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| STATE OF MONTANA  SOFTWARE LICENSE AGREEMENT |
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| **between**  **The State of Montana (“the State”)**  **and**  **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Licensor”)** |
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**SOFTWARE LICENSE AGREEMENT**

1. **PARTIES**

This Software License Agreement (Agreement) is entered into by and between the State of Montana **(insert agency name)**, ("the State"), whose address and phone number are **(insert address)**, **(insert phone number),** and **(insert name of Licensor)**, (the "Licensor"), whose address and phone number are **(insert address)** and **(insert phone number)**.

**THE PARTIES AGREE AS FOLLOWS:**

**2. DEFINITIONS**

**(Insert required definitions in this section. Definitions should be included as a means of clarifying terms for the Software application being licensed in the agreement. The following definitions are offered as examples. This is not an all-inclusive list.)**

* 1. **C*onfidential Information***” means, subject to Montana’s open records laws, all written or oral information, disclosed by either Party to the other, related to the operations of either Party or a third party that has been identified as confidential or that by the nature of the information or the circumstances surrounding disclosure ought reasonably to be treated as confidential. If the Confidential Information is disclosed orally, the disclosing party shall reduce the information to writing within 10 days of disclosure. Failure to put the information in writing eliminates the obligation to keep the information confidential.With respect to the State, Confidential Information shall also include any and all information transmitted to or stored by Licensor in connection with performance of its obligations under this Agreement, including, but not limited to, personally identifiable information (“PII”) of residents, employees, or people recorded on data of the State, including name, address, phone number, e-mail address, date of birth, social security number, patient records, credit card information, driver’s license number, account numbers, PINs and/or passwords, and any other information that could reasonably identify a person;
  2. “***Licensed Software”*** or ***“Software***” means the compiled, machine-readable, and/or executable version of the Software and related Documentation now in use by Licensor and as may be improved or modified by Licensor in the future, as more fully described on Schedule A, including, but not limited to, the Documentation, all Corrections and Updates, and any Upgrades acquired by the State pursuant to this Agreement;
  3. “***Term***” means the time period that applies to this Agreement which begins on the Effective Date and continues perpetually thereafter unless terminated pursuant to Section 18;
  4. “***Acceptance Date***” means the first Business Day after the day the State accepts the Software or it is deemed accepted pursuant to the Section entitled “Acceptance”;
  5. “***Acceptance Period***” means the period commencing on the Installation Date and continuing for **(insert the number of days)** days, as such period may be extended pursuant to Section 8 entitled “Acceptance”;
  6. “***Cooperative Purchasing***” means the prices, terms, and conditions of a contract with the State may be offered to other Montana public procurement units as defined in section 18-4-401, MCA;
  7. “***Correction***” means a modification to Software to resolve one or more Errors;
  8. “***Delivery Date***” means the date on which the State actually receives the Software from Licensor. Deliverables shall be shipped prepaid, F.O.B. Destination, unless otherwise stated in this Agreement.
  9. “***Documentation***” means all user, technical, and operating manuals necessary to enable the State to properly install, use, and maintain the Software.
  10. *“****Enhancements****”*means changes and/or improvements to the Software, whether arising out of the particular Software configuration for the specific use of the Licensor or otherwise;
  11. “***Error***” means an instance of failure of Software to be Operative. An Error is a Class 1 Error if it renders the Software unusable for its intended purpose. An Error is a Class 2 Error if the Software is still usable for its intended purpose, but such use is seriously inconvenient and the value to the State of the use of the Software is substantially reduced. All other Errors are Class 3 Errors.
  12. “***Installation Date***” means the date the Software has been properly installed.
  13. “***Intellectual Property Rights***” means all Intellectual Property Rights throughout the world, including copyrights, patents, mask works, trademarks, trade secrets, authors’ rights, rights of attribution, and other proprietary rights and all applications and rights to apply for registration or protection of such rights.
  14. ***“License Model”*** means categorization of license by its variables, including means of acquisition, packaging, intended purpose, License Metric or duration of license agreement.
  15. ***“License Metric”*** means the alphanumeric or statistical descriptor for measuring the product-use rights specified in the entitlement portion of a Software license agreement, particularly for determining licensing and product usage pricing, i.e., per user, per machine, per processor or per use.
  16. “***Maintenance Fees***” means the fees for Maintenance Services set forth in Schedule B.
  17. “***Maintenance Period***” means unless otherwise specified in Schedule C, a period of 12 calendar months from the later of the Installation Date, or the date when the agreed-to Warranty Period expires. The Maintenance Period shall be Monday through Friday, 8:00 a.m. to 5:00 p.m., local time where the Software is installed, unless a longer period is provided by Licensor or a shorter period is agreed in writing by both Parties.
  18. “***Maintenance Services***” means the services described in Schedule C including telephone consultation, online and on-site technical support, Error correction and the provision of Updates.
  19. “***Operative***” means conforming in all material respects to performance levels and functional specifications described in the Documentation, specifications and any other Documentation delivered in connection with the Software, including without limitation that described in Schedule C.
  20. ***“Perpetual License”*** means a contract pricing product-use rights for an unlimited duration.
  21. “***Repair Period***” means the time period commencing when the State reports an Error to Licensor and continuing for four hours or such other period as may be specified in Schedule C.
  22. “***Source Code***” means the human-readable code from which a computer can compile or assemble the Object Code of a computer program, together with a description of the procedure for generating the Object Code.
  23. “***Time and Materials Rates***” means the rates specified in Schedule B that Licensor may charge for services provided under this Agreement which are not covered by the Maintenance Fee, or if not so specified, Licensor’s standard rates for such services.
  24. *“****Term License****”*means time-limited, non-perpetual contract constraining and pricing product-use rights by a specified termination or renewal date, at which point the license must be renewed or the Software removed. Typically, Software priced by subscription involves only the current version.
  25. *“****Subscription License****”*means time-limited, non-perpetual contract constraining and pricing product-use rights by a specified termination or renewal date, at which point the license must be renewed or the Software removed. Typically, Software priced by subscription involves only the current version.
  26. *“****Update****”* means a set of procedures or new program code that Licensor implements which may correct Errors, may include modifications to improve performance, and/or which may include a revised version or release of the Software which may incidentally improve its functionality, together with related Documentation.
  27. “***Upgrade***” means a new version or release of computer programs licensed hereunder which improves the functionality of, or adds functional capabilities to such computer programs, together with related Documentation. Upgrades shall include new programs which replace, or contain functionality similar to, the Software already licensed to the State hereunder.
  28. “***Warranty Period***” means one year (unless otherwise agreed to in writing) commencing upon the Acceptanceof the applicable Software component.

1. **EFFECTIVE DATE, DURATION AND RENEWAL**

**3.1 Term.** This Agreement shall apply and remain in effect from the Effective Date and perpetually thereafter, unless terminated pursuant to the following Sections 18.1, 18.2, 18.3, 18.4, and 18.5.

(If the license granted in Section 3.1 is term, subscription, annual or other time-limited license period, use the following language for 3.1 and 3.2)

**3.1 Term.** This contract shall take effect on **(insert date)**, 20**( )**, **(or upon contract execution)** and terminate on **(insert date)**, 20**( )**, unless terminated pursuant to the following Sections 18.1, 18.2, 18.3, 18.4, and 18.5.

**3.2 Contract Renewal.** This contract may, upon mutual agreement between the parties and according to the terms of the existing contract, be renewed in **(insert number)**-year intervals, or any interval that is advantageous to the State. This contract, including any renewals, may not to exceed a total of tenyears.

1. **LICENSES**

**4.1** **License.** Licensor hereby grants to the State a non-exclusive, irrevocable, worldwide, perpetual, transferable, fully-paid right and license to copy, use, install, and operate the Software for the benefit of the State. This license, as further defined and described in Schedule A-DESCRIPTION OF SOFTWARE, shall also be deemed to grant the State the right to grant third parties using the Software for the benefit of the State such as vendors, subs, agents, or business partners, the right to access the features and functions of the Licensed Software licensed by the State. In addition to the use rights granted above, the State may (i) install, use, execute, and copy the Software for any backup, archival, and emergency purposes and any internal, non-production purpose of the State including for test, development, and training; (ii) allow any Montana state agency to order and/or use the Software under the terms of this Agreement and (iii) allow any third party outsourcer or service provider to install, use, execute, and copy the Software solely in connection with its provision of services to the State. The State shall reproduce and include the copyright or other restrictive and proprietary notices and markings from the original and all copies. All copies are subject to the terms of this Agreement.

**4.2. Development License.** Subject to the terms and conditions of this Agreement, Licensor hereby grants to the State a non-exclusive, irrevocable, fully-paid, transferable, worldwide, perpetual right and license to use, or have used, any Application Programming Interface (API) for the Licensed Software and to modify and improve via interfacing with API the Licensed Software, or have improved the Licensed Software, and the State will exclusively own all rights to the modifications and improvements developed for the State under this paragraph (4.2).

**4.3 Ownership and Proprietary Rights.** Subject to the rights granted herein, Licensor retains all right, title, and interest in and to the Licensed Software, and the State acknowledges that it neither owns nor acquires any right in and to the Licensed Software not expressly granted by this Agreement.

1. **Licensor Obligations**

**5.1 Delivery of Copies.** Licensor shall deliver to the State the Licensed Software and Documentation on or before a mutually agreed date, or if no date is specified, then as soon as commercially practicable after the Effective Date.

**5.2 Maintenance of Compatibility.** Throughout the Term, if Licensor develops any Updates, Upgrades, or Enhancements to the Licensed Software (an “***Enhanced Version***”), Licensor shall (i) undertake commercially reasonable efforts to maintain backwards compatibility between the Enhanced Version and the previous version(s) of the Licensed Software having been provided under this Agreement (“***Prior Versions***”); and (ii) make such Enhanced Versions available at no cost to the State under the terms of this Agreement, and such Enhanced Version(s) shall be considered to constitute the Licensed Software for all purposes under this Agreement

**6. Fees and Payments**

**6.1 License Fees**. In consideration for the licenses granted to the State hereunder and the performance of Licensor’s obligations hereunder, the State shall pay to Licensor certain fees as set forth in Schedule B, which fees shall be due and payable as set forth in Schedule B.

**6.2 Taxes.** The State is Tax Exempt (81-03022402).

**6.3 Invoices.** Licensor shall invoice the State separately for each transaction. Licensor shall send invoices to the address set forth in any purchase order. All payment terms will be computed from the date of delivery of supplies or services OR receipt of a properly executed invoice, whichever is later. Unless otherwise noted, the State is allowed 30 days to pay such invoices. Licensor will be required to provide banking information at the time of contract execution in order to facilitate State electronic funds transfer payments.

**6.4 No Obligation****.** Notwithstanding the State’s rights to license Licensor’s products as described in Section 4.1, the State is under no obligation to purchase or licensefrom Licensor any of Licensor’s products. This Agreement is non-exclusive and the State may, at its sole discretion, purchase, license or otherwise receive benefits from third party suppliers of products and services similar to, or in competition with, the products and services provided by Licensor.

**7. Documentation**

**7.1** At no additional charge, Licensor shall deliver a complete, written set of Documentation for the Software at the same time as the Software is delivered and for every Upgrade delivered to the State. The Documentation must describe fully the proper procedure for using the Software and provide sufficient information to enable the State to operate all features and functionality of the Software. Licensor shall deliver reasonable Documentation to allow the State to install and use each Update. The State may, at no additional charge to the State, use and reproduce all Documentation furnished by Licensor, including displaying the Documentation on the State’s intranet or other internal electronic distribution system. Documentation for Updates and Upgrades must meet or exceed the level of quality, form and completeness of the Documentation for the Licensed Software.

**7.2** Licensor shall deliver updated Documentation to the State concurrently with delivery of any Upgrades or any other occasion of issuance of updated Documentation.

**8. Acceptance**

**8.1** **Acceptance Period**. During the Acceptance Period, the State shall perform whatever acceptance tests on the Software it may wish to confirm that the Software is Operative. If the State discovers during the Acceptance Period that any Software is not Operative, the State shall notify Licensor of the deficiencies. Licensor, at its own expense, shall modify, repair, adjust, or replace the Software to make it Operative within 15 days after the date of the State’s deficiency notice. The State may perform additional acceptance tests during a period commencing when Licensor has delivered revised Software correcting all the deficiencies the State has noted. This restarted Acceptance Period shall have a duration equal to that of the initial Acceptance Period, unless the State earlier accepts the Software in writing. If the Software, at the end of the Acceptance Period as so extended, still is not Operative in the State's judgment after consultation with Licensor, the State may reject the Software and terminate this Agreement for material breach or, at its option, repeat the procedure of this paragraph as often as it determines is necessary. If the State rejects the Software, the State will return it within 10 days after the end of the Acceptance Period or any extended Acceptance Period, no license or other fees shall apply, and Licensor shall promptly reimburse the State for any fees previously paid for such Software.

**8.2 Upgrades**. The State shall use the procedure in this Section to determine acceptance of Upgrades. If the State finds an Upgrade not to be Operative and rejects it, the State shall have no obligation to pay for such Upgrade, and Licensor shall continue to support the version or release of the Software that the State has installed.

**9. Maintenance and Support Services**

Licensor shall, at option of and upon order from the State, provide the Maintenance and Support Services attached hereto as Schedule C.

**10. Upgrades**

**10.1** Licensor shall offer Upgrades to the State whenever Licensor makes such Upgrades generally available to its other customers. Licensor shall deliver each Upgrade to the State at no additional charge as part of Maintenance Services then in effect.

**10.2** Licensor shall notify the State as far in advance as reasonably possible, but in no event less than six months prior to release, of all Upgrades and Software replacements/phase-outs, and shall provide the State all relevant release notes and other Documentation as soon as possible after notification.

**10.3** Licensor shall continue to make available and, at option of and upon order from the State, provide Maintenance Services on the terms and conditions of this Agreement for the version of Software the State has installed for at least 36 months after Licensor makes an Upgrade available to the State.

**11. Professional Services**

At the State’s written request, Licensor may provide professional services to assist the State with the installation and deployment of the Software application(s) covered by this Agreement. The parties shall agree to the scope, deliverables, and cost of such professional services in a Statement of Work executed by the parties.

**12. Training**

Licensor shall provide, at no additional charge, the training classes called for on Schedule A in use, operation, and maintenance of the Software for the State personnel on the State premises on dates to be specified by the State. Prices for additional classes, if any, are specified on Schedule B Licensor shall provide the State at no charge with all trainer/class leadership materials Licensor has available or used in connection with the classes conducted for the State. The State may duplicate these materials for the State’s use exclusively and use them to conduct other classes at the State's convenience. At no additional charge, Licensor shall provide training Documentation for each attendee at any classes Licensor conducts.

**13. Source Code Escrow**

When requested by the State, Licensor shall place the Source Code and its Documentation with an escrow agent, acceptable to both parties, in accordance with the terms and conditions of an escrow agreement, the exact content of which shall be agreed upon by the parties. Licensor shall bear all escrow fees.

The Source Code Escrow Agreement shall provide that the escrow agent shall release the Source Code Escrow to the State in the event : (a) of Licensor’s insolvency, bankruptcy, or involvement in an involuntary proceeding for protection of its creditors; (b) Licensor materially breaches this Agreement; (c) Licensor fails to continue development of the Licensed Software; (d) Licensor fails to provide the State with the most recent version of the Licensed Software; or (e) of any other circumstance whereby Licensor can no longer satisfy its obligation to provide Maintenance Services to the State under this Agreement These events shall be deemed Release Conditions for purposes of this Section.

Upon occurrence of a Release Condition, the State shall be deemed to have, automatically, a nonexclusive, fully paid, non-terminable, royalty-free, world-wide license to use, modify, copy, produce derivative works from, display, disclose to persons who have entered into a written agreement containing substantially the same confidentiality provisions as in this Agreement for the purpose of maintaining the Software for the State, and otherwise to utilize the Software and the Source Code and other materials necessary to maintain and improve the Software for use by the State and otherwise treat the Source Code as Object Code, subject always to the limitations in this Agreement as clarified by this Section.

**14. Confidentiality Rights and Obligations**

**14.1 Ownership of Confidential Information.** Each Party will have access to certain of the other Party’s Confidential Information or Confidential Information of third parties that the disclosing Party is required to maintain as confidential. Both Parties agree that, subject to Montana’s open records laws, all items of Confidential Information are proprietary to the disclosing Party or such third party, as applicable, and shall remain the sole property of the disclosing Party or such third party.

**14.2 Mutual Confidentiality Obligations.** Except as expressly provided otherwise in this Agreement, each Party agrees as follows: (i) to use the Confidential Information only for the purposes described herein; (ii) that such Party will not reproduce the Confidential Information and will hold in confidence and protect the Confidential Information from dissemination to, and use by, any third party; (iii) that neither Party will create any derivative work from Confidential Information disclosed to such Party by the other Party; (iv) to restrict access to the Confidential Information to such of its personnel, agents, and/or consultants, if any, who have a need to have access; and (v) to return or destroy all Confidential Information of the other Party in its possession upon termination or expiration of this Agreement. Notwithstanding the foregoing, the State shall not be required to return Software if the license is paid for and the license terms have not been breached by the State.

**14.3 Confidentiality Exceptions.** Notwithstanding the foregoing, the provisions of Sections 13.1 and 13.2 shall not apply to Confidential Information that (i) is publicly available or in the public domain at the time disclosed; (ii) is or becomes publicly available or enters the public domain through no fault of the recipient; (iii) is rightfully communicated to the recipient Party by persons not bound by confidentiality obligations with respect thereto; (iv) is already in the recipient’s possession free of any confidentiality obligations with respect thereto at the time of disclosure; (v) is independently developed by the recipient; or (vi) is approved for release or disclosure by the disclosing Party without restriction. Notwithstanding the foregoing, each Party may disclose Confidential Information to the limited extent required (a) in order to comply with the order of a court or other governmental body, or as otherwise necessary to comply with applicable law, provided that the Party making the disclosure pursuant to the order shall, as early as reasonably possible under the circumstances, give written notice to the other Party or (b) to assist the other Party, at its expense, in establishing its rights under this Agreement, including to make such court filings as it may be required to do.

**15. Warranties**

**15.1** Licensor hereby represents and warrants that the Software shall be and shall remain Operative, from the Acceptance Date through the end of the Warranty Period and so long as Licensor provides Maintenance Services for the Software. If the Software is not Operative at the expiration of the initial Warranty Period, the Warranty Period shall be extended until Licensor makes the Software Operative. This warranty shall not be affected by the State’s modification of the Software so long as Licensor can discharge its warranty obligations notwithstanding such modifications or following their removal by the State.

**15.2** Licensor warrants, in performance of work under this contract, that it will fully comply with all applicable federal, state, or local laws, rules, and regulations, including the Montana Human Rights Act, the Civil Rights Act of 1964, the Age Discrimination Act of 1975, the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973. Any subletting or subcontracting by the Licensor subjects subcontractors to the same provision. In accordance with section 49-3-207, MCA, Licensor agrees that the hiring of persons to perform this contract will be made on the basis of merit and qualifications and there will be no discrimination based upon race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin by the persons performing this contract.

**15.3.** Licensor represents and warrants that it shall perform the Maintenance Services in a timely and professional manner using competent personnel having expertise suitable to their assignments. Licensor represents and warrants that the services shall conform to or exceed, in all material respects, the specifications described herein, as well as the standards generally observed in the industry for similar services. Licensor represents and warrants that services supplied hereunder shall be free of defects in workmanship, design and material.

**15.4.** Licensor represents and warrants that sale, licensing or use of any Software and Documentation furnished under this Agreement do not and shall not infringe, misappropriate or otherwise violate any Intellectual Property Right.

**15.5.** Licensor warrants that during the Term of this Agreement, the State may use Licensed Software without disturbance, subject only to the State’s obligations to make the payments required by this Agreement. Licensor represents that this Agreement, the Licensed Software, and the Intellectual Property Rights in the Licensed Software are not subject or subordinate to any right of Licensor's creditors, or if such subordination exists, the agreement or instrument creating it provides for the quiet enjoyment and uninterrupted use of the Software by the State.

**15.6.** If Licensor deletes functions from the Software and transfers or offers those functions in other or new products (whether directly or indirectly or through an agreement with a third party), the portion of those other or new products that contain the functions in question, or the entire product, if the functions cannot be separated out, shall be provided to the State under the terms of this Agreement, at no additional charge, and shall be covered under Maintenance Services then in effect for such Software.

**15.7.** Except during and in conjunction with maintenance or any other authorized servicing or support, in no event shall Licensor, its representatives or subcontractors, or anyone acting on its behalf, disable (or permit or cause any embedded mechanism to disable) the Software owned by, licensed to, or utilized by the State without the prior written permission of an officer of the State.

**15.8.** Licensor represents and warrants that the Licensed Software and any media used to distribute it contain no computer instructions, circuitry or other technological means ("Harmful Code") whose purpose is to disrupt, damage, or interfere with the State's use of its computer and telecommunications facilities for their commercial, test or research purposes. ”Harmful Code" shall include, without limitation, any automatic restraint, virus, worm, Trojan horse, time-bomb, trap-door or other harmful code or instrumentality that will cause the Licensed Software or any other the State Software, hardware or system to cease to operate or to fail to conform to its specifications. Licensor shall defend, indemnify, and hold the State harmless from all claims, losses, damages and expenses, including attorney fees and costs incurred enforcing this indemnity obligation or defending a third party claim, arising from the presence of "Harmful Code" in or with the Licensed Software or contained on media delivered by Licensor. Licensor further represents and warrants that it will not introduce any Harmful Code, into any computer or electronic data storage system used by the State.

**16. intellectual property Indemnification**

**16.1 Third-Party Claim.** In the event of any claim by any third party against the State that the products furnished under this contract infringe upon or violate any patent or copyright, the State shall promptly notify the Licensor. The Licensor shall defend such claim, in the State's name or its own name, as appropriate, but at the Licensor's expense. The Licensor will indemnify the State against all costs, damages, and attorney's fees that accrue as a result of such claim. Such indemnification will be conditional upon the following:

**a.** the State will promptly notify the Licensor of the claim in writing; and

**b.** the State will allow the Licensor to control, and will cooperate with the Licensor in the defense and any related settlement negotiations, provided that:

**i.** the Licensor will permit the State to participate in the defense and settlement of any such claim, at the State's own expense, with counsel of its choosing; and

**ii.** the Licensor shall not enter into or agree to any settlement containing any admission of or stipulation to any guilt, fault, liability or wrongdoing on the part of the State, its elected and appointed officials, agents or employees without the State's prior written consent.

**16.2 Product Subject of Claim** If any product furnished is likely to or does become the subject of a claim of infringement of a patent or copyright, then the Licensor may, at its option, procure for the State the right to continue using the alleged infringing product, or modify the product so that it becomes noninfringing or replace it with one that is at least functionally equivalent. If none of the above options can be accomplished, or if the use of such product by the State shall be prevented by injunction, the State agrees to return the product to the Licensor on written request. The Licensor will then give the State a credit equal to the amount paid to the Licensor for the creation of the Work Product. This is the Licensor's entire obligation to the State regarding a claim of infringement. The State is not precluded from seeking other remedies available to it hereunder, including **Section 18**, and in equity or law for any damages it may sustain due to its inability to continue using such product.

**17. Limitation of Liability**

**The licensor’s liability for contract damages is limited to direct damages and further to no more than twice the contract amount. The licensor shall not be liable for special, incidental, consequential, punitive, or indirect damages.  Damages caused by injury to persons or tangible property, or related to intellectual property indemnification OR CONFIDENTIALITY RIGHTS AND OBLIGATIONS are not subject to a cap on the amount of damages.**

**18. Termination.**

**18.1 Termination for Cause.** The State or the Licensor may, by written notice to the other party, terminate this contract in whole or in part at any time the other party fails to perform this contract pursuant to **Section 19**, Event of Breach – Remedies.

**18.2 Bankruptcy or Receivership.** Voluntary or involuntary bankruptcy or receivership by the Licensor may be cause for termination.

**18.3 Termination for Convenience.** The State may terminate this Agreement for its convenience, without cause, at any time without further charge or expense upon at least 30 calendar days prior written notice to Licensor. Thereafter, the State shall have no further obligations under this Agreement except payment of any fees that accrued and were attributable to the period before the effective date of termination.

**18.4 Termination for** **Reduction of Funding.** The Licensor acknowledges, understands, and agrees that the State is dependent upon state and federal appropriations for funding. If state or federal government funds are not appropriated or otherwise made available through the state budgeting process to support continued performance of this Contract (whether at an initial Contract payment level or any Contract increases to that initial level) in subsequent fiscal periods, the State shall terminate this Contract as required by law. The State shall provide Licensor the date the State’s termination shall take effect. The State shall not be liable to the Licensor for any payment that would have been payable had the Contract not been terminated under this provision. The State shall be liable to the Licensor only for the payment, or prorated portion of that payment, owed to the Licensor up to the date the State’s termination takes effect. This is the Licensor’s sole remedy. State shall not be liable to the Licensor for any other payments or damages arising from termination under this section, including but not limited to general, special or consequential damages such as lost profits or revenues.

**18.5** **Termination for Noncompliance with Department of Administration Requirements.** The Department of Administration, pursuant to section 2-17-514, MCA, retains the right to cancel or modify any contract, project, or activity that is not in compliance with the Department's Plan for Information Technology, the State Strategic Plan for Information Technology, or any Statewide IT policy or standard in effect as of the date of contract execution. In the event of such termination, the State will pay for products and services delivered to date and any applicable termination fee specified in the Statement of work or work order. Any modifications to this contract must be mutually agreed to by the parties.

**18.6 Effect of Termination.** In addition to any other remedies available to either Party, upon the occurrence of a Termination Event (as defined below) with respect to either Party, the other Party may terminate this Agreement by providing written notice of termination. A Termination Event shall have occurred if a Party breaches its obligations under this Agreement, and the breach is not cured within 30 calendar days after written notice of the breach and intent to terminate is provided by the other Party. A good-faith money dispute by the State is not a material breach under this section that would permit Licensor to terminate this Agreement or to terminate the State’s licensed use of the Software.

The Parties agree that all Software delivered pursuant to this Agreement and the Documentation therefore constitute "intellectual property" under Section 101(35A) of the Code (11 U.S.C. section 101(35A)). Licensor agrees that if it, as a debtor-in-possession, or if a trustee in bankruptcy for Licensor, in a case under the Code, rejects this Agreement, the State may elect to retain its rights under this Agreement as provided in Section 365(n) of the Code. The State, and any Intellectual Property Rights, licenses or assignments from Licensor of which the State may have the benefit, shall receive the full protection granted to the State by applicable bankruptcy law.

The licenses granted in this Agreement shall not be terminated by Licensor for any reason unless Licensor terminates this Agreement pursuant to Section 18.

In addition to the rights of the State set forth in this Section, (a) If the State terminates this Agreement for material breach by Licensor before the expiration of the Acceptance Period, the State shall be entitled to a full refund, within 30 calendar days after notice of termination, of all license fees, Maintenance Fees and other fees paid hereunder; and (b) the State may terminate Maintenance Services for convenience at any time, and the State shall then have no obligation to pay any additional Maintenance Fees, other than for Maintenance Services performed through the date of termination. The State may terminate the Maintenance Services for material default by Licensor. Upon the State’s termination of Maintenance Services for default, the State shall be entitled to a pro rata refund of all prepaid Maintenance Fees for the period after the date of termination.

**19. EVENT OF BREACH – REMEDIES**

**19.1 Event of Breach.** Any one or more of the following acts or omissions of the Licensor shall constitute an event of breach:

**a.** products or services furnished by the Licensor fail to conform to any requirement of this contract; or

**b.** failure to submit any report required by this contract; or

**c.** failure to perform any of the other covenants and conditions of this contract, including beginning work under this contract without prior Department of Administration approval.

**19.2 Actions in Event of Breach.** Upon the occurrence of any material breach of this contract, either party may take either one, or both, of the following actions:

**a.** give the breaching party a written notice specifying the event of breach and requiring it to be remedied within, in the absence of a greater specification of time, thirty (30) days from the date of the notice; and if the event of breach is not timely remedied, terminate this contract upon giving the breaching party notice of termination; or

**b.** treat this contract as materially breached and pursue any of its remedies at law or in equity, or both.

**20. WAIVER OF BREACH**

No failure by either party to enforce any provisions hereof after any event of breach shall be deemed a waiver of its rights with regard to that event, or any subsequent event. No express failure of any event of breach shall be deemed a waiver of any provision hereof. No such failure or waiver shall be deemed a waiver of the right of either party to enforce each and all of the provisions hereof upon any further or other breach on the part of the breaching party.

**21. SURVIVAL**

The rights and obligations of the Parties which, by their nature must survive termination or expiration of this Agreement in order to achieve its fundamental purposes, include without limitation, the provisions of the following Sections: LICENSES, CONFIDENTIALITY RIGHTS AND OBLIGATIONS, WARRANTIES, INTELLECTUAL PROPERTY INDEMNIFICATION, and LIMITATION OF LIABILITY. All such sections shall survive any termination of this Agreement.

**22. Assignment**

The Licensor shall not assign, transfer, or subcontract any portion of this Agreement without the State’s express written consent.

**23. Notices**

All notices required by or relating to this Agreement shall be in writing and shall be sent by means of certified mail, postage prepaid, to the Parties to the Agreement and addressed as follows:

If to Licensor:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Attention: \_\_\_\_\_\_\_\_\_\_\_\_\_\_

Phone: \_\_\_\_\_\_\_\_\_\_\_\_\_\_

Fax: \_\_\_\_\_\_\_\_\_\_\_\_\_\_

If to the State:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Attention: \_\_\_\_\_\_\_\_\_\_\_\_\_\_

Phone: \_\_\_\_\_\_\_\_\_\_\_\_\_\_

Fax: \_\_\_\_\_\_\_\_\_\_\_\_\_\_

or addressed to such other address as that Party may have given by written notice in accordance with this provision. The effective date of such written notice shall be five business days from the date postmarked. All notices required by or relating to this Agreement may also be communicated electronically or by facsimile, provided that the sender receives and retains confirmation of successful transmittal to the recipient. Such notices shall be effective on the date indicated in such confirmation. If either Party delivers any notice hereunder by means of facsimile transmission in accordance with the preceding sentence, such Party will promptly thereafter send a duplicate of such notice in writing by means of certified mail, postage prepaid, to the receiving Party, addressed as set forth above or to such other address as the receiving Party may have previously substituted by written notice to the sender.

**24.** **Access and Retention of Records**

**24.1** **Access to Records.** The Licensor shall provide the State, Legislative Auditor, or their authorized agents access to any records required to be made available by 18-1-118 MCA, in order to determine contract compliance.

**24.2** **Retention Period.** The Licensor shall create and retain records supporting this Agreement for a period of eight years after either the completion date of this contract or the conclusion of any claim, litigation, or exception relating to this Agreement taken by the State of Montana or a third party.

**25. Severability**

If any provision of this Agreement is invalid or unenforceable for any reason in any jurisdiction, such provision shall be construed to have been adjusted to the minimum extent necessary to cure such invalidity or unenforceability. The invalidity or unenforceability of one or more of the provisions contained in this Agreement shall not have the effect of rendering any such provision invalid or unenforceable in any other case, circumstance or jurisdiction, or of rendering any other provisions of this Agreement invalid or unenforceable whatsoever.

**26. Waiver**

No waiver under this Agreement shall be valid or binding unless set forth in writing and duly executed by the Party against whom enforcement of such waiver is sought. Any such waiver shall constitute a waiver only with respect to the specific matter described therein and shall in no way impair the rights of the Party granting such waiver in any other respect or at any other time. Any delay or forbearance by either Party in exercising any right hereunder shall not be deemed a waiver of that right.

**27. Force Majeure**

Neither Party shall be responsible for failure to fulfill its obligations due to causes beyond its reasonable control, including without limitation, acts or omissions of government or military authority, acts of God, materials shortages, transportation delays, fires, floods, labor disturbances, riots, wars, tErrorist acts or any other causes, directly or indirectly beyond the reasonable control of the nonperforming party, so long as such party is using its best efforts to remedy such failure or delays.

**28. choice of law and venue**

This contract is governed by the laws of Montana. The parties agree that any litigation concerning this Agreement, related bid or proposal must be brought in the First Judicial District in and for the County of Lewis and Clark, State of Montana. Each party shall pay its own costs and attorney fees, except as otherwise provided in this Agreement.

**29. scope, amendment, and interpretation**

**29.1** **Entire Agreement.** This Agreement sets forth the entire agreement and understanding between the Parties hereto with respect to the subject matter hereof and, except as specifically provided herein, supersedes and merges all prior oral and written agreements, discussions and understandings between the Parties with respect to the subject matter hereof, and neither Party shall be bound by any conditions, inducements or representations other than as expressly provided for herein. The Parties specifically agree that any language or provisions contained on either Party’s website or product schedule, or contained in any “shrinkwrap” or "clickwrap" agreement, shall be of no force and effect and shall not in any way supersede, modify or amend this Agreement.

**29.2 Amendments.** This Agreement may not be amended or modified except in a writing duly executed by authorized representatives of each Party.

**30. EXECUTION**

The parties through their authorized agents have executed this contract on the dates set out below.

|  |  |
| --- | --- |
| **(Insert Agency Name)** | **(INSERT LICENSOR'S NAME)** |
| **(Insert Address)** | **(Insert Address)** |
| **Insert City, State, Zip)** | **(Insert City, State, Zip)** |
|  | **FEDERAL ID #** |
|  |  |
|  |  |
| BY: | BY: |
| (Name/Title) | (Name/Title) |
|  |  |
|  |  |
|  |  |
| (Signature) | (Signature) |
|  |  |
| DATE: | DATE: |
|  |  |
|  |  |
| Approved as to Legal Content: |  |
|  |  |
|  |  |
| Legal Counsel (Date) |  |
|  |  |
| Approved as to Form: |  |
|  |  |
|  |  |
| Procurement Officer (Date) |  |
| State Procurement Bureau |  |

**OPTIONAL**

**Chief Information Officer Approval:**

**The Licensor is notified that pursuant to section 2-17-514, MCA, the Department of Administration retains the right to cancel or modify any contract, project, or activity that is not in compliance with the Agency's Plan for Information Technology, the State Strategic Plan for Information Technology, or any statewide IT policy or standard.**

**Chief Information Officer (Date)**

**Department of Administration**

**SCHEDULE A**

**Description of Software**

### **DESCRIPTION OF SOFTWARE**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Purchase Date | Component | Platform (i.e. server, desktop, etc.) | License Model (perpetual, term, etc.) | License Metric (CPU, processor, MIPS, MSU, user, etc.) | License Quantity |
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1. **AUTHORIZED USE**
   1. Licensor authorizes the State the right to use the Software in the specific scope and quantities defined in Schedule A – Section 1, above. The State’s use of the Software shall not exceed the specified Authorized Use limitation.
   2. Within 60 days of the Purchase Date, Licensor shall explain in writing to State how Software usage will be counted for State to maintain compliance with Authorized Use. For example, if a license’s name and unit of measurement is a Full Administrator License, the license definition should provide explanation of what this means. An example of how the Full Administrator License is counted could be “One Full Administrator’s License is equal to one user.” In case of ambiguity or absence of definition, any Software Product where usage rights are unclear will be interpreted in State’s favor.

**Schedule B**

**FEES AND PAYMENTS**

1. **License Fees**

**1.1 Fees for Software License.** In consideration for the granting of the license of the Software to the State, the State hereby agrees to pay to Licensor a license fee in the amount of **$ \_\_\_\_\_\_\_** upon receipt of a valid invoice as specified in Contract Section 6.3.

## 1.2 Future Purchases. The State may acquire licenses, maintenance and support at the prices on this Schedule B for a period of (insert number of months or years) from the effective date of this Agreement.

1. **Maintenance Fees**

## 2.1 Maintenance Fees. In consideration the maintenance and support services described in Schedule C, the State hereby agrees to pay to Licensor a fee in the amount of $ \_\_\_\_\_\_\_ upon receipt of a valid invoice as specified in Contract Section 6.3.

**2.2** **Renewal.** For each subsequent year, the State, at its sole discretion, may issue a Purchase Order to renew maintenance and support services. Only upon receipt of a signed State of Montana Purchase Order, shall maintenance and support services commence, and shall Licensor invoice the State of such services.

## 2.3 Increases in Annual Maintenance Fee. Licensor Maintenance Fees may be increased after the initial year of maintenance provided ninety days prior written notice is received by the State. The maintenance fee increase shall not exceed the lesser of (1) five percent or, (2) the COLA increase announced by the Social Security Administration or, (3) the price charged to Licensor’s most favored customer. The State may terminate the maintenance any time on or before sixty days of receipt of Licensor’s written notice of a price increase.

**2.4** **Reinstatement.** If maintenance and support services lapse, the State may reinstate maintenance and support at any time by issuing a Purchase Order for maintenance and support fees. The reinstatement fees shall not exceed the monthly fee for the number of delinquent months multiplied by 50%.

**3. Time and Materials Rates (if applicable)**

**4. Training Fees (if applicable)**

**Schedule C**

**MAINTENANCE SERVICES**

**1.** Licensor shall provide the Maintenance Services described in this Section for Software, Updates and Upgrades provided to the State pursuant to this Agreement. After expiration of the Warranty Period, the State shall pay for Maintenance Services:

**1.1** During the Maintenance Period, the Maintenance Fee;

**1.2** Outside the Maintenance Period, and except as otherwise expressly stated in this Section or in Schedule B and when authorized in advance by the State, the Time and Materials Rates.

**2.** As part of Maintenance Services, Licensor shall provide the following:

**2.1** Help desk support available 24 hours a day, seven days a week via toll-free telephone number with help desk technicians sufficiently trained and experienced to identify or resolve most support issues and who shall respond to all requests from the State for support within 15 minutes after receiving a request for assistance;

**2.2** A current list of persons and telephone numbers, including pager numbers, (the “Calling List”) for the State to contact to enable the State to escalate its support requests for issues that cannot be resolved by a help desk technician or for circumstances where a help desk technician does not respond within the time specified.

**3.** The Calling List shall include:

**3.1** The first person to contact if a question arises or problem occurs, and

**3.2** The persons in successively more responsible or qualified positions to provide the answer or assistance desired.

If Licensor does not respond promptly to any request by the State for telephone consultative service, then the State may attempt to contact the next more responsible or qualified person on the Calling List until contact is made and a designated person responds to the call.

**4.** Licensor shall make reasonable efforts to respond within two hours to the State’s initial request for assistance in correcting or creating a workaround for an Error. Licensor’s response shall include assigning fully-qualified technicians to work with the State to diagnose and correct or create a workaround for the Error and notifying the State Representative making the initial request for assistance of Licensor’s efforts, plans for resolution of the Error, and estimated time required to resolve the Error. Licensor shall correct Errors caused by the Object Code by modifying Source Code and distributing the modified Software to the State on the schedule called for in this Section (4).

**4.1** For Class 1 Errors, Licensor shall provide a Correction or workaround reasonable in the State's judgment within the Repair Period after the State reports the Error, or within four (4) hours after the State first reports the Error if no other Repair Period is specified. These steps shall include assigning fully-qualified technicians to work with the State without interruption or additional charge, 24 hours per day, until Licensor provides a Correction or workaround that is reasonable in the State's judgment.

**4.2** For Class 2 Errors, Licensor shall take reasonable steps to provide a Correction or a workaround reasonable in the State's judgment by the opening of business on the second Business Day after the State reports the Error. These steps shall include assigning fully-qualified technicians to work with the State during the State's regular business hours until Licensor provides a workaround reasonable in the State's judgment or a Correction or the State determines after consultation with Licensor that such a workaround or Correction cannot be produced by Licensor's technicians. Licensor shall provide a Correction within thirty (30) calendar days after the State’s report of the Error.

**4.3** For Class 3 Errors, Licensor shall correct the Errors by all reasonable means. Licensor shall correct the Errors and distribute the modified Software to the State no later than the next Update, unless Licensor has scheduled release of such Update less than 30 calendar days after the State's notice, in which case Licensor shall correct the Error no later than the following Update.

**4.4** Without limiting Licensor's obligations under this Section, if Licensor does not deliver a Correction for an Error within the times allowed by this Section (whether Licensor has delivered a reasonable workaround or not), Licensor shall provide a written analysis of the problem and a written plan to supply the State with a Correction.

**5.** Notwithstanding Section 4, if an Error prevents the State from making productive use of the Software, Licensor shall use its best efforts to provide an effective workaround or a Correction by the time the State opens for business on the Business Day after the Business Day on which the State first reports the Error.

**6.** Licensor shall pay the State, as a price adjustment reflecting the reduction in value the State will incur as a result of the following Class Errors;

**6.1** If Licensor fails to provide a reasonable workaround or Correction for a Class 1 Error within the Repair Period, Licensor shall pay the State, as a price adjustment reflecting the reduction in value the State will incur as a result of the Class 1 Error and not as a penalty or compensation for damage, the sum of 2/365 of the Maintenance Fees, expressed as an annual charge, for each additional day or part thereof (not to exceed 90 days) that Licensor fails to provide a reasonable workaround or a Correction for the Class 1 Error.

**6.2** If Licensor fails to provide a reasonable workaround in the State’s judgment or Correction for a Class 2 Error within three Business Days after the State reports the Error, Licensor shall pay the State, as a price reduction reflecting the reduction in value the State will incur as a result of the Class 2 Error and not as a penalty or compensation for damage, the sum of 1/365 of the Maintenance Fees, expressed as an annual charge, for each additional day or part thereof (not to exceed 60 days) that Licensor fails to provide a reasonable workaround or a Correction for the Class 2 Error.

**6.3** In each case of Class 1 or Class 2 Errors for which Licensor does not deliver a reasonable workaround or Correction on the schedule called for in the preceding paragraphs (i) and (ii), respectively, Licensor shall also credit the State the pro rata portion of Maintenance Fees that would otherwise be payable from the date the State first reported the Error until Licensor provides a Correction, in recognition that Maintenance Services during that period have not achieved their objective. If Licensor fails to provide a Correction within 30 days after the State first reported the Class 1 or Class 2 Error, the State may terminate Maintenance Services for Licensor’s material breach. Price adjustments under Section 6.1 and Section 6.2 shall cease to accrue upon such termination.

**6.4** Without limitation of Licensor’s obligations above, the State may fall back, at its option, to any previous version or release of the Software in which a Class 1 or Class 2 Error does not occur or can be worked around, and Licensor shall provide Maintenance Services at no charge, with respect to that version until Licensor provides a Correction.

**6.5** The Parties agree that the price adjustments called for in this Section are reasonable in light of the reduction in value to the State of the products and services provided hereunder.

**6.6** Price adjustments shall be waived to the extent Errors are caused by actions or omissions of the State.

**7.** The State shall submit to Licensor a listing of output and such other data as Licensor reasonably may request in order to reproduce operating conditions similar to those present when the State detected the Error.

**8.** Licensor shall provide all Updates to the State at no additional charge when Updates are completed.