

**EXHIBIT C – TECHNOLOGY CONSULTING PROFESSIONAL  
SERVICES AGREEMENT (SAMPLE)**

**PROFESSIONAL SERVICES**

**BETWEEN**

**THE CITY OF PHOENIX**

**AND**

**CONSULTANT**

**City of Phoenix Agreement No.:** \_\_\_\_\_

**Department Contact  
Name of Department  
Department Address & Phone #**

These are sample terms and conditions of a contract resulting from a Scope of Work (SOW) recommendation.

Being recommended as a qualified vendor is not a contract. As a result of a SOW request recommendation, the respective department will prepare a contract with the awarded Offeror and will be brought forth to City Council for approval. The City reserves the right to change the terms based on the latest requirements and the type and scope of any project awarded.

**TECHNOLOGY CONSULTING PROFESSIONAL SERVICES AGREEMENT**

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## TECHNOLOGY CONSULTING PROFESSIONAL SERVICES AGREEMENT

This **AGREEMENT** (the “Agreement”) is made and entered into **DATE**, (the “Effective Date”), or as of the City Clerk Date, whichever is later, by and between the City of Phoenix, a municipal corporation of the State of Arizona (hereinafter referred to as “**City**”) and Consultant (hereinafter referred to as “**Consultant**”).

### RECITALS

**WHEREAS**, the City Manager of the City of Phoenix, Arizona, is authorized by the provisions of the City Charter to execute Agreements for technology products and professional services; and

**WHEREAS**, the City desires to obtain the technology products and professional services that are specifically set forth in this Agreement; and

**WHEREAS**, the City procured these technology products and professional services in accordance with Administrative Regulation 3.10; and

**WHEREAS**, Consultant possesses the skills and expertise necessary to provide such technology products and professional services as desired by the City; and

**NOW, THEREFORE**, it is agreed by and between the parties as follows:

#### 1. **TERM OF AGREEMENT:**

The term of this Agreement shall commence on the Effective Date and the term shall extend for an initial term of **NUMBER weeks** thereafter through **DATE**, and may be extended for an additional term, which option[s] may be exercised at the sole discretion of the City.

Notwithstanding the foregoing, this Agreement shall terminate upon the earliest occurrence of any of the following: 1) reaching the end of the term and any extensions exercised as set forth above; 2) completing the services set forth in the Scope of Work attached as **Exhibit C** (the “Services”); 3) payment of the maximum compensation under Paragraph 4 of this Agreement, unless it is amended to allow additional compensation; or 4) termination pursuant to the provisions of this Agreement.

#### 2. **CONTRACT ADMINISTRATION AND OPERATION:**

**2.1. Health, Environmental and Safety Requirements.** The Consultant’s products, services and facilities shall be in full compliance with all applicable Federal, State and local health, environmental and safety laws, regulations, standards, codes and ordinances, regardless of whether or not they are referred to by the City. The City shall have the right to inspect operations conducted by the Consultant or subcontractor in the performance of this Agreement.

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**2.2. Compliance with Laws.** Consultant agrees to fully observe and comply with all applicable Federal, State and local laws, regulations, standards, codes and ordinances when performing under this Agreement regardless of whether or not they are referred to by the City. Consultant agrees to permit City inspection of Consultant's business records, including personnel records, to verify any such compliance. Because the Consultant will be acting as an independent contractor, the City assumes no responsibility for the Consultant's acts.

**2.3. Strict Performance.** Either party's failure to insist on strict performance of any term or condition of the Contract will not be deemed a waiver of that term or condition even if the party accepting or acquiescing in the nonconforming performance knows of the nature of the performance and fails to object to it; except where enforcement of this provision would be in conflict with the scope or proposal.

### 3. COSTS AND PAYMENT:

**3.1.** Under this Agreement, the City will pay for services at a fixed or hourly bill rate of \$dollars cents (\$hourly or fixed rate USD) per hour, with no additional charges for overhead, benefits, local travel or administrative support. The total amount to be remitted by the City to Consultant for all Services satisfactorily performed under this Agreement shall not exceed WRITE OUT THE AMOUNT Dollars USD (\$NUMBER AMOUNT USD) per year including reasonable and necessary travel expenses (if such travel expenses are approved in advance by the City and included in the Fee Schedule (Exhibit D)). Payments shall be made in proportion to the Services performed and no more than ninety percent (90%) of the total contract price shall be paid before the work is totally completed and accepted by the City.

**3.2.** City will pay any sales or use taxes resulting from this Agreement. Consultant shall be solely responsible for payment of taxes based on Consultant's income. Consultant agrees that on all billings, invoices, books and records relating to this Agreement, Consultant will state the charges imposed for the sale, transfer and licensing of tangible personal property separately from charges imposed for professional, personal and technological services including, but not limited to, software installation, modification, training, consulting and technical telephone support.

**3.3. Invoices.** Consultant shall submit invoices in arrears, on every other week basis. Each invoice will clearly note any Purchase Order number and be accompanied with itemized receipts which include approved timesheets. The invoice will be submitted free of mathematical errors and/or missing supporting documentation. All appropriate documentation supporting the charges reflected in the invoice will be provided with the invoice. Upon finding of an error and/or missing documentation, the City

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may return the invoice to the Consultant. Consultant will promptly resubmit the revised invoice to the City. Each revised invoice will document the date that the revised invoice is submitted to the City. Requests for payment must be submitted with documentation of dates and hours worked, hourly rate charged, and a detailed description of the Services performed. Oversight by the City in identifying an error does not result in waiver of any of the City's rights. All properly submitted invoices will be paid promptly after the City's receipt of the invoice.

- 3.4. Commencement of Work.** The Consultant is cautioned not to commence any billable work or provide any material or service under this Agreement until Consultant receives a fully executed contract document or otherwise directed to do so, in writing by the City.
- 3.5. Late Submission of Claim by Contactor.** The City will not honor any invoices or claims which are tendered one (1) year after the last item of the account accrued.
- 3.6. No Advance Payments.** Advance payments are not authorized. Payment will be made only for actual services or commodities that have been received.
- 3.7. Fund appropriation Contingency.** The Consultant recognizes that this Agreement shall commence upon the day first provided and continue in full force and effect until termination in accordance with its provisions. The Consultant and the City herein recognize that the continuation of any Agreement after the close of any given fiscal year of the City of Phoenix, which fiscal year ends on June 30 of each year, shall be subject to the approval of the budget of the City of Phoenix providing for or covering such contract item as an expenditure therein. The City does not represent that said budget item will be actually adopted, said determination being the determination of the City Council at the time of the adoption of the budget.
- 3.8. IRS W9 Form.** In order to receive payment, the Consultant shall have a current IRS W-9 form on file with the City of Phoenix. The form can be downloaded at <http://www.irs.gov/pub/irs-pdf/fw9.pdf>.

#### 4. REIMBURSABLE EXPENSES:

Consultant shall demonstrate good judgment when incurring costs that are considered a Reimbursable Expense (as defined below) while conducting business for the City. All Reimbursable Expenses shall be reasonable and prudent. Business expenses (including office and travel expenses) satisfying Sections A, B, and C below, and also all of the following requirements, shall constitute "Reimbursable Expenses": (i) the expenses were necessarily incurred in order to perform the Services, (ii) the expenses were directly attributable to the

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Services, (iii) the expenses are not administrative or office expenses, and (iv) the expenses are not otherwise attributable to overhead or incurred in connection with services provided to any other client of Consultant.

- 4.1. Receipts for Reimbursable Expenses must be submitted with all requests for payment. Reimbursable Expenses that require receipts include, but are not limited to, express mail; delivery services; messenger services; and outside printing.
- 4.2. Requests for reimbursement of office expenses must be submitted with a description of the task, which includes how the expense was incurred. Examples of office expenses needing documentation include, but are not limited to, telephone; internal printing /copies (not to exceed 0.15 cents per page for black & white copies); postage; facsimiles (long distance charges only); and supplies.
- 4.3. Travel expenses must be approved in advance by the City and must be included in the Fee Schedule. Consultant shall comply with City of Phoenix Administrative Regulation 3.41 – Business, Conference and Training Travel and Other Business Expenses (Effective Date: January 16, 2015), as it may be amended, as to the eligible and ineligible expenses for reimbursement and required documentation as set forth in **Exhibit E**, attached hereto, and incorporated herein.

### 5. INVOICE INSTRUCTIONS

Invoice Instructions:

Email Invoices to: TBD

OR Mail Invoices to: TBD

Consultant Remit to: COMPANY NAME  
ATTN: Accounts Receivable  
ADDRESS  
CITY STATE ZIP  
TELEPHONE  
EMAIL ADDRESS

### 6. PERFORMANCE BOND OR IRREVOCABLE STANDBY LETTER OF CREDIT:

Prior to commencement of work to be performed, Consultant shall provide, (and shall maintain during the term of this Agreement), a performance bond or irrevocable standby letter of credit (a "Letter of Credit") to guarantee the full and faithful performance by Consultant of all the terms and conditions of this Agreement and stand as security for payment by Consultant of all claims by the City. The required amount of the performance bond or letter of credit for this Agreement is **REQUIRED AMOUNT**. Consultant's failure to provide a performance bond or Letter of Credit under this Section shall be a material

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breach of this Agreement.

If the security is in the form of a performance bond, the performance bond shall be issued in a form that is satisfactory to the City and must be issued by a surety company authorized to write surety business in Arizona. The surety company providing the performance bond must have an A.M. Best Rating of B+ VI or better for the past four quarters.

If the security is in the form of a Letter of Credit, the Letter of Credit shall be issued by a local financial institution in the Phoenix metropolitan area in a form that is satisfactory to the City, and the City must be able to draw upon the Letter of Credit at any of the financial institution's counters in the Phoenix metropolitan area. If a Letter of Credit is obtained, then unless City receives a written extension of that Letter of Credit in a form acceptable to the City at least 60 days before the end of the term of such letter of credit, the City, without notice to Consultant, may draw upon the full amount of that Letter of Credit and retain all proceeds as a cash security pursuant to this paragraph. The City will not pay interest to Consultant on any bond or Letter of Credit. See **Exhibit F** attached hereto for the City's required Letter of Credit form.

### 7. **SCOPE OF WORK AND SUPPLEMENTAL TERMS AND CONDITIONS:**

Consultant will provide Services in accordance with the Scope of Work (SOW) as set forth in **Exhibit C**, which may be supplemented from time to time during the term of the Agreement, and that are satisfactory to the City. In performing these Services, Consultant shall also specifically comply with the applicable Supplemental Terms and Conditions that are set forth in **Exhibit E, if any**. Consultant will provide progress reports and weekly time sheets to the Project Manager according to a mutually agreed-upon schedule.

### 8. **INSURANCE AND INDEMNITY:**

Consultant and subcontractors shall throughout the term of this Agreement comply with the insurance and indemnity requirements of **Exhibit A, and other indemnity provisions in this Agreement**. Consultant and subcontractors shall also deliver to the City, prior to commencement of the Services provided under this Agreement, a certificate of insurance acceptable to the City in the amounts and form specified in this Agreement. Failure of Consultant and subconsultants to maintain insurance during the term of the Agreement, including renewal options, is a material breach of this Agreement and may result in immediate termination of this Agreement without notice. Insurance requirements are subject to periodic review and adjustment by the City.

### 9. **INDEPENDENT CONTRACTOR STATUS; EMPLOYMENT DISCLAIMER:**

The parties agree that Consultant is providing the Services under this Agreement on a part-time and/or temporary basis and that the relationship created by this Agreement is an independent contractor relationship. Neither Consultant nor any of Consultant's agents, employees or helpers shall be deemed to be the



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employee, agent, or servant of the City. The City is interested in only the results obtained under this Agreement; the manner, means and mode of completing the same are under the sole control of Consultant.

This Agreement is not intended to constitute, create, give rise to, or otherwise recognize a joint venture, partnership or formal business association or organization of any kind, and the rights and obligations of the parties shall be only those expressly set forth in this Agreement. The parties agree that no individual performing under this Agreement on behalf of Consultant will be considered a City employee, and that no rights of City Civil Service, City retirement or City personnel rules shall accrue to such individuals. Consultant shall have total responsibility for all salaries, wages, bonuses, retirement, withholdings, worker's compensation, other employee benefits, and all taxes and premiums appurtenant thereto concerning such individuals and shall save and hold harmless the City with respect thereto.

### **10. LEGAL WORKER REQUIREMENTS**

City is prohibited by A.R.S. § 41-4401 from awarding a contract to any Consultant who fails, or whose subconsultants fail to comply with A.R.S. § 23-214(A). Therefore, Consultant agrees that:

Consultant and each subconsultant it uses warrants their compliance with all federal immigration laws and regulations that relate to their employees and their compliance with A.R.S. § 23-214(A).

A breach of a warranty under this section shall be deemed a material breach of the contract that is subject to penalties including termination of this Agreement.

City retains the legal right to inspect the papers of any Consultant or subconsultant employee(s) who work(s) on this Agreement to ensure that Consultant or subconsultant is complying with the warranty under this section.

### **11. CONFIDENTIALITY AND DATA SECURITY (Involving PII or PCI or financial information)**

All data, regardless of form, including originals, images and reproductions, prepared by, obtained by, or transmitted to Consultant in connection with this Agreement is confidential, proprietary information owned by the City. Except as specifically provided in this Agreement, the Consultant shall not disclose data generated in the performance of the service to any third person without the prior written consent of the City Manager or his/her designee.

Personal identifying information, financial account information, protected health information, or restricted City information, whether electronic format or hard copy, must be secured and protected at all times to avoid unauthorized access. At a minimum, Consultant must encrypt and/or password-protect electronic files. This includes data saved to laptop computers, computerized devices, handheld

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devices, networking devices, removable storage devices, or other electronic media, as well as data in transit, such as during email or file transfer.

When personal identifying information, financial account information, protected health information, or restricted City information, regardless of its format, is no longer necessary, the information must be redacted or destroyed through appropriate and secure methods that ensure the information cannot be viewed, accessed, or reconstructed. Consultant must properly dispose of such information by taking reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal. This includes implementing and monitoring compliance with policies and procedures that require the redaction, destruction, erasure, or other disposal of paper documents and electronic media containing personal identifying information, financial account information, protected health information, or restricted City information so that these types of information cannot practicably be read or reconstructed. Consultant will provide the City with its information security policies and procedures regarding the redaction, destruction, erasure, or other disposal of documents and information.

In the event that data collected or obtained by the Consultant in connection with this Agreement is suspected to have been compromised, Consultant shall notify the contracting City department immediately. Consultant agrees to reimburse the City for any costs incurred by the City to investigate and respond to potential breaches of this data, including, where applicable, the cost of notifying individuals who may be impacted by the breach, attorneys' fees, and for any monetary damages or penalties the City is assessed. In case of a breach or critical breach of the City's information, it will be the City, not the Consultant, that will inform any and all individuals affected by any such breach. Only upon prior written consent of the City, or at the specific direction of the City, will the Consultant notify individuals affected by a breach or critical breach of the City's information.

Consultant agrees that the City may assess or test the security of any applications, web services, or computerized systems created or provided by the Consultant that process, store, or transmit City information. If the City finds vulnerabilities that are rated medium or more critical by the Common Vulnerability Scoring System (CVSS) in these applications, web services, or computerized systems, the Consultant agrees to remediate the vulnerability at no cost to the City and within an agreed-upon timeframe not to exceed 90 days. To clarify, the Consultant must remediate found vulnerabilities in computerized systems they provide; Consultant is not liable for remediating any vulnerability found in the City's network or computing infrastructure used to support the applications, web services, or systems created or provided by the Consultant.

Consultant agrees to abide by all current applicable legal and industry data security and privacy requirements. These include, but are not limited to, Arizona Revised Statutes §44-7501 — Notification of breach of security system; Arizona

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Revised Statutes §44-7601 — Discarding and disposing of records containing personal identifying information; Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy and Security Rules; Health Information Technology for Economic and Clinical Health (HITECH) Act, and Payment Card Industry Data Security Standards.

Consultant agrees to demonstrate that they have adequate controls and safeguards when they host or process personal identifying information, financial account information, protected health information, or restricted City information. This may be accomplished through a third-party audit utilizing a widely recognized auditing standard, such as Statement on Standards for Attestation Engagements (SSAE) No. 16, or through earning industry certification, such as ISO/IEC 27001.

By signing and entering this Agreement the Consultant specifically acknowledges that it is responsible for the security of cardholder data that Consultant possesses or otherwise stores, processes or transmits on behalf of the City. Additionally, you must provide to the City a copy of your written Notice to customers that you are responsible for the security of cardholder data that you obtain and otherwise store, process or transmit.

Consultant agrees to comply with all City information security and technology policies, standards, and procedures when accessing City networks and computerized systems whether onsite or remotely.

Consultant agrees that the requirements of this Section shall be incorporated into all subconsultant agreements entered into by the Consultant. It is further agreed that a violation of this Section shall be deemed to cause irreparable harm that justifies injunctive relief in court. A violation of this Section may at the City's discretion result in immediate termination of this Agreement without notice.

The obligations of Consultant under this Section shall survive the termination of this Agreement.

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### For contracts specifically dealing with PCI compliance:

Consultant will maintain and implement policies and procedures to manage service providers with whom cardholder data is shared, as follows:

- 11.1.1. Maintain a list of service providers or subcontractors.
- 11.1.2. Report PCI DSS compliance status with annual attestation of compliance provided within 30 days of the annual Report of Compliance audit completion, or annual contract renewal date, whichever is sooner, to City that ensures Consultant and all subcontractors are PCI DSS 3.0 compliant and verified by a recognized third party certification.

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11.1.3. Maintain information about which PCI DSS requirements are managed by Consultant.

### 12. CONTACTS WITH THIRD PARTIES:

Consultant or its subconsultants shall not contact third parties to provide any information relating to the Services provided under this Agreement without the prior written consent of the City. Should Consultant or its subconsultants be contacted by any person requesting information or requiring testimony relative to the Services provided under this Agreement or any other prior or existing Agreement with the City, Consultant or its subconsultants shall promptly inform the City, giving the particulars of the information sought, and shall not disclose such information or give such testimony without the written consent of the City or court order. The obligations of Consultant and its subconsultants under this Section shall survive the termination of this Agreement. Consultant agrees that the requirements of this Section shall be incorporated into all subconsultants agreements entered into by the Consultant. It is further agreed that a violation of this Section shall be deemed to cause irreparable harm that justifies injunctive relief in court. A violation of this Section may result in immediate termination of this Agreement without notice.

### 13. EQUAL EMPLOYMENT OPPORTUNITY REQUIREMENT

**13.1.** In order to do business with the City, Consultant must comply with Phoenix City Code, 1969, Chapter 18, Article V, as amended, Equal Opportunity Requirements. Consultant will direct any questions in regard to these requirements to the Equal Opportunity Department, (602) 262-6790.

**13.2. *For a Consultant with 35 employees or less:*** Consultant in performing under this Agreement shall not discriminate against any worker, employee or applicant, or any member of the public, because of race, color, religion, sex, national origin, age, or disability, nor otherwise commit an unfair employment practice. The Consultant will ensure that applicants are employed, and employees are dealt with during employment without regard to their race, color, religion, sex, national origin, age, or disability. Such action shall include but not be limited to the following: employment, promotion, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training; including apprenticeship. The Consultant further agrees that this clause will be incorporated in all subcontracts related to this Agreement that involve furnishing skilled, unskilled and union labor, or who may perform any such labor or services in connection with this Agreement. Consultant further agrees that this clause will be incorporated in all subcontracts, job-consultant agreements or subleases of this agreement entered into by supplier/lessee.

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**13.3. For a Consultant with more than 35 employees:** Consultant in performing under this Agreement shall not discriminate against any worker, employee or applicant, or any member of the public, because of race, color, religion, sex, national origin, age, or disability, nor otherwise commit an unfair employment practice. The Consultant will ensure that applicants are employed, and employees are dealt with during employment without regard to their race, color, religion, sex, national origin, age, or disability, and shall adhere to a policy to pay equal compensation to men and women who perform jobs that require substantially equal skill, effort, and responsibility, and that are performed within the same establishment under similar working conditions. Such action shall include but not be limited to the following: employment, promotion, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training; including apprenticeship. The Consultant further agrees that this clause will be incorporated in all subcontracts with all labor organizations furnishing skilled, unskilled and union labor, or who may perform any such labor or services in connection with this contract. Consultant further agrees that this clause will be incorporated in all subcontracts, job-consultant agreements or subleases of this Agreement entered into by supplier/lessee. The Consultant further agrees not to discriminate against any worker, employee or applicant, or any member of the public, because of sexual orientation or gender identity or expression and shall ensure that applicants are employed, and employees are dealt with during employment without regard to their sexual orientation or gender identity or expression.

**13.4. Documentation.** Suppliers and lessees may be required to provide additional documentation to the Equal Opportunity Department affirming that a nondiscriminatory policy is being utilized.

**13.5. Monitoring.** The Equal Opportunity Department shall monitor the employment policies and practices of suppliers and lessees subject to this article as deemed necessary. The Equal Opportunity Department is authorized to conduct on-site compliance reviews of selected firms, which may include an audit of personnel and payroll records, if necessary.

### **14. AUDIT/RECORDS:**

The City reserves the right to, at reasonable times, audit Consultant's books and records relative to the performance of service under this Agreement. All records pertaining to this agreement shall be kept on a generally accepted accounting basis for a period of three (3) years following termination of the Agreement.

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### 15. COMPLIANCE WITH LAWS:

Consultant shall comply with all existing and subsequently enacted federal, state and local laws, ordinances, codes and regulations which are, or become applicable to this Agreement and the Services. If a subsequently enacted law imposes substantial additional costs on Consultant, Consultant may request an amendment to this Agreement in order to address such additional costs; however, no such amendment or change order may be approved by the City if it results in an increase of the Agreement amount over that approved by the City Council unless the Council approves an increased Agreement amount.

### 16. CONTRACT WORKER ACCESS CONTROLS, BADGE AND KEY ACCESS REQUIREMENT:

#### 16.1 Contractor and Subcontractor Workers Background Screening:

**16.1.1** Contractor agrees that all Contractor and subcontractors' workers (collectively "Contractor's Worker(s)") that Contractor furnishes to the City pursuant to this agreement will be subject to background and security checks and screening (collectively "Background Screening") at Contractor's sole cost and expense, unless otherwise addressed in the Scope of Work.

**16.1.2** The City requires a completed Contract Worker Badge/Key/Intrusion Detection Responsibilities Agreement for each Contract Worker who requires a badge or key.

**16.1.3** The background screening provided by Contractor will comply with all applicable laws, rules and regulations. Contractor further agrees that the background screening required in this section is necessary to preserve and protect the public health, safety and welfare.

**16.1.4** The background screening requirements set forth in this section are the minimum requirements for the agreement. The City in no way warrants that these minimum requirements are sufficient to protect Contractor from any liabilities that may arise out of the Contractor's services under this agreement or Contractor's failure to comply with this section. Therefore, in addition to the specific measures set forth below, Contractor and its Contract Workers will take such other reasonable, prudent and necessary measures to further preserve and protect public health, safety and welfare when providing services under this agreement.

**16.1.5** Unless otherwise addressed in the scope of work, the contracting department will review and approve maximum risk background check results provided by the Contractor. Information to verify the results will be returned to the Contractor after the City's review. The City will not keep records related to background checks. The City will only respond with an approve or deny.

**16.2 Background Screening Level:** Because of the varied types of services performed, the City has established two levels of risk and associated

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background screening: Standard and Maximum risk. The current risk level and background screening required is **TO BE DETERMINED**.

**16.3 Maximum Risk Level:** A maximum risk background screening will be performed every five years when the Contract Worker's work assignment will:

**16.3.1** work directly with vulnerable adults or children, (under age 18); or

**16.3.2** any responsibility for the receipt of payment of City funds or control of inventories, assets, or records that are at risk of misappropriation; or

**16.3.3** unescorted access to:

- City data centers, money rooms, high-value equipment rooms; or
- unescorted access to private residences; or
- access to critical infrastructure sites/facilities; or
- direct or remote access to Criminal Justice Information Systems (CJIS) infrastructure.

**16.4 Requirements:** The background screening for maximum risk level will include a background check for real identity/legal name, and will include felony and misdemeanor records from any county in the United States, the State of Arizona, plus any other jurisdiction where the Contractor worker has lived at any time in the preceding seven years from the Contract Worker's proposed date of hire. In addition, Maximum screening levels may require additional checks as included herein, depending on the scope of work, and may be amended if the scope of work changes.

**16.5 Additional Maximum Risk Background Checks:** Maximum screening will additionally require:

**16.5.1** Credit Check (for cash handling, accounting, and compliance positions only)

**16.5.2** Driving records (for driving positions only)

**16.5.3** Fingerprint verification (when Contract Worker is working directly with children or vulnerable adults or scope takes the individual to a City location with Criminal Justice Information System (CJIS) access.)

**16.6 Maximum Risk Background Criminal Justice Information Services (CJIS) Check Must Include:**

**16.6.1** Criminal records - Conviction of a misdemeanor(s) (not including traffic or parking violation) or felony(ies).

**16.6.2** Sexual offender search

**16.6.3** All outstanding warrants

**16.6.4** Currently the focus of a criminal investigation

**16.6.5** Currently on parole or probation

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### **16.7 Maximum Risk Background Check for Child Care Staff Member:**

- 16.7.1** A Federal Bureau of Investigation fingerprint check using Next Generation Identification;
- 16.7.2** A search of the National Crime Information Center's National Sex Offender Registry; and
- 16.7.3** A search of the following registries, repositories, or databases in the State where the child care staff member resides and each State where resided during the preceding five years:
- 16.7.4** State criminal registry or repository, with the use of fingerprints being:
  - Required in the State where the staff member resides;
  - Optional in other States;
  - State sex offender registry or repository; and
  - State-based child abuse and neglect registry and database.

### **16.8 Contractor Certification; City Approval of Maximum Risk Background Screening:**

- 16.8.1** Unless otherwise provided for in the Scope of Work, Contractor will be responsible for:
  - 16.8.1.1** determining whether Contract Worker(s) are disqualified from performing work for the City for maximum risk level background checks; and,
  - 16.8.1.2** submitting pass/fail results to the City for approval; and,
  - 16.8.1.3** for reviewing the results of the background check every three to five years, dependent on scope; and,
  - 16.8.1.4** to engage in whatever due diligence is necessary to make the decision on whether to disqualify a Contract Worker; and,
  - 16.8.1.5** Submitting the list of qualified Contract Workers to the contracting department; and,
  - 16.8.1.6** If, upon review of the background information, the City will advise the Contractor if it believes a Contract Worker should be disqualified. The Contractor will evaluate the Contract Worker and if the Contractor believes that there are extenuating circumstances that suggest that the person should not be disqualified, the Contractor will discuss those circumstances with the contracting department. The contracting department decision on disqualification of a Contract Worker is final.
- 16.8.2** For sole proprietors, the Contractor must comply with the background check for himself and any business partners, or members or employees who will assist on the contract and for whom the requirements of the Agreement apply.



## TECHNOLOGY CONSULTING PROFESSIONAL SERVICES AGREEMENT

- 16.8.3 By executing this agreement, Contractor certifies and warrants that Contractor has read the background screening requirements and criteria in this section, and that all background screening information furnished to the City is accurate and current.
- 16.8.4 The City final documented decision will be an “approve” or “deny” for identified Contract Workers.
- 16.8.5 The City will not keep records related to background checks once they are confirmed. Information to verify the results will be returned to the Contractor, or any contracted agency that assists with review, after the City’s completed review.
- 16.8.6 By executing this agreement, Contractor further certifies and warrants that Contractor has satisfied all such background screening requirements for the maximum risk background screening, and verified legal worker status, as required.
- 16.8.7 Contract Workers will not apply for the appropriate City of Phoenix identification and access badge or keys until Contractor has received the City’s written acceptance of Contract Worker’s maximum risk background screening. The City may, in its sole discretion, accept or reject any or all the Contract Workers proposed by Contractor for performing work under this Agreement. A Contract Worker rejected for work at a maximum risk level under this agreement will not be proposed to perform work under other city contracts or engagements without city’s prior written approval.

**16.9 Terms of This Section Applicable to all of Contractor’s Contracts and Subcontracts:** Contractor will include the terms of this section for Contract Worker background screening in all contracts and subcontracts for services furnished under this Agreement.

**16.10 Materiality of Background Screening Requirements; Indemnity:** The background screening requirements are material to City’s entry into this agreement and any breach of these provisions will be deemed a material breach of this contract. In addition to the indemnity provisions set forth in this agreement, Contractor will defend, indemnify and hold harmless the City for all claims arising out of this background screening section including, but not limited to, the disqualifications of a Contract Worker by Contractor. The background screening requirements are the minimum requirements for the Agreement. The City in no way warrants that these minimum requirements are sufficient to protect Contractor from any liabilities that may arise out of the Contractor’s services under this Agreement or Contractor’s failure to comply with this section. Therefore,

## TECHNOLOGY CONSULTING PROFESSIONAL SERVICES AGREEMENT

Contractor and its Contract Workers will take any reasonable, prudent and necessary measures to preserve and protect public health, safety and welfare when providing services under this Agreement.

**16.11 Continuing Duty; Audit:** Contractor's obligations and requirements that Contract Workers satisfy this background screening section will continue throughout the entire term of this agreement. Contractor will notify the City immediately of any change to a background screening of a Contract Worker previously approved by the City. Contractor will maintain all records and documents related to all background screenings and the City reserves the right to audit Contractor's compliance with this section.

16.11.1 For any childcare or health worker positions, or Criminal Justice Information Systems access in the scope of work, Contractor is required to send the City updated background checks *every three years*.

**16.12 Variances and Exemptions:**

16.12.1 There are federal and state regulations that necessitate an exemption from this policy. Contract Workers who fall under the following areas may be considered exempt from this policy:

- Federal Homeland Defense Bureau (e.g. Aviation, Water Services, Transit, Police and Fire Departments).
- Transportation Security Administration (e.g. Aviation, Fire, and Police Departments).
- Federal Aviation Administration (e.g. Aviation, Police, and Fire Departments).
- Department of Public Safety (DPS) Administration – presenting a current Level One Department of Public Safety fingerprint card (e.g. Human Services, Housing, Parks, and Aviation Departments).
- Arizona or other State Bars (Lawyers registered to practice and licensed by a State bar).
- Other background checks performed within the last three to five years may be approved if they fit all required criteria herein.

**16.13 Contractor's Default; Liquidated Damages; Reservation of Remedies for Material Breach:** If Contractor is required to access any City facilities without an escort, City badging is required. Contractor's default under this section will include, but is not limited to, the following:

16.13.1 Contract Worker gains access to a City facility(s) without the proper badge or key;

16.13.2 Contract Worker uses a badge or key of another to gain access to a City facility;

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- 16.13.3 Contract Worker commences services under this agreement without the proper badge, key or background screening;
- 16.13.4 Contract Worker or Contractor submits false information or negligently submits wrong information to the City to obtain a badge, key or applicable background screening; or
- 16.13.5 Contractor fails to collect and timely return Contract Worker's badge or key upon termination of Contract Worker's employment, reassignment of Contract Worker to another City facility or upon the expiration, cancellation or termination of this agreement.
- 16.13.6 Contractor acknowledges and agrees that the access control, badge and key requirements in this section are necessary to preserve and protect the public health, safety and welfare. Accordingly, Contractor agrees to properly cure any default under this section within three business days (excluding weekends and City holidays) from the date notice of default is sent by the City. The parties agree that Contractor's failure to properly cure any default under this section will constitute a breach of this section. In addition to any other remedy available to the City at law or in equity, the Contractor will be liable for and pay to the City the sum of \$1,000.00 for each breach by Contractor in this section. The parties further agree that the sum fixed above is reasonable and approximates the actual or anticipated loss to the City at the time and making of this agreement if Contractor breaches this section. Further, the parties expressly acknowledge and agree to the fixed sum set forth above because of the difficulty of proving the City's actual damages if Contractor breaches this section. The parties further agree that three breaches by Contractor in this section arising out of any default within a consecutive period of three months or three breaches by Contractor in this section arising out of the same default within a period of 12 consecutive months will constitute a material breach of this agreement by Contractor and the City expressly reserves all of its rights, remedies and interests under this agreement, at law and in equity including, but not limited to, termination of this agreement.

**16.14 Employee Identification and Access:** It is mandatory that Contractor's employees always have badges and some form of verifiable company identification (badge, uniform, employee id or W-2) unless the Department implements a verification procedure, addressed in the scope of work.

- 16.14.1 Contractor employees are forbidden access to designated restricted areas. Access to each building will be as directed by the authorized Phoenix authorized representative. Contractor employees are not authorized access other than during scheduled hours.
- 16.14.2 Within twenty days of the notice of recommendation of award, Contractor will supply a list of the names and titles of all service

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employees requiring access to the buildings. It is the Contractor's responsibility to provide updates and changes of personnel as necessary. Access to the building will be directed by the City's authorized representative. Contract Worker's will sign in at the security desk when arriving to service enter location and sign out when leaving. No access will be granted without the employee's name being on the approved list.

- 16.14.3 **DAYS** from notice of recommendation of award, Contractor will supply a list of the names and titles of all service employees requiring access to the buildings. It is the Contractor's responsibility to provide updates and changes of personnel as necessary. Access to the building will be directed by the City's authorized representative. Contractor's service personnel will sign in at the security desk when arriving to service **ADDRESS** and sign out when leaving. No access will be granted without the employee's name being on the above-mentioned list.
- 16.14.4 Contractor employees are forbidden access to designated restricted areas. Access to each building will be as directed by the authorized Phoenix authorized representative. Contractor employees are not authorized access other than during scheduled hours.
- 16.14.5 Only authorized Contractor employees are allowed on the premises of the City facilities/buildings. Contractor employees are not to be accompanied in the work area by acquaintances, family members, assistants or any other person unless said person is an authorized Contractor employee.
- 16.14.6 The Contractor will submit prior to scheduling any services, a current list of names, addresses, and social security numbers of all employees requiring access to the facility. The Contractor is responsible for obtaining security clearance from the Police Department for all employees. The City reserves the right to change the restricted areas as needed. The Contractor grants the rights to the Police Department to conduct background checks of all employees entering the building. All employees will submit to the background check before access to the facility is given.
- 16.14.7 The background checks will be conducted prior to any employee entering to work and will be based upon information provided to the Police Department including, but not limited to: name, address, date and place of birth, social security number, INS number if applicable, and a copy of a valid photo identification. The information will be provided to the **DEPARTMENT NAME** at

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least five business days (excluding weekends and holidays) in advance of the need for access. The form will be provided by **DEPARTMENT NAME**. A designated **DEPARTMENT NAME** representative will conduct the security check.

16.14.8 The City may, at any time, in its sole discretion, refuse to allow an employee access to an area for any of the following reasons, but not limited to:

- Conviction of a felony.
- Conviction of a misdemeanor (not including traffic or parking violation).
- Any outstanding warrants (including traffic and parking violations).
- A person currently on parole or probation.
- A person currently involved in an investigation.

**16.15 Key Access Procedures:** If the Contractor worker's services require keyed access to enter a City facility(ies), a separate key issue/return form must be completed and submitted by the Contractor for each key issued. The key issue/return form is available and the completed form will be submitted to the badging office at the address above.

**16.16 Stolen or Lost Badges or Keys:** Contractor must immediately report lost or stolen badges or keys to the City's appropriate badging office. If the badge/key was stolen, Contract Worker's must report the theft to their local police department. Prior to issuance of a new badge or key, a new badge application or key issue form must be completed, submittal of a police department report for stolen badges, and applicable payment of the fee(s) listed herein.

**16.17 Return of Badge or Key:** All badges and keys are the property of the City and must be returned to the City at the badging office within one business day (excluding weekends and City holidays) of when the Contract Worker's access to a City facility is no longer required to furnish the services under this agreement. Contractor will collect a Contract Worker's badge and key(s) upon the termination of the Contract Worker's employment; when the Contractor worker's services are no longer required at a City facility(s); or upon termination, cancellation or expiration of this agreement.

**16.18 Badge and Key Fees:** The following constitute the badge and key fees under this agreement. The City reserves the right to amend these fees upon a 30-day prior written notice to Contractor.

|                        |         |           |
|------------------------|---------|-----------|
| Replacement Badge Fee: | \$55.00 | per badge |
| Lost/Stolen Badge Fee: | \$55.00 | per badge |

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|                      |         |          |
|----------------------|---------|----------|
| Replacement Key Fee: | \$55.00 | per key  |
| Replacement Locks:   | \$55.00 | per lock |

### 16.19 HANDLING OF PHOTOGRAPHS

The US Department of Homeland Security has designated water and wastewater treatment facilities as 'critical infrastructure/key resources'. Because of federal directives, only persons authorized by the WSD Security Management Unit are permitted to photograph or film Water infrastructure, facilities, and assets which any include, but are not limited to: pay stations, warehouses, lift stations, treatment plants, service yards, booster stations, well sites, vehicles and related equipment and supplies.

## 17. AVIATION SECURITY PROCEDURES CONTRACTOR AND SUBCONTRACTOR WORKER BACKGROUND SCREENING:

### 17.1. Contract Worker Background Screening

Contractor agrees that all contract workers and subcontractors (Contract Workers) that Contractor furnishes to the City pursuant to this Contract shall be subject to background and security checks and screening (Background Screening). Contractor further agrees that the Background Screening required in this Section is necessary to preserve and protect public health, safety, and welfare. The Background Screening requirements set forth in this Section are the minimum requirements for this Contract. The City in no way warrants that these minimum requirements are sufficient to protect Contractor from any liabilities that may arise out of Contractor's services under this Contract or Contractor's failure to comply with this Section. Therefore, in addition to the specific measures set forth below, Contractor and its Contract Workers shall take such other reasonable, prudent and necessary measures to further preserve and protect public health, safety and welfare when providing services under this Contract.

### 17.2. Background Screening Requirements and Criteria

Contractor agrees that it will verify legal Arizona worker status as required by Arizona Revised Statutes (A.R.S.) § 41-4401. Contractor further agrees that it will conduct a background check for real identity and legal name on all Contract Workers prior to proposing the Contract Worker to the City.

### 17.3. Additional City Rights Regarding Security Inquiries

17.3.1. In addition to the foregoing, the City reserves the right, but not the obligation, to:

- Have a Contract Worker be required to provide fingerprints and execute such other documentation as may be necessary

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to obtain criminal justice information pursuant to A.R.S. § 41-1750(G)(4) or Phoenix City Code § 4-22 or both;

- Act on newly acquired information, whether or not such information should have been previously discovered;
- Unilaterally change its standards and criteria relative to the acceptability of Contract Workers; and
- Object, at any time and for any reason, to a Contract Worker performing work, including supervision and oversight, under this Contract.

### **17.4. Contractor Certification**

By executing this Contract, Contractor certifies and warrants that Contractor has read the Background Screening requirements and criteria in this Section, understands them, and that all Background Screening information furnished to the City is accurate and current. A Contract Worker rejected for work under this Contract shall not be proposed to perform work under any other City contract or engagement without the City's prior written approval.

### **17.5. Terms of This Section Applicable to all of Contractor's Contracts and Subcontracts**

Contractor shall include the terms of this Section for Contract Worker Background Screening in all contracts and subcontracts for services furnished under this Contract, including supervision and oversight services.

### **17.6. Materiality of Background Screening Requirements; Indemnity**

The Background Screening requirements of this Section are material to the City's entry into this Contract and any breach of this Section by Contractor shall be deemed a material breach of this Contract. In addition to the indemnity provisions set forth in this Contract, Contractor shall defend, indemnify, and hold harmless the City for any and all Claims (as defined in Section II, 6.3) arising out of this Background Screening section including the disqualification of a Contract Worker by Contractor or the City for failure to satisfy this Section.

### **17.7. Continuing Duty; Audit**

17.7.1. Contractor's obligations and requirements that Contract Workers satisfy this Background Screening Section shall continue throughout the entire term of this Contract. Contractor shall notify the City immediately of any change to a Background Screening of a Contract Worker previously approved by the City. Contractor shall maintain all records and documents related to all Background Screenings and the City reserves the right to audit Contractor's compliance with this.

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### **17.8. CONTRACT WORKER ACCESS CONTROLS, BADGE AND KEY ACCESS REQUIREMENTS**

A CONTRACT WORKER SHALL NOT BE ALLOWED TO BEGIN WORK ON AIRPORT PROPERTY WITHOUT THE CONTRACT WORKER'S RECEIPT OF A CITY-ISSUED BADGE. A BADGE WILL BE ISSUED TO A CONTRACT WORKER SOLELY FOR ACCESS TO THE AREAS OF THE AIRPORT TO WHICH THE CONTRACT WORKER IS ASSIGNED. EACH CONTRACT WORKER WHO ENTERS AIRPORT PROPERTY MUST USE THE BADGE ISSUED TO THE CONTRACT WORKER.

### **17.9. Badges**

Upon notification from Contractor's authorized agent, the Contract Worker will proceed to the Badging Office for processing and issuance of a badge. The City will not process the badge until the Contract Worker satisfies the Background Screening requirements. The Contract Worker shall comply with all requirements and furnish all information requested by the Badging Office. All fees associated with security badging will be assessed in compliance with Phoenix City Code § 4-22. Current badging procedures and fees are available for review at <https://www.skyharbor.com/security/BadgingInformation>.

### **17.10. Key Access Procedures**

If a Contract Worker's services require keyed access to enter a City facility, a separate key issue and return form must be completed and submitted to the City project manager by Contractor for each key issued.

### **17.11. Stolen or Lost Badges or Keys**

17.11.1. Contractor shall immediately report lost or stolen badges or keys to the City. A new badge application or key issue form shall be completed and submitted along with payment of the applicable fees prior to issuance of a new badge or key.

### **17.12. Return of Badges or Keys**

All badges and keys are the property of the City and must be returned to the City at the Badging Office within one (1) business day after the Contract Worker's access to a City facility is no longer required to furnish the services under this Contract. Contractor shall collect a Contract Worker's badge and all keys (1) upon the termination of the Contract Worker's employment, (2) when the Contract Worker's services are no longer required at a City facility (3), and upon termination, cancellation, or expiration of this Contract.

### **17.13. Contractor's Default; Liquidated Damages; Reservation of Remedies for Material Breach**

17.13.1. Contractor's default under this Section shall include the following:



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- 17.13.1.1. A Contract Worker gains access to a City facility without the proper badge or key;
- 17.13.1.2. A Contract Worker uses another person's badge or key to gain access to a City facility;
- 17.13.1.3. A Contract Worker commences services under this Contract without the proper badge, key, or Background Screening;
- 17.13.1.4. A Contract Worker or Contractor submits false, incomplete, or misleading information or negligently submits incorrect information to the City to obtain a badge, key, or applicable Background Screening; or
- 17.13.1.5. Contractor fails to collect and timely return Contract Worker's badge or key upon termination of Contract Worker's employment, reassignment of Contract Worker to another City facility, or upon the expiration, cancellation, or termination of this Contract. Contractor acknowledges and agrees that the access control, badge, and key requirements in this Section are necessary to preserve and protect public health, safety, and welfare. Accordingly, Contractor agrees to properly cure any default under this Section within three (3) business days from the date notice of default is sent by the City. Contractor's failure to properly cure any default under this Section shall constitute a breach of this Section. In addition to any other remedy available to the City at law or in equity, Contractor shall be liable for and shall pay to the City the sum of \$1,000.00 for each breach by Contractor of this Section. The parties agree that the foregoing amount is reasonable and approximates the actual or anticipated loss to the City at the time and making of this Contract in the event that Contractor breaches this Section. Further, the parties agree to the foregoing amount because of the difficulty of proving the City's actual damages in the event Contractor breaches this Section. The parties further agree that three (3) breaches of this Section by Contractor within a three-month period of time or three (3) breaches by Contractor of this Section arising out of the same default within a period of twelve (12) consecutive months shall constitute a material breach of this Contract by Contractor and the City expressly reserves all of its rights, remedies, and interests under this Contract at law and in equity, including termination of this Contract.

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### 18. **CJIS SECURITY ADDENDUM:**

This agreement incorporates by reference the requirements of the Criminal Justice Information Services (CJIS) Security Policy (current version 5.3, dated August 4, 2014), and as referenced in Title 28 CFR 20.33.(a)(7), issued by the Federal Bureau of Investigation, Criminal Justice Information Services Division, as in force as of the date of this Agreement and as may, from time to time hereafter, be amended. Consultant warrants that it has the technological capability to handle Criminal Justice Information (CJI), as that term is defined by the FBI CJIS Security Policy, in the manner required by the CJIS Security Policy. Consultant expressly acknowledges that the CJIS Security Policy places restrictions and limitations on the access to, use of, and dissemination of CJI and hereby warrants that its system abides by those restrictions and limitations. Private contractors are permitted access to criminal history record information systems pursuant to a specific agreement for the purpose of providing services for the administration of criminal justice pursuant to that agreement. Private contractors who perform the administration of criminal justice shall meet the same training and certification criteria required by governmental agencies performing a similar function, and shall be subject to the same extent of audit review as are local user agencies. In accordance with the CJIS Security Addendum, a minimum of a background check (fingerprint) will be administered and required through the Arizona state and federal criminal justice system for all contracted employees who may have access to CJIS information. Background checks (fingerprints) will be performed and received with required clearance prior to receipt of any CJIS information.

### 19. **AGREEMENT AMENDMENTS**

Whenever an addition, deletion or alteration to the Services described in **Exhibit C** substantially changes the scope of work, thereby materially increasing or decreasing the cost of performance, a supplemental agreement must first be approved in writing by the City and Consultant before such addition, deletion or alteration shall be performed. Changes to the Services may be made and the compensation to be paid to Consultant may be adjusted by mutual agreement, but in no event may the compensation exceed the amount authorized by the Phoenix City Council for this Agreement without further authorization by the City Council. It is specifically understood and agreed that no claim for extra work done or materials furnished by Consultant will be allowed except as provided herein, nor shall Consultant do any work or furnish any materials not covered by this Agreement unless first authorized in writing by the City. Any work or materials furnished by Consultant without prior written authorization shall be at Consultant's risk, cost and expense, and Consultant agrees to submit no claim for compensation or reimbursement for additional work done or materials furnished without prior written authorization.

### 20. **NON-ASSIGNABILITY:**

20.1 This Agreement is in the nature of a personal services contract and Consultant shall have no power to assign this Agreement, including any

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right, duty, or obligation of Consultant under this Agreement, without the prior written consent of the City. Consultant shall not subcontract with any third party for any component of the Services without the prior written consent of the City. Any attempt to assign or subcontract without the City's prior written consent shall be void.

20.2 An essential consideration provided to the City by Consultant to induce the City to enter into the Agreement is Consultant's representation that the individual(s) performing services shall include Consultant's principals as selected through the Qualified Vendor solicitation process. Therefore, should such named individual(s) sever their relationship with Consultant, or otherwise be unavailable to carry out Consultant's duties under this Agreement for a period of time deemed to be excessive by the City in its sole and absolute discretion, then the City may, without notice, immediately terminate this Agreement for cause.

## 21. NOTICES:

Any notice, consent or other communication ("Notice") required or permitted under this Agreement shall be in writing and either: 1) delivered in person; 2) sent via e-mail, read receipt requested; 3) sent via facsimile transmission; 4) deposited with any commercial air courier or express service; or 5) deposited in the United States mail, postage prepaid.

If to Consultant:

|                |                |
|----------------|----------------|
| CONTACT NAME   | CONTACT NAME   |
| COMPANY NAME   | COMPANY NAME   |
| ADDRESS        | ADDRESS        |
| CITY STATE ZIP | CITY STATE ZIP |
| TELEPHONE      | TELEPHONE      |
| EMAIL ADDRESS  | EMAIL ADDRESS  |

If to the City:

|                             |  |
|-----------------------------|--|
| NAME                        | NAME, Assistant City Attorney                |
| City of Phoenix, DEPARTMENT | City of Phoenix, Office of the City Attorney |
| ADDRESS                     | 200 West Washington, 13th Floor              |
| Phoenix, AZ ZIP             | Phoenix, AZ 85003-1611                       |
| Telephone: (602) NUMBER     | Telephone: (602) NUMBER                      |
| E-Mail:                     | E-mail:                                      |
| _____@phoenix.gov           | _____@phoenix.gov                            |

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Notice shall be deemed received: 1) at the time it is personally served; 2) on the day it is sent via e-mail; 3) on the day it is sent by facsimile transmission; 4) on the second day after its deposit with any commercial air courier or express service; or 5) five (5) business days after the Notice is deposited in the United States mail as above provided. Any time period stated in a Notice will be computed from the time the Notice is deemed received. Either party may change its mailing address, telephone number, facsimile number, e-mail address, or the person to receive Notice by notifying the other party as provided in this Section. Notices sent by e-mail and facsimile transmission must also be sent by regular mail to the recipient at the above address. This requirement for duplicate Notice is not intended to change the effective date of the Notice sent by e-mail or facsimile transmission.

### **22. INTEGRATION:**

This Agreement constitutes and embodies the full and complete understanding and agreement of the parties hereto and supersedes all prior understandings, agreements, discussions, proposals, bids, negotiations, communications, and correspondence, whether oral or written. No representation, promise, inducement, statement of intention, or variation of the terms of this Agreement has been made which is not embodied in this Agreement or a written amendment hereto signed by Consultant and the City, and no party hereto shall be bound by or liable for any agreement or representation not so set forth.

### **23. GOVERNING LAW; FORUM; VENUE:**

This Agreement is executed and delivered in the State of Arizona, and the substantive laws of the State of Arizona (without reference to choice of law principles) shall govern the interpretation and enforcement of this Agreement and any claims or disputes relating to or arising out of this Agreement and/or the Services. Jurisdiction and venue for any action arising out of or relating to this Agreement or the Services shall lie exclusively in the state or federal courts within Maricopa County, Arizona, and each of the parties, to the extent permitted by law, consents to jurisdiction and venue in such courts for such purposes.

### **24. FISCAL YEAR CLAUSE:**

The City's fiscal year begins July 1 and ends June 30 each calendar year. The City may make payment for services rendered or costs encumbered only during a fiscal year and for a period of 60 days immediately following the close of the fiscal year, under the provisions of Arizona Revised Statutes §42-17108. Therefore, Consultant must submit billings for services performed or costs incurred prior to the close of a fiscal year within ample time to allow payment within this 60-day period.

### **25. TERMINATION OR SUSPENSION OF SERVICES:**

**25.1 City's Right to Terminate.** The City reserves the right to terminate this Agreement without cause, or to abandon the Services, or any part of the Services not then completed, by notifying Consultant in writing.

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Immediately upon receiving a written notice to terminate or suspend Services, Consultant shall:

- Discontinue advancing the work in progress, or such part that is described in the notice.
- Deliver to the City all collected raw data, draft reports, preliminary reports, working papers, estimates and forecasts entirely or partially completed, together with all unused materials supplied by the City.
- Appraise the work it has completed and submit its appraisal to the City for evaluation.
- In the event of a termination pursuant to this section the Consultant shall be paid in full the pro rata value for services performed to the date of its receipt of the Notice of Termination, including reimbursement for all reasonable costs and expenses incurred by Consultant in terminating the work, including demobilization of field service. No payment shall be made for loss of anticipated profits or unperformed services. The City shall have no liability for lost profits or other damages suffered by Consultant as a result of a termination pursuant to this section.

**25.2 Final Payment.** The City shall make final payment for all Services performed and accepted within sixty (60) days after Consultant has delivered to the City any final progress reports, documentation, materials and evidence of costs and disbursement as required under this Agreement.

**25.3 Temporary Suspension.** The City may, by written notice, direct Consultant to suspend performance on all or any part of the Services for such period of time as may be determined by the City to be necessary or desirable for its convenience. If such suspension causes additional expense to Consultant in performance, and such additional expense is not due to fault or negligence of Consultant, the payment will be adjusted on the basis of actual costs resulting directly from the suspension, and the period for performance of the Services will be extended by mutual agreement. Any claim by Consultant for a price adjustment must be supported by appropriate documentation asserted promptly after Consultant has been notified to suspend performance.

## 26. PROFESSIONAL COMPETENCY:

**26.1 Qualifications.** Consultant represents that it is familiar with the nature and extent of this Agreement, the Services, and any conditions that may affect its performance under this Agreement. Consultant further represents that it is fully experienced and properly qualified with respect to the Services; is

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in compliance with all applicable law and license requirements; and is adequately equipped, organized, and financed to perform the Services.

**26.2 Level of Care and Skill.** Services provided by Consultant will be performed in a manner consistent with that level of care and skill ordinarily exercised by members of Consultant's profession currently practicing in the same industry under similar conditions. Acceptance or approval by the City of Consultant's work shall in no way relieve Consultant of liability to the City for damages arising from the failure of Consultant to adhere to the aforesaid standard of professional competence.

**26.3 Conflict of Interest.** Except for the Scope of Work described herein, Consultant shall be prohibited from submitting any bid or proposal on any of the contracting opportunities arising from the Scope of Work. In addition, Consultant shall not have any pecuniary or proprietary interest in any agreement for which Consultant is performing services for the City under this Agreement. Consultant shall refrain from engaging in or carrying on any activity on behalf of any client which is in any way directly averse to the City or its interests without the specific written consent and waiver of the City. Such waiver normally requires the concurrence of City management and the Phoenix City Council. A waiver of conflict of interest may be considered by the City when different personnel within the Consultant's firm are undertaking the concurrent representations and the firm takes sufficient steps to ensure confidentiality.

### **27. SPECIFIC PERFORMANCE:**

Consultant agrees that, in the event of a breach by Consultant of any material provision of this Agreement, the City shall, upon proper action instituted by it, be entitled to a decree of specific performance thereof according to the terms of this Agreement. In the event the City shall elect to treat any such breach on the part of Consultant as a discharge of the Agreement, the City may nevertheless maintain an action to recover damages arising out of such breach. This paragraph is not intended as a limitation of such other remedies as may be available to the City under law or equity.

### **28. FORCE MAJEURE:**

Consultant shall not be responsible or liable for, or deemed in breach hereof because of, any delay in the performance of its obligations hereunder to the extent caused by circumstances beyond its control, without its fault or negligence, and that could not have been prevented by the exercise of due diligence, including but not limited to fires, natural disasters, riots, wars, unavoidable and unforeseeable site conditions, failure of the City to provide data within the City's possession or to make necessary decisions or provide necessary comments in connection with any required reports prepared by Consultant in connection with the Services, and the unforeseeable inability to obtain necessary site access, authorization, permits, licenses, certifications and

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approvals (such causes hereafter referred to as "Force Majeure").

### 29. INTELLECTUAL PROPERTY AND SPECIAL TERMS AND CONDITIONS:

**29.1 Definitions.** "Deliverables" means any and all software, equipment, systems, work to be delivered, services to be performed, or other work products provided by the Consultant within the scope of this Agreement.

"Intellectual Property" means all intellectual property rights, including with limitation, any rights in any invention, patent, discovery, improvement, know-how, utility model, trade-mark, copyright, industrial design or mask work, integrated circuit topography, trade secret and all rights of whatsoever nature in computer software and data, Confidential Information, and all intangible rights or privileges of a nature similar to any of the foregoing, including in every case in any part of the world and whether or not registered, and shall include all rights in any applications and granted registrations for any of the foregoing.

"Licensed Patents" shall mean all patents throughout the world (including patents of importation, improvement patents, patents and certificates of addition and utility models, as well as divisions, reissues, continuations, renewals, and extensions of the foregoing), applications therefore, and patents which may issue upon such applications, as to which patents or applications Consultant has at any time during the Term of this Agreement the right to grant licenses of.

"Licensed Products" shall mean any and all Deliverables which employ or are produced by the practice of inventions claimed in the Licensed Patents.

**30. INTELLECTUAL PROPERTY RIGHTS:** Consultant grants to City a nonexclusive, non-transferable (except to a wholly-owned subsidiary of the City), and royalty-free right and license to install, use, and maintain the software, application(s), or similar technology to be provided to the City pursuant to this agreement (collectively, the "Deliverables") for the City's internal or business purposes. The City shall further have the right to reproduce the Deliverables to the extent reasonably necessary for such purposes. The City shall not, without the Consultant's prior written consent, transfer or sub-license its foregoing license rights (except to a wholly-owned subsidiary of the City) or reverse engineer, decompile, or otherwise attempt to derive source code from the Deliverables.

**31. INTELLECTUAL PROPERTY RIGHTS:** The Contractor hereby irrevocably transfers, conveys, and assigns to the City all right, title, and interest (including any and all copyrights) in the software, application(s), or similar technology to be created for the City pursuant to this agreement (collectively, the "Deliverables"). The City shall have the exclusive right to apply for or register any copyrights and

## TECHNOLOGY CONSULTING PROFESSIONAL SERVICES AGREEMENT

other proprietary protections with respect to the Deliverables. The Contractor shall execute such documents, render such assistance, and take such other action as the City may reasonably request, at the City's reasonable expense, to apply for, register, perfect, confirm, and protect the City's foregoing ownership interests and copyright and other proprietary protections. To the extent that the foregoing transfer does not provide the City with full ownership, right, title, and interest in and to the Deliverables, the Contractor hereby grants the City a perpetual, irrevocable, fully paid, royalty-free, worldwide license to reproduce, create derivative works from, distribute, publicly display, publicly perform, and use the Deliverables, with the right to transfer and/or sublicense each and every such right. The rights granted in this section will survive any termination or expiration of this Agreement.

**32. INTELLECTUAL PROPERTY RIGHTS:** The Contractor hereby irrevocably transfers, conveys, and assigns to the City all right, title, and interest (including any and all copyrights) in any software and other technology assets created pursuant to or as a result of this Agreement (collectively, the "Work Product"). The City shall have the exclusive right to apply for or register any copyrights and other proprietary protections with respect to the Work Product. The Contractor shall execute such documents, render such assistance, and take such other action as the City may reasonably request, at the City's reasonable expense, to apply for, register, perfect, confirm, and protect the City's foregoing ownership interests and copyright and other proprietary protections. To the extent that the foregoing transfer does not provide the City with full ownership, right, title, and interest in and to the Work Product, the Contractor hereby grants the City a perpetual, irrevocable, fully paid, royalty-free, worldwide license to reproduce, create derivative works from, distribute, publicly display, publicly perform, and use the Work Product, with the right to transfer and/or sublicense each and every such right. The rights granted in this section will survive any termination or expiration of this Agreement.

**33. INTELLECTUAL PROPERTY INDEMNIFICATION:** In addition to the indemnification provided for elsewhere in this Agreement, Consultant agrees to defend, at its own expense, and to indemnify and hold harmless the City and its officers, agents, and employees from and against all judgments, claims, damages, suits, liabilities, settlements, costs and demands, including reasonable attorneys' fees, suffered or incurred by the City as a result of any claim that the Deliverables infringe the patents, copyrights, or other intellectual property rights of third parties, provided that Consultant is notified in writing of such claim. The City will reasonably cooperate with Consultant, at Consultant's expense, to facilitate the settlement or defense of such claim. Without limiting in any way the Consultant obligations set forth herein, if, as a result of any claim of infringement by Consultant, the City is enjoined from using the Deliverables provided under this Agreement, or if Consultant reasonably believes that the Deliverables are likely to become the subject of a claim of infringement, Consultant may, at Consultant's option and expense, (1) procure the right for the City to continue to



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use the Deliverables, or (2) replace or modify the Deliverables so as to make them non-infringing and of equal or superior functional and capability for the purpose for which the Deliverable was provided.

- 34. LIMITATION OF LIABILITY:** CITY WILL NOT BE LIABLE TO CONSULTANT OR ANY OTHER PARTY FOR ANY LOSS OF USE, INTERRUPTION OF BUSINESS OR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES OF ANY KIND (INCLUDING LOST PROFITS), REGARDLESS OF THE FORM OF ACTION WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT PRODUCT LIABILITY OR OTHERWISE, EVEN IF CONSULTANT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. The foregoing limitation of liability is independent of any exclusive remedies for breach of warranty set forth in this Agreement.

- 35. DOCUMENT DELIVERY:** All documents, together with all unused materials supplied by the City, are to be delivered to the City upon completion or termination of this Agreement before the final payment is made to Consultant.

All documents prepared by Consultant shall be prepared in a format and at a quality approved by the City.

Consultant shall review all documents provided by the City related to the performance of the Services and shall promptly notify the City of any defects or deficiencies discovered in such review.

Consultant shall provide timely and periodic submittals of all documents required of Consultant, including sub-agreements, if any, as such become available to the City for review.

- 36. RESERVATION:** Nothing in this Agreement shall be interpreted to give either party any rights whatsoever to any Intellectual Property of the other not conceived, created, developed, or reduced to practice pursuant to this Agreement or a related subcontract.

- 37. WARRANTY AGAINST INFRINGEMENT:** Consultant warrants that the Deliverables will be free of the rightful claim of any third party for or by way of infringement or misappropriation of patent, copyright, trade secret, trademark or other rights arising under the laws of the United States. Consultant further warrants that no act or omission of Consultant will result in a third party holding a claim that interferes with the City's enjoyment or use of the Deliverables.

Consultant warrants that it owns or possesses all rights, title and licenses necessary to perform its obligations hereunder.

## TECHNOLOGY CONSULTING PROFESSIONAL SERVICES AGREEMENT

Consultant warrants that, as of the Effective Date and throughout the Term, Consultant has not conveyed any rights or licenses to any third party regarding the Deliverables.

- 38. WARRANTY ON DELIVERABLES:** Consultant warrants the Deliverables (including hardware, electrical, electronic, mechanical, and all other system components, including installation, but excluding software), for a period of one (1) year starting with the date of final system acceptance (the "Warranty Period"), to be substantially free of any condition which would make the system fail to perform other than in material accordance with the requirements set forth in this Agreement (each such condition to be considered an "Error"). Consultant specifically warrants that all software (also a Deliverable) shall be free of any condition which could make it fail to perform other than in material accordance with the specifications (each such condition to be considered an "Error") for a period of 9 months after actual installation of the software. If the City reports to Consultant any Errors in the system during the Warranty Period, then Consultant shall, at its expense, use reasonable commercial efforts to modify or replace the faulty hardware, software, electrical component or other system feature as quickly as reasonably practicable. Where possible, both parties shall attempt to resolve Errors through telephone instruction, issuance of updated documentation, corrective code, or hardware replacement or modification.
- 39. MAINTENANCE:** During and after the expiration of the Warranty Period, if a written maintenance and support agreement has not yet been finalized by the parties, the City has the right to receive Basic Maintenance as hereinafter described in addition to the warranty service described above. For purposes of this Agreement, "Basic Maintenance" shall consist of:
- 39.1.** The right of the City to contact Consultant by telephone or email and to consult with Consultant regarding installation, functions, operation, Errors, and updates of the Deliverable free of charge;
  - 39.2.** Telephone support: Contact name, contact number, hours of support;
  - 39.3.** Email support: Email address, turn-around response time on emails;
  - 39.4.** On-line bulletin services: website address;
  - 39.5.** Tips for more efficient use of software: where to look;
  - 39.6.** Patches and bug fixes: how will patches and bug fixes be handled?
  - 39.7.** Errors: how will Errors be corrected, using commercially reasonable efforts? Downtime?
  - 39.8.** Product updates: how and when will this happen?
  - 39.9.** Installation: how will it be handled?
  - 39.10.** Escalation of issues: how will issues be escalated and resolved?
  - 39.11.** Training: what is offered? Included? How many employees? Follow-up?
  - 39.12.** Compensation: how will issues be compensated for if delay by Consultant in resolving them? Additional services for free? Extension of support/maintenance duration? Availability of Consultant's personnel for error correction.

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- 40. ACCEPTANCE OF DELIVERABLES:** Final acceptance of Deliverables shall be provided only after successful completion of testing of the Deliverables. Final acceptance shall not occur until all phases of implementation have been successfully performed. If applicable, acceptance test criteria is set forth below and/or detailed in **Exhibit C**.

Upon completion of any Deliverable, Consultant shall provide a copy thereof to the City for acceptance and approval. At such time, at City request, Consultant will demonstrate to the City that the Deliverable conforms to the description specified for such Deliverable. City will be responsible for any additional review and testing of such deliverable in accordance with any mutually agreed test scripts as may be included in Consultant's project management plan. If the Deliverable does not conform to the description for such Deliverable specified City shall have five business days after Consultant's submission of the Deliverable (the "Acceptance Period") to give Consultant written notice which shall specify the deficiencies in detail. Consultant shall use best efforts to promptly cure any such deficiencies. After completing such cure, Consultant shall resubmit the Deliverable for City review and testing as set forth above. Upon accepting any Deliverable submitted by Consultant, City shall provide Consultant with written acceptance of such Deliverable. If the City fails to provide written notice of any deficiencies within the Acceptance Period, as provided above, such Deliverable shall be deemed accepted at the end of the Acceptance Period.

**40.1. Business Goals.** The City's business goals in entering into this Agreement are as set forth here: **insert statement of business goals/purpose**.

**40.2. Quality Control.** The objectives and goals of this Consulting engagement are as follows: insert statement of quality control goals/purpose. The Consultant will use the following methodology to perform systematic and repeated review of each stage of work against the applicable requirements, specifications and environmental assumptions: insert statement. The Consultant will use the following procedures to present questions to the City and to ensure that any resolutions are fully implemented: insert statement.

**40.3. Non-Disclosure.** In addition to the confidentiality and data security requirements of this Agreement, Consultant shall not disclose, without the City's prior written consent, any information obtained from the City in connection with this Agreement to any person, firm, corporation, association, or other entity other than City employees qualified to receive such information, for any reason or purpose whatsoever, nor shall Consultant make use of any such confidential or proprietary information for its own purposes or for the benefit of any person, firm, corporation or other entity, except the City.

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Consultant agrees to act as a trustee of the foregoing information and as trustee of any other confidential information learned in connection by Consultant's relationship with the City. Consultant further represents to the City that, as an inducement to enter this Agreement, Consultant will hold this information in trust and confidence for the City's sole benefit and use.

Further, the Consultant shall not disseminate or publish of any information gathered, or documents prepared in the course of the performance of the Services without the prior written consent of the City.

Should the City, upon advice of counsel, deem it necessary, due to existing or anticipated litigation, to assert a legal privilege of protection and non-disclosure with regard to the subject matter of this Agreement, then, and in that event, upon written demand, Consultant shall relinquish to the possession and control of the City its entire file related to this Agreement and only those portions of said file deemed by the City to be not privileged shall be returned to Consultant pending the resolution of the existing or anticipated litigation.

Consultant agrees that the requirements of this Section shall be incorporated into any subcontracts entered into by Consultant in connection with the Services. It is further agreed that a violation of this Section shall be deemed to cause irreparable harm that justifies injunctive relief in court. A violation of this Section may result in immediate termination of this Agreement without notice. The obligations of Consultant under this Section shall survive the termination of this Agreement.

**40.4. Mutual Non-disclosure.** Each party (the "Disclosing Party") may from time to time during the term of this Agreement disclose to the other party (the "Receiving Party") certain non-public information regarding the Disclosing Party's business, including technical, marketing, financial, personnel, planning, and other information ("Confidential Information"). The Disclosing Party shall mark all such Confidential Information in tangible form with the legend 'confidential', 'proprietary', or with similar legend. With respect to Confidential Information disclosed orally, the Disclosing Party shall describe such Confidential Information as such at the time of disclosure, and shall confirm such Confidential Information as such in writing within thirty (30) days after the date of oral disclosure. Regardless of whether so marked, however, any non-public information regarding the software used in the Deliverable shall be deemed to be Confidential Information.

Except as expressly permitted by this Agreement, the Receiving Party shall not disclose the Confidential Information of the Disclosing Party using the same degree of care which the Receiving Party ordinarily uses with respect to its own proprietary information, but in no event with less

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than reasonable care. The Receiving Party shall not use the Confidential Information of the Disclosing Party for any purpose not expressly permitted by this Agreement, and shall limit the disclosure of the Confidential Information of the Disclosing Party to the employees or agents of the Receiving Party who have a need to know such Confidential Information for purposes of this Agreement, and who are, with respect to the Confidential Information of the Disclosing party, bound in writing by confidentiality terms no less restrictive than those contained herein. The Receiving Party shall provide copies of such written agreements to the Disclosing Party upon request; provided, however, that such agreement copies shall themselves be deemed the Confidential Information of the Receiving Party.

Confidential Information shall not be deemed to include any information which: 1) was already lawfully known to the Receiving Party at the time of disclosure by the Disclosing Party as reflected in the written records of the Receiving Party; 2) was or has been disclosed by the Disclosing Party to a third party without obligation of confidence; 3) was or becomes lawfully known to the general public without breach of this Agreement; 4) is independently developed by the Receiving Party without access to, or use of, the Confidential Information; 5) is approved in writing by the Disclosing Party for disclosure by the Receiving Party; 6) is required to be disclosed in order for the Receiving Party to enforce its rights under this Agreement; or 7) is required to be disclosed by law or by the order of a court or similar judicial or administrative body; provided, however, that the Receiving Party shall notify the Disclosing Party of such requirement immediately and in writing, and shall cooperate reasonably with the Disclosing Party, at the Disclosing party's expense, in the obtaining of a protective or similar order with respect thereto. The Receiving Party shall return to the Disclosing Party, destroy or erase all Confidential Information of the Disclosing Party in tangible form upon the written request of the Disclosing Party (except for software).

Consultant agrees that the requirements of this Section shall be incorporated into any subconsultant agreements entered into by Consultant. It is further agreed that a violation of this Section shall be deemed to cause irreparable harm that justifies injunctive relief in court. A violation of this Section may result in immediate termination of this Agreement without notice.

**40.5. Supervision of Others.** Consultant shall take all reasonable precautions to prevent any other person with whom Consultant is or may become associated (whether as supervisor, employee, owner or otherwise) from acquiring Confidential Information from or through Consultant and/or using or divulging such Confidential Information at any time; provided, however, Consultant shall not be responsible or liable, nor shall it be in breach of

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this Subsection, if any other person shall acquire, use, or divulge such Confidential Information as a result of a forcible entry into the office or file of City.

- 40.6. Patent License.** Consultant grants to the City under Consultant's Licensed Patents a nonexclusive license to make, use, sell, and import or otherwise dispose of the Licensed Products throughout the United States, its territories, and possessions.
- 40.7. Copyright License.** In consideration of all obligations of City hereunder, including without limitation the payment by City of amounts owing under this Agreement, Consultant hereby grants to City an exclusive (both as to Consultant and to third parties), fully transferable, worldwide, perpetual license (including the right to grant sublicenses) to use, copy, distribute, prepare derivative works of, execute, and publicly display the Deliverables.
- 40.8. Trademark License.** Consultant hereby grants to City an exclusive, fully transferable license (including the right to grant sublicenses) to use its trademarks on copies of the Deliverables and in on advertising and printed materials therefore.
- 40.9. Software License.** Consultant grants to City an irrevocable, perpetual, nonexclusive, non-transferable (other than to Affiliate), fully paid – up right and license to use, display, copy and maintain the Software limited to City's internal business purposes, which may include the right to make backup copies and to use the software at unlimited workplaces. All software and patent rights shall remain in Consultant's property. This license shall be limited to the scope of the Agreement.
- 41. RELEASE OF INFORMATION - ADVERTISING AND PROMOTION:**  
Consultant shall not publish, release, disclose or announce to any member of the public, press, official body, or any other third party: 1) any information concerning this Agreement, the Services, or any part thereof; or 2) any documentation or the contents thereof, without the prior written consent of the City, except as required by law. The name of any site on which Services are performed shall not be used in any advertising or other promotional context by Consultant without the prior written consent of the City.
- 42. CONFLICTS OF INTEREST:**  
Consultant acknowledges that, to the best of its knowledge, information and belief, no person has been employed or retained to solicit or secure this Agreement upon a promise of a commission, percentage, brokerage, or contingent fee, and that no member of the Phoenix City Council or any employee of the City has any financial interest in the consulting firm. For breach of violation

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of this warranty, the City shall have the right to annul this Agreement without liability, including any such commission, percentage, brokerage or contingent fee.

The City reserves the right to disqualify Consultant and/or terminate this Agreement in the event that the City determines that Consultant has an actual or apparent conflict of interest with the purposes of this Agreement and the provisions and procedures set forth in the section of this Agreement titled "TERMINATION OR SUSPENSION OF SERVICES" shall apply.

Upon a finding by the City that gratuities in the form of entertainment, gifts or inducements were offered or given by Consultant, or any agent or representative of Consultant, to any officer or employee of the City for the purpose of securing this Agreement, or securing favorable treatment with respect to the awarding, amending, or making of any determination with respect to the performance of this Agreement, the City may, by one (1) calendar day written notice to Consultant, terminate this Agreement. In the event of such termination, the City shall be entitled to the same remedies against Consultant as could be pursued in the event of default by Consultant.

This Agreement is subject to the requirements of Arizona Revised Statutes §38-511.

### **43. CLAIMS OR DEMANDS AGAINST THE CITY:**

Consultant acknowledges and accepts the provisions of Chapter 18, Section 14 of the Charter of the City of Phoenix, pertaining to claims or demands against the City, including provisions therein for set-off of indebtedness to the City against demands on the City, and Consultant agrees to adhere to the prescribed procedure for presentation of claims and demands. Nothing in Chapter 18, Section 14 of the Charter of the City of Phoenix alters, amends or modifies the supplemental and complementary requirements of the State of Arizona Notice of Claim statutes, Arizona Revised Statutes §§ 12-821 and 12-821.01, pertaining to claims or demands against the City. If for any reason it is determined that the City Charter and state law conflict, then state law shall control.

Moreover, nothing in this Agreement shall constitute a dispute resolution process, an administrative claims process, or contractual term as used in Arizona Revised Statutes § 12-821.01(C), sufficient to affect the date on which the cause of action accrues within Arizona Revised Statutes § 12-821.01(A) and (B).

### **44. WAIVER OF CLAIMS FOR ANTICIPATED PROFITS:**

Consultant waives any claims against the City and its officers, officials, agents and employees for loss of anticipated profits caused by any suit or proceeding, directly or indirectly, involving any part of this Agreement.

### **45. CONTINUATION DURING DISPUTES:**

Consultant agrees as a condition of this Agreement that in the event of any dispute between the parties, provided no Notice of Termination has been given

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by the City, and if it is feasible under the terms of this Agreement, each party shall continue to perform its obligations not related to the dispute required of it during the resolution of such dispute, unless enjoined or prohibited by a court of competent jurisdiction.

Failure or delay by either party to exercise any right, power or privilege specified in or appurtenant to this Agreement shall not be deemed a waiver thereof.

### **46. HIRING OF EACH OTHER'S PERSONNEL:**

Without the prior written consent of the other party, each party shall not actively target for hire personnel of the other party through the term of this Agreement and for six months after the expiration or termination of the last Statement of Work executed by the parties. This prohibition does not apply to or affect in any way the City's standard recruitment processes. The City will not owe any compensation whatsoever to the Consultant if Consultant's employee files an employment application, competes successfully and is hired into a City position. Individuals who are employed by Consultant and who are on assignment at the City may file an application for regular City employment and be considered on the same merits and qualifications as would all other applicants. For this reason, compensation to Consultant would not be appropriate and not incurred if such worker succeeds in the selection process and is appointed to a regular City position.

### **47. NO ISRAEL BOYCOTT:**

By entering into this contract, the Consultant certifies that it is not currently engaged in, and agrees for the duration of the contract to not engage in, a boycott of Israel.

### **48. LAWFUL PRESENCE REQUIREMENT:**

Pursuant to A.R.S. §§ 1-501 and 1-502, the City of Phoenix is prohibited from awarding a contract to any natural person who cannot establish that such person is lawfully present in the United States. To establish lawful presence, a person must produce qualifying identification and sign a City-provided affidavit affirming that the identification provided is genuine. This requirement will be imposed at the time of contract award. This requirement **does not** apply to business organizations such as corporations, partnerships or limited liability companies.

### **49. THIRD PARTY BENEFICIARY CLAUSE:**

The parties expressly agree that this Agreement is not intended by any of its provisions to create of the public or any member thereof a third party beneficiary nor to authorize anyone not a party to this Agreement to maintain a suit for personal injuries or property damage pursuant to the terms or provisions of this Agreement.

### **50. ACCOMMODATIONS:**

50.1 A workstation will be provided for Consultant at **ADDRESS**. A personal



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computer will be provided for access to select documentation provided by City staff and for storage of documentation developed in conjunction with the services being provided. The personal computer and all accessed data and information remain the exclusive property of City. In the event that mobile devices such as a laptop, blackberry, etc. are required to provide Services, City will provide these items to Consultant subject to City of Phoenix rules and regulations associated with the use of these items including, but not limited to, acceptable use, personal use restrictions, and financial responsibility in the event the item is lost or stolen. Should Consultant elect to provide their own mobile devices capable of meeting the requirements necessary to perform the Services, Consultant may do so with the approval of **PROJECT MANAGER NAME** (the "Project Manager").

50.1.1 Parking accommodations, including the cost thereof, shall be borne by Consultant.

50.1.2 Badge and key fees as specified in Section 18.6 of this Agreement shall be borne by Consultant.

### 51. AGREEMENT INTERPRETATION:

**51.1 Implied Agreement Terms.** Each and every provision of law and any clause required by law to be in the Agreement shall be read and enforced as though it were included herein, and if through mistake or otherwise any such provision is not inserted, or is not correctly inserted, then upon the application of either party the Agreement shall forthwith be physically amended to make such insertion or correction.

**51.2 Severability.** The provisions of this Agreement are severable to the extent that any provision or application held to be invalid shall not affect any other provision or application of the Agreement which may remain in effect without the invalid provision or application.

**51.3 Non-Waiver of Liability.** The City, as a public entity supported by tax monies, in execution of its public trust, cannot agree to waive any lawful or legitimate right to recover monies lawfully due it. Therefore, Consultant agrees that it will not insist upon, demand, or be entitled to any statement whereby the City agrees to limit in advance or waive any right the City might have to recover lawful damages.

**51.4 Parole Evidence.** This Agreement is intended by the parties as a final expression of their agreement and is intended also as a complete and exclusive statement of the terms of this Agreement. No course of prior dealings between the parties and no usage in the trade shall be relevant to supplement or explain any term used in this Agreement. Acceptance or acquiescence in a course of performance rendered under this Agreement

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shall not be relevant to determine the meaning of this Agreement even though the accepting or acquiescing party has knowledge of the nature of the performance and opportunity to object.

### 52. **NON-EXCLUSIVITY; AGREEMENT CHANGES:**

**52.1 Non-Exclusive Contract.** Any Agreement resulting from this solicitation shall be awarded with the understanding and agreement that it is for the sole convenience of the City of Phoenix. The City reserves the right to obtain like goods or services from another source when necessary.

**52.2 Authorized Changes.** The City reserves the right at any time to make changes in any one or more of the following, as long as there is not a conflict with the Scope or Proposal: (a) specifications; (b) methods of shipment or packing; (c) place of delivery; (d) time of delivery; and/or (e) quantities. If the change causes an increase or decrease in the cost of or the time required for performance, an equitable adjustment may be made in the price or delivery schedule, or both. Any claim for adjustment shall be deemed waived unless asserted in writing within 30 days from the receipt of the change. Price increases or extensions of delivery time shall not be binding on the City unless evidenced in writing and approved by the Department Director prior to the institution of the change.

### 53. **WARRANTIES:**

**53.1 Quality.** Consultant expressly warrants that all goods or services furnished under this Agreement shall conform to the specifications and appropriate standards.

**53.2 Responsibility for Correction.** It is agreed that the Consultant shall be fully responsible for making any correction, replacement, or modification necessary for specification or legal compliance.

**53.3 Liens.** Consultant shall indemnify, defend, and hold the City harmless from liens or other claims by claimants supplying labor or materials to the Consultant or its subcontractors in the performance of the work required under this Agreement. Consultant agrees to secure, at its own expense, the release of any liens relative to the Deliverables.

**53.4 Professional Responsibility.** Consultant shall use those efforts which a skilled, competent, experienced, and prudent person or organization would use to perform and complete the requirements of this Agreement in a timely manner conforming to the standards and quality generally recognized and accepted within the profession throughout the United States.

**53.5 Indemnification – Patent, Copyright And Trademark.**

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In addition to any other indemnification required by this Agreement, Contractor agrees to defend, at its own expense, and to indemnify and hold harmless the City and its officers, agents, and employees from and against all judgments, claims, damages, suits, liabilities, settlements, costs and demands, including reasonable attorneys' fees, suffered or incurred by the City as a result of any claim that the Technology Assets infringe the patents, copyrights, or other intellectual property rights of third parties, provided that Contractor is notified in writing of such claim. The City will reasonably cooperate with Contractor, at Contractor's expense, to facilitate the settlement or defense of such claim. Without limiting in any way the Contractor obligations set forth herein, if, as a result of any claim of infringement with respect to the Technology Assets, the City is enjoined from using the Technology Assets, or if Contractor reasonably believes that the Technology Assets are likely to become the subject of a claim of infringement, Contractor may, at Contractor's option and expense, (1) procure the right for the City to continue to use the Technology Assets, or (2) replace or modify the Technology Assets so as to make them non-infringing and of equal or superior functionality and capability for the purpose(s) for which the Technology Assets were provided.

The Contractor's obligation to indemnify, defend, and hold harmless the City pursuant to this subsection shall be reduced to the extent the applicable infringement is caused or alleged to be caused by the alteration or modification of the Technology Assets by the City (including its employees and contractors other than the Contractor and its subcontractors) other than in connection with the ordinary or expected use of the Technology Assets.

**53.6 WARRANTIES.** Contractor warrants the hardware, software, application(s), or other technology assets provided to the City pursuant to this contract (collectively, the "Technology Assets"), for a period of one year starting with the date of final acceptance (the "Warranty Period"), to be substantially free of any condition which would make the Technology Assets fail to perform in material accordance with the requirements set forth in this Agreement, including any statement-of-work or scope-of-work document (each such condition to be considered an "Error"). Contractor specifically warrants that all software Technology Assets shall be free of any condition which could make them fail to perform in material accordance with this agreement (each such condition to also be considered an "Error") for a period of nine months after actual installation of the software. If the City reports to Contractor any errors in the system during the Warranty Period, then Contractor shall, at its expense, use reasonable commercial efforts to modify, replace, or otherwise remedy the faulty hardware, software, electrical component or other Technology Assets as quickly as reasonably practicable. Where possible, both parties shall attempt to resolve Errors through telephone instruction, issuance of

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updated documentation, corrective code, or hardware replacement or modification.

**53.7 STANDARDS AND PRACTICES.** Technology Assets shall conform to the generally accepted standards and practices of the trade or industry involved. All work shall be executed by personnel skilled in their respective lines of work.

**53.8 QUALIFICATIONS.** Contractor represents that it is fully experienced and properly qualified; is in compliance with all applicable license requirements; and, is equipped, organized, and financed to provide and/or perform the goods and/or services purchased by the City pursuant to this agreement.

**53.9 INTELLECTUAL PROPERTY WARRANTIES.** Contractor warrants that:

- The Technology Assets will be free of the rightful claim of any third party for or by way of infringement or misappropriation of patent, copyright, trade secret, trademark or other rights arising under the laws of the United States;
- No act or omission of Contractor will result in a third party holding any other claim that interferes with the City's enjoyment or use of the Technology Assets;
- Contractor owns or possesses all right(s), title(s) and license(s) necessary to perform its obligations hereunder; and
- As of the effective date and throughout the term of this Agreement, Contractor has not conveyed and will not convey any rights or licenses to any third party regarding the Technology Assets, except to the extent the Technology Assets consist of commercial-off-the-shelf or similar software product(s).

### **54. CITY'S CONTRACTUAL RIGHTS:**

**54.1 Right to Assurance.** Whenever one party to this Agreement in good faith has reason to question the other party's intent to perform, the former party may demand that the other party give a written assurance of this intent to perform. In the event that a demand is made and no written assurance is given within five days, the demanding party may treat this failure as an anticipatory repudiation of this Agreement.

**54.2 Non-Exclusive Remedies.** The rights and remedies of the City under this Agreement are non-exclusive.

**54.3 Default.** In case of default by the proposer, the City may, by written notice, terminate this Agreement and repurchase from another source and may

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recover the excess or additional costs caused thereby by (1) deduction from an unpaid balance due; (2) collection against the proposal and/or performance bond, or (3) a combination of the aforementioned remedies or other remedies as provided by law.

**IN WITNESS WHEREOF**, the parties herein have caused this Agreement to be executed.

**CONSULTANT**

**CITY OF PHOENIX**, an Arizona corporation  
JEFF BARTON, City Manager

By: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

APPROVED AS TO FORM:  
CRIS MEYER, City Attorney

By: \_\_\_\_\_

Assistant Chief Counsel

ATTEST:

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
Date

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EXHIBIT A – Indemnification and Insurance

***(Specific Indemnification and Insurance requirements will be determined based on the SOW request.)***

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**EXHIBIT B – Consultants Insurance Certificate**

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**EXHIBIT C – Scope of Work / Statement of Work / Services**



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**EXHIBIT D – Fee Schedule**

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**EXHIBIT E – Supplemental Terms and Conditions**

***(Specific Supplemental Terms and Conditions will be determined determined based on the SOW request.)***