

GENERAL PROVISIONS

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1. Definitions

The following terms shall have the meanings set forth below:

- (a) "Contract" means the contract or purchase order attached hereto, these general provisions, any special terms and conditions, and all referenced attachments.
- (b) "Laws and Regulations" means any and all applicable state, federal and local laws, rules, regulations, ordinances, codes, and orders of any and all governmental bodies, agencies, authorities, and courts having jurisdiction.
- (c) "Materials" shall mean the goods, deliverables, software, machinery, equipment, supplies and materials constituting the subject matter of this Contract.
- (d) "SELLER" means the vendor or seller set forth on the contract or purchase order attached hereto.
- (e) "UTILITIES" means Colorado Springs Utilities, an enterprise of the City of Colorado Springs, a Colorado home rule city and municipal corporation, with its principal place of business at 121 South Tejon Street, Colorado Springs, Colorado 80903
- (f) "Work" means all Materials, maintenance, construction and services constituting the subject matter of this Contract.

2. Acceptance of Contract. (NOV 2006) SELLER's acknowledgement, acceptance of a purchase order or payment, shipment of Materials or commencement of performance, whichever occurs first, shall constitute SELLER's unqualified acceptance of this Contract, whether or not SELLER otherwise signs this Contract, unless SELLER objects to such terms in writing within ten (10) days of placement of order by UTILITIES. This writing does not constitute a firm offer within the meaning of C.R.S. § 4-2-205, and may be revoked at any time prior to acceptance.

3. Appropriation of Funds. In accord with the City Charter, performance of UTILITIES obligations under this Contract are expressly subject to appropriation of funds by the City Council or Utilities Board. Further, in the event that funds are not appropriated in whole or in part sufficient for performance of UTILITIES obligations under this Contract, or appropriated funds may not be expended due to City Charter spending limitations, then this Contract shall thereafter become null and void by operation of law, and UTILITIES shall thereafter have no liability for compensation or damages to SELLER in excess of UTILITIES authorized appropriation for this Contract or the applicable spending limit, whichever is less. UTILITIES shall notify SELLER as soon as reasonably possible in the event of non-appropriation or

in the event a spending limitation becomes applicable. The funds appropriated for this Contract are equal to or exceed the Contract amount for the year in which this Contract was awarded. For Work to be completed in subsequent fiscal years, if any, UTILITIES will notify SELLER of the appropriation of funds for such Work after the adoption of UTILITIES annual appropriation ordinance for those years. SELLER and UTILITIES agree and acknowledge as a part of this Contract, that no change order or other form or order or directive may be issued by UTILITIES which requires additional compensable Work to be performed, which Work causes the aggregate amount payable under the Contract to exceed the amount appropriated for this Contract as listed above, unless SELLER has been given a written assurance by UTILITIES that lawful appropriations to cover the cost of the additional Work have been made or unless such Work is covered under a remedy-granting provision in this Contract.

4. Assignment. There shall be no assignment of the rights or obligations contained in this Contract by either party without the prior written consent by the other party, and any such assignment in violation of the foregoing shall be null and void. Notwithstanding the foregoing, upon written notice to SELLER, UTILITIES may assign this Contract without consent to the City of Colorado Springs, Colorado.

5. Audit. SELLER shall maintain accurate documents, papers and records of all amounts billable to and payments made by UTILITIES hereunder and related to the Work in accordance with recognized accounting practices, and as required by Laws and Regulations, and in a format that will permit audit, for a period of three (3) years after payment of the last invoice related to this Contract or resolution of claim, whichever is later. Such records shall be open to reasonable inspection and subject to audit and/or reproduction, during normal working hours, by UTILITIES or its authorized representative.

6. Changes. UTILITIES may at any time, by written notice, and without notice to sureties or assignees, make changes within the general scope of this Contract in any one or more of the following: (i) drawings, designs or specifications; (ii) method of shipping or packing; (iii) place of inspection, acceptance or point of delivery; and (iv) delivery schedule. Subject to Section 3 "Appropriation of Funds" above, if any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of this Contract, UTILITIES may agree to an equitable adjustment in the Contract price and/or delivery schedule, and the Contract will be modified accordingly upon mutual written agreement by authorized representatives of the parties. Any claim for an equitable adjustment by SELLER must be submitted in writing to UTILITIES within thirty (30) days from the date of notice of the change, unless the parties agree in writing to a longer period. Failure to agree to any adjustment shall be resolved in accordance with Section 10 "Dispute Resolution" below. However, nothing contained in this provision shall excuse SELLER from proceeding without delay in the performance of this Contract as changed.

7. **Compliances.** (NOV 2006) In performing or providing the Work hereunder, SELLER shall comply with all Laws and Regulations as well as technical standards or specifications issued by UTILITIES. SELLER must qualify for and obtain any required licenses and permits prior to commencing Work.

Compliance with Colorado Revised Statute 8-17.5-101 et seq. (NOV 2006)

- (a) Contractor represents, warrants, and agrees that it (i) has verified that it does not employ any illegal aliens, or (ii) has attempted to verify through participation in the Department of Homeland Security's Basic Pilot Program that the Contractor does not employ any illegal aliens and, if potential Contractor is a sole proprietor, is not himself/herself an illegal alien. Further, if the Contractor has not been accepted into the Basic Pilot Program prior to entering into this Agreement, the Contractor shall apply to participate in the Basic Pilot Program (unless it has been discontinued) every three months thereafter until the Contractor either is accepted or this Agreement has been completed, whichever is earlier.
- (b) Notwithstanding the foregoing subparagraph, the Contractor shall be prohibited from using and relying upon the Basic Pilot Program procedures for the purpose of, or to undertake, pre-employment screening of job applicants while this Agreement is being performed.
- (c) If at any time prior to or during the performance of this Agreement, the Contractor obtains actual knowledge that a subcontractor performing work under this Agreement knowingly employs or contracts with an illegal alien, the Contractor shall be required to (i) notify both the subcontractor and UTILITIES in writing within three (3) days after obtaining such knowledge that the Contractor has actual knowledge that the subcontractor is employing or contracting with an illegal alien, and (ii) terminate the subcontract with the subcontractor if, within the three (3) days following receipt of such notice, the subcontractor does not stop employing or contracting with the illegal alien, except that the Contractor shall not terminate the contract with the subcontractor if, during such three (3) days' time, the subcontractor provides information to the Contractor to establish that the subcontractor has not knowingly employed or contracted with an illegal alien. For purposes of this subparagraph only, and without waiving or changing any other Notice provisions in this Agreement, all notices to UTILITIES to comply with this subparagraph only shall be addressed to the attention of the "Procurement & Contract Services Manager," Colorado Springs Utilities, P.O. Box 1103, Mail Stop 920, Colorado Springs, Colorado 80947-0920
- (d) The Contractor shall comply with all reasonable requests made in the course of an investigation under CRS 8-17.5-102 by the Colorado Department of Labor and Employment.
- (e) If CONTRACTOR is a sole proprietor, then CONTRACTOR shall comply with Colorado Revised Statutes 24-76.5-101, et seq., 24-37.5-101 and 39-22-604.

8. **Confidentiality.** (NOV 2006)

- (a) SELLER acknowledges that UTILITIES is a public entity subject to the provisions of the Colorado Public Records Act. SELLER acknowledges that it has been or may be exposed to confidential or proprietary information, oral or written, ("Confidential Information"), including, but not limited to, customer information, financial and business information (including, without limitation, revenues, expenses, taxes and contracts), partner relationships, patents, trade secrets, technical processes, formulae related to products and services, pricing and any device, technique or compilation of information used in UTILITIES business. SELLER agrees that it shall not use, commercialize or disclose such Confidential Information to any person or entity, except to its own employees having a "need to know." SELLER may only disclose Confidential Information to third parties upon prior written approval by UTILITIES, and shall comply with UTILITIES approval in making such disclosure. SELLER shall use at least the same degree of care in safeguarding Confidential Information as it uses in safeguarding its own confidential information, but in no event less than reasonable care. Nothing is intended to or shall grant SELLER an ownership right, a license or other right of any nature to use Confidential Information except as expressly provided herein.
- (b) The recipient shall hold such information confidential to the extent provided by law and shall not engage in any use or disclosure of such information not expressly provided for in this Agreement. In the event either party receives a request for such confidential and/or proprietary

information from a third party, notice thereof shall promptly be given to the other party. The recipient shall take all reasonable steps to prevent any unauthorized possession, use, transfer or disclosure of such confidential information. Should the recipient learn of any such unauthorized possession, use, transfer or disclosure, it shall promptly notify the other party. If requested, the recipient shall deliver to the other party all confidential information (including all copies) disclosed to it with respect to this Agreement.

- (c) The disclosure provisions of this section shall not apply to information that a) the parties had in their possession prior to disclosure by the other party; b) becomes public knowledge through no fault of CONTRACTOR; c) the recipient lawfully acquires from a third party not under an obligation of confidentiality to the disclosing party; or d) is required to be disclosed by law or court order.
 - (d) CONTRACTOR shall not disclose any such confidential information or documents to any third party without the prior written authorization of UTILITIES.
9. **Delivery.** Time is of the essence. If the Work is not completed by the designated time, UTILITIES reserves the right without liability, in addition to its other rights and remedies, to terminate this Contract under Section 33 "**Termination for Convenience**" as to Materials not yet shipped or services not yet rendered and to purchase substitute Materials or services elsewhere and charge SELLER with any loss incurred.
10. **Dispute Resolution.** If a dispute arises between the parties relating to this Contract, the following procedure shall be followed:
- (a) The parties shall hold a meeting promptly, but in no event later than thirty (30) calendar days from the initial written notice of the dispute, attended by persons with decision-making authority regarding the dispute, to attempt in good faith to negotiate a resolution of the dispute; provided, however, that no such meeting shall be deemed to vitiate or reduce the obligations and liabilities of the parties thereunder or be deemed a waiver by a party hereto of any remedies to which such party would otherwise be entitled thereunder unless otherwise agreed to by the parties in writing.
 - (b) If, within thirty (30) calendar days after such meeting, the parties have not succeeded in negotiating a resolution of the dispute, they agree to submit the dispute to non-binding mediation and to bear equally the costs of the mediation.
 - (c) The parties will jointly appoint a mutually acceptable mediator. If they fail to do so within twenty (20) calendar days from the conclusion of the negotiation period, they shall each select a mediator. The two mediators will then appoint a third mediator who shall, as the sole mediator, conduct mediation for the parties.

The parties agree to participate in good faith in the mediation and negotiations related thereto for a period of thirty (30) calendar days. The substantive and procedural law of the State of Colorado shall apply to the proceedings. If the parties are not successful in resolving the dispute through mediation, then the parties shall be free to litigate the matter.

11. **Entire Agreement.** This Contract constitutes the entire agreement between the parties and supersedes all previous written or oral communications, understandings, and agreements between the parties unless specifically stated herein. The terms and conditions of this Contract shall prevail notwithstanding any variance with the terms and conditions of any acknowledgement or other document submitted by SELLER. The parties specifically agree that any language or provisions contained on SELLER's web site, product schedule or other ordering document, or contained in any shrinkwrap or "clickwrap" agreement, shall be of no force and effect and shall not in any way supersede, modify, supplement or amend this Contract. This Contract may only be amended by a written agreement signed by both parties. Email and all other electronic (including voice) communications from UTILITIES in connection with this Contract are for informational purposes only. No such communication is intended by UTILITIES to constitute either an electronic record or an electronic signature, or to constitute any agreement by UTILITIES to conduct a transaction by electronic means. Any such intention or agreement is hereby expressly disclaimed.

12. **Force Majeure.** UTILITIES may delay delivery or acceptance occasioned by causes beyond its control. SELLER shall hold Materials at the direction of UTILITIES and shall deliver them when the cause affecting the delay has been removed. UTILITIES shall be responsible only for SELLER's direct additional costs in holding the Materials or delaying performance of this Contract at UTILITIES request. Causes beyond UTILITIES control shall include acts of God, government action or failure of the government to act where such action is required, strike or other labor trouble, fire, flood, or unusually severe weather.

13. **Governing Law.** This Contract shall be construed in accordance with the laws of the State of Colorado without reference to conflicts of laws, the Colorado Springs

City Charter, City Code, Ordinances, Rules and Regulations. In the event of litigation, this Contract shall be enforceable by or against the City of Colorado Springs on behalf of UTILITIES as provided in Colorado Springs City Code § 12.1.108. In the event of any dispute over the Contract's terms and conditions, the exclusive venue and jurisdiction for any litigation arising thereunder shall be in the District Court of El Paso County, Colorado, and, if necessary for exclusive federal questions, the United States District Court for the District of Colorado.

14. **Indemnification** (JUL 2007) To the fullest extent permitted by law, SELLER shall release, defend and hold harmless UTILITIES, the City of Colorado Springs, their officers, City Council, Utilities Board, directors, employees, agents and representatives from and against any and all losses, damages (including attorney's fees, expert fees, and all litigation expenses), injuries, claims, cause or causes of action, or any liability of any kind whatsoever resulting from, or arising out of, or in connection with the Work provided by SELLER pursuant to this Contract, including, without limitation, (i) any claim based on the death or bodily injury to any person, destruction or damage to property, or contamination of the environment and any associated clean up costs, (ii) any claim based on the negligence, omissions or willful misconduct of SELLER or any of its employees, consultants or agents, and (iii) any claim by a third party against UTILITIES alleging that the Work, the results of such Work, or any other products or processes provided under this Contract, infringe a patent, copyright, trademark, trade secret or other proprietary right of a third party; provided, however, that if the Work performed is construction, then SELLER's obligations under this entire paragraph are limited to the extent of the negligence attributed to such acts or omissions of SELLER or any of SELLER's employees, consultants, agents, subcontractors, any subcontractor's subcontractor, or other person or entity employed directly or indirectly by any of them, and anyone for whose acts they may be liable.

15. **Independent Contractor**. SELLER understands and agrees that SELLER and SELLER's employees, agents, subcontractors or other personnel are not UTILITIES employees. SELLER shall be solely responsible for payment of salaries, wages, payroll taxes, unemployment benefits or any other form of compensation or benefits to SELLER or any of SELLER's employees, agents, subcontractors or other personnel performing, directly or indirectly, the Work specified herein. Further, it is expressly understood and agreed that neither SELLER nor SELLER's employees, agents, subcontractors or other personnel shall be entitled to any UTILITIES payroll, insurance, unemployment, Worker's Compensation, retirement or any other benefits whatsoever.

16. **Inspection/Testing**. Payment for any Work supplied hereunder shall not constitute acceptance thereof. UTILITIES shall have the right to inspect Work and to reject any or all of Work which are in UTILITIES' judgment defective or nonconforming. Work rejected and Materials supplied in excess of quantities called for herein may be returned to SELLER at SELLER's expense and, in addition to UTILITIES' other rights, UTILITIES may charge SELLER all expenses of unpacking, examining, repacking and reshipping the Materials. In the event UTILITIES receives Work with defects or nonconformity not apparent on examination, UTILITIES reserves the right to require replacement, as well as payment of damages. Nothing contained in this Contract shall relieve in any way the SELLER from the obligation of testing, inspection and quality control. Use of a portion of the Materials for testing shall not constitute acceptance of the Materials. Nonconforming Materials will be returned to SELLER freight collect and risk of loss will pass to SELLER upon UTILITIES' delivery to the common carrier.

17. **Insurance/Bonds**, (MAR 2007) SELLER agrees to maintain at its own expense all legally required insurance for its premises, associates, and employees. SELLER shall maintain the following insurance with limits not less than as follows: Workers' Compensation in accordance with the requirements of the State of Colorado and Employer's liability insurance of not less than \$500,000 per occurrence; Commercial General Liability insurance with a combined single limit of \$1,000,000 per occurrence for bodily injury and property damage; Automobile Liability insurance including owned and hired vehicles with a combined single limit of \$500,000 per occurrence for bodily injury and property damage insurance with a combined single limit of \$500,000 per occurrence, and excess liability of \$1,000,000 combined single limit per occurrence. Upon request, SELLER shall provide UTILITIES with certificates of insurance. In the event the amounts due under this Contract exceed One Hundred Thousand Dollars (\$100,000), and upon request by UTILITIES, SELLER shall furnish performance, payment and/or maintenance bonds acceptable to UTILITIES, each in an amount at least equal

to the price of the Contract, as security for the faithful performance of SELLER's obligations under the Contract.

18. **Invoicing/Payment**. (APR 2006) Payment of undisputed invoices at the prices stipulated herein is due and payable Net Thirty (30) Days from UTILITIES' receipt of a complete and accurate invoice for supplies or services accepted by UTILITIES. Each invoice shall be accompanied by supporting documentation as required by UTILITIES. Unless otherwise specified in this Contract, payment shall be made on partial deliveries accepted by UTILITIES if (i) the amount due on the deliveries warrants it, or (ii) SELLER requests it and the amount due on the deliveries is at least \$1,000 or 50% of the total contract price. Original invoices for payment shall be submitted and addressed to Accounts Payable - MC 929, Colorado Springs Utilities, PO Box 1103, Colorado Springs, Colorado 80947-0929. Unless otherwise stated in this Contract, a copy of each invoice, duly marked "COPY", shall be sent directly to the project manager or contract administrator as identified in this contract and as otherwise advised in writing.

19. **Late Payment**. (APR 2006) UTILITIES is committed to paying invoices within the terms of the Contract. UTILITIES will not pay any late charges or service charges that may be incurred due to late payment.

20. **Limitation of Liability**. IN NO EVENT SHALL UTILITIES BE LIABLE TO SELLER OR ANY THIRD PARTY FOR ANY INCIDENTAL, INDIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF, OR IN CONNECTION WITH, THIS CONTRACT, WHETHER OR NOT UTILITIES WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. UTILITIES liability on any claim of any kind for any loss or damage arising out of, in connection with or resulting from this Contract or from the performance or breach thereof shall in no case exceed the price allocable to the Work which gives rise to the claim. UTILITIES shall not be liable for penalties of any kind. Any action resulting from any breach on the part of UTILITIES as to the Work hereunder must be commenced within one (1) year after the cause of action has accrued. Nothing in this Contract shall be interpreted to limit or prevent the protections afforded to UTILITIES under the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.*

21. **No Publicity**. SELLER shall not advertise or promote using the name or description of UTILITIES, without prior written consent of UTILITIES.

22. **Non-Discrimination**. UTILITIES is committed to equal employment opportunity for all and maintains and implements equal opportunity and affirmative action where necessary in all of its daily operations. UTILITIES' policy is that no person shall be discriminated against because of race, color, national origin or ancestry, sex, age, religious convictions, veteran status, disability or political beliefs. SELLER shall comply with all Federal and State nondiscrimination laws and have an equal employment opportunity policy. SELLER shall also comply with UTILITIES Equal Employment Opportunity Affirmative Action policies regarding nondiscrimination and harassment, which includes sexual harassment, in the conduct of its business while on UTILITIES property and/or interacting with UTILITIES employees. SELLER will cooperate with UTILITIES in using SELLER's best efforts to ensure that disadvantaged business enterprises are afforded the full opportunity to compete for subcontracts or Work under this Contract.

23. **Non-Exclusive Agreement**. This is not an exclusive agreement. UTILITIES is free to engage others to perform the Work.

24. **Ownership of Work Product**. For purposes of this Contract, "Work Product" shall include, without limitation, all designs, discoveries, creations, works, devices, masks, models, work in progress, deliverables, inventions, products, computer programs, procedures, improvements, developments, drawings, notes, documents, business processes, information and materials made, conceived or developed by SELLER alone or with others which result from or relate to the Work performed hereunder. Standard Materials manufactured by SELLER and sold to UTILITIES without having been designed, customized or modified for UTILITIES do not constitute Work Product. All Work Product shall at all times be and remain the sole and exclusive property of UTILITIES. SELLER hereby agrees to irrevocably assign and transfer to UTILITIES and does hereby assign and transfer to UTILITIES all of its worldwide right, title and interest in and to the Work Product including all associated intellectual property rights. UTILITIES will have the sole right to determine the treatment of any Work Product, including the right to keep it as trade secret, execute and file patent applications on it, to use and disclose it without prior patent application, to file registrations for copyright or trademark in its own name or to follow any other procedure that UTILITIES deems appropriate. SELLER agrees: (i) to disclose promptly in writing to UTILITIES all Work Product in its possession; (ii) to assist UTILITIES in every reasonable way, at UTILITIES' expense, to secure, perfect, register, apply for, maintain, and defend for UTILITIES' benefit all copyrights, patent rights, mask work rights, trade secret rights, and all other proprietary rights or statutory protections in and to the Work Product in UTILITIES' name as it deems appropriate; and (iii) to otherwise treat all Work Product as

UTILITIES Confidential Information as described above. These obligations to disclose, assist, execute and keep confidential survive the expiration or termination of this Contract. All tools and equipment supplied by UTILITIES to Seller shall remain the sole property of UTILITIES.

25. **Price Warranty.** (OCT 2004) The CONTRACTOR warrants that the prices and rates stated herein represent currently established prices and rates and are no higher than would be charged to any other customer, whether commercial or a United States agency of local, state or federal government, for similar services in like quantities.

26. **Setoff.** All claims for money due or to become due from UTILITIES shall be subject to deduction or setoff by UTILITIES by reason of any counterclaim arising out of this or any other transaction with SELLER.

27. **Severability.** Any provision or part of this Contract held to be void or unenforceable under any Laws or Regulations shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon the parties who agree that the Contract shall be reformed to replace such stricken provision with a new provision that comes as close as possible to expressing the intention of the stricken provision.

28. **Shipment: Risk of Loss.** A complete packing list shall be enclosed with all shipments describing the contents of each package or container showing weight, quantity and Contract number. SELLER shall mark containers or packages with necessary lifting, loading, and shipping information, including the UTILITIES Contract number, dates of shipment, and names and addresses of consignor and consignee. Delivery shall be F.O.B. UTILITIES designated facility. Title, and the risk of loss while in transit, to Materials will pass to UTILITIES upon UTILITIES' receipt at the designated facility. SELLER shall not substitute Materials or ship more than the quantity of Work ordered without express written authority from UTILITIES. If, in order to comply with UTILITIES required delivery date, it becomes necessary for SELLER to ship by a more expensive way than specified in this Contract, any increased transportation costs resulting therefrom shall be paid for by SELLER unless the necessity for such rerouting or expedited handling has been caused by UTILITIES and the increased costs are pre-approved by UTILITIES in writing.

29. **Stop Work Order.** SELLER shall stop Work for up to ninety (90) days in accordance with the terms of any written notice received from UTILITIES, or for such longer period of time as the parties may agree, and shall take all reasonable steps to minimize the incurrence of costs allocable to the Work covered by this Contract during the period of Work stoppage. Within such period, UTILITIES shall either terminate or continue the Work by written order to SELLER. In the event of a continuation, an equitable adjustment in accordance with Section 6 "Changes", shall be made to the price, delivery schedule, or other provision affected by the Work stoppage, if applicable, provided that the claim for equitable adjustment is made in writing within thirty (30) days after such continuation.

30. **Survival of Obligations.** (NOV 2006) All representations, indemnifications, warranties, ownership of work products, license grants, and guarantees made in, required by, or given in accordance with this Contract will survive the payment, completion, and acceptance of the Work or termination or completion of the Contract.

31. **Tax Exemptions.** (APR 2006) UTILITIES is an enterprise of the city of Colorado Springs and is exempt from taxes as follows.

(a) **FEDERAL: 84-6000574**

(b) **FEDERAL EXCISE: 138557**

(c) **STATE SALES TAX: 98-03479**

32. **Termination for Cause.** In the event SELLER fails to perform any term or condition hereof ("Default") and the Default continues for a period of seven (7) days after UTILITIES shall have given SELLER written notice thereof, then UTILITIES may, at its option, terminate this Contract or any part hereof for cause. Default shall include, but not be limited to, late deliveries, deliveries of Materials which are defective or which do not conform to this Contract, and failure to provide UTILITIES, upon request, of reasonable assurances of future performance. In the event that this Contract is terminated in accordance with the foregoing, UTILITIES may take possession of any Work and may complete any Work by whatever means UTILITIES may select. The cost of completing said Work shall be deducted from the balance which would have been due to SELLER had the Contract not been terminated

and Work completed in accordance with the Contract. SELLER may terminate this Contract upon written notice to UTILITIES if UTILITIES fails to pay SELLER within sixty (60) days after SELLER notifies UTILITIES that payment is past due.

33. **Termination for Convenience.** UTILITIES reserves the right to terminate this Contract or any part hereof for its sole convenience. In the event of such termination, SELLER shall immediately stop all Work hereunder, and shall immediately cause any of its suppliers or subcontractors to cease such Work. SELLER shall be paid a reasonable termination charge consisting of a percentage of the Contract price reflecting the percentage of the Work completed and accepted by UTILITIES prior to the effective date of termination, plus actual and reasonable direct costs resulting from termination, which shall not include loss of anticipated profits or revenue. SELLER shall not be paid for any Work done after receipt of the notice of termination, or for any costs incurred by SELLER's suppliers or subcontractors which SELLER could reasonably have avoided.

34. **Waiver.** UTILITIES failure to insist on performance of any of the terms or conditions herein or to exercise any right or privilege or UTILITIES waiver of any breach hereunder shall not thereafter waive any other terms, conditions, or privileges, whether of the same or similar type.

35. **Warranty.** (NOV 2006)

(a) SELLER expressly represents and warrants that all Work furnished under this Contract shall be completed in a professional, workmanlike manner, with the degree of skill and care that is required by current, good and sound professional procedures. Further, SELLER represents and warrants that: (i) the Work shall conform to all specifications and appropriate standards and shall be free from defects in material or workmanship; (ii) all Work furnished hereunder will be merchantable, and will be safe and appropriate for the purpose for which Work of that kind are normally used; (iii) all Materials will be new and will not be used or refurbished; and (iv) it has all necessary right, power and authority to enter into this Contract. If SELLER knows or has reason to know the particular purpose for which UTILITIES intends to use the Work, SELLER warrants that such Work will be fit for such particular purpose. Inspection, testing, acceptance or use of the Work furnished hereunder shall not affect the SELLER's obligation under this warranty and such warranties shall survive inspection, testing, acceptance and use. If the Materials include hazardous materials, SELLER represents and warrants that SELLER understands the nature of any hazards associated with the manufacture, handling and transportation of such hazardous materials.

(b) SELLER's warranty shall run to UTILITIES, its successors, assigns and customers, and users of the Work. SELLER agrees to replace or correct defects of any Work not conforming to the foregoing warranty promptly without expense to UTILITIES, when notified of such nonconformity by UTILITIES, provided UTILITIES elects to provide SELLER with the opportunity to do so. In the event of failure of SELLER to correct defects in or replace nonconforming Work promptly, UTILITIES, after reasonable notice to SELLER, may such corrections or replace such Work and charge SELLER for the cost incurred by UTILITIES in doing so.

**SPECIAL TERMS AND CONDITIONS
FOR SOFTWARE (OCT 2004)**

**SPECIAL TERMS AND CONDITIONS
FOR SOFTWARE MAINTENANCE (OCT 2004)**

36. **Acceptance.** UTILITIES, with the full cooperation and assistance of SELLER, shall test the Licensed Program within a commercially reasonable time after UTILITIES receipt of the Licensed Program in order to ensure that the Licensed Program conforms to the Specifications. "Specifications" shall mean the functional and performance specifications and standards of the Licensed Program as set forth in the documentation and any procurement documents. If the Licensed Program passes acceptance, UTILITIES will so notify the SELLER. In the event the Licensed Program does not conform to the Specifications, UTILITIES shall provide SELLER with notice thereof. Promptly after receipt of such notice, and at UTILITIES' option, SELLER shall provide UTILITIES with such assistance as necessary to cause the Licensed Program to conform to the Specifications or UTILITIES may, at its option and as a non-exclusive remedy and in addition to all other remedies available to UTILITIES, terminate this Contract. In the event that SELLER is unable to cause the Licensed Program to conform to the Specifications within thirty (30) days from the date of installation of the Licensed Program, UTILITIES may, at its option and as a non-exclusive remedy and in addition to all other remedies available to UTILITIES, terminate this Contract.

37. **License Grant.** SELLER hereby grants to UTILITIES, its employees, consultants, contractors and agents, and UTILITIES accepts, a nonexclusive, irrevocable, royalty-free and perpetual license to use the Licensed Program (including any and all Updates) in accordance with this Contract. "Licensed Program" shall mean each set of computer software programs and associated documentation developed by or licensed through SELLER and listed on the Contract which Utilities is licensing hereunder. UTILITIES acknowledges that this Contract grants it no title or rights of ownership in the Licensed Program, except as provided herein. UTILITIES may make sufficient copies of the Licensed Program for backup, disaster recovery or archival purposes. UTILITIES shall not decompile, reverse engineer or otherwise attempt to derive or modify the source code of the Licensed Program unless expressly licensed to do so by SELLER in writing. Ownership of all right, title and interest in and to the originals and any copies, in whole or in part, of the Licensed Program, including translations, compilations, partial copies, modifications and updated works, and ownership of all patents, trade secrets, copyrights and other intellectual property rights pertaining thereto anywhere in the world, shall be and shall remain the sole property of SELLER.

38. **Licensed Documentation.** SELLER shall provide UTILITIES with a minimum of two (2) copies of the documentation for the Licensed Program at no cost to UTILITIES. SELLER grants to UTILITIES permission to duplicate, for its internal use, all documentation. If the documentation is revised at any time, or if additional documentation is developed by or for SELLER with respect to the Licensed Program, SELLER shall promptly deliver to UTILITIES two (2) copies of such revised or additional documentation, at no cost to UTILITIES.

39. **Licensed Program Warranty.** SELLER warrants that: (i) the Licensed Program does not contain any virus, time bomb, hidden files, malicious code or any other contaminant, including, but not limited to, codes, commands or instructions that may be used to alter, delete, damage or disable the Licensed Program, other software, UTILITIES information or other UTILITIES property; (ii) the Specifications faithfully and accurately describe the Licensed Program; (iii) UTILITIES' use of the Licensed Program will not in any way constitute an infringement or other violation of any copyright, trade secret, trademark, patent, invention, or other proprietary right of any third party; (iv) the prices for each item and the terms and conditions of this Contract are comparable to, or more favorable to UTILITIES than the comparable prices, terms and conditions that have been offered by SELLER to any of its customers; and (v) there are no actions, suits or proceedings, pending or threatened, which will have a material adverse effect on SELLER's ability to fulfill its obligations under this Contract.

40. **Transfer.** UTILITIES may transfer the Licensed Program to other computers or operating systems, including any operating systems which are not in existence as of the date of this Contract but which the Licensed Program is subsequently certified to operate on, at no cost to UTILITIES. This is not a "site/cpu" license. There shall be no fee due for the transfer of the Licensed Program to a computer that is located at a different location so long as UTILITIES informs SELLER of such transfer within a reasonable period of time.

41. **Fees and Payments.** The fees for the Maintenance Services and any other services under this Agreement are set forth in the Contract. In no event shall the fee for Maintenance Services exceed fifteen percent (15%) of the list price for the associated Licensed Program.

42. **Limited Warranty.** SELLER represents and warrants that any Maintenance Services or other services provided by SELLER hereunder will be performed in a professional manner by qualified personnel and shall be sufficient to enable the Licensed Program to perform in accordance with the Specifications.

43. **Maintenance Services.** During the first twelve (12) months following acceptance of the Licensed Program, and thereafter if UTILITIES at its option pays the maintenance fees set forth in the Contract, ("Maintenance Term") SELLER shall provide the following Maintenance Services ("Maintenance Services"):

- (a) Provide UTILITIES with such assistance as is necessary to cause the Licensed Program to perform in accordance with the Specifications.
- (b) Maintain the Licensed Program in operable condition to UTILITIES' satisfaction and correct, revise or replace the Licensed Program if either SELLER or UTILITIES discovers an Error Condition in the Licensed Program. "Error Condition" shall mean a defect in or failure of the Licensed Program to conform in any non-immaterial respect to the Specifications. In addition, SELLER shall adhere to the following procedure when UTILITIES encounters a problem which diagnosis indicates is caused by a defect in a current unaltered release of the Licensed Program: SELLER shall make a reasonable attempt to develop an emergency by-pass within two (2) business days after notification by UTILITIES, and issue corrected code within one (1) calendar month after notification by UTILITIES. If SELLER does not promptly comply with the foregoing, or in an emergency where delay would cause serious risk of loss or damage, UTILITIES may have services performed by a third party, and all costs, losses, and damages arising out of or relating to such services will be paid by SELLER.
- (c) Remedy any Error Condition which exists or develops and in the most expeditious manner possible.
- (d) Provide to UTILITIES all Updates, as long as such Updates are made generally available to SELLER's other customers of a substantially similar product. "Updates" shall mean all versions, releases, enhancements, upgrades, modifications, extensions and other changes to the Licensed Program developed by or on behalf of SELLER for the Licensed Program used by UTILITIES, including but not limited to, any alteration to the Licensed Program, if and as required by UTILITIES, to cause the Licensed Program to operate under new versions or releases (including successors) of a server, platform or operating system.