



The City of  
**WORCESTER**

Administration & Finance – Purchasing Division  
Christopher J. Gagliastro, MCPPO – Purchasing Director  
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April 7, 2023

To All Bidders:

Subject: **RFP #: 8004-W3, Communications Platform (Two-Way) / WPS**

**ADDENDUM NO. 1**

To Whom It May Concern:

With reference to our proposal request relative to the above subject, please refer to the changes/modifications/clarifications to the original proposal request.

- **PLEASE SEE ATTACHED SOFTWARE AGREEMENT TEMPLATE TO BE USED BY CITY WITH AWARDED SUPPLIER**

Proposers are requested to acknowledge and/or include this addendum with submission. All other terms, conditions and specifications remain unchanged.

Very truly yours,

Christopher J. Gagliastro  
Purchasing Director



## SOFTWARE LICENSE AND SERVICE AGREEMENT

This Agreement made this \_\_\_\_\_ day of \_\_\_\_\_, 2022, by and between the City of Worcester, a Massachusetts municipal corporation with an address of 455 Main Street, Worcester, Massachusetts, 01608, acting through its \_\_\_\_\_ Department (“City”), and \_\_\_\_\_, a \_\_\_\_\_ with a principal place of business at \_\_\_\_\_ (“Licensor”).

### W I T N E S S E T H:

**WHEREAS**, the City seeks to license \_\_\_\_\_ software for the \_\_\_\_\_ Department (“Project”); and

**WHEREAS**, Licensor is the successful proposer, and represents that it has the expertise, experience and capacity to perform the services sought; and

**NOW THEREFORE**, the parties hereto mutually agree as follows:

### Article 1. LICENSE OF SOFTWARE AND DESCRIPTION OF SERVICES

1.1 Grant of License. Subject to the terms and conditions herein, including the Recitals above, Licensor hereby grants City a non-exclusive, non-transferable, license and right to use the \_\_\_\_\_ (“Software”). The City shall be entitled to use the Software for municipal purposes, including to copy, display, perform, modify, and otherwise use (and permit others to use) any City Data, all purposes set forth in the RFP (defined below) and the Proposal (defined below), those purposes required by law, and the purposes for which such Software was designed.

1.2 Summary of Services. Licensor shall furnish and perform implementation, testing, training, support, management and maintenance of said Software and related services, equipment and materials, if any, as set forth herein and in Exhibit A, “Scope of Services,” (“SOS”) as attached hereto and incorporated herein, and as further set forth in the RFP and the Proposal (defined below).

1.3 RFP and Proposal. The Project requirements are set forth at the Statement of Work, Exhibit A, City’s Request for Proposals issued \_\_\_\_\_, 20\_\_\_\_, No. \_\_\_\_\_ (“RFP”), and Licensor’s Proposal, dated \_\_\_\_\_, 20\_\_\_\_, (“Proposal”), each of which are incorporated herein by this reference. The Parties each acknowledge familiarity and possession of said RFP and Proposal. Notwithstanding any provision to the contrary, no legal terms or conditions contained in the Proposal (including any proposed license or contract) shall be incorporated by this reference. Any such legal terms and conditions in the Proposal shall be, by the execution of this Agreement, deemed fully withdrawn and of no force or effect. In the event of a conflict that cannot be harmonized, (a) this Agreement, including its attached exhibits, shall take precedence over the RFP and the Proposal, and (b) the RFP shall take precedence over the Proposal.



1.4 Equipment. To the extent Licensor is furnishing hardware, equipment and/or materials (collectively "Equipment") for this Project, Licensor shall bear all risk of loss to and/or damage for such Equipment that occurs in transit to the City's site(s) and during its installation. The risk of loss and/or damage to purchased Equipment further remains with Licensor until the purchase price for such Equipment is paid and title has passed. Licensor shall bear the risk of loss and/or damage to any licensed or rented Equipment during the City's possession and use thereof except to the extent of the City's negligence or wrongful misconduct; provided however, the express provisions set forth in the RFP shall control such risk of loss and/or damage to the extent of a conflict which cannot be reconciled.

1.5 Hosted Services. Licensor shall provide City with US domestic hosting services more particularly described in the SOS and the RFP ("Hosted Services").

1.6 Security. In addition to satisfying the security requirements set forth in the RFP, Licensor shall employ reasonable security measures which shall in no event be less than that required by all applicable federal and state laws and regulations regarding data security and privacy, including but not limited to that required for provision of the Hosted Service. Further, Licensor's security frameworks shall comply with generally accepted security frameworks, such as NIST or CIS.

1.6.1 In addition to other security requirements set forth elsewhere in this Agreement, Licensor shall conduct annual penetration testing. Licensor shall maintain industry standard intrusion detection and prevention systems to monitor malicious activity in the network and to log and block any such activity. Licensor shall promptly provide the City with a written or electronic record of the actions taken by Licensor in the event that any unauthorized access to the City's database(s) is detected as a result of Licensor's security protocols. Upon the City's reasonable request, Licensor shall undertake an additional security audit, on terms and timing agreed by the Parties. Licensor shall maintain an unqualified SOC1 audit report and an attestation of compliance to PCI DSS and shall make the same available to the City or its designee upon request.

1.6.2 Data Encryption at Rest. Licensor (or its Hosted Services provider) shall salt/hash using Password Based Key Derivative Function, also known as PBKDF2, all sensitive credentialing data, such as passwords. In addition to the hashing of credentialing data, Licensor shall encrypt all other databases at rest in data center hardware using AES-256 encryption.

1.6.3 Data Encryption in Transit. All user communication with Licensor applications is through current securely encrypted TLS/SSL communication channels (https). Licensor shall use the most current technology for its SSL certificates. Insecure cipher keys are not used.

1.6.4 City data uploads are performed using secure FTP (SFTP) connections. IPSec VPN tunnels and TLS\SSL are used to transfer data between locations for disaster recovery and offsite backup.

1.7 Licensor's Subcontractors. If Licensor selects and/or engages any subcontractor or other third party (e.g., subcontractor, service provider) to provide any portion or component of the



Services (including the Software), Equipment hereunder, Licensor shall be responsible to the same extent as if such Service were provided by Licensor directly. Without limiting the generality of the foregoing, Licensor shall be liable for the acts and omissions of such third parties to the same extent as if such acts or omissions were performed by Licensor and shall require such third parties to enter into a written agreement with Licensor requiring that such third parties abide by terms that are as protective of City Data (and other confidential information) as in this Agreement.

1.8 Third Party Equipment and Software. Licensor shall be responsible for the purchase of, and entering into appropriate licensing agreements concerning, the Software, any third party equipment, materials and/or other software, including but not limited to that necessary for the performance of the Hosted Service. Ownership and/or licenses for the third party equipment and software shall be in the name of Licensor.

1.9 Service Levels. Licensor shall satisfy the security requirements set forth in the RFP.

1.10 Disaster Recovery. Licensor (or Hosted Services provider) shall maintain fully-redundant telecommunications access, electrical power, and the required hardware to provide access to the Services, including City Data, in the event of a disaster or component failure. Licensor shall maintain a disaster recovery plan for resumption of Services and shall provide a Recovery Point Objective ("RPO") of twenty-four (24) hours or better and a Recovery Time Objective ("RTO") of not more than twenty-four (24) hours (or such shorter time as set forth in the RFP or the Proposal). RPO is the maximum duration of time between the most recent recoverable copy of the City Data and subsequent data center failure. RTO is the maximum duration of time following data center failure within which the City's access to the Service must be restored. Licensor shall maintain backups of the City Data in accordance with its backup and retention policies (which shall be not less than nightly and monthly) to meet the RPO and RTO commitments contained herein. License shall test its disaster recovery plan annually and, upon the City's reasonable request, shall schedule and execute a customer-specific disaster recovery test. Upon the City's reasonable request, Licensor shall provide the City with disaster recovery test results.

1.11 Upgrades. Licensor shall timely support its Software and Service by furnishing Subscriber with the implementation of upgrades, updates, patches, bug fixes and other enhancements and modifications to the Software.

## **Article 2. TERM AND SCHEDULE**

2.1 Term. This Agreement shall be effective upon the date set forth in the first paragraph above and terminate upon \_\_\_\_\_ ( ) years thereafter, unless earlier terminated as set forth herein and/or unless otherwise extended in writing by the parties.

2.2 Schedule. Licensor shall commence and complete implementation of the Project and make the Software available to the City in compliance with the schedule set forth at Exhibit C, attached and incorporated by reference.



**Article 3. FEE**

3.1 Fee. The City shall pay Licensor an amount not to exceed \_\_\_\_\_ (\$\_\_\_\_\_) (“Fee”) in accordance with the procedures set forth herein. The above sum includes payment in full for all labor, services, software licenses, hosting, Equipment, professional service fees, overhead, profit, travel, and all other costs and/or expenses. The City shall pay Licensor solely on the basis of written invoices evidencing in complete detail the propriety of the charges. For the Software license fee, Licensor shall invoice annually for the amount of license fee for the relevant annual period. For all other payments, Licensor shall submit invoices periodically, but not more than monthly, reflecting services rendered and/or Equipment received. Licensor shall provide such additional detail and/or back up regarding any invoice that the City reasonably determines lacks in sufficient detail. The City shall make payments (except those amounts subject to good faith dispute) within forty five (45) calendar days after receipt of a sufficient invoice. The City shall not be subject to additional charges for late payments. The City’s payment obligations are contingent upon an appropriation.

3.2 City Tax Exempt. City represents to Licensor that it is a tax exempt entity. Licensor shall not include any taxes in invoices and shall not be entitled to recover any such amount from City. City shall provide its tax exempt information to Licensor upon request.

3.3 Fee Breakdown. The fee breakdown and related details are set forth in Exhibit B, attached hereto and incorporated herein.

**Article 4. INFORMATION FURNISHED BY CITY**

The City shall, to the extent the Services under this Agreement may require, furnish Licensor with any relevant information it may have concerning this Agreement. The City does not guarantee the accuracy or completeness of such information.

**Article 5. PROPRIETARY RIGHTS AND CONFIDENTIALITY****5.1 City Ownership.**

5.1.1 As between Licensor (and its licensors, licensees, subcontractors and affiliates) and the City, the City owns and shall retain ownership of its City Data (including any documents, information, as well as any extract or aggregation thereof, in whatever nature or form (collectively, “City Data”). For clarity, said City Data shall include but not be limited to any data that is licensed or made available to the City through a third party, including but not limited to personal and private information. By this Agreement, City does not convey any right, title or interest in City Data (including but not limited to any rights owned by or licensed from any third party). Notwithstanding any provision to the contrary, Licensor is prohibited from retaining or using any City Data for any reason other than its performance under this Agreement, even if said City Data is aggregated, de-identified, pseudonymized or anonymized. Without limiting the



scope of Section 12.10 below, the requirements of this provision shall survive the termination of this Agreement.

In addition to City Data, any deliverables furnished by Licensor for the City's use shall be instruments of service and property of the City, whether the work for which they are made be executed or not, and are not to be used on other work except by agreement with the City.

5.1.2 City may, from time to time, engage or contract with contractors, consultants or other third parties (collectively for this Article "City Consultants") to provide separate software, services or products that relate to (and/or interact with) the Software and/or Services provided by this Agreement. Licensor will provide reasonable cooperation and work in good faith with City and City Consultants as reasonably requested by City. Further, to the extent Licensor has access to information of such City Consultant(s) that is marked as or may reasonably be understood to be confidential information, License shall, except as otherwise required by law, use such confidential information only for the purposes set forth in this Agreement and shall protect such confidential information in the same manner that it protects its own similar confidential information, but in no event using less than a reasonable standard of care.

5.1.3 At the termination of this Agreement, Licensor shall promptly (not less than five (5) calendar days) allow City to extract a copy of City Data at no cost for a period of one hundred twenty (120) calendar days, or such greater period as the Parties may agree. Within fifteen (15) calendar days of a written request by the City, Licensor shall return or destroy, at the City's option, all City Data, of whatever nature or form, including but not limited to all City Data received from or on behalf of the City or any City authorized user that is within Licensor's possession or control and shall (within five (5) calendar days following such destruction or return) certify in writing to the City that all City Data in its possession or control (including in the possession or control of Licensor's subcontractors, licensees, licensors, and other agents) has been destroyed or returned to City.

## 5.2 Licensor Ownership

5.2.1 Licensor represents that it (or its licensors) own all right, title and interest in and to the Software (including but not limited to all source code, object code, class libraries, user interface screens, algorithms, development frameworks, repository, system designs, system logic flow, and processing techniques and procedures related thereto), technical and non-technical documentation, and other Licensor intellectual property rights (copyright, patent, trademark, trade secret and other proprietary rights in any of the foregoing), and subject to the limited license and other rights expressly granted hereunder, Licensor reserves all rights, title and interest thereto.

Additionally, reports or other data generated by Licensor regarding its traffic flow, feature use, system loads and/or product installation, and/or similar information, are the exclusive property of Licensor; expressly excluding however personally identifiable information (PII), which Licensor shall neither collect (except to the limited extent necessary to perform its obligations under this Agreement), nor retain.



5.2.2 Restrictions. Except as otherwise required by law or order of a court with competent jurisdiction, or exempted by Section 5.3.3 or elsewhere in this Agreement, City agrees that it will not

- (i) modify the Software or technical documentation or create any derivative works based on the Software or technical documentation beyond changes necessary to support intended functions and integrations;
- (ii) copy the Software or technical documentation (except for archival copies of the technical documentation for use consistent with this Agreement, copies required as a step in the use of the Software or Service);
- (iii) license, sublicense, sell, resell, rent, lease, assign, distribute, time share, offer in a service bureau, or otherwise make the Software or technical documentation available to any third party, other than to authorized user as permitted herein;
- (iv) reverse engineer or decompile any portion of the Software or documentation;
- (v) access the Software or documentation for the purpose of establishing a competing commercially available product or Service; or
- (vi) modify, or create derivative works of any features, functions, integrations, interfaces or graphics of the Software or technical documentation.

For clarity, for purposes of this Agreement, (a) reports or other documents created from City Data and (b) configurations and customizations performed within the terms of the Agreement shall not be defined as derivative works and shall be available to the City for municipal uses, including public disclosure, in its discretion.

### 5.3 Confidential Information.

5.3.1 Licensor represents to the City that its Software and technical documentation contains proprietary information that are the exclusive property of Licensor (or the licensors of Licensor) ("Licensor Confidential Information"). Neither party shall disclose or use any confidential information of the other Party except (i) as reasonably necessary to perform its obligations or exercise its rights pursuant to this Agreement, or (ii) to comply with applicable law or order of any court of competent jurisdiction. Subject to said first sentence, the Parties agree to protect the confidential information of the other Party in the same manner that it protects its own confidential information of like kind, but in no event using less than a reasonable standard of care. Notwithstanding any provision to the contrary, however, this Section 5.3.1 shall not affect the limits or exclusions to confidential information set forth elsewhere in this Agreement, including but not limited to Section 5.3.3.

5.3.2 Remedies. If a party discloses or uses (or threatens to disclose or use) any confidential information of the other party in breach of confidentiality protections hereunder, the other party shall have the right, in addition to any other remedies available, to seek injunctive relief to enjoin such acts.

5.3.3 Exclusions. The definition of confidential information, including Licensor Confidential Information, shall not include any information (in any form) that: (i) is or becomes generally known to the public without breach of any obligation owed to the other party; (ii) was known to



a party prior to its disclosure by the other party without breach of any obligation owed to the other party; (iii) was independently developed by a party without breach of any obligation owed to the other party; or (iv) is received from a third party without breach of any obligation owed to the other party. Notwithstanding any provision to the contrary in this Agreement, City Data (including but not limited to Personal Data) shall not be subject to the exclusions (i)-(iii) set forth in this Section 5.3.3. Notwithstanding any provision to the contrary in this Agreement, **expressly excluded from the Licensor Confidential Information provisions** shall be (a) this Agreement, as it may be amended (whether by change order, work order, order form, amendment or otherwise), and its appendices, addendum, order forms, exhibits, and (b) all other incorporated or referenced documents/attachments, including the RFP and the Proposal, (c) correspondence with the City by or on behalf of Licensor, (d) invoices and related details, (collectively for this Section “non-confidential documents and information”). City shall have the right to disclose publicly such non-confidential documents and information, in whatever form, for any municipal purpose consistent with the City’s usual practices and activities. Without limiting the generality of Section 12.10, the requirements of this Section shall survive termination of this Agreement.

Additionally and for the avoidance of doubt, none of the requirements of this Agreement shall be interpreted to impede, limit or prohibit the City from disclosing Licensor’s (or licensor, subcontractor, licensees, and affiliates) Confidential Information or other proprietary information, including trade secrets, to the extent that such information is required to be disclosed pursuant to any applicable law, including but not limited to Massachusetts public records law, open meeting law, or any other local public disclosure law applicable to City or pursuant to any order by a court of competent jurisdiction.

**5.3.4 FERPA/COPPA.** To the extent City is an educational institution subject to the Family Educational Rights and Privacy Act (“FERPA”) and to the extent Licensor may have access to student information during the performance of this Agreement, Licensor agrees that it is a “School Official” (as that term is used in FERPA) with a “legitimate educational interest” in any City Data that is protected by FERPA and, therefore, Licensor agrees that with respect to all City Data that is protected by FERPA, to the extent that Licensor accesses unencrypted City Data that is subject to FERPA, Licensor shall comply with any and all obligations of a School Official with respect to such access. Without limiting the foregoing, Licensor shall use education records only for the purposes of fulfilling its duties under this Agreement. Except as required by law or court order, Licensor shall not disclose or share education records with any third party except to subcontractors who have agreed to maintain the confidentiality of the education records to the same extent required of Licensor and only to the extent such education records are needed to fulfill said subcontractor’s duties under this Agreement. Additionally, and to the full extent applicable, Licensor shall comply with the requirements of the Children’s Online Privacy Protection Act (“COPPA”) and SHALL NOT KNOWINGLY COLLECT ANY PERSONALLY IDENTIFYING INFORMATION FROM CHILDREN UNDER THE AGE OF 13 THROUGH THE SOFTWARE AND/OR OTHER PRODUCT EXCEPT IN COMPLIANCE WITH COPPA.

## **Article 6. STANDARD OF CARE**

**6.1** Licensor shall provide all professional Services in a good, timely, thorough, and workmanlike manner, in accordance with the standard of care, skill, training, diligence, and



judgment provided by highly competent providers and licensors performing services of a similar nature. Licensor shall be responsible for the security of the data (including City Data) during any implementation, configuration and integration, and it shall be responsible for non-interference with those aspects of the City's existing computer and related systems that are not intended to be replaced or changed by this Project. Licensor shall be responsible for the professional and technical accuracy and the coordination of all work furnished under this Agreement. Licensor shall furnish duly qualified personnel with the degree of training and expertise required to provide such Services for each aspect and task so that detailed checking or reviewing by the City is not necessary.

6.2 Notwithstanding any provision to the contrary, the City's review, approval, testing, acceptance or payment for any of the software, deliverables, Equipment, labor, and/or services furnished shall not be construed to operate as a waiver of any rights under this Agreement or any cause of action arising out of the performance of this Agreement.

6.3 Without limiting the generality of other provisions of this Agreement, in the event that any aspect of Licensor's performance fails to comply with applicable law due to Licensor's negligence or breach of this Agreement, Licensor shall make all necessary corrections at no cost whatsoever to the City.

## **Article 7. INDEMNIFICATION**

7.1 Licensor shall indemnify, defend and hold harmless the City and its officials, employees, agents, and attorneys against any third party claims, demands, actions, arbitrations, losses and liabilities resulting from any injury, death or damage to property, caused by Licensor's employees or subcontractors in performing the obligations under this Agreement. The City agrees to promptly provide Licensor notice thereof (although a delay of notice will not relieve Licensor of its obligations except to the extent that Licensor is materially prejudiced by such delay) and to provide reasonable cooperation, information, and assistance in connection therewith. If Licensor's indemnification is provided without reservation, Licensor shall have sole control and authority to defend, settle or compromise such claim, *provided* that any settlement/compromise shall unconditionally release City of all liability by all claimants *and further* that Licensor shall nevertheless obtain City's prior written consent prior to making any admission or statement of City breach, error or negligence.

7.2 Without limiting the generality of the foregoing, Licensor shall defend, hold harmless and indemnify the City, and its officials, employees, agents and attorneys against any damages or amounts paid in settlement, as well as any attorney fees and costs, as a result of any claim or threat of claim brought by a third party against the City alleging that: (i) the use of the Software, the documentation (including for this Article 7, technical and non-technical documentation) and/or other products, Equipment that City has licensed or otherwise received from Licensor infringes or misappropriates any patent, copyright, trademark, trade secret or other proprietary right of a third party, or (ii) the Software, documentation and/or other products, Equipment, which City has licensed or otherwise received from Licensor caused damage or injury (including death), to the extent that such damage was not caused by the City through a change in said Software, documentation and/or other products, Equipment, except as performed or authorized



by Licensor. The City agrees to promptly provide Licensor notice thereof (although a delay of notice will not relieve Licensor of its obligations except to the extent that Licensor is materially prejudiced by such delay) and to provide reasonable cooperation, information, and assistance in connection therewith. If Licensor's indemnification is provided without reservation, Licensor shall have sole control and authority to defend, settle or compromise such claim, *provided* that any settlement/compromise shall unconditionally release City of all liability by all claimants *and further* that Licensor shall nevertheless obtain City's prior written consent prior to making any admission or statement of City breach, error or negligence.

7.2.1 If the City is enjoined or otherwise prevented from using Software, documentation and/or other products, Equipment for any reason not the material breach of this Agreement by the City, Licensor shall make all reasonable efforts to obtain for the City (at no additional cost) the right to continue use of such Software, Equipment, documentation and/or other products, so that the City is no longer infringing. If neither of the foregoing options is reasonably available to Licensor, then Licensor shall equitably refund any payments made for the applicable Software, Equipment, documentation and/or other products, as of the last date the City was able to normally use said Software, Equipment, documentation and/or other products, and if the City determines that the functionality of the Software is materially reduced, the City may terminate this Agreement pursuant to Section 11.1.

7.3 Any and all costs of defense (e.g. reasonable attorney's fees and costs, any award, any settlement) related to Sections 7.1 and 7.2 shall be deemed direct damages for purposes of Section 9.1 and shall not be subject to the Limitation of Liability set forth in Section 9.2.

7.4 The City shall have no obligation to indemnify the Licensor. Without limiting the generality of Section 12.12, and notwithstanding any provision to the contrary, the City shall have no obligation to indemnify any third party, whether Licensor's affiliate, partner, licensor or otherwise.

7.5 Without limiting the generality of Section 12.10, the provisions of this Section shall survive the expiration or termination of the Agreement.

## **Article 8. WARRANTIES AND DISCLAIMERS**

8.1 Full Term Warranties. For the full Term of this Agreement, including any extension thereof, Licensor warrants that it has the authority to enter into this Agreement and, in connection with its performance of this Agreement, shall comply with all applicable laws. Licensor further warrants that Licensor is fully authorized by and shall not violate any agreement that Licensor has with any third-party in any manner that may increase the City's liability or cost, or decrease functionality or security of the Software, hardware or any Service provided by Licensor hereunder. Licensor further warrants to the City that it owns or is fully authorized to grant a license to the Software.

8.2 Licensor warrants that the Software shall perform in substantial compliance with its specifications, be free of material defects, and shall not infringe upon the intellectual property rights of any third party. In the event of a breach of this warranty, Licensor either shall promptly



correct defects to the Software, or if that is not reasonable, Licensor shall refund the City's prorated license fee, provided however that if the City determines that such breach materially reduces the functionality of the Software or related Services, the City may terminate this Agreement pursuant to Section 11.1. The remedies set forth in this Article shall be in addition to those set forth elsewhere in this Agreement, including but not limited to Article 7. This warranty does not cover any material defect or infringement resulting from the City's misuse or misapplication of the Software, including that caused by the City's employees or contractors.

8.3 Licensor thereby warrants that any and all Services, including but not limited to the integration of software and the integration of hardware (as applicable) supplied by Licensor will (a) perform in accordance with the RFP and, to the extent additional functionality is offered, the Licensor's Proposal, and (b) is free from defects in material, design, and workmanship and otherwise satisfy the requirements and provide the remedies set forth in this Agreement, including but not limited to Section 6.1. Licensor shall provide such warrantee(s) at no additional cost to the City, commencing on the date of final system acceptance. Said warrantee(s) shall cover all parts, labor, and travel, and such additional costs as required by the RFP and/or offered by the Proposal (resulting in the most inclusive) related to all the hardware and software supplied under this Agreement.

8.4 EXCEPT FOR WARRANTIES SET FORTH ELSEWHERE IN THIS AGREEMENT OR REQUIRED BY THE RFP, APPLICABLE LAW, OR OFFERED BY THE PROPOSAL, LICENSOR DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO IMPLIED WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, OR THAT ANY NETWORK-ACCESSIBLE FEATURES OF THE SOFTWARE WILL BE CONTINUALLY ACCESSIBLE OR ACCESSIBLE AT ANY TIME.

## **Article 9. LIMITATIONS OF LIABILITY**

9.1 EXCEPT FOR EXPRESS EXCLUSIONS SET FORTH ELSEWHERE IN THIS AGREEMENT, IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR INCIDENTAL, CONSEQUENTIAL, INDIRECT, PUNITIVE OR SPECIAL DAMAGES OF ANY NATURE, SUCH AS LOST PROFITS AND LOST OPPORTUNITY, PROVIDED HOWEVER THAT LICENSOR'S INDEMNIFICATION OBLIGATIONS SHALL BE DEEMED DIRECT DAMAGES.

9.2 TO THE FULL EXTENT PERMITTED BY LAW, AND EXCEPT WITH RESPECT TO (a) LICENSOR'S INDEMNIFICATION OBLIGATIONS SET FORTH IN THIS AGREEMENT, (b) THE CITY'S PAYMENT OBLIGATIONS SET FORTH IN ARTICLE 3, (c) AMOUNTS PAID FOR FINES AND PENALTIES IMPOSED BY ANY GOVERNMENTAL AUTHORITY ARISING FROM THE OTHER PARTIES' BREACH, (d) EITHER PARTY'S RECKLESS MISCONDUCT, GROSS NEGLIGENCE, WILLFUL MISCONDUCT AND/OR FRAUD, THE MAXIMUM LIABILITY OF EITHER PARTY ARISING FROM OR RELATING TO THIS AGREEMENT SHALL BE LIMITED TO TWO TIMES (2X) THE AGGREGATED SOFTWARE LICENSE FEES ACTUALLY PAID BY THE CITY TO LICENSOR (OR ITS AGENT) DURING THE IMMEDIATELY PRIOR TWELVE (12) MONTH PERIOD (OR FOR



A CLAIM(S) ARISING BEFORE THE FIRST ANNIVERSARY OF THE EFFECTIVE DATE, THE AMOUNT PAID OR PAYABLE FOR THE FIRST TWELVE (12) MONTH PERIOD). NOTWITHSTANDING ANY PROVISION OF THIS SECTION 9.2 TO THE CONTRARY, THE MAXIMUM LIABILITY FOR EITHER PARTY SHALL NOT BE LESS THAN FIFTY THOUSAND DOLLARS (\$50,000). SAID AMOUNT SHALL BE RESET AT THE START OF ANY EXTENDED TERM.

9.3 If Licensor experiences an actual or suspected security breach that may affect the City, Licensor shall notify the City within 72 hours (or earlier if required by law) and shall take immediate steps to limit and mitigate such security breach to the extent possible and, in any event, as required by law. Notwithstanding the foregoing sentence, if any other applicable law requires a more rapid or additional action, Licensor shall comply with the most rigorous requirements.

9.3.1 In the event of any material breach by Licensor of the security, privacy and/or confidentiality obligations set forth in this Agreement may, at City's discretion, result in termination of this Agreement for cause including but not limited to the immediate termination of any and all rights Licensor may have to receive City Data or other information from the City.

9.3.2 In the event of a security breach, Licensor shall pay reasonably necessary, documented costs incurred by the City, including but not limited to: (a) costs of any reasonably required forensic investigation to determine the cause of the breach, (b) the cost of providing legally required notice of the breach to individuals affected by the unauthorized acquisition and/or misuse of the City Data; (c) providing one year (or the greater period required by law) of credit monitoring service to individuals whose personal information may have been accessed or acquired and who elect such a service, (d) operating a call center for a period of one year (or the greater period required by law) to respond to questions from individuals whose personal information may have been accessed or acquired, and (f) reasonable attorney's fees and defense costs incurred by the City with respect to such data breach and notification. Licensor shall indemnify, defend and hold City harmless for any loss, cost, damage or expense suffered by City, including but not limited to the cost of notification of affected persons, as a result of Licensor's unauthorized disclosure of education records that are subject to FERPA, or any other confidentiality/privacy provision, whether federal, state or administrative in nature. The limitation of liability set forth in Sections 9.1 and 9.2 shall not apply to Licensor's costs associated with this Section 9.3. Notwithstanding the foregoing, Licensor shall have no responsibility to pay such costs to the extent that such costs are incurred due to the reckless misconduct, gross negligence, willful misconduct or fraud of the City.

9.4 Right to Seek Injunction. Notwithstanding any provision to the contrary, either Party shall have the right to seek injunctive relief as against the other Party to enforce the provisions of this Agreement.

## **Article 10. INSURANCE**

10.1 Licensor shall maintain liability insurance sufficient to fulfill its obligations pursuant to this Agreement, and not less than set forth in this Article. Such insurance shall not be cancelled



or reduced during the Term of this Agreement or for such additional period required below. Neither insurance amounts below nor actual coverage shall serve to limit Licensor's liability arising under this Agreement.

10.2 Licensor shall obtain and maintain professional liability/errors and omissions insurance at its sole expense, sufficient to cover any claims, damages, liabilities, costs and expenses (including attorney's fees) arising out of or in connection with Licensor's fulfillment of any of its obligations under this Agreement. Errors and omissions insurance shall cover professional errors and omissions of Licensor, its employees, and officers and professional subcontractors. Coverage under each policy will be a minimum of Five Million Dollars (\$5,000,000) for each occurrence (if on a claims made basis, then with a 6 year extended coverage ("tail" coverage)); provided however that if Licensor's network security/data privacy/cyber liability coverage is included within such policy each shall be not less than the amount set forth for that coverage below.

10.3 Licensor shall also obtain and maintain in force at all times during the term of this Agreement, insurance coverages pertaining to Personal Injury, Property Damage, Motor Vehicle and Worker's Compensation in the following amounts:

- i. Commercial General Liability (including property damage) - \$1,000,000 per occurrence and \$3,000,000 in aggregate. Commercial General Liability insurance shall include within its coverage Licensor's indemnity obligations.
- ii. Automobile Liability/Combined Single Limit (all owned, scheduled, hired, and non-owned autos) - \$1,000,000.
- iii. Workers Compensation - MA Statutory Requirements

10.4 Licensor shall also obtain and maintain in force at all times during the term of this Agreement Excess/Umbrella Liability coverage at not less than \$5,000,000 per occurrence.

10.5 Licensor shall also obtain and maintain in force at all times during the term of this Agreement data breach coverage at not less than \$5,000,000 per occurrence; and cyber liability policy which includes internet liability and computer security and privacy liability at not less than \$5,000,000 per occurrence.

10.6 A waiver of subrogation favoring the City shall be included in the policy(ies) for all coverage (except workers compensation). Licensor is solely responsible for payment of deductible or retention amounts.

10.7 Licensor shall furnish certificates of insurance evidencing that it has coverage of the types and amounts required above, to the City, prior to the execution of this Agreement in a form satisfactory to the City. The City of Worcester shall be named as an additional insured on all coverage and certificates, except for workers compensation and errors and omissions coverage in Section 10.2. The Certificate Holder shall be Purchasing Agent, City Hall, 455 Main Street, Worcester, Massachusetts 01608. Licensor shall require its insurance company(ies) to notify the Certificate Holder of any reduction or cancellation of the insurance at least thirty (30) days prior to the effective date of such reduction or cancellation.



10.8 Licensor's required insurance coverage set forth above shall not be construed as a limitation or waiver of any potential liability or satisfaction of Licensor's indemnification obligation.

10.9 Licensor shall require its insurer to waive subrogation on claims under its Commercial General Liability and Automobile Liability policies that arise out of or relate to this Agreement. Licensor is solely responsible for payment of deductible or retention amounts relating to its insurance coverage. Licensor's insurance shall be primary and non-contributory to any coverage by the City.

10.10 The City reserves the right to self funded/self insured and shall not be required to obtain commercial insurance coverage.

## **Article 11. TERMINATION OF CONTRACT**

11.1 Termination of Contract for Cause If either party fails to fulfill in a timely and proper manner its obligations under this Agreement for any cause, or if either party violates any of the terms, covenants and conditions of this Agreement, then in such event the offended party shall have the right to terminate this Agreement by giving written notice to the breaching party of such termination and specifying the effective date thereof, said written notice to be given not less than thirty (30) days before the effective date of such termination. Unless the Party receiving such notice cures within said thirty (30) days (or such longer period as the parties may agree in writing), termination of this Agreement shall occur on the effective date without additional notice by the offended party. In the event of such termination, City shall be obligated to pay for such Equipment, if any, licenses and/or Services received and accepted, but no termination fees, expenses or payment for all or any portion of the remainder of the Term. Licensor shall refund the pro-rata portion of any pre-paid license fees, and Licensor shall be obligated to provide the transition Services set forth in Section 5.1.3 and 11.4. Neither Party shall be relieved of liability to the other for damages sustained as a result of negligence or breach occurring prior to the termination of this Agreement, subject to Article 9. Notwithstanding the notice period and opportunity to cure above, either party may terminate immediately if the other party ceases business, becomes the subject of a petition in bankruptcy or any other proceeding relating to insolvency, receivership, liquidation or assignment for the benefit of creditors. The Parties may, but shall not be required to, use arbitration and/or mediation to resolve disputes.

11.2 Termination for Non Appropriation. The City may terminate this Agreement, without penalty or additional fee, after giving Licensor not less than thirty (30) days prior written notice, if it does not obtain sufficient funding for this Agreement after a good faith request. Notwithstanding the foregoing, City shall be obligated to pay for such Equipment and/or Services already received, but no termination expenses or payment for all or any portion of the remainder of the Term. Neither Party shall be relieved of liability to the other for damages sustained as a result of negligence or breach occurring prior to the termination of this Agreement.

11.3 Termination for Convenience. Either Party may terminate this Agreement at any time, without penalty or additional fee, by giving at least ninety (90) days' notice in writing to the other. In the event of such termination, City shall be obligated to pay for such Equipment, if any,



licenses and/or Services received and accepted, but no termination fee, expenses or payment for all or any portion of the remainder of the Term. Licensor shall refund the pro-rata portion of any pre-paid license fees, and Licensor shall be obligated to provide the transition Services set forth in Section 5.1.3 and 11.4. Neither Party shall be relieved of liability to the other for damages sustained as a result of negligence or breach occurring prior to the termination of this Agreement.

#### 11.4 Responsibilities in the Event of Termination.

11.4.1 Upon any termination of this Agreement, the City shall cease to use the Software and shall have no obligations to make any payment for any period after the date of termination, except as set forth in Section 5.1.3 regarding transition. Licensor shall, upon the City's request, provide reasonable cooperation and assistance as City may reasonably request to support an orderly transition to another provider of similar software, services, or to City's internal operations.

11.4.2 Licensor shall fully comply with any and all FERPA requirements, which shall control over the requirements in this Section 11.4.1 and Section 5.1.3, above, to the extent FERPA is more protective of data. If Licensor is requested to return City Data, Licensor shall furnish City such City Data in a form agreed to by the Parties at a cost of not more its then market rate pursuant to an amendment to this Agreement.

### **Article 12. MISCELLANEOUS**

12.1 Successors and Assignments. The City and Licensor each bind itself, its partners, successors, legal representatives and assigns of such other party in respect to all covenants of this Agreement.

#### 12.2 Contractors, Subcontracting, Successors & Assignments

Licensor shall not engage subcontractors or consultants to perform any part of its Services or obligations specifically pursuant to this Agreement (directly or indirectly) without the prior written consent of the City. The written consent shall not in any way relieve Licensor from its obligations and duties set forth in the Agreement.

Neither Party may assign the Agreement, or any portion thereof, without the prior written consent of the other, which consent will not be unreasonably withheld or delayed. The Agreement shall be binding on each Party's permitted assignee. If Licensor assigns this Agreement to any subsidiary or affiliate, Licensor shall nevertheless retain responsibility for all liabilities and obligations set forth in this Agreement. Licensor and assignee shall provide the City written confirmation of such assignment and assignees financial capacity to meet said obligations in a form acceptable to the City. Notwithstanding the foregoing, either party may assign this Agreement in its entirety as the result of a sale of all or substantially all of its assets without having to obtain the other party's consent, provided that it promptly informs the City of the transfer, provides contact information for the assignee, as well as evidence reasonably acceptable to the City of the assignee's capacity to satisfy the obligations of this Agreement, and



further provided that the assignee accepts in writing in a form reasonably acceptable to the City all the rights, duties and obligations of the Licensor.

12.3 Records Licensor shall maintain records with respect to all matters covered by this Agreement for a period of six (6) years from the date of receipt of final payment under this Agreement.

12.4 Independent Contractor Licensor is an independent contractor and not an employee of the City.

12.5 Coordination with other Contractors. Licensor may have access to information of City's consultants, contractors, license holders and the like that is marked as or may reasonably be understood to be confidential information related (whether directly or indirectly) to this Agreement. In such an event, Licensor agrees that, except as required by law, such confidential information may be used only for the purposes set forth in this Agreement and that Licensor shall protect such confidential information in the same manner that it protects its own similar confidential information, but in no event using less than a reasonable standard of care.

12.5 Discrimination Prohibited

A. In all hiring or employment made possible by or resulting from this Agreement, there (1) will not be any discrimination against any employee or applicant for employment because of race, color, religion, sex, or national origin, and (2) affirmative action will be taken to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin.

B. No person in the United States shall, on the ground of race, color, religion, sex or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity made possible by or resulting from the contract. Licensor shall comply with all requirements imposed by or pursuant to Title VI of the Civil Rights Act of 1964.

12.6 Compliance with Laws In the performance of this Agreement, each Party shall comply with all applicable federal, state and local laws, rules, ordinances, regulations and administrative requirements.

12.7 Conflict of Interest Licensor certifies that it has complied with all provisions of law regarding the award of this Agreement and that it, or its employees, agents, officers, directors or trustees have not offered or attempted to offer anything of any value to any employee of the City in connection with this Agreement. Licensor further certifies that no employee of the city of Worcester, including unpaid members of City boards and commissions, serves as an officer, director, trustee or employee of Licensor, and that no employees of the City have or will have a direct or indirect financial interest in this Agreement. Violation of this Section shall be a material breach of this Agreement and shall be grounds for immediate termination of this Agreement by the City without regard to any enforcement activities undertaken or completed by any enforcement agency. Termination of this Agreement pursuant to this Section shall not waive any



claims for damages the City may have against Licensor resulting from Licensor's violation of the terms of this Section.

12.8 Certifications Required by Law. Licensor, by executing this document, certifies the following:

- (a) it has not given, offered or agreed to give any person, corporation or other entity any gift, contribution or offer of employment as an inducement for, or in connection with, the award of this Agreement;
- (b) that no consultant to or subcontractor for Licensor has given, offered or agreed to give any gift, contribution or offer of employment to Licensor, or to any other person, corporation, or entity as an inducement for, or in connection with, the award to the consultant or subcontractor of a contract by Licensor;
- (c) that no person, corporation or other entity, other than a bona fide full time employee of Licensor, has been retained or hired by Licensor to solicit for or in any way assist Licensor in obtaining this Agreement upon an agreement or understanding that such person, corporation or other entity be paid a fee or other consideration contingent upon the award of this Agreement to Licensor; and
- (d) with respect to contracts which exceed ten thousand dollars or which are for the design of a building for which the budgeted or estimated construction costs exceed one hundred thousand dollars, that Licensor has internal accounting controls as required by subsection (c) of thirty-nine R of chapter thirty of the General Laws and that Licensor has filed and will continue to file an audited financial statement as required by subsection (d) of said section thirty-nine R.
- (e) that Licensor, and any consultant to or subcontractor for Licensor, represents, warrants and certifies that it has complied with all laws of the commonwealth of Massachusetts relating to taxes and all Ordinances and Orders of the city of Worcester relating to taxes, fees and charges, or is lawfully contesting the validity of the same. Licensor, and any consultant to or subcontractor for Licensor, further represents, warrants and certifies that it will remain in such compliance during the term of this Agreement, including any amendments or extensions hereto. Breach of any of these provisions shall be deemed a material breach which shall entitle the City to immediately terminate this contract pursuant to Article 11 and take any other action authorized by law to collect any amounts due the City.

12.9 Applicable Law The laws of the commonwealth of Massachusetts shall govern the validity, interpretation, construction and performance of this Agreement, without giving effect to its provisions regarding choice of laws. Any suit brought hereunder shall be brought in the state or federal courts sitting in the Worcester County, Massachusetts, the parties hereby waiving any claim or defense that such forum is not convenient or proper. Each party agrees that any such court shall have *in personam* jurisdiction over it and consents to service of process in any manner authorized by Massachusetts law. In no event does the City waive any of the applicable protections granted it by federal or Massachusetts law, including but not limited to G.L. c. 258.

12.10 Survivorship. Those sections that by their nature survive expiration or termination of this Agreement will survive such expiration or termination.



12.11 Notices. Any formal notices necessary under this Agreement shall be given by certified mail, return receipt requested, or by hand delivery or overnight mail by a nationally recognized carrier to the address set forth below for the Parties, and addressed to the City at the City Manager, Room 306, City Hall, Worcester, Massachusetts 01608 and addressed to Licensor at the address appearing in the first paragraph of page 1 of this Agreement.

12.12 No Third Party Beneficiary. This Agreement is by and between the parties that have executed it. The Parties state that the Agreement is intended for their mutual benefit alone and is not intended to confer any express or implied benefits on any other person, including but not limited any third party identified herein.

12.13 Severability If any provision of this Agreement is held invalid by any court or body of competent jurisdiction, the remainder of this Agreement shall remain in full force and effect.

12.14 Headings The article and section headings in this Agreement are for convenience and reference only and in no way define or limit the scope or content of this Agreement or in any way affect its provisions.

12.15 Amendments This Agreement may be amended or modified only by a written amendment hereto duly executed by the parties.

12.16 Exhibits The exhibits referenced herein are hereby incorporated and made a part of this Agreement.

12.17 Entire Agreement This Agreement contains the entire understanding of the parties and supersedes all prior agreements, representations, proposals and undertakings of the parties. Any additional or contrary terms or conditions contained in any invoice, proposal, purchase order, order form or other document issued by either Party shall be null and void unless expressly agreed to in an amendment to this Agreement.

*[remainder of page intentionally blank – signature page to follow]*



RFP:

Contract #:

**IN WITNESS WHEREOF**, the parties hereto, intending to be legally bound, have caused this Agreement to be executed as a sealed instrument by their duly authorized representatives the day and year first above written.

RECOMMENDED:

[\_\_\_\_\_]

\_\_\_\_\_

\_\_\_\_\_  
Name

Title

\_\_\_\_\_  
Christopher Gagliastro, Purchasing Director

Approved as to Form:

**CITY OF WORCESTER**

\_\_\_\_\_

Assistant City Solicitor

\_\_\_\_\_  
Eric D. Batista

City Manager

I certify that funds are available in Account No. \_\_\_\_\_

\_\_\_\_\_

Budget Analyst, Department of Administration and Finance



RFP:

Contract #:

**EXHIBIT A**  
**SCOPE OF SERVICES**



RFP:

Contract #:

**EXHIBIT B  
FEE BREAKDOWN  
(LICENSOR's PRICE PROPOSAL)**

The City shall pay Licensor for all licenses and all Services rendered pursuant to this Agreement in an amount not to exceed the amount set forth in Article 3 of the Agreement, in accordance with the following fee breakdown:



RFP:

Contract #:

## **EXHIBIT C SCHEDULE**

Licensors shall comply with the following Project Management- Implementation and Timeline:



RFP:

Contract #:

**EXHIBIT D**  
Service Level Agreement

Licensors shall provide service and support as follows:



RFP:

Contract #:

CERTIFICATE OF AUTHORITY

At a duly authorized meeting of the Board of Directors of the \_\_\_\_\_ held  
on \_\_\_\_\_ Directors were present or waived  
(name of corporation) (date)

notice, it was voted that \_\_\_\_\_ of this company be and hereby  
(officer and title)

is authorized to execute contracts and bonds in the name and behalf of said company, and affix its  
Corporate Seal thereto, and such execution of any contract or bond of obligation in this company's name  
shall be valid and binding upon this company.

A TRUE COPY,

ATTEST:

\_\_\_\_\_

Place of Business:

\_\_\_\_\_

I hereby certify that I am the \_\_\_\_\_ of the \_\_\_\_\_  
(Title) (Name of Corporation)  
that \_\_\_\_\_ is the duly elected \_\_\_\_\_  
(Name of Officer) (Title)

of said company, and the above vote has not been amended or rescinded and remains in full force and effect  
as of the date of this contract.

Signature: \_\_\_\_\_

Name/Title: \_\_\_\_\_

Date: \_\_\_\_\_

(Corporate Seal)

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me the undersigned notary public, personally appeared  
\_\_\_\_\_, who proved to me through satisfactory evidence of identification, which  
was/were \_\_\_\_\_, to be the person whose name is signed on the preceding or  
attached document, and acknowledged to me he/she signed it voluntarily for its stated purpose.

\_\_\_\_\_  
Notary Public  
My commission expires:



RFP:

Contract #:

## TAX CERTIFICATION

DATE: \_\_\_\_\_

Pursuant to Mass. G.L. c. 62C, Section 49A, I certify under the penalties of perjury that I, to my best knowledge and belief, have complied with all laws of the commonwealth relating to taxes, reporting of employees and contractors, and withholding and remitting child support.

Signature: \_\_\_\_\_

Print below signature line name and title  
of Individual or Corporate Officer (as applicable)

\_\_\_\_\_  
Company Name

Address: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Tel No. \_\_\_\_\_

\_\_\_\_\_  
SOCIAL SECURITY NUMBER  
OR  
FEDERAL IDENTIFICATION NUMBER