

Contract Number K3778

for

**SolarWinds Monitoring Software and
Support**

between the

Employment Security Department

and

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Ivoxy Consulting, LLC

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CONTRACT NUMBER K3778

for

SolarWinds Monitoring Software and Support

PARTIES

This Contract ("Contract") is entered into by and between the state of Washington, acting by and through the Employment Security Department, an agency of Washington State government ("Purchaser" or "ESD"), located at 640 Woodland Square Loop SE, Lacey, WA 98503, and Ivoxy Consulting a corporation licensed to conduct business in the state of Washington ("Vendor"), located at 5400 Carillon Point, Kirkland, WA 98033, for the purpose of purchasing SolarWinds software licenses, maintenance and support.

RECITALS

WHEREAS Purchaser issued RFQ-2015-034 for SolarWinds software in 2015 and received no Responses from the Vendor Community; and,

WHEREAS Contractor has provided the Purchaser with the initial order of Software licenses; and,

WHEREAS Purchaser requires additional SolarWinds software licensing in order to complete the state required migration to the State Data Center; and,

WHEREAS Purchaser may require additional SolarWinds software licenses during the term of this Contract, based on the size and configuration of the infrastructure environment and network architecture;

NOW THEREFORE, Purchaser awards this Contract K3778, the terms and conditions of which shall govern Vendor's furnishing to ESD the services documented in Exhibit A Statement of Work, further identified herein. This Contract is not for personal use.

IN CONSIDERATION of the mutual promises as hereinafter set forth, the parties agree as follows:

1. Definition of Terms

"Acceptance" shall mean that the installed and configured Software has passed its Acceptance Testing and shall be formalized in a written notice from ESD to Vendor; or, if there is no Acceptance Testing, Acceptance shall occur when the Products are delivered.

"Acceptance Testing" shall mean the process for ascertaining that the Software meets the standards set forth in the Statement of Work, prior to Acceptance by ESD.

"Business Days and Hours" shall mean Monday through Friday, 8:00 a.m. to 5:00 p.m., Pacific Time, except for holidays observed by the state of Washington.

"Confidential Information" shall mean information that may be exempt from disclosure to the public or other unauthorized persons under either chapter 42.56 RCW or other state or federal statutes. Confidential Information includes, but is not limited to, names, addresses, Social Security numbers, e-mail addresses, telephone numbers, financial profiles, credit card information, driver's license numbers, medical data, law enforcement records, agency source code or object code, agency security data.

“Contract” shall mean this document, all schedules and exhibits, Statements of Work, and all amendments hereto.

“Contractor” shall mean Ivoxy Consulting, LLC, its employees and agents. Contractor also includes any firm, provider, organization, individual, or other entity performing the business activities under this Contract. It shall also include any Subcontractor retained by Contractor as permitted under the terms of this Contract.

“Contractor Account Manager” shall mean a representative of Contractor who is assigned as the primary contact person whom the Purchaser Contract Manager.

“Contractor Contracting Officer” shall mean the person to whom signature authority has been delegated in writing. This term includes, except as otherwise provided in this Contract, an authorized representative of Contractor Contracting Officer acting within the limits of his/her authority.

“Delivery Date” shall mean the date by which the Products ordered hereunder must be delivered.

“Employment Security Department” shall mean the same as Purchaser.

“Effective Date” shall mean the first date this Contract is in full force and effect. It may be a specific date agreed to by the parties; or, if not so specified, the date of the last signature of a party to this Contract.

“Exhibit A” shall mean the Order, which provides the software and quantities to be licensed and delivered under this Contract.

“Order” or **“Order Document”** shall mean any official document and attachments thereto specifying the Software and/or Services to be licensed or purchased from Vendor under this Contract.

“Price” shall mean charges, costs, rates, and/or fees charged for the Services under this Contract and shall be paid in United States dollars.

“Product(s)” shall mean any Vendor-supplied equipment, Software, and documentation.

“Proprietary Information” shall mean information owned by Vendor to which Vendor claims a protectable interest under law. Proprietary Information includes, but is not limited to, information protected by copyright, patent, trademark, or trade secret laws.

“Purchaser” shall mean the state of Washington, Employment Security Department, any division, section, office, unit or other entity of Purchaser or any of the officers or other officials lawfully representing Purchaser.

“Purchaser Contract Administrator” shall mean that person designated by Purchaser to administer this Contract on behalf of Purchaser.

“Purchaser Contracting Officer” shall mean the person to whom signature authority has been delegated in writing. This term includes, except as otherwise provided in this Contract, an authorized representative of the Purchaser Contracting Officer acting within the limits of his/her authority.

“Purchaser Contract Manager” shall mean the person designated by Purchaser to oversee execution of this contract and monitor the quality and timeliness of contract deliverables.

“RCW” shall mean the Revised Code of Washington.

“Services” shall mean those Services provided under this Contract and related to the Software License(s) being purchased that are appropriate to the scope of this Contract and includes such things as installation Services, maintenance, training, etc.

“Software” shall mean SolarWinds Orion NPM SLX and SolarWinds NTA Module programs and other operating information provided by through resale by Contractor to Purchaser. Software includes all prior, current, and future versions of the Software and all maintenance updates and error corrections.

“Subcontractor” shall mean one not in the employment of Vendor, who is performing all or part of the business activities under this Contract under a separate contract with Vendor. The term “Subcontractor” means Subcontractor(s) of any tier.

“Work Product” shall mean data and products produced under this Contract including but not limited to, discoveries, formulae, ideas, improvements, inventions, methods, models, processes, techniques, findings, conclusions, recommendations, reports, designs, plans, diagrams, drawings, Software, databases, documents, pamphlets, advertisements, books, magazines, surveys, studies, computer programs, films, tapes, and/or sound reproductions, to the extent provided by law.

Contract Term

2. Term

The initial Term of this Contract shall begin upon the Date of Execution and shall remain in effect for one year. The Contract may be renewed for up to an additional three (3) annual terms, by a written amendment to this Contract signed by both parties, and at the discretion of Purchaser. Additional SolarWinds Software may be added to the scope of this Contract during the Term with each new Purchase Order added as an Amendment to this Agreement.

3. Survivorship

All license and purchase transactions executed pursuant to the authority of this Contract shall be bound by all of the terms, conditions, Prices and Price discounts set forth herein, notwithstanding the expiration of the initial term of this Contract or any extension thereof. Further, the terms, conditions and warranties contained in this Contract that by their sense and context are intended to survive the completion of the performance, cancellation or termination of this Contract shall so survive. In addition, the terms of the sections titled **Overpayments to Vendor; Ownership/Rights in Data; Date Warranty; Vendor Commitments, Warranties and Representations; Protection of Purchaser's Confidential Information; Section Headings, Incorporated Documents and Order of Precedence; Publicity; Review of Vendor's Records; Patent and Copyright Indemnification; Vendor's Proprietary Information; Disputes; and Limitation of Liability**, and shall survive the termination of this Contract.

Pricing, Invoice and Payment

4. Pricing

- 4.1. The total amount expended under this Contract shall not exceed twenty thousand three hundred thirty-seven dollars and seventy-one cents (\$20,337.71).
- 4.2. Vendor agrees to provide the Products and Services at the Prices set forth in Exhibit A, Purchase Order. No other Prices shall be payable to Vendor for implementation of the agreed upon Services.

5. Invoice and Payment

- 5.1. Vendor will submit properly itemized invoices to Purchaser Contract Manager at PO Box 9046, Olympia, WA 98507-9046. Invoices shall provide and itemize, as applicable, the following:
 - Purchaser Contract Number K3778
 - Vendor name, address, phone number, and Federal Tax Identification Number;
 - Title of Software;
 - Quantity of Licenses;
 - License terms;
 - Date(s) of delivery;
 - Description of each line item as either goods or services;
 - Net invoice price for each line item;
 - Applicable taxes;
 - Total invoice price; and
 - Payment terms including any available prompt payment discounts.

- 5.2. Payments shall be due and payable within thirty (30) calendar days after receipt and Acceptance of Software or Services or thirty (30) calendar days after receipt of properly prepared invoices, whichever is later.
- 5.3. Incorrect or incomplete invoices will be returned by Employment Security to Vendor for correction and reissue.
- 5.4. The Employment Security Contract number K3778 must appear on all bills of lading, packages, and correspondence relating to this Contract.
- 5.5. Purchaser shall not honor drafts, nor accept goods on a sight draft basis.

6. Taxes

All payments accrued on account of payroll taxes, unemployment contributions, any other taxes, insurance, or other expenses for Vendor or Vendor's staff shall be Vendor's sole responsibility.

7. Overpayments to Vendor

Vendor shall refund to Purchaser the full amount of any erroneous payment or overpayment under this Contract within thirty (30) days' written notice. If Vendor fails to make timely refund, Purchaser may charge Vendor one percent (1%) per month on the amount due, until paid in full.

Vendor's Responsibilities

8. Vendor Commitments, Warranties and Representations

Any written commitment by Vendor within the scope of this Contract shall be binding upon Vendor. Failure of Vendor to fulfill such a commitment may constitute breach and shall render Vendor liable for damages under the terms of this Contract. For purposes of this section, a commitment by Vendor includes: (i) Prices, discounts, and options committed to remain in force over a specified period of time; and (ii) any warranty or representation made by Vendor in its Response or contained in any Vendor or manufacturer publications, written materials, schedules, charts, diagrams, tables, descriptions, other written representations, and any other communication medium accompanying or referred to in its Response or used to effect the sale to Purchaser.

Contract Administration

9. Legal Notices

- 9.1. Any notice or demand or other communication required or permitted to be given under this Contract or applicable law shall be effective only if it is in writing and signed by the applicable party, properly addressed, and either delivered in person, or by a recognized courier service, or deposited with the United States Postal Service as first-class mail, postage prepaid, to the parties at the addresses provided in this section. For purposes of complying with any provision in this Contract or applicable law that requires a "writing," such communication, when digitally signed with a Washington State Licensed Certificate, shall be considered to be "in writing" or "written" to an extent no less than if it were in paper form.

To Vendor at:

To Purchaser at:

Ivoxy Consulting, LLC

Attn: Bill Hammett

5400 Carillon Point
Kirkland, WA 98033

Phone: (206) 399-2480

E-mail: bill.hammett@ivoxy.com

State of Washington

Employment Security Department

Attn: Mary Mueller

PO Box 9046
Olympia, WA 98507-9046

Phone: (360) 902-9387

E-mail: esdgpcontractsoffice@esd.wa.gov

- 9.2. Notices shall be effective upon receipt or four (4) Business Days after mailing, whichever is earlier. The notice address as provided herein may be changed by written notice given as provided above.
- 9.3. In the event that a subpoena or other legal process commenced by a third party in any way concerning the Services provided pursuant to this Contract is served upon Vendor or Purchaser, such party agrees to notify the other party in the most expeditious fashion possible following receipt of such subpoena or other legal process. Vendor and Purchaser further agree to cooperate with the other party in any lawful effort by the other party to contest the legal validity of such subpoena or other legal process commenced by a third party.

10. Vendor Account Manager

Vendor shall appoint an Account Manager for Purchaser's account under this Contract who will provide oversight of Vendor activities conducted hereunder. Vendor's Account Manager will be the principal point of contact for Purchaser concerning Vendor's performance under this Contract. Vendor shall notify Purchaser Contract Administrator and Purchaser Business Manager, in writing, when there is a new Vendor Account Manager assigned to this Contract. The Vendor Account Manager information is:

Vendor Account Manager: Bill Hammett
Address: 5400 Carillon Point
Kirkland, WA 98033
Phone: (206) 399-2480
E-mail: bill.hammett@ivoxy.com

11. Purchaser Contract Manager

Purchaser shall appoint Josh Swenson who will be the Purchaser Contract Manager and will provide oversight of the activities conducted hereunder. Purchaser Contract Manager will be the principal contact for Vendor concerning business activities under this Contract. Purchaser shall notify Vendor, in writing, when there is a new Purchaser Contract Manager assigned to this Contract.

12. Section Headings, Incorporated Documents and Order of Precedence

- 12.1. The headings used herein are inserted for convenience only and shall not control or affect the meaning or construction of any of the sections.
- 12.2. Each of the documents listed below is, by this reference, incorporated into this Contract as though fully set forth herein.
- a) Exhibit A, Purchase Order;

- b) Exhibit B, General Terms and Conditions;
- c) All other attachments to this Contract; and,
- d) All Vendor or manufacturer publications, written materials and schedules, charts, diagrams, tables, descriptions, other written representations and any other supporting materials Vendor made available to Purchaser and used to effect the sale of Services to Purchaser.

12.3. In the event of any inconsistency in this Contract, the inconsistency shall be resolved in the following order of precedence:

- 1. Applicable federal and state statutes, laws, and regulations;
- 2. Sections of this Contract;
- 3. Exhibit A, Purchase Order;
- 4. Exhibit B, General Terms and Conditions;
- 5. All other attachments to this Contract; and
- 6. All Vendor or manufacturer publications, written materials and schedules, charts, diagrams, tables, descriptions, other written representations and any other supporting materials Vendor made available to Purchaser and used to effect the sale of Services to Purchaser.

13. Entire Agreement

This Contract sets forth the entire agreement between the parties with respect to the subject matter hereof and except as provided in the section titled **Vendor Commitments, Warranties and Representations**, understandings, agreements, representations, or warranties not contained in this Contract or a written amendment hereto shall not be binding on either party. Except as provided herein, no alteration of any of the terms, conditions, delivery, Price, quality, or Specifications of this Contract will be effective without the written consent of both parties.

14. Authority for Modifications and Amendments

No modification, amendment, alteration, addition, or waiver of any section or condition of this Contract shall be effective or binding unless it is in writing and signed by Purchaser and Vendor Contracting Officers. Only Purchaser Contracting Officer shall have the express, implied, or apparent authority to alter, amend, modify, add, or waive any section or condition of this Contract on behalf of Purchaser.

15. Independent Status of Vendor

In the performance of this Contract, the parties will be acting in their individual, corporate or governmental capacities and not as agents, employees, partners, joint venturers, or associates of one another. The parties intend that an independent contractor relationship will be created by this Contract. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purpose whatsoever. Vendor shall not make any claim of right, privilege or benefit which would accrue to an employee under chapter 41.06 RCW or Title 51 RCW.

16. Governing Law

This Contract shall be governed in all respects by the law and statutes of the state of Washington, without reference to conflict of law principles. However, if the Uniform Computer

Information Transactions Act (UCITA) or any substantially similar law is enacted as part of the law of the state of Washington, said statute will not govern any aspect of this Contract or any license granted hereunder, and instead the law as it existed prior to such enactment will govern. The jurisdiction for any action hereunder shall be exclusively in the Superior Court for the state of Washington. The venue of any action hereunder shall be in the Superior Court for Thurston County, Washington.

17. Publicity

- 17.1. The award of this Contract to Vendor is not in any way an endorsement of Vendor or Vendor's products by Purchaser and shall not be so construed by Vendor in any advertising or other publicity materials.
- 17.2. Vendor agrees to submit to Purchaser, all advertising, sales promotion, and other publicity materials relating to this Contract or any Product furnished by Vendor wherein Purchaser's name is mentioned, language is used, or Internet links are provided from which the connection of Purchaser's name therewith may, in Purchaser's judgment, be inferred or implied. Vendor further agrees not to publish or use such advertising, sales promotion materials, publicity or the like through print, voice, the World Wide Web, and other communication media in existence or hereinafter developed without the express written consent of Purchaser prior to such use.

18. Review of Vendor's Records

- 18.1. Vendor and its Subcontractors shall maintain books, records, documents and other evidence relating to this Contract, including but not limited to Minority and Women's Business Enterprise participation, protection and use of Purchaser's Confidential Information, and accounting procedures and practices which sufficiently and properly reflect all direct and indirect costs of any nature invoiced in the performance of this Contract. Vendor shall retain all such records for six (6) years after the expiration or termination of this Contract. Records involving matters in litigation related to this Contract shall be kept for either one (1) year following the termination of litigation, including all appeals, or six (6) years from the date of expiration or termination of this Contract, whichever is later.
- 18.2. All such records shall be subject at reasonable times and upon prior notice to examination, inspection, copying, or audit by personnel so authorized by the Purchaser's Contract Administrator and/or the Office of the State Auditor and federal officials so authorized by law, rule, regulation or contract, when applicable, at no additional cost to the State. During this Contract's term, Vendor shall provide access to these items within Thurston County. Vendor shall be responsible for any audit exceptions or disallowed costs incurred by Vendor or any of its Subcontractors.
- 18.3. It is agreed that books, records, documents, and other evidence of accounting procedures and practices related to Vendor's cost structure, including overhead, general and administrative expenses, and profit factors shall be excluded from Purchaser's review unless the cost or any other material issue under this Contract is calculated or derived from these factors.

19. Patent and Copyright Indemnification

- 19.1. Vendor, at its expense, shall defend, indemnify, and save Purchaser harmless from and against any claims against Purchaser that any Product Work Product supplied hereunder, or

Purchaser's use of the Product Work Product within the terms of this Contract, infringes any patent, copyright, utility model, industrial design, mask work, trade secret, trademark, or other similar proprietary right of a third party worldwide. Vendor shall pay all costs of such defense and settlement and any penalties, costs, damages and attorneys' fees awarded by a court or incurred by Purchaser provided that Purchaser:

- a) Promptly notifies Vendor in writing of the claim, but Purchaser's failure to provide timely notice shall only relieve Vendor from its indemnification obligations if and to the extent such late notice prejudiced the defense or resulted in increased expense or loss to Vendor; and
- b) Cooperates with and agrees to use its best efforts to encourage the Office of the Attorney General of Washington to grant Vendor sole control of the defense and all related settlement negotiations.

19.2. If such claim has occurred, or in Vendor's opinion is likely to occur, Purchaser agrees to permit Vendor, at its option and expense, either to procure for Purchaser the right to continue using the Product or Work Product or to replace or modify the same so that they become noninfringing and functionally equivalent. If use of the Product or Work Product is enjoined by a court and Vendor determines that none of these alternatives is reasonably available, Vendor, at its risk and expense, will take back the Product or Work Product and provide Purchaser a refund. In the case of Work Product, Vendor shall refund to Purchaser the entire amount Purchaser paid to Vendor for Vendor's provision of the Work Product. In the case of Product, Vendor shall refund to Purchaser its depreciated value. No termination charges will be payable on such returned Product, and Purchaser will pay only those charges that were payable prior to the date of such return. Depreciated value shall be calculated on the basis of a useful life of four (4) years commencing on the date of purchase and shall be an equal amount per year over said useful life. The depreciation for fractional parts of a year shall be prorated on the basis of three hundred sixty-five (365) days per year. In the event the Product has been installed less than one (1) year, all costs associated with the initial installation paid by Purchaser shall be refunded by Vendor.

19.3. Vendor has no liability for any claim of infringement arising solely from:

- a) Modification of the Product or Work Product by Purchaser or a third party without the prior knowledge and approval of Vendor; or
- b) Use of the Product or Work Product in a way not specified by Vendor;

unless the claim arose against Vendor's Product or Work Product independently of any of these specified actions.

Approved as to Form

State of Washington
Office of the Attorney General

Signature

Print or Type Name

Assistant Attorney General

Title

Date

Vendor Information	
Vendor's UBI Number:	
Minority or Woman Owned Business Enterprise	
Yes _____	No <input checked="" type="checkbox"/>
(Certification Number)	

Exhibit A – Statement of Work

Exhibit A-1 – Schedule of Fees

Exhibit B – General Terms and Conditions

Exhibit C - Certification Regarding Lobbying

Exhibit D - Certification Regarding Debarment and Suspension

STATE OF WASHINGTON
Employment Security Department
SOLE SOURCE POSTING

The Employment Security Department (ESD) contemplates awarding a sole source contract to Ivoxy Consulting, LLC to provide ESD with SolarWinds Orion Software licenses.

The contract will be issued on or about June 2, 2015 for approximately 12 months. The Contract may be renewed for up to an additional three (3) annual terms, at the discretion of Department. Additional SolarWinds Software may be added to the scope during the Term with each new Purchase Order added as an Amendment to this Agreement.

The dollar value is estimated at \$20,337.71.

Offerors contemplating the above requirements are required to submit capability statements detailing their ability to meet the state's requirements by June 1, 2015.

In the absence of other qualified sources, it is the state's intent to make a sole source award of the contract.

To submit capability statements or for questions, contact:

Contact Name: Mary Mueller
E-mail: esdgpcontractsoffice@esd.wa.gov
Phone: (360) 902-9387

**Contract K3778
Exhibit A
Purchase Order**

Item	Unit Cost	Quantity	Item Total
1. Part #1253277 – SolarWinds Orion NPM SLX Upgrade from SL2000	\$6308.11	1	\$6308.11
2. Part #3609 – SolarWinds NTA Module for Orion NPM SLX Upgrade from SL2000	\$2891.24	1	\$2891.24
3. Part #1254278 – SolarWinds Orion SL2000 Upgrade from SL500	\$5924.85	1	\$5924.85
4. Part #3607 – SolarWinds NTA Module for Orion NPM SL2000	\$3724.47	1	\$3724.47
		<i>Subtotal</i>	\$18848.67
		<i>Tax (7.9%)</i>	\$1489.04
		Total	\$20,337.71

Exhibit B

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1 Contract Term

The Contract term shall begin on the Effective Date and shall be in full force and effect for a term of one year, unless terminated earlier as provided herein. This Contract may be extended by up to two additional one year terms in the Department's sole discretion.

2 Acceptance

It is understood and agreed by and between the Agency and the Vendor that the Vendor's payment is conditioned upon satisfactory performance and acceptance by the Agency. The Agency reserves the right to withhold payment of any deliverable contingent upon acceptance of the deliverable by the Agency. If defects preventing acceptance of a deliverable are present, the Agency shall immediately notify the Vendor in writing of the nature of the defects and the method of remedy of those defects. The Vendor will take timely action to remedy defects as to permit acceptance of the subject deliverable. Notwithstanding the other provisions of this Contract, the Agency shall not unreasonably withhold acceptance of a deliverable nor reimbursement of the Vendor.

3 Assignment

The work to be provided under this Contract, and any claim arising thereunder, is not assignable or delegable by either party in whole or in part, without the express prior written consent of the other party, which consent shall not be unreasonably withheld.

4 Assurances

The Agency and the Vendor agree that all activity pursuant to this Contract will be in accordance with all applicable current or future federal, state or local laws, rules and regulations.

5 Changes and Modifications

The Agency or Vendor may, from time to time, request changes in the services to be performed, or in the project undertaken. Such changes, including any increase or decrease in the amount of payment or reimbursement, which are mutually agreed upon by and between the Agency and the Vendor shall be incorporated in written modifications to this Contract.

Alteration of the terms of this Contract shall be valid only when in writing and signed by the authorized representatives of the parties.

6 Survivorship

All license and purchase transactions executed pursuant to the authority of this Contract shall be bound by all of the terms, conditions, Prices and Price discounts set forth herein, notwithstanding the expiration of the initial term of this Contract or any extension thereof. Further, the terms, conditions and warranties contained in this Contract that by their sense and context are intended to survive the completion of the performance, expiration, cancellation or termination of this Contract shall so survive. In addition, the terms of the sections titled Overpayments to Vendor; License Grant; Software Ownership; Software Code Escrow Ownership/Rights in Data; Data Warranty; No Surreptitious Codes Warranty; Vendor Commitments; Protection of Purchaser's Confidential Information; Section Headings, Incorporated Documents and Order of Precedence; Publicity; Review of Vendor's Records; Patent and Copyright Indemnification; Vendor's Proprietary

Information; Disputes; and Limitation of Liability, Legal Notices, Hold Harmless, Withholding, Termination Procedure, Attorneys Fees and Costs, Non-Exclusive Remedies, and shall survive the termination of this Contract.

7 Severability

The provisions of this Contract are intended to be severable. If any term or provision is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of this Contract.

8 Conflict of Interest

Notwithstanding any determination by the Executive Ethics Board or other tribunal, the Agency may, in its sole discretion, by written notice to the Vendor terminate this Contract if it is found after due notice and examination by the Agency that there is a violation of the Ethics in Public Service Act, RCW 42.52, or any similar statute involving the Vendor in the procurement of, or performance under, this Contract.

In the event this Contract is terminated as provided above, the Agency shall be entitled to pursue the same remedies against the Vendor as it could pursue in the event of a breach of this Contract by the Vendor. The rights and remedies of the Agency provided for in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law. The existence of facts upon which the Agency makes any determination under this clause shall be an issue and may be reviewed as provided in the DISPUTES clause of this Contract.

9 Conformance

If any provision of this Contract is in conflict with or violates any statute or rule of law of the state of Washington, it is considered modified to conform to that statute or rule of law.

10 Covenant against Contingent Fees

The Vendor warrants that no person or selling agent has been employed or retained to solicit or secure this Contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established agent maintained by the Vendor for the purpose of securing business. The Agency shall have the right, in the event of breach of this clause by the Vendor, to annul this Contract without liability or, in its discretion, to deduct from the contract price or consideration or otherwise recover by other means the full amount of such commission, percentage, brokerage or contingent fees. In no event shall the Agency be liable for any brokerage or contingent fees.

11 Pricing, Invoice and Payment

11.1 Advance Payment Prohibited

No advance payment shall be made for the Software and Services furnished by Vendor pursuant to this Contract.

11.2 PRICE WARRANT

The Vendor warrants that the cost charged for services under the terms of this Contract are not in excess of those charged any other client for the same services performed by the same individuals.

11.3 Pricing

- a) The Total Amount expended under this Contract shall not exceed the amount designated as such in Exhibit A-1.
- b) Vendor agrees to provide the Products and Services at the Prices set forth Schedule A-1. No other Prices shall be payable to Vendor for implementation of Vendor's Response.
- c) Prices shall not be increased during the term of the Contract.
- d) If Vendor reduces its Prices for any of the Software or Services provided to additional clients during the term of this Contract, Purchaser shall have the immediate benefit of such lower Prices for new purchases. Vendor shall send notice to the Purchaser Contract Administrator with the reduced Prices within 15 Business Days of the reduction taking effect.
- e) At least 120 calendar days before the end of the then-current initial term or renewal term, as applicable, of this Contract, Vendor may propose Price increases by written notice to the Purchaser Contract Administrator. Such Price increases shall increase annually by an amount no greater than the increase in the US Bureau of Labor Statistics Consumer Price Index for All Urban Consumers in the prior calendar year. Price adjustments will be taken into consideration by Purchaser Contract Administrator when determining whether to extend this Contract.

11.4 Taxes

- a) Purchaser will pay sales and use taxes, if any, imposed on the Products acquired hereunder. Vendor must pay all other taxes including, but not limited to, Washington Business and Occupation Tax, other taxes based on Vendor's income or gross receipts, or personal property taxes levied or assessed on Vendor's personal property. Purchaser, as an agency of Washington State government, is exempt from property tax.
- b) Vendor shall complete registration with the Washington State Department of Revenue and be responsible for payment of all taxes due on payments made under this Contract, except sales and use taxes as stipulated above.

11.5 Invoicing and Payment

- a) Incorrect or incomplete invoices will be returned by Purchaser to Vendor for correction and reissue.
- b) The Purchaser Contract number K3730 must appear on all bills of lading, packages, and correspondence relating to this Contract.
- c) Purchaser shall not honor drafts, nor accept goods on a sight draft basis.
- d) If Purchaser fails to make timely payment, Vendor may invoice Purchaser one percent per month on the amount overdue or a minimum of one dollar. Payment will not be considered late if payment is deposited electronically in Vendor's bank account or if a check or warrant is postmarked within 30 calendar days of Acceptance of the Software or receipt of Vendor's properly prepared invoice, whichever is later.

11.6 Duplication of Billed Costs

The Vendor shall not bill the Agency for costs if the Vendor is being paid by another funding source for those same costs.

11.7 Overpayments to Vendor

Vendor shall refund to Purchaser the full amount of any erroneous payment or overpayment under this Contract within 30 calendar days' written notice. If Vendor fails to make timely refund, Purchaser may charge Vendor one percent per month on the amount due, until paid in full.

12 Software Specifications

During the term of this Contract Vendor warrants that all Software will conform to its applicable Specifications and that the Products delivered hereunder shall perform in conformance with the applicable Specifications.

13 Additional Warranties

13.1 System Warranty

Vendor warrants that the System, in whole and in part, including but not limited to the Software source code, data base structures, and Data design, shall operate in accordance with the Specifications during the Warranty Period.

13.2 Other Deliverables

Vendor represents and warrants that until the end of the Contract term each Deliverable shall meet its applicable Specifications as provided herein. Vendor shall promptly and, as applicable, in accordance with Exhibit A, repair or replace a Deliverable or any portion thereof, without charge, including without limitation for labor, travel, shipping or handling, that does not meet its applicable Specifications as provided herein.

14 Protection of Purchaser's Confidential Information

Vendor acknowledges that some of the material and information that may come into its possession or knowledge in connection with this Contract or its performance may consist of Confidential Information. Confidential Information includes, but is not limited to, names, addresses, Social Security numbers, e-mail addresses, telephone numbers, financial profiles, credit card information, driver's license numbers, medical data, law enforcement records, agency or third party source code or object code and associated documentation, agency security data, or Unemployment Insurance Claimant information, or information identifiable to an individual that relates to any of these types of information. Vendor agrees to hold Confidential Information in strictest confidence and not to make use of Confidential Information for any purpose other than the performance of this Contract, to release it only to authorized employees or Subcontractors requiring such information for the purposes of carrying out this Contract, and not to release, divulge, publish, transfer, sell, disclose, or otherwise make the information known to any other party without Purchaser's express written consent or as provided by law. Vendor agrees to release such information or material only to employees or Subcontractors who have signed a nondisclosure agreement, the terms of which have been previously approved by Purchaser. Vendor agrees to implement physical, electronic, and managerial safeguards to prevent unauthorized access to Confidential Information.

Immediately upon expiration or termination of this Contract, Vendor shall, at Purchaser's option: (i) certify to Purchaser that Vendor has destroyed all Confidential Information; or (ii) return all Confidential Information to Purchaser; or (iii) take whatever other steps Purchaser requires of Vendor to protect Purchaser's Confidential Information.

Vendor, upon request and to the extent available without significant additional cost to Vendor, provide documentation of the following: the Confidential Information received in the performance of this Contract; the purpose(s) for which the Confidential Information was received; who received, maintained and used the Confidential Information; and the final disposition of the Confidential Information. Vendor's records shall be subject to inspection, review or audit in accordance with Review of Vendor's Records. Vendor shall also make the Deliverables and Services being provided by Vendor available for inspection and review in a Project repository at any reasonable time by representatives of the Department.

Purchaser reserves the right to monitor, audit, or investigate the use of Confidential Information collected, used, or acquired by Vendor through this Contract. The monitoring, auditing, or investigating may include, but is not limited to, salting databases.

Violation of this Section by Vendor or its Subcontractors may result in termination of this Contract and demand for return of all Confidential Information, monetary damages, or penalties.

14.1 Injunctive Relief and Indemnity

Vendor will immediately report to the Department any and all unauthorized disclosures or uses of the Department's Confidential Information of which it or its staff is aware or has knowledge. Vendor acknowledges that any publication or disclosure of the Department's Confidential Information to others may cause immediate and irreparable harm to the Department. If Vendor should publish, use or disclose such Confidential Information to others without authorization, the Department shall immediately be entitled to injunctive relief or any other remedies to which it is entitled under law or equity without requiring a cure period. Vendor shall indemnify and hold harmless the Department from all damages, costs, liabilities and expenses (including without limitation reasonable attorneys' fees) to the extent caused by or arising from Vendor's failure to fulfill its obligations related to the Department's Confidential Information.

14.2 Nondisclosure of Other State Information

The use or disclosure by Vendor of any Department or State information not necessary for, nor directly connected with, the performance of Vendor's responsibility with respect to Services is prohibited, except upon the express written consent of the Department.

14.3 Security Requirements

Each party, and its officers, employees, subcontractors and agents shall at all times comply with all applicable security standards, practices, and procedures which are equal to or exceed those of Purchaser, including but not limited to the Washington State Office of the Chief Information Officer IT Standards, with respect to information and materials which come into each party's possession and to which such party gains access under this Contract. Such information and materials include without limitation all Proprietary Information and Confidential Information.

15 Disputes and Remedies

15.1 Disputes

- a) The parties shall use their best, good faith efforts to cooperatively resolve disputes and problems that arise in connection with this Contract. When a dispute arises between the Department and Vendor, both parties will attempt to resolve the dispute pursuant to this

Section and will continue without delay to carry out all their respective responsibilities under this Contract.

- b) The Department and Vendor will use their best efforts to resolve disputes arising in the normal course of business at the lowest organizational level between each party's staff with appropriate authority to resolve such disputes. When a dispute arises between the Department and Vendor which cannot be resolved in the normal course of business, the Vendor Project Manager and the Department Project Manager shall each notify the other of the dispute, with the notice specifying the disputed issues. The parties shall use their best, good faith efforts to resolve the dispute within five business days of submission by either party to the other of such dispute notice.
- c) If the Vendor Project Manager and the Department Project Manager are unable to resolve the dispute within such five business days, they shall immediately escalate the matter to senior management representatives and their designees of Vendor and the Department who will have ten business days or another mutually agreed upon (in writing) timeframe to resolve the dispute. If these representatives are unable to resolve the dispute within such period, either party may pursue its available legal and equitable remedies.
- d) Discussion and correspondence among the representatives for purposes of these negotiations shall be treated as confidential information developed for purposes of settlement, exempt from discovery and production, which shall not be admissible in litigation, subject to applicable State and Federal law. Documents identified in or provided with such communications, which are not prepared for purposes of the negotiations, are not so exempted and may, if otherwise admissible, be admitted in evidence in a lawsuit.
- e) Continued Performance. Vendor and the Department agree that, the existence of a dispute notwithstanding, they will continue without delay to carry out all their respective responsibilities under this Contract, and the parties will have the right to exercise their rights and remedies during the dispute resolution process.

15.2 Attorney Fees and Costs

If any litigation is brought to enforce this Contract or any litigation arises out of any contract term, clause or provision, each party shall be responsible for its own expenses, costs and attorney fees.

15.3 Non-Exclusive Remedies

The remedies provided for in this Contract shall not be exclusive but are in addition to all other remedies available under law and equity.

15.4 Withholding

The Department shall have the right to delay or withhold payments to Vendor, in whole or in part, if Vendor fails to perform its obligations set forth in this Contract within ten Business Days after receiving proper notice of such failure.

15.5 Reductions in Payments Due

Amounts due the Department by Vendor, including but not limited to liquidated or other damages, or claims for damages, may be deducted or set off by the Department from any money payable to Vendor pursuant to this Contract.

15.6 Cover

If, in the reasonable judgment of the Department, a default by Vendor is not so substantial as to require termination, reasonable efforts to induce Vendor to cure the default are unavailing, Vendor fails to cure such default within ten calendar days of receipt of Notice from the Department, and the default is capable of being cured by the Department or by another resource without unduly interfering with continued performance by Vendor, the Department may, without prejudice to any other remedy it may have, provide or procure the Services reasonably necessary to cure the default, in which event Vendor shall reimburse the Department for such Services. In addition, Vendor must cooperate with these resources in allowing access to the Software.

15.7 Failure to Perform

If Vendor fails to perform any substantial obligation under this Contract, Purchaser shall give Vendor written notice of such Failure to Perform. If after thirty (30) calendar days or other appropriate time period from the date of the written notice Vendor still has not performed, then Purchaser may withhold all monies due and payable to Vendor, without penalty to Purchaser, until such Failure to Perform is cured or otherwise resolved.

16 Limitation of Liability

The parties agree that neither Vendor nor Purchaser shall be liable to each other, regardless of the form of action, for consequential, incidental, indirect, or special damages except a claim related to breach of confidentiality or security, bodily injury or death, or a claim or demand based on a Data Warranty or No Surreptitious Code Warranty issue or patent, copyright, or other intellectual property right infringement or misappropriation, and other indemnity obligations, in which case liability shall be as set forth elsewhere in this Contract. This section does not modify any sections regarding remedies or damages or any other conditions as are elsewhere agreed to herein between the parties.

IN NO EVENT SHALL the DEPARTMENT'S AGGREGATE LIABILITY TO VENDOR UNDER THIS CONTRACT, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY OR BY STATUTE OR OTHERWISE, FOR ANY CLAIM RELATED TO OR ARISING UNDER THIS CONTRACT, EXCEED THE TOTAL AMOUNT.

EXCEPT AS PROVIDED BELOW IN THIS SECTION 12, IN NO EVENT SHALL VENDOR'S AGGREGATE LIABILITY TO the Department UNDER THIS CONTRACT, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY OR BY STATUTE OR OTHERWISE, FOR ANY CLAIM RELATED TO OR ARISING UNDER THIS CONTRACT, EXCEED THE TOTAL AMOUNT. HOWEVER, the damages limitation in THIS Section shall not apply to CLAIMS, DAMAGES, EXPENSES, LOSSES, FEES, LIABILITIES, COSTS OR OTHER AMOUNTS ARISING FROM VENDOR'S INDEMNIFICATION OBLIGATIONS.

16.1 Force Majeure

Neither Vendor nor Purchaser shall be liable for damages or responsible for delays or failures in performance resulting or arising from causes beyond the reasonable control and without the fault or negligence of such party. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of a governmental body other than Purchaser acting in its sovereign capacity, war, explosions, fires, floods, earthquakes, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather,

whether or not similar to the foregoing, and acts or omissions or failure to cooperate of the other party or third parties (except Subcontractors), including, but not limited to, correcting deficiencies, but in every case the delays or failures in performance must be beyond the reasonable control and without fault or negligence of such party or their respective subcontractors.

If delays are caused by a Subcontractor without its fault or negligence, Vendor shall not be liable for damages for such delays, unless the Services to be performed were obtainable on comparable terms from other sources in sufficient time to permit Vendor to meet its required performance schedule.

Neither party shall be liable for personal injury to the other party or damage to the other party's property except personal injury or damage to property proximately caused by such party's respective fault or negligence.

17 Suspension and Termination

17.1 Suspension Due to Breach

In the event the Department, in its reasonable judgment, determines that a material breach of Contract has occurred in Vendor's compliance with the conditions of this Contract or if the Department has reason to believe that fraud, abuse, malfeasance, misfeasance or nonfeasance has occurred on the part of Vendor under this Contract, and the situation is deemed by the Department to merit corrective action, the following sequential suspension procedure may be implemented by the Department:

- The Department will notify Vendor in writing by registered mail to Vendor's last known address with a return receipt to the Department of a perceived compliance breach describing the Department's concerns.
- Vendor will respond to the Department's concerns by letter describing proposed corrective actions and proposing completion dates for bringing this Contract into compliance. Such response will be sent by registered mail and delivered to the Department within ten (10) calendar days of the date of receipt of the Department's letter.
- The Department will notify Vendor in writing by registered mail to Vendor's last known address with a return receipt to the Department as to the Department's final disposition of the Department's concerns.
- Upon receipt of Notice of final disposition by Vendor, the Department reserves the right to suspend all, or part of, this Contract, and to withhold further payments, or to prohibit Vendor from incurring additional obligations of funds during investigation of the alleged compliance breach and pending corrective action, if necessary, by Vendor or a decision by the Department to terminate in accordance with Section 21.2 below.

17.2 Suspension for Convenience

The Department shall, at its own convenience, have the right to order the Services of Vendor, or any of its Subcontractors or suppliers fully or partially stopped for a period of up to 30 consecutive days. Vendor shall receive Notice of the reasons for such an order. The Schedule shall be delayed on a day-for-day basis if the Department has issued a stop work order to Vendor and such stop work order is causing delays in completing Services in accordance with the Schedule. Vendor shall have the right to submit claims as a result of stop work orders issued under this Section.

17.3 Correction or Removal

The Department may elect to correct Defects or non-conformities in case of default.

17.4 Termination for Breach

If Vendor materially breaches this Contract, then the Department shall give Vendor Notice of such breach. Vendor shall correct the breach within 30 calendar days or as otherwise mutually agreed. If the breach is not corrected, this Contract may be terminated immediately by Notice from the Department to Vendor. The option to terminate shall be at the sole discretion of the Department.

If the Department fails to pay Vendor undisputed, material Purchase Prices and Charges when due under the Contract and fails to make such payments within 30 days of receipt of Notice from Vendor of the failure to make such payments, unless the Department is withholding amounts as provided in Section 15.4, Vendor may, by giving Notice to the Department, terminate this Contract as of a date specified in the Notice of Termination. In addition: (i) if the Department prevents Vendor from performing its obligations for meeting the Critical Events in accordance with the Schedule, (ii) then Vendor shall give the Department Notice of such breach, (iii) the Department shall correct such action within 30 calendar days or as otherwise mutually agreed in writing and, (iv) if the action is not corrected, this Contract may be terminated immediately by Notice from Vendor to the Department. Vendor shall not have the right to terminate the Contract for the Department's breach of the Contract or other acts or omissions except as provided in this Section.

In the event of termination of this Contract under Sections 17.4 or 17.8 by the Department, the Department shall have the right to procure the software and or Services that are the subject of this Contract on the open market and Vendor shall be liable for all damages, subject to the terms of Section 17 and this Section, including, but not limited to: (1) the cost difference between the original Contract price for the hardware Software and/or Services and the replacement costs of such hardware Software and/or Services acquired from another Vendor; (2) if applicable, all administrative costs directly related to the replacement of this Contract, such as costs of competitive bidding, mailing, advertising, applicable fees, charges or penalties, staff time costs; and, (3) any other costs to the Department resulting from Vendor's breach. The Department shall have the right to deduct from any monies due to Vendor, or that thereafter become due, an amount for damages that Vendor will owe the Department for Vendor's default. In the event the Department replaces the Software and/or System under this Section, it agrees to stop using the Proprietary Software and Third-Party Software and to return hardcopies of associated Documentation. Electronic copies will be retained until the end of the record retention period at which time the electronic documents will be deleted.

If it is determined for any reason the failure to perform is without the defaulting party's control, fault, or negligence, the termination shall be deemed to be a Termination for Convenience.

This Section shall not apply to any failure(s) to perform that result from the willful or negligent acts or omissions of the aggrieved party.

17.5 Termination for Convenience

When it is in the best interest of the Department, the Department may terminate this Contract, in whole or in part, by 15 Business Days written notice to Vendor. Invocation of Section 17.6 Termination for Withdrawal of Authority or Section 17.7 Termination for Non-

Allocation of Funds shall be deemed a Termination for Convenience but will not require such 15 calendar days' Notice.

If this Contract is so terminated, the Department is liable only for payments required by the terms of this Contract for Equipment, Software and Services for which the Department has given its Acceptance.

During this 15 Business Day period, Vendor shall wind down and cease its Services as quickly and efficiently as reasonably possible, without performing unnecessary Services or activities and by minimizing negative effects on the Department from such winding down and cessation of Services. If this Contract is so terminated, the Department shall be liable only for payment in accordance with the terms of this Contract: for Services rendered prior to the effective date of termination; and for Vendor's unamortized costs for Equipment and Software licenses which have been purchased by Vendor on behalf of the Department with the Department's consent.

In case of such termination for convenience, the Department shall pay to Vendor the agreed upon price, if separately stated, for Deliverables for which Acceptance has been given by the Department, amounts for Services provided prior to the date of termination for which no separate price is stated and which are not associated with or related to a specific Deliverable for which Acceptance has been given, and amounts for Deliverables which are in development but which have not received Acceptance. The amounts for such Services and Deliverables in development but not accepted will be costs actually and reasonably incurred by Vendor therefor, as based on Exhibit A-1, but such costs shall be no greater than the final Purchase Price for each Deliverable and the charges as described in Exhibit A-1.

17.6 Termination for Withdrawal of Authority

In the event that Purchaser's authority to perform any of its duties is withdrawn, reduced, or limited in any way after the commencement of this Contract and prior to normal completion, Purchaser may terminate this Contract by seven calendar days or other appropriate time period by written notice to Vendor. No penalty shall accrue to Purchaser in the event this Section shall be exercised. This Section shall not be construed to permit Purchaser to terminate this Contract in order to acquire similar Services from a third party.

17.7 Termination for Non-Allocation of Funds

If funds are not allocated to Purchaser to continue this Contract in any future period, Purchaser may terminate this Contract by seven calendar days' written notice to Vendor or work with Vendor to arrive at a mutually acceptable resolution of the situation. Purchaser will not be obligated to pay any further charges for Services including the net remainder of agreed to consecutive periodic payments remaining unpaid beyond the end of the then-current period. Purchaser agrees to notify Vendor in writing of such non-allocation at the earliest possible time. No penalty shall accrue to Purchaser in the event this Section shall be exercised. This Section shall not be construed to permit Purchaser to terminate this Contract in order to acquire similar Services from a third party.

17.8 Termination for Conflict of Interest

Purchaser may terminate this Contract by written notice to Vendor if Purchaser determines, after due notice and examination, that any party has violated chapter 42.52 RCW, Ethics in Public Service or any other laws regarding ethics in public acquisitions and procurement and performance of contracts. In the event this Contract is so

terminated, Purchaser shall be entitled to pursue the same remedies against Vendor as it could pursue in the event Vendor breaches this Contract.

17.9 Termination Procedure

In addition to the procedures set forth below, if Purchaser terminates this Contract, Vendor shall follow any procedures Purchaser specifies in Purchaser's Notice of Termination or on expiration, as applicable.

Upon termination of this Contract, Purchaser, subject to the terms of this Contract, may require Vendor to deliver to Purchaser any property, Products, or Work Products specifically produced or acquired for the performance of such part of this Contract as has been terminated. The section titled Treatment of Assets shall apply in such property transfer.

Unless otherwise provided herein, Purchaser shall pay to Vendor the agreed-upon price, if separately stated, for the Products or Services received and Accepted by Purchaser, provided that in no event shall Purchaser pay to Vendor an amount greater than Vendor would have been entitled to if this Contract had not been terminated. Failure to agree with such determination shall be a dispute within the meaning of the Disputes section of this Contract. Purchaser may withhold from any amounts due Vendor such sum as Purchaser determines to be necessary to protect Purchaser from potential loss or liability.

Vendor shall pay amounts due Purchaser as the result of termination within 30 calendar days of notice of amounts due. If Vendor fails to make timely payment, Purchaser may charge interest on the amounts due at one percent per month until paid in full.

After receipt of notice of termination, and except as otherwise directed by the Department, Vendor shall:

- Stop work under this Contract on the date, and to the extent specified, in the Notice;
- Place no further orders or subcontracts for materials, Services, or facilities except as may be necessary for completion of such portion of the work under this Contract that is not terminated;
- As soon as practicable, but in no event longer than 30 calendar days after termination, terminate its orders and subcontracts related to the work which has been terminated and settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Department to the extent required, which approval or ratification shall be final for the purpose of this Section;
- Complete performance of such part of this Contract as shall not have been terminated by the Department;
- Take such action as may be necessary, or as the Department Contract Manager may direct, for the protection and preservation of the Property related to this Contract which is in the possession of Vendor and in which the Department has an interest;
- And on expiration, transfer title to the Department and deliver in the manner, at the times, and to the extent directed by the Department Business Manager, any Property which is required to be furnished to the Department and which has been accepted or requested by the Department; and

- Provide written certification to the Department that Vendor has surrendered to the Department all said Property.

17.10 Transition Support

Vendor must provide for a reasonable, mutually agreed period of time after the expiration or termination of this Contract, all reasonable transition assistance requested by the Department, to allow for the expired or terminated portion of the Services to continue without interruption or adverse effect, and to facilitate the orderly transfer of such Services to the Department or its designees. Such transition assistance will be deemed by the parties to be governed by the terms and conditions of this Contract, except for those terms or conditions that do not reasonably apply to such transition assistance. The Department shall pay the Vendor for any resources utilized in performing such transition assistance at the rates in Schedule A-1. On expiration or termination of the Contract, Vendor shall provide or make available to the Department a copy of all Data with instructions and software necessary to decrypt the Data, if it is encrypted.

18 Treatment of Assets

18.1 Ownership

ESD shall retain title to all Property furnished by ESD to Vendor under the Program.

18.2 Use of Property

Any Property furnished to Vendor shall, unless otherwise provided herein, or approved in writing by the Program Director, be used only for the performance of and subject to the terms of this Contract. Vendor's use of the Equipment shall be subject to ESD's security, administrative and other requirements.

18.3 Damage to Property

Vendor shall continuously protect and be responsible for any loss, destruction, or damage to Property which results from or is caused by Vendor's acts or omissions. Vendor shall repair or make good any damage, destruction, personal injury or loss at the Facility or Sites caused by Vendor's acts or omissions.

18.4 Notice of Damage

Upon the loss of, destruction of, or damage to any of the Property, Vendor shall notify the Program Director thereof and shall take all reasonable steps to protect that Property from further damage.

18.5 Surrender of Property

Vendor will ensure that the Property will be returned to ESD in like condition to that in which it was furnished to Vendor, reasonable wear and tear excepted. Vendor shall surrender to ESD all Property upon the earlier of expiration or termination of this Contract.

18.6 Proprietary Information

Vendor acknowledges that Purchaser is subject to chapter 42.56 RCW and that this Contract shall be a public record as defined in chapter 42.56 RCW. Any specific information that is claimed by Vendor to be Proprietary Information must be clearly identified as such by Vendor. To the extent consistent with chapter 42.56 RCW, Purchaser shall maintain the confidentiality of all such information marked or otherwise identified in the Contract or on the Project as Proprietary Information. If a public disclosure request is made to view Vendor's Proprietary Information, Purchaser will notify Vendor of

the request and of the date that such records will be released to the requester unless Vendor obtains a court order from a court of competent jurisdiction enjoining that disclosure. If Vendor fails to obtain the court order enjoining disclosure, Purchaser will release the requested information on the date specified.

Any specific information that is claimed by ESD to be Proprietary Information must be clearly identified as such by ESD. To the extent consistent with chapter 42.56 RCW, Vendor shall maintain the confidentiality of all such information marked or otherwise identified in the Contract or on the Project as Proprietary Information.

19 Save Harmless

Vendor shall defend, indemnify, and save Purchaser harmless from and against any claims, including reasonable attorneys' fees resulting from such claims, by third parties for any or all injuries to persons or damage to property of such third parties to the extent caused by the intentional, willful or negligent acts or omissions of Vendor, its officers, employees, or agents, or Subcontractors, their officers, employees, or agents.

For all obligations of Vendor to defend the Department as described in the Contract, the Department shall promptly give Vendor notice of such claim or action and shall cooperate in the defense of such claims at Vendor's expense. The Department agrees to use its best efforts to encourage the Office of the Attorney General of Washington to grant Vendor sole control of the defense and all related settlement negotiations. However, if principles of governmental or public law are involved, the State may participate in the defense of any such action, but no costs or expenses shall be incurred for the account of Vendor without Vendor's written consent.

20 Insurance

Vendor shall, during the term of this Contract, maintain in full force and effect, the insurance described in this Section. Vendor shall acquire such insurance from an insurance carrier or carriers licensed to conduct business in the state of Washington having a rating of A-, Class VII or better, in the most recently published edition of Best's Reports. In the event of cancellation, non-renewal, revocation, or other termination of any insurance coverage required by this Contract, Vendor shall provide written notice of such to Purchaser within five Business Days of Vendor's receipt of such notice. Failure to buy and maintain the required insurance may, at Purchaser's sole option, result in this Contract's termination.

All insurance provided by Vendor shall be primary as to any other insurance or self-insurance programs afforded to or maintained by the State and shall include a severability of interests (cross-liability) provision.

Subcontractor(s) shall comply fully with all insurance requirements stated herein. Failure of Subcontractor(s) to comply with insurance requirements does not limit Vendor's liability or responsibility.

Vendor shall furnish to Purchaser copies of certificates of all required insurance within thirty (30) calendar days of this Contract's Effective Date and copies of renewal certificates of all required insurance within thirty (30) days after the renewal date. These certificates of insurance must expressly indicate compliance with each and every insurance requirement specified in this Section. Failure to provide evidence of coverage may, at Purchaser's sole option, result in this Contract's termination.

By requiring insurance herein, Purchaser does not represent that coverage and limits will be adequate to protect Vendor. Such coverage and limits shall not limit Vendor's liability under the indemnities and reimbursements granted to Purchaser in this Contract.

For Professional Liability Errors and Omissions coverage and Crime Coverage, Vendor shall continue such coverage for one year beyond the expiration or termination of this Contract and providing Purchaser with certificates of insurance on an annual basis.

Vendor shall pay premiums on all insurance policies. Such insurance policies shall reference this Contract number and shall have a condition that they not be revoked by the insurer until 30 calendar days after notice of intended revocation thereof shall have been given to Purchaser by the insurer.

20.1 Minimum Acceptable Limits

The minimum acceptable limits shall be as indicated below, with no deductible for each of the following categories:

- a) Commercial General Liability covering the risks of bodily injury (including death), property damage and personal injury, including coverage for contractual liability, with a limit of not less than \$1 million per occurrence/\$2 million general aggregate;
- b) Business Automobile Liability (owned, hired, or non-owned) covering the risks of bodily injury (including death) and property damage, with a combined single limit of not less than \$1 million per accident;
- c) Employers Liability insurance covering the risks of Vendor's employees' bodily injury by accident or disease with limits of not less than \$1 million per accident for bodily injury by accident and \$1 million per employee for bodily injury by disease;
- d) Umbrella policy providing excess limits over the primary policies in an amount not less than \$3 million;
- e) Professional Liability Errors and Omissions, with a deductible not to exceed \$25,000, conditioned upon this Section, and coverage of not less than \$1 million per occurrence or claim/\$2 million general aggregate; and
- f) Crime Coverage with a deductible not to exceed \$100,000, conditioned upon this Section, and coverage of not less than \$1 million single limit per occurrence, which shall at a minimum cover occurrences falling in the following categories: Computer Fraud; Forgery; Money and Securities; and Employee Dishonesty.
- g) Cyber-security insurance, with coverage of not less than \$1 million per claim/\$2 million general aggregate, that includes but is not limited to coverage for first-party costs and third-party claims from: (i) failure to protect data, including unauthorized disclosure, use or access, (ii) security failure or privacy breach, (iii) failure to disclose such breaches as required by law, regulation or contract, (iv) notifications, public relations, credit monitoring, postage, advertising, and other services to assist in managing and mitigating a cyber-incident, (v) interruptions of business operations, (vi) network security failure, (vii) cyber-extortion, (viii) cyber-terrorism, (ix) communications and media liability (e.g., infringement of copyright, title, slogan, trademark, trade name, trade dress, service mark or service name in the

policyholder's covered material), (x) EFT, computer, and electronic transmissions fraud and theft, and (xi) other cyber-liability and cyber-crime expenses.

20.2 Industrial Insurance Coverage

Prior to performing work under this Contract, Vendor shall provide or purchase industrial insurance coverage for its employees, as may be required of an “employer” as defined in Title 51 RCW, and shall maintain full compliance with Title 51 RCW during the course of this Contract. Purchaser will not be responsible for payment of industrial insurance premiums or for any other claim or benefit for Vendor, or any Subcontractor or employee of Vendor, which might arise under the industrial insurance laws during the performance of duties and services under this Contract.

21 Licensing Standards

Vendor shall comply with all applicable local, state, and federal licensing, accreditation and registration requirements and standards necessary in the performance of this Contract. (See, for example, chapter 19.02 RCW for state licensing requirements and definitions.)

22 OSHAWISHA

Vendor represents and warrants that its Products, when shipped, are designed and manufactured to meet then current federal and state safety and health regulations. Vendor agrees to indemnify and hold Purchaser harmless from all damages assessed against Purchaser as a result of the failure of the Products furnished under this Contract to so comply.

23 Uniform Commercial Code (UCC) Applicability

Except to the extent the sections of this Contract are clearly inconsistent, this Contract shall be governed by any applicable sections of the Uniform Commercial Code (UCC) as set forth in Title 62A RCW.

To the extent this Contract entails delivery or performance of services, such services shall be deemed “goods” within the meaning of the UCC, except when to do so would result in an absurdity.

In the event of any clear inconsistency or contradiction between this Contract and the UCC, the terms and conditions of this Contract take precedence and shall prevail unless otherwise provided by law.

The Software, in whole and in part is considered a good under applicable provisions of the Uniform Commercial Code as promulgated in the State of Washington, for purposes of this Contract.

24 Antitrust Violations

Vendor and Purchaser recognize that, in actual economic practice, overcharges resulting from antitrust violations are usually borne by Purchaser. Therefore, Vendor hereby assigns to Purchaser any and all claims for such overcharges as to goods and services purchased in connection with this Contract, except as to overcharges not passed on to Purchaser resulting from antitrust violations commencing after the date of the bid, quotation, or other event establishing the Price under this Contract.

25 Compliance with Civil Rights Laws

During the performance of this Contract, Vendor shall comply with all federal and applicable state nondiscrimination laws, including but not limited to: Title VII of the Civil Rights Act, 42 U.S.C. §12101 et seq.; the Americans with Disabilities Act (ADA); and Title 49.60 RCW, Washington Law against Discrimination. In the event of Vendor's noncompliance or refusal to comply with any nondiscrimination law, regulation or policy, this Contract may be rescinded, canceled, or terminated in whole or in part under the Termination for Default sections, and Vendor may be declared ineligible for further contracts with Purchaser.

26 Debarment and Suspension

The Vendor certifies that it is in compliance with and shall not contract with individuals or organizations which are debarred, suspended, or otherwise excluded from or ineligible from participation in Federal Assistance Programs under Executive Order 12549, and Debarment and Suspension, codified at 29 CFR part 98.

27 Governing Law

This Contract shall be construed and interpreted in accordance with the laws of the state of Washington and the venue of any action brought hereunder shall be in the Superior Court for Thurston County.

28 Independent Capacity of Vendor

The parties intend that an independent Vendor relationship will be created by this Contract. The Vendor and his or her employees or agents performing under this Contract are not employees or agents of the Agency. The Vendor will not hold himself/herself out as, nor claim to be an officer or employee of, the Agency or of the state of Washington by reason hereof, nor will the Vendor make any claim of right, privilege or benefit which would accrue to such employee under law. Conduct and control of the work will be solely with the Vendor.

29 Licensing and Accreditation

The Vendor shall comply with all applicable local, state, and federal licensing, accreditation, and registration requirements/standards, necessary for the performance of this Contract.

30 Limitation of Signature Authority

Only the Commissioner or Commissioner's delegate by writing (delegation to be made prior to action) shall have the express, implied, or apparent authority to alter, amend, modify, or waive any clause or condition of this Contract. Furthermore, any alteration, amendment, modification, or waiver of any clause or condition of this Contract is not effective or binding unless made in writing and signed by the Commissioner or Commissioner's delegate.

31 Lobbying Activities

The Vendor certifies that it is in compliance with the requirements of 29 CFR Part 93, restricting lobbying activities. The Vendor shall also make available upon request required

disclosure information if the Vendor participates in lobbying activities during the Contract period.

32 Site Security

While on Agency premises, Vendor, its agents, employees, or Subcontractors shall conform in all respects with physical, fire or other security policies or regulations.

33 Subcontracting

The Vendor shall not subcontract work or services contemplated under this Contract and/or use an outside consultant except as provided for in the Statement of Work without obtaining the prior written approval of the Agency for the authority to enter into subcontracts. Vendor acknowledges that such approval for any subcontract does not relieve the Vendor of its obligations to perform hereunder. The Agency retains the authority to review and approve or disapprove all subcontracts. At the Agency's request, the Vendor will forward copies of subcontracts and fiscal, programmatic and other material pertaining to any and all subcontracts.

For any proposed Subcontractor the Vendor shall:

- a) Be responsible for Subcontractor compliance with these General Terms and Conditions and the subcontract terms and conditions; and
- b) Ensure that the Subcontractor follows the Agency's reporting formats and procedures as specified by the Agency.

34 Use of Name Prohibited

The Vendor shall not in any way contract on behalf of or in the name of the Agency. Nor shall the Vendor release any informational pamphlets, notices, press releases, research reports, or similar public notices concerning this project without obtaining the prior written approval of the Agency.

35 Waiver

Waiver of any default or breach shall not be deemed to be a waiver of any subsequent default or breach. Any waiver shall not be construed to be a modification of the terms of this Contract unless stated to be such in writing signed by authorized representative of the Agency.

36 Sovereign Immunity.

The parties expressly agree that no provision of this Contract is in any way intended to constitute a waiver by ESD or the State of Washington of any immunities from suit or from liability that ESD or the State of Washington may have by operation of law.