

## STATE TERM CONTRACT

**THIS CONTRACT** (the "Contract") is between the State of Ohio ("State"), through its Office of Information Technology, IT Governance Division, with offices at 30 East Broad Street, Columbus, Ohio 43215 and: Sun Microsystems, Inc. ("Contractor") with offices at 7777 Gateway Blvd. Newark, CA 94560.

### BACKGROUND

The State recognizes that it is sometimes advantageous to do business with some manufacturers under a State term contract rather than through a competitive bidding or proposal process. In such cases, the State may enter into a contract with the manufacturer provided that the manufacturer offers its products and ancillary services at the same prices that the manufacturer offers those products and services to the US Government under the GSA's Multiple Award Schedule program or SmartBuy program. Or if the manufacturer has no contract under the GSA's Multiple Award Schedule program or SmartBuy program, the State will accept the pricing the manufacturer offers to its distributors. Further, if the manufacturer has no GSA Multiple Award Schedule or SmartBuy contract and no distributors, the State may accept the prices that the manufacturer offers to its Most-Favored Customers as defined in Paragraph 2.2 for each product or service.

This Contract establishes terms and conditions under which State agencies (including any board, instrumentality, commission, or other political body) and Ohio political subdivisions, such as counties, municipalities, and townships, and education institutions may acquire the Contractor's products or services at the pricing identified below. This Contract, however, only permits such; it is not a requirements contract and does not obligate any State agency or political subdivision to acquire the Contractor's products or services.

## TERMS AND CONDITIONS

### 1 -TERM

- 1.1 TERM.** This Contract is effective on the date the State's duly authorized representative executes it, as evidenced by the date appearing with the representative's signature, below. Unless this Contract is terminated or expires without renewal, it will remain in effect until the end of the State's current fiscal biennium, which is June 30, 2009 Termination or expiration of this Contract will not limit the Contractor's continuing obligations with respect to Deliverables that the State paid for before termination or limit the State's rights in such.
- 1.2 CONTRACT RENEWAL.** In the State's sole discretion, it may renew this Contract for a period of one month at the end of each biennium during which this Contract remains in place. Any further renewals will be only by written agreement between the State and the Contractor. Such renewals may be for any number of times for any period not to exceed the time remaining in the State's then-current biennium.

### 2 -PRICING AND PAYMENT

- 2.1 CERTIFICATION OF ACCURACY.** By checking one of the following three items, the Contractor certifies that the Contractor's prices under this Contract are:
- The prices at which the Contractor currently offers each product and service to the US Government under the GSA's Multiple Award Schedule program;
  - The prices at which the Contractor currently offers each product and service to the US Government under the GSA's SmartBuy program; or
  - The best prices at which the Contractor has offered each product and service to its most favored

state customers under the SDS within one year before the date the Contractor executed this Contract or adds the product or service to this Contract, whichever is later.

If the Contractor is offering prices based on its most favored state customer prices, the Contractor represents that it does not have a GSA Multiple Award Schedule or SmartBuy contract.

The Contractor further certifies that the above representations will apply and be true with respect to all future pricing information submitted to revise this Contract as provided in 2.2 below.

**2.2 PRICE ADJUSTMENTS.** For the purposes of this Contract the following terms have the meaning defined below:

1. "End of Life" means those Products and Services the Contractor no longer makes available to the general public
2. "Price" means the net price paid by an end user after the application of SDS discounts to the Contractor's then current Price List
3. "Price List" means the Contractor's standard published pricing for Products and Services available in the United States
4. "Special Pricing" means net pricing for Products and Services that is greater than the net price of contractual discounts applied to then current price list. Special Pricing may result from additional discounts or a Contractor sales allowance provided to an end user for competitive reasons or unique circumstances
5. "Most-Favored Customer" means the group of customers of the Contractor that are signed on to Sun's Western States Contract Alliance Agreement. These Customers are, collectively and individually, similarly situated and have comparable terms and conditions to the State of Ohio.

In determining the Prices of this Contract, the Contractor has relied on its pricing that is provided to the Contractor's Most-Favored Customer. The State will be entitled to a price decrease any time the Contractor sells a product or a service to its Most-Favored Customer for less than the price agreed to between the State and the Contractor under this Contract unless such sale was based on Special Pricing or was a one time sale to member of the Western States Contracting Alliance and was not a general reduction in price under a term contract. The Contractor must notify the State of that event within 30 days of its occurrence and immediately reduce the price of the affected products or services to the State under this Contract.

**2.3 PRICELIST.** The initial Contractor's pricelist for the products and services that the Contractor may provide to the State under this Contract is attached as Exhibit I. The State acknowledges that Contractor may, from time to time: a) publish new price lists; b) remove individual items from the price list (EOL); c) add new items to existing product categories d) add new standard service offerings, and add new Product categories. For convenience, those products (hardware and software) and standard service listings included in the price list are called "Deliverables" in this Contract. Any custom materials resulting from the Contractor's services via a statement of work are called "**Custom** Deliverables" in this Contract. Exhibit I is identified as the following pricelist:

#### Sun State and Local Government Standard Discount Schedule

The Contractor will not sell to the State any notebook computers with less than a 1.60 GHz internal clock speed. Additionally, the Contractor will not sell to the State any PCs or servers using CPUs with less than a 3.0 GHz internal clock speed. Additionally, the Contractor will not sell to the State any term software licenses. And except in the case of operating systems licensed in conjunction with desktop PCs, notebook computers, PDAs, and similar personal computing devices that the OEM does not distribute without an operating system, the Contractor will not sell or license any Microsoft software to the State. If any of the foregoing items are listed in the Contractor's pricelist, they are deleted for purposes of this Contract.

**2.4 NOTIFICATION OF PRICE INCREASES.** The Contractor will endeavor to notify the State and any affected State agencies of the increase within 60 days, but in no event less than 30 days before the effective date of the price increase. The Contractor must notify affected State agencies at their purchase order "bill to" address contained in the applicable purchase orders. This notification must specify, when applicable, the product serial number, location, current price, increased price, and applicable purchase order number.

**2.5 PAYMENT DUE DATE.** Payments will be due on the 30th day after the later of:

(a) The date the State actually receives a proper invoice at the office designated in the applicable purchase order to receive it; or

(b) The date the State accepts the Deliverable or Custom Deliverable in accordance with Section 4.1 herein.

The date the State issues a warrant (the State's equivalent to a check) in payment of an invoice will be considered the date payment is made. Without diminishing the Contractor's right to timely payment, the payment will be overdue only if it is not received by the 30th day after the payment's due date. If the State has not issued payment by then, interest will begin to accrue under Ohio Revised Code (the "Code") § 126.30.

**2.6 INVOICE REQUIREMENTS.** The Contractor must submit an original invoice with three copies to the office designated in the purchase order as the "bill to" address. To be a proper invoice, the invoice must include the following information:

(a) Name and address of the Contractor as designated in this Contract;

(b) The Contractor's federal tax identification number as designated in this Contract;

(c) The Contractor's invoice remittance address as designated in this Contract;

(d) The purchase order number authorizing the delivery of the Deliverables;

(e) A description of the Deliverables, including, as applicable, the time period, serial number, unit price, quantity, and total price of the Deliverables; and

(f) If the invoice is for a lease, the Contractor also must include the payment number (e.g., 1 of 36).

If an authorized dealer has fulfilled the purchase order, then the dealer's information should be supplied in lieu of the Contractor's information. If an invoice does not meet this section's requirements, or if the Contractor fails to give proper notice of a price increase (see the next section), the State will send the Contractor written notice. The State will send the notice, along with the improper invoice, to the Contractor's address designated for receipt of purchase orders within 15 days. The notice will contain a description of the defect or impropriety and any additional information the Contractor needs to correct the invoice. If such notification has been sent, the payment due date will be 30 days after the State receives a proper invoice and has accepted the Contractor's Deliverable.

**2.7 OHIO PAYMENT CARD.** Participating State agencies issuing orders under this Contract may use the Ohio Payment Card. Such purchases may not exceed \$2,500 unless the Office of Budget and Management ("OBM") has authorized the agency to exceed this limit. If OBM increases the dollar limit for payment cards for all State agencies, the State will post notice of that on its Procurement Website. Participating State agencies are required to use the Ohio Payment Card in accordance with OBM's current guidelines for the Ohio Payment Card and the agency's approved plan filed with the OBM. The Contractor may process a payment in the payment card network only upon delivery and acceptance of the applicable Deliverables. For partial deliveries or performance, the Contractor may process a payment for the amount delivered or completed only and not for the entire amount ordered by the ordering agency. Upon completion of the delivery of remaining Deliverables, the Contractor may process a payment request in the payment card network for the remainder of the order. The Contractor should receive payment through its merchant bank within the time agreed upon between the Contractor and its merchant bank. The Contractor should expect normal processing fees from its merchant bank for payment card transactions, which the Contractor may not pass on to the State.

**2.8 NON-APPROPRIATION OF FUNDS.** The State's funds are contingent on the availability of lawful appropriations by the Ohio General Assembly. If the Ohio General Assembly fails to continue funding for any payments due hereunder, the order or orders under this Contract that are affected by the lack of funding will terminate as of the date that the funding expires, and the State will have no further obligation to make any payments with

respect to the affected order or orders other than for products or services delivered before such termination and for which funds were certified.

- 2.9 OBM CERTIFICATION.** This Contract is subject to Code  $\alpha$  126.07. Any orders under this Contract are void until the Director of the OBM certifies that there is a balance in the appropriation available to pay for the order.
- 2.10 CONTROLLING BOARD AUTHORIZATION.** The State's obligations under this Contract are subject to the Ohio Controlling Board continuing to authorize the State's use of its term contracts program. If the Ohio Controlling Board fails to authorize or withdraws its authorization for this program, this Contract will terminate immediately, and the Contractor may not take any more orders under it.
- 2.11 TRAVEL EXPENSES.** Any travel that the Contractor requires to perform its obligations under this Contract will be at the Contractor's expense. The State will pay for any additional travel that it requests only with prior written approval. The State will pay for all additional travel expenses that it requests in accordance with OBM's travel policy in Rule126-1-02 of the Ohio Administrative Code (the "Administrative Code").
- 2.12 TAXES.** The State is exempt from all sales, use, excise, and property taxes and will not pay any such taxes. To the extent sales, use, excise, or any similar taxes are imposed on the Contractor in connection with any Deliverable, the Contractor must pay those taxes together with any interest and penalties not successfully disputed with the taxing authority.

### 3 -CONTRACT ADMINISTRATION

- 3.1 DEALERS AND DISTRIBUTORS.** The State authorizes the Contractor to name one or more dealers to work with the State on behalf of the Contractor. But if the Contractor decides to use any dealers, the Contractor must submit the name, principal business address, addresses for purchase orders and for payments, telephone number, and its federal tax identification number. The Contractor also must submit a completed W9 form for each dealer it wishes to name under this section. The Contractor's submission must be on its official letterhead, signed by an authorized representative, and addressed to the Deputy State Chief Information Officer, Office of Information Technology.

In doing so, the Contractor warrants that:

- (a) The Contractor has provided the dealer with a copy of this Contract, and a duly authorized representative of the dealer has agreed, in writing, to be bound by the terms and conditions in this Contract.
- (b) Such agreement specifically provides that it is for the benefit of the State as well as the Contractor.
- (c) The Contractor will remain liable under this Contract for the services of any dealer and will remedy any breach of the dealer under this Contract.
- (d) Payments under this Contract for the services of any dealer may be made directly to that dealer, and the Contractor will look solely to the dealer for any payments due to the Contractor once the State has paid the dealer.
- (e) To the extent that there is any liability to the State arising from doing business with a dealer that has not signed the agreement required under this section with the Contractor, the Contractor will indemnify the State for such liability.

If the Contractor wants to designate a dealer that will not receive payments (a "distributor"), the Contractor may do so by identifying the person or organization as a distributor in the authorizing letter. In such cases, information regarding taxpayer identification and payment addressing may be omitted, as may the distributor's W9 form. All other requirements and obligations for designating a dealer apply to designating a distributor.

The State strongly encourages the participation of small and disadvantaged businesses in its contracting programs and has created a certification program to Encourage Diversity Growth and Equity (EDGE) in State contracting. State agencies are instructed to include in their procurements such participation, including through the use of State Term Schedule contracts that are either held by EDGE businesses or that offer the opportunity to work with EDGE dealers or distributors.

- 3.2 AUDITS.** During the term of this Contract and for three years after termination, on reasonable notice and during Contractor's business hours, the State may audit the Contractor's records and other materials directly pertinent to the Deliverables provided under this Contract and as it concerns pricing adjustments and invoicing information related to the Tracking Customers identified in Exhibit A. This audit right also will apply to the State's duly authorized representatives and any organization providing funding for any Deliverable.

Unless it is impracticable to do so, all records related to this Contract must be kept in a single location, either at the Contractor's principle place of business or the facilities where the Contractor substantially performed under this Contract. If this is not practical, the Contractor must assume the cost of collecting, organizing, and relocating the records, along with any technology needed for accessing the records, to its office nearest Columbus, Ohio whenever the State or any entity with audit rights requests access to the records. The Contractor must do so within 15 days of receiving the State's written notice of its intent to audit the Contractor's records and must notify the State as soon as the records are ready for audit.

If any audit reveals any overcharge to the State, the State will be entitled to recover the amount of such overcharges and the reasonable cost of the audit.

- 3.3 INSURANCE.** The Contractor must provide the following insurance coverage at its own expense throughout the term of this Contract:

- (a) Workers' compensation insurance, as required by Ohio law, and if some work will be done outside Ohio, the laws of the appropriate states where work will be done. The Contractor also must maintain employer's liability insurance with at least a \$1,000,000.00 limit.
- (b) Commercial General Liability insurance coverage for bodily injury, personal injury, wrongful death, and property damage.. Such policy must designate the State of Ohio as an additional insured, as its interest may appear. The policy also must be endorsed to include a blanket waiver of subrogation. At a minimum, the limits of the insurance must be:

- \$ 2,000,000 General Aggregate
- \$ 2,000,000 Products/Completed Operations Aggregate
- \$ 1,000,000 Per Occurrence Limit
- \$ 1,000,000 Personal and Advertising Injury Limit
- \$ 100,000 Fire Legal Liability
- \$ 10,000 Medical Payments

The policy must be endorsed to include that the Contractor will endeavor to provide the State with 30-days prior written notice of cancellation or material change to the policy. And the Contractor's Commercial General Liability must be primary over any other insurance coverage.

- (c) Commercial Automobile Liability insurance with a combined single limit of \$500,000.
- (d) Professional Liability insurance covering all staff with a minimum limit of \$1,000,000 per incident and \$3,000,000 aggregate. If the Contractor's policy is written on a "claims made" basis, the Contractor must provide the State with proof of continuous coverage at the time the policy is renewed. If for any reason the policy expires, or coverage is terminated, the Contractor must purchase and maintain "tail" coverage through the applicable statute of limitations.

All certificates must be in a form that is reasonably satisfactory to the State as to the contents of the policies and the quality of the insurance carriers. All carriers must have at least an "A-" rating by A.M. Best.

- 3.4 CONTRACT COMPLIANCE.** Any State agency that uses this Contract will be responsible for the administration of this Contract with respect to the orders that it places and may monitor the Contractor's performance and compliance with this Contract. If an agency becomes aware of any noncompliance with the terms of this Contract or the specifications of an order, the agency may document the noncompliance and give the Contractor written notice of the noncompliance for immediate correction. If the Contractor fails to cure the noncompliance, the agency may notify the State through the Office of Information Technology Contract

Management, by executing a Complaint to Vendor form to help resolve the issue. Should the State determine that the form identifies an uncured breach of this Contract, the State may terminate this Contract and seek such other remedies as may be available to it.

- 3.5 POLITICAL SUBDIVISIONS.** Ohio political subdivisions, such as Ohio cities, counties, and townships ("Political Subdivisions"), may rely on this Contract. Whenever a Political Subdivision relies on this Contract to issue a purchase order, the Political Subdivision will step into the shoes of the State under this Contract for purposes of its order, and, as to the Political Subdivision's order, this Contract will be between the Contractor and the Political Subdivision. The Contractor must look solely to the Political Subdivision for performance, including but not limited to payment, and must hold the State harmless with regard to such orders and the Political Subdivision's performance. But the State will have the right to terminate this Contract and seek such remedies on termination as this Contract provides should the Contractor fail to honor its obligations under an order from a Political Subdivision. Nothing in this Contract requires the Contractor to accept an order from a Political Subdivision, if the Contractor reasonably believes that the Political Subdivision is or will be unable to perform its obligations in relation to that order.
- 3.6 RECALLS.** If a Deliverable is recalled, seized, or embargoed, or if the Contractor, a manufacturer, packer, processor, or regulatory body finds that a Deliverable has been misbranded, adulterated, or is unsafe, the Contractor must notify the State, through the Office of Information Technology Contract Management, as well as all agencies that have ordered the Deliverable, within ten business days after the Contractor learns of any of the above events. At the option of the State, the Contractor must either reimburse the State for the purchase price of each affected Deliverable or provide an equal or better replacement for each Deliverable at no additional cost to the State. The Contractor also must remove and replace all affected Deliverables within a reasonable time, as determined by the State. Further, at the option of the State, the Contractor may be required to reimburse the State for storage costs and handling fees, which the State may calculate from the time of delivery of each affected Deliverable to the Deliverable's actual removal. Furthermore, the Contractor must bear all direct costs associated with the removal and proper disposal of the affected Deliverables. The State will treat any failure to refund the purchase price or provide a suitable replacement as a default.
- 3.7 TERMINATION.** The State may terminate this Contract or any order under this Contract if the Contractor defaults in meeting its obligations and fails to timely cure its default. The Contractor may terminate this Contract as it applies to an ordering entity who defaults in meeting a material obligation and fails to timely cure its default. The State also may terminate this Contract or any order under it if a petition in bankruptcy is filed by or against the Contractor and not dismissed within 60 days. And the State may terminate this Contract or any order under it if the Contractor violates any law or regulation while performing under this Contract or if it appears to the State that the Contractor's performance is substantially endangered through no fault of the State. In all of the foregoing cases, the termination will be for cause.

On written notice, the breaching party will have 30 days to cure any breach of its obligations under this Contract, provided the breach is curable. If the breaching party fails to cure the breach within 30 days after written notice or if the breach is not one that is curable, the State will have the right to terminate this Contract, the applicable orders, or both immediately upon written notice to the breaching party. Some provisions of this Contract may provide for a shorter cure period than 30 days or for no cure period at all. Those provisions will prevail over this one. If a particular section does not state what the cure period will be, this provision will govern.

The State also may terminate this Contract in the case of breaches that are cured within 30 days but are persistent. "Persistent" in this context means that the State has notified the Contractor in writing of the Contractor's failure to meet any of its obligations three times. After the third such notice, the State may terminate this Contract without a cure period if the Contractor again fails to meet any obligation. The three defaults do not have to relate to the same obligation or type of failure.

Either party may terminate this Contract or any order under this Contract for its convenience and without cause. In addition, the State may terminate this Contract or any order under it if the Ohio General Assembly fails to appropriate funds for any order under this Contract. Further, if a third party is providing funding for an order, the State also may terminate this Contract or any order under it should that third party fail to release any funds related to this Contract or an order under it.

Any notice of termination will be effective on the date the notice is received. On receipt of a notice of termination pursuant to this provision, the Contractor will immediately cease all work on any Deliverables affected by the termination and take all steps necessary to minimize any costs the Contractor will incur related to the affected orders. The Contractor also must immediately prepare a report and deliver it to the State. The report must detail all open orders at the time of termination.

If the State terminates this Contract or any order for cause, it will be entitled to cover for the affected orders by using another vendor or vendors on such commercially reasonable terms and conditions as it and the covering vendors may agree. The Contractor will be liable to the State for all costs directly related to covering for the affected orders to the extent that such costs exceed the costs that the State would have incurred under this Contract for those orders. Subject to the limitation of liability herein, the Contractor also will be liable for any other direct damages resulting from its breach of this Contract or other event leading to termination for cause.

If the termination is for the convenience of the State, the Contractor will be entitled to compensation for any Deliverable that the Contractor has delivered before the termination. Such compensation will be the Contractor's exclusive remedy in the case of termination for convenience and will be available to the Contractor only once the Contractor has submitted a proper invoice for such, with the invoice reflecting the amount the State determines that it owes the Contractor.

- 3.8 EXCUSABLE DELAY.** Neither party will be liable for any delay in its performance under this Contract that arises from causes beyond its reasonable control and without its negligence or fault. The delayed party must notify the other promptly of any material delay in performance and must specify in writing the proposed revised performance date as soon as practicable after notice of delay. For any such excusable delay, the date of performance or delivery will be extended for a period equal to the time lost by reason of the excusable delay. The delayed party also must describe the cause of the delay and what steps it then is taking or will take to remove the cause. The delayed party may not rely on a claim of excusable delay to avoid liability for a delay if the party has not taken commercially reasonable steps to mitigate or avoid the delay.
- 3.9 INDEPENDENT STATUS.** The parties will be acting as independent entities. The partners, employees, officers, directors, and agents of one party may only act in the capacity of representatives of that party and not as employees, officers, directors, or agents of the other party and will not be deemed as such for any purpose. Each party assumes full responsibility for the actions of its partners, employees, officers, directors, and agents while performing under this Contract and will be solely responsible for paying those people. Additionally, each party will be solely responsible for withholding and paying social security and income taxes, making workers' compensation contributions, paying disability benefits, and providing fringe benefits, if any, for its partners, employees, officers, directors, and agents, and neither party may legally bind the other party in any manner.
- 3.10 LOCATION OF SERVICES AND DATA.** As part of this Contract, the Contractor must disclose the following:
- (a) All locations where any services will be performed;
  - (b) All locations where any State data applicable to the Contract will be maintained or made available; and
  - (c) The principal place of business for the Contractor and all its subcontractors under this contract.

The Contractor may not change any location where any services are performed under this contract to a location outside the country of the original location or change any location where the data is maintained or made available to any other location outside the country of the original location without prior written approval of the State, which the State will not be obligated to provide.

#### 4 -DELIVERY AND ACCEPTANCE

- 4.1 ACCEPTANCE.** The acceptance procedure for Deliverables will be an informal review by the agency acquiring the Deliverables to ensure that each shipment received is consistent with its order. The State will have up to 15 business days after receipt of an order to do this. The State will not issue a formal letter of acceptance, and passage of 15 business days will imply acceptance, though the State will issue a notice of noncompliance if a shipment does not match the order.

If the State issues a noncompliance letter, the Contractor will have 30 days to correct the problems listed in the letter. If the Contractor fails to do so, the Contractor will be in default without a cure period. If the State has issued a noncompliance letter, the shipment will not be accepted until the State issues a letter of acceptance indicating that each problem noted in the noncompliance letter has been cured. If the problems have been fixed during the 30-day period, the State will issue the acceptance letter within 15 business days after all defects have been fixed.

Acceptance procedures for Custom Deliverables, if any, will be defined in a statement of work, or if not defined in a State of Work, acceptance will be governed by the above.

- 4.2 TITLE.** Title to any Deliverable will pass to the State only on acceptance of the Deliverable, and all risk of loss will remain with the Contractor until title to the Deliverable passes to the State except that State will be liable for any damages to Deliverables, while in its possession, arising from the negligence or willful misconduct of State personnel.
- 4.3 DELIVERIES.** The Contractor must make all deliveries F.O.B. destination.

#### 5 -INTELLECTUAL PROPERTY

- 5.1 COMMERCIAL MATERIAL.** As used in this section, "Commercial Material" means anything that the Contractor or a third party has developed at private expense and that is commercially available in the marketplace, subject to intellectual property rights, and readily susceptible to copying through duplication on magnetic media, paper, or other media. Examples include the written reports, books, pictures, videos, movies, computer programs, source code, and documentation.

Any Commercial Material that the Contractor intends to deliver as a Deliverable or Custom Deliverable must have the scope of the license granted in such material disclosed in an Exhibit to this Contract or a statement of work, if that scope of license is different than the scope of license contained in this section for Commercial Materials.

Except for Commercial Material that is software ("Commercial Software"), if the Commercial Material is copyrighted and published material, then the State will have the rights permitted under the federal copyright laws for each copy of the Commercial Material delivered to it by the Contractor.

Except for Commercial Software, if the Commercial Material is patented, then the State will have the rights permitted under the federal patent laws for each copy of the Commercial Material delivered to it by the Contractor.

For Commercial Software, the State will have the rights specified in the Software License Agreement in Exhibit I

The State will treat any Commercial Software as Confidential Information, in accordance with the requirements of the Confidential Information section of this Contract, if the Commercial Software is clearly and conspicuously labeled as confidential or secret.

**5.2 CUSTOM DELIVERABLES.** Notwithstanding this Contract cannot be used for Software Development, all custom work done by the Contractor and covered by this Contract will belong to the State, with all rights, title, and interest in all intellectual property that comes into existence through the Contractor's work under this Contract being assigned to the State. Additionally, the Contractor waives any shop rights, author rights, and similar retained interests in any such custom developed materials. The Contractor must provide the State with all assistance reasonably needed to vest such rights of ownership in the State. But the Contractor will retain ownership of all tools, methods, techniques, standards, and other development procedures, as well as generic and preexisting shells, subroutines, and similar material incorporated in any Custom Deliverable ("Pre-existing Materials").

The Contractor will grant the State a worldwide, non-exclusive, royalty-free, perpetual license to use, modify, sell, and otherwise distribute all Pre-existing Materials that are incorporated in any custom-developed Deliverable. The Contractor will not include in any Custom Deliverable any intellectual property unless such has been created under this Contract or qualifies as Pre-existing Material. If the Contractor wants to incorporate any Pre-existing materials in a Custom Deliverable, the Contractor must disclose that and obtain written approval from the State for doing so in advance. On the request of the Contractor, the State will incorporate any proprietary notice the Contractor may reasonably want for any Pre-existing Materials included in a Custom Deliverable in all copies the State makes of that Deliverable.

Subject to the limitations and obligations of the State with respect to Pre-existing Materials, the State may make all Custom Deliverables available to the general public without any proprietary notices of any kind.

**5.3 CONFIDENTIALITY.** The State may disclose to the Contractor written material or oral or other information that the State treats as confidential ("Confidential Information"). Title to the Confidential Information and all related materials and documentation the State delivers to the Contractor will remain with the State. The Contractor agrees to treat such Confidential Information as secret if it is so marked, or otherwise identified as such, or when, by its very nature, it deals with matters that, if generally known, would be damaging to the best interests of the public, other contractors or potential contractors with the State, or individuals or organizations about whom the State keeps information. The Contractor agrees not disclose any Confidential Information to third parties unless otherwise authorized by the State to do so in writing and to use such Confidential Information solely to perform under this Contract.

The State acknowledges that in connection with the Contract and its relationship with the Contractor, it may obtain information relating to the Products or to the Contractor that is of a confidential and proprietary nature ("Confidential Information"). Such information may include, but is not limited to, trade secrets, know how, inventions, techniques, processes, programs, schematics, software source documents, data, financial information, and sales and marketing plans or information which the State knows or has reason to know is confidential, proprietary or trade secret information of Contractor. The state shall at all times, during the term of this Contract and for a period of at least three (3) years after its termination (except for source code which shall be protected in perpetuity), keep in trust and confidence all such Confidential Information, and shall not use such Confidential Information other than as expressly authorized by Contractor under this Contract, nor shall the State disclose any such Confidential Information to third parties without Contractor's written consent.

The parties' obligation to maintain the confidentiality of Confidential Information will not apply where such:

- (1) Was already in the possession of the receiving party before disclosure by the disclosing party, and was received by the receiving party without an obligation of confidence;
- (2) Is independently developed by the Receiving Party, provided documentary evidence exists to support the independent development;
- (3) Is or becomes publicly available without a breach of this Contract;
- (4) Is rightfully received by the receiving party from a third party without an obligation of confidence;
- (5) Is disclosed by the receiving party with the written consent of the disclosing party; or
- (6) Is released under a valid order of a court or governmental agency, provided that the receiving party:
  - (a) Notifies the Disclosing Party of the order immediately upon receipt of it; and

- (b) Makes a reasonable effort to obtain a protective order from the issuing court or agency limiting the disclosure and use of the Confidential Information solely for the purposes intended to be served by the original order of production.

Except for Confidential Information that the Contractor delivers to the State and that is part of a Deliverable or necessary for the proper use or maintenance of a Deliverable, the Receiving Party must return all originals of any Confidential Information and destroy any copies it has made on termination or expiration of this Contract.

The disclosure of the Confidential Information of the Disclosing Party in a manner inconsistent with the terms of this provision may cause the Disclosing Party irreparable damage for which remedies other than injunctive relief may be inadequate, and each Receiving Party agrees that in the event of a breach of the Receiving Party's obligations hereunder, the Disclosing Party will be entitled to temporary and permanent injunctive relief to enforce the provisions of this Contract without the necessity of proving actual damages. However, provision does not diminish or alter any right to claim and recover damages

- 5.4 USE OF NAME.** The Contractor may not publicize that it is doing business with the State or use this Contract or the Contractor's relationship with the State as a marketing or sales tool, unless the State agrees otherwise in writing. The State has no obligation to agree to any such advertising, publicity, sales, or marketing activities. The State may refer to Products and Services by their associated names, provided that such reference is not misleading and complies with Contractor's Trademark and Logo Policies, which are found at <http://www.sun.com/policies/trademarks>. The State may not remove or alter any Contractor Trademarks, nor may it co-logo Products or Services. The State agrees that any use of Contractor Trademarks by the State will inure to the sole benefit of Contractor. The State agrees not to incorporate any Contractor Trademarks into the State's trademarks, service marks, State names, Internet addresses, domain names, or any other similar designations.

## 6 – TRANSACTION REPORTING

- 6.1 Contractor's SALES REPORT.** The Contractor must report the quarterly dollar value (in US currency rounded to the nearest whole dollar) of the sales under this Contract each calendar quarter (i.e., January-March, April-June, July-September and October-December). The dollar value of the sales reported must equal the price paid by all State agencies and Political Subdivisions for Deliverables under this Contract during the reporting period.

The Contractor must report the quarterly dollar value of sales to the State via the Internet using the Web form at the Office of Information Technology's vendor portal, <https://cm.ohio.gov>. If no sales occur, the Contractor must show zero sales on the report. The report must be submitted 30 days after the completion of the reporting period.

The Contractor also must submit a closeout report within 120 days after the expiration of this Contract. The Contract expires on the physical completion of the last, outstanding task or delivery order of the Contract. The closeout report must cover all sales not shown in the final quarterly report and reconcile all errors and credits. If the Contractor reported all Contract sales and reconciled all errors and credits on the final quarterly report, then the Contractor should show zero sales in the closeout report.

If the Contractor fails to submit any sales report in a timely manner or falsifies any sales report, the State may terminate or cancel this Contract pursuant to paragraph 3.7

- 6.2 Contractor's REVENUE SHARE.** The Contractor must pay the State a share of the sales transacted under this Contract. The Contractor must remit the revenue share in US dollars within 30 days after the end of the quarterly reporting period. The revenue share that the Contractor must pay equals .0075 of the total quarterly sales reported. The revenue share is included in the prices reflected on Exhibit I and reflected in the total amount charged to ordering activities, and the Contractor may not add a surcharge to orders under this Contract to cover the cost of the revenue share.

The Contractor must remit any amount due as the result of a quarterly or closeout report at the time the quarterly or closeout report is submitted to the Office of Information Technology. The Contractor also must pay the revenue share by check. To ensure the payment is credited properly, the Contractor must identify the

check as a "Revenue Share" and include the applicable State Term Contract Number, total report amount, and reporting period covered.

The Contractor must make each check payable to "Treasurer, State of Ohio", and forward it to the following address:

Department of Administrative Services  
Office of Finance  
30 East Broad Street, Suite 4060  
Columbus, Ohio 43215 – 3414

If the full amount of the revenue share is not paid within 30 days after the end of the applicable reporting period, the non-payment will constitute a contract debt to the State. The State may setoff any unpaid revenue share from any amount owed to the Contractor under this Contract and employ all other remedies available to it under Ohio law for the non-payment of the revenue share. Additionally, if the Contractor fails to pay the revenue share in a timely manner, the State may terminate or cancel this Contract pursuant to paragraph 3.7. .

## **7 -WARRANTIES AND LIABILITIES**

**7.1 WARRANTIES.** The Contractor warrants that the r performance of the Contractor under this Contract will:

- (a) Be in accordance with the sound professional standards and the requirements of this Contract and without any material defects for the applicable warranty period provided for in this agreement
- (b) Not infringe on the intellectual property rights of any third party. The Contractors exclusive obligations for breach of this warranty are governed by the paragraph entitled Indemnity in this Contract.
- (c) That the Deliverables hereunder will meet all of Contractors written specifications for them and function in accordance with any applicable user or technical documentation during the applicable warranty provided for in Exhibit I.
- (d) That Custom Deliverables will be warranted as a) as agreed to in a Statement of Work or, b) if no warranty is specified in a Statement of Work, that the work will be performed in a good and workmanlike manner.

Additionally, with respect to the Contractor's activities under this Contract, the Contractor warrants that:

- (a) The Contractor has the right to enter into this Contract;
- (b) The Contractor has not entered into any other contracts or employment relationships that restrict the Contractor's ability to perform under this Contract;
- (c) The Contractor will observe and abide by all applicable laws and regulations, including those of the State regarding conduct on any premises under the State's control;
- (d) The Contractor has good and marketable title to any products delivered under this Contract and in which title passes to the State; and
- (e) The Contractor has the right and ability to grant the license provided in any Deliverable in which title does not pass to the State.

If any work of the Contractor or any Deliverable fails to comply with these warranties, and the Contractor is so notified in writing, the Contractor must correct such failure with all due speed, or refund the amount of the compensation paid for the Deliverable. For Custom Deliverables, the State will notify the Contractor of any warranty claims within 30 days of the performance of the service and Contractor will a) re-perform any service which does not meet the applicable warranty or b) refund the amounts paid for the non conforming service(s). The Contractor also must indemnify the State for any direct damages and any claims by third parties based on any breach of these warranties.

## 7.2 PRODUCT WARRANTIES

Unless inconsistent with Section 7.1 above, the Contractors standard commercial warranties as stated below and in its commercial price list will apply.

(a) Contractor warrants that all Equipment as at the date of delivery will be free from material defects in materials and workmanship for the period shown on the web page at: <http://www.sun.com/service/support/warranty> (the "Warranty Web Page"), (a hardcopy of which is available on request), provided that warranty is at least ninety (90) days. The State may review Contractor's warranty programs and related procedural details at the warranty Web Page.

(b) Contractor further warrants that Software listed on the Warranty Web Page as of the date of delivery, for the period shown on the Warranty Web Page will contain the features described in the applicable users manual, as it exists at the date of delivery to the State.

(c) Contractor further warrants that for a period of 90 days from the date of purchase, as evidenced by a copy of the receipt, the media on which Software is furnished (if any) will be free from defects in materials and workmanship under normal use.

Any changes to the warranty details specified on the Warranty Web Page from time to time will not apply to Products ordered prior to such change.

Except when breach of warranty for (a) and (b) above results in damage to real property or injury or death to any individual, the State's sole and exclusive remedy and Sun's entire liability for breach of the above warranty will be: (a) the repair or, at Sun's option and expense, replacement of the defective equipment; and (b) the provision of Software Support as shown on the Warranty Web Page. Parts or components which are replaced under applicable warranty may not be new. Title in all defective parts which are removed from equipment under applicable warranty shall transfer back to Contractor. For (c) above, except in a case of damage to tangible property, death, or bodily injury, the exclusive remedy and Contractors entire liability under this limited warranty will be at Contractors option to replace software media or refund the fee paid for the Software.

No Warranty will apply to any Product which has been:

- (a) modified, altered or adapted without Contractors prior written consent;
- (b) maltreated or used in a manner other than in accordance with the relevant manual;
- (c) repaired by any third party in a manner which fails to meet Contractor's quality standards; improperly installed by any part other than Contractor;
- (d) used with equipment or software not covered by the warranty, to the extent that the problems are attributable to such use;
- (e) purchased from an entity other than Contractor or a Contractor authorized reseller.

Except as otherwise provided by an express or implied warranty, the Contractor will not be liable to the ordering activity for consequential damages resulting from any defect or deficiencies in accepted items.

**7.4 INDEMNITY.** The Contractor must indemnify the State against all liability or expense resulting from bodily injury to any person (including injury resulting in death) or damage to real and tangible property arising out of its performance under this Contract, provided such bodily injury or property damage is due to the negligence of the Contractor, its employees, agents, or subcontractors. The Contractor also must indemnify the State against any claim of infringement of a copyright, patent, trade secret, or other intellectual property rights based on the State's proper use of any Deliverable and/or Custom Deliverables under this Contract. This obligation of indemnification will not apply where the State has modified the Deliverable and/or Custom Deliverables and the claim of infringement is based on the modification. The State will give the Contractor notice of any such claim as soon as reasonably practicable. If a successful claim of infringement is made, or if the Contractor reasonably believes that an infringement claim that is pending may actually succeed, the Contractor will do

one of the following four things:

- (a) Modify the Deliverable so that is no longer infringing;
- (b) Replace the Deliverable with an equivalent or better item;
- (c) Acquire the right for the State to use the Deliverable as it was intended for the State to use under this Contract; or
- (d) Remove the Deliverable and refund the fee the State paid for the Deliverable and the fee for any other Deliverable that required the availability of the infringing Deliverable for it to be useful to the State.

**7.5 LIMITATION OF LIABILITY.** NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS CONTRACT OR ANYTHING INCORPORATED BY REFERENCE INTO THIS CONTRACT, THE PARTIES AGREE AS FOLLOWS:

- (a) NEITHER PARTY WILL BE LIABLE FOR ANY INDIRECT, INCIDENTAL, OR CONSEQUENTIAL LOSS OR DAMAGE OF ANY KIND, INCLUDING BUT NOT LIMITED TO LOST PROFITS, EVEN IF THE PARTIES HAVE BEEN ADVISED, KNEW, OR SHOULD HAVE KNOWN OF THE POSSIBILITY OF SUCH DAMAGES.
- (b) THE CONTRACTOR WILL BE LIABLE FOR ALL DIRECT DAMAGES DUE TO THE FAULT OR NEGLIGENCE OF THE CONTRACTOR UP TO THREE TIMES THE COST OF THE PRODUCT OR SERVICE OR \$3,000,000 PER OCCURRENCE FOR ALL PURCHASES UNDER THE CONTRACT WHICHEVER IS GREATER.
- (c) THE CONTRACTOR WILL NOT BE LIABLE FOR DAMAGES (1) ARISING OUT OF USE OF THE PRODUCT OR SERVICES AS DESCRIBED HIGH RISK ACTIVITIES SECTION IN EXHIBIT I OR (2) DATA BASES NOT SUBJECT TO A REASONABLE BACK UP PROGRAM.

## **8 -MAINTENANCE**

**8.1 Contractors standard maintenance, support and pricing plans are described in Exhibit II.**

## **9 -ASSIGNMENT AND SUBCONTRACTING**

**9.1 ASSIGNMENT.** The Contractor may not assign this Contract without the written consent of the State.

**9.2 SUBCONTRACTING.** The State recognizes that it may be necessary for the Contractor to use subcontractors to perform portions of the work under this Contract. Contractor agrees that it will be fully liable for the performance of such Subcontractors who provide services under this Contract.

## **10 – CONSTRUCTION**

**10.1 HEADINGS.** The headings used in this Contract are for convenience only and may not be used in interpreting this Contract.

**10.2 ENTIRE DOCUMENT.** This Contract, which includes the Contractor's Tracking Customers attached as Exhibit A, the pricelist attached as Exhibit I and Maintenance and Support Plans attached as Exhibit II and all documents referred to in this Contract, constitutes the entire agreement between the parties with respect to the subject matter and supersedes any previous agreements, whether oral or written.

**10.3 BINDING EFFECT.** This Contract will be binding on and benefit the respective successors and assigns of the State and the Contractor.

- 10.4 AMENDMENTS – WAIVER.** No amendment or modification of this Contract will be effective unless it is in writing and signed by both parties. The failure of either party at any time to demand strict performance by the other party of any of the terms or conditions of this Contract may not be construed as a waiver of any those terms or conditions, and either party may at any time demand strict and complete performance by the other party.
- 10.5 SEVERABILITY.** If a court of competent jurisdiction finds any provision of this Contract to be unenforceable, the remaining provisions of this Contract will remain in full force and affect.
- 10.6 CONSTRUCTION.** This Contract must be construed in accordance with the plain meaning of its language and neither for nor against the drafting party.
- 10.7 NOTICES.** For any notice under this Contract to be effective, the noticing party must make it in writing and sent it to the address of the other party first appearing above, unless that party has notified the other party, in writing and in accordance with the provisions of this section, of a new mailing address for the receipt of notices. This notice requirement will not apply to any notices that this Contract expressly authorizes to be made orally.
- 10.8 CONTINUING OBLIGATIONS.** Any terms, conditions, representations, or warranties contained in this Contract that must survive termination or expiration of this Contract to be fully effective will survive the termination or expiration of the Contract. Additionally, termination or expiration of this Contract will not affect the State's right to continue to use any Deliverable for which it has paid, including licensed material. And no termination or expiration of the Contract will affect the State's right to receive maintenance, warranty work, or other services for which the State has paid.
- 10.9 PRIORITY.** If there is any inconsistency or conflict between this document and any provision of anything incorporated by reference, this document will prevail.
- 10.10 DAYS.** When this Contract refers to days, it means calendar days, unless it expressly provides otherwise.

## 11 -LAW AND COURTS

- 11.1 EEO.** The Contractor must comply with all Ohio laws regarding equal employment opportunity, including among others Code  $\square$  125.111, as well as all related Executive Orders of the Governor of Ohio.
- 11.2 DRUG FREE WORKPLACE.** The Contractor must comply with all Ohio laws regarding maintaining a drug-free workplace and make a good faith effort to ensure that all its employees do not possess and are not under influence of illegal drugs or alcohol or abuse prescription drugs while working on State property.
- 11.3 OHIO ETHICS LAW AND LIMITS ON POLITICAL CONTRIBUTIONS.** The Contractor certifies that it is currently in compliance and will continue to adhere to the requirements of the Ohio ethics laws. In accordance with Executive Order 2007-01S, the Contractor, by signature on this document, certifies: (1) it has reviewed and understands Executive Order 2007-01S, (2) has reviewed and understands the Ohio ethics and conflicts of interest laws, and (3) will take no action inconsistent with those laws and this order. The Contractor understands that failure to comply with Executive Order 2007-01S is, in itself, grounds for termination of this Agreement and may result in the loss of other contracts or grants with the State. The Contractor hereby certifies that all applicable parties listed in Division (I)(3) or (J)(3) of Ohio Revised Code Section 3517.13 are in full compliance with Divisions (I)(1) and (J)(1) of Ohio Revised Code Section 3517.13.
- 11.4 SECURITY & SAFETY RULES.** When accessing State networks and systems, the Contractor must comply with all applicable policies and regulations regarding data security and integrity. And when on any property owned or controlled by the State, the Contractor must comply with all security and safety rules applicable to people on those premises.
- 11.5 LAW AND VENUE.** This Contract is governed by and will be construed under Ohio law, and venue for all disputes will lie exclusively with the appropriate court in Franklin County, Ohio.

**11.6 UNRESOLVED FINDINGS.** The Contractor represents that it is not subject to an unresolved finding for recovery under Code  $\alpha$  9.24. If this warranty proves false when the parties sign this Contract, the Contract will be void. Additionally, if this representation proves false on the date of any renewal or extension of the Contract, the renewal or extension will be void.

**11.7 TERROR DECLARATION.** Pursuant to Ohio Revised Code Section 2909.33, unless Contractor has been pre-certified, the Contractor must complete a Declaration Regarding Material Assistance/non-assistance to Terrorist Organizations ("Declaration") in its entirety to enter into this Contract and to renew it. If the State discovers that the Contractor submitted a false Declaration to obtain this Contract or any renewal of it, this Contract will terminate for cause, and the State will be entitled to the damages specified in this Contract or such a termination. Should this Contract require renewal for completion of any services the Contractor performs under it or for the State to obtain maintenance for any Deliverable acquired during the term of this Contract, the Contractor must submit a new Declaration as part of that process. The Contractor's failure to submit an acceptable Declaration in such a situation will entitle the State to damages as in the case of a termination of this Contract for cause.

**11.8 ANTITRUST.** The State and the Contractor recognize that, in actual economic practice, overcharges resulting from antitrust violations are usually borne by the State. The Contractor therefore assigns to the State all state and federal antitrust claims and causes of action that the Contractor has or acquires relating to the goods and services acquired under this Contract.

**To SHOW THEIR AGREEMENT,** the parties have executed this Contract on the date(s) identified below, and this Contract will be effective as of the date it is signed on behalf of the State.

**CONTRACTOR**

BY: Tom Lockman

TITLE: REGION SALES EXECUTIVE

DATE: 2-15-08

**STATE OF OHIO,  
OFFICE OF INFORMATION TECHNOLOGY**

R. Steve Edmonson

**R. STEVE EDMONSON  
DIRECTOR, OFFICE OF INFORMATION TECHNOLOGY  
STATE CHIEF INFORMATION OFFICER**

DATE: 2/26/08



## EXHIBIT I Pricelist, Discounts and Software License Agreement

1. Pricelist – The initial pricelist applicable to this Contract is:

{INSERT PRICE LIST INFORMATION}

2. High Risk Activities: The State acknowledges that Products and Services are not designed or intended for use in the design, construction, operation or maintenance of any nuclear facility.
3. Discounts

The following discounts comprise Sun's State and Local Standard Discount Schedule (SDS).

<u>Category</u>	<u>Description</u>	<u>Discount Rates off of US Pricelist</u>
A	Mid to high-end Enterprise & Data Center products, and peripherals	29%
B	Software except SunOne	19%
C	Custom Pricing	Non-contractual discountable
D	Educational Promotion	Non-discountable – promotions, allowances etc
E	Volume Products and Service Plans	05%
F	Midrange products & services	14%
G	Highend products & services ( <i>Systems</i> )	24%
H	Workstation, Workgroup products and associated peripherals	14%
J	SunOne, non-subscription	21%
K	Warranty Service	20%
M	Highend products & services ( <i>Storage</i> )	24%
N	Java Enterprise System & Java Desktop System (subscription)	Non-discountable – subscription pricing
P	Enterprise Storage products and software	20%

## Exhibit II

These terms will apply to licenses of the Contractor's commercial software.

1. Definitions. For purposes of this Exhibit II, the following terms have the following meanings:

- (a) "Entitlement" means the collective set of applicable documents authorized by Sun evidencing your obligation to pay associated fees (if any) for the license, associated Services, and the authorized scope of use of Software under this Agreement.
- (b) "Licensed Unit" means the unit of measure by which your use of Software and/or Service is licensed, as described in your Entitlement.
- (c) "Permitted Use" means the licensed Software use(s) authorized in this Agreement as specified in your Entitlement. The Permitted Use for any bundled Sun software not specified in your Entitlement will be evaluation use as provided in Section 3.
- (d) "Service" means the service(s) that Sun or its delegate will provide, if any, as selected in your Entitlement and as further described in the applicable service listings at [www.sun.com/service/servicelist](http://www.sun.com/service/servicelist).
- (e) "Software" means the Sun software described in your Entitlement. Also, certain software may be included for evaluation use under Section 3.
- (f) "You" and "Your" means the ordering entity specified in the Entitlement, or for evaluation purposes, the entity performing the evaluation.
- (g) "Agreement" means this Exhibit and the STS Contract that it is a part of. Agreement and Contract are used interchangeably in this Exhibit.

2. License Grant and Entitlement.

Subject to the Permitted Use and Licensed Units specified in your Entitlement, Sun grants you a perpetual nonexclusive, nontransferable limited license to use Software for your Permitted Use. Your Entitlement will specify (a) Software licensed, (b) the Permitted Use, (c) the license term as perpetual, (d) the Licensed Units, and e) the authorized scope of use. Any term and conditions in the Entitlement that conflict with the Contract other than scope of use or limitation of use during the perpetual license will be governed by the Contract.

Additionally, if your Entitlement includes Services, then it will also specify the (f) Service and (g) service term.

If your rights to Software or Services are limited in duration and the date such rights begin is other than the purchase date, your Entitlement will provide that beginning date(s).

The Entitlement may be delivered to you in various ways depending on the manner in which you obtain Software and Services, for example, the Entitlement may be provided in your receipt, invoice or your contract with Sun or authorized Sun reseller. It may also be in electronic format if you download Software. If the Entitlement is inconsistent with your purchase order, the parties will meet to resolve the inconsistency. The parties will continue to meet until all inconsistencies between the documents are resolved.

### 3. Permitted Use.

As selected in your Entitlement, one or more of the following Permitted Uses will apply to your use of Software. Unless you have an Entitlement that expressly permits it, or you have paid for the use, you may not use Software for any of the other Permitted Uses. If you don't have an Entitlement, or if your Entitlement doesn't cover additional software delivered to you, then such software is for your Evaluation Use. The State will not be responsible for its use of evaluation software that it did not order and that is not clearly marked or does not contain an appropriate expiration code.

(a) Evaluation Use. You may evaluate Software internally for a period of 90 days from your first use.

(b) Research and Instructional Use. You may use Software internally to design, develop and test, and also to provide instruction on such uses.

(c) Commercial Use. You may use Software internally for your own commercial or governmental purposes.

(e) Service Provider Use. You may make Software functionality accessible (but not by providing Software itself or through outsourcing services) to your end users in an extranet deployment, but not to your affiliated companies or to government agencies.

### 4. Licensed Units.

Your Permitted Use is limited to the number of Licensed Units stated in your Entitlement. If you require additional Licensed Units, you will need additional Entitlement(s).

### 5. Restrictions.

(a) The copies of Software provided to you under this Agreement are licensed, not sold, to you by Sun. Sun reserves all rights not expressly granted. (b) You may make up to two archival copies of Software, but otherwise may not copy, modify, or distribute Software. However if the Sun documentation accompanying Software lists specific portions of Software, such as header files, class libraries, reference source code, and/or redistributable files, that may be handled differently, you may do so only as provided in the Sun documentation. (c) You may not rent, lease, lend or encumber Software. (d) Unless enforcement is prohibited by applicable law, you may not decompile, or reverse engineer Software. (e) The terms and conditions of this Agreement will apply to any Software updates, provided to you at Sun's discretion, that replace and/or supplement the original Software. (f) You may not publish or provide the results of any benchmark or comparison tests run on Software to any third party without the prior written consent of Sun unless required to do so under Ohio law.

(g) Software is confidential and copyrighted. (h) Unless otherwise specified, if Software is delivered with embedded or bundled software that enables functionality of Software, you may not use such software on a stand-alone basis or use any portion of such software to interoperate with any program(s) other than Software. (i) Software may contain programs that perform automated collection of system data and/or automated software updating services. System data collected through such programs may be used by Sun, its subcontractors, and its service delivery partners for the purpose of providing you with remote system services. (j) Software is not designed, licensed or intended for use in the design, construction, operation or maintenance of any nuclear facility and Sun and its licensors disclaim any express or implied warranty of fitness for such uses. (k) No right, title or interest in or to any trademark, service mark, logo or trade name of Sun or its licensors is granted under this Agreement.

### 6. Java Compatibility and Open Source.

Software may contain Java technology. You may not create additional classes to, or modifications of, the Java technology, except under compatibility requirements available under a separate agreement available at [www.java.net](http://www.java.net).

Sun supports and benefits from the global community of open source developers, and thanks the community for its important contributions and open standards-based technology, which Sun has adopted into many of its products.

## Exhibit I (cont)

Portions of Software may be provided with notices and open source licenses from such communities and third parties that govern the use of those portions, and any licenses for open source software developed by a third party granted hereunder do not alter any rights and obligations you may have under such open source licenses, however, the disclaimer of warranty and limitation of liability provisions in this Agreement will apply to all Software in this distribution.

#### 7. Term and Termination.

**License Termination.** Sun may terminate any license that one of your state agencies or political subdivisions has that is affected by a material breach of this Agreement by that agency or political subdivision, provided Sun gives that entity written notice of the breach and the entity fails to cure the breach within a reasonable time after receipt of written notice. Sun may not terminate one agency's or political subdivision's licenses due to another agency's or political subdivision's breach and failure to cure. Such right of termination is limited to the agency or political subdivision involved and affected Software licensed to that agency or political subdivision.

The license and service term are set forth in your Entitlement(s). Your rights under this Agreement will terminate immediately without notice from Sun if you materially breach it or take any action in derogation of Sun's and/or its licensors' rights to Software. Sun may terminate this Agreement should any Software become, or in Sun's reasonable opinion likely to become, the subject of a claim of intellectual property infringement or trade secret misappropriation. Upon termination, you will cease use of, and destroy, Software and confirm compliance in writing to Sun. Sections 1, 5, 6, 7, and 9-15 will survive termination of the Agreement.

The license and service term are set forth in your Entitlement(s). Your rights under this Agreement will terminate immediately without notice from Sun if you materially breach it or take any action in derogation of Sun's and/or its licensors' rights to Software. If any Software is found to infringe, or in Sun's opinion is likely to be found to infringe, Sun may elect to: (i) obtain for you the right to use such Software, (ii) replace or modify the Software so that it becomes non-infringing; or if neither of these alternatives is reasonably available, (iii) remove the Software and refund your net book value for the Software. If Sun has elected to remove the Software and refund your net book value, Sun may also terminate this Agreement. On termination, you will cease use of, and destroy, Software and confirm compliance in writing to Sun. Sections 1, 5, 6, 7, and 9-15 will survive termination of the Agreement. Notwithstanding anything in this section to the contrary, Sun will have no obligation to obtain the right to use Software, replace or modify the Software or remove and refund the Software, if the infringement or potential infringement results from: (i) your use of the Software in combination with any non-Sun provided equipment, software or data; (ii) Sun's compliance with your designs or specifications; (iii) your modification of the Software; or your use of an allegedly infringing version of any Software if the alleged infringement could be avoided by the use of a different version made available to you.

#### 8. Disclaimer of Warranty.

UNLESS SPECIFIED IN THIS AGREEMENT OR THE STATE TERM CONTRACT, THIS AGREEMENT IS INCORPORATED INTO ALL EXPRESS OR IMPLIED CONDITIONS, REPRESENTATIONS AND WARRANTIES, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT ARE DISCLAIMED, EXCEPT TO THE EXTENT THAT THESE DISCLAIMERS ARE HELD TO BE LEGALLY INVALID.

#### 9. Export Regulations.

All Software, documents, technical data, and any other materials delivered under this Agreement are subject to U.S. export control laws and may be subject to export or import regulations in other countries. You agree to comply strictly with these laws and regulations and acknowledge that you have the responsibility to obtain any licenses to export, re-export, or import as may be required after delivery to you.

#### 10. U.S. Government Restricted Rights.

If Software is being acquired by or on behalf of the U.S. Government or by a U.S. Government prime contractor or subcontractor (at any tier), then the Government's rights in Software and accompanying documentation will be only as set forth in this Agreement; this is in accordance with 48 CFR 227.7201 through 227.7202-4 (for Department of Defense (DOD) acquisitions) and with 48 CFR 2.101 and 12.212 (for non-DOD acquisitions).

Please contact Sun Microsystems, Inc. 4150 Network Circle, Santa Clara, California 95054 if you have questions.

## Exhibit II Maintenance – Support Plans and Pricing

### 1. Product Support Plan Descriptions

*SunSpectrum Support provides the flexibility of multiple service plan options and the simplicity of a single support agreement. Sun customer service is consistently rated highest among technology providers.*

*For a complete listing of SunSpectrum Service Plan offerings and deliverables please visit the SunSpectrum website at <http://www.sun.com/service/serviceplans/index.jsp>.*

### 2. SunSpectrum Service Plan Discounts

<i>Type</i>	<i>Discount % off MSRP</i>
State and Local Government	20%
*Multi-Year Service Plan – 2 year	4%
*Multi-Year Service Plan – 3+ years	8%
*Pre-Pay – 1 year	3%
*Pre-Pay – 2 year	6%
*Pre-Pay – 3+ years	9%
<i>* \$12K annual minimum required</i>	

### 3. Time and Material On-Call Rates

<i>Sun Contract Status</i>	<i>During Local Business Hours</i>	<i>After Local Business Hours</i>
Sun Contracted Customer	\$250 / hr	\$350 / hr
Non Contracted Customer	\$350 / hr	\$450 /hr
<i>2 hour minimum required</i>		
<i>Travel over 30 miles charged hourly rate</i>		

### 4. Service Listing

*For a complete listing of available Sun Service offerings visit:*  
<http://www.sun.com/service/servicelist>

**DEFINITIONS**

"*Order Confirmation*" means a written or electronic acknowledgment or invoice issued by the Contractor in response to an Order;

"*Service Contract*" means an Order for Services that has been accepted by the Contractor. A service contract is not a separate agreement but is part of this Contract, and it may not contain any terms or conditions that modify or conflict with the terms of this Contract.

"*Services*" means any offering in Sun's Service List (each offering, a "Service Listing"), which is located at

<http://www.sun.com/service/servicelist>

"*State*" means the State of Ohio and/or eligible end users of this Contract.

Capitalized terms used but not defined in this Exhibit have the meanings set out in the Contract. .

**SYSTEMS SUPPORT**

**Service Contracts.** For each Service to be delivered by Contractor, Contractor will issue a quote for such Service, and State will issue a PO against such quote. Contractor will then issue an order acknowledgement. Together, these documents form the Service Contract.

**State Sites.** Systems support will be delivered in accordance with the Service Contract and/or SOW to the State's sites and for the systems indicated on the relevant Order Confirmation (respectively, "State Sites" and "Covered Systems"). State will give Contractor at least 30 days' written notice prior to relocating Covered Systems, which notice must specify the new site. Support of relocated systems is subject to local availability and may be subject to additional fees, and to inspection and recertification of the relocated systems at the Contractor's applicable time and materials rates.

**Problem Avoidance.** State will perform routine system preventative maintenance and cleaning. Prior to requesting support from Contractor, State will comply with all applicable operating and troubleshooting procedures, as posted on a Contractor knowledge database or as otherwise provided by the Contractor. If such efforts are unsuccessful in eliminating the malfunction, The State will promptly notify the Contractor. The State will establish and maintain a procedure external to Covered Systems so that the State can reconstruct lost or altered files, data, or programs.

## Exhibit II Maintenance – Support Plans and Pricing (cont)

Qualified Personnel. Requests for hardware and software support may be made only by State personnel who:

- (a) possess the necessary expertise and training (as from time to time defined by Contractor) to diagnose and resolve system and software malfunctions with direction by Contractor; and
- (b) are designated as "Contacts" in accordance with the applicable Service Listing or SOW.

Additional Systems. The State may add systems to a Service Contract for a period coterminous with the term of the Service Contract at the Contractor's applicable, pro-rated, per-system fee, upon written notice to the Contractor and subject to the Contractor's rights of inspection. The Contractor will provide to the State an add-on Order Confirmation reflecting the additional Covered Systems and associated additional fee.

Eligible Systems - Automatic Eligibility. Systems support is available for systems which are covered by a valid software license and are either still under the Contractor's warranty or currently under an existing Contractor support agreement. For any other systems, the Contractor, in its sole discretion, may elect to provide systems support provided that:

- (a) the systems pass a Contractor inspection, and State places an order to systems support within 120 days of the Contractor's issuance of a support qualification certificate evidencing such inspection; or
- (b) The Contractor may place the systems under observation and that support coverage will only commence once the systems have operated for 90 consecutive days without experiencing a system failure, during which period required support will be charged on a time and materials basis.

Exclusions. Services do not include services required due to:

- (a) improper use, abuse, accident, or neglect;
- (b) alterations, modifications, or attempts to repair Covered Systems that Contractor has not authorized;
- (c) causes external to a Covered System, such as failure to maintain environmental conditions within the operating range specified by the manufacturer;
- (d) attachment of a Covered System to equipment, software, or other items not listed on Contractor's then current Price List;
- (e) relocations or attempts to relocate Covered Systems; or
- (f) failure to maintain software and Covered Systems at Contractor-specified minimum release levels or configurations necessary to keep a Covered System within the terms of the Contractor's applicable end of life support policy, or to properly install remedial replacement parts, patches, software updates or subsequent releases as directed by Contractor.

Any Services the Contractor delivers as a result of any such events will be invoiced separately at the Contractor's applicable time and materials rates, and are subject to the applicable Agreement.

### **STATE OBLIGATIONS**

Additional services. Any additional services which the Contractor provides as a result of State's failure to fulfill all applicable State obligations under the Agreement, will be billed separately, at Contractor's applicable time and materials rates.

Cooperation. State will cooperate with Contractor and will provide safe and timely access to its premises and computer equipment, including remote access, adequate working space, facilities and any other services, personnel, information or materials that Contractor personnel may reasonably require to perform Contractor's obligations.

Compliance with data privacy laws. Both parties will comply with all applicable laws regarding collection and use of data under this Agreement. State consents to Contractor's use and processing of State's data for purposes of fulfilling its obligations under this Contract and will ensure that, where it provides Contractor with data relating to another, it has obtained that other's consent to the Contractor's use and processing of such data.

## Exhibit II Maintenance – Support Plans and Pricing (cont)

**REMOTE SERVICES**

By purchasing any Services which are delivered remotely, the State:

- (a) agrees that the Contractor may access Products remotely at the State's site, and may process and store Product data in order to remotely monitor, manage and service Products (all such data will be treated by the Contractor as State Confidential Information, except that the State permits disclosure for the purposes of fulfilling this Agreement);
- (b) commits to procure and maintain a Contractor-specified bridge or gateway appropriate to the systems or networks involved, at the State's expense; and
- (c) assumes responsibility for all telecommunications and internet access charges related to the remote Services.

If the State fails to permit or facilitate remote Services, the Contractor may decline to deliver such Services and assess additional charges or other conditions for the delivery of Services which would otherwise be provided remotely, or revoke any applicable warranties.

**ON-SITE MATERIALS**

The State will segregate, safeguard and designate as the property of the Contractor all tools, parts, spares, equipment and materials placed on a State site and for which title is not transferred to the State ("On-Site Materials").

On-Site Materials may only be used by authorized persons consistent with the terms of the applicable Service Listing. The State will have no right or interest in the On-Site Materials, and will not grant any liens or security interests therein. The State assumes all risk of loss or damage to On-Site Materials that may occur prior to their return and receipt by the Contractor.

Within ten days after termination or expiration of any Service Contract, the State will deliver to the Contractor any On-Site Materials related to such Service Contract, with a bill of lading, freight charges prepaid and fully insured.

**MISCELLANEOUS**

Service availability. Services may not be available in certain locations, and Deliverables may vary between locations. Services are subject to availability of qualified Contractor personnel and facilities and may be subject to additional costs or terms or to payment of minimum applicable fees. The Contractor may modify the Service Listings at any time, but will continue to provide Deliverables as set out in the relevant Service Listing in effect on the date the relevant Order Confirmation was issued until expiration or renewal of the relevant Service Contract. The Contractor may make Service substitutions and modifications that do not cause a materially adverse effect in overall Service performance.

Limitations on use of Service. The State acknowledges that Services are solely for the State's internal use, and the State may not provide, lease, or resell Services, directly or indirectly, to any third party, unless, and only to the extent that, the State is authorized by the Contractor in writing to do so.

**TO SHOW THEIR AGREEMENT**, the parties have executed this Contract on the date(s) identified below, and this Contract will be effective as of the date it is signed on behalf of the State.

CONTRACTOR

STATE OF OHIO,  
OFFICE OF INFORMATION TECHNOLOGY

BY: Tom Lockman

R. Steve Edmonson

R. STEVE EDMONSON  
DIRECTOR, OFFICE OF INFORMATION TECHNOLOGY  
STATE CHIEF INFORMATION OFFICER

TITLE: REGION SALES EXECUTIVE

DATE: 2/26/08

DATE: 2-15-08