

R2015-0585

DEPARTMENT OF JUSTICE
OFFICE OF THE
ATTORNEY GENERAL
MAY 05 2015
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SOFTWARE LICENSE AND PROFESSIONAL SERVICES AGREEMENT

THIS SOFTWARE LICENSE AND PROFESSIONAL SERVICES AGREEMENT ("Agreement") is hereby entered into between PALM BEACH COUNTY, a Political Subdivision of the State of Florida, by and through its BOARD OF COUNTY COMMISSIONERS ("Contractor"), and the Government of the U.S. Virgin Islands, by and through its Department of Property and Procurement, on behalf of its Department of Licensing & Consumer Affairs ("Government") on the following terms and conditions:

WITNESSETH:

WHEREAS the Government is in need of the continued services of the Contractor to upgrade and enhance its website and web-based business license application, which duties and responsibilities are more particularly described in Addendum I (Statement of Work) attached hereto; and

WHEREAS, Contractor represents that it is willing and capable of providing such services; and

WHEREAS, the Government and Contractor are governmental entities, the Government's authority to enter into this Agreement is codified at Chapter 23 of Title 31, Virgin Islands Code and the Contractor's authority to enter into this Agreement is codified at Section 125.01 of the Florida Statutes.

NOW THEREFORE, in consideration of the mutual covenants herein contained, and intending to be legally bound by this written instrument, the parties hereto do covenant and agree as follows:

1. Licensed Product. The parties are entering into this Agreement to establish an arrangement whereby Contractor is licensing certain application software programs and providing professional services, as more fully described in Addendum I to this Agreement, (the "Statement of Work") on the terms and conditions set forth herein.
2. Scope of Use.
 - a. Delivery & Installation. The Contractor shall be responsible for providing access to the Licensed Product.
 - b. Operating License. The Government is granted a nonexclusive license to use the Licensed Product for the Government's internal use only.
 - c. Transfer of License. Except as specifically authorized in another provision of this Agreement, neither this Agreement, nor any rights or obligations hereunder, may be transferred, assigned, delegated, sublicensed, relocated or moved without Contractor's prior written consent.
3. Term. This Agreement shall commence **October 1, 2014** and shall terminate on **September 30, 2016**. The Contract can be extended for two additional one-year terms by executing an Exercise of Renewal Option Form. Notice of option to renew must be provided at least ninety (90) days prior to the termination date of the Agreement.

4. Compensation. The Government, in consideration of the satisfactory performance of the services described in Addendum I (Statement of Work), agrees to pay Contractor compensation not to exceed THREE HUNDRED TWENTY-EIGHT THOUSAND DOLLARS (\$328,000.00) in accordance with the provisions set forth in Addendum II of this Agreement as follows:
 - a. Professional Services fee, which shall cover maintenance and support services, not to exceed \$216,400, which shall be invoiced on a monthly basis.
 - b. Monthly Software Lease Fee of \$1,650 per month with the monthly installment due and payable by the first day of the month. Contractor retains the option to review the Software Lease Fee on an annual basis and reserves the right to adjust said fee based upon actual costs; provided, however, that no adjustment shall be greater than 10% of the fee for the previous year.
 - c. Monthly Application Hosting Service Fee not to exceed \$3,000 with monthly installment due and payable by the first day of the month.

Contractor shall invoice the Government monthly in arrears for Software Lease and Application Hosting Services. The Government shall use its best efforts to pay the subject invoices within THIRTY (30) days of receipt of the invoices. Failure of the Government, despite its best efforts, to pay an invoice within THIRTY (30) days of receipt of the invoice shall not be interpreted as an indication that the Government no longer desires Contractor's services.

Contractor shall separately invoice the Government on a monthly basis for Professional Services. The invoices shall specify the hours worked and the services provided. The invoices shall be subject to review and approval by the Government. The Government shall use its best efforts to, within THIRTY (30) days of receipt an invoice, pay the subject invoice in full or give a written explanation for non-payment of any contested portions of the invoice. Failure of the Government, despite its best efforts, to respond to a Professional Services invoice within THIRTY (30) days of receipt of the invoice shall not be interpreted as an indication that the Government no longer desires Contractor's professional services.

5. Acceptance and Training. The Licensed Product shall be deemed accepted by the Government upon installation and demonstration of its fitness for the particular purpose it was purchased by the Government. The Contractor shall, at no additional cost, provide training to Government personnel who will be utilizing the Licensed Product.
6. Travel. In addition to the compensation for services as specified in Paragraph 4 above, the Government agrees to pay documented transportation, subsistence, lodging and other travel expenses, while in travel status, for trips which have been authorized in writing in advance by the Government. These costs shall be advanced or reimbursed on the same basis as is

applicable to non-contract employees of the Government and the total of said costs and expenses shall not exceed \$10,000.

7. Program Code & Documentation.

- a. Program Code. No source code or technical-level documentation are licensed under this Agreement.
- b. Program Documentation. Contractor shall provide an electronic copy of "Documentation" describing in reasonable detail understandable by a user of general proficiency the use and operation of the Licensed Product at no cost to the Government. Documentation may be reproduced by the Government for the exclusive use of the Government.

8. Confidential & Proprietary Information.

- a. Acknowledgment. The Government hereby acknowledges that the Licensed Product (including any Documentation, source code, translations, compilations, partial copies and derivative works) contains confidential and proprietary information belonging exclusively to the Contractor or such third party as may be identified on the Licensed Project or applicable Documentation ("Confidential & Proprietary Information"). Confidential & Proprietary Information does not include: (i) information already known or independently developed by the Government outside the scope of this relationship by personnel not having access to any Confidential & Proprietary Information, (ii) information in the public domain, or (iii) information received by the Government from a third party who was free to disclose it.
- b. Covenant. With respect to the Confidential & Proprietary Information, and except as expressly authorized herein, the Government agrees that during the term of this Agreement and at all times thereafter it shall not use, commercialize or disclose such Confidentiality & Proprietary Information to any person or entity, except its own employees having a "need to know" (and who themselves are bound by similar nondisclosure restrictions), and to such other recipients as the Contractor may approve in writing. Neither the Government nor any recipient shall: (i) alter or remove from any Licensed Product or associated Documentation any proprietary, copyright, trademark or trade secret legend, or (ii) decompile, disassemble or reverse engineer the Licensed Product or other Confidentiality & Proprietary Information (and any information derived in violation of such covenant shall automatically be deemed Confidential & Proprietary Information owned exclusively by the Contractor). The Government and its personnel shall use the same degree of care in safeguarding the Confidential & Proprietary Information as that used in safeguarding its own confidential information. Upon termination, the Government shall return or destroy all Confidential & Proprietary Information in its possession or control and cease all further use thereof.

- c. Injunctive Relief. The Government acknowledges that violation of this Section would cause irreparable harm to Contractor not adequately compensable by monetary damages. In addition to other relief, the Government agrees that, to the extent permitted by law, injunctive relief shall be available to prevent any actual or threatened violation of such provisions.

9. Warranties.

- a. Noninfringement Warranty. Contractor represents and warrants that the Licensed Product, when properly used as contemplated herein will not infringe or misappropriate any United States copyright, trademark, patent, or the trade secrets of any third persons. Upon being notified of such a claim, Contractor shall (i) defend through litigation or obtain through negotiation the right of the Government to continue using the Licensed Product, (ii) rework the Licensed Product as to make it noninfringing while preserving the original functionality, or (iii) replace the Licensed Product with functionally equivalent software. If none of the foregoing alternatives provide an adequate remedy, the Government may terminate all or any part of this Agreement and recover amounts paid for the infringing Licensed Product.
- b. Limited Performance Warranty. Contractor represents and warrants for a period of 60 days from acceptance ("Warranty Period") that it will ensure the Licensed Product operates in accordance with the applicable Documentation provided, that the Licensed Product is installed, implemented and operated in accordance with all instructions supplied by Contractor; (ii) the Government has properly installed all updates made available with respect to the Licensed Product and updates recommended by Contractor with respect to any third party software products (including operating system software) that materially affects the performance of the Licensed Product; (iii) The Government has properly maintained all associated equipment, software and environmental conditions in accordance with applicable specifications and industry standards; and (iv) the Government has not introduced other equipment or software creating an adverse impact on the Licensed Product.
- c. Warranty Disclaimer. EXCEPT AS SPECIFICALLY PROVIDED IN THIS SECTION ("WARRANTIES") THE CONTRACTOR HEREBY DISCLAIMS WITH RESPECT TO ALL LICENSED PRODUCTS, SUPPORT SERVICES OR OTHER DELIVERABLES PROVIDED HEREUNDER, ALL EXPRESS AND IMPLIED WARRANTIES, EXCEPT THE WARRANTY OF TITLE AND THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

10. Indemnification. [Omitted]

- 11. Limitation on Liability. By entering into this Agreement, neither the Government nor Contractor and their agencies waive sovereign immunity or any other immunity defenses

that may be extended to them by operation of law, including limitations on the amount of damages that may be awarded or paid.

12. Liability of Others. Nothing in this Agreement shall be construed to impose any liability upon Government persons, firms, associations, or corporations engaged by Contractor as servants, agents, independent contractors, or in any other capacity whatsoever, or make the Government liable to any such persons, firms, associations or corporations for the acts, omissions, responsibilities, obligations and taxes of Contractor of whatsoever nature, including but not limited to unemployment insurance and social security taxes for Contractor, its servants, agents or independent contractors.

No provision of this Contract is intended to, or shall be construed to, create any third party beneficiary or to provide any rights to any person or entity not a party to this Contract, including but not limited to any citizen or employees of the Contractor and/or Government.

13. Independent Contractor. The Contractor shall perform this Agreement as an independent contractor and nothing herein contained shall be construed to be inconsistent with this relationship or status.
14. Access and Audits. The Government shall maintain adequate records to justify all expenses and costs incurred for at least three (3) years after completion or termination of the Agreement. The County shall have access to such books, records, and documents as required in this section for the purpose of inspection or audit during normal business hours, at the County's place of business.

Palm Beach County has established the Office of the Inspector General in Palm Beach County Code, Section 2-421 – 2-440, as may be amended. The Inspector General's authority includes but is not limited to the power to review past, present and proposed County contracts, transactions, accounts and records, and to audit, investigate, monitor, and inspect the activities of the Government.

Failure to cooperate with the Inspector General or interference or impeding any investigation shall be in violation of Palm Beach County Code, Section 2-421 – 2-440, and punished pursuant to Section 125.69, Florida Statutes, in the same manner as a second degree misdemeanor.

15. Right to Withhold. If work under this Contract is not performed in accordance with the terms hereof, Government will have the right to withhold out of any payment due to Contractor, such sums as the Government may deem reasonable to protect it against loss or to assure payment of claims arising there from, and, at its option, the Government may apply such sums in such manner as the Government may deem reasonable to secure itself or to satisfy such claims. The Government will immediately notify the Contractor in writing of the specifics of the issue in the event that it elects to exercise its right to withhold.

No such withholding or application shall be made by the Government if and while Contractor gives satisfactory assurance to the Government that such claims will be paid by the Contractor or its insurance carrier, if applicable, in the event that such contest is not successful.

16. Condition Precedent. This Agreement shall be Subject to the availability and appropriation of funds and to the approval of the Governor.
17. Termination. Either party will have the right to terminate this contract, without penalty, with or without cause on SIXTY (60) days written notice to the other party specifying the date of termination.
18. Non-Discrimination. The Government warrants and represents that all of its employees are treated equally during employment without regard to race, color, religion, disability, sex, age, national origin, ancestry, marital status, familial status, sexual orientation, gender identity and expression, or genetic information.
19. Governing Law and Jurisdiction. This Agreement shall be governed by the laws of the United States Virgin Islands. Jurisdiction over this Agreement is exclusive in the District Court of the United States Virgin Islands.
20. Dispute Resolution.
 - a. Mediation. The Government and Contractor agree that in the event of any controversy, claim or dispute arising out of or relating to this Agreement the parties shall first seek resolution of such controversy, claim or dispute through mediation. The mediation shall be conducted in the U.S. Virgin Islands by a mediator mutually acceptable to the parties, who shall conduct the mediation pursuant to the rules of the American Mediation Association. The mediator's fee shall be shared equally by both parties. Other than the mediator's fee, the parties shall bear in full their respective costs all other costs relating to the mediation.
 - b. Arbitration. In the event the parties cannot resolve through mediation a controversy, claim or dispute arising out of or relating to this Agreement, the parties agree such controversy, claim or dispute shall be resolved and determined by binding arbitration in accordance with the Commercial Rules of the American Arbitration Association and judgment on the award rendered by the arbitrator shall be entered by the District Court of the U.S. Virgin Islands. The parties shall choose a mutually acceptable arbitrator, who shall meet the requirements of the American Arbitration Association. The arbitration shall be conducted in the U.S. Virgin Islands and shall be completed within sixty (60) days of the arbitration notice submitted to the arbitrator, unless otherwise agreed to by the parties. In rendering an award, the arbitrator shall determine the rights and obligations of the parties according to the laws of the U.S. Virgin Islands. The award must be based on and accompanied by a written decision (to be considered a component of the award) explaining the

factual and legal basis for the award as to each of the controverted issues at the hearing. The award shall be conclusive and binding as to the facts so found, and may thereafter be entered as a judgment by the U.S. Virgin Islands District Court. All decisions of the arbitrator shall be final, binding, and conclusive on the parties. To the extent permitted by law, in the event of arbitration, the prevailing party shall be entitled to recover as an element of its costs of suit, and not as damages, reasonable attorneys' fees to be fixed by the arbitrator. Other than said attorneys' fees, the prevailing party may not recover any other portion of its costs of the suit; provided, however, that the arbitrator's fee shall be shared equally by both parties, regardless of which party prevails.

21. Waivers and Amendments. No waiver, modification or amendment of any term, condition or provision of this Agreement shall be valid or of any force or effect unless made in writing, signed by the parties hereto or their duly authorized representative, and specifying with particularity the nature and extent of such waiver, modification or amendment. Any such waiver, modification or amendment in any instance or instances shall in no event be construed to be a general waiver, modification or amendment of any of the terms, conditions or provisions of this Contract, but the same shall be strictly limited and restricted to the extent and occasion specified in such signed writing or writings.

The Government reserves the right to make changes to the Statement of Work, including alterations, reductions therein or additions thereto. Upon receipt by the Contractor of the Government's notification of a contemplated change, the Contractor shall, in writing: (1) provide a detailed estimate for the increase or decrease in cost due to the contemplated change, (2) notify the Government of any estimated change in the completion date, and (3) advise the Government if the contemplated change shall affect the Contractor's ability to meet the completion dates or schedules of this Agreement.

If the Government so instructs in writing, the Contractor shall suspend work on that portion of the Statement of Work affected by a contemplated change, pending the Government's decision to proceed with the change.

No change to the Statement of Work shall be valid or of any force unless made in writing, signed by the parties thereto, and the writing satisfies the requirements of Virgin Islands public contract procedures.

22. Assignment. The Contractor shall not assign or subcontract any part of the services under this Agreement without the prior written consent of the Government.
23. Effective Date. The Agreement will become effective upon execution of the Governor of the United States Virgin Islands.
24. Notices. Any notice required to be given by the terms of this Agreement shall be deemed to have been given when the same is sent by certified mail, return receipt requested, postage

prepaid, personally delivered or by any overnight delivery service requiring signed acceptance, addressed to the parties as follows:

Government

Commissioner
Department of Property and Procurement
Sub Base, Building No. 1
St. Thomas, Virgin Islands 00802

and

Commissioner
Department of Licensing and Consumer Affairs
3000 Golden Rock Shopping Center, Christiansted
St. Croix, VI 00820-4311

Contractor

Deputy Director,
IT Operations Information Systems Services
301 N. Olive Avenue, 8th Floor
West Palm Beach, FL 33401

and

County Attorney
Palm Beach County Attorney's Office
301 North Olive Avenue, Suite 601
West Palm Beach, FL 33401

25. Entire Agreement. This Agreement constitutes the entire agreement between the parties hereto, and all other understandings or communications, written or oral, with respect to the services that are the subject matter of this Agreement, are merged herein. None of the provisions, terms, and conditions contained in this Agreement may be added to, modified, superseded or otherwise altered, except by written instrument executed by the parties hereto.
26. Severability. In the event that any provision of this Agreement shall be held to be invalid, the validity of the remaining provisions of the Agreement shall not in any way be affected thereby.
27. Authority. The Government and Contractor acknowledge that they are each governmental entities. The Government and Contractor each warrant that its execution and delivery of this Agreement is duly authorized by law and that the Agreement when fully executed will constitute the legal, valid, and binding obligation of each party.
28. Other Provisions. The Addenda attached hereto are a part of the Agreement and are incorporated herein by reference. In the event of a conflict between the terms of any

addenda to this Agreement and the terms of this Agreement, the terms of this Agreement shall prevail.

29. Excusable Delays. The Contractor shall not be considered in default by reason of any failure in performance if such failure arises out of causes reasonably beyond the control of the Contractor or its subcontractors and without their fault or negligence. Such causes include, but are not limited to, acts of God, force majeure, natural or public health emergencies, labor disputes, freight embargos, and abnormally severe and unusual weather conditions.

IN WITNESS WHEREOF, and intending to be legally bound, the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

R2015-0585

PALM BEACH COUNTY, FL
BY ITS BOARD OF COUNTY COMMISSIONERS

By: Shelley Vana MAY 05 2015
Mayor Shelley Vana Date

SHARON R. BOCK
CLERK & COMPTROLLER
By: Nancy Powell MAY 05 2015
Deputy Clerk Date

APPROVED AS TO FORM AND
LEGAL SUFFICIENCY

By: Paul F. J. 4/22/15
Assistant County Attorney Date

APPROVED AS TO TERMS AND CONDITIONS

By: Steven Bordelon 4-22-15
Steve Bordelon Date
Director, Information Systems Services

WITNESSES:

GOVERNMENT OF THE
UNITED STATES VIRGIN ISLANDS

Seaside L. Driol

[Signature]

8/6/15
Date

Randolph N. Bennett
Commissioner Designee
Department of Property & Procurement

[Signature]

[Signature]

4-20-15
Date

Devin F. Carrington, Esq.
Commissioner Designee
Department of Licensing & Consumer Affairs

APPROVED:

[Signature]

Honorable Kenneth E. Mapp
Governor, U.S. Virgin Islands

09-02-15
Date

APPROVED TO LEGAL SUFFICIENCY
DEPARTMENT OF JUSTICE

By: [Signature]

7/29/15
Date