



Southwestern Community College District
Office of Procurement, Central Services & Risk Management
RFP 1516 - 149 for Service Management System for Information
Technology Service Management and Computerized Maintenance
Management System (CMMS)

Addendum No. Five (5)
June 21, 2016

A blue ink signature of Priya Jerome, consisting of a large loop and a horizontal line.

Priya Jerome, Director of Procurement,
Central Services & Risk Management

6/21/2016

Date

Note

All documents remain unchanged except sections or parts added to, revised, deleted and clarified by this addendum.

Software Development Agreement for RFP 1516-149 for the Service Management System for Information Technology Service Management and Computerized Maintenance Management System (CMMS)

Replace Appendix D Sample Agreement – Consultant Services Agreement with the enclosed Software Development Agreement.

Proposer must submit all exceptions to the below Agreement as part of the RFP submission for District review.

See Agreement on page 2.

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SOFTWARE DEVELOPMENT AGREEMENT

This Software Development Agreement (“Agreement”), dated _____, (“Effective Date”), is entered into by and between [VENDOR NAME] (“Vendor”), a _____, and Southwestern Community College District (“District”), a California public community college district.

RECITALS

- A. District is a California community college, providing, among other things, educational and support services to students in and around the County of San Diego.
- B. Vendor provides independent software development services including, but not limited to, those services required by District as described in the RFP.
- C. District desires to retain Vendor to perform services, in accordance with the RFP, and Vendor agrees to perform such services on the terms and conditions set forth herein.

AGREEMENT

1. DEFINITIONS

Whenever used in this Agreement, any schedules, exhibits, or addenda to this Agreement, the following terms shall have the meanings assigned below. Other capitalized terms used in this Agreement are defined in the context in which they are used.

1.1 ***"Agreement"*** means this Software Development Agreement inclusive of all schedules, exhibits, attachments, addenda and other documents incorporated by reference.

1.2 ***"Authorized User"***, notwithstanding any attached schedules, means: (a) District, including its employees, authorized agents, students and volunteers of District; (b) Third Party consultants, auditors and other independent contractors performing services for District; (c) any governmental, accrediting or regulatory bodies lawfully requesting or requiring access to any system on which the Software may be in use; and (d) external users collaborating with District.

1.3 ***"Class 1 Error"*** means any error that renders the Software unusable for its intended purpose.

1.4 ***"Confidential Information"*** means any information that a disclosing party treats in a confidential manner and that is marked “Confidential Information” prior to disclosure to the other party. Confidential Information does not include information which: (a) is public or becomes public through no breach of the confidentiality obligations herein; (b) is disclosed by the party that has received Confidential Information (the “Receiving Party”) with the prior written approval of the other party; (c) was known by the Receiving Party at the time of disclosure; (d) was developed independently by the Receiving Party without use of the

Confidential Information; (e) becomes known to the Receiving Party from a source other than the disclosing party through lawful means; (f) is disclosed by the disclosing party to others without confidentiality obligations; or (g) is required by law to be disclosed.

1.5 **"Documentation"** means, collectively: (a) all materials published or otherwise made available to District by Vendor that relate to the functional, operational and/or performance capabilities of the Software; (b) all user, operator, system administration, technical, support and other manuals and all other materials published or otherwise made available by Vendor that describe the functional, operational and/or performance capabilities of the Software; and (c) any Requests for Information and/or Responses for Proposals (or documents of similar effect) issued by District, and the responses thereto from Vendor, and any document which purports to update or revise any of the foregoing.

1.6 **"Enhancements"** means any improvements, modifications, upgrades, updates, fixes, revisions and/or expansions to the Software that Vendor may develop or acquire.

1.7 **"Intellectual Property Rights"** includes without limitation all right, title, and interest in and to all (a) Patent and all filed, pending, or potential applications for Patent, including any reissue, reexamination, division, continuation, or continuation-in-part applications throughout the world now or hereafter filed; (b) trade secret rights and equivalent rights arising under the common law, state law, federal law, and laws of foreign countries; (c) copyrights, other literary property or author's rights, whether or not protected by copyright or as a mask work, under common law, state law, federal law, and laws of foreign countries; and (d) proprietary indicia, trademarks, tradenames, symbols, logos, and/or brand names under common law, state law, federal law, and laws of foreign countries.

1.8 **"Project Manager"** means the individual who shall serve as each party's point of contact with the other party's personnel as provided in this Agreement.

1.9 **"RFP Response"** means any proposal submitted by Vendor to District in response to the RFP.

1.10 **"Software"** means the software developed by Vendor for District pursuant to this Agreement that provides the functionality and/or produces the results described in the Documentation, including without limitation all Enhancements thereto, all interfaces, and all Third Party Software, including open source software.

1.11 **"Support and Maintenance Services"** means the technical support, error correction services and support, and Enhancements provided by Vendor to District in order to use, maintain and enhance the Software provided by Vendor to District.

1.12 **"Third Party"** means persons, corporations and entities other than Vendor, District or any of their employees, contractors or agents.

1.13 ***“Third Party Software”*** means any Software provided by Vendor to District that Vendor licensed from a Third Party and is to be delivered by Vendor to District in connection with the Software.

2. ORDER OF PRECEDENCE

The following order of precedence shall be followed in resolving any inconsistencies between the terms of this Agreement and the terms of any schedules, exhibits, attachments, addenda and other attached and included documents: (a) first, the terms contained in the body of this Agreement; (b) second, the terms of the schedules, exhibits, attachments and addenda to this Agreement, provided that no order of precedence shall be applied among schedules, exhibits, attachments and addenda; and (c) third, all Documentation (as defined in DEFINITIONS section above) not included in the foregoing (a) or (b) above.

3. SCOPE OF AGREEMENT

The Software and/or Support and Maintenance Services included under this Agreement are as follows: [AS SPECIFIED IN THE RFP TO WHICH THIS DOCUMENT IS ATTACHED].

4. GRANT OF LICENSE

4.1 Vendor grants to District a perpetual, irrevocable, unlimited user, non-exclusive, fully paid-up right and license for District and its Authorized Users to use the Software and Documentation to conduct District business at any and all locations where District business may be conducted. For the purposes of this Agreement, “District business” shall include, but not be limited to, use for production, internal development, testing, quality assurance, training and support, and maintenance purposes.

4.2 District at its sole discretion may make and use a reasonable number of copies of the Software and Documentation for District business and for backup, disaster recovery/use and archival purposes.

4.3 District acquires the right to use Software acquired under this Agreement at any location under the direct control of the District.

5. TESTING AND ACCEPTANCE

District shall have ninety (90) days from the date of completion of the Software implementation to determine whether it complies in all material respects with the Documentation. Within this period, District shall notify Vendor whether it has accepted the Software (“Accept”) or whether it has identified discrepancies with the Documentation (“Reject”). If District Rejects the Software, District shall provide a written list of items that must be corrected. On receipt of District’s notice, Vendor shall promptly commence, at no additional charge to District, all reasonable efforts to complete, as quickly as possible, such necessary corrections, repairs and modifications to the Software as will permit it to be ready for retesting and review, but in no

event shall such corrective measures exceed twenty (20) days from receipt of District's notice. The evaluation process shall resume, as set forth above. If District Accepts the Software, it shall issue a written "Acceptance Notice." The date of such Acceptance Notice shall be deemed the "Acceptance Date." If District determines the Software, as revised, still does not comply in all material respects with the Documentation, District may either: (1) afford Vendor the opportunity to repeat the correction and modification process as set forth above at no additional cost or charge to District, or (2) depending on the nature and extent of the failure in District's sole judgment, terminate this Agreement. The foregoing correction and modification procedure shall be repeated until the Software is accepted or District elects to terminate the Agreement as provide above.

6. SUPPORT AND MAINTENANCE SERVICES

6.1 INTELLECTUAL PROPERTY INDEMNIFICATION section below notwithstanding, Vendor shall provide to District the Support and Maintenance Services outlined herein.

6.2 Support and Maintenance Services shall be provided by Vendor to District for an initial one (1) year term (the "Initial Support Term") commencing on the "Support and Maintenance Services Commencement Date" (as hereafter defined). The Initial Support Term shall be renewable for successive one (1) year terms ("Extension Terms", and collectively with the Initial Support Term, the "Support Term") upon written notice from District to Vendor. For the purposes of this Agreement, the term "Support and Maintenance Services Commencement Date" shall refer to the first day of the month following the month in which the end of the Warranty Period (as hereafter defined) occurs.

6.3 Grant of License shall be unaffected by subsequent Support and Maintenance Services renewals.

6.4 District acquires the right to use Support and Maintenance Services acquired under this Agreement at any location under the direct control of the District.

6.5 District may, in its sole discretion, discontinue Support and Maintenance Services on any Software and/or product with no effect on other Support and Maintenance Services, or other Software and/or products.

6.6 In consideration of the Support and Maintenance Services, District agrees at its option to pay Vendor annual fees (the "Support and Maintenance Services Fees") as described herein. During each Extension Term, District shall at its option pay Vendor annual Support and Maintenance Services Fees (on the annual anniversaries of the Support Commencement Date).

6.7 Vendor shall provide District at District's option with the following Support and Maintenance Services:

6.7.1 Vendor shall provide telephone and online assistance to District for the purpose of answering questions relating to the Software, including (a) clarification of functions and features

of the Software; (b) clarification of the Documentation; (c) guidance in the operation of the Software; and (d) error verification, analysis, and correction, including the failure to produce results in accordance with the Documentation.

6.7.2 Such assistance shall be provided by Vendor twenty-four (24) hours a day, seven (7) days a week via a toll-free telephone number and live, online chat staffed by help desk technicians sufficiently trained and experienced to identify and resolve most support issues.

6.8 The following provisions shall be applicable to the correction of Software errors:

6.8.1 If District detects what it considers to be an error in the Software which causes it not to conform to, or produce results in accordance with, the Documentation, then District shall, by telephone or e-mail, notify Vendor of the error.

6.8.2 For Class 1 Errors, within twenty-four (24) hours after District first reports the error, Vendor shall provide a correction or workaround acceptable to District. Vendor's correction process shall include assigning fully-qualified technicians to work with District without interruption or additional charge.

6.9 The following provisions shall set forth Vendor's obligations to provide Enhancements:

6.9.1 Vendor shall generally enhance and improve the Software for as long as District elects to receive and pays for Support and Maintenance Services.

6.9.2 Vendor shall provide to District during the Support Term for use in accordance with this Agreement, at no charge, (a) any and all Enhancements which it develops with respect to the Software and (b) the Documentation associated with any Enhancements.

6.9.3 All Enhancements shall become part of the Software and subject to all terms and provisions of this Agreement.

7. TRAINING

7.1 Vendor shall provide District with training for the purposes of understanding and using the Software ("Training Services"). Training Services will be provided by Vendor as detailed below at no additional cost to District. Training Services will be provided by Vendor at District at mutually agreeable dates and times.

7.2 [DESCRIPTION, FREQUENCY AND TIMING OF ANY NEGOTIATED TRAINING SERVICES TO BE INSERTED HERE (OR AS A REFERENCED ATTACHED SCHEDULE)].

8. TRANSITION ASSISTANCE

8.1 Vendor will provide the following transition assistance ("Transition Assistance") to support District's transition from its current software, or other solution in this area, to Vendor's Software. Transition Assistance will be provided by Vendor as detailed below at no additional

cost to District. Transition assistance will be provided by Vendor at District at mutually agreeable dates and times, but no later than ten (10) days following the Effective Date of this Agreement.

8.2 Within a reasonable period of time, not to exceed ten (10) days after the Effective Date of this Agreement, Vendor shall, at its own expense, provide qualified individuals to (a) uninstall existing solution, (b) install the Software, and (c) assist in testing of the Software to ensure that it is functioning in accordance with the terms of this Agreement. Vendor's Project Manager shall coordinate with District's Project Manager, and they shall develop a mutually agreeable installation plan and schedule for the assistance provided above.

8.3 District agrees (a) to have the license installation site(s) prepared in accordance with applicable Vendor requirements prior to the Effective Date of the installation plan and schedule; and (b) maintain the site(s) at its own expense subsequent to completion of the installation plan and schedule. District shall provide any and all necessary utility services for use of the Software.

8.4 In connection with Vendor's Transition Assistance, District will provide information, data, computer access and time, work space, forms, data entry and telephone service and personnel reasonably necessary to assist Vendor consistent with District's policies and procedures.

9. FEES, INVOICING, PAYMENT AND TAXES

9.1 District agrees to pay all net undisputed amounts due to Vendor in accordance with this Agreement. Such fees will be payable within thirty (30) calendar days of District's receipt of Vendor's invoice or the invoice due date, whichever is later. District shall not be subject to late payment fees.

9.2 If an invoiced amount is disputed in good faith by District, then District shall work with the Vendor to resolve the dispute. District may suspend the payment of all disputed amounts until the dispute is resolved. All of Vendor's obligations shall continue unabated until dispute resolution.

10. TERM AND TERMINATION

District may terminate this agreement for convenience upon thirty (30) days written notice to Vendor. Following such termination, District shall retain the right to (a) use any Software or components thereof installed prior to the termination date for its own internal business purposes, and (b) use and make copies of any Documentation in conjunction with such use. District shall pay Vendor for all undisputed services performed by Vendor through the effective date of termination.

10.1 District may terminate this Agreement immediately upon any Vendor material breach of the terms of this Agreement. In the event of an uncorrected material breach of this Agreement by Vendor, District shall be entitled to seek to recover damages from Vendor.

10.2 Vendor may terminate this Agreement if District intentionally and materially breaches this Agreement and then fails to correct such breach within thirty (30) days following receipt of written notice from Vendor of the breach. In the event of an uncorrected breach by District, Vendor shall be entitled to recover actual amounts owed by District to Vendor that accrued on or before the date of termination.

10.3 Notwithstanding anything to the contrary in this Agreement, failure of District to pay invoices or other amounts due Vendor on a timely basis will not be deemed a breach of this Agreement; provided (a) such failure results from a bona fide dispute which has been communicated to Vendor prior to the due date; (b) any undisputed amounts are paid in a timely fashion; and (c) District Project Manager is available to resolve the dispute (“Bona Fide Dispute Provisions”). So long as the Bona Fide Dispute Provisions are being, or have been, complied with by District, Vendor shall continue to perform its obligations under this Agreement (including any Support and Maintenance Services).

10.4 District’s rights to the Software as provided in this Agreement will survive a bankruptcy claim by the Vendor consistent with applicable laws.

11. WARRANTIES, REPRESENTATIONS AND COVENANTS

11.1 District shall have the right to return the Software for any reason, and shall receive a full refund of all payments, for a period of ninety (90) days after purchase (the “Warranty Period”).

11.2 Software Warranty. Vendor represents and warrants that the Software provided under this Agreement shall function substantially in accordance with the Documentation and produce results substantially in accordance with the Documentation.

11.3 Services Warranty. Vendor represents, warrants and agrees that it shall perform its obligations required by this Agreement in a professional manner, in accordance with the highest applicable industry practices and standards and in compliance with all applicable laws and regulations.

11.4 Intellectual Property Warranty. Vendor represents, warrants and agrees that: Vendor has all Intellectual Property Rights necessary to license the Software to District in accordance with the terms of this Agreement; Vendor is the sole owner or is a valid licensee of the Software and has secured all necessary licenses, consents, and authorizations with respect to the use of the Software to the full extent contemplated herein, including, but not limited to: all Source Code, text, pictures, audio, video, logos and copy contained therein; the Software does not and shall not infringe upon any patent, copyright, trademark or other proprietary right or violate any trade secret or other contractual right of any Third Party; and there is currently no actual or threatened suit against Vendor by any Third Party based on an alleged violation of such right. This warranty shall survive the expiration or termination of this Agreement.

11.5 Warranty of Authority. Each party represents and warrants that it has the right to enter into this Agreement. Vendor represents and warrants that it has the unrestricted right to license the Software, and that it has the financial viability to fulfill its obligations under this Agreement. Vendor represents, warrants and agrees that Software shall be free and clear of all liens, claims, encumbrances or demands of Third Parties. Vendor represents and warrants that it has no knowledge of any pending or threatened litigation, dispute or controversy arising from or related to the Software. This warranty shall survive the expiration or termination of this Agreement.

11.6 Third Party Warranties and Indemnities. Vendor will assign to District all Third Party warranties and indemnities that Vendor receives in connection with any Software or products provided to District. To the extent that Vendor is not permitted to assign any warranties or indemnities through to District, Vendor agrees to specifically identify and enforce those warranties and indemnities on behalf of District to the extent Vendor is permitted to do so under the terms of the applicable Third Party agreements.

11.7 THE WARRANTIES SET FORTH ABOVE ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, WITH REGARD TO THE SOFTWARE PURSUANT TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

12. INTELLECTUAL PROPERTY INFRINGEMENT INDEMNIFICATION

12.1 Vendor shall indemnify, defend and hold District harmless from any and all actions, proceedings, or claims of any type brought against District alleging that the Software and/or Documentation or District's use of the Software and/or Documentation constitutes a misappropriation or infringement upon any patent, copyright, trademark, or other proprietary right or violates any trade secret or other contractual right of any Third Party. Vendor agrees to defend against, and hold District harmless from, any claims and to pay all litigation costs, all reasonable attorneys' fees, settlement payments and all judgments, damages, costs or expenses awarded or resulting from any claim. District shall, after receiving notice of a claim, advise Vendor of it. District's failure to give Vendor timely notification of said claim shall not effect Vendor's indemnification obligation unless such failure materially prejudices Vendor's ability to defend the claim. District reserves the right to employ separate counsel and participate in the defense of any claim at its own expense.

12.2 If the Software and/or Documentation, or any part thereof, is the subject of any claim for infringement of any patent, copyright, trademark, or other proprietary right or violates any trade secret or other contractual right of any Third Party, or if it is adjudicated by a court of competent jurisdiction that the Software and/or Documentation, or any part thereof, infringes any patent, copyright, trademark, or other proprietary right or violates any trade secret or other contractual right of any Third Party, and District's use of the Software and/or Documentation, or any part of it, is enjoined or interfered with in any manner, Vendor shall, at its sole expense and within thirty (30) calendar days of such injunction or interference, either: (a) procure for District the right to continue using the Software and/or Documentation free of any liability for infringement or violation; (b)

replace or modify the Software and/or Documentation, or parts thereof, with non-infringing Software and/or Documentation of equivalent or better functionality that is reasonably satisfactory to District.

12.3 Vendor shall have no obligation to indemnify District for a claim if: (a) District uses the Software in a manner contrary to the provisions of this Agreement and such misuse is the cause of the infringement or misappropriation; or (b) District's use of the Software in combination with any product, software or system not authorized, approved or recommended by Vendor and such combination is the cause of the infringement or misappropriation.

12.4 No limitation of liability set forth elsewhere in this Agreement is applicable to the Intellectual Property Infringement Indemnification.

13. GENERAL INDEMNIFICATION

Vendor shall defend, indemnify, and hold harmless District, its officers, employees, and agents, respective assigns and successors-in-interest from and against all losses, expenses (including attorneys' fees), damages, and liabilities of any kind resulting from or arising out of this agreement and/or Vendor's performance hereunder, provided such losses, expenses, damages and liabilities are due or claimed to be due to the negligent or willful acts or omissions of Vendor, its officers, employees, agents, subcontractors, or anyone directly or indirectly employed by them, or any person or persons under Vendor's direction and control.

14. LIMITATION OF LIABILITY

EXCEPT AS OTHERWISE PROVIDED IN THIS AGREEMENT, NEITHER PARTY SHALL BE LIABLE FOR ANY LOST PROFITS, CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, OR SPECIAL DAMAGES, HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY ARISING OUT OF OR RELATING TO THIS AGREEMENT EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING LIMITATION OF LIABILITY IS NOT APPLICABLE TO VENDOR'S WARRANTY AND INDEMNIFICATION OBLIGATIONS SET FORTH ELSEWHERE IN THIS AGREEMENT OR ANY PERSONAL INJURY CLAIM. FURTHER, THE FOREGOING LIMITATION IS NOT APPLICABLE TO DAMAGES ARISING OUT OF ANY LOSS, CORRUPTION, OR BREACH OF DATA CAUSED BY OR RESULTING FROM VENDOR'S ERRORS OR OMISSIONS.

15. **INSURANCE**

15.1 On or before the Effective Date, Vendor shall provide to District proof, such as an insurance certificate, evidencing full compliance with the insurance requirements set forth herein.

Vendor, at its sole cost and expense, shall insure its activities in connection with the work under this order and obtain, keep in force, and maintain insurance as follows:

- a) Comprehensive or Commercial Form General Liability Insurance (contractual liability included) with limits as follows:

Each Occurrence \$1,000,000.00

Products/Completed Operations Aggregate \$2,000,000.00

Personal and Advertising Injury \$1,000,000.00

General Aggregate (Not applicable to the Comprehensive Form) \$2,000,000.00

If the above insurance is written on a claims-made form, it shall continue for three years following termination of this Agreement. The insurance shall have a retroactive date of placement prior to or coinciding with the effective date of this Agreement.

- b) Business Automobile Liability Insurance for owned, scheduled, non-owned, or hired automobiles with a combined single limit not less than \$1,000,000.00 per occurrence.

- c) Professional Liability Insurance with a limit of \$2,000,000.00 per occurrence with an aggregate of not less than \$2,000,000.00.

If this insurance is written on a claims-made form, it shall continue for three years following termination of this Agreement. The insurance shall have a retroactive date of placement prior to or coinciding with the effective date of this Agreement.

- d) Workers' Compensation as required by California State law.

15.2 It is agreed that the coverage and limits referred to under 15.1 a, b, and c above shall not in any way limit the liability of Vendor. Vendor shall furnish the District with certificates of insurance evidencing compliance with all requirements prior to commencing work under this Agreement. Such certificates shall:

- a) Provide for thirty (30) days advance written notice to the District of any modification, change, or cancellation of any of the above insurance coverage.

- b) Indicate that District has been endorsed as an additional insured for the coverage referred to herein. This provision shall only apply in proportion to and to the extent of the negligent acts or omissions of Vendor, its officers, agents, or employees.

- c) Include a provision that the coverage will be primary and will not participate with nor be excess over any valid and collectible insurance or program of self-insurance carried or maintained by the District.
- d) Such insurance shall be with insurers with at least an “A+” rating.
- e) The insurance policies shall provide that the insurance company shall notify District in writing at least thirty (30) days in advance if Vendor’s insurance coverage is to be canceled or materially altered so as not to comply with the requirements of this Agreement.

16. CONFIDENTIALITY

16.1 Each party acknowledges that certain information that it shall acquire from the other is of a special and unique character and constitutes Confidential Information.

16.2 The Receiving Party agrees to exercise the same degree of care and protection with respect to the Confidential Information that it exercises with respect to its own similar Confidential Information and not to directly or indirectly provide, disclose, copy, distribute, republish or otherwise allow any Third Party to have access to any Confidential Information without prior written permission from the disclosing party. However: (a) either party may disclose Confidential Information to its employees and authorized agents who have a need to know; (b) either party may disclose Confidential Information if so required to perform any obligations under this Agreement; and (c) either party may disclose Confidential Information if so required by law (including court order or subpoena).

16.3 Nothing in this Agreement shall in any way limit the ability of District to comply with any laws or legal process concerning disclosures by public entities. Vendor acknowledges that any responses, materials, correspondence, documents or other information provided to District are subject to applicable state and federal law, including the California Public Records Act and Brown Act, and that the release of Confidential Information in compliance with those acts or any other law will not constitute a breach or threatened breach of this Agreement.

17. PERSONAL INFORMATION

During the course of this Agreement, should Vendor come into possession of any personal information related to District’s Authorized Users that is considered sensitive, nonpublic personal data or contains individually identifiable information, Vendor may not disclose this information to any Third Party under any circumstances.

18. TITLE/OWNERSHIP

18.1 District acknowledges that Vendor holds all right, title and interest in any copyrights, patents, trade secrets and any other Intellectual Property Rights in the Software. Nothing in this Agreement shall be construed to convey any title or ownership rights in the Software to District.

18.2 All data created and/or processed by the Software is and shall remain the property of District and shall in no way become attached to the Software, nor shall Vendor have any rights in or to the data of District.

18.3 Any documents, forms, compilations and/or spreadsheets that are generated from the utilization of the functionality of the Software are not the intellectual property of the Vendor, and can be used by District in its ordinary course of business, including but not limited to District sharing such documents with Third Parties.

18.4 In the event that District develops any enhancements, modifications, improvements, expansions and revisions of or to the Software (collectively, the "District Modifications"), all right, title and interest in and to such District Modifications, as well as related copyright, patent, trade secret, and other related proprietary rights therein, shall rest with District, provided that District agrees that it will only use such District Modifications for District business. District shall have no obligation to make such District Modifications available to Vendor, but to the extent that District Modifications are provided to Vendor, they will be provided AS IS, WITHOUT WARRANTY OF ANY KIND, AND DISTRICT SPECIFICALLY DISCLAIMS IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

19. AUDIT

19.1 Vendor is responsible for keeping accurate records related to its performance and obligations under this Agreement.

19.2 Vendor agrees that District or its authorized representative has the right to audit any directly pertinent books, documents, papers and records related to transactions and/or performance of the terms and conditions of the Agreement. Vendor shall make available to District or its representative all such records and documents for audit on Vendor's premises during regular business hours within ten (10) business days of a written request for availability.

19.3 District's right to audit shall also apply to agents and subcontractors hired by Vendor for the purpose of fulfilling the Agreement.

20. DISPUTE RESOLUTION

20.1 Designated Vendor and District Project Managers shall meet as often as is reasonably required to review the performance of the parties under this Agreement and to resolve any disputes.

20.2 If a dispute arises and these representatives are unable to resolve the dispute within ten (10) business days, then the dispute will be escalated to an executive level representative of each party with the authority to resolve such matters. Vendor and District executives must meet to resolve any disputes.

20.3 This article does not prohibit a party from seeking judicial relief at any time.

20.4 Vendor shall continue performance of obligations under this Agreement while resolving any outstanding invoices or disputes.

21. ASSIGNMENT

This Agreement shall be binding on the parties and their successors (through merger, acquisition or other process) and permitted assigns. Neither party may assign, delegate or otherwise transfer its obligations or rights under this Agreement to a Third Party without the prior written consent of the other party.

22. GOVERNING LAW

This Agreement shall be governed by, and construed in accordance with, the laws of the State of California, excluding its conflicts of laws provisions. Any dispute, claims, demands or actions arising out of or in relation to this Agreement, or the interpretation, making, performance, breach or termination thereof shall be brought in and resolved by the Superior Court of the County of San Diego, California or in the Federal District Court that has jurisdiction over San Diego, California.

23. NAMES AND LOGOS

Vendor may not advertise that District is a client, list District as a reference or otherwise use District's name, logos, trademarks, etc. without prior written permission obtained from District personnel authorized to permit District brand use.

24. NOTICES

24.1 All notices, requests, consents, approvals, or authorizations in connection with this Agreement (collectively, "Notices") must be given in writing, sent by personal delivery, messenger, overnight delivery service, or the United States mail, postage prepaid, certified or registered, return receipt requested, and addressed as follows:

If to Vendor:

If to District:

24.2 All Notices sent in accordance with the foregoing shall be deemed received by the intended recipient: (a) upon personal delivery; or (b) one (1) business day following deposit with an overnight courier service submitted in time for next day delivery.

24.3 Either party may change its notice contact information above by written notice to the other party.

25. SEVERABILITY

25.1 The terms of this Agreement are severable. If any provision of this Agreement, or any portion thereof, is declared by a court of competent jurisdiction to be illegal, void, invalid or unenforceable, that provision of the Agreement will be enforced to the maximum extent permissible so as to effect the intent of the parties, and the remainder of the Agreement will continue in full force and effect for the same purpose.

25.2 In the event that any provision shall be held to be illegal, void, invalid or unenforceable, that provision shall in good faith be renegotiated to reflect as closely as possible the intent of the original provisions of this Agreement in a manner that is valid and enforceable.

26. WAIVER

26.1 No waiver of any right or remedy under this Agreement shall be effective unless such waiver is in writing signed by the performing or non-breaching party.

26.2 The waiver of any performance required under this Agreement or of any breach of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent failure to perform or breach of the same or any other provision of this Agreement.

26.3 The delay or omission by either party to exercise any right or remedy under this Agreement shall not be construed to be either acquiescence or the waiver of the ability to exercise any right or remedy in the future.

27. BANKRUPTCY

27.1 The rights granted under the Agreement, as amended hereby, shall be deemed a license of “intellectual property” for purposes of the United States Code, Title 11 (“Bankruptcy Code”), Section 365(n).

27.2 In the event of the bankruptcy of Vendor and a subsequent rejection of this Agreement pursuant to Section 365(a) of the Bankruptcy Code, or in the event of a similar action under applicable law, District may elect to retain its rights in the Software, subject to and in accordance with the provisions of the Section 365(n) of the Bankruptcy Code or other applicable law.

28. FORCE MAJEURE

Neither party shall be liable to the other for failure or delay of performance hereunder due to earthquake, flood, storm, fire, epidemics, acts of government, governmental agencies or officers, war, insurrection, riots, civil disturbances, or any other cause beyond the reasonable control of the non-performing party. The non-performing party will promptly notify the other party in writing of an event of force majeure, the expected duration of the events, and its anticipated effect on the ability of the party to perform its obligations, and make reasonable effort to remedy the event of force majeure in a timely fashion.

29. COUNTERPARTS

This Agreement may be executed in multiple counterparts, each of which when so executed and delivered shall be deemed an original, and such counterparts together shall constitute one and the same instrument. Each party shall receive a duplicate original of the counterpart copy or copies executed by it. For purposes hereof, a facsimile or emailed copy of this Agreement, including the signature pages hereto, shall be deemed an original, and each party agrees that it will not contest the validity of the execution of this Agreement solely on the basis of any signature being a facsimile or electronic transmission. Notwithstanding the foregoing, the parties shall each deliver original execution copies of this Agreement to one another as soon as practicable following execution thereof. If this Agreement is executed in counterparts, no signatory hereto shall be bound by this Agreement until all parties have executed a counterpart of this Agreement.

30. HEADINGS

The section headings in this Agreement are inserted for convenience only, are not substantive, and shall not be interpreted to define, describe, modify or otherwise limit the interpretation or scope of the provision under the section heading or of the Agreement as a whole.

31. ENTIRE AGREEMENT

This Agreement, together with all of the incorporated exhibits, schedules, attachments, and proposals and addenda, constitutes the entire, final and exclusive Agreement between the parties with respect to the subject matter herein and supersedes all prior and contemporaneous agreements, understandings, negotiations and discussions, whether oral or written, between the parties. The parties expressly disclaim the right to claim the enforceability or effectiveness of any oral modifications to this Agreement or any amendments based on course of dealing, waiver, release, estoppel or other similar legal theory. No shrink-wrap, click-wrap, or other end user terms and conditions or agreements ("Additional Terms") provided with any Software or products hereunder shall be binding on District, even if use of such Software or products requires an affirmative "acceptance" of those Additional Terms before access is permitted. All such Additional Terms shall be of no force and effect and shall be deemed rejected by District in their entirety. Any amendment or modification to this Agreement shall be effective only if in writing and signed by duly authorized representatives of both Vendor and District.

The authorized signatory from each party has read the Agreement, understands it and is authorized to bind his/her organization. This Agreement becomes binding when signed by the authorized signatory of both parties.

IN WITNESS WHEREOF, the parties have entered into this Agreement as of the Effective Date.

[VENDOR NAME]

**SOUTHWESTERN COMMUNITY
COLLEGE DISTRICT**

By: _____

By: _____

Print Name: _____

Print Name: _____

Title: _____

Title: _____

Date: _____

Date: _____