

## STATE TERM CONTRACT

THIS CONTRACT ("Contract") is between the State of Ohio ("State"), through its Department of Administrative Services, General Services Division, at 4200 Surface Road, Columbus, Ohio, 43228 and AgileAssets Inc. ("Contractor"), with offices at 3144 Bee Caves Rd., Austin, TX, 78746.

### 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 for each product or service.

The State also recognizes that some manufacturers work primarily through dealers for various reasons, including offering customers better support through dealers that have a local presence in a service area. Because of this, the State may sometimes agree to work directly with a manufacturer's dealers.

However, if the Contractor is not the manufacturer of the products or services under this Contract, the Contractor must submit a letter from the manufacturer that assures the State that the Contractor is an authorized dealer in the manufacturer's products or services. The letter also must assure the State that the Contractor will have sufficient quantities of the offered products for the duration of the Contract to meet the State's needs under the Contract during the initial term and any extensions. Further, the letter must identify each of the manufacturer's product and service that the Contractor will supply under this Contract. The letter also must contain an assurance of the availability through the dealer of repair services and spare parts for products covered by this Contract for five years from the date of purchase. It also must contain an assurance that software maintenance will be available under the terms of this Contract either from the dealer or the manufacturer for six years from the date of acceptance. (This assurance is not necessary for PC and PC-based server software with a perpetual license fee of less than \$10,000.00 per copy.) The dealer must submit the letter, signed by an authorized representative of the manufacturer, with the executed copies of this Contract.

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, 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 June 30, 2013. 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

- X The best prices at which the Contractor has offered each product and service to its most favored customers 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 customer prices, the Contractor represents that it does not have a GSA Multiple Award Schedule or SmartBuy contract.

If the Contractor has submitted a manufacturer's letter to certify that the Contractor is an authorized dealer for the manufacturer, the Contractor represents that the information in the letter is accurate and that a duly authorized representative of the manufacturer signed the letter.

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.

- 2.2 **PRICE ADJUSTMENTS.** If the Contractor has relied on its GSA Multiple Award Schedule pricing or its GSA SmartBuy pricing, the State will be entitled to any price decreases that the Contractor offers to the GSA for any of its products and services during the term of this Contract. The Contractor must notify the State of any reduction in its GSA Multiple Award Schedule or SmartBuy pricing within 30 days of its occurrence and immediately reduce the price of the affected products or services to the State under this Contract.

If the Contractor has relied on its best customer pricing, the State will be entitled to a price decrease any time the Contractor or any of its dealers or distributors under this Contract sells a product or a service to any of its customers for less than the price agreed to between the State and the Contractor under this Contract. Any time the Contractor or any of its dealers or distributors under Section 3.1 of this Contract sells a product or provides a service to any customer for less than it is then available to the State under this 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.

The Contractor also must notify the State within 30 days of any general reduction in the price of any product or service covered by this Contract, even if the general reduction does not place the price of the product or service below the price available to the State under this Contract. The purpose of this notice of a general reduction in price is to allow the State to assess the value the State believes it is receiving under this Contract in light of the general reduction. If the State believes it is appropriate, the State may ask to renegotiate the Contract price for the products and services affected by the general reduction in price. If the Contractor and the State cannot agree on a renegotiated price, then on written notice to the Contractor, the State may immediately remove the affected products and services from this Contract.

- 2.3 **PRICELIST.** The Contractor's pricelist for the products and services that the Contractor may provide to the State under this Contract is attached as Exhibit I. For convenience, those products and services are called "Deliverables" in this Contract. Any custom materials resulting from the Contractor's services also are called "Deliverables" in this Contract. The Contractor may not provide any other Deliverables under this Contract without a prior written amendment to this Contract that both the State and the Contractor have signed. Furthermore, the Contractor may not charge the State greater prices for these Deliverables than the prices on the Exhibit I. If Exhibit I contains or incorporates by reference any terms or conditions other than a description of the scope of license for software, a description of the Contractor's products and services, and the prices for those products and services, those terms or conditions are excluded from this Contract and are of no effect. Exhibit I is identified as the following pricelist:

Exhibit 1 – AgileAssets Price List

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.** If this Contract permits any price increases, the Contractor must notify the State and any affected State agencies of the increase at least 60 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.

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.

**2.9 OBM CERTIFICATION.** This Contract is subject to Code § 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 Rule 126-1-02 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.

- 2.13 **OFFSET.** The State may set off any amounts the Contractor owes to the State under this or other contracts against any payments due from the State to the Contractor under this or any other contracts with the State.

### 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 customary business hours, the State may audit the Contractor's records and other materials that relate to the Deliverables and to the pricing representations that the Contractor has made to acquire this Contract. 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 material misrepresentation or overcharge to the State, the State will be entitled to recover its damages, including the 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. The defense cost must be outside of the policy limits. 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 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.

- a. Commercial Automobile Liability insurance with a combined single limit of \$500,000.
- b. 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 Department of Administrative Services, Office of State Purchasing, 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 Department of Administrative Services, Office of State Purchasing, 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 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 within a reasonable time, not to exceed 30 days, 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 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 Contractor will have 30 days to cure any breach of its obligations under this Contract, provided the breach is curable. If the Contractor 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 Contractor. 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 two times. After the second 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.

The State also may terminate this Contract or any order under this Contract for its convenience and without cause. And 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 as soon as the Contractor receives it. On receipt of the notice of termination, 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 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. 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.

The Contractor may not change any location where any services are performed 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 Deliverable meets the warranties in this Contract. The State will have up to 30 days after installation to do this. The State will not issue a formal letter of acceptance, and passage of 30 days will imply acceptance, though the State will issue a notice of noncompliance if a Deliverables does not meet the warranties in this Contract.

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 Deliverable 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 days after all defects have been fixed.

- 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.
- 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 must have the scope of the license granted in such material disclosed in an Exhibit to this Contract, 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 following, perpetual rights, subject to the next paragraph. The State may:

- (1) Use and copy the Commercial Software for use in or with the computer or computers for which it was acquired, including use at any State installation to which such computer or computers may be transferred;
- (2) Use or copy the Commercial Software for use with a backup computer for disaster recovery and disaster recovery testing purposes or if any computer for which it was acquired is inoperative;
- (3) Reproduce the Commercial Software for archival, image management, and backup purposes;
- (4) Modify, adapt, and combine the Commercial Software with other computer software, provided that the modified, combined, and adapted portions of the derivative software incorporating any of the Commercial Software will be subject to same restrictions on use;
- (5) Disclose to and reproduce the Commercial Software for use on behalf of the State by support service contractors or their subcontractors, subject to the same restrictions on use; and
- (6) Use or copy the Commercial Software for use with a replacement computer.

In the case of any other scope of license (e.g., MIPs, tier, concurrent users, enterprise, site, or otherwise), the foregoing will apply except as expressly modified by the applicable license description, which must be incorporated as part of Exhibit I. If the Contractor provides greater license rights in an item included in Exhibit I to its general customer base for the Software's list price, those additional license rights also will be provided to the State without additional cost or obligation. No license description may reduce the rights in items 1 through 6 above; it may only define the extent of use, if the use is other than a CPU license.

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.** 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. However, 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 grants 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 may 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 desire to the State 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 that 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 must treat such Confidential Information as secret if it is so marked, 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 may not disclose any Confidential Information to third parties and must use it solely to perform under this Contract.

If any Deliverables contain data, documentation, or other written information that is confidential in nature and properly labeled as such, then it also will be Confidential Information for purposes of this section. The State will keep all such Confidential Information in confidence and will not use it other than as authorized under this Contract. Nor will the State disclose any such Confidential Information to any third party without first obligating the third party to maintain the secrecy of the Confidential Information.

If one party discloses Confidential Information ("Disclosing Party") to the other party to this Contract ("Receiving Party"), the Receiving Party's obligation to maintain the confidentiality of the Confidential Information will not apply where such:

- (1) Was already in the possession of 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) Except as provided in the next paragraph, 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.

Information that may be available publicly through other sources about people that is personal in nature, such as medical records, addresses, phone numbers, social security numbers, and similar things are nevertheless sensitive in nature and may not be disclosed or used in any manner except as expressly authorized in this Contract. Therefore, item (3) in the preceding paragraph does not apply, and the Contractor must treat such information as Confidential Information whether it is available elsewhere or not.

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.

## 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 Department of Administrative Services, OIT 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 this Contract for cause.

- 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 Department of Administrative Services, Office of State Purchasing. 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  
GSD Business Office  
4200 Surface Road  
Columbus, OH 43228

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 failure will be a breach of this Contract, and the State may terminate this Contract for cause and seek damages for the breach.

## 7 - WARRANTIES AND LIABILITIES

- 7.1 **WARRANTIES.** The Contractor warrants that the recommendations, guidance, and performance of the Contractor and all Deliverables under this Contract will:

- (a) Be in accordance with the sound professional standards and the requirements of this Contract and without any material defects;
- (b) Not infringe on the intellectual property rights of any third party;
- (c) Be the work solely of the Contractor, unless otherwise provided in this Contract; and
- (d) Be merchantable and fit for the particular purpose for which the Deliverables were acquired.

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, not to exceed 30 days, or refund the amount of the compensation paid for the Deliverable. 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 SOFTWARE WARRANTY.** If Exhibit I includes work to develop custom software as a Deliverable, then on delivery and for one year after the date of acceptance of any Deliverable that includes custom software, the Contractor warrants that:

- (a) The software will operate on the computer(s) for which the software is intended in the manner described in the relevant software documentation;
- (b) The software will be free of material defects;
- (c) The Contractor will deliver and maintain relevant and complete software documentation, commentary, and source code;
- (d) The source code language used to code the software is readily available in the commercial market, widely used and accepted for the type of programming involved, and support programming in the language is reasonably available in the open market; and
- (e) The software and all maintenance will be provided in a professional, timely, and efficient manner.

For Commercial Software developed by the Contractor or licensed from a third party, the Contractor represents and warrants that it either has the right or has obtained a binding commitment from the third party licensor to make the following warranties and commit to the following maintenance obligations. During the warranty period described in the next paragraph, the Contractor must:

- (a) Maintain or cause the third-party licensor to maintain the Commercial Software so that it operates in the manner described in its documentation;
- (b) Supply technical bulletins and updated user guides;
- (c) Supply the State with all updates, improvements, enhancements, and modifications to the Commercial Software and documentation and, if available, the commentary and the source code;
- (d) Correct or replace the software and remedy any material programming error that is attributable to the Contractor or the third-party licensor; and
- (e) Maintain or obtain a commitment from the third-party licensor to maintain the Commercial Software so that it will properly operate in conjunction with changes in the operating environment for which it was designed.

For Commercial Software designed for mainframe platforms and for Commercial Software designed for PC or PC-based servers and costing more than \$10,000.00 per license or per copy, the warranty period will be the longer of one year after acceptance or the licensor's standard warranty period. For Commercial Software designed for PC or PC-based servers and costing less than \$10,000.00 per license or per copy, the warranty period will be the longer of three months after acceptance or the licensor's standard warranty period. For PC and PC-based servers, the warranty will not include updates, improvements, enhancements, or modifications to the Commercial Software and documentation, if such are not provided as part of the licensor's standard warranty or license fee.

Software documentation means well written, readily understood, clear, and concise instructions for the software's users as well as a system administrator. The software documentation must provide the users of the software with meaningful instructions on how to take full advantage of all of the capabilities designed for end users. It also means installation and system administration documentation for a system administrator to allow proper control, configuration, and management of the software. Source code means the uncompiled operating instructions. The Contractor must provide the source code in the language in which it was written and must include such commentary or annotations as would allow a competent programmer proficient in the source language to readily interpret the source code and understand the purpose of all routines and subroutines contained within the source code.

**7.3 EQUIPMENT WARRANTY.** If any computer hardware or other type of electrical equipment ("Equipment") will be a part of any Deliverable, the following warranties apply. The Contractor warrants that the Equipment fully complies with all government environmental and safety standards applicable to the Equipment. The Contractor also warrants for the warranty period described in the next paragraph that the Equipment will perform substantially in

accordance with its user manuals, technical materials, and related writings published by the manufacturer with respect to such Equipment, and that such Equipment will achieve any function described in such writings. The foregoing warranty will not apply to Equipment that the State modifies or damages after title passes to it. The warranty period for all Equipment will be the longer of one year after the State accepts the Equipment or the Contractor's standard warranty period.

If any Equipment does not meet the above warranties during the applicable warranty period, the Contractor must fix the nonconforming Equipment so it performs substantially in accordance with its user manuals, technical materials, and related publications, replace the Equipment, or grant the State a refund equal to the amount it paid for the Equipment. The Contractor must either fix or replace the Equipment or refund the purchase price to the State with all due speed, not to exceed seven days in the case of a fix or a replacement or 30 days in the case of a refund. The Contractor will be responsible for all shipping costs associate with fixing, replacing, or returning any defective equipment.

**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 property arising out of its performance under this Contract, provided such bodily injury or property damage is due to the negligence or other tortious conduct 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 under this Contract. This obligation of indemnification will not apply where the State has modified the Deliverable 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 it 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 OR ITS BREACH OF ANY PROVISION OF THIS CONTRACT.

## 8 - MAINTENANCE

**8.1 SOFTWARE MAINTENANCE.** If this Contract involves any custom software as a Deliverable, then during the warranty period, the Contractor must correct any material programming errors that are attributable to the Contractor within a reasonable time, provided the State notifies the Contractor, either orally or in writing, of a problem with the software and provides sufficient information to identify the problem. The Contractor's response to a programming error will depend upon the severity of the problem. In the case of programming errors that slow the processing of data by a small degree, render minor and non-critical functions of the System inoperable or unstable, or require users or administrations to employ workarounds to fully use the software, the Contractor must respond to requests for resolution within four business hours and begin working on a proper solution within one business day, dedicating the resources of one qualified programmer full-time to fixing the problem. In the case of any defects with more significant consequences, including those that render key functions of the software inoperable or significantly slow data processing, the Contractor must respond within two business hours of notification and, if requested, provide on-site assistance and dedicate all available resources to resolving the problem.

For Commercial Software other than PC or PC-based server software costing less than \$10,000.00 per copy or license, the Contractor must provide maintenance during the warranty period at no cost to the State. At a minimum, that maintenance must be the standard maintenance program that the licensor, whether the Contractor or a third party, normally provides to its client base. That maintenance program must include all new releases, updates, patches, and fixes to the Commercial Software. It also must include a commitment to keep the software current with the operating environment in which it is designed to function and a commitment to promptly correct all material defects in the software.

Additionally, the Contractor will make (or obtain a commitment from the third-party licensor to make) maintenance available for the software for at least five years after the warranty period. The Contractor will limit or obtain a

commitment from the third-party licensor, if applicable, to limit increases in the annual fee for maintenance to no more than five percent annually. If the licensor, whether it is the Contractor or a third-party, is unable to provide maintenance during that period, then the licensor must do one of the following things: (a) give the State a *pro rata* refund of the license fee based on a five-year useful life; or (b) release the source code for the software to the State for use by the State solely for the purpose of maintaining any copies of the software for which the State has a proper license. The State will treat the source code as Confidential Information under the Confidentiality Section of this Contract. In the case of third-party Commercial Software, the Contractor warrants that it has legally bound the third-party licensor to the obligations of this Contract or that the Contractor has the right to make these commitments directly to the State.

For Commercial Software designed for PC or PC-based server platforms and costing less than \$10,000.00 per copy or license, the Contractor must provide the same maintenance and user assistance during the warranty period at no additional cost to the State as the Contractor or the third-party licensor makes generally available at no additional charge to its other customers.

**8.2 SOFTWARE UPGRADES.** After an initial acquisition of a license in Commercial Software, the State may want to acquire a broader license than the original. Or the State may later want to migrate to another platform for the Commercial Software. When the Contractor or third-party licensor makes the broader license generally available to its customer base or makes the version of the Commercial Software that runs on the new platform to which the State wants to migrate, then the State will have a right to upgrade any of its licenses to that broader license or to acquire the version of the Software that is appropriate for the new platform that the State intends to use. In these cases, the Contractor will provide the broader license or other version of the Commercial Software in exchange for a license fee that is based on the lesser of the following:

- (a) The Contractor's (or third party licensor's) standard upgrade or migration fee;
- (b) The upgrade or migration fee in Exhibit I; or
- (c) The difference between the license fee originally paid and the then-current license fee for the license or version of the Commercial Software that the State seeks to acquire.

The foregoing will not apply to Commercial Software for PCs and PC-based server software with a license fee of less than \$10,000.00, unless the Contractor or third-party licensor makes upgrade packages available for the Commercial Software to other customers. If PC or PC-based server software upgrades are available, the State will be entitled to the most favorable license fee on which such are made available to other most favored customers or dealers, as appropriate.

**8.3 EQUIPMENT MAINTENANCE.** If this Contract involves computer or telecommunications hardware or other mechanical or electrical equipment ("Equipment") as a Deliverable, then, during the warranty period and during any period covered by annual maintenance, the Contractor must provide maintenance to keep the Equipment in or restore the Equipment to good working order. This maintenance must include preventative and remedial maintenance, installation of safety changes, and installation of engineering changes based upon the specific needs of the individual item of Equipment. This maintenance also must include the repair, replacement, or exchange deemed necessary to keep the Equipment in good working order. For purposes of this Contract, Equipment restored to good working order means Equipment that performs in accordance with the manufacturer's published specifications. The Contractor must use its best efforts to perform all fault isolation and problem determination attributed to the Equipment. The following services are outside the scope of this Contract:

- (a) Maintenance to bring the Equipment into compliance with any law, rule, or regulation, if such law, rule, or regulation was not in effect on the acceptance date;
- (b) Repair and replacement work or increase in maintenance time as a result of damage or loss resulting from accident, casualty, neglect, misuse, or abuse, if such is the State's fault (and beyond normal wear and tear), damage resulting from improper packing or failure to follow prescribed shipping instruction (if such is done by the State), failure of electrical power, air conditioning or humidity control, use of supplies not approved by the original manufacturer of the Equipment as describe in the Equipment's documentation, or causes other than ordinary use of Equipment;
- (c) Furnishing platens, supplies, or accessories, making specification changes, or adding or removing approved accessories, attachments, or other devices except as permitted in the Equipment's user documentation;
- (d) Maintenance or increased maintenance time resulting from any improper use, maintenance, or connection to other equipment (not done by the Contractor) that results in damage to the Equipment;
- (e) Repairs needed to restore the Equipment to good operating condition if the Equipment has been damaged by anyone other than the Contractor's authorized service personnel repairing, modifying, or performing maintenance on the Equipment.

**8.4 EQUIPMENT MAINTENANCE STANDARDS.** Except in the case of excusable delay, remedial Equipment maintenance by the Contractor will be completed within eight business hours after notification by the State that maintenance is required. In the case of preventative maintenance, the Contractor will perform such in accordance with the manufacturer's published schedule and specifications. If maintenance is not completed within eight hours after notification by the State, the Contractor will be in default. Failure of the Contractor to meet or maintain these

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requirements will provide the State with the same rights and remedies as specified elsewhere in this Contract for default, except that the Contractor will only have eight hours to remedy a default. The Contractor will provide adequate staff to provide the maintenance required by this Contract.

**8.5 EQUIPMENT MAINTENANCE CONTINUITY.** If the Contractor is unable to provide Equipment maintenance to meet the State's ongoing performance requirements and if, in the State's sole opinion, the Contractor is unlikely to resume providing warranty services that meets the State's ongoing performance requirement, the Contractor will be in default, and the State will be entitled to the remedies in the default section of this Contract. The State will also be entitled to the following items from the Contractor:

- (a) All information necessary for the State to perform the maintenance, including but not limited to logic diagrams, maintenance manuals, and system and unit schematics, with all changes noted;
- (b) A listing of suppliers capable of supplying necessary spare parts;
- (c) Adequate information to permit the State to have spare parts manufactured elsewhere; and
- (d) A listing of spare parts and their recommended replacement schedule to enable the State to create a centralized inventory of spare parts.

The State will treat as Confidential Information in accordance with the Confidentiality Section of this Contract any information in items (a) through (d) above that the Contractor rightfully identifies in writing as confidential. And when disclosure to a third-party is necessary for the State to continue the maintenance, the State will require any third-party to whom disclosure is made to agree to hold the Confidential Information in confidence and to make no further disclosure of it. Further, the State agrees that any such Confidential Information will be used solely to perform maintenance for the State and will be returned to the Contractor or destroyed when such use is no longer needed.

**8.6 PRINCIPAL PERIOD OF MAINTENANCE (GENERAL).** Software and Equipment maintenance must be available nine working hours per weekday, between 8:00 a.m. and 5:00 p.m. Eastern Standard Time. Travel time and expenses related to remedial and preventative maintenance will not be billable and must be included in the price of the maintenance.

**8.7 MAINTENANCE ACCESS (GENERAL).** For all Software and Equipment maintenance under this Contract, the State will provide the Contractor with reasonable access to the Deliverable to perform maintenance. All maintenance that requires a Deliverable to be inoperable must be performed outside the State's customary working hours, except when the Deliverable is already inoperable. Preventative or scheduled maintenance must be performed at mutually agreeable times, within the parameters of the manufacturer's published schedule.

#### 9 - ASSIGNMENT AND SUBCONTRACTING

**9.1 ASSIGNMENT.** The Contractor may not assign this Contract without the written consent of the State, which the State will not be obligated to provide.

**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. In those circumstances, before the Contractor engages any such subcontractor, the Contractor must submit a list identifying its subcontractors or joint venture partners performing portions of the work under the Contract. If any changes to that list occur during the term of the Contract, the Contractor must immediately provide the State an updated list of subcontractors or joint venture business partners. In addition, all subcontractors and joint venture business partners must agree in writing to be bound by all of the terms and conditions of this Contract and any specifications of any order under this Contract for which they perform work. The State may reject any subcontractor submitted by the Contractor.

#### 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 pricelist attached as Exhibit I 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 § 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. The Contractor hereby certifies that all applicable parties listed in Ohio Revised Code Section 3517.13 are in full compliance with Ohio Revised Code Section 3517.13.
- 11.4 **SECURITY & SAFETY RULES.** When using or possessing State data or accessing State networks and systems, the Contractor must comply with all applicable State rules, 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, regulations, and policies 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 § 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.** In accordance with R.C. 2909.33(C), Contractor certifies that it meets one of the following conditions:
  - (a) Contractor has not received, nor will receive as a result of this contract, an aggregate amount greater than one hundred thousand dollars (\$100,000) in business or funding, excluding personal benefits, from the state, instrumentalities, or political subdivisions during the current fiscal year;  
or
  - (b) (1) Contractor has received, or will receive as a result of this contract, an aggregate amount greater than one hundred thousand dollars (\$100,000) in business or funding, excluding personal benefits, from the state, instrumentalities, or political subdivisions during the current fiscal year.  
and,

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(2) Contractor has either precertified with the Office of Budget and Management, or has completed the attached Declaration of Material Assistance form certifying that Contractor has not provided material assistance to any organization on the Terrorist Exclusion List, as that term is defined in R.C. 2909.21.

- 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.
- 11.9 **Governing the Expenditure of Public Funds on Offshore Services (EO 2011-12K).** The Contractor affirms to have read and understands Executive Order 2011-12K and shall abide by those requirements in the performance of this Contract. Notwithstanding any other terms of this Contract, the State reserves the right to recover any funds paid for services the Contractor performs outside of the United States for which it did not receive a waiver. The State does not waive any other rights and remedies provided the State in this Contract.

The Contractor agrees to complete the attached Executive Order 2011-12K Affirmation and Disclosure Form which is incorporated and becomes a part of this Agreement.

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,  
DEPARTMENT OF ADMINISTRATIVE SERVICES  
OFFICE OF STATE PURCHASING

BY:   
CURT SMITH  
CFO

BY:   
ROBERT BLAIR, DIRECTOR,  
DEPARTMENT OF ADMINISTRATIVE SERVICES

DATE: 7/11/2012

DATE: 7-18-12

**Exhibit I**

AgileAssets Inc. provides Exhibit 1 – AgileAssets Price List as an exhibit of this State Term Contract.

Product Name	Manufacturer	Manufacturer Part No	Vendor Part No	Description	Unit of Measure	State Price	List Price
AgiloAssets Server Licenses							
System Foundation	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 120,000	\$ 120,000
Bridge Inspector	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 145,000	\$ 145,000
Environment Manager	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 85,000	\$ 85,000
Fuelbin Manager	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 85,000	\$ 85,000
Fleet Manager	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 100,000	\$ 100,000
Maintenance Manager (oad)	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 100,000	\$ 100,000
Materials Manager	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 190,000	\$ 190,000
Mobile Defect Survey	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 45,000	\$ 45,000
Mobile Field Data Unit	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 25,000	\$ 25,000
Mobile Fleet Manager	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 45,000	\$ 45,000
Mobile Inventory Manager	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 25,000	\$ 25,000
Mobile Warehouse Manager	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 25,000	\$ 25,000
Mobile Work Manager	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 25,000	\$ 25,000
Mobility Analyst	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 25,000	\$ 25,000
Network Manager	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 85,000	\$ 85,000
Pavement Analyst	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 155,000	\$ 155,000
Rail Crossing Manager	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 145,000	\$ 145,000
Rail Manager (Analyst)	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 85,000	\$ 85,000
Right-Of-Way Manager	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 145,000	\$ 145,000
Safety Analyst	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 85,000	\$ 85,000
Sign Manager	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 145,000	\$ 145,000
Signal Manager	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 85,000	\$ 85,000
Telecom/ITS Manager	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 100,000	\$ 100,000
Asset Trade-Off Analyst (ATO)	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 265,000	\$ 265,000
Utilities Analyst	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 145,000	\$ 145,000
Utilities Manager	AgiloAssets Inc.			AgiloAssets Functional Module - Server License	each	\$ 100,000	\$ 100,000
AgiloAssets Named User License							
First 5 Named Users	AgiloAssets Inc.			AgiloAssets Named User License, 1-5 Users, price per user	each	\$ 5,000	\$ 5,000
Users 6 through 20	AgiloAssets Inc.			AgiloAssets Named User License, 6-20 Users, price per user	each	\$ 4,200	\$ 4,200
Users 21 through 50	AgiloAssets Inc.			AgiloAssets Named User License, 21-50 Users, price per user	each	\$ 3,400	\$ 3,400
Users 51 through 100	AgiloAssets Inc.			AgiloAssets Named User License, 51-100 Users, price per user	each	\$ 2,400	\$ 2,400
Users 101 through 200	AgiloAssets Inc.			AgiloAssets Named User License, 101-200 Users, price per user	each	\$ 1,500	\$ 1,500
Users 201 through 400	AgiloAssets Inc.			AgiloAssets Named User License, 201-400 Users, price per user	each	\$ 1,000	\$ 1,000
Users 401 through 1000	AgiloAssets Inc.			AgiloAssets Named User License, 401-1000 Users, price per user	each	\$ 700	\$ 700
Users over 1000	AgiloAssets Inc.			AgiloAssets Named User License, 1001 or more Users, price per user	each	\$ 400	\$ 400
Annual Maintenance of Software is 20% of the total discounted software pricing				Annual Maintenance 20% - NB	each	20%	20%
IT Services							
Project Management	AgiloAssets Inc.	2012 - Project Manager		Project Manager (4/1/12 - 3/31/14), Assurates project feasibility and project management	Hour	\$ 215	\$ 215
Functional Lead	AgiloAssets Inc.	2012 - Functional Lead		Functional Lead (4/1/12 - 3/31/14), System module functionality review and configuration	Hour	\$ 205	\$ 205
Consultant	AgiloAssets Inc.	2012 - Consultant		Consultant (4/1/12 - 3/31/14), System configuration and deployment	Hour	\$ 175	\$ 175
Senior System Analyst	AgiloAssets Inc.	2012 - Senior System Analyst		Senior System Analyst (4/1/12 - 3/31/14), Functional reconciliation and coordination development to meet business or other requirements	Hour	\$ 185	\$ 185
Senior Software Architect	AgiloAssets Inc.	2012 - Senior Software Architect		Senior Software Architect (4/1/12 - 3/31/14), Oversee technical standard of code development and system configuration	Hour	\$ 185	\$ 185
Programmer	AgiloAssets Inc.	2012 - Programmer		Programmer (4/1/12 - 3/31/14), Code revision and development	Hour	\$ 185	\$ 185
Technical Writer	AgiloAssets Inc.	2012 - Technical Writer		Technical Writer (4/1/12 - 3/31/14), Documentation development	Hour	\$ 135	\$ 135

6

**Exhibit II**

[Insert scope of license]

*ca*

## Exhibit 2 - SOFTWARE LICENSE AND MAINTENANCE AGREEMENT

This Software License and Maintenance Agreement (hereinafter referred to as this "Agreement") is made and entered into as of this 10 day of July 2012 (the "Effective Date") by and between:

**Department of Administrative Services  
IT Procurement Services  
4200 Surface Road  
Columbus, OH 43228-1395**

(hereinafter called "Client")  
- and -

**AgileAssets Inc.  
3144 Bee Caves Road  
Austin, Texas 78746**

(hereinafter called "AgileAssets")

IN CONSIDERATION OF the mutual covenants contained herein, the parties hereto agree as follows:

### 1. SCOPE

This Agreement shall apply to the license of certain AgileAssets proprietary computer software product(s) (and certain corresponding documentation), and certain support, maintenance and other services related thereto, as specified in Exhibit A.

### 2. DEFINITIONS

In addition to any terms defined elsewhere in this Agreement, the following capitalized terms shall have the following respective meanings for purposes of this Agreement:

- A. AgileAssets Materials – AgileAssets Materials has the meaning ascribed to that term in Section 9.
- B. Annual Hours Allotted for Enhancements – The maximum number of hours available from AgileAssets to implement Enhancements during an Annual Maintenance Period, the cost of which is covered by the Annual Maintenance Fee for such Annual Maintenance Period. The Annual Hours Allotted for Enhancements are specified in Exhibit C. Hours spent by AgileAssets to correct Defects do not count against the Annual Hours Allotted for Enhancements unless the Defect is attributable, in whole or in part, to an Excluded Cause. Annual Hours Allotted for Enhancements are only available during periods in which AgileAssets is providing Maintenance Services to Client and for which Client has paid the Annual Maintenance Fee. No Annual Hours Allotted for Enhancements apply during the Initial Maintenance Period. The licensing of additional modules to Client under this Agreement after the Effective Date shall not increase the Annual Hours Allotted for Enhancements. Hours not utilized during the applicable Annual Maintenance Period are not carried over to subsequent periods. References in this Agreement to Annual Hours Allotted for Enhancements refer to the remaining unused hours for the relevant Annual Maintenance Period.
- C. Annual List of Enhancements – A list of all Enhancements that Client desires to have AgileAssets implement during any Annual Maintenance Period pursuant to this Agreement.
- D. Annual Maintenance Fee – Annual Maintenance Fee has the meaning ascribed to that term in Exhibit B.

- E. Annual Maintenance Period – Annual Maintenance Period has the meaning ascribed to that term in Section 5. For the avoidance of doubt, the term "Annual Maintenance Period" does not include the Initial Maintenance Period.
- F. Business Days – Days on which AgileAssets is open for business.
- G. Client Data and Results – Client Data and Results has the meaning ascribed to that term in Section 3.H.
- H. Defect – A verifiable and reproducible failure of the System to perform in all material respects the functions described in the specifications for the System that are contained in the applicable System User Manual and System Technical Manual. All Defects shall be categorized by AgileAssets into one of the following classifications:
- i. "Level 1 Defects" are Defects that (x) completely prevent the System from operating or (y) are of a severity that prevent the System from being used without significant disruption to Client's business operations and with respect to which no workarounds exist that would enable the System to be so used until corrections can be made.
  - ii. "Level 2 Defects" are Defects that are of a severity that prevent the System from being used without significant disruption to Client's business operations but with respect to which a workaround exists.
  - iii. "Level 3 Defects" are Defects that are not Level 1 Defects and are not Level 2 Defects.
- I. Designated Support Personnel – Employees of Client who are Named Users and who are designated by Client to be the exclusive points of contact for all technical and operational issues relating to this Agreement.
- J. Enhancements – Modifications to the System, to any subsequent modification thereto, or to any subsequent derivative work thereof.
- K. Error – A Level 1 Defect or Level 2 Defect.
- L. Excluded Causes – Excluded Causes has the meaning ascribed to that term in Section 5.H.
- M. Initial Maintenance Period – Initial Maintenance Period has the meaning ascribed to that term in Section 5.
- N. Initial System Installation – The point at which Client is first granted access to the System and before any Client specific System configuration begins.
- O. Maintenance Period – Maintenance Period has the meaning ascribed to that term in Section 5.
- P. Maintenance Services – The support and maintenance services specifically described in Section 5.
- Q. Named Users – Employees of Client (i) who have been designated as Named Users by Client, (ii) with respect to whom Client has paid the relevant license fees under Section 17 of this Agreement, and (iii) who utilize the System (and any documentation licensed hereunder) only on behalf of Client.
- R. Person – Any individual, corporation, partnership, trust, unincorporated organization, government (or any department or agency thereof) or any other form of association or entity.
- S. Services – All Maintenance Services or other services provided or to be provided by AgileAssets pursuant to this Agreement.
- T. Supported Database – A relational database management system (RDBMS) brand and that is certified by AgileAssets to work with the System.

- U. Supported J2EE Server – A Java application server brand and version that is certified by AgileAssets to work with the System.
- V. System – The AgileAssets proprietary software program(s) described in Exhibit A above. Except as may be specifically provided herein, the term "System" shall include any Version to the extent that it is made available by AgileAssets to Client in accordance with this Agreement. For the avoidance of doubt, Client shall have no right to receive, have access to or use any Version except (i) any Version provided by AgileAssets to Client as part of AgileAssets' provision of Maintenance Services; (ii) any Version made available to Client pursuant to Section 5.B of this Agreement; (iii) any Enhancements made available to Client pursuant to Section 6 or Section 8 of this Agreement; or (iv) any Version that AgileAssets may specifically agree in writing from time to time after the date of execution of this Agreement to provide to Client.
- W. System Acceptance – Milestone of initial System implementation services at which point the System as initially delivered and configured has substantially conformed to the requirements of an acceptance test plan agreed upon in advance in writing by Client and AgileAssets that certifies the System is ready for System Go-Live.
- X. System Go-Live – Milestone of initial System implementation services, specified by Client to be either at the same time as or later than System Acceptance, at which point Client may begin using the System for production work activities.
- Y. Version – A current or future version, release, update or upgrade of the System or a portion thereof, including its components stored in a Supported Database (tables, functions and procedures), developed by or on behalf of AgileAssets. For the avoidance of doubt, the term "Version" includes Enhancements but does not include any modules of AgileAssets' software other than the modules specifically listed in Exhibit A of this Agreement or any additional modules specifically licensed to Client under this Agreement after the Effective Date (which licensing of additional modules, if not expressly provided for in Exhibit B of this Agreement, shall only be made with the prior written consent of AgileAssets).

### 3. LICENSE

- A. AgileAssets hereby grants to Client, and Client hereby accepts, subject to all of the terms and conditions of this Agreement, a nontransferable and nonexclusive license to use (i.e., to load, execute and display) the System (in compiled form only) on a Supported J2EE Server and Supported Database during the term of this Agreement, but only (i) for Client's internal business purposes, and (ii) on hardware/computing equipment and systems operated by Named Users.
- B. The System may be used by Client on any networked computer connected to a Supported J2EE Server and Supported Database on which the System is installed provided that each individual user accessing any portion of the System is a Named User.
- C. Client assumes full responsibility, at Client's expense, for the selection, acquisition, maintenance, condition and effectiveness of the computer and networking hardware, operating systems, Supported J2EE Server, Supported Database, other application software and other aspects of the operating environments in which the System is to function.
- D. Client shall use the System for internal business purposes only. Client shall not directly or indirectly copy or duplicate, or allow any other Person to directly or indirectly copy or duplicate, the System or any portion thereof without the prior written consent of AgileAssets, except that Client may make up to two (2) copies of the System, in compiled form only, for use solely as backup copies or disaster recovery (which shall be subject to all of the restrictions of this Agreement) if the original copies are lost or damaged, provided that each such copy shall contain AgileAssets' name and all copyright, trademark and other proprietary rights notices contained in any manner on any portion of the software being copied. Client shall not (and shall not permit any other Person to) directly or indirectly provide, transfer, assign, sublicense or otherwise make available the System or any portion thereof or any copies of any thereof in any form to any Person on a temporary or permanent basis, or otherwise utilize or allow any Person to utilize any

portion of the System, except as may be specifically permitted in writing by AgileAssets. Client also shall not, and shall not allow any other Person to, directly or indirectly modify, translate, decompile, disassemble, create derivative works of, or reverse engineer any portion of the System.

- E. AgileAssets hereby grants to Client, and Client hereby accepts, subject to all of the terms and conditions of this Agreement, a non-transferable, non-exclusive license to use any System documentation (e.g. manuals, publications, specifications or other documentation) provided by AgileAssets to Client for use in connection with any portion of the System during the term of this Agreement, but only (i) for Client's own internal business purposes in connection with its authorized use of the System, and (ii) by Named Users. Client shall not directly or indirectly copy or duplicate (or allow any other Person to copy or duplicate) any such documentation or any portion thereof without the prior written consent of AgileAssets, except that Client shall have the right, without additional license fees or royalty, to make a limited number of copies (not to exceed the total number of Named Users in effect from time to time) of such documentation solely for delivery to Named Users solely for use on behalf of Client and in strict accordance with this Agreement; provided, however, that Client shall reproduce and include the AgileAssets name and all copyright, trademark, and other proprietary rights notices contained in any manner on any portion of the documentation being reproduced on any such copies, including partial copies. Client shall not (and shall not permit any other Person to) directly or indirectly provide, transfer, assign, sublicense or otherwise make available any such documentation or any portion thereof or any copies of any thereof in any form to any Person on a permanent or temporary basis, or otherwise utilize or allow any Person to utilize any portion of such documentation, except as may be specifically permitted in writing by AgileAssets. Client also shall not, and shall not allow any other Person to, directly or indirectly modify, translate or create derivative works of any portion of any such documentation.
- F. The rights granted by this Agreement shall not extend to any parent, subsidiary or other affiliate of Client or any other Person. Client shall not permit any Person to utilize the System or any documentation licensed hereunder (unless such Person is a Named User, and then only in strict accordance with the terms and conditions of this Agreement) or to exercise any of the other rights granted to Client under this Agreement.
- G. Client is responsible for supplying all data for use by the System and, if AgileAssets agrees to provide data conversion or other implementation services, for delivering it to AgileAssets in such form as AgileAssets may reasonably request from time to time and in a manner consistent with any and all applicable laws and regulations. Without limitation of the foregoing, Client shall not supply any data which is not authorized for publication or dissemination or which (or AgileAssets' use of which in connection with this Agreement) infringes or misappropriates any intellectual property or proprietary rights of any Person. Notwithstanding anything to the contrary in this Agreement, AgileAssets shall have access to and the right to directly or indirectly copy and otherwise use such data for purposes of (i) providing the Services; (ii) testing or modifying the System (or any Version); and (iii) otherwise complying with AgileAssets' obligations under this Agreement. Client is responsible for all data supplied by or on behalf of Client to AgileAssets and for any results or conclusions drawn from use of such data or the System (collectively, "Client Data and Results"). AgileAssets shall have no liabilities to Client, or to any other Person, in connection with the use of such Client Data and Results.
- H. A user name and password is required to access the System. AgileAssets or Client shall provide each Named User with a user name and each Named User shall choose a password. Each Named User is the only authorized user of such Named User's user name and password. Client is entirely responsible for maintaining the confidentiality of each user name and password. Client is also entirely responsible for any and all acts or omissions that occur under any such user name or password. Client shall ensure that no Named User shares its password with any other Person other than a limited number of IT personnel of Client selected by Client. Client agrees to notify AgileAssets immediately of any unauthorized use of any user name or password, any improper disclosure or any loss of a password, or any other breach of security with respect to the System.

#### 4. TERM; SURVIVAL

The term of this Agreement shall commence on the Effective Date and shall remain in effect until terminated as provided herein. However, Sections 2, 3.G, 4 (this sentence only), 5I, 5J, 9-13, 14 (second paragraph), 15, 16 and Exhibit B, any accrued rights to payment, and any remedies for a prior breach of this Agreement, shall continue in full force and effect and shall survive the termination of this Agreement.

#### 5. MAINTENANCE AND TECHNICAL SUPPORT SERVICES

AgileAssets shall provide to Client the Maintenance Services described below in this Section 5 for the Initial Maintenance Period (as defined below). For purposes of this Agreement, the term "Initial Maintenance Period" shall mean (i) with respect to the software modules described in Exhibit A of this Agreement and licensed to Client under this Agreement as of the Effective Date, an initial period beginning on the date of Initial System Installation and continuing for one (1) year thereafter and (ii) with respect to any additional modules licensed to Client under this Agreement after the Effective Date, an initial period beginning on the date of initial installation of such additional modules and continuing until the expiration of the then current Initial Maintenance Period or Annual Maintenance Period (as defined below), as applicable, for the modules originally licensed under this Agreement, even if such initial period is less than one (1) year. The cost of Maintenance Services during the Initial Maintenance Period is identified in Exhibit B of this Agreement.

After the expiration of the Initial Maintenance Period, Client may request Maintenance Services for subsequent twelve (12) month periods (each being an "Annual Maintenance Period"), provided that AgileAssets' obligation to provide Maintenance Services for any such period is expressly contingent upon and subject to (i) Client's payment of the Annual Maintenance Fee applicable to such subsequent Annual Maintenance Period; (ii) Client incorporating into the System any Version that AgileAssets has made available to Client within eighteen (18) months after the date such Version was first made available to Client by AgileAssets; (iii) Client's requesting Maintenance Services for all modules that Client has licensed or agreed to license under this Agreement (regardless of the number of licenses then in effect or the number of modules then utilized by Client). Client agrees to provide remote access to Client's data center to allow AgileAssets to provide Maintenance Services. Further, if Maintenance Services are not renewed for any period, then Client may not obtain subsequent Maintenance Services unless Client pays to AgileAssets, prior to the resumption of Maintenance Services, the amount that would have been payable by Client for Maintenance Services during the period in which Maintenance Services were not obtained. The Initial Maintenance Period and any subsequent Annual Maintenance Periods are referred to collectively herein as the "Maintenance Period."

Subject to payment of the applicable Annual Maintenance Fee in any Annual Maintenance Period and Client's compliance with the other requirements of this Agreement, the following additional terms shall apply during the Maintenance Period:

- A. AgileAssets shall furnish to Client a telephonic "Help Desk" for use by Client's Designated Support Personnel concerning installation, use, and problem resolution with respect to the System, accessible via a toll free telephone number between the hours of 8:00 a.m. and 5:00 p.m. Monday through Friday, Austin, Texas time (except for holidays observed by AgileAssets, a list of which will be provided by AgileAssets to Client upon request). The Help Desk shall be staffed with one or more individuals who have an understanding of the System and the ability to offer basic troubleshooting information/solutions.
- B. Client shall have a license to use any Version of the System (to the extent that such Version is authorized for general release by AgileAssets to licensees of the System who are receiving Maintenance Services and who receive copies of the Version for installation on their own computer systems at no additional charge) under the same terms as Client's rights and obligations with respect to the System as such are set out in this Agreement.

- C. Client shall have a license to use any revisions to the System documentation associated with any Version referred to in Section 5.B (to the extent such revised documentation is authorized by AgileAssets for general release to licensees of the System who are receiving Maintenance Services and who receive copies of the Version for installation on their own computer systems at no additional charge) under the same terms as Client's rights and obligations with respect to System documentation as such are set out in this Agreement.
- D. AgileAssets shall furnish to Client membership in the AgileAssets System Users Group. Client may send additional attendees and pay the then current conference registration fee, lodging, meals, and travel costs for each additional attendee. For every Client attendee at the conference, including additional attendees, ten (10) Annual Hours Allotted for Enhancements will be credited to the Client's remaining unused hours for the then current Annual Maintenance Period.
- E. AgileAssets shall designate two (2) employees of AgileAssets that shall be the primary and backup points of contact for Client on maintenance and technical support services issues relating to this Agreement.
- F. Help Desk Support.
- a. Availability. During normal daytime operations, AgileAssets shall be available to support the Client HelpDesk for all defects and/or errors. During night time, weekend, or holiday operations (off-hour operations), AgileAssets personnel will be available by telephone ("Oncall"). Services will be available according to the following schedule.
  - b. User Feedback. Feedback is the communication of status to the Client person who initiates a Service or Investigative Request and/or a SIR, typically the Application Administrator (represented throughout the remainder of this agreement as Client Point Of Contact or POC). Users may report problems during off-hour periods (weekends, evenings, or holidays). The error resolution services include a multi-layer contact method that enables the user to report application-execution problems as needed including outside regular office hours. It is expected that all inquiries, problems and defects or bugs be reviewed with in-house staff to rule out causes not related and falling outside the responsibilities of the SLMA. A central point of contact (POC) from the client will determine if there is a need to escalate or forward the item to AgileAssets and assign the initial Priority Code. The item may be forwarded by telephone and for Priority Code 2 or lower, e-mail or onsite visits. The AgileAssets Support Team is responsible for determining the consequences of the problem and taking the required corrective action.
  - c. Service requests are classified by priority code. There are four classes of priority code:
    - i. **Priority Code 1.** Problem materially affects business operations and there is no suitable workaround procedure.
    - ii. **Priority Code 2.** Problem materially affects business operations and a suitable workaround procedure can be temporarily used while the problem is resolved
    - iii. **Priority Code 3.** The problem does not affect business operations and there is no suitable workaround procedure.
    - iv. **Priority Code 4.** The problem does not affect business operations and a suitable workaround procedure can be temporarily used while the problem is resolved.
  - d. The priority code determines the response and feedback time requirements. Client personnel should not contact the analyst on call during off-hours for priority codes 3 and 4 problem reports. These problems should be communicated during daytime hours
  - e. Response Table - The priority code determines the response and feedback time requirements. Client personnel should not contact the analyst on call during off-hours for priority codes 3 and 4 problem reports. These problems should be communicated during daytime hours

Priority	Service Item	Normal Feedback		Off-Hour Feedback	
		Initial	Periodic	Initial	Periodic
1	Critical Problem (without workaround)	4 hours via e-mail and telephone call	Every 2 hours via telephone call	4 hours via e-mail and telephone call	Every 4 hours via telephone call
2	Critical Problem (with workaround)	8 hours via e-mail	Every 8 hours via telephone call	8 hours via e-mail	N/A
3	Non-Critical Problem (without workaround)	4 business days via e-mail	Every 2 business days via e-mail	N/A	N/A
4	Non-Critical Problem (with workaround)	5 business days via e-mail	Every week via e-mail	N/A	N/A

- f. Escalation Table - The AgileAssets shall also provide notice to Client without regard to whether the Service Item is resolved or not resolved as follows

Priority Code	Regular Day Notify Within	Client Personnel Notified	Contractor Personnel Notified
1. Critical Problem (without workaround)	Within 4 hours	Client POC / Application Administrator	AgileAssets Support Team
	4 hours	Client Application Manager	AgileAssets Client Manager (previous project PM)
	6 hours	Client Application Manager / Business Owner	AgileAssets Client Manager (previous project PM)
	8 hours	Client Application Manager / Business Owner	AgileAssets Project Director
2. Critical Problem (with workaround)	Within 8 hours	Client POC / Application Administrator	AgileAssets Support Team

Priority Code	Regular Day Notify Within	Client Personnel Notified	Contractor Personnel Notified
	2 Business Days	Client Application Manager / Business Owner	AgileAssets Client Manager (previous project PM)
	4 Business Days	Client Application Manager / Business Owner	AgileAssets Project Director
3. Non-Critical Problem (without workaround)	Within 4 Business Days	Client POC / Application Administrator	AgileAssets Support Team
	4 days	Client Application Manager / Business Owner	AgileAssets Client Manager (previous project PM)
	5+ days	Client Application Manager / Business Owner	AgileAssets Project Director
4. Non-Critical Problem (with workaround)	After work on the Problem has commenced	Client POC / Application Administrator	AgileAssets Support Team
	5 days	Client Application Manager / Business Owner	AgileAssets Client Manager (previous project PM)
	7+ days	Client Application Manager / Business Owner	AgileAssets Project Director

- g. Additional Support Services. The efforts of the AgileAssets Support Staff are defined to allow for identification of service performance. This section identifies the service level categories and related definitions. Service definitions are associated with commitments and priorities to provide meaningful factors by which to determine the level of success. Although the service levels are identified for the entire engagement, there may be differences in service scope and priority across domains. Support Service activities are related to supporting application use not involved in defects or errors. These are typically unscheduled activities where responsiveness is crucial due to direct impact to business through application use. The metrics for each of these requests are response and resolution to the request within the prescribed timeframe. (Response is defined as: Time elapsed from problem notification (evidenced by receipt of the email or page by the AgileAssets Support Staff member to the time AgileAssets replies to the initiator that

notification has been received. Resolution is defined as: the application meets the immediate business requirements in place prior to the error that resulted in the call to the AgileAssets Support Staff, and the Client individual who reported the problem has been contacted and agrees that it has been resolved.)

- i. **Production Support.** Production support includes those activities that are required for ensuring the applications produce the expected results, the on-line applications function as required (as applicable), and batch processes complete as scheduled (as applicable). Resolution effort during production support may require code modifications to resolve the immediate issue. Permanent resolution of the problem identified by the production incident may require root cause analysis and a subsequent Maintenance Request to implement a complete solution to the problem. Production support incidents include abnormal termination of an application or application function, data-related issues, or other error condition that needs to be diagnosed and resolved. Service is evidenced by one or more of the following: log entries, code or data changes, escalation records, or email notifications. Production support request is a measured / evaluated by response and resolution within a prescribed timeframe
- ii. **Operational Support.** Operational support requests include scheduled activities that are related to the operations of the applications. This type of request includes monitoring, batch scheduling, and special application-related processes to be completed for month-end or year-end processing. Operational Support is evidenced by one or more of the following: log entries, support request form, or report of results. Operational Support is measured by the completion of the event within the scheduled timeframe
- iii. **User Support.** User support includes those activities that provide support associated with use of a supported application (questions are answered, problems are researched, and assistance is made available for client users to perform their tasks). This type of support is typically requests for assistance to resolve non-programming related issues(not application code related). In instances that user support uncovers production problems, the requests are reclassified as production support. The user communities receiving support differ by domain and application area, as described in the Client Environment Section. User Support service is typically evidenced by email correspondence and log entries. User Support is measured / evaluated by response and resolution within the agreed upon timeframe
- iv. **User Support Types.**

Type 1 – A user support request that requires research and response to an event that could result in an immediate / near term impact to Client's ability to conduct business. Examples of Type 1 User Support events include requests for application access, application performance, or questions regarding reported data. AgileAssets provides User Support: Type 1 to a specified subset of applications that have been identified as business critical. (See Appendix A.) This level of service is not generally available to all applications supported.

Type 2 – A user support request that requires research to an event but would not immediately impact Client's ability to conduct business. Examples of Type 2 User Support events include requests for non-critical problem research, or requests for status of in-progress services. User Support: Type 2 is the typical User Support level provided to the Client business user community

- G. AgileAssets shall endeavor to investigate and correct Errors at AgileAssets' offices. If AgileAssets is unable to correct an Error at AgileAssets' offices, and the suspected Error is not attributable, in whole or in part, to any Excluded Causes, then upon Client's request, AgileAssets

may travel to Client's location to investigate Errors with travel and other out-of-pocket expenses included in the applicable Annual Maintenance Fee. If after AgileAssets travels to the Client location the suspected Error is determined to be attributable, in whole or in part, to any Excluded Causes, then Client shall pay all AgileAssets investigative (and, if undertaken by AgileAssets, correction) costs on a time and materials basis in accordance with Exhibit B.

- H. Notwithstanding anything to the contrary contained herein, if AgileAssets is not able to reproduce the reported Error or if the suspected Error is attributable, in whole or in part, to (i) any modifications to the System that were not created by AgileAssets and provided to Client by AgileAssets, (ii) any combination, operation or use of any portion of the System with any product, data, apparatus or materials not provided by AgileAssets, (iii) any failure of Client to utilize any Version previously made available by AgileAssets to Client, or (iv) any other cause not confined solely within the System, including any defect, deficiency or other difficulty with other hardware or software (including Client or third party systems or networks) or resulting from accident, neglect, misuse, or failure of power, air conditioning, or humidity control ((i)-(iv) collectively, "Excluded Causes"), then AgileAssets shall have no responsibility with respect to the Error, but may, in its discretion, offer to attempt to investigate and correct the Error upon Client's payment of AgileAssets' investigation and/or correction work on a time and materials basis in accordance with Exhibit B.
- I. If AgileAssets is unable to correct an Error (within sixty (60) days after notice by Client to AgileAssets, specifying the Error in reasonable detail and specifically indicating Client's intention to terminate this Agreement if the Error is not corrected during such period), Client may, as its sole and exclusive remedy, terminate the Maintenance Services by notice to AgileAssets and receive a refund of that portion, if any, of the Annual Maintenance Fee actually received by AgileAssets that is allocable to the period following the termination date.
- J. AgileAssets shall have no responsibilities for maintenance or support with respect to the System except as specifically provided in this Section 5.
- K. **[Client may request AgileAssets staff to provide on-site Maintenance Services at the Client's location for one (1) session during the Initial Maintenance Period and each subsequent Annual Maintenance Period. A session provides up to four contiguous Business Days of on-site Maintenance Services by AgileAssets as needed by Client. Any on-site Maintenance Services provided under this Section 5.K shall be in addition to the Annual Hours Allotted for Enhancement and shall be at no additional cost to Client.]**

## 6. ADDITIONAL SERVICES

Subject to payment of the amounts described in Exhibit B, Section 3, AgileAssets may, upon written agreement with Client on a case by case basis (which may be in the form of a written supplement to this Agreement executed by AgileAssets and Client), furnish the following additional services to Client:

- A. Initial implementation services including discovery, business process review and development, user familiarization, data conversions, system interfaces, system configuration and other relevant services which may be mutually agreed to during initial implementation of the System.
- B. Training in System operation at one or more sites selected by Client and agreed to by AgileAssets at dates and times as may be mutually agreeable to AgileAssets and to Client.
- C. Enhancements to the System (other than Enhancements covered by the Annual Hours Allotted for Enhancements).
- D. Implementation or training Services on any future Version.
- E. Implementation of any additional Modules of the System licensed by Client.

## 7. CLIENT RESPONSIBILITIES

In addition to its other obligations under this Agreement, Client shall perform as follows:

- A. Designate in writing to AgileAssets one (1) employee of Client who shall be the point of contact for Client on all contractual issues relating to this Agreement.
- B. Designate in writing to AgileAssets a group of no more than two (2) Designated Support Personnel to be the exclusive points of contact for all technical and operational issues relating to this Agreement and the System.
- C. Bear the cost of travel for Client personnel/representatives in all activities.
- D. Maintain the accuracy of Client data files.
- E. Provide a full copy of the Client database elements associated with System to AgileAssets (i) no less than once annually in the form of a dump file, and (ii) upon AgileAssets' request, to allow AgileAssets to perform the Maintenance Services.
- F. Be responsible for the cost of all forms, papers and other supplies used for and from the Client files.
- G. Provide, upon AgileAssets' request from time to time, AgileAssets with reasonable assistance in connection with AgileAssets' obligations under this Agreement, including a convenient, safe and comfortable work area at Client's site(s), access to Client's relevant personnel, facilities and records (including computer files and including remote access to Client's data center), and access to telephones, telephone lines and pertinent computer equipment.

## **8. SYSTEM ENHANCEMENTS**

From time to time following the start of the Initial Maintenance Period, Client may request by notice to AgileAssets that AgileAssets prepare Enhancements for the System.

Upon Client's request for any Enhancements, AgileAssets shall determine in AgileAssets' sole judgment the effort required to develop and deliver the Enhancements and shall respond by providing Client with a delivery schedule for the Enhancements plus an estimate of the effect of the Enhancements on the System as then licensed to Client and the estimated costs of incorporating the Enhancements into the System as then licensed to Client. All proposed work (or, with respect to any Annual Maintenance Period, all proposed work that exceeds the Annual Hours Allotted for Enhancements for such Annual Maintenance Period) shall be quoted on a time and materials basis rates in accordance with Exhibit B, Section 3. AgileAssets shall not be required to prepare any Enhancements unless AgileAssets, in its sole discretion, agrees in writing to do so with respect to any particular Enhancements.

Except as may be otherwise agreed in writing by AgileAssets and Client from time to time, once Enhancements are created and incorporated into the System by AgileAssets for use by Client, Maintenance Services with respect to the Enhancements shall be provided by AgileAssets under the provisions of Section 5 of this Agreement. Except as may be expressly provided otherwise in this Agreement (or by the parties in writing in connection with the development of specific Enhancements), (i) Client shall have no right to use any Enhancements until such Enhancements have been incorporated into the System by AgileAssets for use by Client and (ii) Client's rights and obligations with respect to its use of any Enhancements incorporated into the System by AgileAssets for use by Client are governed by the terms of this Agreement with respect to the System.

## **9. TITLE, ETC.**

As between AgileAssets and Client, title to the System, every Version, all information or materials related thereto, related to AgileAssets or supplied to Client under this Agreement (including System documentation and the results of any performance tests on the System), any reproductions of any portion of any thereof (collectively, the "AgileAssets Materials"), and all patent, copyright, trade secret, trademark and other intellectual property or proprietary rights with respect to any thereof are and shall remain the sole property of AgileAssets. All rights not specifically granted to Client are reserved by AgileAssets.

AgileAssets and Client expressly agree that in no event shall any Enhancements or anything created in the performance of Services be considered a work for hire, and Client hereby assigns to AgileAssets any and all rights worldwide (including but not limited to United States and international copyrights) that Client may now have or hereafter acquire in any of the foregoing.

**10. NON-DISCLOSURE I deleted the EULA provision and replaced with the STS language which is meant to be mutual.** The State may disclose to the Contractor and Contractor may disclose to State written material or oral or other information that the the disclosing party treats as confidential ("Confidential Information"). Title to the Confidential Information and all related materials and documentation the disclosing party delivers to the receiving party will remain with the disclosing party. The receiving party must treat such Confidential Information as secret if it is so marked, 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 disclosing party, or individuals or organizations about whom the disclosing party keeps information. The receiving party may not disclose any Confidential Information to third parties and must use it solely to perform under this Contract.

If any Deliverables contain data, documentation, or other written information that is confidential in nature and properly labeled as such, then it also will be Confidential Information for purposes of this section. The disclosing party will keep all such Confidential Information in confidence and will not use it other than as authorized under this Contract. Nor will the disclosing party disclose any such Confidential Information to any third party without first obligating the third party to maintain the secrecy of the Confidential Information.

If one party discloses Confidential Information ("Disclosing Party") to the other party to this Contract ("Receiving Party"), the Receiving Party's obligation to maintain the confidentiality of the Confidential Information will not apply where such:

- (1) Was already in the possession of 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) Except as provided in the next paragraph, 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.

Information that may be available publicly through other sources about people that is personal in nature, such as medical records, addresses, phone numbers, social security numbers, and similar things are nevertheless sensitive in nature and may not be disclosed or used in any manner except as expressly authorized in this Contract. Therefore, item (3) in the preceding paragraph does not apply, and the Contractor must treat such information as Confidential Information whether it is available elsewhere or not.

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.

## **11. DISCLAIMERS**

AGILEASSETS MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS, IMPLIED, OR OTHERWISE, WITH RESPECT TO ANY OF THE AGILEASSETS MATERIALS, ANY OF THE SERVICES OR ANY OTHER PRODUCTS OR SERVICES PROVIDED OR TO BE PROVIDED HEREUNDER, AND DISCLAIMS ANY AND ALL SUCH REPRESENTATIONS AND WARRANTIES, INCLUDING ANY WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, ANY WARRANTIES OF MERCHANTABILITY, AND ANY WARRANTIES REGARDING TITLE OR AGAINST INFRINGEMENT. AGILEASSETS DOES NOT WARRANT OR MAKE ANY REPRESENTATIONS REGARDING THE USE, OR THE RESULTS OF THE USE, OF ANY OF THE AGILEASSETS MATERIALS, AND DOES NOT WARRANT THAT THE SYSTEM WILL RUN UNINTERRUPTED OR BE ERROR FREE.

## **12. LIMITS OF LIABILITY**

NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, IN NO EVENT SHALL AGILEASSETS OR ANY PERSON AFFILIATED WITH IT BE LIABLE TO CLIENT OR ANY OTHER PERSON FOR ANY SPECIAL, CONSEQUENTIAL, INCIDENTAL, EXEMPLARY, PUNITIVE, OR INDIRECT DAMAGES (INCLUDING INTERRUPTION OF SERVICE, LOSS OF DATA, OR LOSS OF REVENUE OR PROFIT), HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY, ARISING OUT OF THIS AGREEMENT, ANY OF THE AGILEASSETS MATERIALS, ANY OF THE SERVICES, OR ANY OTHER PRODUCTS OR SERVICES PROVIDED OR TO BE PROVIDED HEREUNDER, WHETHER OR NOT AGILEASSETS HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT AND EXCEPT FOR PERSONAL INJURY, PROPERTY DAMAGE, AND INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS, THE AGGREGATE LIABILITY OF AGILEASSETS AND ANY PERSONS AFFILIATED WITH IT UNDER OR WITH RESPECT TO THIS AGREEMENT, ANY OF THE AGILEASSETS MATERIALS, ANY OF THE SERVICES, OR ANY SUCH OTHER PRODUCTS OR SERVICES SHALL IN NO EVENT EXCEED THE TOTAL AMOUNT ACTUALLY PAID TO AGILEASSETS UNDER THIS AGREEMENT DURING THE TWELVE (12) MONTH PERIOD ENDING ON THE DATE ON WHICH THE LIABILITY AROSE.

## **13. INDEMNITY – I DELETED THE EULA PROVISION AND REPLACED WITH THE STS PROVISION. I KEPT IN THE HIGHLIGHTED PROVISION FROM THE EULA AS THE LAST PARAGRAPH OF THE NEW LANGUAGE.**

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 property arising out of its performance under this Contract, provided such bodily injury or property damage is due to the negligence or other tortious conduct 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 under this Contract. This obligation of indemnification will not apply where the State has modified the Deliverable 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 it 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.

Notwithstanding any provision herein to the contrary, AgileAssets shall have no liability to Client with respect to any claim of infringement or misappropriation to the extent based on or arising out of (i) any hardware, software, technology, or other materials or information provided by or on behalf of Client to AgileAssets (the "Provided Materials"); (ii) a combination or utilization of the System, or any portion thereof, with other hardware, software, technology, or other materials or information, unless such hardware, software, technology or other materials or information are either provided to Client by AgileAssets specifically for use with the System or specifically approved in writing by AgileAssets for use with the System with reference to this Section 13A; (iii) the failure of Client to utilize any updates to the System, or to any portion thereof, previously provided by AgileAssets to Client; or (iv) any modification of the System, or any portion thereof, by any Person other than AgileAssets.

#### **14. ADDITIONAL RESTRICTIONS ON USE**

The System may be used by Client only to process or analyze data collected within the jurisdiction of Client (i.e., the roadway network owned and/or maintained by Client) and only for the purposes permitted by this Agreement. Under no circumstances shall Client use (or permit any other Person to use) any portion of the System in the operation of a service bureau for purposes of rendering services to any third party.

U.S. Government Restricted Rights. The System and any documentation licensed hereunder are provided with RESTRICTED RIGHTS. Use, duplication or disclosure by the Government is subject to restrictions as set forth in the Rights in Technical Data and Computer Software clause at DFARS 252.227-7013(c)(1)(ii) or the Commercial Computer Software-Restricted Rights clause at 48 CFR 52.227-19(c)(2), or clause 18-52.227-86(d) of the NASA Supplement, as applicable. Contractor/Manufacturer is AgileAssets Inc., 3144 Bee Caves Road, Austin, Texas 78746.

#### **15. TERMINATION**

- A. If either party shall be in default of any of its obligations under this Agreement and such default continues for thirty (30) days after written notice thereof by the other party, the party in default will have thirty (30) days to cure. If the party in default cannot cure the default within the cure period, this Agreement may thereafter be terminated by such other party by notice to the defaulting party.
- B. In the absence of default by AgileAssets, Client has a right to terminate this Agreement for any reason or for no reason upon sixty (60) days written notice to AgileAssets. Client shall be entitled to a refund of that portion, if any, of the Annual Maintenance Fee actually received by AgileAssets that is allocable to the period following the termination date. Client shall not be entitled to any other refund of amounts paid. In addition, Client is obligated to pay AgileAssets for any services rendered or products provided and accepted by the State (acceptance shall not be unreasonably withheld) for which AgileAssets has not yet been compensated. For the avoidance of doubt, any election by Client to not request Maintenance Services after the Initial Maintenance Period shall not be deemed an election by Client to terminate this Agreement under this Section 15.B.
- C. This Agreement may be terminated by AgileAssets in accordance with Section 13.A.
- D. Immediately upon any termination of this Agreement, Client shall discontinue use of the System and any other AgileAssets Materials, shall deliver to AgileAssets all AgileAssets Materials and all copies and modifications of any thereof that were delivered or made available to or are held by Client or any Named User or are subject to Client's or any Named User's control, and shall concurrently with such return certify in writing to AgileAssets that all of the foregoing have been returned to AgileAssets or have been irretrievably destroyed.

#### **16. GENERAL PROVISIONS**

- A. This Agreement is subject to the terms and conditions of the State Term Contract executed between the parties effective \_\_\_\_\_, 2012.
- B. Client agrees that because of the unique nature of the AgileAssets Materials, any breach by Client of its obligations hereunder may cause immediate and irreparable harm to AgileAssets, that monetary damages may be inadequate to compensate for such harm, and that AgileAssets is entitled to obtain injunctive relief to enforce such obligations.
- C. Neither this Agreement nor any of Client's rights and/or obligations hereunder may be assigned or otherwise transferred by Client, by operation of law or otherwise, without the prior written consent of AgileAssets. Any attempted assignment or transfer in violation of the foregoing shall be void. Subject to the foregoing, this Agreement shall be binding on the parties and their respective successors and assigns. AgileAssets reserves the right to utilize subcontractors in connection with its obligations under this Agreement.
- D. Client shall comply with all applicable governmental laws, statutes, ordinances, administrative orders, rules and regulations with respect to export of products or technical data. Without limitation of the foregoing, Client shall not export any of the AgileAssets Materials or any related technical data without the prior written consent of AgileAssets.
- E. Client agrees that, during the term of this Agreement and for a period of two (2) years immediately following termination of this Agreement, Client shall not, and shall not permit any of its affiliates to, directly or indirectly, on behalf of Client, any such affiliate or any other Person, (i) solicit or induce any Person who worked with AgileAssets as an employee, contractor or otherwise at any time during any of such periods (including any staff of AgileAssets) to terminate, to not renew, or to modify in a manner adverse to AgileAssets, any contractual or other relationships (including employment relationships) with AgileAssets; or (ii) hire any such Person or otherwise directly or indirectly retain any such Person to provide any services.
- F. At any time and from time to time, within seven (7) days after written request by AgileAssets, Client shall provide AgileAssets with a written certification of all locations at which any of the System is stored, maintained, used or accessed (or any licensed documentation is stored, used or accessed), the number of copies of any portion of the AgileAssets Materials made by or on behalf of Client, and the names of all Persons who are using or have access to any of the same. Further, at any time and from time to time, within seven (7) days after written request by AgileAssets, Client shall permit AgileAssets (or its agents and representatives) to inspect such locations and to review the records and procedures of Client in order to confirm its compliance with its obligations under this Agreement, and Client shall otherwise cooperate reasonably with such request. In the event that any such inspection discloses any breach of this Agreement, then without limitation of any other rights or remedies as may be available to AgileAssets as a result of such breach, Client shall pay to AgileAssets the full cost of such inspection.

IN WITNESS WHEREOF, the parties hereto have executed and accepted this Agreement as of the Effective Date.

Client:

\_\_\_\_\_

By: \_\_\_\_\_  
Signature of Authorized Representative

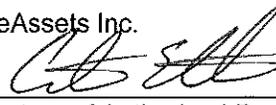
\_\_\_\_\_  
Name of Authorized Representative

\_\_\_\_\_  
Title of Authorized Representative

\_\_\_\_\_  
Date

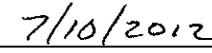
AgileAssets:

AgileAssets Inc.

By:  \_\_\_\_\_  
Signature of Authorized Representative

 \_\_\_\_\_  
Name of Authorized Representative

 \_\_\_\_\_  
Title of Authorized Representative

 \_\_\_\_\_  
Date

## EXHIBIT A

### **AGILEASSETS SYSTEM**

This Agreement shall apply to the license of the AgileAssets proprietary computer software product(s) (and certain corresponding documentation), and certain support, maintenance and other services related thereto, as such software is specified in an approved Purchase Order issued by the State of Ohio and processed by AgileAssets for licensed software products included on the approved STS Price List then in effect.

## EXHIBIT B

### PRICING PROVISIONS

As of the Effective Date Sums to be paid AgileAssets pursuant to the terms of this Agreement are comprised of (1) License Fees, (2) Maintenance and Support Fees, and (3) Professional Service Fees. All amounts indicated below are in U.S. Dollars. All fees charged must be included in the approved STS Price List.

#### 1. License Fees

For the use described in Section 3 and Section 14 of this Agreement, Client shall pay to AgileAssets the non-refundable license fees, as set forth below. The license fees indicated are individual and separate from each other and the fees in this Exhibit B.

- a. License Fees for each module of the System (i.e., prior to any Enhancements) are as follows

[INSERT TABLE OF SOFTWARE MODULES BEING PURCHASED AND RESPECTIVE STS PRICING]

- b. User licenses are required to be purchased in addition to the modules above. Named User licenses may be used to the quantity agreed to below for any of the modules listed in this section 1(a) above and any modules purchased in the future.

[INSERT TABLE OF USER COUNTS BEING PURCHASED AND RESPECTIVE STS PRICING]

- c. By notice to AgileAssets from time to time, Client may request that additional modules be licensed to Client, or that the number of Named Users be increased. Notwithstanding anything to the contrary in this Agreement, however, no additional modules may be licensed or additional Named Users added unless (i) AgileAssets consents in writing (such consent not to be unreasonably withheld), (ii) AgileAssets shall have received such information regarding the same (including the identity, location and employer of the Named Users) as AgileAssets shall reasonably request, and (iii) AgileAssets shall have received from Client full payment for such additional modules and users at AgileAssets' state term schedule (STS) license fees.

- d. AgileAssets shall invoice Client for License Fees for the System upon receipt of a purchase order. In no event shall Client be entitled to a refund of any fees previously paid, except as specifically provided in Section 5.1 or Section 13.A.

If Client licenses additional modules under this Agreement after the Effective Date, or if the number of Named Users is increased after the Effective Date, Client shall pay AgileAssets the additional license fees with respect to such additional modules or Named Users at that time at state term schedule rates.

#### 2. Maintenance Fees

- a. Annual Maintenance Fee: Client shall pay to AgileAssets an annual maintenance fee (the "Annual Maintenance Fee") for the Initial Maintenance Period and any Annual Maintenance Period. The Annual Maintenance Fee for the modules described in Exhibit A of this Agreement and the number of Named Users described in Exhibit B and licensed to Client

under this Agreement as of the Effective Date shall initially be equal to twenty percent (20%) of the total System License Fees as set forth in Section 1 of this Exhibit B above and shall be at STS rates or lower. The Annual Maintenance Fee for any additional modules licensed to Client under this Agreement after the Effective Date or for any Named Users added after the Effective Date shall be in an amount initially equal to twenty percent (20%) of the total license fees for such additional modules or Named Users. The Annual Maintenance Fee shall be adjusted each year beginning on the expiration of the first Annual Maintenance Period and continuing as long as this Agreement remains in effect, as provided in Section 2(b) of this Exhibit below. The Annual Maintenance Fee shall be due on the first day of each Annual Maintenance Period.

- b. Annual Maintenance Fee Adjustment: The Annual Maintenance Fee as set forth in Section 2 of this Exhibit shall be adjusted beginning on the expiration of the first Annual Maintenance Period and continuing each year thereafter that this Agreement remains in effect. The adjustment shall be accomplished without necessity of formal contract amendment. The adjustment shall occur automatically and shall consist of increasing the fees for each module and Named User by five percent (5%) of the previous period's Annual Maintenance Fee amount for such module and Named User on such date.

### **3. Professional Services**

- a. Enhancements: The fees and expenses for Enhancements beyond those covered by the Annual Hours Allotted for Enhancements shall be charged to and paid by Client on a time and materials basis in accordance with Section 3(b) of this Exhibit below.
- b. Time and Materials: Work tasks not covered under the fixed price arrangements within this Agreement shall be charged to Client on a time and materials basis at AgileAssets' STS rates.

As of the Effective Date, standard rates for Services are as follows:

Project Management	\$215
Functional Lead	\$205
Consultant	\$175
Senior System Analyst	\$185
Senior Software Architect	\$185
Programmer	\$185
Technical Writer	\$135

Rate changes must be amended in the STS. Other direct costs, such travel, lodging and meals are to be invoiced at OBM rates. Prior to initiating time and materials assignments, AgileAssets shall provide detailed estimates of work to be performed and of direct costs thought to be necessary to perform the assignment, including estimates by function and estimated hours by position. AgileAssets shall not proceed with any time and material assignments unless approved in advance in writing by Client and AgileAssets and receipt of a valid purchase order.

### **4. Fixed Prices for Additional Services and Modules**

AgileAssets offers some additional services and the ability to license additional modules for the System based on fixed prices. The current price list for all AgileAssets modules and available fixed price services is shown in STS.

**EXHIBIT C**

**ANNUAL HOURS ALLOTTED FOR ENHANCEMENT**

This Attachment (this "Attachment") is an attachment to the Software License and Maintenance Agreement between \_\_\_\_\_ ("Client") and AgileAssets Inc. ("AgileAssets") effective \_\_\_\_\_, 20\_\_\_\_ (the "Agreement"). All capitalized terms used herein and not defined herein shall have the same meaning as in the Agreement.

<b>(1) Annual Maintenance Period</b>	<b>(2) Annual Hours Allotted for Enhancements</b>
First Annual Maintenance Period (if any)	
Second Annual Maintenance Period (if any)	
Third Annual Maintenance Period (if any)	
Fourth Annual Maintenance Period (if any)	

**STANDARD AFFIRMATION AND DISCLOSURE FORM  
EXECUTIVE ORDER 2011-12K**

Governing the Expenditure of Public Funds on Offshore Services

All of the following provisions must be included in all invitations to bid, requests for proposals, state term schedules, multiple award contracts, requests for quotations, informal quotations, and statements of work. This information is to be submitted as part of the response to any of the procurement methods listed.

By the signature affixed hereto, the Contractor affirms, understands and will abide by the requirements of Executive Order 2011-12K. If awarded a contract, both the Contractor and any of its subcontractors shall perform no services requested under this Contract outside of the United States.

The Contractor shall provide all the name(s) and location(s) where services under this Contract will be performed in the spaces provided below or by attachment. Failure to provide this information may subject the Contractor to sanctions. If the Contractor will not be using subcontractors, indicate "Not Applicable" in the appropriate spaces.

1. Principal location of business of Contractor:

3144 Bee Caves Road Austin, TX 78746  
(Address) (City, State, Zip)

N/A \_\_\_\_\_  
(Name) (Address, City, State, Zip)

Name/Principal location of business of subcontractor(s):

N/A \_\_\_\_\_  
(Name) (Address, City, State, Zip)

2. Location where services will be performed by Contractor:

3144 Bee Caves Road Austin, TX 78746  
(Address) (City, State, Zip)

N/A \_\_\_\_\_  
(Name) (Address, City, State, Zip)

Name/Location where services will be performed by subcontractor(s):

N/A \_\_\_\_\_  
(Name) (Address, City, State, Zip)

N/A \_\_\_\_\_  
(Name) (Address, City, State, Zip)

3. Location where state data will be stored, accessed, tested, maintained or backed-up, by Contractor:

3144 Bee Caves Road Austin, TX 78746  
(Address) (City, State, Zip)

N/A \_\_\_\_\_  
(Address) (City, State, Zip)

u

Name/Location(s) where state data will be stored, accessed, tested, maintained or backed-up by subcontractor(s):

N/A \_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Address, City, State, Zip)

Contractor also affirms, understands and agrees that Contractor and its subcontractors are under a duty to disclose to the State any change or shift in location of services performed by Contractor or its subcontractors before, during and after execution of any Contract with the State. Contractor agrees it shall so notify the State immediately of any such change or shift in location of its services. The State has the right to immediately terminate the contract, unless a duly signed waiver from the State has been attained by the Contractor to perform the services outside the United States.

On behalf of the Contractor, I acknowledge that I am duly authorized to execute this Affirmation and Disclosure form and have read and understand that this form is a part of any Contract that Contractor may enter into with the State and is incorporated therein.

By:   
Contractor

Print Name: CURTIS E. SMITH

Title: CFO

Date: 7/12/12

