



2000 West Sam Houston Parkway South, Houston, TX 77042

Office: 713.881.5300 Customer Service: 713.881.5353 Fax: 713.881.5330

**MAINTENANCE AGREEMENT**

**Avaya Partner Support Services With EXPERT Systems (sm)**

Proposal Submitted to:

Effective Date:

10/1/2009

Fort Bend County (All ECG Locations)

Expiration Date:

9/30/2010

Buyers Name

Address

City State Zip

Charles King 281-341-4584

Contact & Telephone Number

Please choose a method of invoice

\*\*TAX EXEMPT\*\*

Monthly Charge:\*

\$8,640.77

Work to be Performed at:

Fort Bend County

Buyers Name

Address

City State Zip

**THIS CONTRACT COVERS THE FOLLOWING LOCATIONS:**

- Precinct 1 Courthouse
- Precinct 2 Agriculture
- Precinct 4 Juvenile
- Emily Court Cinco Ranch Library
- Engineering First Colony Library
- Emergency Mng. George Library
- Road & Bridge Rosenberg Annex Building

**Contract Maintenance**

Please Note: This agreement covers the Switches and Voice Mails. Telephone sets are not covered.

Please refer to Addendum B for Items Excluded from being covered under this agreement.

This comprehensive maintenance contract covers the failure of equipment, as per the attached terms and conditions except for equipment damaged by misuse or acts of God. By signing below, customer agrees to and understands the terms and conditions. An invoice for the agreed price plus applicable sales tax will be forwarded.

Steve Ferguson, President

DataVox, Inc. Representative

[Signature]  
DataVox Approval

09/30/09

Date Approved

Fort Bend County (All ECG Locations)

Accepted By (Company Name)

[Signature]  
Signature & Title of Company Representative

Robert Hebert, County Judge

October 6, 2009

Date Approved

10-8-09 COPY received

## **Addendum B to the County of Fort Bend**

This **Addendum B** entered into by and between **Fort Bend County** and **DataVox, Inc.** (DataVox) outlines the provisions by which each party agrees to accept once the Addendum has been executed by both parties.

### **Sites Covered under this Agreement**

The following sites are to have their switches and voice mails covered under a DataVox PSS Maintenance Agreement and DataVox's Terms and Conditions:

- Precinct 2 – 2920172
- George Library – 2920109
- Engineering – 4491818
- Emergency Management – 2920113 (Switch and Voice Mail)
- Courthouse – 2920093
- Rosenberg Annex Building – 3643876 (Switch and Voice Mail)
- Agriculture – 3643876
- Road & Bridge – 2920150 (Switch and Voice Mail)
- Precinct 4 – 5010917
- Juvenile – 5007857
- Cinco Ranch Library – 5006489
- First Colony Library – 5015198
- Precinct 1 – 5081077
- Emily Court - 5085977

### **Items Excluded from Coverage**

The DataVox Maintenance Agreement covers the **Switches and Voice Mails only**, which includes cabinets, carriers, circuit packs, gateways and power supplies, servers and excludes all other adjunct items including but not limited to the following parts:

- CSU/DSU's
- All Battery Back Ups **EXCEPT** for the Courthouse APC Batter Back Up.
- All terminals including digital, analog, IP, soft phone and wireless sets
- All data equipment
- All paging equipment including all horns, speakers and amps

# MAINTENANCE AGREEMENT

## TERMS AND CONDITIONS

### 1. MAINTENANCE OBLIGATIONS

DataVox, Inc. (DataVox) hereby agrees to service and maintain the equipment per attached Addendum A, in accordance with the following provisions: Upon Customers request, DataVox will make annual inspection of the equipment to keep it in good working condition, and at such times to provide normal repair and maintenance service, including labor and materials. In addition, within twenty-four (24) hours of the Customer's request, during regular business hours (Monday – Friday 8 AM – 5 PM), DataVox will provide regular repair of malfunctions which originate within the equipment. Emergency service, involving an equipment outage of all or a substantial part of the installed system, will be provided within four (4) hours of the Customer's request. During annual inspections and at other times, DataVox will replace defective parts on an exchange basis without charge.

This agreement, however, does not cover the replacement of parts rendered inoperative by misuse or damage; nor parts lost or stolen or damaged by accident or negligence or by lightning or acts of God. Further, maintenance does not include labor and material cost of additions to, rearrangements, relocation, or removal of equipment.

The Customer understands and agrees that the equipment is very sophisticated and complex, and that DataVox has advised that only qualified personnel be permitted to perform service, maintenance or other work on the equipment. Accordingly, the Customer understand and agrees that if non qualified persons perform service, maintenance, repair or any other work on the equipment, THIS MAINTENANCE AGREEMENT AND THE WARRANTY PROVIDED HEREUNDER WILL IMMEDIATELY TERMINATE AND BE OF NO FURTHER EFFECT. Thereafter, if DataVox is requested to perform any service, maintenance, repair or any other work on the equipment, INCLUDING EMERGENCY SERVICES, such services will be furnished at DataVox's then applicable rates for time and material and shall be subject to regular scheduling. Further, if the Customer requests service outside the scope of the Agreement, such repair or services will be furnished at DataVox's then applicable rates for time and material and subject to regular scheduling. In addition, any equipment added to the phone system which is connected to the system must be installed by qualified persons. If the work is performed by persons other than DataVox, the Customer agrees to inform DataVox before the work is performed.

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### 2. PARTS REPLACEMENT

All Replacement Parts will be shipped from AVAYA for delivery Next Business Day (NBD) from 8:00 AM -5:00 PM, Monday through Friday. DataVox will replace parts required during an emergency on a "best effort" basis by replacing the parts out of existing inventory. If DataVox does not have the replacement part in stock and if the Customer requests the part to be replaced more rapidly than the contracted NBD replacement from AVAYA, then the Customer agrees to pay Avaya's Current expedite charge to have emergency parts delivered after hours. Currently the expedite charge is based on an hourly rate off \$600.00/hr with a 4 hr minimum.

### 3. EXPERT SYSTEMS (SM)

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### 4. PAYMENT

The Customer agrees to pay DataVox the annual charges set forth on the reverse side of the Agreement, and any charges incurred by reason of Paragraph 1 above. Charges are due within thirty (30) days of Customer's receipt of invoice

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### 5. TERM, OPTION TO RENEW

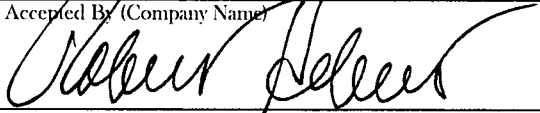
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### 6. MISCELLANEOUS

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Fort Bend County

Accepted By (Company Name)



Signature & Title of Company Representative

Robert Hebert, County Judge

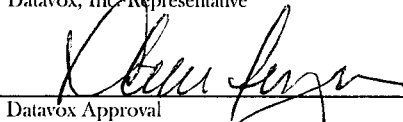
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October 6, 2009

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Datavox Approval

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Brian M. Deats

Datavox, Inc. Representative

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Datavox Approval

Signature & Title of Company Representative

08/05/09

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Date Approved

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\_\_\_\_\_  
Accepted By (Company Name)

\_\_\_\_\_  
Signature & Title of Company Representative

\_\_\_\_\_  
Printed & Title of Company Representative

\_\_\_\_\_  
Date Approved

Steve Ferguson      V. P.  
Datavox, Inc. Representative

\_\_\_\_\_  
Datavox Approval

\_\_\_\_\_  
Date Approved

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Please choose a method of invoice  
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\_\_\_\_\_  
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Monthly Charge: \* \$8,475.54

Charles King 281-341-4584  
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Brian M. Deats  
Datavox, Inc. Representative

\_\_\_\_\_  
Datavox Approval

08/20/08  
Date Approved

Fort Bend County (All ECG Locations)  
Accepted By (Company Name)

\_\_\_\_\_  
Signature & Title of Company Representative

Robert Hebert, County Judge  
10-28-08  
Date Approved

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Accepted By (Company Name)


Signature & Title of Company Representative

Printed & Title of Company Representative

Date Approved

Steve Ferguson V. P.

Datavox, Inc. Representative

 V.P.  
Datavox Approval

10/14/08  
Date Approved

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Datavox Approval

11/14/07

Date Approved

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Signature & Title of Company Representative

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January 15, 2008

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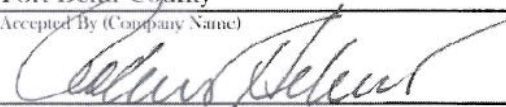
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Accepted By (Company Name)

Signature & Title of Company Representative

Robert Hebert, County Judge

Printed & Title of Company Representative

**January 15, 2008**

Date Approved

**Steve Ferguson V. P.**

Datavox, Inc. Representative

Datavox Approval

Date Approved

## **MAINTENANCE AGREEMENT TERMS AND CONDITIONS**

### **1. MAINTENANCE OBLIGATIONS**

DataVox, Inc. (DataVox) hereby agrees to service and maintain the equipment per attached Addendum A, in accordance with the following provisions: DataVox will make annual inspection of the equipment to keep it in good working condition, and at such times to provide normal repair and maintenance service, including labor and materials. In addition, within twenty-four (24) hours of the Customer's request, during regular business hours (Monday – Friday 8 AM – 5 PM), DataVox will provide regular repair of malfunctions which originate within the equipment. Emergency service, involving an equipment outage of all or a substantial part of the installed system, will be provided within four (4) hours of the Customer's request. During annual inspections and at other times, DataVox will replace defective parts on an exchange basis without charge.

This agreement, however, does not cover the replacement of parts rendered inoperative by misuse or damage; nor parts lost or stolen or damaged by accident or negligence or by lightning or acts of God. Further, maintenance does not include labor and material cost of additions to, rearrangements, relocation, or removal of equipment.

The Customer understands and agrees that the equipment is very sophisticated and complex, and that DataVox has advised that only qualified personnel be permitted to perform service, maintenance or other work on the equipment. Accordingly, the Customer understand and agrees that if non qualified persons perform service, maintenance, repair or any other work on the equipment, THIS MAINTENANCE AGREEMENT AND THE WARRANTY PROVIDED HEREUNDER WILL IMMEDIATELY TERMINATE AND BE OF NO FURTHER EFFECT. Thereafter, if DataVox is requested to perform any service, maintenance, repair or any other work on the equipment, INCLUDING EMERGENCY SERVICES, such services will be furnished at DataVox's then applicable rates for time and material and shall be subject to regular scheduling. Further, if the Customer requests service outside the scope of the Agreement, such repair or services will be furnished at DataVox's then applicable rates for time and material and subject to regular scheduling. In addition, any equipment added to the phone system which is connected to the system must be installed by qualified persons. If the work is performed by persons other than DataVox, the Customer agrees to inform DataVox of work performed.

In the performance of all of these various services, DataVox shall have, and the Customer hereby grants, full and unrestricted access to the premises on which the equipment is located.

### **2. PARTS REPLACEMENT**

All Replacement Parts will be shipped from AVAYA for delivery Next Business Day (NBD) from 8:00 AM -5:00 PM, Monday through Friday. DataVox will replace parts required during an emergency on a "best effort" basis by replacing the parts out of existing inventory. If DataVox does not have the replacement part in stock and if the Customer requests the part to be replaced more rapidly than the contracted NBD replacement from AVAYA, then the Customer agrees to pay Avaya's Current expedite charge to have emergency parts delivered after hours. Currently the expedite charge is based on an hourly rate of \$600.00/hr with a 4 hr minimum.

### **3. EXPERT SYSTEMS (SM)**

EXPERT Systems (SM) will monitor and work all alarms received 24 x 7. In those cases where EXPERT Systems (SM) is unable to resolve an alarm condition, Avaya's automated tools will notify DataVox who will in turn notify the Customer and discuss appropriate action.

### **4. PAYMENT**

The Customer agrees to pay DataVox the annual charges set forth on the reverse side of the Agreement, and any charges incurred by reason of Paragraph 1 above. Charges are due within thirty (30) days of Customer's receipt of invoice.

If any equipment is added to the system subsequent to the date of the installation of the equipment described above, a new charge will be computed to take into account the increased cost of servicing and maintaining the equipment added. However, such additional maintenance charge for added equipment will not take effect until the expiration of the warranty period applicable to that equipment.

### **5. TERM, OPTION TO RENEW**

The effective commencement date of this Agreement shall be the first day following the expiration of the warranty covering the equipment or date maintenance contract is signed. Any renewal shall not be automatic and shall be subject to express written agreement of the parties. Each party reserves the right to cancel and terminate the renewal of this Agreement after the first six (6) months by giving sixty (60) days notice thereof to the other with no penalties, fees or obligations.

### **6. MISCELLANEOUS**

In the performance of this Agreement, DataVox shall be liable only for the expense of providing normal repair and maintenance service, but not otherwise for consequential damages, personal injury, or commercial loss. Further, DataVox shall have no liability for any cost, expense, injury, damage or loss, direct or indirect, if the performance of such services is prevented by any event of "force majeure" including, but not limited to, declared government emergencies, civil disturbance, strikes, or other causes beyond the control of DataVox. It is expressly understood and agreed that the term "force majeure" shall include the unavailability or delayed availability of parts, components or services from a manufacturer or other third party unless such unavailability is the sole fault of DataVox. This Agreement may not be amended except by written instrument by both parties. This Agreement shall bind and benefit both parties hereto including their successors, designers, and assigns. THIS WARRANTY IS THE ONLY WARRANTY GIVEN BY DATAVOX, AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, IS EXCLUDED.

## **Addendum B to the County of Fort Bend**

This **Addendum B** entered into by and between **Fort Bend County** and **DataVox, Inc.** (DataVox) outlines the provisions by which each party agrees to accept once the Addendum has been executed by both parties.

### **Avaya Maintenance Termination**

Based on an email provided from Karen Oswald, an Avaya Representative, all Avaya Maintenance Contracts associated to Fort Bend County have been terminated as of Dec. 5<sup>th</sup> 2005. This Maintenance Agreement covers the sites listed below that are currently not being covered by any type of Avaya Maintenance and Fort Bend County been released from any financial obligations to Avaya Maintenance Services.

Sites to have their switches fully covered under a DataVox PSS Maintenance Agreement and DataVox's Terms and Conditions:

- Precinct 2 – 2920172
- George Library – 2920109
- Engineering – 4491818
- Emergency Management – 2920113
- Courthouse – 2920093
- Rosenberg Annex Building – 3643876
- Agriculture – 3643876
- Road & Bridge – 2920150
- Precinct 4 – 5010917
- Juvenile – 5007857
- Justice of Peace – 5012604
- Cinco Ranch Library – 5006489
- First Colony Library – 5015198
- Precinct 1 – 5081077
- Emily Court - 5085977

### **Intuity Voicemails**

The 3 Intuity voicemails that Fort Bend County currently utilizes (Emergency Management-2920113, Annex Building-3643876, Road & Bridge-2920150) will not be covered by DataVox. DataVox will be responsible for maintaining the voicemails but is not responsible for any hardware replacement if need be over the course of 1-year. DataVox will assist in the replacement of any hardware on a time and material basis but any normal service calls that do not involve hardware replacement will be covered under this agreement. **Please note:** If Avaya's Technical Assistance Center (TAC) support team is needed to help perform a service call on one of these voicemails then Fort Bend County will be responsible for paying for all billing and invoices sent from Avaya.

STATE OF TEXAS

COUNTY OF FORT BEND

**ADDENDUM TO DATAVOX, INC.  
MAINTENANCE AGREEMENT**

THIS ADDENDUM, entered into by and between Fort Bend County, a body corporate and politic, and DATAVOX, INC., authorized to conduct business in the State of Texas.

THAT, WHEREAS, the parties have executed and accepted that certain 'Maintenance Agreement,' as attached hereto and incorporated by reference; and

WHEREAS, the following changes are incorporated as if a part of the original 'Maintenance Agreement:'

1. Fort Bend County, Texas, is a body corporate and politic under the laws of the State of Texas and claims exemption from sales and use taxes. A copy of a tax-exempt certificate will be furnished upon request.
2. This Agreement shall not automatically renew.
3. This agreement may be terminated by any party with thirty (30) days prior written notice.
4. This Agreement shall be construed under and in accord with the laws of the State of Texas, and all obligations of the parties created hereunder are performable in Fort Bend County, Texas.
5. If there is a conflict between this Addendum and the Maintenance Agreement, the provisions of this addendum shall prevail.

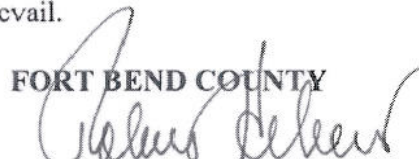
ATTEST:



Dianne Wilson, County Clerk

FORT BEND COUNTY

By:

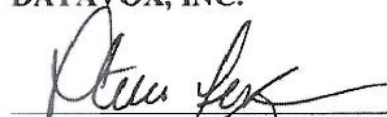
  
Robert E. Hebert, County Judge

Date:

12-12-06

DATAVOX, INC.

By:

  
Authorized Agent - Signature

STEVE FERGUSON  
Authorized Agent - Printed Name

Title:

V.P.

Date:


11/30/06



AUDITOR'S CERTIFICATE

76,000.<sup>00</sup> RE 12/15/06

I hereby certify that funds in the amount of \$ 76,788.<sup>00</sup> are available to pay the obligation of Fort Bend County within the foregoing Agreement.

  
\_\_\_\_\_  
Robert Ed Sturdivant, County Auditor

MER:Datavox addendum.2006./:2249(111406)

## **Addendum B to the County of Fort Bend**

This **Addendum B** entered into by and between **Fort Bend County** and **Datavox, Inc.** outlines the provisions by which each party agrees to accept once the Addendum has been executed by both parties.

### **Avaya Maintenance Termination**

This Maintenance Agreement is based on the knowledge that Fort Bend County has terminated all of their existing Avaya Maintenance Agreements and is not currently under any maintenance with Avaya or an Avaya Business Partner. This Maintenance Agreement covers the sites listed below that are currently not being covered by any type of Avaya maintenance and Fort Bend County will provide written documentation from Avaya that these 8 sites have been released from any financial obligations to Avaya in association to the following sites.

- Precinct 2 – 2920172
- George Library – 2920109
- Engineering – 4491818
- Emergency Management – 2920113
- Courthouse – 2920093
- Annex Building – 3643876
- Agriculture – 3643876
- Road & Bridge – 2920150

### **Intuity Voicemails**

The 3 Intuity voicemails that Fort Bend County currently utilizes (Emergency Management-2920113, Annex Building-3643876, Road & Bridge-2920150) will be covered using Avaya maintenance under Coverage 90 (Parts + Remote Service 8x5) for a 12 month period and will be obligated to Avaya's Terms and Conditions for these 3 Intuity voicemails for the length of the agreement. Datavox will be responsible for all other service calls relating to the voicemails including remote and/or onsite labor in the event our services are needed.

### **Items Excluded from Coverage**

The Datavox Maintenance Agreement covers the **Switch Only**, which includes cabinets, carriers, circuit packs and power supplies, and excludes all other adjunct items including but not limited to the following parts:

- Battery back-ups
- CSU/DSU's
- All terminals including digital, analog and wireless sets
- All data equipment
- All paging equipment including all horns, speakers and amps



### Remaining 5 Sites

Since Datavox is an Avaya Business Partner, Datavox is contractually bound to Avaya and will refrain from quoting Datavox maintenance to the 5 remaining sites:

- Precinct 4 – 5010917
- Juvenile – 5007857
- Justice of Peace – 5012604
- Cinco Ranch Library – 5006489
- First Colony Library – 5015198

If and when these 5 sites have been released from all contractual obligations to Avaya, Datavox will be able to quote Datavox maintenance to Fort Bend County on the 2 sites that have the S8500 G650's (Juvenile-5007857 and Precinct 4-5010917) but will have to quote Avaya Maintenance, Coverage 90 (Parts + Remote Service 8x5) on the 3 sites (Justice of Peace-5012604, Cinco Ranch-5006489 and First Colony Libraries-5015198) that have the S8300's.

Fort Bend County  
Accepted By (Company Name)

Deleus Deleus  
Signature & Title of Company Representative

Fort Bend County Judge  
Printed & Title of Company Representative

12/12/2006  
Date Approved

Steve Ferguson V. P.  
Datavox Inc. Representative

Steve Ferguson  
Datavox Approval

11/30/06  
Date Approved

**STATE OF TEXAS**  
**DEPARTMENT OF INFORMATION RESOURCES**  
**CONTRACT FOR PRODUCTS AND RELATED SERVICES**  
**AVAYA, INC.**

**1. Introduction**

**A. Parties**

This Contract for products and related services is entered into between the State of Texas, acting by and through the Department of Information Resources (hereinafter "DIR") with its principal place of business at 300 West 15<sup>th</sup> Street, Suite 1300, Austin, Texas 78701, and AVAYA, Inc. (hereinafter "Vendor"), with its principal place of business at 211 Mt. Airy Road, Basking Ridge, NJ 07920.

**B. Compliance with Procurement Laws**

This Contract is the result of compliance with applicable procurement laws of the State of Texas. DIR issued a solicitation on the Texas Building and Procurement Commission's Electronic State Business Daily, Request for Offer (RFO) DIR-SDD-TMP-064, on July 21, 2005, for Data Networking/Telephone System Equipment & Services. Upon execution of this Contract, a notice of award for RFO DIR-SDD-TMP-064 shall be posted by DIR on the Electronic State Business Daily.

**C. Order of Precedence**

This Contract; Appendix A, Standard Terms and Conditions For Products and Related Services Contracts; Appendix B, Vendor's Historically Underutilized Businesses Subcontracting Plan; Appendix C, Product and Pricing Index; Appendix D, Avaya Customer Agreement including General Terms, Licensing and Services; Exhibit 1, Vendor's Response to RFO DIR-SDD-TMP-064, including all addenda; and Exhibit 2, RFO DIR-SDD-TMP-064, including all addenda; are incorporated by reference and constitute the entire agreement between DIR and Vendor. In the event of a conflict between the documents listed in this paragraph, the controlling document shall be this Contract, then Appendix A, then Appendix B, then Appendix C, then Appendix D, then Exhibit 1, and finally Exhibit 2. In the event and to the extent any provisions contained in multiple documents address the same or substantially the same subject matter but do not actually conflict, the more recent provisions shall be deemed to have superseded earlier provisions.

**2. Term of Contract**

The term of this Contract shall be two (2) years commencing on the last date of approval by DIR and Vendor. Prior to expiration of the original term, DIR and Vendor may extend the Contract, upon mutual agreement, for up to two (2) optional one-year terms.

**3. Product and Service Offerings**

**A. Products**

Products available under this Contract are limited to brands identified in Appendix C Product and Pricing Index. Vendor may incorporate changes to their product offering; however, any changes must be within the scope of products awarded based on the posting described in Section 1.B above.

**B. Services**

Services available under this Contract are limited to those services identified in Appendix C Product and Pricing Index. Vendor may incorporate changes to their service offering; however, any changes must be within the scope of services awarded based on the posting described in Section 1.B above.

**4. Pricing**

**A. Manufacturer's Suggested Retail Price (MSRP)**

MSRP is defined as the product sales price suggested by the manufacturer of a product.

**B. Customer Discount**

The minimum Customer discount for all products and services will be the percentages off MSRP as specified in Appendix C Products and Pricing Index.

**C. Customer Price**

1) The price to the Customer shall be calculated as follows:

$$\text{Customer Price} = \text{MSRP} - \text{Customer Discount}$$

2) Customers purchasing products and services under this Contract may negotiate more advantageous pricing or participate in special promotional offers. In such event, a copy of such better offerings shall be furnished to DIR upon request. Vendor agrees it shall offer and make available this DIR Contract as first choice for all sales of Products and Services identified in Section 3. above to eligible Texas DIR Customers during its term.

3) If pricing for products or services available under this Contract are provided at a lower price, based on a quantity of one, to: (i) an eligible Customer who is not purchasing those products or services under this Contract or (ii) any other entity or consortia authorized by Texas law to sell said products and services to eligible Customers, then the available Customer Price in this Contract shall be adjusted to that lower price. This Contract shall be amended within ten (10) business days to reflect the lower price.

**D. DIR Administrative Fee**

The administrative fee specified in Section 5 below shall not be broken out as a separate line item when pricing or invoice is provided to Customer.

**E. Shipping and Handling Fees**

The price to the Customer under this Contract shall include all shipping and handling fees. Shipments will be Free On Board Customer's destination. No additional fees shall be charged to the Customer for standard shipping and handling. If the Customer requests expedited delivery, Customer will be responsible for any charges for expedited delivery.

**F. Tax-Exempt**

As per Section 151.309, Texas Tax Code, Customers under this Contract are exempt from the assessment of State sales, use and excise taxes. Further, Customers under this Contract are exempt from Federal Excise Taxes, 26 United States Code Sections 4253(i) and (j).

**G. Travel Expense Reimbursement**

Pricing for services provided under this Contract are exclusive of any travel expenses that may be incurred in the performance of those services. Travel expense reimbursement may include personal vehicle mileage or commercial coach transportation, hotel accommodations, parking and meals; provided, however, the amount of reimbursement by Customers shall not exceed the amounts authorized by the current State Travel Regulations. Travel time may not be included as part of the amounts payable by Customer for any services rendered under this Contract. The DIR administrative fee specified in Section 5 below is not applicable to travel expense reimbursement. Anticipated travel expenses must be pre-approved in writing by Customer.

**H. Changes to Prices**

Vendor may change the price of any product or service at any time, based upon changes to the MSRP, but discount levels shall remain consistent with the discount levels specified in this Contract. Price decreases shall take effect automatically during the term of this Contract and shall be passed onto the Customer immediately.

**5. DIR Administrative Fee**

**A)** The administrative fee to be paid by the Vendor to DIR based on the dollar value of all sales to Customers pursuant to this Contract is two percent (2%). Payment will be calculated for all sales, net of returns and credits. For example, the administrative fee for sales totaling \$100,000 shall be \$2,000.

**B)** All prices quoted to Customers shall include the administrative fee. DIR reserves the right to change this fee upwards or downwards during the term of this Contract, upon written notice to Vendor. Any change in the administrative fee shall be incorporated in the price to the Customer.

**6. Notification**

All notices under this Contract shall be sent to a party at the respective address indicated below.

If sent to the State:

Sherri Parks, Service Delivery Division  
Department of Information Resources  
300 W. 15<sup>th</sup> St., Suite 1300  
Austin, Texas 78701  
Phone: (512) 475-4700  
Facsimile: (512) 475-4759  
Email: sherri.parks@dir.state.tx.us

If sent to the Vendor:

Jenifer Bond  
Avaya, Inc.  
10213 Sunningdale Cove  
Austin, TX 78717  
Phone: (713) 852-1161  
Facsimile: (713) 852-1161  
Email: jeniferbond@avaya.com

**7. Software License and Service Agreements**

**A. Software License Agreement**

1) Customers acquiring software licenses under the Contract shall hold, use and operate such software subject to compliance with the Avaya Customer Agreement set forth in Appendix D of this Contract. No changes to the Avaya Customer Agreement may be made unless previously agreed to between Vendor and DIR. Customers may not add, delete or alter any of the language in Appendix D. Order Fulfiller shall make the Avaya Customer Agreement available to all Customers at all times.

2) Compliance with the Avaya Customer Agreement is the responsibility of the Customer. DIR shall not be responsible for any Customer's compliance with the Avaya Customer Agreement. If DIR purchases software licenses for its own use under this Contract, it shall be responsible for its compliance with the Avaya Customer Agreement.

**B. Shrink/Click-wrap License Agreement**

Software provided in conjunction with the Equipment is licensed to Customer under the license provided by the software publisher or by the equipment manufacturer with which the software is provided. Customer shall, if required, execute a separate software license agreement in a form satisfactory to the software publisher or equipment manufacturer.

**C. Service Agreement**

Services provided under this Contract shall be in accordance with the Avaya Customer Agreement General Terms as set forth in Appendix D of this Contract. No changes to the Avaya Customer Agreement General Term's terms and conditions may be made unless previously agreed to by Vendor and DIR.

**8. Authorized Exceptions to Appendix A, Standard Terms and Conditions for Product and Related Services Contracts.**

**A. Appendix A, Section 8. Contract Administration, Subsection C. Records and Audit, Paragraphs 2) and 3) are hereby amended to read as follows:**

2) Vendor and Order Fulfillers shall maintain adequate records to establish compliance with the Contract until the later of a period of four (4) years after termination of the Contract or until full, final and unappeasable resolution of all Compliance Check or litigation issues that arise under the Contract. Such records shall include per transaction: the Order Fulfiller's company name if applicable, Customer name, invoice date, invoice number, description, part number, manufacturer, quantity, unit price, extended price, Customer Purchase Order number, contact name, Customer's complete billing address, the calculations supporting each administrative fee owed DIR under the Contract, Historically Underutilized Businesses Subcontracting reports, and such other directly relevant and reasonable documentation as DIR may request.

3) Vendor and/or Order Fulfillers shall grant access to all paper and electronic records, books, documents, accounting procedures, practices and any other items relevant to the performance of the Contract to DIR, including the compliance checks designated by DIR, the State Auditor's Office and of the United States, and such other persons or entities designated by DIR for the purposes of inspecting, Compliance Checking and/or copying such books and records. Vendor and/or Order Fulfillers shall provide copies and printouts requested by DIR without charge. DIR shall provide Vendor and/or Order Fulfillers thirty (30) business days' notice prior to inspecting, Compliance Checking, and/or copying Vendor's and/or Order Fulfiller's records. Vendor's and/or Order Fulfillers records, whether paper or electronic, shall be made available during regular office hours. Audits shall be limited to once annually. Vendor and/or Order Fulfiller personnel familiar with the Vendor's and/or Order Fulfiller's books and records shall be available to DIR staff and designees as needed. Vendor and/or Order Fulfiller shall provide adequate office space to DIR staff during the performance of Compliance Check.

**B. Appendix A, Section 9. Vendor Responsibilities, Subsection A.2. Infringements Paragraphs b) and c) are hereby amended to read as follows:**

b) Avaya will have no defense or indemnity obligation for any Claim based on: (i) a Product that has been modified by someone other than Avaya; (ii) a Product that has been modified by Avaya in accordance with Customer-provided specifications or instructions; (iii) use or combination of a Product with third party products; or (iv) Customer products or third party products. To the extent allowed by Texas law and constitution, Customer will defend Avaya against any Claim, and will indemnify Avaya for any judgments, settlements and reasonable attorney's fees resulting from a Claim to the extent the Claim is based on subsection (i) or (ii) above. For the purposes of the Agreement, "third party products" means any products manufactured by a party other than Avaya, and may include, without limitation, products ordered by Customer from third parties pursuant to Avaya's recommendations. However, components of Avaya-

branded Products are not third party products if they are both: (i) embedded in Products (i.e., not recognizable as standalone items); and (ii) are not identified as separate items on Avaya's price list, quotes, order specifications forms or documentation. THE FOREGOING STATES AVAYA'S ENTIRE LIABILITY, AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDY, WITH RESPECT TO ANY INFRINGEMENT OR MISAPPROPRIATION OF ANY INTELLECTUAL PROPERTY RIGHTS OF ANY OTHER PARTY.

c) If a Product becomes, or Avaya reasonably believes use of a Product may become, the subject of a Claim, Avaya may, at its own expense and option: (i) procure for Customer the right to continue use of the Product; (ii) replace or modify the Product; or (iii) refund to Customer a pro-rated portion of the applicable fees for the Product based on a linear depreciation monthly over a five year useful life, in which case Customer will cease all use of the Product and return it to Avaya.

- C. **Appendix A, Section 9. Vendor Responsibilities, Subsection H. Security of Premises, Equipment, Data and Personnel** is hereby amended to read as follows:

**H. Security of Premises, Equipment, Data and Personnel**

Vendor and/or Order Fulfiller may, from time to time during the performance of the Contract, have access to the personnel, premises, equipment, and other property, including data, files and /or materials (collectively referred to as "Data") belonging to the Customer. Vendor and/or Order Fulfiller shall use their best efforts to ensure they do not cause damage or injury to the property or personnel of the Customer, in accordance with the instruction of the Customer. Vendor and/or Order Fulfiller shall be responsible for damage to Customer's equipment, workplace, and its contents when such damage is negligently or willfully caused by its employees or subcontractors.

- D. **Appendix A, Section 10. Contract Enforcement, Subsection B. Termination, Paragraph 3. Termination for Convenience** is hereby amended to read as follows:

**3) Termination for Convenience**

DIR or Vendor may terminate the Contract, in whole or in part, by giving the other party thirty (30) calendar day's written notice. A Customer may terminate a Purchase Order if it is determined by the Customer that Order Fulfiller will not be able to deliver product or services in a timely manner to meet the business needs of the Customer, after Customer gives the Vendor fifteen (15) days to cure the delay in progress pursuant to a written notice.

- E. **Appendix A, 10. Contract Enforcement, Subsection C. Force Majeure** is hereby amended to read as follows:

**C. Force Majeure**

DIR, Customer, or Order Fulfiller may be excused from performance under the Contract for any period when performance is prevented as the result of an act of God, strike, war,

civil disturbance, epidemic, court order or other cause beyond the suffering party's control, provided that the party experiencing the event of Force Majeure has prudently and promptly acted to take any and all steps that are within the party's control to ensure performance and to shorten the duration of the event of Force Majeure. The party suffering an event of Force Majeure shall provide notice of the event to the other parties when commercially reasonable. Subject to this provision, such non-performance shall not be deemed a default or a ground for termination. However, a Customer may terminate a Purchase Order if it is determined by the Customer that Order Fulfiller will not be able to deliver product or services in a timely manner to meet the business needs of the Customer.

This Contract is executed to be effective as of the date of last signature.

**Avaya, Inc.**

**The State of Texas, acting by and through the  
Department of Information Resources**

**Authorized By: Signature on File**

**Authorized By: Signature on File**

**Name: David Ruggiero**

**Name: Brian S. Rawson**

**Title: Vice President**

**Title: Director of Service Delivery**

**Date: 7/19/06**

**Date: 7/27/06**

**Legal: Signature on File**

**Appendix A**  
**Standard Terms and Conditions For Product and Related Services Contracts**

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The following terms and conditions shall govern the conduct of DIR and Vendor during the term of the Contract.

**1. Contract Scope**

The Vendor shall provide the products and related services specified in Section 3 of the Contract for purchase by Customers. In addition, DIR and Vendor may agree to provisions that allow Vendor and/or Order Filler to lease the products offered under the Contract. Terms used in this document shall have the meanings set forth below in Section 3.

**2. No Quantity Guarantees**

The Contract is not exclusive to the Vendor. Customers may obtain products and related services from other sources during the term of the Contract. DIR makes no express or implied warranties whatsoever that any particular quantity or dollar amount of products and related services will be procured through the Contract.

**3. Definitions**

- A. Customer** - any Texas state agency, unit of local government, institution of higher education as defined in Section 2054.003, Texas Government Code, and those state agencies purchasing from a DIR contract through an Interagency Agreement, as authorized by Chapter 771, Texas Government Code, any local government as authorized through the Interlocal Cooperation Act, Chapter 791, Texas Government Code, and the state agencies and political subdivisions of other states as authorized by Section 2054.0565, Texas Government Code.
- B. Contract** – the document executed between DIR and Vendor into which this Appendix A is incorporated.
- C. Day** - shall mean business days, Monday through Friday, except for State and Federal holidays. If the Contract calls for performance on a day that is not a business day, then performance is intended to occur on the next business day.
- D. Order Filler** – the party, either Vendor or a party that may be designated by Vendor, who is fulfilling a Purchase Order pursuant to the Contract.
- E. Purchase Order** - the Customer's fiscal form or format, which is used when making a purchase (e.g., formal written Purchase Order, Procurement Card, Electronic Purchase Order, or other authorized instrument).
- F. State** – refers to the State of Texas.
- G. TBPC** – refers to the Texas Building and Procurement Commission.

**4. General Provisions**

**A. Entire Agreement**

The Contract and its Appendices constitute the entire agreement between DIR and the Vendor. No statement, promise, condition, understanding, inducement or representation, oral or written, expressed or implied, which is not contained in the Contract or its Appendices shall be binding or valid.

**B. Modification of Contract Terms and/or Amendments**

- 1) The terms and conditions of the Contract shall govern all transactions by

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Customers under the Contract. The Contract may only be modified or amended upon mutual written agreement of DIR and Vendor.

2) Customers shall not have the authority to modify the terms of the Contract; however, additional Customer terms and conditions that do not conflict with the Contract and are acceptable to Order Fulfiller may be added in a Purchase Order and given effect. No additional term or condition added in a Purchase Order issued by a Customer can weaken a term or condition of the Contract. Pre-printed terms and conditions on any Purchase Order issued by Customer hereunder will have no force and effect. In the event of a conflict between a Customer's Purchase Order and the Contract, the Contract term shall control.

**C. Invalid Term or Condition**

1) To the extent any term or condition in the Contract conflicts with the applicable Texas and/or United States law or regulation, such Contract term or condition is void and unenforceable. By executing a contract which contains the conflicting term or condition, DIR makes no representations or warranties regarding the enforceability of such term or condition and DIR does not waive the applicable Texas and/or United States law or regulation which conflicts with the Contract term or condition.

2) If one or more term or condition in the Contract, or the application of any term or condition to any party or circumstance, is held invalid, unenforceable, or illegal in any respect by a final judgment or order of the State Office of Administrative Hearings or a court of competent jurisdiction, the remainder of the Contract and the application of the term or condition to other parties or circumstances shall remain valid and in full force and effect.

**D. Assignment**

DIR or Vendor may assign the Contract without prior written approval to: i) a successor in interest (for DIR, another state agency as designated by the Texas Legislature), or ii) a subsidiary, parent company or affiliate, or iii) as necessary to satisfy a regulatory requirement imposed upon a party by a governing body with the appropriate authority. Assignment of the Contract under the above terms shall require written notification by the assigning party. Any other assignment by a party shall require the written consent of the other party. Each party agrees to cooperate to amend the Contract as necessary to maintain an accurate record of the contracting parties.

**E. Survival**

All applicable software license agreements, warranties or service agreements that were entered into between Vendor and a Customer under the terms and conditions of the Contract shall survive the expiration or termination of the Contract. All Purchase Orders issued and accepted by Order Fulfiller shall survive expiration or termination of the Contract.

**F. Choice of Law**

The laws of the State of Texas shall govern the construction and interpretation of the Contract. Nothing in the Contract or its Appendices shall be construed to waive the State's sovereign immunity.

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**5. Product Terms and Conditions**

**A. Technology Access Clause, As Required By §2157.005, Texas Government Code (Applicable to State Agency Purchases Only)**

1) Vendor expressly acknowledges and agrees that State funds may not be expended in connection with the purchase of an automated information system unless that system meets certain statutory requirements relating to accessibility by persons with visual impairments. Accordingly, the Vendor represents and warrants to DIR and each Customer purchasing products under the Contract that the technology provided hereunder is capable, either by virtue of features included within the technology or because it is readily adaptable by use with other technology of: (i) providing equivalent access for effective use by both visual and non-visual means, (ii) presenting information, including prompts used for interactive communications, in formats intended for both visual and non-visual use, and (iii) being integrated into networks for obtaining, retrieving, and disseminating information used by individuals who are not blind or visually impaired. For the purposes of this section, the phrase "equivalent access means a substantially similar ability to communicate with or make use of the technology, either directly by features incorporated within the technology or by other reasonable means such as assistive devices or services that would constitute reasonable accommodations under the Americans with Disabilities Act or similar state or federal laws. Examples, of methods by which equivalent access may be provided include, but are not limited to, keyboard alternatives to mouse commands and other means of navigating graphical display and customizable display appearance.

2) In accordance with Section 2157.001, Texas Government Code, this Subsection 5.A. remains in full force and effect for any Purchase Order issued under the Contract prior to September 1, 2006. This Subsection 5.A is invalid for any Purchase Order issued under the Contract on or after September 1, 2006.

**B. Electronic and Information Resources Accessibility Standards, As Required by 1 TAC Chapter 213 (Applicable to State Agency and Institution of Higher Education Purchases Only)**

1) Effective September 1, 2006 state agencies and institutions of higher education shall procure products which comply with the State of Texas Accessibility requirements for Electronic and Information Resources specified in 1 TAC Chapter 213 when such products are available in the commercial marketplace or when such products are developed in response to a procurement solicitation.

2) Vendor shall provide DIR with the URL to its Voluntary Product Accessibility Template (VPAT) for reviewing compliance with the State of Texas Accessibility requirements (based on the federal standards established under Section 508 of the Rehabilitation Act), or indicate that the product/service accessibility information is available from the General Services Administration "Buy Accessible Wizard" (<http://www.buyaccessible.gov>). Vendors not listed with the "Buy Accessible Wizard" or supplying a URL to their VPAT must provide DIR with a report that addresses the same accessibility criteria in substantively the same format. Additional

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information regarding the "Buy Accessible Wizard" or obtaining a copy of the VPAT is located at <http://www.section508.gov/>.

3) State agencies and institutions of higher education may begin voluntary compliance with this Subsection 5.B prior to September 1, 2006.

**C. Purchase of Commodity Items (Applicable to State Agency Purchases Only)**

1) Texas Government Code, §2157.068 requires State agencies to buy commodity items, as defined in 5.C.2 below, in accordance with contracts developed by DIR, unless the agency obtains an exemption from DIR.

2) Commodity items are commercially available software, hardware and technology services that are generally available to businesses or the public and for which DIR determines that a reasonable demand exists in two or more state agencies. Hardware is the physical technology used to process, manage, store, transmit, receive or deliver information. Software is the commercially available programs that operate hardware and includes all supporting documentation, media on which the software may be contained or stored, related materials, modifications, versions, upgrades, enhancements, updates or replacements. Technology services are the services, functions and activities that facilitate the design, implementation, creation, or use of software or hardware. Technology services include seat management, staffing augmentation, training, maintenance and subscription services. Technology services do not include telecommunications services. Seat management is services through which a state agency transfers its responsibilities to a vendor to manage its personal computing needs, including all necessary hardware, software and technology services.

3) Vendor agrees to coordinate all State agency commodity item sales through existing DIR contracts. Institutions of higher education are exempt from this Subsection 5.C.

**6. Contract Fulfillment and Promotion**

**A. Service, Sales and Support of the Contract**

Vendor shall provide service, sales and support resources to serve all Customers throughout the State. It is the responsibility of the Vendor to sell, market, and promote products and services available under the Contract. Vendor shall use its best efforts to ensure that potential Customers are made aware of the existence of the Contract. All sales to Customers for products and services available under the Contract shall be processed through the Contract.

**B. Use of Order Fulfillers**

DIR agrees to permit Vendor to utilize designated Order Fulfillers to provide service, sales and support resources to Customers. Such participation is subject to the following conditions:

**1) Designation of Order Fulfillers**

a) Vendor may designate Order Fulfillers to act as the distributors for products and services available under the Contract. In designating Order Fulfillers, Vendor must be in compliance with the State's Policy on Utilization of Historically

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Underutilized Businesses. In addition to the required Subcontracting Plan, Vendor shall provide DIR with the following Order Fulfiller information: Order Fulfiller name, Order Fulfiller business address, Order Fulfiller TBPC Identification Number, Order Fulfiller contact person email address and phone number.

b) DIR reserves the right to require the Vendor to rescind any such Order Fulfiller participation or request that Vendor name additional Order Fulfillers should DIR determine it is in the best interest of the State.

c) Vendor shall be fully liable for its Order Fulfillers' performance under and compliance with the terms and conditions of the Contract. Vendor shall enter into contracts with Order Fulfillers and use terms and conditions that are consistent with the terms and conditions of the Contract.

d) Vendor shall have the right to qualify Order Fulfillers and their participation under the Contract provided that: i) any criteria is uniformly applied to all potential Order Fulfillers based upon Vendor's established, neutrally applied criteria, ii) the criteria is not based on a particular procurement, and iii) all Customers are supported under the different criteria.

e) Vendor shall not prohibit Order Fulfiller from participating in other procurement opportunities offered through DIR.

**2) Changes in Order Fulfiller List**

Vendor may add or delete Order Fulfillers throughout the term of the Contract upon written authorization by DIR. Prior to adding or deleting Order Fulfillers, Vendor must make a good faith effort in the revision of its Subcontracting Plan in accordance with the State's Policy on Utilization of Historically Underutilized Businesses. Vendor shall provide DIR with its updated Subcontracting Plan and the Order Fulfiller information listed in Section 6.B.1.a above.

**3) Conditions of Order Fulfiller Participation**

All participating Order Fulfillers must be approved Catalog Information Systems Vendors with the State of Texas. DIR and Vendor will agree on the number of Order Fulfillers that are Historically Underutilized Businesses as defined by the TBPC.

**4) Order Fulfiller Pricing to Customer**

Order Fulfiller pricing to the Customer shall comply with the Customer price as stated within Section 4 of the Contract. This pricing shall only be offered by Order Fulfillers to Customers for sales that pass through the Contract.

**C. Product Warranty and Return Policies**

Order Fulfiller will adhere to the Vendor's then-currently published policies concerning product warranties and returns. Product warranty and return policies for Customers will not be more restrictive or more costly than warranty and return policies for other similarly situated Customers for like products.

**D. Customer Site Preparation**

Customers shall prepare and maintain its site in accordance with written instructions furnished by Order Fulfiller prior to the scheduled delivery date of any product or service and shall bear the costs associated with the site preparation.

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**E. Internet Access to Contract and Pricing Information**

**1) Vendor Website**

Vendor will maintain a website specific to the product and service offerings under the Contract which is clearly distinguishable from other, non-DIR Contract offerings at Vendor's website. The website must include: the product and services offered, product and service specifications, Contract pricing, designated Order Fulfillers, contact information for Vendor and designated Order Fulfillers, instructions for obtaining quotes and placing Purchase Orders, and warranty and return policies. The Vendor's website shall list the DIR Contract number, reference the DIR Go DIRect program, display the DIR logo in accordance with the requirements in paragraph F of this Section, and contain a link to the DIR website for the Contract.

**2) Accurate and Timely Contract Information**

Vendor warrants and represents that the website information specified in the above paragraph will be accurately and completely posted, maintained and displayed in an objective and timely manner. Vendor, at its own expense, shall correct any non-conforming or inaccurate information posted at Vendor's website within ten (10) business days after written notification by DIR.

**3) Website Compliance Checks**

Periodic compliance checks of the information posted for the Contract on Vendor's website will be conducted by DIR. Upon request by DIR, Vendor shall provide verifiable documentation that pricing listed upon this website is uniform with the pricing as stated in Section 4 of the Contract.

**4) Website Changes**

Vendor hereby consents to a link from the DIR website to Vendor's website in order to facilitate access to Contract information. The establishment of the link is provided solely for convenience in carrying out the business operations of the State. DIR reserves the right to terminate or remove a link at any time, in its sole discretion, without advance notice, or to deny a future request for a link. DIR will provide Vendor with subsequent notice of link termination or removal. Vendor shall provide DIR with timely written notice of any change in URL or other information needed to access the site and/or maintain the link.

**5) Use of Access Data Prohibited**

If Vendor stores, collects or maintains data electronically as a condition of accessing Contract information, such data shall only be used internally by Vendor for the purpose of implementing or marketing the Contract, and shall not be disseminated to third parties or used for other marketing purposes. The Contract constitutes a public document under the laws of the State and Vendor shall not restrict access to Contract terms and conditions including pricing, i.e., through use of restrictive technology or passwords.

**6) Responsibility for Content**

Vendor is solely responsible for administration, content, intellectual property rights, and all materials at Vendor's website. DIR reserves the right to require a change of listed content if, in the opinion of DIR, it does not adequately represent the Contract.

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**F. DIR Logo**

Order Fulfiller may use the DIR logo in the promotion of the Contract to Customers with the following stipulations: (i) the logo may not be modified in any way, (ii) when displayed, the size of the DIR logo must be equal to or smaller than the Order Fulfiller logo, (iii) the DIR logo is only used to communicate the availability of products and services under the Contract to Customers, and (iv) any other use of the DIR logo requires prior written permission from DIR.

**G. Vendor and Order Fulfiller Logo**

DIR may use the Vendor's and Order Fulfiller's name and logo in the promotion of the Contract to communicate the availability of products and services under the Contract to Customers. Use of the logos may be on the DIR website or on printed materials. Any use of Vendor's and Order Fulfiller's logo by DIR must comply with and be solely related to the purposes of the Contract and any usage guidelines communicated to DIR from time to time. Nothing contained in the Contract will give DIR any right, title, or interest in or to Vendor's or Order Fulfiller's trademarks or the goodwill associated therewith, except for the limited usage rights expressly provided by Vendor and Order Fulfiller.

**H. Trade Show Participation**

At DIR's discretion, Vendor and Order Fulfillers may be required to participate in one or more DIR sponsored trade shows each calendar year. Vendor understands and agrees that participation, at the Vendor's and Order Fulfiller's expense, includes providing a manned booth display or similar presence. DIR will provide four months advance notice of any required participation. Vendor and Order Fulfillers must display the DIR logo at all trade shows that potential Customers will attend. DIR reserves the right to approve or disapprove of the location or the use of the DIR logo in or on the Vendor's or Order Fulfiller's booth.

**I. Orientation Meeting**

Upon thirty (30) calendar days from execution of the Contract, Vendor and Order Fulfillers will be required to attend an orientation meeting to discuss the content and procedures of the Contract. The meeting will be held within the Austin, Texas area at a date and time mutually acceptable to DIR and the Vendor. DIR shall bear no cost for the time and travel of the Vendor or Order Fulfillers for attendance at the meeting.

**J. Performance Review Meetings**

DIR will require the Vendor to attend periodic meetings to review the Vendor's performance under the Contract. The meetings will be held within the Austin, Texas area at a date and time mutually acceptable to DIR and the Vendor. DIR shall bear no cost for the time and travel of the Vendor for attendance at the meeting.

**K. DIR Cost Avoidance**

As part of the performance measures reported to state leadership, DIR must provide the cost avoidance the State has achieved through the Contract. Upon request by DIR, Vendor shall provide DIR with a detailed report of a representative sample of products sold under the Contract. The report shall contain: product part number, product

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description, list price, price to Customer under the Contract, and pricing from three (3) alternative sources under which DIR customers can procure the products.

**7. Purchase Orders, Invoices, and Payments**

**A. Purchase Orders**

All Customer Purchase Orders will be placed directly with the Order Fulfiller. Accurate Purchase Orders shall be effective and binding upon Order Fulfiller when accepted by Order Fulfiller.

**B. Invoices**

1) Invoices shall be submitted by the Order Fulfiller directly to the Customer and shall be issued in compliance with Chapter 2251, Texas Government Code. All payments for products and/or services purchased under the Contract and any provision of acceptance of such products and/or services shall be made by the Customer to the Order Fulfiller.

2) Invoices must be timely and accurate. Each invoice must match Customer's Purchase Order and include any written changes that may apply, as it relates to products, prices and quantities. Invoices must include the Customer's Purchase Order number or other pertinent information for verification of receipt of the product or services by the Customer.

**C. Payments**

Customers shall comply with Chapter 2251, Texas Government Code, in making payments to Order Fulfiller. Payment under the Contract shall not foreclose the right to recover wrongful payments.

**8. Contract Administration**

**A. Contract Administrators**

DIR and the Vendor will each provide a Contract Administrator to support the Contract. Information regarding the Contract Administrators will be posted on the Internet website designated for the Contract.

**1) State Contract Administrator**

DIR shall provide a Contract Administrator whose duties shall include but not be limited to: i) supporting the marketing and management of the Contract, ii) advising DIR of Vendor's performance under the terms and conditions of the Contract, and iii) periodic verification of product pricing and monthly reports submitted by Vendor.

**2) Vendor Contract Administrator**

Vendor shall provide a dedicated Contract Administrator whose duties shall include but not be limited to: i) supporting the marketing and management of the Contract, ii) facilitating dispute resolution between a Order Fulfiller and a Customer, and iii) advising DIR of Order Fulfillers performance under the terms and conditions of the Contract. DIR reserves the right to require a change in Vendor's then-current Contract Administrator if the assigned Contract Administrator is not, in the opinion of DIR, adequately serving the needs of the State.

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**B. Reporting and Administrative Fees**

**1) Reporting Responsibility**

a) Vendor shall be responsible for reporting all products and services purchased through Order Fulfillers under the Contract. Vendor shall file the monthly reports, subcontract reports, and pay the administrative fees in accordance with the due dates specified in this section.

b) DIR shall have the right to verify required reports and to take any actions necessary to enforce its rights under this section, including but not limited to, compliance checks of Vendor's applicable Contract books at DIR's expense.

**2) Detailed Monthly Report**

Vendor shall electronically provide DIR with a detailed monthly report in the format required by DIR showing the dollar volume of any and all sales under the Contract for the previous month period. Reports shall be submitted to the DIR Go DIRect Coordinator. Reports are due on the fifteenth (15<sup>th</sup>) calendar day after the close of the previous month period. It is the responsibility of Vendor to collect and compile all sales under the Contract from participating Order Fulfillers and submit one (1) monthly report. The monthly report shall include, per transaction: the detailed sales for the period, the Order Fulfiler's company name, if applicable, Customer name, invoice date, invoice number, description, part number, manufacturer, quantity, unit price, extended price, Customer Purchase Order number, contact name, Customer's complete billing address, and other information as required by DIR. Each report must contain all information listed above per transaction or the report will be rejected and returned to the Vendor for correction in accordance with this section.

**3) Historically Underutilized Businesses Subcontract Reports**

a) Vendor shall electronically provide each Customer with their relevant Historically Underutilized Business Subcontracting Report, pursuant to the Contract, as required by Chapter 2161, Texas Government Code. Reports shall also be submitted to DIR.

b) Reports shall be due in accordance with the TBPC rules.

**4) DIR Administrative Fee**

a) An administrative fee shall be paid by Vendor to DIR to defray the DIR costs of negotiating, executing, and administering the Contract. The administrative fee is specified in Section 5 of the Contract. Payment of the administrative fee shall be due on the fifteenth (15<sup>th</sup>) calendar day after the close of the previous month period.

b) Vendor shall reference the DIR Contract number on any remittance instruments.

**5) Accurate and Timely Submission of Reports**

a) The reports and administrative fees shall be accurate and timely and submitted in accordance with the due dates specified in this section. Vendor shall correct any inaccurate reports or administrative fee payments within three (3) business days upon written notification by DIR. Vendor shall deliver any late reports or late administrative fee payments within three (3) business days upon written

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notification by DIR. If Vendor is unable to correct inaccurate reports or administrative fee payments or deliver late reports and fee payments within three (3) business days, Vendor must contact DIR and provide a corrective plan of action, including the timeline for completion of correction. The corrective plan of action shall be subject to DIR approval.

b) Should Vendor fail to correct inaccurate reports or cure the delay in timely delivery of reports and payments within the corrective plan of action timeline, DIR reserves the right to require an independent third party audit of the Vendor's records as specified in C.3 of this Section, at DIR's expense.

**C. Records and Audit**

1) Acceptance of funds under the Contract by Vendor and/or Order Fulfiller acts as acceptance of the authority of the State Auditor's Office, or any successor agency, to conduct an audit or investigation in connection with those funds. Vendor further agrees to cooperate fully with the State Auditor's Office or its successor in the conduct of the audit or investigation, including providing all records requested. Vendor will ensure that this clause concerning the authority to audit funds received indirectly by subcontractors through Vendor or directly by Order Fulfillers and the requirement to cooperate is included in any subcontract or Order Fulfiller contract it awards pertaining to the Contract. Under the direction of the Legislative Audit Committee, a Vendor that is the subject of an audit or investigation by the State Auditor's Office must provide the State Auditor's Office with access to any information the State Auditor's Office considers relevant to the investigation or audit.

2) Vendor and Order Fulfillers shall maintain adequate records to establish compliance with the Contract until the later of a period of four (4) years after termination of the Contract or until full, final and unappealable resolution of all Compliance Check or litigation issues that arise under the Contract. Such records shall include per transaction: the Order Fulfiller's company name if applicable, Customer name, invoice date, invoice number, description, part number, manufacturer, quantity, unit price, extended price, Customer Purchase Order number, contact name, Customer's complete billing address, the calculations supporting each administrative fee owed DIR under the Contract, Historically Underutilized Businesses Subcontracting reports, and such other documentation as DIR may request.

3) Vendor and/or Order Fulfillers shall grant access to all paper and electronic records, books, documents, accounting procedures, practices and any other items relevant to the performance of the Contract to DIR, including the compliance checks designated by DIR, the State Auditor's Office and of the United States, and such other persons or entities designated by DIR for the purposes of inspecting, Compliance Checking and/or copying such books and records. Vendor and/or Order Fulfillers shall provide copies and printouts requested by DIR without charge. DIR shall provide Vendor and/or Order Fulfillers ten (10) business days' notice prior to inspecting, Compliance Checking, and/or copying Vendor's and/or Order Fulfiller's records. Vendor's and/or Order Fulfillers records, whether paper or electronic, shall be made available during regular office hours. Vendor and/or Order Fulfiller

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personnel familiar with the Vendor's and/or Order Fulfiller's books and records shall be available to DIR staff and designees as needed. Vendor and/or Order Fulfiller shall provide adequate office space to DIR staff during the performance of Compliance Check.

4) For procuring State Agencies whose payments are processed by the Texas Comptroller of Public Accounts, the volume of payments made to Order Fulfillers through the Texas Comptroller of Public Accounts and the administrative fee based thereon shall be presumed correct unless Vendor can demonstrate to DIR's satisfaction that Vendor's calculation of DIR's administrative fee is correct.

#### D. Contract Administration Notification

1) Upon execution of the Contract, Vendor shall provide DIR with written notification of the following: i) Vendor Contract Administrator name and contact information, ii) Vendor sales representative name and contact information, and iii) name and contact information of Vendor personnel responsible for submitting reports and payment of administrative fees specified herein.

2) Upon execution of the Contract, DIR shall provide Vendor with written notification of the following: i) DIR Contract Administrator name and contact information, and ii) DIR Go DIRect Coordinator name and contact information.

### 9. Vendor Responsibilities

#### A. Indemnification

##### 1) Acts or Omissions

Vendor shall defend, indemnify and hold harmless the State of Texas and Customers, their officers, agents, and employees from and against all claims, actions, suits, demands, proceeding, costs, damages and liabilities, including attorneys fees, arising out of, or resulting from any acts or omissions of the Vendor or its agents, employees, subcontractors, Order Fulfillers, or suppliers of subcontractors in the execution or performance of the Contract and any Purchase Orders issued under the Contract. Vendor agrees to coordinate defense with the Texas Office of Attorney General, as requested by DIR.

##### 2) Infringements

a) Vendor shall defend, indemnify and hold harmless the State of Texas and Customers, their officers, agents and employees, from any and all third party claims involving infringement of United States patents, copyrights, trade and service marks, and any other intellectual or intangible property rights in connection with the use of any product or service supplied under the Contract. Vendor agrees to defend against any and all third party claims at Vendor's expense, whether or not such claims become the subject of litigation provided the Customer: (i) notifies Vendor promptly in writing of such claim, (ii) grants Vendor control over the defense and settlement thereof, and (iii) reasonably cooperates in response to Vendor's requests for assistance. DIR will provide reasonable assistance in the defense of such claims if so requested by the Vendor. Vendor agrees to coordinate defense with the Texas Office of Attorney General, as may be requested by DIR.

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b) Vendor shall have no liability if the alleged infringement is caused in whole or part by: (i) use of the product or service in combination with product or services not provided under the Contract, (ii) use of the product or service for a purpose or in a manner for which the product or service was not designed, (iii) any modification made to the product without Vendor's written approval, (iv) any modifications made to the product by the Vendor pursuant to Customer's specific instructions, (v) any intellectual property right owned by or licensed to Customer, or (vi) any use of the product or service by Customer that is not in conformity with the terms of any applicable license agreement.

c) If Vendor becomes aware of an actual or potential claim, or Customer provides Vendor with notice of an actual or potential claim, Vendor may (or in the case of an injunction against Customer, shall), at Vendor's sole option and expense: (i) procure for the Customer the right to continue to use the affected portion of the product or service, or (ii) modify or replace the affected portion of the product or service with functionally equivalent or superior product or service so that Customer's use is non-infringing.

#### B. Vendor Certifications

Vendor certifies that it and its designated Order Fulfillers: (i) have not given, offered to give, and do not intend to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the Contract, (ii) are not currently delinquent in the payment of any franchise tax owed the State of Texas and are not ineligible to receive payment under §231.006 of the Texas Family Code and acknowledge the Contract may be terminated and payment withheld if this certification is inaccurate, (iii) neither they, nor anyone acting for them, have violated the antitrust laws of the United States or the State of Texas, nor communicated directly or indirectly to any competitor or any other person engaged in such line of business for the purpose of obtaining an unfair price advantage, (iv) have not received payment from DIR or any of its employees for participating in the preparation of the Contract, (v) are not ineligible to receive the Contract under §2155.004, Texas Government Code, (vi) to the best of their knowledge and belief, there are no suits or proceedings pending or threatened against or affecting them, which if determined adversely to them will have a material adverse effect on the ability to fulfill their obligations under the Contract, (vii) are not suspended or debarred from doing business with the federal government as listed in the *Excluded Parties List System (EPLS)* maintained by the General Services Administration, and (viii) as of the effective date of the Contract, are not listed in the prohibited vendors list authorized by Executive Order #13224, "*Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism*", published by the United States Department of the Treasury, Office of Foreign Assets Control. In addition, Vendor acknowledges the applicability of §2155.444 and §2155.4441, Texas Government Code, in fulfilling the terms of the Contract.

#### C. Ability to Conduct Business in Texas

Order Fulfiller shall be an entity authorized and validly existing under the laws of its state of organization, and shall be authorized to do business in the State of Texas. Order

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Fulfiller shall be a "Catalog Information Systems Vendor" approved by TBPC. All products and services offered to Customers under the Contract are listed in Order Fulfiller's catalog on file with TBPC.

#### **D. Equal Opportunity Compliance**

Vendor agrees to abide by all applicable laws, regulations, and executive orders pertaining to equal employment opportunity, including federal laws and the laws of the State in which its primary place of business is located. In accordance with such laws, regulations, and executive orders, the Vendor agrees that no person in the United States shall, on the grounds of race, color, religion, national origin, sex, age, veteran status or handicap, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed by Vendor under the Contract. If Vendor is found to be not in compliance with these requirements during the term of the Contract, Vendor agrees to take appropriate steps to correct these deficiencies. Upon request, Vendor will furnish information regarding its nondiscriminatory hiring and promotion policies, as well as specific information on the composition of its principals and staff, including the identification of minorities and women in management or other positions with discretionary or decision-making authority.

#### **E. Use of Subcontractors**

If Vendor uses any subcontractors in the performance of this Contract, Vendor must make a good faith effort in the submission of its Subcontracting Plan in accordance with the State's Policy on Utilization of Historically Underutilized Businesses. A revised Subcontracting Plan shall be required before Vendor can engage additional subcontractors in the performance of this Contract. Vendor shall remain solely responsible for the performance of its obligations under the Contract.

#### **F. Responsibility for Actions**

Vendor is solely responsible for its actions and those of its agents, employees, or subcontractors, and agrees that neither Vendor nor any of the foregoing has any authority to act or speak on behalf of DIR or the State.

#### **G. Confidentiality**

1) Vendor acknowledges that DIR is a government agency subject to the Texas Public Information Act. Vendor also acknowledges that DIR will comply with the Public Information Act, and with all opinions of the Texas Attorney General's office concerning this Act.

2) Under the terms of the Contract, DIR may provide Vendor with information related to Customers. Vendor shall not re-sell or otherwise distribute or release Customer information to any party in any manner.

#### **H. Security of Premises, Equipment, Data and Personnel**

Vendor and/or Order Fulfiller may, from time to time during the performance of the Contract, have access to the personnel, premises, equipment, and other property, including data, files and /or materials (collectively referred to as "Data") belonging to the

**Appendix A**  
**Standard Terms and Conditions For Product and Related Services Contracts**

Customer. Vendor and/or Order Fulfiller shall use their best efforts to preserve the safety, security, and the integrity of the personnel, premises, equipment, Data and other property of the Customer, in accordance with the instruction of the Customer. Vendor and/or Order Fulfiller shall be responsible for damage to Customer's equipment, workplace, and its contents when such damage is caused by its employees or subcontractors.

**I. Background and/or Criminal History Investigation**

Prior to commencement of any services, background and/or criminal history investigation of the Vendor and/or Order Fulfiller's employees and subcontractors who will be providing services to the Customer under the Contract may be performed by certain Customers having legislative authority to require such investigations. Should any employee or subcontractor of the Vendor and/or Order Fulfiller who will be providing services to the Customer under the Contract not be acceptable to the Customer as a result of the background and/or criminal history check, then Customer may immediately terminate its Purchase Order and related Service Agreement or request replacement of the employee or subcontractor in question.

**J. Limitation of Liability**

For any claim or cause of action arising under or related to the Contract: i) none of the parties shall be liable to the other for punitive, special, or consequential damages, even if it is advised of the possibility of such damages; and ii) Vendor's liability for damages of any kind to the Customer shall be limited to the total amount paid to Vendor under the Contract during the twelve months immediately preceding the accrual of the claim or cause of action.

**10. Contract Enforcement**

**A. Enforcement of Contract and Dispute Resolution**

1) Vendor and DIR agree to the following: (i) a party's failure to require strict performance of any provision of the Contract shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision, (ii) for disputes not resolved in the normal course of business, the dispute resolution process provided for in Chapter 2260, Texas Government Code, shall be used, and (iii) actions or proceedings arising from the Contract shall be heard in a state court of competent jurisdiction in Travis County, Texas.

2) Disputes arising between a Customer and the Vendor shall be resolved in accordance with the dispute resolution process of the Customer that is not inconsistent with subparagraph A.1 above. DIR shall not be a party to any such dispute unless DIR, Customer, and Vendor agree in writing.

**B. Termination**

**1) Termination for Non-Appropriation**

Customer may terminate Purchase Orders if funds sufficient to pay its obligations under the Contract are not appropriated by the governing body on behalf of local governments, or by the Texas legislature on behalf of state agencies. In the event of non-appropriation, Vendor and/or Order Fulfiller will be provided ten (10) calendar

**Appendix A**  
**Standard Terms and Conditions For Product and Related Services Contracts**

days written notice of intent to terminate. Notwithstanding the foregoing, if a Customer issues a Purchase Order and has accepted delivery of the product or services, they are obligated to pay for the product or services or they may return the product and discontinue using services under any return provisions that Vendor offers.

**2) Absolute Right**

DIR shall have the absolute right to terminate the Contract without recourse in the event that: i) Vendor becomes listed on the prohibited vendors list authorized by Executive Order #13224, "*Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism*", published by the United States Department of the Treasury, Office of Foreign Assets Control, or ii) Vendor becomes suspended or debarred from doing business with the federal government as listed in the *Excluded Parties List System (EPLS)* maintained by the General Services Administration. Vendor shall be provided written notice in accordance with Section 11.A, Notices, of intent to terminate.

**3) Termination for Convenience**

DIR or Vendor may terminate the Contract, in whole or in part, by giving the other party thirty (30) calendar days written notice. A Customer may terminate a Purchase Order if it is determined by the Customer that Order Fulfiller will not be able to deliver product or services in a timely manner to meet the business needs of the Customer.

**4) Termination for Cause**

**a) Contract**

Either DIR or Vendor may issue a written notice of default to the other upon the occurrence of a material breach of any covenant, warranty or provision of the Contract. The non-defaulting party shall give the defaulting party thirty (30) calendar days from receipt of notice to cure said default. If the defaulting party fails to cure said default within the timeframe allowed, the non-defaulting party may, at its option and in addition to any other remedies it may have available, cancel and terminate the Contract. Customers purchasing products or services under the Contract have no power to terminate the Contract for default.

**b) Purchase Order**

Customer or Order Fulfiller may terminate a Purchase Order upon the occurrence of a material breach of any term or condition: (i) of the Contract, or (ii) included in the Purchase Order in accordance with Section 4.B.2 above. The non-defaulting party shall give the defaulting party thirty (30) calendar days from receipt of notice to cure said default. If the defaulting party fails to cure said default within the timeframe allowed, the non-defaulting party may, at its option and in addition to any other remedies it may have available, cancel and terminate the Purchase Order.

**5) Customer Rights Under Termination**

In the event the Contract expires or is terminated for any reason, a Customer shall

**Appendix A**  
**Standard Terms and Conditions For Product and Related Services Contracts**

retain its rights under the Contract and the Purchase Order issued with respect to all products or services ordered and accepted prior to the effective termination date.

**6) Vendor or Order Fulfiller Rights Under Termination**

In the event a Purchase Order is terminated or the Contract expires or is terminated for any reason, a Customer shall pay all amounts due for products or services ordered prior to the effective termination date and ultimately accepted.

**C. Force Majeure**

DIR, Customer, or Order Fulfiller may be excused from performance under the Contract for any period when performance is prevented as the result of an act of God, strike, war, civil disturbance, epidemic, or court order, provided that the party experiencing the event of Force Majeure has prudently and promptly acted to take any and all steps that are within the party's control to ensure performance and to shorten the duration of the event of Force Majeure. The party suffering an event of Force Majeure shall provide notice of the event to the other parties when commercially reasonable. Subject to this provision, such non-performance shall not be deemed a default or a ground for termination. However, a Customer may terminate a Purchase Order if it is determined by the Customer that Order Fulfiller will not be able to deliver product or services in a timely manner to meet the business needs of the Customer.

**11. Notification**

**A. Notices**

All notices, demands, designations, certificates, requests, offers, consents, approvals and other instruments given pursuant to the Contract shall be in writing and shall be validly given on: (i) the date of delivery if delivered by email, facsimile transmission, mailed by registered or certified mail, or hand delivered, or (ii) three business days after being mailed via United States Postal Service. All notices under the Contract shall be sent to a party at the respective address indicated in Section 6 of the Contract or to such other address as such party shall have notified the other party in writing.

**B. Handling of Written Complaints**

In addition to other remedies contained in the Contract, a person contracting with DIR may direct their written complaints to the following office:

Public Information Office  
Department of Information Resources  
Attn: Public Information Officer  
300 W. 15<sup>th</sup> Street, Suite 1300  
Austin, Texas 78701  
(512) 475-4759, facsimile.

**12. Captions**

The captions contained in the Contract and its Appendices are intended for convenience and reference purposes only and shall in no way be deemed to define or limit any provision thereof.

## Appendix C

### Product & Pricing Index

### DIR-SDD-272

AVAYA Product Discount Families	AVAYA Material Price Group &	AVAYA MPG Description	DIR Customer Discount		Definition of MSRP
			Front Market	After Market	
Communication Manager (CM)®, Digital Terminals, Converged Conferencing	MPG Family	Communication Mgr (CM)®, etc.	38%	28%	Commercial List Price
	AI	CM Common Hardware	38%	28%	Commercial List Price
	DA	CM Software	38%	28%	Commercial List Price
	DB	Integrated Management	38%	28%	Commercial List Price
	DP	CM CSI Server	38%	28%	Commercial List Price
	DR	CM R Server	38%	28%	Commercial List Price
	DS	CM SI Server	38%	28%	Commercial List Price
	DT	DCS Terminals	38%	28%	Commercial List Price
	DX	Audix	38%	28%	Commercial List Price
	IT	IP Softconsole	38%	28%	Commercial List Price
	SV	Converged Conferencing	38%	28%	Commercial List Price
	MPG Family	Unified Communications Systems	38%	28%	Commercial List Price
	AM	Modular Messaging	38%	28%	Commercial List Price
	IA	ECAD - Intuity Audix	38%	28%	Commercial List Price
	IB	ECAD - Intuity Interchange	38%	28%	Commercial List Price
	IL	ECAD - Intuity Lodging	38%	28%	Commercial List Price
	OR	ECAD - Octel 250/350	38%	28%	Commercial List Price
OS	ECAD - Octel 200/300	38%	28%	Commercial List Price	
UC	ECAD - Unified Communication	38%	28%	Commercial List Price	
IMI	ECAD - Internet Messaging	38%	28%	Commercial List Price	
ECAD - Call Center & OTHER	MPG Family	ECAD - Call Center & OTHER			
	CR	ECAD Call Center	22%	22%	Commercial List Price
	DL	ECAD - Proactive Contact	17%	17%	Commercial List Price
	EM	ECAD Self-Service	18%	18%	Commercial List Price
	QO	ECAD - Reporting	18%	13%	Commercial List Price
	QQ	ECAD - Contact Center	18%	13%	Commercial List Price

ECAD - OEM Hardware & Software	MPG Family	ECAD - OEM HDW / Stwr				
	QP	OEM - Nice	18%	18%	Commercial List Price	
	QW	OEM - Witness	23%	23%	Commercial List Price	
	RX	OEM - Ventnt	23%	23%	Commercial List Price	
IP	MPG Family	IP				
	IE	IP Endpoints	38%	28%	Commercial List Price	
	IG	CM S8500, S87G0, S8710 Server & Gateways 3	33%	13%	Commercial List Price	
	IH	CM S8300 Server & Gateways	33%	13%	Commercial List Price	
	IS	IP Common	38%	28%	Commercial List Price	
	MPG Family	Data				
	PP	Cajun Workgroup	18%	18%	Commercial List Price	
	PQ	Cajun View	18%	18%	Commercial List Price	
	PR	Extreme	18%	18%	Commercial List Price	
	PS	Wireless Infrastructure	13%	13%	Commercial List Price	
Data	PL	Adv. Network Solutions	13%	13%	Commercial List Price	
	PD	CSU/DSU/DSL	13%	13%	Commercial List Price	
	PJ	Cajun Client Solutions	13%	13%	Commercial List Price	
	PC	Paradyne Frsr/Optns	8%	8%	Commercial List Price	
	PO	VP Net	18%	18%	Commercial List Price	
	RK	OEM - Other HW/SW including Data Access-Paradyne	13%	13%	Commercial List Price	
	SpectralLink	SpectralLink Wireless	28%	28%	Commercial List Price	
	ECAD CentreVu	ECAD CentreVu	13%	13%	Commercial List Price	
	Cajun Backbone	Cajun Backbone	13%	13%	Commercial List Price	
	AVAYA Peripheral Equipment	Peripheral Equipment	13%	13%	Commercial List Price	
CM Custom Software	CM Custom Software	0%	0%	Commercial List Price		
ECAD - Non-Discountable	ECAD - Non-Discountable	0%	0%	Commercial List Price		
Non-Discountable	Non-Discountable	0%	0%	Commercial List Price		
OEM - Custom Solutions	OEM - Custom Solutions	0%	0%	Commercial List Price		
Professional Services	Professional Services	0%	0%	Commercial List Price		
Training Courses, Media	Training Courses, media	0%	0%	Commercial List Price		

OEM Custom Solutions	ZP	OEM Custom Solutions	0%	0%	Commercial List Price
Service and Maintenance	SO	Service and Maintenance	0%	0%	Commercial List Price
Misc AVAYA Equipment	ZZ	Misc Equipment	0%	0%	Commercial List Price

## Appendix D



### CUSTOMER AGREEMENT GENERAL TERMS

This Customer Agreement (the "Agreement") governs the undersigned Customer's purchase and/or license of hardware, software and associated documentation ("Products") and related services as described in the relevant Attachment(s) ("Services") from Avaya Inc., with an address of 211 Mount Airy Road, Basking Ridge, NJ 07920 ("Avaya"). The "Effective Date" of the Agreement is the date Avaya countersigns it. Products acquired under the Agreement are for use in the ordinary course of Customer's business and are not for resale by Customer. If applicable, the Agreement also consists of one or more of the following Attachments:

- Attachment 1 – Supply of Generally Available Products
- Attachment 2 – Implementation Services Terms
- Attachment 3 – Maintenance/Managed Services Terms

THE PARTIES ACKNOWLEDGE THAT DIR CONTRACT NO. DIR-SDD-272 IS A PRIOR WRITTEN AGREEMENT THE PROVISIONS OF WHICH SHALL PREVAIL OVER ANY INCONSISTENT PROVISIONS FOUND IN THESE TERMS.

#### 1. ORDERS

Orders are subject to acceptance by Avaya. Avaya may accept an order by shipping Products or commencing to perform Services. Accepted orders will be deemed to incorporate and be subject to the Agreement and DIR Contract No. DIR-SDD-272. Orders will be governed by the terms of the Agreement even when they lack an express reference to the Agreement. All other terms and conditions contained in any Customer purchase order or other document not expressly referenced in the Agreement will have no effect.

#### 2. INVOICING AND PAYMENT

**2.1 Invoicing and Payment.** Avaya will invoice Customer Product and Service fees as provided in the applicable Attachment. Unless otherwise requested by Customer in writing, Avaya will invoice to and process payments from Customer via Avaya's electronic bill application. Payment of undisputed invoices is due within 30 days from the date of Avaya's invoice. Customer will pay all bank charges, taxes, duties, levies and other costs and commissions associated with other methods of invoicing and payment subject to any limitations imposed by Chapter 2251, Texas Government Code. Avaya may suspend licenses and performance of orders for which payment is overdue until the overdue amount is paid in full. Overdue payments will be subject to a late payment charge of the lesser of 1.5% per month or the maximum rate allowed by Chapter 2251, Texas Government Code.

**2.2 Taxes.** Unless Customer provides Avaya with a tax exemption certificate, Customer is solely responsible for paying all legally required taxes, including without limitation any sales, excise or other taxes and fees which may be levied upon the sale, transfer of ownership, license, installation or use of the Products, except for any income tax assessed upon Avaya.

#### 3. CUSTOMER RESPONSIBILITIES

Customer will cooperate with Avaya as reasonably necessary for Avaya's delivery of Products and performance of Services in a timely manner. Customer will provide Avaya with interface and other information regarding access to third party products in Customer's network and necessary third party consents and licenses to enable Avaya's performance under the Agreement. Customer is responsible for ensuring that its networks and systems are adequately secured against unauthorized intrusion or attack and regularly backing up its data and files in accordance with good computing practices.

#### 4. CONFIDENTIAL INFORMATION

To the extent this provision is consistent with the Texas Public Information Act, "Confidential Information" means party's business and/or technical information, pricing, discounts and other information or data, regardless of whether in tangible or other form if marked or otherwise expressly identified in writing as confidential. Information communicated verbally will qualify as Confidential Information if designated as confidential or proprietary at the time of disclosure and summarized in writing within 30 days after disclosure. Confidential Information excludes information that: (i) is publicly available other than by an act or omission of the receiving party; (ii) subsequent to its disclosure was lawfully received from a third party having the right to disseminate the information without restriction on its dissemination or disclosure; (iii) was known by the receiving party prior to its receipt and was not received from a third party in breach of that third party's confidentiality obligations; (iv) was independently developed by the receiving party without use of the disclosing party's Confidential Information; or (v) is required to be disclosed by court order or other lawful government action, but only to the extent so ordered, provided the receiving party provides prompt written notification to the disclosing party of the pending disclosure so the disclosing party may attempt to obtain a protective order. In the event of a potential disclosure in the case of subsection (v) above, the receiving party will provide reasonable assistance to the disclosing party should the disclosing party attempt to obtain a protective order. Each party will protect the secrecy of all Confidential Information received from the other party with the same degree of care as it uses to protect its own Confidential Information,

but in no event with less than a reasonable degree of care. Neither party will use or disclose the other party's Confidential Information except as permitted in this Section or for the purpose of performing obligations under the Agreement. The confidentiality obligations of each party will survive expiration or termination of the Agreement. To the extent consistent with the records retention laws of the State of Texas, upon termination of the Agreement, each party will cease all use of the other party's Confidential Information and will promptly return, or at the other party's request destroy, all Confidential Information, including any copies, in tangible form in that party's possession or under its control, including Confidential Information stored on any medium. Upon request, a party will certify in writing its compliance with this Section.

#### 5. INTELLECTUAL PROPERTY RIGHTS

**5.1 Customer Owns Customer IP.** Customer reserves all rights, including, but not limited to, ownership, title, intellectual property rights and all other rights and interest in and to any computer programs (in object or source code format or any other form), know-how, inventions, processes, data bases, documentation, training materials and any other intellectual property and any tangible embodiments of it (collectively "Intellectual Property" or "IP") that Customer makes available to Avaya (collectively "Customer IP").

**5.2 Avaya Owns Avaya IP.** Avaya reserves all rights, including, but not limited to, ownership, title, and all other rights and interest in, and to, any Intellectual Property that Avaya owned prior to providing Services under the Agreement, any Intellectual Property that Avaya develops, creates, or otherwise acquires independently of these Services Terms, and any Intellectual Property that Avaya develops, creates, or otherwise acquires (excluding Customer IP) while performing Services under the Agreement.

**5.3 Customer's License to Deliverables.** Subject to Customer's payment of fees for the Services, Avaya grants Customer a non-exclusive, non-transferable, perpetual, limited, non-sublicenseable license to use tangible deliverables created by Avaya and delivered to Customer as part of the Services ("Deliverables"). Software contained in Deliverables will be licensed subject to the Software License Terms contained in the Agreement.

#### 6. SOFTWARE LICENSE TERMS AND RESTRICTIONS

**6.1 License.** Avaya grants Customer a non-sublicenseable, non-exclusive, non-transferable license to use software and documentation provided under the Agreement and for which applicable fees have been paid at the indicated capacity and feature levels and within the scope of the applicable license types described below for Customer's internal business purposes and at locations in the United States. Except for the limited license rights expressly granted in the Agreement, Avaya reserves all rights, title and interest in and to the software and documentation and any modifications to it.

**6.2 License Restrictions.** To the extent permissible under applicable law, Customer agrees not to: (i) decompile, disassemble, or reverse engineer the software; (ii) alter, modify or create any derivative works based on the software or documentation; (iii) merge the software with any other software other than as expressly set forth in the documentation; (iv) use, copy, sell, sublicense, lease, rent, loan, assign, convey or otherwise transfer the software or documentation except as expressly authorized by the Agreement; (v) distribute, disclose or allow use of the software or documentation, in any format, through any timesharing service, service bureau, network or by any other means; or (vi) permit or encourage any third party to do so.

**6.3 Backup Copies.** Customer may create a reasonable number of archival and backup copies of the software and documentation, provided all proprietary rights, notices, names and logos are duplicated on all copies.

**6.4 Termination of License.** Avaya may, with immediate effect, terminate the software licenses granted in the Agreement and exercise all available rights and remedies if, within ten business days of Customer's receipt of a reasonably detailed written notice, Customer has not cured all breaches of license limitations or restrictions.

**6.5 License Compliance.** At Avaya's request and upon reasonable prior written notice, Avaya will have the right to inspect Customer's compliance with these Software License Terms.

#### 7. WARRANTIES AND LIMITATIONS

Specific warranties for Products and Services are provided in the Attachments. THESE WARRANTIES ARE LIMITED AS PROVIDED IN EACH ATTACHMENT AND GENERALLY AS PROVIDED BELOW.

**7.1 Exclusions and Disclaimers.** The warranties do not extend to any damages, malfunctions, or non-conformities caused by: (i) Customer's use of Products in violation of the license granted under the Agreement or in a manner inconsistent with the operating documentation; (ii) use of non-Avaya furnished equipment, software, or facilities with Products (except to the extent provided in the documentation); (iii) Customer's failure to follow Avaya's installation, operation or maintenance instructions; (iv) Customer's failure to permit Avaya timely access, remote or otherwise, to Products; (v) failure to implement all new updates to software provided under the Agreement; (vi) Products that have had their original manufacturer's serial numbers altered, defaced or deleted; or (vii) Products that have been serviced or modified other than by Avaya or a third party specifically authorized by Avaya to provide the service or modification. EXCEPT AS

REFERENCED AND LIMITED IN THIS SECTION, NEITHER AVAYA NOR ITS LICENSORS OR SUPPLIERS MAKES ANY EXPRESS REPRESENTATIONS OR WARRANTIES WITH REGARD TO ANY PRODUCTS OR SERVICES OR OTHERWISE RELATED TO THE AGREEMENT. AVAYA DOES NOT WARRANT UNINTERRUPTED OR ERROR FREE OPERATION OF PRODUCTS OR THAT THE PRODUCTS AND SERVICES WILL PREVENT TOLL FRAUD. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, AVAYA DISCLAIMS ALL IMPLIED OR STATUTORY WARRANTIES, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. THE WARRANTY REMEDIES EXPRESSLY PROVIDED IN THE AGREEMENT WILL BE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES.

## 8. INFRINGEMENT DEFENSE AND INDEMNIFICATION

**8.1 Defense and Indemnity.** Avaya will defend Customer, at Avaya's expense, against any Claim, as defined below, and will indemnify Customer as provided in this Section for any judgments, settlements and court awarded attorney's fees resulting from a Claim. Avaya's obligations under this Section are conditioned on the following: (i) Customer promptly notifies Avaya of the Claim in writing upon Customer being made aware of the Claim; (ii) Customer gives Avaya sole authority and control of the defense and (if applicable) settlement of the Claim, subject to coordination of defense matters with the Office of the Attorney General for State of Texas agency Customers; and (iii) Customer provides all information and assistance reasonably requested by Avaya to handle the defense or settlement of the Claim. For purposes of this Section, "Claim" means any cause of action in a third party action, suit or proceeding against Customer based upon an allegation that a Product as of its delivery date under the Agreement infringes a valid U.S. patent or copyright.

**8.2 Remedial Measures.** If a Product becomes, or Avaya reasonably believes use of a Product may become, the subject of a Claim, Avaya may, at its own expense and option: (i) procure for Customer the right to continue use of the Product; (ii) replace or modify the Product; or (iii) refund to Customer a pro-rated portion of the applicable fees for the Product based on a linear depreciation monthly over a five year useful life, in which case Customer will cease all use of the Product and return it to Avaya.

**8.3 Exceptions.** Avaya will have no defense or indemnity obligation for any Claim based on: (i) a Product that has been modified by someone other than Avaya; (ii) a Product that has been modified by Avaya in accordance with Customer-provided specifications or instructions; (iii) use or combination of a Product with third party products; or (iv) Customer products or third party products. To the extent allowed by Texas law and constitution, Customer will defend Avaya against any Claim, and will indemnify Avaya for any judgments, settlements and reasonable attorney's fees resulting from a Claim to the extent the Claim is based on subsection (i) or (ii) above. For the purposes of the Agreement, "third party products" means any products manufactured by a party other than Avaya, and may include, without limitation, products ordered by Customer from third parties pursuant to Avaya's recommendations. However, components of Avaya-branded Products are not third party products if they are both: (i) embedded in Products (i.e., not recognizable as standalone items); and (ii) are not identified as separate items on Avaya's price list, quotes, order specifications forms or documentation.

**8.4 Sole Remedy.** THE FOREGOING STATES AVAYA'S ENTIRE LIABILITY, AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDY, WITH RESPECT TO ANY INFRINGEMENT OR MISAPPROPRIATION OF ANY INTELLECTUAL PROPERTY RIGHTS OF ANY OTHER PARTY.

## 9. LIMITATION OF LIABILITY

IN NO EVENT WILL EITHER PARTY OR ITS RESPECTIVE LICENSORS OR SUPPLIERS HAVE ANY LIABILITY FOR ANY INCIDENTAL, SPECIAL, STATUTORY, INDIRECT OR CONSEQUENTIAL DAMAGES, INCLUDING LOSS OF PROFITS OR REVENUE, LOSS OR CORRUPTION OF DATA, TOLL FRAUD, COST OF COVER, OR SUBSTITUTE GOODS OR PERFORMANCE. THE TOTAL AGGREGATE LIABILITY OF EITHER PARTY FOR ALL CLAIMS ARISING OUT OF OR IN CONNECTION WITH THE AGREEMENT WILL NOT EXCEED AN AMOUNT EQUAL TO THE TOTAL AMOUNT OF ALL FEES PAID OR PAYABLE UNDER THE AGREEMENT IN THE 12 MONTH PERIOD IMMEDIATELY PRECEDING THE DATE OF THE EVENT GIVING RISE TO THE CLAIM. THE LIMITATIONS OF LIABILITY IN THIS SECTION WILL APPLY TO ANY DAMAGES, HOWEVER CAUSED, AND ON ANY THEORY OF LIABILITY, WHETHER FOR BREACH OF CONTRACT, TORT (INCLUDING, BUT NOT LIMITED TO, NEGLIGENCE), OR OTHERWISE, AND REGARDLESS OF WHETHER THE LIMITED REMEDIES AVAILABLE TO THE PARTIES FAIL OF THEIR ESSENTIAL PURPOSE. HOWEVER, THEY WILL NOT APPLY IN CASES OF WILLFUL MISCONDUCT, PERSONAL INJURY OR BREACHES OF AVAYA'S LICENSE RESTRICTIONS. THE LIMITATIONS OF LIABILITY IN THIS SECTION ALSO WILL APPLY TO ANY LIABILITY OF DIRECTORS, OFFICERS, EMPLOYEES, AGENTS AND SUPPLIERS. THE LIMITATIONS OF AGGREGATE LIABILITY WILL NOT APPLY TO CONTRACTUAL INDEMNIFICATION OBLIGATIONS PROVIDED IN THE AGREEMENT.

## 10. GOVERNING LAW AND DISPUTE RESOLUTION

**Governing Law.** This Agreement shall be governed in accordance with the laws of the State of Texas. Any legal action brought pursuant to the Agreement shall be brought only in the State courts of Travis County, Texas. Both parties waive any objection to the personal jurisdiction of such courts.

### 10.1 Arbitration.

**10.2 Injunctive Relief.** To the extent allowed by Texas law and constitution, nothing in this Section will be construed to preclude either party from seeking provisional remedies, including but not limited to temporary restraining orders and preliminary injunctions from a state court in Travis County, Texas, in order to protect its rights pending arbitration.

## 11. TERM AND TERMINATION

The Agreement will be effective and continue in effect for two years from the Effective Date unless terminated earlier in accordance with this Section. Either party may terminate the Agreement: (i) by written notice to the other party effective immediately upon receipt, if the other party fails to cure any material breach of the Agreement within a 30 day period after having received a written notice from the non-breaching party detailing the breach and requesting the breach be cured; and (ii) at any time for convenience upon 90 days written notice and subject to termination or cancellation fees, if any. The provisions concerning confidentiality, license grant to Customer, and indemnity (as well as any other terms which, by their nature, are intended to survive termination or expiration) of these General Terms will survive any termination or expiration of the Agreement and any order. Except as expressly provided otherwise in the Agreement and termination for uncured breach, any termination of the Agreement will not affect any rights or obligations of the parties under any order accepted before the termination of the Agreement became effective.

## 12. NO SOLICITATION

During the period Avaya provides Services and one year after completion of all Services or payment by Customer of all fees for Services, whichever occurs later, Customer will not solicit for employment any Avaya employee performing the Services. In the event that Customer hires any Avaya employee performing the Services prior to the end of this period either as an employee or independent, Customer will pay Avaya a finders fee equal to 100% of the Avaya employee's last gross annual salary, in addition to any other remedies available to Avaya, at law or in equity. Nothing in this Section will restrict Customer's right to recruit or solicit generally in the media or to hire an Avaya employee who answers any advertisement or who applies for hire without having been recruited or solicited personally by Customer.

## 13. MISCELLANEOUS

The parties will observe all applicable laws and regulations, including export and re-export laws and regulations, when using the Products and work product of any Services. Avaya may assign the Agreement and any order under the Agreement to any of its affiliated entities or to any entity to which Avaya may sell, transfer, convey, assign or lease all or substantially all of the assets or properties used in connection with its performance under the Agreement. Any other assignment of the Agreement or any rights or obligations under the Agreement without the express written consent of the other party will be invalid. Avaya may subcontract any or all of its obligations under the Agreement, but will retain responsibility for the work. Neither party will be liable for any delay or failure in performance to the extent the delay or failure is caused by events beyond the party's reasonable control, including, fire, flood, Act of God, explosion, war or the engagement of hostilities, strike, embargo, labor dispute, government requirement, civil disturbances, civil or military authority, and inability to secure materials or transportation facilities. The Agreement constitutes the entire understanding of the parties with respect to the subject matter of the Agreement and will supersede all previous and contemporaneous communications, representations or understandings, either oral or written, between the parties relating to that subject matter and will not be contradicted or supplemented by any prior course of dealing between the parties. Notwithstanding the foregoing, as provided in the preamble above, to the extent this Agreement is inconsistent with DIR Contract No. DIR-SDD-272, the terms of that Contract shall prevail.

If any provision of the Agreement is determined to be unenforceable or invalid by court decision, the Agreement will not be rendered unenforceable or invalid as a whole, and the provision will be changed and interpreted so as to best accomplish the objectives of the original provision within the limits of applicable law. The failure of either party to assert any of its rights under the Agreement, including, but not limited to, the right to terminate the Agreement in the event of breach or default by the other party, will not be deemed to constitute a waiver by that party of its right to enforce each and every provision of the Agreement in accordance with their terms. All notices under the Agreement and any modifications or amendments to the Agreement must be in writing.

The parties have caused the Agreement to be executed by their duly authorized representatives with the intent to be legally bound, for good and valuable consideration, the receipt and adequacy of which is hereby acknowledged.

CUSTOMER LEGAL NAME: \_\_\_\_\_

AVAYA INC.

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

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

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

Customer Information:	Street Address:	
	City, State, Zip Code:	
	Billing Address (if different from above):	
	Telephone Number:	Fax Number:



CUSTOMER AGREEMENT  
ATTACHMENT I

SUPPLY OF GENERALLY AVAILABLE PRODUCTS

These terms for Supply of Generally Available Products are part of the Customer Agreement between Avaya and Customer, which incorporates them by reference (the "Agreement"). They apply if and to the extent Customer purchases or receives licenses for Products under the Agreement that are generally available on Avaya's price lists.

**1. DELIVERY AND IN-SERVICE DATES**

The "Delivery Date" means the date on which Avaya delivers: (i) Avaya-installed Products to Customer's premises; or (ii) other Products to a carrier for shipment. In the case of software features that can be enabled by Avaya remotely or delivered via electronic means, "Delivery Date" means the date the features are enabled or the software is downloaded to the target processor. The "In-Service Date" means the date on which Avaya notifies Customer that the Avaya-installed Products are installed in good working order in accordance with applicable documentation. "Installation Start Date" means the date on which Avaya's personnel arrive at Customer's premises to install Products.

**2. PRODUCT CHANGES**

Avaya may make changes to Products or modify the drawings and specifications relating to Products, or substitute Products of later design, provided that the changes do not adversely and materially impact Product form, fit or function.

**3. ORDER CHANGES AND CANCELLATIONS**

For purposes of this Section, "Configured Products" means made-to-order Products provided under this Attachment and "Non-configured Products" are all other Products provided under this Attachment. Customer may change or cancel orders as follows:

Configured Products:

- Changes within 72 hours of order placement – 5% of Product and related installation fees
- Changes after 72 hours of order placement or any cancellation prior to Delivery Date – 15% of Product and related installation fees

Non-Configured Products

- Change or cancellation prior to Delivery Date– No Charge
- Change or cancellation after Delivery Date, but prior to installation Start Date AND Avaya is installing the Product – 15% of Product and related installation fees

In the event of a permitted cancellation, all preliminary or advance Products that have been delivered to Customer will be returned promptly to Avaya in the original, unopened packaging and in the same condition as delivered. No other changes or cancellations are permitted.

**4. SHIPPING; RISK OF LOSS; TITLE**

Products will be shipped to the destination in the United States specified in the order. The price to the Customer under this Contract shall include all shipping and handling fees. Shipments will be Free On Board Customer's destination. No additional fees shall be charged to the Customer for standard shipping and handling. If the Customer requests expedited delivery, Customer will be responsible for any charges for expedited delivery.

Risk of loss will pass to Customer on the Delivery Date. Title to Avaya-installed hardware will pass to Customer on the In-Service Date. Title to all other hardware will pass to Customer on the Delivery Date. Title to software provided under the Agreement will remain solely with Avaya and its licensors.

**5. INVOICING**

Unless otherwise agreed, Avaya will invoice Customer for Products as follows: (i) non-Avaya-installed Products will be invoiced 100% on the Delivery Date; (ii) Avaya-installed Products will be invoiced 100% on the In-Service Date.

**6. WARRANTY AND LIMITATION OF LIABILITY**

**6.1 Warranty.** Avaya warrants to Customer that during the applicable warranty period, the Product will conform to and operate in accordance with the applicable documentation in all material respects.

**6.2 Warranty Period.** Unless a different period is specified in the applicable order, the warranty periods for Products are as follows: (i) hardware: 12 months, beginning on the In-Service Date for Avaya-installed hardware and on the Delivery Date for all other hardware; and/or (ii) software and software media: 90 days, beginning on the In-Service Date for Avaya-installed software and on the Delivery Date for all other software.

**6.3 Remedies.** If a Product is not in conformance with the warranty above and Avaya receives from Customer during the applicable warranty period a written notice describing in reasonable detail how the Product failed to be in conformance, Avaya at its option will: (i) repair or replace the Product to achieve conformance and return the Product to Customer; or (ii) refund to Customer the applicable fees upon return of the non-conforming Product to Avaya. For software warranty claims, Customer must provide Avaya with information in

sufficient detail to enable Avaya to reproduce and analyze the failure and must provide remote access to the affected Products. Replacement hardware may be new, factory reconditioned, refurbished, re-manufactured or functionally equivalent and will be furnished only on an exchange basis. Returned hardware that has been replaced by Avaya will become Avaya's property. Replacement Products are warranted as above for the remainder of the original applicable Product warranty period. THESE REMEDIES WILL BE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES AND WILL BE IN LIEU OF ANY OTHER RIGHTS OR REMEDIES CUSTOMER MAY HAVE AGAINST AVAYA WITH RESPECT TO THE NONCONFORMANCE OF PRODUCTS.

**6.4 Warranty Procedures.** Products subject to a warranty claim must be returned to Avaya in accordance with Avaya's instructions accompanied by evidence satisfactory to Avaya that the Products remain entitled to warranty protection.

**6.5 Costs.** If a Product is returned within the applicable warranty period subject to a valid warranty claim, Avaya will not charge for any repair, replacement, error identification or correction, or return shipment of the non-conforming Product. If Avaya determines that the Product was operating in conformance with its applicable warranty, Avaya may charge Customer for error identification or correction efforts, repair, replacement and shipment costs at Avaya's then current rates.

**7. SOFTWARE LICENSE TERMS**

The following license terms and restrictions will apply to software licensed pursuant to this Attachment in addition to those in the General Terms.

**7.1 License Types.** Avaya grants Customer a license within the scope of one of the license types described below. The license type abbreviations below may be referenced in the order and/or Product documentation. Where the order or documentation does not expressly identify a license type, the applicable license will be a Designated System License. Where the order does not expressly indicate a specific number of licenses or units of capacity, the applicable number of licenses and units of capacity for which the license is granted will be one. For purposes of this list of license types: (i) "Designated Processor" means a single stand-alone computing device; and (ii) "Server" means a Designated Processor that hosts a software application to be accessed by multiple users.

**7.1.1 Designated System(s) License (DS).** Customer may install and use each copy of the software only on a number of Designated Processors up to the number indicated in the order. Avaya may require the Designated Processor(s) to be identified in the order by type, serial number, feature key, location or other specific designation, or to be provided by Customer to Avaya through electronic means established by Avaya specifically for this purpose.

**7.1.2 Concurrent User License (CU).** Customer may install and use the software on multiple Designated Processors or one or more Servers, so long as only the licensed number of Units are accessing and using the software at any given time. A "Unit" means the unit on which Avaya, at its sole discretion, bases the pricing of its licenses and can be, without limitation, an agent, port or user, an e-mail or voice mail account in the name of a person or corporate function (e.g., webmaster or helpdesk), or a directory entry in the administrative database utilized by the Product that permits one user to interface with the software. Units may be linked to a specific, identified Server.

**7.1.3 Database License (DL).** Customer may install and use each copy of the software on one Server or on multiple Servers provided that each of the Servers on which the software is installed communicates with no more than a single instance of the same database.

**7.1.4 CPU License (CP).** Customer may install and use each copy of the software on a number of Servers up to the number indicated in the order provided that the performance capacity of the Server(s) does not exceed the performance capacity specified for the software. Customer may not re-install or operate the software on Server(s) with a larger performance capacity without Avaya's prior consent and payment of an upgrade fee.

**7.1.5 Named User License (NU).** Customer may: (i) install and use the software on a single Designated Processor or Server per authorized Named User (defined below); or (ii) install and use the software on a Server so long as only authorized Named Users access and use the software. A "Named User" means a user or device that has been expressly authorized by Avaya to access and use the software. At Avaya's sole discretion, a Named User may be, without limitation, designated by name, corporate function (e.g., webmaster or helpdesk), an e-mail or voice mail account in the name of a person or corporate function, or a directory entry in the administrative database utilized by the Product that permits one user to interface with the Product.

**7.1.6 Shrinkwrap License (SR).** With respect to software that contains elements provided by third party suppliers, Customer may install and use the software in accordance with the terms and conditions of the applicable license agreements, such as "shrinkwrap" or "click-through" licenses, accompanying or applicable to the software ("Shrinkwrap License").



**CUSTOMER AGREEMENT  
ATTACHMENT 2  
IMPLEMENTATION SERVICES TERMS**

These Implementation Services Terms are part of the Customer Agreement between Avaya and Customer, which incorporates these Services Terms by reference (the "Agreement"). These Implementation Services Terms apply if and to the extent Customer acquires Services.

**1. SCOPE; ORDER OF PRECEDENCE; CHANGES**

**1.1 Services Provided.** Avaya will provide the Services described in this paragraph ("Implementation Services") as specified in an order and/or a Statement of Work executed by both parties ("SOW"). "Installation" or "Installation Services" are Implementation Services where Avaya performs Product installation and Product configuration. "Milestone Services" are Implementation Services where Avaya creates and delivers customized software, hardware, documentation, or other work product ("Deliverables") or completes other defined objectives ("Milestone Objectives") on a milestone basis. "T&M Services" are technical services and other Implementation Services provided on a time and materials basis in exchange for hourly or daily fees and expense reimbursements calculated on the basis of Avaya service records. Deliverables and work product of T&M Services do not include generally available hardware and software and are not Products. To the extent a SOW provides that Avaya will deliver Products, the terms for Supply of Generally Available Products will apply to those Products. Implementation Services do not include Maintenance Services or Managed Services and do not include "consulting services" as defined by Chapter 2254, Subchapter B, Texas Government Code.

**1.2 Order of Precedence.** In the event of conflict among the General Terms, these Implementation Services Terms, a SOW and any ancillary attachments to or documents referenced in a SOW, the order of precedence is: (i) Implementation Services Terms; (ii) General Terms; (iii) SOW; and (iv) ancillary documents. Notwithstanding the foregoing, as provided in the preamble above, to the extent this Agreement is inconsistent with DIR Contract No. DIR-SDD-272, the terms of Contract DIR-SDD-272 shall prevail.

**1.3 Site Survey.** Prior to performing Installation Services, Avaya may perform a site survey to identify site-specific Installation requirements. Upon completion of the site survey, Avaya will notify Customer of any additional fees relating to the Installation that may apply. If the additional fees exceed 5% of the Installation Services fees in the order or SOW, Customer may cancel the Installation Services without incurring cancellation charges if Avaya receives the cancellation in writing within five business days of Customer's receipt of Avaya's notice.

**1.4 Changes.** Changes in Implementation Services will be made in accordance with the change control procedure in the SOW. If there is no procedure: (i) Avaya will respond promptly to Customer's change requests by identifying the impact of the proposed change on schedules and pricing; and (ii) changes will be valid only where agreed in writing by both parties.

**2. ACCEPTANCE**

**2.1 T&M SERVICES. T&M SERVICES ARE DEEMED ACCEPTED UPON PERFORMANCE.**

**2.2 SOW without Acceptance Procedures.** Where the SOW does not contain specific acceptance criteria and procedures ("Acceptance Procedures"), Implementation Services are deemed accepted upon the earlier of either: (i) Avaya providing notice of completion to Customer, or (ii) production use of Deliverables or installed Products.

**2.3 SOW with Acceptance Procedures.** Where the SOW contains Acceptance Procedures, the Deliverable or Milestone Objective is deemed accepted upon the earlier of either: (i) the end of the acceptance period defined in the Acceptance Procedures, unless Avaya has received from Customer a rejection notice indicating in reasonable detail the material failure of the Deliverable or Milestone Objective to conform to the criteria in the

Acceptance Procedures ("Rejection Notice"); or (ii) production use (except to the extent production use is included in the Acceptance Procedures). If the Deliverable or Milestone Objective fails to conform to the criteria in the Acceptance Procedures and Avaya has received a timely Rejection Notice, then Avaya will re-perform the respective Milestone Services and re-submit the Deliverable or Milestone Objective for acceptance as described above. If, after resubmission, Customer provides another Rejection Notice, then Customer's remedies will be either to: (a) terminate the SOW, return all Deliverables and receive a refund of fees paid under the SOW; or (b) accept the Deliverable or Milestone Objective subject to the warranties and remedies described in Section 0. If requested by Avaya, Customer will sign and return an acceptance certificate or other document evidencing acceptance in accordance with this Section.

**2.4 Transfer of Risk and Title.** Title to hardware components of Deliverables will pass to Customer upon acceptance. Risk of loss will pass to Customer when the carrier receives the Deliverable for shipment to Customer or when the Deliverable arrives on Customer's premises, whichever occurs earlier.

**3. INVOICING AND PAYMENT**

Fees will be invoiced as follows: (i) Installation Services on completion of the installation, unless otherwise provided in the SOW; (ii) Milestone Services according to the schedule in the SOW; and (iii) T&M Services monthly in arrears, unless otherwise provided in the SOW.

**4. WARRANTY AND LIMITATION OF LIABILITY**

**4.1 Warranty Period.** Unless a different period is specified on the order or SOW, the warranty period for Implementation Services and Deliverables will be 30 days beginning on the acceptance or deemed acceptance date of the Deliverables or the performance of the Service (the "Warranty Period").

**4.2 Warranty.** Avaya warrants to Customer that Services will be carried out in a professional and workmanlike manner by qualified Personnel. Avaya warrants that, during the Deliverables Warranty Period, Deliverables will conform in all material respects to the specifications contained in the SOW. However, Avaya does not warrant that software contained in the Deliverables will perform uninterrupted or error-free.

**4.3 Remedies.** For T&M Services, if Avaya receives written notice from Customer to cure a non-conformance with the above warranty describing the non-conformance in reasonable detail within 30 days of its performance, and Avaya fails to cure the non-conformance within 30 days of receiving Customer's notice, Customer may cancel the affected T&M Services, subject to payment of fees for T&M Services already performed. If, during the Deliverable Warranty Period, Avaya receives from Customer a written notice describing in reasonable detail how the Deliverables failed to be in conformance with the above warranty, Avaya will, at its option, repair or replace the non-conforming Deliverables, or refund to Customer the applicable fees upon return of the non-conforming Deliverables. THESE REMEDIES WILL BE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES AND WILL BE IN LIEU OF ANY OTHER RIGHTS OR REMEDIES CUSTOMER MAY HAVE AGAINST AVAYA WITH RESPECT TO THE NON-COMFORMANCE OF IMPLEMENTATION SERVICES.

**5. TERM AND TERMINATION**

**5.1 Term.** The term of a SOW will begin on the date specified in the SOW and will continue until the work is completed or the SOW is terminated earlier in accordance with this Section.

**5.2 Termination.** Unless otherwise provided in the SOW, either party may terminate T&M or Installation Services upon 60 days prior written notice, and Customer will pay for Services performed to the date of termination. Unless otherwise provided in the SOW, Customer may terminate Milestone Services at any time upon written notice subject to payment of: (i) Avaya's standard time and materials rates for work performed to the date of termination; and (ii) all non-refundable or non-terminable out-of-pocket expenses Avaya incurred.



CUSTOMER AGREEMENT  
ATTACHMENT 3

MAINTENANCE/MANAGED SERVICES TERMS

These Maintenance Services Terms are part of the Customer Agreement between Avaya and Customer, which incorporates these Services Terms by reference (the "Agreement"). These Maintenance/Managed Services Terms apply if and to the extent Customer acquires Services.

**1. ORDER, PROVISION AND SCOPE OF SERVICES**

**1.1 Order and Provision of Services.** In return for the payment of the fees specified in the order, Avaya will provide the maintenance services options for Supported Products or Supported Systems at Supported Sites, as described further in this Attachment and the SAS (for purposes of this Attachment, "Services"). The "Service Agreement Supplement" or "SAS" is the Avaya Service Agreement Supplement then current as of the date of Avaya's acceptance of an order for Services and available to Customer upon request. Where the parties have executed a statement of work describing specific Services ("Statement of Work" or "SOW"), the SAS includes the Statement of Work. "Supported Products" are: (i) hardware or software products identified in the order; and (ii) Added Products (defined in Section 1.8). Supported Products may include non-Avaya products to the extent they are specified in the order. "Supported Systems" are a group of products or networks specified in the order. "Supported Sites" are locations specified in the order. "Managed Services are beyond the scope of services allowed in Contract NO. DIR - SDD - 272 and may not be ordered or provided under this DIR Contract

**Documents and Order of Precedence.** In the event of conflict among the General Terms, these Maintenance Services Terms; the SAS and any ancillary attachments to or documents referenced in the SAS, the order of precedence is: (i) Maintenance Services Terms; (ii) General Terms; (iii) SAS; and (iv) ancillary documents. Notwithstanding the foregoing, as provided in the preamble above, to the extent this Agreement is inconsistent with DIR Contract No. DIR-SDD-287, the terms of Contract DIR-SDD-272 shall prevail.

**1.2 Monitoring.** Avaya may electronically monitor Supported Products and Supported Systems for the following purposes: (i) remote diagnostics and corrective actions; (ii) to determine system configuration and applicable charges; (iii) to verify compliance with applicable software license terms and restrictions; (iv) when providing managed Services, to assess Customer needs for additional products or Services; (v) as otherwise provided in the SAS.

**1.3 Error Correction.** Some Services options may include correction of Errors. An "Error" means a failure of a Supported Product to conform in all material respects to the manufacturer's specifications that were currently applicable when the Supported Product was purchased or licensed.

**1.4 Help Line Support.** Where the selected Services option includes help line support, Avaya will provide it in accordance with the coverage option (service hours, target response intervals, etc.) that Customer has selected.

**1.5 Updates.** Where the selected Services option includes the provision of Updates, Avaya will make Updates available to Customer if, and when, the manufacturer makes them generally available to its other customers. An "Update" is a change in software that typically provides maintenance correction only. It typically is designated as a change in the digit to the right of the second decimal point (e.g. n.y.[z]). Avaya will provide Updates via a website, email or post mail, at Avaya's option. Updates may be remotely installed by Avaya or delivered to Customer for self-installation.

**1.6 End of Support.** Avaya may discontinue or limit the scope of Services for Supported Products that Avaya or the third party manufacturer has declared "end of life," "end of service," "end of support," "manufacture discontinued" or similar designation ("End of Support"). Customer may access Avaya's user support website ([www.support.avaya.com](http://www.support.avaya.com)) for End of Support notifications. Avaya targets posting of End of Support notifications for Avaya-manufactured Products at least six months in advance of the End of Support date. End of Support will be effective as of the effective date of the End of Support notice. Avaya also may provide End of Support notices by email to email addresses that Customer has registered with Avaya. If Services are discontinued for a Supported Product, the Supported Product will be removed from the order and rates will be adjusted accordingly. For certain Products subject to End of Support, Avaya may continue to offer a limited set of Services ("Extended Support"). Where Avaya has chosen to do this, the description of Extended Support available and related fees will be available at the time of Avaya's notice. These notices will communicate information such as Extended Support eligibility, Extended Support alerts related to parts shortages, and end of Services coverage eligibility (including Extended Support).

**1.7 Replacement Hardware.** Replacement hardware provided as part of Services may be new, factory reconditioned, refurbished, re-manufactured or functionally equivalent. It will be furnished only on an exchange basis. Returned hardware that has been replaced by Avaya, whether Avaya Equipment or otherwise, will become Avaya's property.

**1.8 Added Products.** If Customer acquires additional products of the same type and manufacturer(s) as the existing Supported Products and locates them with existing Supported Products at a Supported Site, they will be considered "Added Products", and will be added to the order automatically for the remainder of the term. Added Products purchased from a party other than the manufacturer or an authorized reseller are subject to certification by Avaya at Avaya's then current Services rates. If Added Products fail certification, Avaya may choose not to add them to the Supported Products.

**1.9 General Limitations.** Unless the SAS provides otherwise, Avaya will provide software Services only for the unaltered current release of the software and the prior release. The following items are included in the Services only if the SAS specifically includes them: (i) support of user-defined applications; (ii) support of Supported Products that have been modified by a party other than Avaya (except for installation of standard, self-installed Updates provided by the manufacturer); (iii) making corrections to user-defined reports; (iv) data recovery services; (v) services associated with relocation of Supported Products; (vi) correction of Errors arising from causes external to the Supported Products (such as power failures or surges); and (vii) services for Supported Products that have been misused, used in breach of their license restrictions, improperly installed or configured, or that have had their serial numbers altered, defaced or deleted.

**2. INVOICING AND PAYMENT**

Avaya will invoice Customer for Services in advance unless another payment option is specified in the order.

**3. CUSTOMER RESPONSIBILITIES**

**3.1 General.** Customer will cooperate with Avaya as reasonably necessary for Avaya's performance of its obligations, such as: (i) providing Avaya with full, free and safe access to its facilities; (ii) providing telephone numbers, network addresses and passwords necessary for remote access; and (iii) providing interface information for Supported Products and necessary third party consents and licenses to access them. All items will be provided by Customer at Customer's expense. If Avaya provides an Update or other new release of software as part of the Services, Customer will implement it promptly.

**3.2 Provision of Supported Products and Systems.** Except for Avaya Equipment or Avaya hosted facilities identified in the SAS, Customer will provide all Supported Products, Supported Systems and Supported Sites. Customer continuously represents and warrants that: (i) Customer is either the owner of, or is authorized to access and use, each of them; and (ii) Avaya, its suppliers, and subcontractors are authorized to do the same to the extent necessary to provide the Services in a timely manner.

**3.3 Moves of Supported Products.** Customer will notify Avaya in advance before moving Supported Products. Only Avaya may move Avaya Equipment. Avaya may charge additional amounts to recover additional costs in providing the Services as a result of moved Supported Products.

**3.4 Vendor Management.** Where Avaya is to instruct or request products or services on Customer's behalf from third party vendors under Customer's supply contracts with the third party vendors ("Vendor Management"), Customer will provide Avaya upon request a letter of agency or similar document, in a form reasonably satisfactory to Avaya, permitting Avaya to perform the Vendor Management. Where the third party vendor's consent is required for Avaya to be able to perform Vendor Management in a timely manner, Customer will obtain the written consent of the vendor and provide Avaya a copy of it upon request.

**3.5 Third Party Hosting.** In the event one or more network address(es) to be monitored by Avaya are associated with systems owned, managed, and/or hosted by a third party service provider ("Host"), Customer will: (i) notify Avaya of the Host prior to commencement of the Services; (ii) obtain the Host's advance written consent for Avaya to perform the Services on the Host's computer systems and provide Avaya with a copy of the consent upon request; and (iii) facilitate necessary communications between Avaya and the Host in connection with the Services.

**3.6 Access to Personal Data.** Where Customer instructs Avaya to access any employee, customer or other individual's personal data contained in any Supported Product or Supported System, or to provide Customer or a third party identified by Customer with access, to the extent allowed by Texas law and constitution, Customer will indemnify Avaya and its officers, directors, employees, subcontractors and affiliates against, and hold each of them harmless from, any and all liabilities, costs, damages, judgments and expenses (including reasonable attorney's fees and costs) arising out of Avaya accessing or providing access in accordance with Customer's instructions.

**3.7 Avaya Equipment.** Customer will not remove any identification tags or other markings on Avaya Equipment. Customer will keep Avaya Equipment free and clear of all levies, liens and encumbrances arising by or through Customer or arising in connection with the location of Avaya Equipment at a Supported Site, and consents to the filing of informational financing statements by the owner of the Avaya Equipment to give notice of ownership. Customer will, at its own expense, either maintain insurance or self-insure against loss, theft, destruction or damage to Avaya Equipment (each, a "Loss") for the full replacement value of the Avaya Equipment, will provide evidence of this insurance upon request, and will notify Avaya promptly in writing of any Loss.

**4. TITLE AND RISK OF LOSS TO EQUIPMENT**

Title to Avaya-installed replacement hardware provided as part of Services will pass to Customer when installed. Title to all other hardware provided as part of Services will pass to Customer when it arrives at the Supported Site. Avaya may, without notice to Customer, assign, pledge, transfer or otherwise convey any or all of Avaya's right, title and interest in Avaya Equipment. Customer will bear the risk of loss, theft, destruction or damage to Avaya Equipment except for losses caused by Avaya.

## 5. SOFTWARE LICENSE

Where Services include provision of patches, Updates or feature upgrades for Supported Products ("New Software"), they will be provided subject to the license grant and restrictions contained in the original agreement under which Customer licensed the original software from Avaya. Where there is no existing license from Avaya, New Software will be provided subject to the manufacturer's then current license terms and restrictions for the New Software. New Software may include components provided by third party suppliers that are subject to their own end user license agreements. Customer may install and use these components in accordance with the terms and conditions of the "shrinkwrap" or "clickwrap" end user license agreement accompanying them.

## 6. WARRANTY AND LIMITATION OF LIABILITY

**6.1 Warranty.** Avaya warrants to Customer that Services will be carried out in a professional and workmanlike manner by qualified Personnel.

**6.2 Remedy.** If Services are not in conformance with the above warranty and Avaya receives Customer's detailed request to cure a non-conformance within 30 days of its occurrence, Avaya will re-perform those Services. This remedy will be Customer's sole and exclusive remedy and will be in lieu of any other rights or remedies Customer may have against Avaya with respect to the non-conformance of Services.

**Disclaimer.** Services provided to enhance network security are not a guaranty against malicious code, deleterious routines, and other techniques and tools employed by computer "hackers" and other third parties to create security exposures. Neither Avaya

nor its suppliers make any warranty, express or implied, that all security threats and vulnerabilities will be detected or that the Services will render an end user's network or particular network elements safe from intrusions and other security breaches.

## 7. TERM AND TERMINATION

**7.1 Term.** Unless a different term is defined in the order, Avaya will provide Services for an initial term of one year. Services will be renewed automatically for successive one year terms applying the then most similar current generally available support plan offering and then current rates, unless either party gives the other written notice of its intent not to renew at least 30 days prior to the expiration of the applicable initial or renewal term. Unless otherwise specified in the SAS, Customer may terminate Services in whole or in part upon 30 days written notice subject to the following cancellation fees: (i) no charge if terminated within 30 days after commencement of an automatic renewal term; (ii) for maintenance Services only, a fee equal to six months of maintenance fees if terminated during the applicable warranty period for the Supported Product where Services have not commenced; and/or (iii) for maintenance Services only, a fee equal to 12 months, or the remaining term, of fees for Services terminated at any other time.

**7.2 Re-Delivery of Avaya Equipment.** Within 30 days after the termination of the SOW, Customer will: (i) deliver at no cost to Avaya all Avaya Equipment located at a Supported Site subject to the termination to a location in the United States designated by Avaya, in the same condition as when originally delivered to the Supported Site, reasonable wear and tear excepted; and (ii) cease all use and return to Avaya all copies of software (including backup copies) provided as part of the Services.

## Appendix E

### MASTER LEASE AGREEMENT

#### 1. Scope.

Lessor hereby leases to Lessee, and Lessee hereby leases from Lessor the Equipment described on each Supplementary Schedule ("Schedule"), which is a separate agreement executed from time to time by Lessor and Lessee and makes specific reference to this Master Lease Agreement ("MLA"). The terms and conditions contained herein shall apply to each Schedule that is properly executed in conjunction with this MLA and made subject to such terms and conditions as if a separate MLA were executed for each Schedule by the Lessee. Each Lessee has made an independent legal and management determination to enter into each Schedule. DIR has not offered or given any legal or management advice to the Lessor or to any Lessee under any Schedule. Lessee may negotiate additional terms or more advantageous terms with the Lessor to satisfy individual procurements, such terms shall be developed by the Lessor and Lessee and stated within a Rider to the MLA or the Schedule. To the extent that any of the provisions of the MLA conflict with any of the terms contained in any Schedule, the terms of the Schedule shall control. It is expressly understood that the term "Equipment" shall refer to the Products and any related Services as allowed within said Contract number DIR-SDD-272, as described on a Schedule and any associated items therewith, including but not limited to all parts, replacements, additions, repairs, and attachments incorporated therein and/or affixed thereto, all documentation (technical and/or user manuals), operating system and application software as needed.

If more than one Lessee is named in a Schedule, the liability of each named Lessee shall be joint and several. However, unless DIR leases Equipment for its own use, DIR is not a party to any Schedule executed under this MLA and is not responsible for Rents, payments or any other obligations under such Lessee's Schedule. The invalidation, fulfillment, waiver, termination, or other disposition of any rights or obligations of either a Lessee or the Lessor or both of them arising from the use of this MLA in conjunction with any one Schedule shall not affect the status of the rights or obligations of either or both of those parties arising from the use of this MLA in conjunction with any other Schedule, except in the Event of Default as provided in Section 23 of this MLA.

Any reference to "MLA" shall mean this Agreement, including the Opinion of Counsel, and any riders, amendments and addenda thereto, and any other documents as may from time to time be made a part hereof upon mutual agreement by DIR and Lessor.

As to conditions precedent to Lessor's obligation to purchase any Equipment, (i) Lessee shall accept the MLA terms and conditions as set forth herein and execute all applicable documents such as the Schedule, the Acceptance Certificate, Opinion of Counsel, and any other documentation as may be required by the Lessor that is not in conflict with this MLA, and (ii) there shall be no material adverse change in Lessee's financial condition except as provided for within Section 7 of this MLA.

#### 2. Term of MLA.

The term of this MLA shall commence on the last date of approval by DIR and Lessor of Amendment Number 2 and shall continue until (i) the obligations of Lessee under every Schedule are fully discharged,

(ii) the full and final expiration date of the Contract, or (iii) either party exercises their termination rights as stated within Appendix A, Section 10B of the Contract. In regards to either the Contract expiration date or Contract termination date or the termination of this MLA, before all obligations of Lessee under every Schedule are fully discharged, such Schedules and such other provisions of the Contract and this MLA as may be necessary to preserve the rights of the Lessor or Lessee hereunder shall survive said termination or expiration.

### **3. Term of Schedule.**

The term for each Schedule, executed in conjunction to this MLA, shall commence on the date of execution of an Acceptance Certificate by the Lessee or twenty (20) days after the delivery of the last piece of Equipment to the Lessee ("Commencement Date"), and unless earlier terminated as provided for in the MLA, shall continue for the number of whole months or other payment periods as set forth in the applicable Schedule Term, commencing on the first day of the month following the Commencement Date (or commencing on the Commencement Date if such date is the first day of the month). The Schedule Term may be earlier terminated upon: (i) the Non-appropriation of Funds pursuant to Section 7 of this MLA, (ii) an Event of Loss pursuant to Section 18 of this MLA, or (iii) an Event of Default by Lessee and Lessor's election to cancel the Schedule pursuant to Section 24 of this MLA.

### **4. Administration of MLA.**

- (a) For requests involving the leasing of Equipment, each potential Lessee will submit its request directly to the Lessor. Lessor shall apply the then current Equipment pricing discounts as stated within Section 4 of the Contract or the price as agreed upon by Lessee and Lessor, whichever is lower. Lessor shall submit the lease proposal and all other applicable documents directly to the potential Lessee and negotiate the Schedule terms directly with the potential Lessee.
- (b) All leasing activities in conjunction to this MLA shall be treated as a "purchase sale" in regards to the requirements of the Lessor to report the sale and make payment of the DIR administrative fee as defined within Section 5 of the Contract.
- (c) Upon agreement by Lessor and Lessee on pricing, availability and the like, Lessee may issue a purchase order in the amount indicated on the Schedule to Lessor for the Equipment and reference said Contract number DIR-SDD-272 on the purchase order. Any pre-printed terms and conditions on the purchase order submitted by the Lessee shall not be effective with respect to the lease of Equipment hereunder. Rather, the terms and conditions of this MLA and applicable Schedule terms and conditions shall control in all respects.
- (d) Nothing herein shall require the Lessor to use this MLA exclusively with Lessees. Further, this MLA shall not constitute a requirements Agreement and Lessor shall not be obligated to enter into any Schedule for the lease of Equipment with any Lessee.

### **5. Rent Payments.**

During the Schedule Term and any renewal terms, Lessee agrees to pay Lessor Rent Payments. Rent Payments shall be the amount equal to the Rent Payment amount specified in the Schedule multiplied by

the amount of the total number of Rent Payments specified therein. Lessee shall pay Rent Payments in the amount and on the due dates specified by Lessor until all Rent Payments and all other amounts due under the Schedule have been paid in full. If the Schedule Commencement Date is other than the first day of a month, Lessee shall make an initial payment on the Schedule Commencement Date in an amount equal to one-thirtieth of the Rent Payment specified in the Schedule for each day from the Schedule Commencement Date (including the Schedule Commencement Date) through the last day of such month (including that day). For example, if a scheduled payment amount is \$3,000 and the Scheduled Commencement date is the 15<sup>th</sup> of the month, a payment of \$1,500 will be made.

Any amounts received by Lessor from the Lessee in excess of Rent Payments and any other sums required to be paid by the Lessee shall be held as non-interest bearing security for Lessee's faithful performance under the conditions of this MLA and any Schedule. All Rent Payments shall be paid to the Lessor at the address stated on the Schedule or any other such place as the Lessor or its assigns may hereafter direct to the Lessee. Lessee shall abide by Appendix A, Section 7C of the Contract in making payments to the Lessor. Any sum received by the Lessor later than ten (10) business days after its due date will bear interest from such due date at the rate of one-percent (1%) per month (or the maximum rate allowable by law, if less) until paid. Late charges, attorney's fees and other costs or expenses necessary to recover Rent Payments and any other amounts owed by Lessee hereunder are considered an integral part of this MLA.

Each Schedule is a net lease and except as specifically provided herein, Lessee shall be responsible for all costs and expenses arising in connection with the Schedule or Equipment. Lessee acknowledges and agrees, except as specifically provided for in Section 7 of this MLA, that its obligation to pay Rent and other sums payable hereunder, and the rights of Lessor and Lessor's assignees, shall be absolute and unconditional in all events, and shall not be abated, reduced or subject to offset or diminished as a result of any event, including without limitation damage, destruction, defect, malfunction, loss of use, or obsolescence of the Equipment, or any other event, defense, counterclaim or recoupment due or alleged to be due by reason of any past, present or future claims Lessee may have against Lessor, Lessor's assigns, the manufacturer, vendor, or maintainer of the Equipment, or any person for any reason whatsoever.

"Price" shall mean the actual purchase price of the Equipment. Rent Payments shall be adjusted proportionately downward if the actual price of the Equipment is less than the estimate (original proposal), and the Lessee herein authorizes Lessor to adjust the Rent Payments downward in the event of the decrease in the actual Equipment price. However, in the event that the Equipment price is more than the estimate (original proposal), the Lessor may not adjust the Rent Payment without prior written approval of the Lessee.

#### **6. Liens and Taxes.**

Lessee shall keep the Equipment free and clear of all levies, liens and encumbrances, except those in favor of Lessor or its assigns, and shall give Lessor immediate notice of any attachment or other judicial process affecting any item of Equipment. Unless Lessee first provides proof of exemption therefrom, Lessee shall promptly reimburse Lessor, upon receipt of an accurate invoice, as an additional sum payable under this MLA, or shall pay directly if so requested by Lessor, all license and registration fees, sales, use, personal property taxes and all other taxes and charges imposed by any federal, state, or local governmental or taxing authority, from which the Lessee is not exempt, whether assessed against Lessee or Lessor, relating to the purchase, ownership, leasing, or use of the Equipment or the Rent Payments, excluding all taxes

computed upon the net income of Lessor. Any tax statement received by the Lessor, for taxes payable by the Lessee, shall be promptly forwarded by the Lessor to the Lessee for payment.

## **7. Appropriation of Funds.**

- (a) This paragraph applies only to Lessees designated as state agencies defined in Section 2054.003, Texas Government Code, including institutions of higher education as defined in Texas Education Code, Section 61.003 and those state agencies utilizing a DIR contract through an Interagency Agreement, as authorized by Chapter 771, Texas Government Code.

Lessee intends to continue each Schedule to which it is a party for the Schedule Term and to pay the Rent and other amounts due thereunder. Lessee reasonably believes that legally available funds in an amount sufficient to pay all Rent during the Schedule Term can be obtained. Lessee further intends to act in good faith to do those things reasonably and lawfully within its power to obtain and maintain funds from which the Rent may be paid. Notwithstanding the foregoing, in the event sufficient funds are not appropriated to continue the Schedule Term for any Fiscal Period (as set forth on the Schedule) of Lessee beyond the Fiscal Period first in effect at the Commencement of the Schedule Term, Lessee may terminate the Schedule with regard to not less than all of the Equipment on the Schedule so affected. Lessee shall endeavor to provide Lessor written notice sixty (60) days prior to the end of its current Fiscal Period confirming the Schedule will be so terminated. All obligations of Lessee to pay Rent due after the end of the Fiscal Period for which such termination applies will cease, all interests of Lessee in the Equipment will terminate and Lessee shall surrender the Equipment in accordance with Section 13 of this MLA. Notwithstanding the foregoing, Lessee agrees, without creating a pledge, lien or encumbrance upon funds available to Lessee in other than its current Fiscal Period, that it will use reasonable efforts to obtain appropriation of funds to avoid termination of the Schedule by taking reasonable and appropriate action including the inclusion in Lessee's budget request for each Fiscal Period during the Schedule Term hereof a request for adequate funds to meet its obligations and to continue the Schedule in force. Lessee represents and warrants it has adequate funds to meet its obligations during the first Fiscal Period of the Schedule Term. Lessor and Lessee understand and intend that the obligation of Lessee to pay Rent hereunder shall constitute a current expense of Lessee and shall not in any way be construed to be a debt of Lessee in contravention of any applicable constitutional or statutory limitation or requirement concerning the creation of indebtedness by Lessee, nor shall anything contained herein constitute a pledge of the general revenues, funds or monies of Lessee or the State of Texas beyond the Fiscal Period for which sufficient funds have been appropriated to pay Rent hereunder.

- (b) This paragraph applies only to Lessees designated as local government entities.

Lessee intends to continue each Schedule to which it is a party for the Schedule Term and to pay the Rent and other amounts due thereunder. Lessee reasonably believes that legally available funds in an amount sufficient to pay all Rent during the Schedule Term can be obtained. Lessee further intends to act in good faith to do those things reasonably and lawfully within its power to obtain and maintain funds from which the Rent may be paid. Notwithstanding the foregoing, in the event sufficient funds are not appropriated for Lessee to continue the Schedule Term for any Fiscal Period (as set forth on the Schedule) of the Lessee beyond the Fiscal Period first in effect at the commencement of the Schedule Term, the Lessee may terminate the Schedule with regard to not less than all of the

Equipment on the Schedule so affected. Lessee shall endeavor to provide Lessor written notice sixty (60) days prior to the end of its current Fiscal Period confirming the Schedule will be terminated. All obligations of Lessee to pay Rent due after the end of the Fiscal Period first in effect at the commencement of the Schedule Term will cease, all interests of Lessee in the Asset(s) will terminate and Lessee shall surrender the Equipment in accordance with Section 13 of this MLA. Notwithstanding the foregoing, Lessee agrees, without creating a pledge, lien or encumbrance upon funds available to Lessee in other than its current Fiscal Period, that it will use reasonable efforts to obtain appropriation of funds to avoid termination of the Schedule by taking reasonable and appropriate action including the inclusion in Lessee's budget request for each Fiscal Period during the Schedule Term hereof a request for adequate funds to meet its obligations and to continue the Schedule in force. Lessee represents and warrants it has adequate funds to meet its obligations during the first Fiscal Period of the Schedule Term.

#### **8. Selection of Equipment.**

The Equipment is the size, design, capacity and manufacture selected by Lessee in its sole judgment and not in reliance on the advice or representations of Lessor. No representation by the manufacturer or a vendor shall in any way affect Lessee's duty to pay Rent and perform its other obligations hereunder. Each Schedule is intended to be a "finance lease" as defined in Article 2A of the Uniform Commercial Code. Lessor has acquired or will acquire the Equipment in connection with this MLA. Lessor shall not be liable for damages for any reason, for any act or omission of the supplying manufacturer. Lessor agrees, to the extent they are assignable, to assign the Lessee, without recourse to Lessor, any warranties provided to Lessor with respect to the Equipment during the Term of the applicable Schedule. Lessee acknowledges that neither its dissatisfaction with any unit of Equipment, nor the failure of any of the Equipment to remain in useful condition for the Schedule Term, nor the loss of possession or the right of possession of the Equipment or any part thereof by the Lessee, shall relieve Lessee from the obligations under this MLA or Schedule Term. Lessee shall have no right, title or interest in or to the Equipment except the right to use the same upon the terms and conditions herein contained. The Equipment shall remain the sole and exclusive personal property of the Lessor and not be deemed a fixture whether or not it becomes attached to any real property of the Lessee. Any labels supplied by Lessor to Lessee, describing the ownership of the Equipment, shall be affixed by Lessee upon a prominent place on each item of Equipment.

#### **9. Inspection and Acceptance.**

Promptly upon delivery of the Equipment, Lessee will inspect and test the Equipment, and not later than ten (10) business days following the Commencement Date, Lessee will execute and deliver either (i) an Acceptance Certificate, or (ii) written notification of any defects in the Equipment. If Lessee has not given notice within such time period, the Equipment shall be conclusively deemed accepted by the Lessee as of the tenth (10<sup>th</sup>) business day. Lessor, its assigns or their agents, shall be permitted free access at reasonable times authorized by the Lessee, the right to inspect the Equipment.

#### **10. Installation and Delivery; Use of Equipment; Repair and Maintenance.**

- (a) All transportation, delivery, and installation costs associated with the Equipment shall be borne by the Lessee. Lessor is not and shall not be liable for damages if for any reason the manufacturer of the

Equipment delays the delivery or fails to fulfill the order by the Lessee's desired timeframe. Any delay in delivery by the manufacturer shall not affect the validity of any Schedule. Lessee shall provide a place of installation for the Equipment, which conforms to the requirements of the manufacturer and Lessor.

- (b) Subject to the terms hereof, Lessee shall be entitled to use the Equipment in compliance with all laws, rules, and regulations of the jurisdiction wherein the Equipment is located and will pay all cost, claims, damages, fees and charges arising out of its possession, use or maintenance. Lessee agrees to solely use the Equipment in the conduct of Lessee's business. Lessee agrees, at its expense, to obtain all applicable permits and licenses necessary for the operation of the Equipment, and keep the Equipment in good working order, repair, appearance and condition (reasonable wear and tear is acceptable). Lessee shall not use or permit the use of the Equipment for any purpose, which according to the specification of the manufacturer, the Equipment is not designed or reasonably suited. Lessee shall use the Equipment in a careful and proper manner and shall comply with all of the manufacturer's instructions, governmental rules, regulations, requirements, and laws, and all insurance requirements, if any, with regard to the use, operation or maintenance of the Equipment.
- (c) Lessee, at its expense, shall take good and proper care of the Equipment and make all repairs and replacements necessary to maintain and preserve the Equipment and keep it in good order and condition. Unless Lessor shall otherwise consent in writing, Lessee shall, at its own expense, enter into and maintain in force a maintenance agreement covering each unit of Equipment. Lessee shall furnish Lessor with a copy of such agreement, upon request. Lessee shall pay all costs to install and dismantle the Equipment. Lessee shall not make any alterations, additions, or improvements, or add attachments to the Equipment without the prior written consent of Lessor, except for additions or attachments to the Equipment purchased by Lessee from the original supplier of the Equipment or any other person approved by Lessor. If Lessee desires to lease any such additions or attachments, Lessee hereby grants to Lessor the right of first refusal to provide such lease financing to Lessee for such items. Subject to the provisions of Section 13B of this MLA, Lessee agrees to restore the Equipment to Return Condition prior to its return to the Lessor.

#### **11. Relocation of Equipment.**

Lessee shall at all times keep the Equipment within its exclusive possession and control. Upon Lessor's prior written consent, which shall not be unreasonably withheld, Lessee may move the Equipment to another location of Lessee within the continental United States, provided (i) Lessee is not in default on any Schedule, (ii) Lessee executes and causes to be filed at its expense such instruments as are necessary to preserve and protect the interests of Lessor and its assigns in the Equipment, (iii) Lessee pays all costs of, and provides adequate insurance during such movement, and (iv) Lessee pays all costs otherwise associated with such relocation. Notwithstanding the foregoing, Lessee may move the Equipment to another location within Texas without notification to, or the consent of, Lessor. Provided, however, that not later than December 31 of each calendar year, Lessee shall provide Lessor a written report detailing the total amount of Equipment at each location of Lessee as of that date, and the complete address for each location. Lessor shall make all filings and returns for property taxes due with respect to the Equipment, and Lessee agrees that it shall not make or file any property tax returns, including information returns, with respect to the Equipment.

## **12. Ownership.**

The Equipment shall at all times be and remain the sole and exclusive property of Lessor, subject to the parties rights under any applicable software license agreement. Lessee shall have no right, title or interest in the Equipment except a leasehold interest as provided for herein. Lessee agrees that the Equipment shall be and remain personal property and shall not be so affixed to realty as to become a fixture or otherwise to lose its identity as the separate property of the Lessor. Upon request, Lessee will enter into any and all agreements necessary to ensure that the Equipment remain the personal property of Lessor.

## **13. Purchase and Renewal Options; Location and Surrender of Equipment.**

- (a) Not less than 90 days prior to the expiration of the initial Schedule Term Lessor shall notify Lessee of options for continued use of Equipment. Lessee shall have the option to: (i) renew the Schedule as to all but not less than all of the Equipment, or (ii) purchase all but not less than all of the Equipment for cash or by the Lessor's acceptance of a purchase order from Lessee upon the last business day on or prior to the expiration of the Schedule Term thereof for a price equal to the amount set forth in the Schedule. If the Fair Market Value (FMV) Purchase Option was selected on the Schedule, the FMV shall be determined on the basis of and shall be equal in amount to, the value which would be obtained in an arms-length transaction between an informed and willing buyer-user (other than a used equipment dealer), who would be retaining the Equipment as part of its current operations, in continuing and consistent use, and an informed and willing seller under no compulsion to sell, and in such determination, costs of removal from the location of current use shall not be a deduction from such value. If Lessee desires to exercise either option, it shall give Lessor irrevocable written notice of its intention to exercise such option at least sixty (60) days (and not more than 180 days) before the expiration of such Schedule Term. In the event that Lessee exercises the purchase option described herein, upon payment by Lessee to Lessor of the purchase price for the Equipment, together with all Rent Payments and any other amounts owing to Lessor hereunder, Lessor shall transfer to Lessee without any representation or warranty of any kind, express or implied, title to such Equipment. NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY, IF LESSEE FAILS TO NOTIFY LESSOR OF ITS INTENT WITH RESPECT TO THE EXERCISE OF THE OPTIONS DESCRIBED IN THIS SECTION 13 WITHIN THE TIME FRAMES CONTEMPLATED HEREIN, THE INITIAL SCHEDULE TERM SHALL BE TERMINATED ON THE DATE AS STATED IN THE SCHEDULE.
- (b) The Equipment shall be delivered to and thereafter kept at the location specified in the Schedule and shall not be removed therefrom without Lessor's prior written consent and in accordance with Section 11 of this MLA. Upon the expiration, early termination as provided herein, or upon final termination of the Schedule, upon at least ninety (90) days prior written notice to Lessor, Lessee at its cost and expense, shall immediately disconnect, properly package for transportation and return all (not part) of the Equipment (including, without limitation, all service records and user manuals), freight prepaid, to Lessor in good repair, working order, with unblemished physical appearance and with no defects which affect the operation or performance of the Equipment ("Return Condition"), reasonable wear and tear excepted. Lessee shall, at Lessor's request, affix to the Equipment, tags, decals or plates furnished by Lessor indicating Lessor's ownership and Lessee shall not permit their removal or concealment. Lessee shall return the Equipment to Lessor at a location specified by Lessor, provided,

however, such location shall be within the United States no farther than 500 miles from the original Lessee delivery location, unless otherwise agreed to on the applicable Schedule. If the Equipment is not in Return Condition, Lessee shall remain liable for all reasonable costs required to restore the Equipment to Return Condition. Lessee shall arrange and pay for the de-installation and packing of the Equipment and the de-installation shall be performed by manufacturer-certified technicians, approved by Lessor and the Lessor shall have the right to supervise and direct the preparation of the Equipment for return. IF, UPON TERMINATION OR EXPIRATION OF THE SCHEDULE FOR ANY REASON, LESSEE FAILS OR REFUSES FORTHWITH TO RETURN AND DELIVER THE EQUIPMENT TO LESSOR, LESSEE SHALL REMAIN LIABLE FOR ANY RENT PAYMENTS ACCRUED AND UNPAID WITH RESPECT TO ALL OF THE EQUIPMENT ON THE SCHEDULE AND SHALL PAY RENT UP TO THE DATE THAT THE EQUIPMENT IS RETURNED TO THE ADDRESS SPECIFIED BY LESSOR. Notwithstanding the foregoing, Lessor shall have the right, without notice or demand, to enter Lessee's premises or any other premises where the Equipment may be found and to take possession of and to remove the Equipment, at Lessee's sole cost and expense, without legal process. Lessee understands that it may have a right under law to notice and a hearing prior to repossession of the Equipment. As an inducement to Lessor to enter into a transaction, but only to the extent that Lessee, if a state agency, has statutory authority to do so, Lessee hereby expressly waives all rights conferred by existing law to notice and a hearing prior to such repossession by Lessor or any officer authorized by law to effect repossession and hereby releases Lessor from all liability in connection with such repossession. Without waiving the doctrines of sovereign immunity and immunity from suit and to the extent authorized by the constitution and laws of the State of Texas, Lessee's obligation to return Equipment may, at Lessor's option, be specifically enforced by Lessor.

#### **14. Quiet Enjoyment.**

During the Schedule Term, Lessor shall not interfere with Lessee's quiet enjoyment and use of the Equipment provided that an Event of Default (as hereinafter defined in Section 23 of the MLA) has not occurred.

#### **15. Warranties.**

Lessor and Lessee acknowledge that manufacturer Equipment warranties, if any, inure to the benefit of the Lessee. Lessee agrees to pursue any warranty claim directly against such manufacturer of the Equipment and shall not pursue any such claim against Lessor. Lessee shall continue to pay Lessor all amounts payable under any Schedule under any and all circumstances.

#### **16. No Warranties.**

The following is applicable only if the Lessor is not Vendor: LESSEE ACKNOWLEDGES THAT LESSOR IS NOT THE MANUFACTURER OR LICENSOR OF THE EQUIPMENT. LESSEE AGREES THAT LESSOR HAS NOT MADE AND MAKES NO REPRESENTATIONS OR WARRANTIES OF WHATSOEVER NATURE, DIRECTLY OR INDIRECTLY, EXPRESS OR IMPLIED, AS TO THE SUITABILITY, DURABILITY, FITNESS FOR USE, MERCHANTABILITY, CONDITION, OR QUALITY OF THE EQUIPMENT OR ANY UNIT THEREOF. LESSEE SPECIFICALLY WAIVES ALL RIGHT TO MAKE CLAIM AGAINST LESSOR FOR BREACH OF

ANY EQUIPMENT WARRANTY OF ANY KIND WHATSOEVER; AND WITH RESPECT TO LESSOR, LESSEE LEASES EQUIPMENT "AS IS". LESSOR SHALL NOT BE LIABLE TO LESSEE FOR ANY LOSS, DAMAGE, OR EXPENSE OF ANY KIND OR NATURE CAUSED DIRECTLY OR INDIRECTLY BY ANY EQUIPMENT LEASED HEREUNDER, OR BY THE USE OR MAINTENANCE THEREOF, OR BY THE REPAIRS, SERVICE OR ADJUSTMENT THERETO OR ANY DELAY OR FAILURE TO PROVIDE ANY THEREOF, OR BY ANY INTERRUPTION OF SERVICE OR LOSS OF USE THEROF, OR FOR ANY LOSS OF BUSINESS OR DAMAGE WHATSOEVER AND HOWSOEVER CAUSED. WITHOUT IN ANY WAY IMPLYING THAT ANY SUCH WARRANTY EXISTS AND WITHOUT INCREASING ITS LIABILITY HEREUNDER, TO ASSIGN TO LESSEE UPON LESSEE'S REQUEST THEREFOR ANY WARRANTY OF A MANUFACTURER OR LICENSOR OR SELLER RELATING TO THE EQUIPMENT THAT MAY HAVE BEEN GIVEN TO LESSOR.

**17. Indemnification.**

- (a) Without waiving the doctrines of sovereign immunity and immunity from suit, and to the extent permitted by the laws and Constitution of the State of Texas, Lessee shall indemnify, protect, save and hold harmless Lessor, its agents, servants and successors from and against all losses, damages, injuries, claims, demands and expenses, including legal expenses and attorney's fees, of whatsoever nature, arising out of the use, misuse, condition, repair, storage, return or operation (including, but not limited to, latent and other defects, whether or not discoverable by it) of any unit of Equipment, regardless of where, how and by whom operated, and arising out of negligence (excluding the gross negligence or willful misconduct of Lessor). Lessee is liable for the expenses of the defense or the settlement of any suit or suits or other legal proceedings brought to enforce any such losses, damages, injuries, claims, demands, and expenses and shall pay all judgments entered in any such suit or suits or other legal proceedings. The indemnities and assumptions of liabilities and obligations herein provided for shall continue in full force and effect notwithstanding the termination of the MLA or a Schedule whether by expiration of time, by operation of law or otherwise. With respect to Lessor, Lessee is an independent contractor, and nothing contained herein authorizes Lessee or any other person to operate the Equipment so as to impose or incur any liability or obligation for or on behalf of Lessor.
- (b) Without waiving the doctrines of sovereign immunity and immunity from suit, and to the extent permitted by the laws and Constitution of the State of Texas, Lessee and DIR individually and collectively assume all risks and liabilities with respect to any claim made by any third party that the lease arrangements herein are not authorized by law. Without waiving the doctrines of sovereign immunity and immunity from suit, and to the extent permitted by the laws and Constitution of the State of Texas, Lessee and DIR agree to indemnify, save and hold harmless Lessor from any and all such claims and all expenses incurred in connection with such claims or to defend against such claims, including without limitation any judgments by a court of competent jurisdiction or settlement or compromise with such claimant.
- (c) Lessor is the owner of the Equipment and has title to the Equipment. If any other person attempts to claim ownership of the Equipment by asserting that claim against Lessee or through Lessee, Lessee agrees, at its expense, to protect and defend Lessor's title to the Equipment. Lessee further agrees that it will at all times keep the Equipment free from any legal process, encumbrance or lien whatsoever,

and Lessee shall give Lessor immediate notice if any legal process, encumbrance or lien is asserted or made against the Equipment.

#### **18. Risk of Loss.**

Commencing upon delivery and continuing throughout the Schedule Term, Lessee shall bear the entire risk of loss or damage in respect to any Equipment, whether partial or complete, from any cause whatsoever. In the event of loss, theft, destruction or damage of any kind to any item of Equipment, or if any Equipment is lost stolen, or taken by governmental action for a stated period extending beyond the Term of any Schedule (an "Event of Loss"), Lessee shall promptly notify Lessor. Lessee shall, at its option: (a) immediately place the affected Equipment in good condition and working order, (b) replace the affected Equipment with identical equipment of at least equal value, in good condition and repair, and transfer clear title thereto to Lessor, or (c) to the extent permitted by law, pay to Lessor, within thirty (30) days of the Event of Loss, an amount equal to the Stipulated Loss Value ("SLV" as hereafter defined) for such affected Equipment, plus any other unpaid amounts then due under the Schedule. If an Event of Loss occurs as to part of the Equipment for which the SLV is paid, a prorated amount of each Rent Payment shall abate from the date the SLV payment is received by Lessor. The SLV shall be an amount equal to the sum of all future Rent Payments from the last Rent Payment date to the end of the Schedule Term with such Rent Payments discounted to present value at the like-term Treasury Bill rate for the remaining Schedule Term in effect on the date of such Event of Loss, or if such rate is not permitted by law, then at the lowest permitted rate.

In the event of a governmental taking of Equipment for an indefinite period or for a stated period, which does not extend beyond the Schedule Term, all obligations of the Lessee with respect to such Equipment (including payment of Rent) shall continue. So long as Lessee is not in default hereunder, Lessor shall pay to Lessee all sums received by Lessor from the government by reason of such taking.

#### **19. Insurance.**

At its expense, Lessee shall keep the Equipment insured against all risks of loss and damage with companies acceptable to Lessor for an amount equal to the original cost of the Equipment, with Lessor or its assign(s) named as a loss payee. Lessee shall also maintain comprehensive general liability insurance, with Lessor or its assign(s) named as an additional insured. Lessee shall be liable for any loss not covered by insurance. All said insurance shall be in form and amount satisfactory to Lessor. Lessee shall pay the premiums therefor and deliver to Lessor or its assign(s) the certificates of insurance or duplicates thereof or other evidence satisfactory to Lessor or its assign(s) of such insurance coverage. Evidence of such insurance coverage shall be furnished no later than the Schedule Commencement Date of each Schedule and from time to time as Lessor or its assign(s) may request. Each insurer shall agree by endorsement upon the policy or policies issued by it or by independent instrument furnished to Lessor that it will give Lessor or its assign(s) thirty (30) days prior written notice of the effective date of any alteration or cancellation of such policy. Lessee hereby irrevocably appoints Lessor as Lessee's attorney-in-fact to make claim for, receive payment of, and execute and endorse all documents, checks or drafts received in payment for loss or damage under any said insurance policy. Lessee may self-insure with respect to the required coverage.

Further, Lessees that are defined as state agencies in accordance with Section 2054.003, Texas Government Code (including institutions of higher education as defined in Texas Education Code, Section 61.003) and those purchasing from a DIR contract through an Interagency Agreement, as authorized by Chapter 771, Texas Government Code, may self-insure their obligations in this section.

## **20. Representations and Warranties of Lessee.**

Lessee represents and warrants for the benefit of Lessor and its assigns, and Lessee will provide an opinion of counsel to the effect that, as of the time of execution of the MLA and each Schedule between Lessor and Lessee:

- (a) Lessee is either a Texas state agency or Texas local government, as defined in Section 2054.003, Texas Government Code (including institutions of higher education as defined in Texas Education Code, Section 61.003) or a state agency purchasing from a DIR contract through an Interagency Agreement, as authorized by Chapter 771, Texas Government Code. Lessee has made an independent legal and management determination to enter into this transaction;
- (b) Each Schedule executed by Lessee has been duly authorized, executed and delivered by Lessee and constitutes a valid, legal and binding agreement of Lessee, enforceable in accordance with its terms;
- (c) No approval, consent or withholding of objection is required from any federal or other governmental authority or instrumentality with respect to the entering into or performance by Lessee of any Schedule between Lessor and Lessee;
- (d) The entering into and performance of any Schedule between Lessor and Lessee, the MLA or any Schedule will not violate any judgment, order, law or regulation applicable to Lessee or result in any breach of, or constitute a default under, or result in the creation of any lien, charge, security interest or other encumbrance upon assets of the Lessee or on the Equipment leased under any Schedule between Lessor and Lessee pursuant to any instrument to which the Lessee is a party or by which it or its assets may be bound;
- (e) To the best of Lessee's knowledge and belief, there are no suits or proceedings pending or threatened against or affecting Lessee, which if determined adversely to Lessee will have a material adverse effect on the ability of Lessee to fulfill its obligations under the MLA or any Schedule between Lessor and Lessee;
- (f) The use of the Equipment is essential to Lessee's proper, efficient and economic operation, and Lessee will sign and provide to Lessor upon execution of each Schedule between Lessor and Lessee hereto written certification to that effect; and
- (g) Lessee represents and warrants that (i) It has authority to enter into any Schedule under this MLA, (ii) the persons executing a Schedule have been duly authorized to execute the Schedule on Lessee's behalf, (iii) all information supplied to Lessor is true and correct, including all credit and financial information and (iv) it is able to meet all its financial obligations, including the Rent Payments hereunder.

## **21. Representation and Warranties of DIR.**

DIR represents and warrants for the benefit of Lessor and its assigns, and DIR will provide an opinion of counsel to the effect that, as of the time of execution of the MLA:

- (a) DIR is a State agency as defined in Section 2251.001, Texas Government Code. DIR has not provided the Lessee or the Lessor with any legal or management advice regarding the MLA or any Schedule executed pursuant thereto;
- (b) This MLA has been duly authorized, executed and delivered by DIR and constitutes a valid, legal and binding Agreement of DIR, enforceable in accordance with its terms;
- (c) No approval, consent or withholding of objection is required from any federal or other governmental authority or governmental authority or instrumentality with respect to the entering into or performance by DIR of this MLA;
- (d) The entering into and performance of the MLA does not violate any judgment, order, law or regulation applicable to DIR or result in any breach of, constitute a default under, or result in the creation of any lien, charge, security interest or other encumbrance upon assets of DIR or on the Equipment pursuant to any instrument to which DIR is a party or by which it or its assets may be bound;
- (e) To the best of DIR's knowledge and belief, there are no suits or proceedings pending or threatened against or affecting DIR, which if determined adversely to DIR will have a material adverse effect on the ability of DIR to fulfill its obligations under the MLA;
- (f) DIR is authorized to charge and collect the administrative fee as set forth within Section 5 of the Contract;
- (g) Lessor's payment of the administrative fee to DIR shall not constitute an illegal gratuity or otherwise violate Texas law; and
- (h) DIR is a government agency subject to the Texas Public Information Act. Lessor acknowledges that DIR will comply with the Public Information Act, and with all opinions of the Texas Attorney Generals' office concerning this Act.

## **22. Representations and Warranties of Lessor.**

- (a) Lessor is an entity authorized and validly existing under the laws of its state of organization, is authorized to do business in Texas, and is not in default as to taxes owed to the State of Texas and any of its political subdivisions;
- (b) The MLA and each Schedule executed in conjunction to this MLA have been duly authorized, executed and delivered by Lessor and constitute valid, legal and binding agreements of Lessor, enforceable with respect to the obligations of Lessor herein in accordance with their terms;

- (c) No approval, consent or withholding of objection is required from any federal or other governmental authority or instrumentality with respect to the entering into or performance by Lessor of this MLA or any Schedule;
- (d) The entering into and performance of the MLA or any Schedule will not violate any judgment, order, law or regulation applicable to Lessor or result in any breach of, or constitute a default under, or result in the creation of any lien, charge, security interest or other encumbrance upon the assets of the Lessor, including Equipment leased under the MLA and Schedules thereto, pursuant to any instrument to which the Lessor is a party or by which it or its assets may be bound; and
- (e) To the best of Lessor's knowledge and belief, there are no suits or proceedings pending or threatened against or affecting Lessor, which if determined adversely to Lessor will have a material adverse effect on the ability of Lessor to fulfill its obligations under the MLA or any Schedule.

### **23. Default.**

Lessee shall be in default under a Schedule upon the occurrence of any one or more of the following events (each an "Event of Default"): (a) nonpayment or incomplete payment by Lessee of Rent or any other sum payable; (b) nonpayment or incomplete payment by Lessee of Rent or any other sum payable on its due date; (c) failure by Lessee to perform or observe any other term, covenant or condition of this MLA, any Schedule, or any applicable software license agreement, which is not cured within ten (10) days after notice thereof from Lessor; (d) insolvency by Lessee; (e) Lessee's filing of any proceedings commencing bankruptcy or the filing of any involuntary petition against Lessee or the appointment of any receiver not dismissed within sixty (60) days from the date of said filing or appointment; (f) subjection of a substantial part of Lessee's property or any part of the Equipment to any levy, seizure, assignment or sale for or by any creditor or governmental agency; or (g) any representation or warranty made by Lessee in this MLA, any Schedule or in any document furnished by Lessee to Lessor in connection therewith or with the acquisition or use of the Equipment being or becoming untrue in any material respect.

### **24. Remedies.**

- (a) Upon the occurrence of an "Event of Default" and at any time thereafter Lessor may, in its sole discretion, do any one or more of the following: (i) After giving fifteen (15) days prior written notice to Lessee of default, during which time Lessee shall have the opportunity to cure such default, terminate any or all Schedules executed by Lessor and the defaulting Lessee; (ii) without Lessee and DIR waiving the doctrines of sovereign immunity and immunity from suit, and to the extent allowed by the laws and Constitution of the State of Texas, Lessor may proceed by appropriate court action to enforce the performance of the terms of the Schedule and/or recover damages, including all of Lessor's economic loss for the breach thereof; (iii) whether or not the Schedule is terminated, upon notice to Lessee, take possession of the Equipment wherever located, without demand, liability, court order or other process of law, and for such purposes Lessee, to the extent authorized by Texas law, hereby authorizes Lessor, its assigns or the agents of either to enter upon the premises where such Equipment is located or cause Lessee, and Lessee hereby agrees, to return such Equipment to Lessor in accordance with the requirements of Section 13 of the MLA; (iv) by notice to Lessee, and to the extent permitted by law, declare immediately due and payable and recover from Lessee, as liquidated damages and not as a penalty, the sum of (a) the present value of the Rent owed from the

earlier of the date of payment by Lessee or the date Lessor obtains a judgment against Lessee until the end of the Schedule Term plus, if the Equipment is not returned to or repossessed by Lessor, the present value of the estimated in-place fair market value of the Equipment at the end of the Schedule Term as determined by Lessor, each discounted at a rate equal to the rate used by Lessor for business opportunity analysis; (b) all Rent and other amounts due and payable on or before the earlier of the date of payment by Lessee or the date Lessor obtains a judgment against Lessee; and (c) without Lessee and DIR waiving the doctrines of sovereign immunity and immunity from suit, and to the extent allowed by the laws and Constitution of the State of Texas, costs, fees (including all attorneys' fees and court costs) and expenses associated with collecting said sums; and (d) interest on (a) and (b) from the date of default at 1 ½% per month or portion thereof (or the highest rate allowable by law, if less) and, on (c) from the date Lessor incurs such fees, costs or expenses.

- (b) Upon return or repossession of the Equipment, Lessor may, if it so decides in its sole discretion, upon notice to Lessee, use reasonable efforts to sell, re-lease or otherwise dispose of such Equipment, in such manner and upon such terms as Lessor may determine in its sole discretion, so long as such manner and terms are commercially reasonable. Upon disposition of the Equipment, Lessor shall credit the Net Proceeds (as defined below) to the damages paid or payable by Lessee. Proceeds upon sale of the Equipment shall be the sale price paid to Lessor less the Stipulated Loss Value in effect as of the date of default. Proceeds upon a re-lease of the Equipment shall be all rents to be received for a term not to exceed the remaining Schedule Term, discounted to present value as of the commencement date of the re-lease at the Lessor's current applicable debt rate. Without Lessee and DIR waiving the doctrines of sovereign immunity and immunity from suit, and to the extent allowed by the laws and Constitution of the State of Texas, "Net Proceeds" shall be the Proceeds of sale or re-lease as determined above, less all costs and expenses incurred by Lessor in the recovery, storage and repair of the Equipment, in the remarketing or disposition thereof, or otherwise as a result of Lessee's default, including any court costs and attorney's fees and interest on the foregoing at eighteen percent (18%) per annum or the highest rate allowable by law, if less, calculated from the dates such costs and expenses were incurred until received by Lessor. Lessee shall remain liable for the amount by which all sums, including liquidated damages, due from Lessee exceeds the Net Proceeds. Net Proceeds in excess thereof are the property of and shall be retained by Lessor.
- (c) No termination, repossession or other act by Lessor in the exercise of its rights and remedies upon an Event or Default shall relieve Lessee from any of its obligations hereunder. No remedy referred to in this Section is intended to be exclusive, but each shall be cumulative and in addition to any other remedy referred to above or otherwise available to Lessor at law or in equity.
- (d) Neither DIR nor non-defaulting Lessees shall be deemed in default under the MLA or Schedules because of the default of a particular Lessee. Lessor's remedies under this Section 24 shall not extend to DIR and those non-defaulting Lessees.

## 25. Notices and Waivers.

All notices relating to this MLA shall be delivered to DIR or the Lessor as specified within Section 6 of the Contract, or to another representative and address subsequently specified in writing by the appropriate parties hereto. All notices relating to a Schedule shall be delivered in person to an officer of the Lessor or

Lessee or shall be mailed certified or registered to Lessor or Lessee at its respective address shown on the Schedule or to another address subsequently specified in writing by the appropriate parties thereof. DIR, Lessee, and Lessor intend and agree that a photocopy or facsimile of this MLA or a Schedule and all related documents, including but not limited to the Acceptance Certificate, with their signatures thereon shall be treated as originals, and shall be deemed to be as binding, valid, genuine, and authentic as an original signature document for all purposes. This MLA and those Schedules in conjunction hereof are a "Finance Lease" as defined in Article 2A of the Uniform Commercial Code ("UCC"). A waiver of a specific Default shall not be a waiver of any other or subsequent Default. No waiver of any provision of this MLA or a provision of a Schedule shall be a waiver of any other provision or matter, and all such waivers shall be in writing and executed by an officer of the Lessor. No failure on the part of Lessor to exercise, and no delay in exercising, any right hereunder shall operate as a waiver thereof.

**26. Assignment by Lessor; Assignment or Sublease by Lessee.**

- (a) Lessor may (i) assign all or a portion of Lessor's right, title and interest in this MLA and/or any Schedule; (ii) grant a security interest in the right, title and interest of Lessor in the MLA, any Schedule and/or any Equipment; and/or (iii) sell or transfer its title and interest as owner of the Equipment and/or as Lessor under any Schedule; and DIR and each Lessee leasing Equipment under the MLA understand and agree that Lessor's assigns may each do the same (hereunder collectively "Assignment"). All such Assignments shall be subject to each Lessee's rights under the Schedule(s) executed between it and Lessor and to DIR's rights under the MLA. Each Lessee leasing Equipment through Schedules under this MLA and DIR hereby consent to such Assignments and agree to execute and deliver promptly such acknowledgements, Opinions of Counsel and other instruments reasonably requested to effect such Assignment. Each Lessee leasing Equipment through Schedules under this MLA and DIR acknowledge that the assigns do not assume Lessor's obligations hereunder and agree to make all payments owed to the assigns without abatement and not to assert against the assigns any claim, defense, setoff or counterclaim which DIR or the Lessee(s) may possess against the Lessor or any other party for any other reason. Lessor shall remain liable for performance under the MLA and any Schedule(s) executed hereunder to the extent Lessor's assigns do not perform Lessor's obligations under the MLA and Schedule(s) executed hereunder. Upon any such Assignment, all references to Lessor shall also include all such assigns, whether specific reference thereto is otherwise made herein.
- (b) **LESSEE WILL NOT SELL, ASSIGN, SUBLET, PLEDGE OR OTHERWISE ENCUMBER, OR PERMIT A LIEN TO EXIST ON OR AGAINST ANY INTEREST IN THIS LEASE, OR THE EQUIPMENT, OR REMOVE THE EQUIPMENT FROM ITS LOCATION REFERRED TO ON THE SCHEDULE, WITHOUT LESSOR'S PRIOR WRITTEN CONSENT EXCEPT AS PROVIDED IN SECTION 11 OF THIS MLA. LESSOR MAY ASSIGN ITS INTEREST IN THIS LEASE AND SELL OR GRANT A SECURITY INTEREST IN ALL OR ANY PART OF THE EQUIPMENT WITHOUT LESSEE'S CONSENT. LESSEES THAT ARE STATE AGENCIES, WITHOUT WAIVING THE DOCTRINE OF SOVEREIGN IMMUNITY AND IMMUNITY FROM SUIT, AND ONLY AS MAY BE AUTHORIZED BY THE CONSTITUTION AND LAWS OF THE STATE OF TEXAS, AGREE THAT IN ANY ACTION BROUGHT BY AN ASSIGNEE AGAINST LESSEE TO ENFORCE LESSOR'S RIGHTS HEREUNDER, LESSEE WILL NOT ASSERT AGAINST SUCH ASSIGNEE AND EXPRESSLY WAIVES AS AGAINST ANY**

**ASSIGNEE, ANY BREACH OR DEFAULT ON THE PART OF LESSOR HEREUNDER OR ANY OTHER DEFENSE, CLAIM OR SET-OFF WHICH LESSEE MAY HAVE AGAINST LESSOR EITHER HEREUNDER OR OTHERWISE. NO SUCH ASSIGNEE SHALL BE OBLIGATED TO PERFORM ANY OBLIGATION, TERM OR CONDITION REQUIRED TO BE PERFORMED BY LESSOR HEREUNDER.** Without the prior written consent of Lessor, DIR shall not assign, sublease, transfer, pledge or hypothecate the Master Lease Agreement; provided, however, that no such prior written consent from Lessor is necessary in the event of a legislative mandate to transfer the contract to another state agency.

#### **27. Delivery of Related Documents.**

For each Schedule, Lessee will provide the following documents and information satisfactory to Lessor: (a) Certificate of Acceptance; (b) Opinion of Counsel; (c) proof of self-insurance acceptable to Lessor; (d) Financial Statements; (e) Incumbency Certificate; and (f) Other documents as reasonably required by Lessor.

#### **28. Lessee's Waivers.**

To the extent permitted by applicable law, Lessee hereby waives the following rights and remedies conferred upon Lessee by the Uniform Commercial Code: to (i) cancel any Schedule under the MLA; (ii) repudiate any Schedule; (iii) reject the Equipment; (iv) revoke acceptance of the Equipment; (v) recover damages from Lessor for any breach of warranty by the manufacturer; (vi) claim a security interest in the Equipment in Lessee's possession or control for any reason; (vii) deduct all or any part of any claimed damages resulting from Lessor's default, if any, under any Schedule; (viii) accept partial delivery of the Equipment; (ix) "cover" by making any purchase or lease of or contract to purchase or lease equipment in substitution for the Equipment due from Lessor; (x) recover any special, punitive, incidental or consequential damages, for any reason whatsoever. Lessee agrees that any delay or failure to enforce Lessor's rights under this MLA or a Schedule does not prevent Lessor from enforcing any rights at a later time.

#### **29. Security Interest and UCC Filings.**

To secure payments hereunder, Lessor reserves and Lessee hereby grants to Lessor a continuing security interest in the Equipment and any and all additions, replacements, substitutions, and repairs thereof. When all of the Lessee's obligations under this MLA and respective Schedules have been fully paid and satisfied, Lessor's security interest shall terminate. Nothing contained herein shall in any way diminish Lessor's right, title, or interest in or to the Equipment. Lessor and Lessee agree that a reproduction of this MLA and/or any associated Schedule may be filed as a financing statement and shall be sufficient as a financing statement under the Uniform Commercial Code ("UCC"). Lessee hereby appoints Lessor, its agents, successors or assigns its true and lawful attorney-in-fact for the limited purpose of executing and filing on behalf of Lessee any and all UCC Financing Statements which in Lessor's sole discretion are necessary or proper to secure Lessor's interest in the Equipment in all applicable jurisdictions. Lessee shall execute or obtain and deliver to Lessor, upon Lessor's request, such instruments, financing statements and assurances, as Lessor deems necessary or advisable for the protection or perfection of this Lease and Lessor's rights hereunder and will pay all costs incident thereto.

### 30. Miscellaneous.

- (a) Jurisdiction. The MLA and each Schedule SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS. In the event of a dispute between the parties, suit may be brought in the federal or state courts where Lessee has its principal office or where the Equipment is located.
- (b) Counterpart. Only original counterpart No. 1 of each Schedule shall be deemed to be an "Original" for chattel paper purposes under the Uniform Commercial Code. Any and all other counterparts shall be deemed to be a "Copy". NO SECURITY INTEREST IN THIS MLA, IN ANY SCHEDULE, OR IN ANY OF THE EQUIPMENT MAY BE CREATED, TRANSFERRED, ASSIGNED OR PERFECTED BY THE TRANSFER AND POSSESSION OF THIS MLA ALONE OR OF ANY "COPY" OF THE SCHEDULE, BUT RATHER SOLELY BY THE TRANSFER AND POSSESSION OF THE "ORIGINAL" COUNTERPART OF THE SCHEDULE INCORPORATING THIS MLA BY REFERENCE.
- (c) Suspension of Obligations of Lessor. Prior to delivery of any Equipment, the obligations of Lessor hereunder shall be suspended to the extent that it is hindered or prevented from performing because of causes beyond its control.
- (d) Severability. In the event of any provision of this MLA or any Schedule shall be determined by a court of competent jurisdiction to be invalid or unenforceable, the parties hereto agree that such provision shall be ineffective without invalidating the remaining provisions thereof.
- (e) Entire Agreement. Lessor and Lessee acknowledge that there are no agreements or understanding, written or oral, between them with respect to the Equipment, other than as set forth in this MLA and in each Schedule to which Lessee is a signatory party. Lessor and Lessee further acknowledge that this MLA and each Schedule to which Lessee is a party contain the entire agreement between Lessor and Lessee and supersedes all previous discussions and terms and conditions of any purchase orders issued by Lessee. Lessor and Lessee acknowledge that there are no agreements or understandings, written or oral, between them other than as set forth in this MLA and Contract Number DIR-SDD-272 and that both contain the entire agreement between them. Neither this MLA nor any Schedule may be altered, modified, terminated, or discharged except by a writing signed by the party against whom enforcement of such action is sought.
- (f) Headers. The descriptive headings hereof do not constitute a part of any Schedule and no inferences shall be drawn therefrom.
- (g) Language context. Whenever the context of this MLA requires, the masculine gender includes the feminine or neuter, and the singular number includes the plural, and whenever the word Lessor is used herein, it shall include all assignees of Lessor.
- (h) Lessor Certifications. Lessor certifies (i) it has not given, offered to give, and does not intend to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with this MLA and/or any

Schedules executed hereunder; (ii) it is not currently delinquent in the payment of any franchise tax owed the State of Texas and is not ineligible to receive payment under Section 231.006, Texas Family Code and acknowledges this MLA may be terminated and payment withheld if this certification is inaccurate; (iii) neither it, nor anyone acting for it, has violated the antitrust laws of the United States or the State of Texas, nor communicated directly or indirectly to any competitor or any other person engaged in such line of business for the purpose of obtaining an unfair price advantage; (iv) it has not received payment from DIR, Lessee or any of their employees for participating in the preparation of this MLA and the Schedule(s) hereunder; and (v) during the term of this MLA, it will not discriminate unlawfully against any employee or applicant and that, upon request it will furnish information regarding its nondiscriminatory hiring and promotion policies, as well as specific information on the composition of its principals and staff, including the identification of minorities and women in management or other positions with discretionary or decision making authority.

- (i) Dispute Resolution. The following paragraph applies only to Lessees designated as a State agency as defined in Section 2054.003, Texas Government Code, including a university system or institution of higher education, and those purchasing from a DIR contract through an Interagency Agreement, as authorized by Chapter 771, Texas Government Code.

To the extent that Chapter 2260 of the Texas Government Code, as it may be amended from time to time ("Chapter 2260"), is applicable to this Agreement and is not preempted by other applicable law, the dispute resolution process provided for in Chapter 2260, and rules promulgated there under shall be used by the Lessee and Lessor to attempt to resolve any claim for breach of agreement made by Lessor.

- (j) Sovereign Immunity. Nothing herein shall be construed to waive the State's sovereign immunity.

### **31. Amendments.**

The terms and conditions of this MLA may be amended only by written instrument executed by the Lessor and DIR.

**Amendment Number 1**  
**To**  
**Contract Number DIR-SDD-272**  
**Between**  
**STATE OF TEXAS, Acting By and Through the Department of Information Resources**  
**And**  
**Avaya, Inc.**

This Amendment Number 1 to Contract Number DIR-SDD-272 ("Contract") is between the Department of Information Resources (DIR) and Avaya, Inc. ("Vendor"). DIR and Vendor agree to modify the terms and conditions of the Contract as follows:

**1. Appendix A, Section 9.B, Vendor Certifications** is hereby restated in its entirety as follows:

Vendor certifies that it and its designated Order Fulfillers: (i) have not given, offered to give, and do not intend to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the Contract, (ii) are not currently delinquent in the payment of any franchise tax owed the State of Texas and are not ineligible to receive payment under §231.006 of the Texas Family Code and acknowledge the Contract may be terminated and payment withheld if this certification is inaccurate, (iii) neither they, nor anyone acting for them, have violated the antitrust laws of the United States or the State of Texas, nor communicated directly or indirectly to any competitor or any other person engaged in such line of business for the purpose of obtaining an unfair price advantage, (iv) have not received payment from DIR or any of its employees for participating in the preparation of the Contract, (v) under Section 2155.004, Texas Government Code, the vendor certifies that the individual or business entity named in this bid or contract is not ineligible to receive the specified contract and acknowledges that this contract may be terminated and payment withheld if this certification is inaccurate, (vi) to the best of their knowledge and belief, there are no suits or proceedings pending or threatened against or affecting them, which if determined adversely to them will have a material adverse effect on the ability to fulfill their obligations under the Contract, (vii) are not suspended or debarred from doing business with the federal government as listed in the Excluded Parties List System (EPLS) maintained by the General Services Administration, and (viii) as of the effective date of the Contract, are not listed in the prohibited vendors list authorized by Executive Order #13224, "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism", published by the United States Department of the Treasury, Office of Foreign Assets Control. In addition, Vendor acknowledges the applicability of §2155.444 and §2155.441, Texas Government Code, in fulfilling the terms of the Contract.

**2. Appendix A, Section 9.K, Overcharges** is hereby added as follows:

**K. Overcharges**

Vendor hereby assigns to DIR any and all of its claims for overcharges associated with this contract which arise under the antitrust laws of the United States, 15 U.S.C.A. Section 1, et seq., and which arise under the antitrust laws of the State of Texas, Tex. Bus. and Comm. Code Section 15.01, et seq.

3. **Appendix A, Section 9.L, Prohibited Conduct** is hereby added as follows:

**L. Prohibited Conduct**

Vendor represents and warrants that, to the best of its knowledge as of the date of this certification, neither Vendor nor any Order Fulfiller, subcontractor, firm, corporation, partnership, or institution represented by Vendor, nor anyone acting for such Order Fulfiller, subcontractor, firm, corporation or institution has: (1) violated the antitrust laws of the State of Texas under Texas Business & Commerce Code, Chapter 15, or the federal antitrust laws; or (2) communicated its response to the Request for Offer directly or indirectly to any competitor or any other person engaged in such line of business during the procurement for the Contract.

4. **Appendix B, Vendor's Historically Underutilized Businesses Subcontracting Plan** is hereby replaced in its entirety with the attached **Appendix B, Vendor's Historically Underutilized Businesses Subcontracting Plan**.
5. All other terms and conditions of the Contract, not specifically modified herein, shall remain in full force and effect. In the event of a conflict among provisions, the order of precedence shall be this Amendment Number 1 and then Contract DIR-SDD-272.

IN WITNESS WHEREOF, the parties hereby execute this amendment to be effective as of the date of last signature.

AVAYA, INC.

**THE STATE OF TEXAS Acting by and through  
the Department of Information Resources**

By: signature on file

By: signature on file

Name: John Leary

Name: Cindy Reed

Title: RVP – Central Region

**Deputy Executive Director**  
Title: Operations & Statewide Technology Sourcing

Date: 7-10-2007

Date: 7-12-2007

Legal: signature on file 7-12-2007

**AMENDMENT NUMBER 2**  
**TO**  
**CONTRACT NUMBER DIR-SDD-272**  
**BETWEEN**  
**STATE OF TEXAS, ACTING BY AND THROUGH THE DEPARTMENT OF**  
**INFORMATION RESOURCES**  
**AND**  
**AVAYA, INC.**

This Amendment Number 2 to Contract Number DIR-SDD-272 ("Contract") is between the Department of Information Resources (DIR) and Avaya, Inc. ("Vendor"). DIR and Vendor agree to modify the terms and conditions of the Contract as follows:

1. **Section 1.C. Order of Precedence**, is hereby restated in its entirety as follows:

**C. Order of Precedence**

This Contract; Appendix A, Standard Terms and Conditions For Products and Related Services Contracts; Appendix B, Vendor's Historically Underutilized Businesses Subcontracting Plan; Appendix C, Product and Pricing Index; Appendix D, Avaya Customer Agreement including General Terms, Licensing and Services; Appendix E, Master Lease Agreement; Exhibit 1, Vendor's Response to RFO DIR-SDD-TMP-064, including all addenda; and Exhibit 2, RFO DIR-SDD-TMP-064, including all addenda; are incorporated by reference and constitute the entire agreement between DIR and Vendor. In the event of a conflict between the documents listed in this paragraph, the controlling document shall be this Contract, then Appendix A, then Appendix B, then Appendix C, then Appendix D, then Appendix E, then Exhibit 1, and finally Exhibit 2. In the event and to the extent any provisions contained in multiple documents address the same or substantially the same subject matter but do not actually conflict, the more recent provisions shall be deemed to have superseded earlier provisions.

2. **Appendix A, Section 1, Contract Scope**, is hereby restated in its entirety as follows:

**1. Contract Scope**

The Vendor shall provide the products and related services specified in Section 3 of the Contract for purchase or lease by Customers.

3. **Appendix A, Section 3, Definitions**, the following are hereby restated as follows:

**A. Customer/Lessee** – any Texas state agency, unit of local government, institution of higher education as defined in Section 2054.003, Texas Government Code, and those state agencies purchasing from a DIR contract through an Interagency Agreement, as authorized by Chapter 771, Texas Government Code, any local government as authorized through the Interlocal

Cooperation Act, Chapter 791, Texas Government Code, and the state agencies and political subdivisions of other states as authorized by Section 2054.0565, Texas Government Code.

**D. Order Fulfiller/Lessor** – the party, either Vendor or a party that may be designated by Vendor, who is fulfilling a Purchase Order, pursuant to the Contract.

**4. New Appendix A, Section 13, Leasing Provision**, is hereby added as follows:

The parties to this Contract agree to the terms and conditions, as stated within Appendix F, Master Lease Agreement, attached hereto, that allow leasing of the Products identified in Section 3 Product and Service Offerings of the Contract in addition to purchase sales.

**5. All other terms and conditions of the Contract**, not specifically modified herein, shall remain in full force and effect. In the event of a conflict among provisions, the order of precedence shall be this Amendment Number 2, then Amendment Number 1 and finally Contract DIR-SDD-272.

**IN WITNESS WHEREOF**, the parties hereby execute this amendment to be effective as of the date of last signature.

**AVAYA, INC.**

**THE STATE OF TEXAS Acting by  
and through the Department of  
Information Resources**

By: signature on file

By: signature on file

Name: John Leary

Name: Cindy Reed

Title: RVP – Central Region

Title: Deputy Executive Director  
Operations & Statewide Technology Sourcing

Date: 8-16-2007

Date: 8-17-2007

Legal: signature on file 8-17-2007

**Amendment Number 3**  
**To**  
**Contract Number DIR-SDD-272**  
**Between**  
**STATE OF TEXAS, Acting By And Through The Department of Information Resources**  
**And**  
**AVAYA, INC.**

This Amendment Number 3 to Contract Number DIR-SDD-272 ("Contract") is between the Department of Information Resources (DIR) and Avaya, Inc. ("Vendor"). DIR and Vendor agree to modify the terms and conditions of the Contract as follows:

- 1. Contract, Section 8, Authorized Exceptions to Appendix A, Standard Terms and Conditions for Product and Related Services Contracts** is hereby amended to include the following:
  - F. All references to Catalog Information Systems Vendor (CISV) are hereby deleted.
  - G. All references to Texas Building and Procurement Commission (TBPC) are hereby revised and replaced with Texas Comptroller of Public Accounts (CPA).
  
- 2. Appendix A, Section 3, Definitions**, the following are hereby restated as follows:
  - A. Customer/Lessee** - any Texas state agency, unit of local government, institution of higher education as defined in Section 2054.003, Texas Government Code, and those state agencies purchasing from a DIR contract through an Interagency Agreement, as authorized by Chapter 771, Texas Government Code, any local government as authorized through the Interlocal Cooperation Act, Chapter 791, Texas Government Code, and the state agencies and political subdivisions of other states as authorized by Section 2054.0565, Texas Government Code and, except for telecommunications services under Chapter 2170, Texas Government Code, assistance organizations as defined in Section 2175.001, Texas Government Code to mean:
    1. A non-profit organization that provides educational, health or human services or assistance to homeless individuals;
    2. A nonprofit food bank that solicits, warehouses, and redistributes edible but unmarketable food to an agency that feeds needy families and individuals;
    3. Texas Partners of the Americas, a registered agency with the Advisory Committee on Voluntary Foreign Aid, with the approval of the Partners of the Alliance Office of the Agency for International Development;
    4. A group, including a faith-based group, that enters into a financial or non-financial agreement with a health or human services agency to provide services to that agency's clients;
    5. A local workforce development board created under Section 2308.253;
    6. A nonprofit organization approved by the Supreme Court of Texas that provides free legal services for low-income households in civil matters;
    7. The Texas Boll Weevil Eradication Foundation, Inc., or an entity designated by

the commissioner of agriculture as the foundation's successor entity under Section 74.1011, Texas Agriculture Code;

8. A nonprofit computer bank that solicits, stores, refurbishes and redistributes used computer equipment to public school students and their families; and
9. A nonprofit organization that provides affordable housing.

3. **Appendix A, Section 5, Product Terms and Conditions**, is hereby restated as follows:

**5. Product Terms and Conditions**

**A. Electronic and Information Resources Accessibility Standards, As required by 1 TAC Chapter 213 (Applicable to State Agency and Institution of Higher Education Purchases Only)**

- 1) Effective September 1, 2006 state agencies and institutions of higher education shall procure products which comply with the State of Texas Accessibility requirements for Electronic and Information Resources specified in 1 TAC Chapter 213 when such products are available in the commercial marketplace or when such products are developed in response to a procurement solicitation.
- 2) Vendor shall provide DIR with the URL to its Voluntary Product Accessibility Template (VPAT) for reviewing compliance with the State of Texas Accessibility requirements (based on the federal standards established under Section 508 of the Rehabilitation Act), or indicate that the product/service accessibility information is available from the General Services Administration "Buy Accessible Wizard" (<http://www.buyaccessible.gov>). Vendors not listed with the "Buy Accessible Wizard" or supplying a URL to their VPAT must provide DIR with a report that addresses the same accessibility criteria in substantively the same format. Additional information regarding the "Buy Accessible Wizard" or obtaining a copy of the VPAT is located at <http://www.section508.gov/>.

**B. Purchase of Commodity Items**

- 1) Texas Government Code, §2157.068 requires State agencies to buy commodity items, as defined in 5.B.2 below, in accordance with contracts developed by DIR, unless the agency obtains an exemption from DIR.
- 2) Commodity items are commercially available software, hardware and technology services that are generally available to businesses or the public and for which DIR determines that a reasonable demand exists in two or more state agencies. Hardware is the physical technology used to process, manage, store, transmit, receive or deliver information. Software is the commercially available programs that operate hardware and includes all supporting documentation, media on which the software may be contained or stored, related materials, modifications, versions, upgrades, enhancements, updates or replacements. Technology services are the services, functions and activities that facilitate the design, implementation, creation, or use of software or hardware. Technology services include seat

management, staffing augmentation, training, maintenance and subscription services. Technology services do not include telecommunications services. Seat management is services through which a state agency transfers its responsibilities to a vendor to manage its personal computing needs, including all necessary hardware, software and technology services.

- 3) Vendor agrees to coordinate all State agency commodity item sales through existing DIR contracts. Institutions of higher education are exempt from this Subsection 5.B.

4. **Appendix A, Section 9 Vendor Responsibilities, Subsection C Ability to Conduct Business in Texas**, is hereby restated in its entirety as follows:

**C. Ability to Conduct Business in Texas**

Order Fulfiller shall be an entity authorized and validly existing under the laws of its state of organization, and shall be authorized to do business in the State of Texas.

5. **Appendix B, Vendor's Historically Underutilized Businesses (HUB) Subcontracting Plan** is hereby replaced in its entirety with the attached **Appendix B, HUB Subcontracting Plan (HSP)**.
6. All other terms and conditions of the Contract, not specifically modified herein, shall remain in full force and effect. In the event of a conflict among provisions, the order of precedence shall be this Amendment Number 3, then Amendment Number 2, then Amendment Number 1 and finally Contract DIR-SDD-272.

IN WITNESS WHEREOF, the parties hereby execute this amendment to be effective as of the date of last signature.

AVAYA, INC.

THE STATE OF TEXAS Acting by  
and through the Department of  
Information Resources

By: signature on file

By: signature on file

Name: John Leary

Name: Cindy Reed

Title: RVP – Central Region

Title: Deputy Executive Director  
Operations & Statewide Technology Sourcing

Date: 12-17-2007

Date: 12-18-2007

Legal: signature on file 12-18-2007

# HUB SUBCONTRACTING PLAN (HSP)

In accordance with Gov't Code §2161.252, the contracting agency has determined that subcontracting opportunities are probable under this contract. Therefore, respondents, including State of Texas certified Historically Underutilized Businesses (HUBs), must complete and submit a State of Texas HUB Subcontracting Plan (HSP) with their solicitation response.

**NOTE: Responses that do not include a completed HSP shall be rejected pursuant to Gov't Code §2161.252(b).**

The HUB Program promotes equal business opportunities for economically disadvantaged persons to contract with the State of Texas in accordance with the goals specified in the State of Texas Disparity Study. The HUB goals defined in 1 TAC §111.13 are: **11.9 percent for heavy construction other than building contracts, 26.1 percent for all building construction, including general contractors and operative builders contracts, 57.2 percent for all special trade construction contracts, 20 percent for professional services contracts, 33 percent for all other services contracts, and 12.6 percent for commodities contracts.**

## -- Agency Special Instructions/Additional Requirements --

### SECTION 1 - RESPONDENT AND SOLICITATION INFORMATION

- a. Respondent (Company) Name: Avaya, Inc. State of Texas VID #: 1223713430400  
 Point of Contact: Jennifer Bond Phone #: 713-852-1161
- b. Is your company a State of Texas certified HUB?  - Yes  - No
- c. Solicitation #: DIR-SDD-TMP-064 DIR Contract No. DIR-SDD-272

### SECTION 2 - SUBCONTRACTING INTENTIONS

After having divided the contract work into reasonable lots or portions to the extent consistent with prudent industry practices, the respondent must determine what portion(s) of work, including goods or services, will be subcontracted. Note: In accordance with 1 TAC §111.12, a "Subcontractor" means a person who contracts with a vendor to work, to supply commodities, or contribute toward completing work for a governmental entity. Check the appropriate box that identifies your subcontracting intentions:

- Yes, I will be subcontracting portion(s) of the contract.  
 (If Yes, in the spaces provided below, list the portions of work you will be subcontracting, and go to page 2.)
- No, I will not be subcontracting any portion of the contract, and will be fulfilling the entire contract with my own resources.  
 (If No, complete SECTION 9 and 10.)

Line Item # - Subcontracting Opportunity Description	Line Item # - Subcontracting Opportunity Description
( #1) - Order Fulfillment	(#11) -
( #2) - Training	(#12) -
( #3) - Installation	(#13) -
( #4) -	(#14) -
( #5) -	(#15) -
( #6) -	(#16) -
( #7) -	(#17) -
( #8) -	(#18) -
( #9) -	(#19) -
(#10) -	(#20) -

\*If you have more than twenty subcontracting opportunities, a continuation page is available at [http://www.tbpc.state.tx.us/communities/procurement/prog/hub/hub-forms/hsp\\_sep06\\_cont1.doc](http://www.tbpc.state.tx.us/communities/procurement/prog/hub/hub-forms/hsp_sep06_cont1.doc).

Enter your company's name here: Avaya, Inc.

Solicitation #: DIR-SDD-TMP-064

**IMPORTANT:** You must complete a copy of this page for each of the subcontracting opportunities you listed in SECTION 2. You may photocopy this page or download copies at [http://www.tbpc.state.tx.us/communities/procurement/prog/hub/hub-forms/hsp\\_sep06\\_cont2.doc](http://www.tbpc.state.tx.us/communities/procurement/prog/hub/hub-forms/hsp_sep06_cont2.doc).

### SECTION 3 - SUBCONTRACTING OPPORTUNITY

Enter the line item number and description of the subcontracting opportunity you listed in SECTION 2.

Line Item # 1 Description: Order Fulfillment

### SECTION 4 - MENTOR-PROTÉGÉ PROGRAM

If respondent is participating as a Mentor in a State of Texas Mentor Protégé Program, submitting their Protégé (Protégé must be a State of Texas certified HUB) as a subcontractor to perform the portion of work (subcontracting opportunity) listed in SECTION 3, constitutes a good faith effort towards that specific portion of work. Will you be subcontracting the portion of work listed in SECTION 3 to your Protégé?

- Yes (If Yes, complete SECTION 8 and 10.)  - No / Not Applicable (If No or Not Applicable, go to SECTION 5.)

### SECTION 5 - PROFESSIONAL SERVICES CONTRACTS ONLY

This section applies to Professional Services Contracts only. All other contracts go to SECTION 6.

Does your HSP contain subcontracting of 20% or more with HUB(s)?

- Yes (If Yes, complete SECTION 8 and 10.)  - No / Not Applicable (If No or Not Applicable, go to SECTION 6.)

In accordance with Govt Code §2254.004, "Professional Services" means services: (A) within the scope of the practice, as defined by state law of accounting; architecture; landscape architecture; land surveying; medicine; optometry; professional engineering; real estate appraising; or professional nursing; or (B) provided in connection with the professional employment or practice of a person who is licensed or registered as a certified public accountant; an architect; a landscape architect; a land surveyor; a physician, including a surgeon; an optometrist; a professional engineer; a state certified or state licensed real estate appraiser; or a registered nurse.

### SECTION 6 - NOTIFICATION OF SUBCONTRACTING OPPORTUNITY

Complying with a, b and c of this section constitutes Good Faith Effort towards the portion of work listed in SECTION 3. After performing the requirements of this section, complete SECTION 7, 8 and 10.

- Provide written notification of the subcontracting opportunity listed in SECTION 3 to three (3) or more HUBs. Use the State of Texas' Centralized Master Bidders List (CMBL), found at <http://www2.tbpc.state.tx.us/cmb/cmb/hub.html>, and its HUB Directory, found at <http://www2.tbpc.state.tx.us/cmb/hubonly.html>, to identify available HUBs. Note: Attach supporting documentation (letters, phone logs, fax transmittals, electronic mail, etc.) demonstrating evidence of the good faith effort performed.
- Provide written notification of the subcontracting opportunity listed in SECTION 3 to a minority or women trade organization or development center to assist in identifying potential HUBs by disseminating the subcontracting opportunity to their members/participants. A list of trade organizations and development centers may be accessed at <http://www.tbpc.state.tx.us/hub/minoritywomenbuslinks.html>. Note: Attach supporting documentation (letters, phone logs, fax transmittals, electronic mail, etc.) demonstrating evidence of the good faith effort performed.
- Written notifications should include the scope of the work, information regarding the location to review plans and specifications, bonding and insurance requirements, required qualifications, and identify a contact person. Unless the contracting agency has specified a different time period, you must allow the HUBs no less than five (5) working days from their receipt of notice to respond, and provide notice of your subcontracting opportunity to a minority or women trade organization or development center no less than five (5) working days prior to the submission of your response to the contracting agency.

### SECTION 7 - HUB FIRMS CONTACTED FOR SUBCONTRACTING OPPORTUNITY

List three (3) State of Texas certified HUBs you notified regarding the portion of work (subcontracting opportunity) listed in SECTION 3. Specify the vendor ID number, date you provided notice, and if you received a response. Note: Attach supporting documentation (letters, phone logs, fax transmittals, electronic mail, etc.) demonstrating evidence of the good faith effort performed.

Company Name	VID #	Notice Date (mm/dd/yyyy)	Was Response Received?
<u>Walkercom</u>	<u>1760302758600</u>	<u>06/26/07</u>	<input checked="" type="checkbox"/> - Yes <input type="checkbox"/> - No
<u>Globalscope</u>	<u>1743023291200</u>	<u>06/22/07</u>	<input checked="" type="checkbox"/> - Yes <input type="checkbox"/> - No
			<input type="checkbox"/> - Yes <input type="checkbox"/> - No

### SECTION 8 - SUBCONTRACTOR SELECTION

List the subcontractor(s) you selected to perform the portion of work (subcontracting opportunity) listed in SECTION 3. Also, specify the expected percentage of work to be subcontracted, the approximate dollar value of the work to be subcontracted, and indicate if the company is a Texas certified HUB.

Company Name	VID #	Expected % of Contract	Approximate Dollar Amount	Texas Certified HUB?
<u>AT&amp;T</u>	<u>1430529710400</u>	<u>10%</u>	<u>\$75000.</u>	<input type="checkbox"/> - Yes <input checked="" type="checkbox"/> - No*
<u>Avaya</u>	<u>1223713430400</u>	<u>50%</u>	<u>\$500000</u>	<input type="checkbox"/> - Yes <input checked="" type="checkbox"/> - No*
<u>Bearing Point</u>	<u>1223680505200</u>	<u>5%</u>	<u>\$25000</u>	<input type="checkbox"/> - Yes <input checked="" type="checkbox"/> - No*
<u>CDW-G</u>	<u>1364230110800</u>	<u>10%</u>	<u>\$750000</u>	<input type="checkbox"/> - Yes <input checked="" type="checkbox"/> - No*

Cross Telecom	1411861853800	10%	\$75000	<input type="checkbox"/> - Yes <input checked="" type="checkbox"/> - No*
Datavox	1760251479000	3%	\$10000.	<input type="checkbox"/> - Yes <input checked="" type="checkbox"/> - No*
Globalscope Communications	1743023291200	5%	\$25000.	<input checked="" type="checkbox"/> - Yes <input type="checkbox"/> - No*
Lantana Communications	1752324280200	5%	\$25000.	<input type="checkbox"/> - Yes <input checked="" type="checkbox"/> - No*
North American Communication Resource	1411763228200	5%	\$25000	<input checked="" type="checkbox"/> - Yes <input type="checkbox"/> - No*
Quagga	1201106305900	3%	\$10000	<input type="checkbox"/> - Yes <input checked="" type="checkbox"/> - No*
Source, Inc	1751369078800	2%	\$10000	<input type="checkbox"/> - Yes <input checked="" type="checkbox"/> - No*
Verizon Select Services	1161337624000	3%	\$500000.	<input type="checkbox"/> - Yes <input checked="" type="checkbox"/> - No*
Walkercom	1760302758600	3%	\$30000	<input checked="" type="checkbox"/> - Yes <input type="checkbox"/> - No*

\*If the subcontractor(s) you selected is not a Texas certified HUB, provide written justification of your selection process below:

They were the best qualified.

Enter your company's name here: Avaya, Inc.

Solicitation #: DIR-SDD-TMP-064

**IMPORTANT:** You must complete a copy of this page for each of the subcontracting opportunities you listed in SECTION 2. You may photocopy this page or download copies at [http://www.tbpc.state.tx.us/communities/procurement/prog/hub/hub-forms/hsp\\_sep06\\_cont2.doc](http://www.tbpc.state.tx.us/communities/procurement/prog/hub/hub-forms/hsp_sep06_cont2.doc).

### SECTION 3 - SUBCONTRACTING OPPORTUNITY

Enter the line item number and description of the subcontracting opportunity you listed in SECTION 2.

Line Item # 2,3 Description: 2 - Training & 3 - Installation

### SECTION 4 - MENTOR-PROTÉGÉ PROGRAM

If respondent is participating as a Mentor in a State of Texas Mentor Protégé Program, submitting their Protégé (Protégé must be a State of Texas certified HUB) as a subcontractor to perform the portion of work (subcontracting opportunity) listed in SECTION 3, constitutes a good faith effort towards that specific portion of work. Will you be subcontracting the portion of work listed in SECTION 3 to your Protégé?

- Yes (If Yes, complete SECTION 8 and 10.)  - No / Not Applicable (If No or Not Applicable, go to SECTION 5.)

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In accordance with Gov't Code §2254.004, "Professional Services" means services: (A) within the scope of the practice, as defined by state law of accounting; architecture; landscape architecture; land surveying; medicine; optometry; professional engineering; real estate appraising; or professional nursing; or (B) provided in connection with the professional employment or practice of a person who is licensed or registered as a certified public accountant; an architect; a landscape architect; a land surveyor; a physician, including a surgeon; an optometrist; a professional engineer; a state certified or state licensed real estate appraiser; or a registered nurse.

### SECTION 6 - NOTIFICATION OF SUBCONTRACTING OPPORTUNITY

Complying with a, b and c of this section constitutes Good Faith Effort towards the portion of work listed in SECTION 3. After performing the requirements of this section, complete SECTION 7, 8 and 10.

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- Provide written notification of the subcontracting opportunity listed in SECTION 3 to a minority or women trade organization or development center to assist in identifying potential HUBs by disseminating the subcontracting opportunity to their members/participants. A list of trade organizations and development centers may be accessed at <http://www.tbpc.state.tx.us/hub/minoritywomenbuslinks.html>. **Note: Attach supporting documentation (letters, phone logs, fax transmittals, electronic mail, etc.) demonstrating evidence of the good faith effort performed.**
- Written notifications should include the scope of the work, information regarding the location to review plans and specifications, bonding and insurance requirements, required qualifications, and identify a contact person. Unless the contracting agency has specified a different time period, you must allow the HUBs no less than five (5) working days from their receipt of notice to respond, and provide notice of your subcontracting opportunity to a minority or women trade organization or development center no less than five (5) working days prior to the submission of your response to the contracting agency.

### SECTION 7 - HUB FIRMS CONTACTED FOR SUBCONTRACTING OPPORTUNITY

List three (3) State of Texas certified HUBs you notified regarding the portion of work (subcontracting opportunity) listed in SECTION 3. Specify the vendor ID number, date you provided notice, and if you received a response. **Note: Attach supporting documentation (letters, phone logs, fax transmittals, electronic mail, etc.) demonstrating evidence of the good faith effort performed.**

Company Name	VID #	Notice Date (mm/dd/yyyy)	Was Response Received?
<u>Walkercom</u>	<u>1760302758600</u>	<u>06/26/07</u>	<input checked="" type="checkbox"/> - Yes <input type="checkbox"/> - No
<u>Globalscope</u>	<u>1743023291200</u>	<u>06/22/07</u>	<input checked="" type="checkbox"/> - Yes <input type="checkbox"/> - No
			<input type="checkbox"/> - Yes <input type="checkbox"/> - No

### SECTION 8 - SUBCONTRACTOR SELECTION

List the subcontractor(s) you selected to perform the portion of work (subcontracting opportunity) listed in SECTION 3. Also, specify the expected percentage of work to be subcontracted, the approximate dollar value of the work to be subcontracted, and indicate if the company is a Texas certified HUB.

Company Name	VID #	Expected % of Contract	Approximate Dollar Amount	Texas Certified HUB?
<u>AT&amp;T</u>	<u>1430529710400</u>	<u>10%</u>	<u>\$75000.</u>	<input type="checkbox"/> - Yes <input checked="" type="checkbox"/> - No*
<u>Avaya</u>	<u>1223713430400</u>	<u>50%</u>	<u>\$500000</u>	<input type="checkbox"/> - Yes <input checked="" type="checkbox"/> - No*
<u>Cross Telecom</u>	<u>1411861853800</u>	<u>10%</u>	<u>\$75000</u>	<input type="checkbox"/> - Yes <input checked="" type="checkbox"/> - No*
<u>Datavox</u>	<u>176025147900</u>	<u>3%</u>	<u>\$10000.</u>	<input type="checkbox"/> - Yes <input checked="" type="checkbox"/> - No*

Globalscope Communications	1743023291200	5%	\$25000.	<input checked="" type="checkbox"/> - Yes <input type="checkbox"/> - No*
Lantana Communications	1752324280200	5%	\$25000.	<input type="checkbox"/> - Yes <input checked="" type="checkbox"/> - No*
North American Communication Resource	1411763228200	5%	\$25000	<input checked="" type="checkbox"/> - Yes <input type="checkbox"/> - No*
Quagga	1201106305900	3%	\$10000	<input type="checkbox"/> - Yes <input checked="" type="checkbox"/> - No*
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Walkercom	1760302758600	3%	\$30000	<input checked="" type="checkbox"/> - Yes <input type="checkbox"/> - No*

\*If the subcontractor(s) you selected is not a Texas certified HUB, provide written justification of your selection process below:

They were the best qualified.

Enter your company's name here: Avaya, Inc.

Solicitation #: DIR-SDD-TMP-064

**SECTION 9 - SELF PERFORMANCE JUSTIFICATION**

(If you responded "No" to SECTION 2, you must complete SECTION 9 and 10.)

Does your response/proposal contain an explanation demonstrating how your company will fulfill the entire contract with its own resources?

- **Yes** If Yes, in the space provided below, list the specific page/section of your proposal which identifies how your company will perform the entire contract with its own equipment, supplies, materials and/or employees.
- **No** If No, in the space provided below, explain how your company will perform the entire contract with its own equipment, supplies, materials, and/or employees.

**SECTION 10 - AFFIRMATION**

As evidenced by my signature below, I affirm that I am an authorized representative of the respondent listed in SECTION 1, and that the information and supporting documentation submitted with the HSP are true and correct. Respondent understands and agrees that, if awarded any portion of the solicitation:

- The respondent must submit monthly compliance reports (Prime Contractor Progress Assessment Report – PAR) to the contracting agency, verifying their compliance with the HSP, including the use/expenditures they have made to subcontractors. (The PAR is available at <http://www.tbpc.state.tx.us/communities/procurement/prog/hub/hub-forms/progressassessmentrptf>).
- The respondent must seek approval from the contracting agency prior to making any modifications to their HSP. If the HSP is modified without the contracting agency's prior approval, respondent may be subject to debarment pursuant to Gov't Code §2161.253(d).
- The respondent must, upon request, allow the contracting agency to perform on-site reviews of the company's headquarters and/or work-site where services are to be performed and must provide documents regarding staff and other resources.

signature on file  
Signature

Jenifer Bond  
Printed Name

GAM  
Title

12-7-07  
Date