method, including cost of mediator

or arbitrator. In addition, each party shall be responsible for its own attorneys' fees incurred as a result of the alternative dispute resolution method.

37. Non-Exclusive Remedies

Except as what's specified in Section 3b of the Vendor MSSA as it relates to Service Availability Warranty, the remedies provided for in this Contract shall not be exclusive but are in addition to all other remedies available under law.

38. Limitation of Liability

- 38.1. The parties agree that neither Vendor nor Purchaser shall be liable to each other, regardless of the form of action, for consequential, incidental, indirect, or special damages except a claim related to bodily injury or death, or a claim or demand based on patent, copyright, or other intellectual property right infringement, in which case liability shall be as set forth elsewhere in this Contract. This section does not modify any other conditions as are elsewhere agreed to herein between the parties. The damages specified in the sections titled **Termination for Default** and **Review of Vendor's Records** are not consequential, incidental, indirect, or special damages as that term is used in this section.
- 38.2. Neither Vendor nor Purchaser shall be liable for damages arising from causes beyond the reasonable control and without the fault or negligence of either Vendor or Purchaser. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of a governmental body other than Purchaser acting in either its sovereign or contractual capacity, war, explosions, fires, floods, earthquakes, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the delays must be beyond the reasonable control and without fault or negligence of Vendor, Purchaser, or their respective Subcontractors.
- 38.3. If delays are caused by a Subcontractor without its fault or negligence, Vendor shall not be liable for damages for such delays, unless the Services to be performed were obtainable on comparable terms from other sources in sufficient time to permit Vendor to meet its required performance schedule.
- 38.4. Neither party shall be liable for personal injury to the other party or damage to the other party's tangible property except personal injury or damage to tangible property proximately caused by such party's respective fault or negligence.

Contract Termination

39. Termination for Default

- 39.1. If either Purchaser or Vendor violates any material term or condition of this Contract, then the aggrieved party shall give the other party written notice of such failure or violation. The responsible party will correct the violation or failure within thirty (30) calendar days or other appropriate time period or as otherwise mutually agreed in writing. If the failure or violation is not corrected, this Contract may be terminated immediately by written notice from the aggrieved party to the other party. The option to terminate shall be at the sole discretion of the aggrieved party. Purchaser reserves the right to suspend all or part of the Contract, withhold further payments, or prohibit Vendor from incurring additional obligations of funds during investigation of any alleged Vendor

compliance breach and pending corrective action by Vendor or a decision by Purchaser to terminate the Contract.

39.2. If the Failure to Perform is without the defaulting party's control, fault, or negligence, the termination shall be deemed to be a **Termination for Convenience**.

39.3. This section shall not apply to any failure(s) to perform that results from the willful or negligent acts or omissions of the aggrieved party.

40. Termination for Non-Allocation of Funds

Performance by Purchaser under the Contract may be dependent upon the appropriation and allotment of funds by the Washington State Legislature (the "Legislature") and/or allocation of funds by the Board of Regents of the Washington State Board for Community & Technical Colleges (the "Board"), which is beyond the control of the Purchaser. If the Legislature fails to appropriate or allot the necessary funds, or the Board fails to allocate the necessary funds, then Purchaser will issue written notice to Vendor and Purchaser may terminate the Contract without further duty or obligation hereunder.

If funds are not allocated to Purchaser to continue this Contract in any future period, Purchaser may terminate this Contract by seven (7) calendar days or other appropriate time period written notice to Vendor or work with Vendor to arrive at a mutually acceptable resolution of the situation. Purchaser will not be obligated to pay any further charges for Services including the net remainder of agreed to consecutive periodic payments remaining unpaid beyond the end of the then-current period. Purchaser agrees to notify Vendor in writing of such non-allocation at the earliest possible time. No penalty shall accrue to Purchaser in the event this section shall be exercised. This section shall not be construed to permit Purchaser to terminate this Contract in order to acquire similar Services from a third party.

41. Termination for Conflict of Interest

Purchaser may terminate this Contract by written notice to Vendor if Purchaser determines, after due notice and examination, that any party has violated chapter 42.52 RCW, Ethics in Public Service, or any other laws regarding ethics in public acquisitions and procurement and performance of contracts. In the event this Contract is so terminated, Purchaser shall be entitled to pursue the same remedies against Vendor as it could pursue in the event Vendor materially breaches this Contract.

42. Termination Procedure

42.1. In addition to the procedures set forth below, if Purchaser terminates this Contract, Vendor shall follow any procedures Purchaser specifies in Purchaser's Notice of Termination.

42.2. Upon termination of this Contract, Purchaser, in addition to any other rights provided in this Contract, may require Vendor to deliver to Purchaser any property or Work Product specifically produced or acquired for the performance of such part of this Contract as has been terminated. The section titled **Treatment of Assets** shall apply in such property transfer.

42.3. Unless otherwise provided herein, Purchaser shall pay to Vendor the agreed-upon Price, if separately stated, for the Services received by Purchaser, provided that in no event shall Purchaser pay to Vendor an amount greater than Vendor would have been entitled to if

this Contract had not been terminated. Failure to agree with such determination shall be a dispute within the meaning of the **Disputes** section of this Contract. Purchaser may withhold from any amounts due Vendor such sum as Purchaser determines to be necessary to protect Purchaser from potential loss or liability.

- 42.4. Vendor shall pay amounts due Purchaser as the result of termination within thirty (30) calendar days of notice of the amounts due. If Vendor fails to make timely payment, Purchaser may charge interest on the amounts due at one percent (1%) per month until paid in full.

43. Covenant Against Contingent Fees

- 43.1. Vendor warrants that no person or selling agency has been employed or retained to solicit or secure this Contract upon any agreement or understanding for a commission, percentage, brokerage, or contingent fee, *except* bona fide employees or a bona fide established commercial or selling agency of Vendor.
- 43.2. In the event Vendor breaches this section, Purchaser shall have the right to either annul this Contract without liability to Purchaser or, in Purchaser's discretion, deduct from payments due to Vendor, or otherwise recover from Vendor, the full amount of such commission, percentage, brokerage, or contingent fee.

Contract Execution

44. Authority to Bind

The signatories to this Contract represent that they have the authority to bind their respective organizations to this Contract.

45. Counterparts

This Contract may be executed in counterparts or in duplicate originals. Each counterpart or each duplicate shall be deemed an original copy of this Contract signed by each party, for all purposes.

In Witness Whereof, the parties hereto, having read this Contract in its entirety, including all attachments, do agree in each and every particular and have thus set their hands hereunto.

This Contract is effective this _____ day of _____, 2012.

Approved

State of Washington
State Board for Community & Technical
Colleges

Approved

Instructure, Inc.

Charles N. Earl
Signature

Signature

Charles N. Earl 6/28/12
Print or Type Name Date

Print or Type Name Date

Executive Director
Title

Title

Vendor Information	
Vendor's UBI Number:	
Minority or Woman Owned Business Enterprise	
Yes _____ (Certification Number)	No <input type="checkbox"/>

Schedule A
Authorized Services and Price List

as of May 31, 2012

for
Contract Number SBCTC 2012-13-001
with
Instructure, Inc.

Schedule A

Authorized Services and Price List

as of May 31, 2012

for
Contract Number SBCTC 2012-13-001
with
Instructure, Inc.

The following colleges are eligible to participate in the MSSA and pricing agreement contained herein. The price available to all schools under this contract is \$8.82 per FTE, per year. An order form will be executed for each participating college and the dates of eligibility are from 7/1/12 through 6/30/16. All contracts going beyond this date require separate negotiations.

SBCTC Institutions

Bates Technical College
Bellevue College
Bellingham Technical College
Big Bend Community College
Cascadia Community College
Centralia College
Clark College
Clover Park Technical College
Columbia Basin
Edmonds Community College
Everett Community College
Grays Harbor College
Green River Community College
Highline Community College
Lake Washington Institute of Technology
Lower Columbia College
North Seattle Community College
Olympic College
Peninsula College
Pierce Colleges (Fort Steilacoom, Puyallup,
and Military Program)
Renton Technical College
Seattle Central Community College
Seattle Vocational Institute

Shoreline Community College
Skagit Valley College
South Puget Sound Community College
South Seattle Community College
Spokane District Community Colleges (Spokane
and Spokane Falls)
Tacoma Community College
Walla Walla Community College
Wenatchee Valley College
Whatcom Community College
Yakima Valley Community College

Four Year Institutions

Central Washington University
Eastern Washington University
Evergreen State College
Washington State University
Western Washington University
University of Washington

Schedule B
Master Subscription Services Agreement

for
Contract Number SBCTC 2012-13-001
with
Instructure, Inc.

Master Subscription Services Agreement

This agreement is between Instructure, Inc., a Delaware corporation (**Instructure**), and the entity or individual agreeing to these terms (**Customer**). It is effective _____ as _____ of _____ the _____ date _____ of _____ last _____ signature.

LEARNING MANAGEMENT SYSTEM SOFTWARE SERVICE. Under an order, Instructure will provide its learning management system software as a service through a URL to be provided by Instructure within a hosted server environment under the terms below (**Service**). This agreement contemplates one or more orders for the Service, which orders are governed by the terms of this agreement. **User** means a student, teacher, or administrator of Customer's educational institution, who is authorized by Customer to use the Service with an assigned login credential.

(I) USE OF SERVICE.

- a). **Customer Owned Content.** All information, data, results, plans, sketches, texts, files, links, images, photos, videos, audio files, notes, or other materials uploaded under Customer's account in the Service remains the sole property of Customer, as between Instructure and Customer (**Customer Content**). Customer grants Instructure the right to use the Customer Content solely for purposes of performing under this agreement. During the term of this agreement and for 3 months after expiration or termination, Customer may export the Customer Content through the API or by using the export feature within the Service.
- b). **Return of Customer Content.**
 - i. *Within 3 months after termination*, upon request Instructure will make the Service available for Customer to export the Customer Content as further described in Section 1(a).
 - ii. *After such 3-month period*, Instructure has no obligation to maintain the Customer Content and may destroy it.
- c). **API Access.** Instructure provides access to its application-programming interface (**API**) as part of the Service for no additional fee. Subject to the other terms of this agreement, Instructure grants Customer a non-exclusive, nontransferable, terminable license to operate the API only for purposes of interfacing Customer's technology applications or services with the Service as allowed by the API. The Instructure **API Policy** is located at <http://www.instructure.com/policies/api-policy>
 - i. Customer may not use the API in a manner, as reasonably determined by Instructure, that exceeds reasonable request volume, constitutes excessive or abusive usage, or fails to comply with the API Policy or with any part of the API. If any of these occur, Instructure can suspend or terminate Customer's access to the API on a temporary or permanent basis.
 - ii. Instructure may change or remove existing endpoints or fields in API results upon at least 30 days notice to Customer, but Instructure will use commercially reasonable efforts to support the previous version of the API for at least 6 months. Instructure may add new endpoints or fields in API results without prior notice to Customer.
 - iii. Instructure will maintain and provide access to an API, unless it terminates the API for all customers with notice, as it is not technically feasible or economically viable to continue granting access to the API.
 - iv. The API is provided on an 'AS IS' and 'WHEN AVAILABLE' basis. Instructure has no liability to Customer as a result of any change, temporary unavailability, suspension, or termination of access to the API.
- d). **Customer Responsibilities.** Customer (i) is solely responsible for Customer Content (defined below), and User activity in its account in the Service, (ii) must keep its passwords secure and confidential, and notify Instructure promptly of any known unauthorized access, and (iii) may use the Service only in accordance with applicable law.
- e). **Customer Restrictions.** Customer may not, and will ensure that each User does not,
 - i. sell, resell, rent or lease the Service or API (defined below);
 - ii. use the Service, for non-Customer educational purposes, to store or transmit infringing, unsolicited marketing emails, libelous, obscene, deceptive, defamatory, pornographic, racist, sexual, hateful, or otherwise objectionable, unlawful or tortious material, or any other material in violation of a third-party right;
 - iii. use the Service to harm or impersonate any person, or for any commercial purpose;
 - iv. interfere with or disrupt the integrity or performance of the Service; or
 - v. attempt to gain unauthorized access to the Service or their related systems or networks.
- f). **Disclosure of User Information.** Instructure may access, preserve, and disclose User's registration and any other information if required to do so by law or based on Instructure's good faith belief that such access preservation or disclosure is necessary: (i) enforce this agreement; (ii) respond to claims of a violation of the rights of third parties, whether or not the third party is a User, individual, or government agency; (iii) respond to customer service inquiries; or (iv) protect the rights, property, or personal safety of Instructure, other users or the public.
- g). **Customer Support.** Instructure must provide customer support for the Service under the terms of Instructure's Customer Support (**Support**), which are located at <http://www.instructure.com/policies/support-terms>, and are incorporated into this agreement for all purposes.

(2) PAYMENT TERMS.

Customer must pay all fees as specified on the order, but if not specified then within 30 days of receipt of an invoice. Customer is responsible for the payment of all sales, use and other similar taxes. All orders are non-cancelable and the fees are non-refundable (except as expressly provided below).

(3) WARRANTY/SERVICE LEVEL AGREEMENT AND REMEDY.

a). **FERPA Compliance Warranty.** Each party represents and warrants to the other party that it will comply with all applicable provisions of the Family Educational Rights and Privacy Act, as amended (FERPA), and other laws with respect to its activities under this agreement, including without limitation, Instructure's obligations under FERPA as a "school official" and FERPA's "legitimate educational interests" limitation on use or disclosure of education records. Instructure will implement reasonable and typical administrative, technical, and physical safeguards to secure its facilities and systems from unauthorized access, and to secure the Customer Confidential Information (defined below) and data. Instructure agrees: to abide by FERPA's limitations on re-disclosure of personally identifiable information in education records; to not use or disclose education records created or received from, by, or on behalf of Customer or its students for any purpose other than the purpose for which such disclosure is made; and to not use or disclose such education records except as permitted by this agreement, as required by law, or as authorized by Customer in writing.

b). **Service Availability Warranty.** Instructure warrants to Customer, (i) that commercially reasonable efforts will be made to maintain the online availability of the Service for a minimum of availability in any given month as provided in the chart below (excluding scheduled outages, force majeure, and outages that result from any Customer or User technology issue), (ii) the functionality or features of the Service may change but will not materially decrease during a paid term, and (iii) that Support may change but will not materially degrade during any paid term.

Availability Warranty: 99.9% availability percentage
Credit/Refund: 3% of the pro-rated subscription fee (for that month)

Maximum amount of the credit/refund is 100% of the pro-rated subscription fee (for that month).

Customer's exclusive remedy and Instructure's sole obligation for breach of the warranty in b(i) will be for Instructure to provide a credit as provided in the chart above (if this agreement is not renewed, then a refund), for the month; provided that Customer notifies Instructure of such claim within the applicable month or 30 days after.

c). **Third Party Links/Service Disclaimer.** The Service may contain links to third party web sites (including without limitation, links provided by instructors) or access third-party services (including without limitation, turnitin.com and Google docs). Such sites and services are not under the control of Instructure, and Instructure is not responsible for the content or any link on such sites or for the temporary or permanent unavailability of such third party sites or services.

d). **Warranty Disclaimer.** INSTRUCTURE DISCLAIMS ALL OTHER WARRANTIES, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY, TITLE AND FITNESS FOR A PARTICULAR PURPOSE. THE SERVICE MAY BE INTERRUPTED OR CONTAIN AN ERROR. WHILE INSTRUCTURE TAKES REASONABLE MEASURES TO SECURE THE SERVICE, INSTRUCTURE DOES NOT GUARANTY THAT THE SERVICE CANNOT BE COMPROMISED.

(4) MUTUAL CONFIDENTIALITY.

a). **Definition of Confidential Information.** Confidential Information means all confidential information disclosed by a party (Discloser) to the other party (Recipient), whether orally or in writing, that is designated as confidential or that reasonably should be understood to be confidential given the nature of the information and the circumstances of disclosure (Confidential Information).

The software, workflow processes, user interface, designs, know-how, API information, third party technology and other technologies provided by Instructure as part of the Service are the proprietary property of Instructure and its licensors, and all right, title and interest in and to such items, including all associated intellectual property rights, remain only with Instructure. Instructure reserves all rights unless expressly granted in this agreement.

b). **Protection of Confidential Information.** The Recipient must use the same degree of care that it uses to protect the confidentiality of its own confidential information (but in no event less than reasonable care) not to disclose or use any Confidential Information of the Disclosing Party for any purpose outside the scope of this agreement. The Recipient must make commercially reasonable efforts to limit access to Confidential Information of Discloser to those of its employees and contractors who need such access for purposes consistent with this agreement and who have signed confidentiality agreements with Recipient no less restrictive than the confidentiality terms of this agreement.

c). **Exclusions.** Confidential Information *excludes* information that: (i) is or becomes generally known to the public without breach of any obligation owed to Discloser, (ii) was known to the Recipient prior to its disclosure by the Discloser without breach of any obligation owed to the Discloser, (iii) is received from a third party without breach of any obligation owed to Discloser, or (iv) was independently developed by the Recipient without use or access to the Confidential Information. The Recipient may disclose Confidential Information to the extent required by law or court order, but will provide Discloser with advance notice to seek a protective order.

- d). **Public Records.** Instructure acknowledges that Customer is an agency of the state of Washington and is subject to Washington's Public Records Act, RCW 42.56, and that this agreement and any associated order are public records as defined under the Public Records Act. Additionally, the terms of the Mutual Confidentiality provisions of this MSSA are subject to the Contract's Section 11 "Protection of Purchaser's Confidential Information".

(5) PROPRIETARY RIGHTS.

- a). **Reservation of Rights by Instructure.** The software, workflow processes, user interface, designs, know-how, API information, third party technology and other technologies provided by Instructure as part of the Service are the proprietary property of Instructure and its licensors, and all right, title and interest in and to such items, including all associated intellectual property rights, remain only with Instructure. Instructure reserves all rights unless expressly granted in this agreement.
- b). **Customer Restrictions.** Customer *may not*:
- i. reverse engineer the Service or the API;
 - ii. remove or modify any proprietary marking or restrictive legends in the Service; or
 - iii. access the Service to build a competitive service or product, or copy any feature, function or graphic for competitive purposes.
- c). **Feedback.** Instructure may contact each User (no more than once each year) for the *sole purpose* of seeking aggregate anonymous feedback regarding performance of the Service and suggestions for improvements. Customer, and each User (to the extent Customer has such right), hereby grants Instructure an irrevocable, royalty-free perpetual license to all feedback and suggestions regarding the Service.

(6) EXCLUSION OF DAMAGES AND LIMITATION OF LIABILITY.

- a). **EXCLUSION OF CERTAIN DAMAGES.** INSTRUCTURE IS NOT LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT (INCLUDING, WITHOUT LIMITATION, COSTS OF DELAY, LOSS OF DATA, RECORDS OR INFORMATION, AND ANY FAILURE OF DELIVERY OF THE SERVICE).
- B). **LIMITATION OF LIABILITY.** EXCEPT FOR INSTRUCTURE'S INDEMNITY OBLIGATIONS, INSTRUCTURE'S LIABILITY FOR DIRECT DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT (WHETHER IN CONTRACT, TORT OR OTHERWISE) DOES NOT EXCEED THE AMOUNT PAID BY CUSTOMER WITHIN THE PRECEDING 12 MONTHS UNDER THIS AGREEMENT.

(7) TERM, TERMINATION, AND SUSPENSION OF SERVICE.

- a). **Term.** This agreement continues for the duration specified on the order (**Term**).
- b). **Mutual Termination for Material Breach.** If either party is in material breach of this agreement (including without limitation non-payment of any amounts owed Instructure), the other party may terminate this agreement at the end of a written 30-day notice/cure period, if the breach has not been cured.
- c). **Return or Destroy Upon Termination.** Upon termination or expiration of this agreement for any reason, Customer must pay Instructure all amounts owed, and destroy or return all property of Instructure. Customer will confirm this destruction or return requirement in writing upon request of Instructure.
- d). **Suspension of Service and Removal of Customer Content for Violations of Law or Policy.** Instructure may immediately suspend the Service and remove applicable Customer Content if it in good faith believes that, as part of using the Service, Customer may have violated a law or a restriction in this agreement. Instructure may try to contact Customer in advance, but it is not required to do so.

(8) INDEMNITY.

- a). **By Instructure for Infringement.** If a third-party claims that the Service (other than related to any Customer Content) infringes that party's patent, copyright or other proprietary right, Instructure will defend Customer against that claim at Instructure's expense and pay all costs, damages, and attorney's fees, that a court finally awards or that are included in a settlement approved by Instructure, provided that Customer:
- i. promptly notifies Instructure in writing of the claim; and
 - ii. allows Instructure to control, and cooperates with Instructure in, the defense and any related settlement.

If such a claim is made, Instructure could continue to enable Customer to use the Service or to modify it. If Instructure determines that these alternatives are not reasonably available, Instructure may terminate the Service without any liability to Customer) upon notice to Customer and with the return of any prepaid and unused fees. This indemnity does not apply to the extent of any technology not provided by Instructure, if the Service is used other than in accordance with this agreement, or with third party technology it is not designed to operate with.

- b). **By Customer.** If a third-party claims against Instructure that any part of the Customer Content infringes or violates a patent, copyright or other right, Customer will defend Instructure against that claim at Customer's expense and pay all costs, damages, and attorney's fees, that a court finally awards or that are included in a settlement approved by Customer, provided that Instructure:
- i. promptly notifies Customer in writing of the claim; and
 - ii. allows Customer to control, and cooperates with Customer in, the defense and any related settlement.

(10) MISCELLANEOUS OTHER TERMS.

- a). **Money Damages Insufficient.** Any breach by a party of this agreement or violation of the other party's intellectual property rights could cause irreparable injury or harm to the other party. The other party may seek a court order to stop any breach or avoid any future breach.
- b). **Entire Agreement and Changes.** This agreement and the order are part of Contract number SBCTC 2012-13-001. No modification or waiver of any term of this agreement is effective unless both parties sign it.
- c). **Publicity.** Customer agrees to act as a reference account that will, upon Instructure's reasonable request, provide Service-related comments to the press, potential investors, and current or prospective customers and participate in Service-related case studies. Customer agrees to issue joint press releases with Instructure regarding the Service, *as approved by Instructure*. Customer agrees to allow Instructure to use its name, logo and non-competitive use details in both text and pictures in its various marketing communications and materials, in accordance with Customer's trademark guidelines and policies.
- d). **No Assignment.** Neither party may assign or transfer this agreement or an order to a third party, except that this agreement with all orders may be assigned as part of a merger, or sale of all or substantially all of the business or assets, of a party.
- e). **Independent Contractors.** The parties are independent contractors with respect to each other.
- f). **Enforceability.** If any term of this agreement is invalid or unenforceable, the other terms remain in effect.
- g). **No Additional Terms.** Instructure rejects additional or conflicting terms of any Customer form-purchasing document.
- h). **Order of Precedence.** If there is an inconsistency between this agreement and an order, the order prevails.
- i). **Survival of Terms.** Any terms that by their nature survive termination or expiration of this agreement, will survive.
- j). **Notices.** For purposes of service messages and notices about the Service, Instructure may place a banner notice or send an email to an email address associated with an account.
- k). **CISG.** The Convention on Contracts for the International Sale of Goods does not apply.
- l). **Force Majeure.** Neither party is liable for force majeure events.

Charles N Earl (Customer)

Instructure, Inc.

Signature

Charles N. Earl

Signature

Name

Executive Director

Name

Title

WA State Board for Community
& Technical Colleges

Title

Date

6-28-12

Date

Address

P.O. Box 42495, Olympia, WA 98504

Sandy, UT 8407

9020 South Sandy Parkway

Copies of
Exhibit A "SBCTC Request for Proposal for a Learning Management System"
And
Exhibit B "Excerpts from Vendor's Response"
Are available upon request to SBCTC