



**TECHNOLOGY CONSULTING PROFESSIONAL SERVICES SAMPLE CONTRACT
AGREEMENT**

BETWEEN

THE CITY OF PHOENIX

AND

CONSULTANT

City of Phoenix Agreement No. _____

Department Contact
Name of Department
Department Address & Phone #

SAMPLE CONTRACT

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SAMPLE CONTRACT

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 has been allocated funds from the Coronavirus Local Fiscal Recovery Fund pursuant to the American Rescue Plan Act (“ARPA”) for the purpose of, among others, responding to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19) or its negative economic impacts; and

WHEREAS, many City residents are in need of financial aid to assist with housing costs, utilities, and other basic needs due to the ongoing public health and economic consequences of COVID-19, and the City has funding to meet these needs through the federal Emergency Rental Assistance, Coronavirus Local Fiscal Recovery Fund, LIHEAP, and other state, federal, and local assistance programs; and

WHEREAS, the City desires to expedite and facilitate applications from City residents for such assistance through the use of an internet-based application portal and associated technologies; and

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 to help respond to the public health emergency and negative economic impacts associated with COVID-19 by facilitating applications for housing, utility, and other assistance; and

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

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

WHEREAS, this Agreement is authorized by action of the City Council dated DATE;

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

1. TERM OF AGREEMENT:

The term of this Agreement shall commence on or about March 1, 2022 and continue through June 20, 2026 with two options to extend for additional five-year terms which options 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.

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 rate of \$ dollars cents, 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. 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 a monthly basis or as directed by City staff. Each invoice will clearly note any Purchase Order. 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 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/w9.pdf>

Invoice Instructions:

Email Invoices to: TBD

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

4. **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 F, if any**. Consultant will provide progress reports and weekly time sheets to the Project Manager according to a mutually agreed-upon schedule.
5. **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.

6. 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 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.

7. 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.

8. CONFIDENTIALITY AND DATA SECURITY

“Confidential Information” means all non-public, confidential, sensitive, or proprietary information disclosed or made available by City to Consultant or its affiliates, employees, contractors, partners, or agents (collectively “Recipients”), whether disclosed before or after the Effective Date, whether disclosed orally, in writing, or via permitted electronic access, and whether or not marked, designated, or otherwise identified as “confidential,” including: all user contents, user data, electronic files, meta data, technology networks, information security practices, business operations, financial accounts, personal identifying data, protected health information, protected criminal justice information, and any other information that by the nature and circumstance of the disclosure should be deemed confidential. Confidential Information does not include information that: (a) is now or subsequently becomes generally available to the public through no wrongful act or omission of Consultant; (b) Consultant can demonstrate by its written records to lawfully have had in its possession prior to receiving such information from the City; (c) Consultant can demonstrate by its written records to have been independently developed by Consultant without direct or indirect use of any Confidential Information; (d) Consultant lawfully obtains from a third party who has the right to transfer or disclose it; or (e) is approved in writing by the City for disclosure.

Consultant shall: (a) protect and safeguard Confidential Information with at least the same degree of care as Consultant would protect its own Confidential Information, but in no event with less than a commercially reasonable degree of care, such as using data encryption and maintaining appropriate technical and organizational measures in performing the Services under this Agreement; (b) not use Confidential Information or permit it to be accessed or used, for any purpose other than in accordance with this Agreement; (c) not use Confidential Information, or permit it to be accessed or used, in any manner that would constitute a violation of law, including without limitation export control and data privacy laws; and (d) not disclose Confidential Information except to the minimum number of Recipients who have a need to know and who have been informed of and agree to abide by confidentiality obligations that are no less restrictive than the terms of this Agreement. If Consultant is required by law to disclose any Confidential Information, Consultant will first give written notice to the City and provide the City with a meaningful opportunity to seek a protective order or limit disclosure.

Upon the termination of this Agreement or at any time as instructed by the City in writing, Consultant shall promptly return to the City all copies of Confidential Information that Consultant has in its possession and/or destroy all such copies and certify in writing to the City that Confidential Information has been destroyed. If applicable, Consultant agrees to comply with all City information security and technology policies, standards, as may be updated from time to time, when accessing City networks and computerized systems whether onsite or remotely.

Consultant will indemnify and hold the City harmless against all losses, claims,

costs, attorneys' fees, damages or proceedings suffered or incurred by the City arising out of Consultant's breach of this Section (Confidentiality). This provision shall not be subject to any limits of liability or exclusions as may be stated elsewhere in this Agreement.

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.

DATA SECURITY

The parties agree this Section shall apply to Confidential Information and/or any other category of legally protected information (collectively "PII") that Consultant processes in the course of providing Services to the City pursuant to this Agreement. As between the parties, the City is the data controller and owner of PII and Consultant is a data processor.

When Consultant processes PII pursuant to this Agreement, Consultant shall, at no additional cost to the City:

- process PII only within the United States and only in accordance with this Agreement and not for Consultant's own purposes, including product research, product development, marketing, or commercial data mining, even if the City's data has been aggregated and anonymized;
- implement and maintain appropriate technical and organizational measures to protect PII against unauthorized or unlawful processing and against accidental loss, destruction, damage, theft, alteration or disclosure, including as a minimum those measures specified by A.R.S. § 44-7601 (Discard and Disposal of Personal Identifying Information Records); Consultant's Security and Privacy document attached as **Exhibit** ___ and incorporated herein; and good industry practice; (When considering what measures are appropriate and in line with good industry practice, Consultant shall keep abreast of current regulatory trends in data security and the state of technological development to ensure a level of security appropriate to the nature of the data to be protected and the harm that might result from such unauthorized or unlawful processing or accidental loss, destruction, damage, theft, alteration or disclosure. If requested by the City, Consultant shall

promptly provide a written description of the technical and organizational methods it employs for processing PII.)

- not subcontract any processing of PII to any third party (including affiliates, group companies or sub-contractors) without the prior written consent of the City; and Consultant shall remain fully liable to the City for any processing of PII conducted by a sub-processor appointed by Consultant in accordance with this Section;
- take reasonable steps to ensure the competence and reliability of Consultant's personnel or sub-processor who have access to the PII, including verifications and background checks appropriate to the security level required for such data access;
- maintain written records of all information reasonably necessary to demonstrate Consultant's compliance with this Agreement and applicable laws;
- allow the City or its authorized agents to conduct audit inspection during the term of the Agreement, but no more than once per year, which may include providing access to the premises, documents, resources, personnel Consultant or Consultant's sub-contractors use in connection with the Services; provided however, the City may at its sole discretion accept a qualified independent third-party assessment report or certification provided by Consultant at no cost to the City in lieu of the audit inspection rights of this section;

If Consultant becomes aware of any data breach, Consultant shall notify the City without undue delay and:

- provide the City with a detailed description of the data breach, the type of data that was the subject of the data breach, and the identity of each affected person as soon as such information can be collected or otherwise becomes available;
- take action immediately, at Consultant's own expense, to investigate the data breach and to identify, prevent, and mitigate the effects of the data breach and to carry out any recovery or other action necessary to remedy the data breach;

- cooperate with the City in investigating the occurrence, including making available all relevant records, logs, files, data reporting, and other materials required to comply with applicable laws or as otherwise required by the City; and
- not directly contact any individuals who may be impacted by the breach or release or publish any filing, communication, notice, press release, or report concerning the data breach without the City's prior written approval (except where required to do so by applicable laws).

Consultant will indemnify and hold the City harmless against all losses, claims, costs, attorneys' fees, damages, or proceedings suffered or incurred by the City arising out of Consultant's breach of this Section (Data Security). This provision shall not be subject to any limits of liability or exclusions as may be stated elsewhere in this Agreement.

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.

9. 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.

10. EQUAL EMPLOYMENT OPPORTUNITY REQUIREMENT

10.1 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.

10.2 For a Consultant with 35 employees or less: Consultant in performing under this Agreement shall not discriminate against any worker, employee or Client, 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 Clients 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.

10.3 For a Consultant with more than 35 employees: Consultant in performing under this Agreement shall not discriminate against any worker, employee or Client, 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 Clients 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 Client, or any member of the public, because of sexual orientation or gender identity or expression and shall ensure that Clients are employed, and employees are dealt with during employment without regard to their sexual orientation or gender identity or expression.

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

10.5 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.

11. 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 five (5) years following termination of the Agreement.

12. 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.

13. 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.

14. NON-ASSIGNABILITY:

14.1 This Agreement is in the nature of a personal services contract and Consultant shall have no power to assign this Agreement, including any right, duty, or obligation of Consultant under this Agreement, without the prior written consent of the City.

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.

16. 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 liable for any agreement or representation not so set forth.

17. 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.

18. 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.

19. TERMINATION OR SUSPENSION OF SERVICES:

19.1 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. 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.

19.2 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.

19.3 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.

20. PROFESSIONAL COMPETENCY:

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

20.2 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.

21. 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.

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

23. INTELLECTUAL PROPERTY AND SPECIAL TERMS AND CONDITIONS:

23.1 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 as specified in Exhibit C (collectively, the "Deliverables") for the City's internal or business purposes. This license will extend to an unlimited number of City-authorized users, which may include third parties assisting the City with its internal or business uses of the Deliverables. 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.

23.2 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 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.

23.3 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.

23.4 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.

23.5 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.

23.6 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.

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

23.7 Warranty on Deliverables. Consultant warrants the Deliverables (including hardware, electrical, electronic, mechanical, and all other system components, including installation, but excluding software), for the duration of the term of this Agreement, including any extensions, 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 the duration of the term of this Agreement, including any extensions. If the City reports to Consultant any Errors in the system during the term of this Agreement, including any extensions, 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.

23.8 Maintenance. During the term of this Agreement, 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:

23.8.1 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;

- 23.8.2 Telephone support: Contact name, contact number, hours of support;
- 23.8.4 Email support: Email address, turn-around response time on emails;
- 23.8.5 On-line bulletin services: website address;
- 23.8.6 Tips for more efficient use of software: where to look;
- 23.8.7 Patches and bug fixes: how will patches and bug fixes be handled?
- 23.8.8 Errors: how will Errors be corrected, using commercially reasonable efforts? Downtime?
- 23.8.9 Product updates: how and when will this happen?
- 23.8.10 Installation: how will it be handled?
- 23.8.11 Escalation of issues: how will issues be escalated and resolved?
- 23.8.12 Training: what is offered? Included? How many employees? Follow-up?
- 23.8.13 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.

23.9 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.

23.10 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.

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.

23.11 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 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.

23.12 Trademark License. Consultant hereby grants to City a non-exclusive, non-transferable license to use its trademarks on copies of the Deliverables and in, on advertising and printed materials, therefore.

24. 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.

25. 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 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.

26. 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).

27. 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.

28. 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 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.

29. 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 a questionnaire for regular City employment and be considered on the same merits and qualifications as would all other Clients. 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.

30. 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.

31. 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.

32. 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.

33. AGREEMENT INTERPRETATION:

33.1 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.

33.2 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.

33.3 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.

33.4 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 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.

34. NON-EXCLUSIVITY; AGREEMENT CHANGES:

34.1 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.

34.2 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 90 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.

35. WARRANTIES:

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

35.2 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.

35.3 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.

35.4 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.

35.5 STANDARDS AND PRACTICES. Deliverables 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.

35.6 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.

36. CITY'S CONTRACTUAL RIGHTS:

36.1 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.

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

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

SAMPLE CONTRACT

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

CONSULTANT

CITY OF PHOENIX, a municipal corporation
Jeffrey Barton, City Manager

By:

By:

Title:

Date:

Date:

SAMPLE CONTRACT

APPROVED AS TO FORM,
CRIS MEYER, City Attorney

Print Name

Assistant Chief Counsel

ATTEST:

City Clerk

Date