Amendment No. 2
to
Contract No. NS160000027
For
Records Management System
Between
FDM Software, LTD
and the
City of Austin

1.0 The Contract is hereby amended as follows: Change the vendor information as requested and documented by the vendor.

	From	To
Vendor Name	FDM Software, LTD	CentralSquare Canada Software, Inc.
Vendor Code	FDM7158075	V00000969354
FEIN	[redacted]	[redacted]

2.0 All other terms and conditions of the Contract remain unchanged and in full force and effect.

BY THE SIGNATURE affixed below, this Amendment No. 2 is hereby incorporated into and made a part of the Contract.

Linell Goodin-Brown Digitally signed by Linell Goodin-Brown Date: 2020.07.21 08:04:53 -05'00'

Linell Goodin-Brown
Procurement Supervisor
City of Austin, Purchasing Office

Date

DocuSign Envelope ID: 5D2B43FC-E9B1-43C4-98E0-49316F1493E2

Amendment No. 1
to
Contract No. 5600 NS160000027
for
Records Management System
between
FDM Software LTD
and the
City of Austin

1.0 The City hereby exercises this extension option for the subject contract. This extension option will be February 16 2019, through February 15, 2020. One (12 month) option will remain.

2.0 The total contract amount is increased by $115,927.00 by this extension period. The total contract authorization is recapped below:

Action	Action Amount	Total Contract Amount
Initial Term: 02/16/2016 – 02/15/2019	$331,092.00	$331,092.00
Amendment No. 1: Option 1 – Extension 02/16/2019 – 02/15/2020	$115,927.00	$447,019.00

3.0 MBE/WBE goals do not apply to this contract.

4.0 By signing this Amendment the Contractor certifies that the vendor and its principals are not currently suspended or debarred from doing business with the Federal Government, as indicated by the GSA List of Parties Excluded from Federal Procurement and Non-Procurement Programs, the State of Texas, or the City of Austin.

5.0 All other terms and conditions remain the same.

BY THE SIGNATURES affixed below, this amendment is hereby incorporated into and made a part of the above-referenced contract.

DocuSigned by:
Sign/Date: Megan Knight-Facey 2/26/2019
0CF7935E35ED4F2...
Megan Knight-Facey
Printed Name:
Authorized Representative

FDM Software LTD
Ste. 216 - 930 West 1st Street
North Vancouver, BC V7P3N4
CA

Sign/Date: IT Purchasing
Printed Name: JAMES T. HOWARD
Authorized Representative

Sign/Date:
Printed Name: Ken Bragdon 2/26/19

City of Austin
Purchasing Office
124 W. 8th Street, Ste. 310
Austin, Texas 78701

CONTRACT BETWEEN THE CITY OF AUSTIN
AND
FDM Software LTD.
For
Records Management System

This Contract is made by and between the City of Austin ("City"), a home-rule municipality incorporated by the State of Texas, and FDM Software LTD. ("Contractor"), having offices at 949 West 3rd Street, Suite 113, North Vancouver, B.C., V7P 3P7.

SECTION 1. GRANT OF AUTHORITY, SERVICES AND DUTIES

1.1 **Engagement of the Contractor.** Subject to the general supervision and control of the City and subject to the provisions of the Terms and Conditions contained herein, the Contractor is engaged to provide the services set forth in Section 2, Scope of Work.

1.2 **Responsibilities of the Contractor.** The Contractor shall provide all technical and professional expertise, knowledge, management, and other resources required for accomplishing all aspects of the tasks and associated activities identified in the Scope of Work. In the event that the need arises for the Contractor to perform services beyond those stated in the Scope of Work, the Contractor and the City shall negotiate mutually agreeable terms and compensation for completing the additional services.

1.3 **Responsibilities of the City.** The City's Contract Manager will be responsible for exercising general oversight of the Contractor's activities in completing the Scope of Work. Specifically, the Contract Manager will represent the City's interests in resolving day-to-day issues that may arise during the term of this Contract, shall participate regularly in conference calls or meetings for status reporting, shall promptly review any written reports submitted by the Contractor, and shall approve all invoices for payment, as appropriate. The City's Contract Manager shall give the Contractor timely feedback on the acceptability of progress and task reports.

1.4 **Designation of Key Personnel.** The Contractor's Contract Manager for this engagement shall be Lettie Costea, Phone: (604) 986-9941, Email Address: lcostea@fdmsoft.com. The City's Contract Manager for the engagement shall be Sherry Goertz, Phone: (512) 974-0872, Email Address: Sherry.Goertz@austintexas.gov. The City and the Contractor resolve to keep the same key personnel assigned to this engagement throughout its term. In the event that it becomes necessary for the Contractor to replace any key personnel, the replacement will be an individual having equivalent experience and competence in executing projects such as the one described herein. Additionally, the Contractor will promptly notify the City Contract Manager and obtain approval for the replacement. Such approval shall not be unreasonably withheld.

SECTION 2. SCOPE OF WORK

2.1 **Contractor's Obligations.** The Contractor shall fully and timely provide all deliverables described herein and in the Contractor's Offer (Exhibit A) in strict accordance with the terms, covenants, and conditions of the Contract and all applicable Federal, State, and local laws, rules, and regulations.

SECTION 3. COMPENSATION

3.1 **Contract Amount.** The Contractor will be paid as indicated herein upon the successful completion of the Scope of Work, as described herein. In consideration for the services to be performed under this Contract, the Contractor shall be paid an amount not to exceed $331,092.00 for the initial term, $115,927.00 for the first extension, and $118,826.00 for the second extension, for a total estimated contract amount not to exceed $565,845.00 comprising the software maintenance and support fees.

3.2 **Economic Price Adjustment.**

3.2.1 **Price Adjustments.** Prices shown in this Contract shall remain firm for the first 12-month period of the Contract. After that, in recognition of the potential for fluctuation of the Contractor's cost, a price adjustment (increase or decrease) may be requested by either the City or the Contractor on the anniversary date of the Contract or as may otherwise be specified herein. The percentage change between the contract price and the requested price shall not exceed the percentage change between the specified index in effect

on the date the solicitation closed and the most recent, non-preliminary data at the time the price adjustment is requested. The requested price adjustment shall not exceed ten percent (10%) for any single line item and in no event shall the total amount of the contract be automatically adjusted as a result of the change in one or more line items made pursuant to this provision. Prices for products or services unaffected by verifiable cost trends shall not be subject to adjustment.

3.2.2 **Effective Date.** Approved price adjustments will go into effect on the first day of the upcoming renewal period or anniversary date of contract award and remain in effect until contract expiration unless changed by subsequent amendment.

3.2.3 **Adjustments.** A request for price adjustment must be made in writing and submitted to the other Party prior to the yearly anniversary date of the Contract; adjustments may only be considered at that time unless otherwise specified herein. Requested adjustments must be solely for the purpose of accommodating changes in the Contractor's direct costs. Contractor shall provide an updated price listing once agreed to adjustment(s) have been approved by the parties.

3.2.4 **Indexes.** In most cases an index from the Bureau of Labor Standards (BLS) will be utilized; however, if there is more appropriate, industry recognized standard then that index may be selected.

3.2.4.1 The following definitions apply:

3.2.4.1.1 **Base Period:** Month and year of the original contracted price (the solicitation close date).

3.2.4.1.2 **Base Price:** Initial price quoted, proposed and/or contracted per unit of measure.

3.2.4.1.3 **Adjusted Price:** Base Price after it has been adjusted in accordance with the applicable index change and instructions provided.

3.2.4.1.4 **Change Factor:** The multiplier utilized to adjust the Base Price to the Adjusted Price.

3.2.4.1.5 **Weight %:** The percent of the Base Price subject to adjustment based on the index change.

3.2.4.2 **Adjustment-Request Review.** Each adjustment-request received will be reviewed and compared to changes in the index(es) identified below. Where applicable:

3.2.4.2.1 Utilize final Compilation data instead of Preliminary data

3.2.4.2.2. If the referenced index is no longer available shift up to the next higher category index.

3.2.4.3 **Index Identification.** Complete table as they may apply.

Weight % or $ of Base Price: 100	
Database Name: Producer Price Index Data	
Series ID: WPU34	
☒ Not Seasonally Adjusted	☐ Seasonally Adjusted
Geographical Area:	
Description of Series ID: Software Publishing	
This Index shall apply to the following items of the Bid Sheet / Cost Proposal: ALL	

3.2.5 **Calculation.** Price adjustment will be calculated as follows:

3.2.5.1 **Single Index.** Adjust the Base Price by the same factor calculated for the index change.

Index at time of calculation
Divided by index on solicitation close date
Equals Change Factor
Multiplied by the Base Price
Equals the Adjusted Price

3.2.6 If the requested adjustment is not supported by the referenced index, the City, as its sole discretion, may consider approving an adjustment on fully documented market increases.

3.3 Invoices.

3.3.1 **Invoices shall contain a unique invoice number, the purchase order or delivery order number and the master agreement number if applicable, the Department's Name, and the name of the point of contact for the Department.** Invoices shall be itemized. The Contractor's name and, if applicable, the tax identification number on the invoice must exactly match the information in the Contractor's registration with the City. Unless otherwise instructed in writing, the City may rely on the remittance address specified on the Contractor's invoice. Invoices received without all required information cannot be processed and will be returned to the Contractor. Invoices shall be mailed to the below address:

	City of Austin
Department	Communication Technology Management or (CTM)
Attn:	Accounts Payable
Address	PO Box 1088
City, State, Zip Code	Austin, TX 78767

3.3.2 Unless otherwise expressly authorized in the Contract, the Contractor shall pass through all Subcontract and other authorized expenses at actual cost without markup.

3.3.3 Federal excise taxes, State taxes, or City sales taxes must not be included in the invoiced amount. The City will furnish a tax exemption certificate upon request.

3.4 Payment.

3.4.1 All proper invoices received by the City will be paid within thirty (30) calendar days of the City's receipt of the deliverables or of the invoice, whichever is later.

3.4.2 **If payment is not timely made, (per this paragraph), interest shall accrue on the unpaid balance at the lesser of the rate specified in Texas Government Code Section 2251.025 or the maximum lawful rate; except, if payment is not timely made for a reason for which the City may withhold payment hereunder, interest shall not accrue until ten (10) calendar days after the grounds for withholding payment have been resolved.**

3.4.3 The City may withhold or off set the entire payment or part of any payment otherwise due the Contractor to such extent as may be necessary on account of:

3.4.3.1 delivery of defective or non-conforming deliverables by the Contractor;

3.4.3.2 third party claims, which are not covered by the insurance which the Contractor is required to provide, are filed or reasonable evidence indicating probable filing of such claims;

3.4.3.3 failure of the Contractor to pay Subcontractors, or for labor, materials or equipment;

3.4.3.4 damage to the property of the City or the City's agents, employees or contractors, which is not covered by insurance required to be provided by the Contractor;

3.4.3.5 failure of the Contractor to submit proper invoices with all required attachments and supporting documentation; or

3.4.3.6 failure of the Contractor to comply with any material provision of the Contract Documents.

3.4.4 Notice is hereby given of Article VIII, Section 1 of the Austin City Charter which prohibits the payment of any money to any person, firm or corporation who is in arrears to the City for taxes, and of §2-8-3 of the Austin City Code concerning the right of the City to offset indebtedness owed the City.

3.4.5 Payment will be made by check unless the parties mutually agree to payment by credit card or electronic transfer of funds. The Contractor agrees that there shall be no additional charges, surcharges, or penalties to the City for payments made by credit card or electronic transfer of funds.

3.5 **Non-Appropriation.** The awarding or continuation of this Contract is dependent upon the availability of funding. The City's payment obligations are payable only and solely from funds Appropriated and available for this Contract. The absence of Appropriated or other lawfully available funds shall render the Contract null and void to the extent funds are not Appropriated or available and any deliverables delivered but unpaid shall be returned to the Contractor. The City shall provide the Contractor written notice of the failure of the City to make an adequate Appropriation for any fiscal year to pay the amounts due under the Contract, or the reduction of any Appropriation to an amount insufficient to permit the City to pay its obligations under the Contract. In the event of non or inadequate appropriation of funds, there will be no penalty nor removal fees charged to the City.

3.6 **Reimbursable Expenses.** Expenses incurred directly in support of completing the work set forth in this Contract are reimbursable to the Contractor within the Contract amount.

3.6.1 **Administrative.** The Contractor will be reimbursed for selected administrative expenses incurred directly in support of executing this Contract. Reimbursable administrative expenses include actual charges for long distance telephone calls, facsimile transmissions, reproduction, printing and binding, postage, express delivery and report processing.

3.6.2 **Travel Expenses,** All travel, lodging, and per diem expenses in connection with the Contract for which reimbursement may be claimed by the Contractor under the terms of the Contract will be reviewed against the City's Travel Policy and the current United States General Services Administration Domestic Per Diem Rates (the "Rates") as published and maintained on the Internet at:

http://www.gsa.gov/portal/category/21287

No amounts in excess of the Travel Policy or Rates shall be paid. All invoices must be accompanied by copies of itemized receipts (e.g. hotel bills, airline tickets). No reimbursement will be made for expenses not actually incurred. Airline fares in excess of coach or economy will not be reimbursed. Mileage charges may not exceed the amount permitted as a deduction in any year under the Internal Revenue Code or Regulation.

3.7 **Final Payment and Close-Out.**

3.7.1 The making and acceptance of final payment will constitute:

3.7.1.1 a waiver of all claims by the City against the Contractor, except claims (1) which have been previously asserted in writing and not yet settled, (2) arising from defective work appearing after final inspection, (3) arising from failure of the Contractor to comply with the Contract or the terms of any warranty specified herein, (4) arising from the Contractor's continuing obligations under the Contract, including but not limited to indemnity and warranty obligations, or (5) arising under the City's right to audit; and

3.7.1.2 a waiver of all claims by the Contractor against the City other than those previously asserted in writing and not yet settled.

SECTION 4. TERM AND TERMINATION

4.1 Term of Contract. The Contract shall be in effect for an initial term of 36 months and may be extended thereafter for up to 2 additional 12 month periods, subject to the approval of the Contractor and the City Purchasing Officer or his designee.

4.1.1 Upon expiration of the initial term or period of extension, the Contractor agrees to hold over under the terms and conditions of this Contract for such a period of time as is reasonably necessary to re-solicit and/or complete the project (not to exceed 120 calendar days unless mutually agreed on in writing).

4.2 Right To Assurance. Whenever one party to the Contract in good faith has reason to question the other party's intent to perform, demand may be made to the other party for written assurance of the intent to perform. In the event that no assurance is given within the time specified after demand is made, the demanding party may treat this failure as an anticipatory repudiation of the Contract.

4.3 Default. The Contractor shall be in default under the Contract if the Contractor (a) fails to fully, timely and faithfully perform any of its material obligations under the Contract, (b) fails to provide adequate assurance of performance under the "Right to Assurance paragraph herein, (c) becomes insolvent or seeks relief under the bankruptcy laws of the United States or (d) makes a material misrepresentation in Contractor's Offer, or in any report or deliverable required to be submitted by Contractor to the City.

4.4 Termination For Cause.. In the event of a default by the Contractor, the City shall have the right to terminate the Contract for cause, by written notice effective ten (10) calendar days, unless otherwise specified, after the date of such notice, unless the Contractor, within such ten (10) day period, cures such default, or provides evidence sufficient to prove to the City's reasonable satisfaction that such default does not, in fact, exist. The City may place Contractor on probation for a specified period of time within which the Contractor must correct any non-compliance issues. Probation shall not normally be for a period of more than nine (9) months, however, it may be for a longer period, not to exceed one (1) year depending on the circumstances. If the City determines the Contractor has failed to perform satisfactorily during the probation period, the City may proceed with suspension. In the event of a default by the Contractor, the City may suspend or debar the Contractor in accordance with the "City of Austin Purchasing Office Probation, Suspension and Debarment Rules for Vendors" and remove the Contractor from the City's vendor list for up to five (5) years and any Offer submitted by the Contractor may be disqualified for up to five (5) years. ~~In addition to any other remedy available under law or in equity, the City shall be entitled to recover all actual damages, costs, losses and expenses incurred by the City as a result of the Contractor's default, including without limitation cost of cover, reasonable attorneys' fees, court costs, and prejudgment and post-judgment interest at the maximum lawful rate. All rights and remedies under the Contract are cumulative and are not exclusive of any other right or remedy provided by law.~~

4.5 Termination Without Cause. The City shall have the right to terminate the Contract, in whole or in part, without cause any time upon thirty (30) calendar days prior written notice. Upon receipt of a notice of termination, the Contractor shall promptly cease all further work pursuant to the Contract, with such exceptions, if any, specified in the notice of termination. The City shall pay the Contractor, to the extent of funds Appropriated or otherwise legally available for such purposes, for all goods delivered and services performed and obligations incurred prior to the date of termination in accordance with the terms hereof.

4.6 Fraud. Fraudulent statements by the Contractor on any Offer or in any report or deliverable required to be submitted by the Contractor to the City shall be grounds for the termination of the Contract for cause by the City and may result in legal action.

SECTION 5. OTHER DELIVERABLES

5.1 Insurance: The following insurance requirements apply.

5.1.1 General Requirements.

5.1.1.1 The Contractor shall at a minimum carry insurance in the types and amounts indicated herein for the duration of the Contract and during any warranty period.

5.1.1.2 The Contractor shall provide a Certificate of Insurance as verification of coverages required below to the City at the below address prior to Contract execution and within fourteen (14) calendar days after written request from the City.

5.1.1.3 The Contractor must also forward a Certificate of Insurance to the City whenever a previously identified policy period has expired, or an extension option or holdover period is exercised, as verification of continuing coverage.

5.1.1.4 The Contractor shall not commence work until the required insurance is obtained and has been reviewed by City. Approval of insurance by the City shall not relieve or decrease the liability of the Contractor hereunder and shall not be construed to be a limitation of liability on the part of the Contractor.

5.1.1.5 The City may request that the Contractor submit certificates of insurance to the City for all subcontractors prior to the subcontractors commencing work on the project.

5.1.1.6 The Contractor's and all subcontractors' insurance coverage shall be written by companies licensed to do business in the State of Texas at the time the policies are issued and shall be written by companies with A.M. Best ratings of B+VII or better.

5.1.1.7 All endorsements naming the City as additional insured, waivers, and notices of cancellation endorsements as well as the Certificate of Insurance shall be mailed to the following address:

City of Austin
Purchasing Office
P. O. Box 1088
Austin, Texas 78767

5.1.1.8 The "other" insurance clause shall not apply to the City where the City is an additional insured shown on any policy. It is intended that policies required in the Contract, covering both the City and the Contractor, shall be considered primary coverage as applicable.

5.1.1.9 If insurance policies are not written for amounts specified in Paragraph 5.1.2, Specific Coverage Requirements, the Contractor shall carry Umbrella or Excess Liability Insurance for any differences in amounts specified. If Excess Liability Insurance is provided, it shall follow the form of the primary coverage.

5.1.1.10 The City shall be entitled, upon request, at an agreed upon location, and without expense, to review certified copies of policies and endorsements thereto and may make any reasonable requests for deletion or revision or modification of particular policy terms, conditions, limitations, or exclusions except where policy provisions are established by law or regulations binding upon either of the parties hereto or the underwriter on any such policies.

5.1.1.11 The City reserves the right to review the insurance requirements set forth during the effective period of the Contract and to make reasonable adjustments to insurance coverage, limits, and exclusions when deemed necessary and prudent by the City based upon changes in statutory law, court decisions, the claims history of the industry or financial condition of the insurance company as well as the Contractor.

5.1.1.12 The Contractor shall not cause any insurance to be canceled nor permit any insurance to lapse during the term of the Contract or as required in the Contract.

5.1.1.13 The Contractor shall be responsible for premiums, deductibles and self-insured retentions, if any, stated in policies. All deductibles or self-insured retentions shall be disclosed on the Certificate of Insurance.

5.1.1.14 The Contractor shall endeavor to provide the City thirty (30) calendar days written notice of erosion of the aggregate limits below occurrence limits for all applicable coverages indicated within the Contract.

5.1.2 **Specific Coverage Requirements.** The Contractor shall at a minimum carry insurance in the types and amounts indicated below for the duration of the Contract, including extension options and hold over periods, and during any warranty period. These insurance coverages are required minimums and are not intended to limit the responsibility or liability of the Contractor.

5.1.2.1 **Commercial General Liability Insurance.** The minimum bodily injury and property damage per occurrence are $500,000 for coverages A (Bodily Injury and Property Damage) and B (Personal and Advertising Injuries). The policy shall contain the following provisions and endorsements.

5.1.2.1.1 Contractual liability coverage for liability assumed under the Contract and all other Contracts related to the project.

5.1.2.1.2 Contractor/Subcontracted Work.

5.1.2.1.3 Products/Completed Operations Liability for the duration of the warranty period.

5.1.2.1.4 Waiver of Subrogation, Endorsement CG 2404, or equivalent coverage.

5.1.2.1.5 Thirty (30) calendar days Notice of Cancellation, Endorsement CG 0205, or equivalent coverage.

5.1.2.1.6 The City of Austin listed as an additional insured, Endorsement CG 2010, or equivalent coverage.

5.1.2.2 **Business Automobile Liability Insurance.** The Contractor shall provide coverage for all owned, non-owned and hired vehicles with a minimum combined single limit of $500,000 per occurrence for bodily injury and property damage. Alternate acceptable limits are $250,000 bodily injury per person, $500,000 bodily injury per occurrence and at least $100,000 property damage liability per accident. The policy shall contain the following endorsements:

5.1.2.2.1 Waiver of Subrogation, Endorsement CA0444, or equivalent coverage.

5.1.2.2.2 Thirty (30) calendar days Notice of Cancellation, Endorsement CA0244, or equivalent coverage.

5.1.2.2.3 The City of Austin listed as an additional insured, Endorsement CA2048, or equivalent coverage.

5.1.2.3 **Worker's Compensation and Employers' Liability Insurance.** Coverage shall be consistent with statutory benefits outlined in the Texas Worker's Compensation Act (Section 401). The minimum policy limits for Employer's Liability are $100,000 bodily injury each accident, $500,000 bodily injury by disease policy limit and $100,000 bodily injury by disease each employee. The policy shall contain the following provisions and endorsements:

5.1.2.3.1 The Contractor's policy shall apply to the State of Texas.

5.1.2.3.2 Waiver of Subrogation, Form WC420304, or equivalent coverage.

5.1.2.3.3 Thirty (30) calendar days Notice of Cancellation, Form WC420601, or equivalent coverage.

5.1 **Equal Opportunity.**

5.2.1 **Equal Employment Opportunity.** No Contractor or Contractor's agent shall engage in any discriminatory employment practice as defined in Chapter 5-4 of the City Code. No Bid submitted to the City shall be considered, nor any Purchase Order issued, or any Contract awarded by the City unless the Contractor has executed and filed with the City Purchasing Office a current Non-Discrimination Certification. The Contractor shall sign and return the Non-Discrimination Certification attached hereto as Exhibit B. Non-compliance with Chapter 5-4 of the City Code may result in sanctions, including termination of the contract and the Contractor's suspension or debarment from participation on future City contracts until deemed compliant with Chapter 5-4.

5.1.2 **Americans With Disabilities Act (ADA) Compliance.** No Contractor, or Contractor's agent shall engage in any discriminatory employment practice against individuals with disabilities as defined in the ADA.

5.2 **Acceptance of Incomplete or Non-Conforming Deliverables.** If, instead of requiring immediate correction or removal and replacement of defective or non-conforming deliverables, the City prefers to accept it, the City may do so. The Contractor shall pay all claims, costs, losses and damages attributable to the City's evaluation of and determination to accept such defective or non-conforming deliverables. If any such acceptance occurs prior to final payment, the City may deduct such amounts as are necessary to compensate the City for the diminished value of the defective or non-conforming deliverables. If the acceptance occurs after final payment, such amount will be refunded to the City by the Contractor.

5.3 **Delays.**

5.4.1 The City may delay scheduled delivery or other due dates by written notice to the Contractor if the City deems it is in its best interest. If such delay causes an increase in the cost of the work under the Contract, the City and the Contractor shall negotiate an equitable adjustment for costs incurred by the Contractor in the Contract price and execute an amendment to the Contract. The Contractor must assert its right to an adjustment within thirty (30) calendar days from the date of receipt of the notice of delay. Failure to agree on any adjusted price shall be handled under the Dispute Resolution process specified herein. However, nothing in this provision shall excuse the Contractor from delaying the delivery as notified.

5.3.2 Neither party shall be liable for any default or delay in the performance of its obligations under this Contract if, while and to the extent such default or delay is caused by acts of God, fire, riots, civil commotion, labor disruptions, sabotage, sovereign conduct, or any other cause beyond the reasonable control of such Party. In the event of default or delay in Contract performance due to any of the foregoing causes, then the time for completion of the services will be extended; provided, however, in such an event, a conference will be held within three (3) business days to establish a mutually agreeable period of time reasonably necessary to overcome the effect of such failure to perform.

5.4 **Ownership And Use Of Deliverables.** Ownership of any intellectual property rights or material under this contract shall be governed by Section 6 of the Software Support and Maintenance Agreement, attached as Exhibit A.

~~5.4 The City shall own all rights, titles, and interests throughout the world in and to the deliverables.~~

~~5.5.1 **Patents.** As to any patentable subject matter contained in the deliverables, the Contractor agrees to disclose such patentable subject matter to the City. Further, if requested by the City, the Contractor agrees to assign and, if~~

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Commented [RH1]: Does this change work?

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Commented [LC2]: We need a definition of Deliverables. Software ownership remains with FDM. Materials produced under this project are owned by the City.

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~~necessary, cause each of its employees to assign the entire right, title, and interest to specific inventions under such patentable subject matter to the City and to execute, acknowledge, and deliver and, if necessary, cause each of its employees to execute, acknowledge, and deliver an assignment of letters patent, in a form to be reasonably approved by the City, to the City upon request by the City.~~

~~6.4.2 **Copyrights.** As to any deliverables containing copyrightable subject matter, the Contractor agrees that upon their creation, such deliverables shall be considered as work made-for-hire by the Contractor for the City and the City shall own all copyrights in and to such deliverables, provided however, that nothing in this paragraph shall negate the City's sole or joint ownership of any such deliverables arising by virtue of the City's sole or joint authorship of such deliverables. Should by operation of law, such deliverables not be considered works made-for-hire, the Contractor hereby assigns to the City (and agrees to cause each of its employees providing services to the City hereunder to execute, acknowledge, and deliver an assignment to the City of) all worldwide right, title, and interest in and to such deliverables. With respect to such work made-for-hire, the Contractor agrees to execute, acknowledge, and deliver and cause each of its employees providing services to the City hereunder to execute, acknowledge, and deliver a work-made-for-hire agreement, in a form to be reasonably approved by the City, to the City upon delivery of such deliverables to the City or at such other time as the City may request.~~

~~6.4.3 **Additional Assignments.** The Contractor further agrees to, and if applicable, cause each of its employees to, execute, acknowledge, and deliver all applications, specifications, oaths, assignments, and all other instruments which the City might reasonably deem necessary in order to apply for and obtain copyright protection, mask work registration, trademark registration and/or protection, letters patent, or any similar rights in any and all countries and in order to assign and convey to the City, its successors, assigns and nominees, the sole and exclusive right, title, and interest in and to the deliverables. The Contractor's obligation to execute, acknowledge, and deliver (or cause to be executed, acknowledged, and delivered) instruments or papers such as those described in this paragraph shall continue after the termination of this Contract with respect to such deliverables. In the event the City should not seek to obtain copyright protection, mask work registration or patent protection for any of the deliverables, but should desire to keep the same secret, the Contractor agrees to treat the same as Confidential Information under the terms herein.~~

5.5 **Rights to Proposal and Contractual Material.** All proposal material or offers submitted by the Contractor to the City in response to a solicitation for this contract shall become property of the City upon receipt. Any portions of such material claimed by the Contractor to be proprietary must be clearly marked as such. Determination of the public nature of the material is subject to the Texas Public Information Act, Chapter 552, Texas Government Code.

5.6 **Publications.** All published material and written reports submitted under the Contract must be originally developed material unless otherwise specifically provided in the Contract. When material not originally developed is included in a report in any form, the source shall be identified.

SECTION 6. WARRANTIES

6.1 **Warranty – Price.**

6.1.1 The Contractor warrants the prices quoted in the Offer are no higher than the Contractor's current prices on orders by others for like deliverables under similar terms of purchase.

6.1.2 The Contractor certifies that the prices in the Offer have been arrived at independently without consultation, communication, or agreement for the purpose of restricting competition, as to any matter relating to such fees with any other firm or with any competitor.

6.1.3 In addition to any other remedy available, the City may deduct from any amounts owed to the Contractor, or otherwise recover, any amounts paid for items in excess of the Contractor's current prices on orders by others for like deliverables under similar terms of purchase.

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Commented [LC3]: We need clear delimitation between what the City owns and what FDM owns.

The City has ownership over the data contained within the database and materials generated through FDM Software.

FDM retains ownership of the Software, data structures and architecture of the Software, and any application code provided by FDM and contained within the database, customizations of the Software and Documentation.

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6.2 **Warranty – Services.** The Contractor warrants and represents that all services to be provided to the City under the Contract will be fully and timely performed in a good and workmanlike manner in accordance with generally accepted industry standards and practices, the terms, conditions, and covenants of the Contract, and all applicable Federal, State and local laws, rules or regulations.

6.2.1 The Contractor may not limit, exclude or disclaim the foregoing warranty or any warranty implied by law, and any attempt to do so shall be without force or effect.

6.2.2 Unless otherwise specified in the Contract, the warranty period shall be at least one year from the acceptance date. If during the warranty period, one or more of the warranties are breached, the Contractor shall promptly upon receipt of demand perform the services again in accordance with above standard at no additional cost to the City. All costs incidental to such additional performance shall be borne by the Contractor. The City shall endeavor to give the Contractor written notice of the breach of warranty within thirty (30) calendar days of discovery of the breach of warranty, but failure to give timely notice shall not impair the City's rights under this section.

6.2.3 If the Contractor is unable or unwilling to perform its services in accordance with the above standard as required by the City, then in addition to any other available remedy, the City may reduce the amount of services it may be required to purchase under the Contract from the Contractor, and purchase conforming services from other sources. In such event, the Contractor shall pay to the City upon demand the increased cost, if any, incurred by the City to procure such services from another source.

SECTION 7. MISCELLANEOUS

7.1 **Place and Condition of Work.** The City shall provide the Contractor access to the sites where the Contractor is to perform the services as required in order for the Contractor to perform the services in a timely and efficient manner in accordance with and subject to the applicable security laws, rules, and regulations. The Contractor acknowledges that it has satisfied itself as to the nature of the City's service requirements and specifications, the location and essential characteristics of the work sites, the quality and quantity of materials, equipment, labor and facilities necessary to perform the services, and any other condition or state of fact which could in any way affect performance of the Contractor's obligations under the Contract. The Contractor hereby releases and holds the City harmless from and against any liability or claim for damages of any kind or nature if the actual site or service conditions differ from expected conditions.

7.2 **Workforce.**

7.2.1 The Contractor shall employ only orderly and competent workers, skilled in the performance of the services which they will perform under the Contract.

7.2.2 The Contractor, its employees, subcontractors, and subcontractor's employees may not while engaged in participating or responding to a solicitation or while in the course and scope of delivering goods or services under a City of Austin contract or on the City's property:

7.2.2.1 use or possess a firearm, including a concealed handgun that is licensed under state law, except as required by the terms of the Contract; and

7.2.2.2 use or possess alcoholic or other intoxicating beverages, illegal drugs or controlled substances, nor may such workers be intoxicated, or under the influence of alcohol or drugs, on the job.

7.2.3 If the City or the City's representative notifies the Contractor that any worker is incompetent, disorderly or disobedient, has knowingly or repeatedly violated safety regulations, has possessed any firearms, or has possessed or was under the influence of alcohol or drugs on the job, the Contractor shall immediately remove such worker from Contract services, and may not employ such worker again on Contract services without the City's prior written consent.

7.3 **Compliance with Health, Safety, and Environmental Regulations.** The Contractor, its Subcontractors, and their respective employees, shall comply fully with all applicable federal, state, and local health, safety, and environmental laws, ordinances, rules and regulations in the performance of the services, including but not limited to those promulgated by the City and by the Occupational Safety and Health Administration (OSHA). In case of conflict, the most stringent safety requirement shall govern. The Contractor shall indemnify and hold the City harmless from and against all claims, demands, suits, actions, judgments, fines, penalties and liability of every kind arising from the breach of the Contractor's obligations under this paragraph.

7.4 **Significant Event.** The Contractor shall immediately notify the City's Contract Manager of any current or prospective "significant event" on an ongoing basis. All notifications shall be submitted in writing to the Contract Manager. As used in this provision, a "significant event" is any occurrence or anticipated occurrence which might reasonably be expected to have a material effect upon the Contractor's ability to meet its contractual obligations. Significant events may include but not be limited to the following:

7.4.1 disposal of major assets;

7.4.2 any major computer software conversion, enhancement or modification to the operating systems, security systems, and application software, used in the performance of this Contract;

7.4.3 any significant termination or addition of provider contracts;

7.4.4 the Contractor's insolvency or the imposition of, or notice of the intent to impose, a receivership, conservatorship or special regulatory monitoring, or any bankruptcy proceedings, voluntary or involuntary, or reorganization proceedings;

7.4.5 strikes, slow-downs or substantial impairment of the Contractor's facilities or of other facilities used by the Contractor in the performance of this Contract;

7.4.6 reorganization, reduction and/or relocation in key personnel;

7.4.7 known or anticipated sale, merger, or acquisition;

7.4.8 known, planned or anticipated stock sales;

7.4.9 any litigation against the Contractor; or

7.4.10 significant change in market share or product focus.

7.5 **Right To Audit.**

7.5.1 The Contractor agrees that the representatives of the Office of the City Auditor or other authorized representatives of the City shall have access to, and the right to audit, examine, or reproduce, any and all records of the Contractor related to the performance under this Contract. The Contractor shall retain all such records for a period of three (3) years after final payment on this Contract or until all audit and litigation matters that the City has brought to the attention of the Contractor are resolved, whichever is longer. The Contractor agrees to refund to the City any overpayments disclosed by any such audit.

7.5.2 The Contractor shall include this provision in all subcontractor agreements entered into in connection with this Contract.

7.6 **Stop Work Notice.** The City may issue an immediate Stop Work Notice in the event the Contractor is observed performing in a manner that is in violation of Federal, State, or local guidelines, or in a manner that is determined by the City to be unsafe to either life or property. Upon notification, the Contractor will cease all work

until notified by the City that the violation or unsafe condition has been corrected. The Contractor shall be liable for all costs incurred by the City as a result of the issuance of such Stop Work Notice.

7.7 **Indemnity.**

7.7.1 Definitions:

7.7.1.1 "Indemnified Claims" shall include any and all claims, demands, suits, causes of action, judgments and liability of every character, type or description, including all reasonable costs and expenses of litigation, mediation or other alternate dispute resolution mechanism, including attorney and other professional fees for:

7.7.1.1.1 damage to or loss of the property of any person (including, but not limited to the City, the Contractor, their respective agents, officers, employees and subcontractors; the officers, agents, and employees of such subcontractors; and third parties); and/or;

7.7.1.1.2 death, bodily injury, illness, disease, worker's compensation, loss of services, or loss of income or wages to any person (including but not limited to the agents, officers and employees of the City, the Contractor, the Contractor's subcontractors, and third parties),

7.7.1.2 "Fault" shall include the sale of defective or non-conforming deliverables, negligence, willful misconduct, or a breach of any legally imposed strict liability standard.

7.7.2 **THE CONTRACTOR SHALL DEFEND (AT THE OPTION OF THE CITY), INDEMNIFY, AND HOLD THE CITY, ITS SUCCESSORS, ASSIGNS, OFFICERS, EMPLOYEES AND ELECTED OFFICIALS HARMLESS FROM AND AGAINST ALL INDEMNIFIED CLAIMS DIRECTLY ARISING OUT OF, INCIDENT TO, CONCERNING OR RESULTING FROM THE FAULT OF THE CONTRACTOR, OR THE CONTRACTOR'S AGENTS, EMPLOYEES OR SUBCONTRACTORS, IN THE PERFORMANCE OF THE CONTRACTOR'S OBLIGATIONS UNDER THE CONTRACT. NOTHING HEREIN SHALL BE DEEMED TO LIMIT THE RIGHTS OF THE CITY OR THE CONTRACTOR (INCLUDING, BUT NOT LIMITED TO, THE RIGHT TO SEEK CONTRIBUTION) AGAINST ANY THIRD PARTY WHO MAY BE LIABLE FOR AN INDEMNIFIED CLAIM.**

7.8 **Claims.** If any claim, demand, suit, or other action is asserted against the Contractor which arises under or concerns the Contract, or which could have a material adverse affect on the Contractor's ability to perform thereunder, the Contractor shall give written notice thereof to the City within ten (10) calendar days after receipt of notice by the Contractor. Such notice to the City shall state the date of notification of any such claim, demand, suit, or other action; the names and addresses of the claimant(s); the basis thereof; and the name of each person against whom such claim is being asserted. Such notice shall be delivered personally or by mail and shall be sent to the City and to the Austin City Attorney. Personal delivery to the City Attorney shall be to City Hall, 301 West 2nd Street, 4th Floor, Austin, Texas 78701, and mail delivery shall be to P.O. Box 1088, Austin, Texas 78767.

7.9 **Notices.** Unless otherwise specified, all notices, requests, or other communications required or appropriate to be given under the Contract shall be in writing and shall be deemed delivered three (3) business days after postmarked if sent by U.S. Postal Service Certified or Registered Mail, Return Receipt Requested. Notices delivered by other means shall be deemed delivered upon receipt by the addressee. Routine communications may be made by first class mail, telefax, or other commercially accepted means. Notices to the City and the Contractor shall be addressed as follows:

To the City:	To the Contractor:
City of Austin, Purchasing Office	FDM Software LTD.
ATTN: Gil Zilkha, Contract Administrator	ATTN: Name, Contract Manager
P O Box 1088	949 West 3rd Street, Suite 113
Austin, TX 78767	North Vancouver, B.C., V7P 3P7

7.10 **Confidentiality.** In order to provide the deliverables to the City, Contractor may require access to certain of the City's and/or its licensors' confidential information (including inventions, employee information, trade secrets, confidential know-how, confidential business information, and other information which the City or its licensors consider confidential) (collectively, "Confidential Information"). Contractor acknowledges and agrees that the Confidential Information is the valuable property of the City and/or its licensors and any unauthorized use, disclosure, dissemination, or other release of the Confidential Information will substantially injure the City and/or its licensors. The Contractor (including its employees, subcontractors, agents, or representatives) agrees that it will maintain the Confidential Information in strict confidence and shall not disclose, disseminate, copy, divulge, recreate, or otherwise use the Confidential Information without the prior written consent of the City or in a manner not expressly permitted under this Contract, unless the Confidential Information is required to be disclosed by law or an order of any court or other governmental authority with proper jurisdiction, provided the Contractor promptly notifies the City before disclosing such information so as to permit the City reasonable time to seek an appropriate protective order. The Contractor agrees to use protective measures no less stringent than the Contractor uses within its own business to protect its own most valuable information, which protective measures shall under all circumstances be at least reasonable measures to ensure the continued confidentiality of the Confidential Information.

7.11 **Advertising.** The Contractor shall not advertise or publish, without the City's prior consent, the fact that the City has entered into the Contract, except to the extent required by law.

7.12 **No Contingent Fees.** The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure the Contract upon any agreement or understanding for commission, percentage, brokerage, or contingent fee, excepting bona fide employees of bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty, the City shall have the right, in addition to any other remedy available, to cancel the Contract without liability and to deduct from any amounts owed to the Contractor, or otherwise recover, the full amount of such commission, percentage, brokerage or contingent fee.

7.13 **Gratuities.** The City may, by written notice to the Contractor, cancel the Contract without liability if it is determined by the City that gratuities were offered or given by the Contractor or any agent or representative of the Contractor to any officer or employee of the City with a view toward securing the Contract or securing favorable treatment with respect to the awarding or amending or the making of any determinations with respect to the performing of such contract. In the event the Contract is canceled by the City pursuant to this provision, the City shall be entitled, in addition to any other rights and remedies, to recover or withhold the amount of the cost incurred by the Contractor in providing such gratuities.

7.14 **Prohibition Against Personal Interest in Contracts.** No officer, employee, independent consultant, or elected official of the City who is involved in the development, evaluation, or decision-making process of the performance of any solicitation shall have a financial interest, direct or indirect, in the Contract resulting from that solicitation. Any willful violation of this section shall constitute impropriety in office, and any officer or employee guilty thereof shall be subject to disciplinary action up to and including dismissal. Any violation of this provision, with the knowledge, expressed or implied, of the Contractor shall render the Contract voidable by the City.

7.15 **Independent Contractor.** The Contract shall not be construed as creating an employer/employee relationship, a partnership, or a joint venture. The Contractor's services shall be those of an independent contractor. The Contractor agrees and understands that the Contract does not grant any rights or privileges established for employees of the City.

7.16 **Assignment-Delegation.** The Contract shall be binding upon and enure to the benefit of the City and the Contractor and their respective successors and assigns, provided however, that no right or interest in the Contract shall be assigned and no obligation shall be delegated by the Contractor without the prior written consent of the City. Any attempted assignment or delegation by the Contractor shall be void unless made in conformity with this paragraph. The Contract is not intended to confer rights or benefits on any person, firm or entity not a party hereto; it being the intention of the parties that there be no third party beneficiaries to the Contract.

7.17 **Waiver.** No claim or right arising out of a breach of the Contract can be discharged in whole or in part by a waiver or renunciation of the claim or right unless the waiver or renunciation is supported by consideration and is in writing signed by the aggrieved party. No waiver by either the Contractor or the City of any one or more events of default by the other party shall operate as, or be construed to be, a permanent waiver of any rights or obligations under the Contract, or an express or implied acceptance of any other existing or future default or defaults, whether of a similar or different character.

7.18 **Modifications.** The Contract can be modified or amended only in writing signed by both parties. No pre-printed or similar terms on any Contractor invoice, order or other document shall have any force or effect to change the terms, covenants, and conditions of the Contract.

7.19 **Interpretation.** The Contract is intended by the parties as a final, complete and exclusive statement of the terms of their agreement. No course of prior dealing between the parties or course of performance or usage of the trade shall be relevant to supplement or explain any term used in the Contract. Although the Contract may have been substantially drafted by one party, it is the intent of the parties that all provisions be construed in a manner to be fair to both parties, reading no provisions more strictly against one party or the other. Whenever a term defined by the Uniform Commercial Code, as enacted by the State of Texas, is used in the Contract, the UCC definition shall control, unless otherwise defined in the Contract.

7.20 **Dispute Resolution.**

7.20.1 If a dispute arises out of or relates to the Contract, or the breach thereof, the parties agree to negotiate prior to prosecuting a suit for damages. However, this section does not prohibit the filing of a lawsuit to toll the running of a statute of limitations or to seek injunctive relief. Either party may make a written request for a meeting between representatives of each party within fourteen (14) calendar days after receipt of the request or such later period as agreed by the parties. Each party shall include, at a minimum, one (1) senior level individual with decision-making authority regarding the dispute. The purpose of this and any subsequent meeting is to attempt in good faith to negotiate a resolution of the dispute. If, within thirty (30) calendar days after such meeting, the parties have not succeeded in negotiating a resolution of the dispute, they will proceed directly to mediation as described below. Negotiation may be waived by a written agreement signed by both parties, in which event the parties may proceed directly to mediation as described below.

7.20.2 If the efforts to resolve the dispute through negotiation fail, or the parties waive the negotiation process, the parties may select, within thirty (30) calendar days, a mediator trained in mediation skills to assist with resolution of the dispute. Should they choose this option, the City and the Contractor agree to act in good faith in the selection of the mediator and to give consideration to qualified individuals nominated to act as mediator. Nothing in the Contract prevents the parties from relying on the skills of a person who is trained in the subject matter of the dispute or a contract interpretation expert. If the parties fail to agree on a mediator within thirty (30) calendar days of initiation of the mediation process, the mediator shall be selected by the Travis County Dispute Resolution Center (DRC). The parties agree to participate in mediation in good faith for up to thirty (30) calendar days from the date of the first mediation session. The City and the Contractor will share the mediator's fees equally and the parties will bear their own costs of participation such as fees for any consultants or attorneys they may utilize to represent them or otherwise assist them in the mediation.

7.21 **Minority And Women Owned Business Enterprise (MBE/WBE) Procurement Program.**

7.21.1 All City procurements are subject to the City's Minority-Owned and Women-Owned Business Enterprise Procurement Program found at Chapters 2-9A, 2-9B, 2-9C and 2-9D of the City Code. The Program provides Minority-Owned and Women-Owned Business Enterprises (MBEs/WBEs) full opportunity to participate in all City contracts.

7.21.2 The City of Austin has determined that no goals are appropriate for this Contract. **Even though no goals have been established for this Contract, the Contractor is required to comply with the City's MBE/WBE Procurement Program, Chapters 2-9A, 2-9B, 2-9C and 2-9D, of the City Code, as applicable, if areas of subcontracting are identified.**

7.21.3 If any service is needed to perform the Contract and the Contractor does not perform the service with its own workforce or if supplies or materials are required and the Contractor does not have the supplies or materials in its inventory, the Contractor shall contact the Department of Small and Minority Business Resources (DSMBR) at (512) 974-7600 to obtain a list of MBE and WBE firms available to perform the service or provide the supplies or materials. The Contractor must also make a Good Faith Effort to use available MBE and WBE firms. Good Faith Efforts include but are not limited to contacting the listed MBE and WBE firms to solicit their interest in performing on the Contract; using MBE and WBE firms that have shown an interest, meet qualifications, and are competitive in the market; and documenting the results of the contacts.

7.22 **Subcontractors.**

7.22.1 If the Contractor identified Subcontractors in an MBE/WBE Program Compliance Plan or a No Goals Utilization Plan, the Contractor shall comply with the provisions of Chapters 2-9A, 2-9B, 2-9C, and 2-9D, as applicable, of the Austin City Code and the terms of the Compliance Plan or Utilization Plan as approved by the City (the "Plan"). The Contractor shall not initially employ any Subcontractor except as provided in the Contractor's Plan. The Contractor shall not substitute any Subcontractor identified in the Plan, unless the substitute has been accepted by the City in writing in accordance with the provisions of Chapters 2-9A, 2-9B, 2-9C and 2-9D, as applicable. No acceptance by the City of any Subcontractor shall constitute a waiver of any rights or remedies of the City with respect to defective deliverables provided by a Subcontractor. If a Plan has been approved, the Contractor is additionally required to submit a monthly Subcontract Awards and Expenditures Report to the Contract Manager and the Purchasing Office Contract Compliance Manager no later than the tenth calendar day of each month.

7.22.2 Work performed for the Contractor by a Subcontractor shall be pursuant to a written contract between the Contractor and Subcontractor. The terms of the subcontract may not conflict with the terms of the Contract, and shall contain provisions that:

7.22.2.1 require that all deliverables to be provided by the Subcontractor be provided in strict accordance with the provisions, specifications and terms of the Contract.

7.22.2.2 prohibit the Subcontractor from further subcontracting any portion of the Contract without the prior written consent of the City and the Contractor. The City may require, as a condition to such further subcontracting, that the Subcontractor post a payment bond in form, substance and amount acceptable to the City;

7.22.2.3 require Subcontractors to submit all invoices and applications for payments, including any claims for additional payments, damages or otherwise, to the Contractor in sufficient time to enable the Contractor to include same with its invoice or application for payment to the City in accordance with the terms of the Contract;

7.22.2.4 require that all Subcontractors obtain and maintain, throughout the term of their contract, insurance in the type and amounts specified for the Contractor, with the City being a named insured as its interest shall appear; and

7.22.2.5 require that the Subcontractor indemnify and hold the City harmless to the same extent as the Contractor is required to indemnify the City.

7.22.3 The Contractor shall be fully responsible to the City for all acts and omissions of the Subcontractors just as the Contractor is responsible for the Contractor's own acts and omissions. Nothing in the Contract

shall create for the benefit of any such Subcontractor any contractual relationship between the City and any such Subcontractor, nor shall it create any obligation on the part of the City to pay or to see to the payment of any moneys due any such Subcontractor except as may otherwise be required by law.

7.22.4 The Contractor shall pay each Subcontractor its appropriate share of payments made to the Contractor not later than ten (10) calendar days after receipt of payment from the City.

7.23 **Jurisdiction And Venue**. The Contract is made under and shall be governed by the laws of the State of Texas, including, when applicable, the Uniform Commercial Code as adopted in Texas, V.T.C.A., Bus. & Comm. Code, Chapter 1, excluding any rule or principle that would refer to and apply the substantive law of another state or jurisdiction. All issues arising from this Contract shall be resolved in the courts of Travis County, Texas and the parties agree to submit to the exclusive personal jurisdiction of such courts. The foregoing, however, shall not be construed or interpreted to limit or restrict the right or ability of the City to seek and secure injunctive relief from any competent authority as contemplated herein.

7.24 **Invalidity**. The invalidity, illegality, or unenforceability of any provision of the Contract shall in no way affect the validity or enforceability of any other portion or provision of the Contract. Any void provision shall be deemed severed from the Contract and the balance of the Contract shall be construed and enforced as if the Contract did not contain the particular portion or provision held to be void. The parties further agree to reform the Contract to replace any stricken provision with a valid provision that comes as close as possible to the intent of the stricken provision. The provisions of this section shall not prevent this entire Contract from being void should a provision which is the essence of the Contract be determined to be void.

7.25 **Holidays**. The following holidays are observed by the City:

Holiday	Date Observed
New Year's Day	January 1
Martin Luther King, Jr.'s Birthday	Third Monday in January
President's Day	Third Monday in February
Memorial Day	Last Monday in May
Independence Day	July 4
Labor Day	First Monday in September
Veteran's Day	November 11
Thanksgiving Day	Fourth Thursday in November
Friday after Thanksgiving	Friday after Thanksgiving
Christmas Eve	December 24
Christmas Day	December 25

If a Legal Holiday falls on Saturday, it will be observed on the preceding Friday. If a Legal Holiday falls on Sunday, it will be observed on the following Monday.

7.26 **Survivability of Obligations**. All provisions of the Contract that impose continuing obligations on the parties, including but not limited to the warranty, indemnity, and confidentiality obligations of the parties, shall survive the expiration or termination of the Contract.

7.27 **Non-Suspension or Debarment Certification**. The City of Austin is prohibited from contracting with or making prime or sub-awards to parties that are suspended or debarred or whose principals are suspended or debarred from Federal, State, or City of Austin Contracts. By accepting a Contract with the City, the Vendor certifies that its firm and its principals are not currently suspended or debarred from doing business with

the Federal Government, as indicated by the General Services Administration List of Parties Excluded from Federal Procurement and Non-Procurement Programs, the State of Texas, or the City of Austin.

7.28 **Incorporation of Documents. Section 0100, Standard Purchase Definitions**, is hereby incorporated into this Contract by reference, with the same force and effect as if they were incorporated in full text. The full text versions of this Section are available, on the Internet at the following online address: http://www.austintexas.gov/sites/default/files/files/Finance/Purchasing/standard-purchase-definitions.pdf.

7.29 **Order of Precedence**. The Contract includes, without limitation, the Solicitation, the Offer submitted in response to the Solicitation, the Contract award, the Standard Purchase Terms and Conditions, Supplemental Terms and Conditions if any, Specifications, and any addenda and amendments thereto. Any inconsistency or conflict in the Contract documents shall be resolved by giving precedence in the following order.

7.29.1 any exceptions to the Offer accepted in writing by the City;

7.29.2 the Supplemental Purchase Terms and Conditions;

7.29.3 the Standard Purchase Terms and Conditions;

7.29.4 the Offer and exhibits; within the Offer, drawings (figured dimensions shall govern over scaled dimensions) will take precedence over specifications or scope of work.

In witness whereof, the parties have caused duly authorized representatives to execute this Contract on the dates set forth below.

FDM Software LTD.	CITY OF AUSTIN
By:_____ Signature	By:_____ Signature
Name: _____ Printed Name	Name: _____ Printed Name
Title: _____	Title: _____
Date:_____	Date:_____

List of Exhibits

Exhibit A	Pricing Agreement and Statement of Work
Exhibit B	Non Discrimination Certification

EXHIBIT A
Pricing Agreement and Statement of Work

SOFTWARE SUPPORT AND MAINTENANCE AGREEMENT

between
THE CITY OF AUSTIN

and
FDM SOFTWARE LTD.

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SUPPORT AND MAINTENANCE AGREEMENT

between

THE CITY OF AUSTIN

and

FDM SOFTWARE LTD.

THIS AGREEMENT for the support and maintenance of a Fire Department Records Management System (RMS) Software ("Agreement") is dated for reference this _____day of _____ 2015 between the City of Austin, a municipal corporation under the laws of the State of Texas, whose address is P.O. Box 1088, Austin, Texas 78767-1088 ("Customer") and FDM Software Ltd., an existing British Columbia corporation, whose address is 949 West 3rd Street, Suite 113, North Vancouver, B.C., V7P 3P7 ("FDM").

RECITALS:

A. FDM has licensed to the Customer the use of certain modules of the Software, which modules are listed in Schedule B, and the Customer wishes to retain FDM to provide Support and Maintenance Services for the Software.

1 DEFINITIONS

The following terms have the following meanings for the purposes of this Agreement (including all Schedules):

a) CURRENT RELEASE. The term "Current Release" means the latest version of the Software offered for general commercial distribution at a given point in time and includes all Updates and Upgrades.

b) CUSTOMER SUPPORT. The term "Customer Support" means a person employed by or contracted by FDM to work on behalf of FDM to provide support services to the Customer.

c) CUSTOMIZATIONS. The term "Customizations" means all newly-developed software relating to the Software created for a separate fee by FDM or its subcontractors for the Customer, including but not limited to all interfaces between different components of the Software and Third Party Software.

d) DOCUMENTATION. The term "Documentation" means, without limitation, all written, electronic, or recorded works, that describe the use, functions, features, or purpose of the Software or any component thereof, and which are published or provided to the Customer by FDM or its subcontractors, including without limitation all end user manuals, training manuals, guides, program listings, data models, flow charts, logic diagrams, and other materials related to or for use with the Software.

e) INTELLECTUAL PROPERTY. The term "Intellectual Property" means all right, title, interest and benefit of a party in and to any registered or unregistered worldwide trade-marks, trade or brand names, service marks, copyrights, copyright applications, designs, logos, symbols, patents, patent applications, industrial design rights, circuit topographies or similar rights, rights in and to licences and sub-licences from third parties in any of the foregoing, confidential information, trade secrets, processes, know-how, technology and other intellectual or industrial property.

f) SOFTWARE. The term "Software" means all modules of the software described in Schedule B and all Updates, Upgrades and Customizations to the Software.

g) SOFTWARE ADMINISTRATOR. The term "Software Administrator" means the Customer's designated staff person who must have taken the training prescribed by FDM for the implementation and use of the Software.

h) SUPPORT AND MAINTENANCE SERVICES. The term "Support and Maintenance Services" means the support and maintenance services to be provided by FDM as described in this Agreement.

i) THIRD PARTY SOFTWARE. The term "Third Party Software" means all software not owned by FDM but included within the Software or required by FDM to be used as part of the Software requirements specified by FDM. The use of Third Party Software is subject to all of the terms and conditions of the third party's software license or agreement provided with the Third Party Software.

j) UPDATES. The term "Updates" means minor modifications to the Software to fix bugs and to minimally change current functionality.

k) UPGRADES. The term "Upgrades" means program changes to the Software made to add significant new functionality to the Software. most commonly given a new version number. that are made generally available without charge to FDM's licensees who have contracted for support and maintenance. For greater certainty. the "Upgrades" do not include separate modules that are separately licensed and priced and supported. or any replacement product that is developed and marketed and sold as a separate product by FDM.

2 SUPPORT AND MAINTENANCE SERVICES

During the term of this Agreement. FDM shall provide to the Customer the Support and Maintenance Services for the Software in accordance with the terms of this Agreement and the attached Schedules.

2.1 Scope of Support and Maintenance

Support and Maintenance means access to pre-defined Customer Support representative who may assist the Customer with:

- Access to website/FTP site
- Access to Documentation
- Access to the FDM online help desk
- Assisting with changes to the database
- Assisting with reports building
- Troubleshooting errors
- Assisting with configuration and testing problems
- Assisting with problems related to queries. advanced queries. calculated columns
- Supporting the Customer with issues that may arise from database upgrades to the latest FDM release
- Access to 24/7/365 Support for Software critical issues
- Assisting with up to three (3) upgrades per year

Support and Maintenance also includes the provision of Updates and Upgrades. Schedule B shall be deemed to have been amended without further action of the parties in the event that the Customer purchases the right to use additional modules of the Software that include the right Support and Maintenance pursuant to this Agreement.

2.2 NFIRS

Support and Maintenance includes annual NFIRS reporting updates as issued by the US Fire Administration.

2.3 Billable Support Services

The following support services are not included in Support and Maintenance during the term of this Agreement and may be billed by FDM at its then current rates:

- Creating reports
- Creating new tables and/or columns
- Creating calculated columns
- Creating interfaces between FDM and other data sources or CAD systems
- Creating scripts to fix issues that were not caused by FDM
- Database customization review
- Database clean up

- Converting current database to another database software system
- Upgrading databases on client's behalf to latest FDM release, either at the Customer's site or at the FDM's location
- Additional training
- Custom programming or software development
- Services required because the Administrator is not available or is not trained on FDM products
- Services required due to failure of software or hardware not supplied by FDM and not covered in this Agreement
- Services required due to the Customer's use of hardware or software that does not meet FDM specifications or failure of the Customer to maintain or perform industry standard maintenance on the Customer's hardware or software
- Services required due to software or portions thereof that were incorrectly configured by the Customer
- Services required due to cases of force majeure, especially lightning strikes, fire or flood or other events not caused through FDM's fault
- Services required due to the Customer's failure to fulfill the Customer's Obligations set forth in Section 4
- On-site services

2.4 Hours of Support

FDM shall provide Support Services during the hours as described in Schedule A.

2.5 New Releases

FDM shall, from time-to-time issue new releases of the Software (Schedule B), and when it does, it will immediately make available to the Customer a copy of the release documentation, and updated user or Software documentation. FDM will assist and provide guidance for integrating pre-existing custom code into the new release. Any custom code and/or modules created outside the core functionality of the product is the responsibility of the Customer. FDM can offer professional services to integrate custom changes with new functionality. Such services will be billed at FDM's then current rates.

2.6 FDM Exceptions

For greater certainty, FDM is responsible only for maintaining the Software as contemplated by this Agreement. Without limiting the generality of the foregoing, FDM is not responsible for (1) any hardware required to run the Software or to permit it to function, (2) any software required to run the hardware, including without limitation the operating Software and data base software, (3) maintaining unauthorized Customer modified portions of the Software, Customer data files or for maintaining portions of the Software affected by unauthorized Customer modified portions of the Software. The Customer shall cause the hardware on which the Software operates to be operating properly at all times and to be and continue to be properly maintained by the manufacturer of the equipment or a properly qualified service organization. Without limiting the generality of the foregoing, Customer will cause the hardware and underlying software to meet the minimum specifications for running the Software as declared by FDM from time to time. Corrections for difficulties or defects traceable to the Customer's errors or unauthorized changes, Customer's hardware, or conflicts with other software not identified by FDM as compatible or part of the recommended operating environment may be subject to billing at FDM's current rates. For greater certainty, FDM does not provide support for the Customer's database software application.

3 COST, PAYMENT AND TAXES

3.1 Annual Fee

The Customer shall pay the annual fee to FDM for Support and Maintenance Services as shown in Schedule C. All requests by the Customer for additional features or functionality that fall outside of FDM's ongoing policy of upgrading the Software will be quoted on separately.
Software version Updates and Upgrades are included in this Support and Maintenance Agreement and Customers are encouraged to keep their system up to date. A surcharge on the annual Support and Maintenance fee will be charged for systems that are two or more versions behind the current release version.

FDM will be charging the following support premium fees for versions older than 12.5:

- Versions 10.x to 12.2: a premium of 5% of the annual support and maintenance fee
- Versions 9.x: a premium of 10% of the annual support and maintenance fee
- Older versions: a premium of 15% of the annual support and maintenance fee

If you are in testing, or just scheduled to upgrade to one of these releases, no premium fee will be charged.

3.2 Additions to Support and Maintenance Agreement

In the event the Customer purchases additional licenses or additional modules from FDM during the term of this Agreement, FDM will provide a written quote that reflects the additional licenses or module, and the support and maintenance fee. The support and maintenance fees for additional licenses are due immediately, while the support and maintenance fees for additional modules are due upon the go live date of the module.

3.3 Removal of Modules

Either party may provide written notice to the other party at least sixty (60) calendar days prior to the end of the support and maintenance coverage period of its intent to remove any individual modules from the Agreement. Neither party may remove Software modules except upon Agreement renewal. Should the Customer desire to reinstate support and maintenance services for the modules that were removed from the Agreement, the Customer must pay the support and maintenance fees retroactively from the date of the cancellation or re-purchase the licenses at the then current list price.

3.4 Travel Expenses

The Customer shall reimburse FDM for any out-of-pocket expenses incurred at the Customer's request and authorization, including travel to and from the Customer site, lodgings, meals, telephone and shipping, as may be necessary in connection with the duties performed by FDM under this Agreement.

3.5 Payment

Support and Maintenance Services will be invoiced annually in advance on December 31st. Payment is due thirty (30) calendar days after invoice.

3.6 Taxes

~~Customer shall pay all federal, state or local sales, or use taxes, or import duties and taxes that may be imposed upon the amount invoiced to Customer under this Agreement, unless Customer has furnished FDM with a certificate of exemption Customer shall pay all such amounts directly to the taxing authority unless the taxing authority requires that FDM collect and remit payment, in which event Customer shall pay said amounts to FDM and FDM shall remit such amounts to the authority. Customer and FDM shall cooperate in taking all reasonable actions necessary to minimize, or to qualify for exemptions from, any such taxes, duties or liabilities, including the furnishing of certifications that purchases by Customer are for purposes of resale. Customer and FDM shall each have the right to protest or appeal any tax or charge assessed against it by any taxing authority.~~

4 CUSTOMER OBLIGATIONS

4.1 Customer's Responsibility

The Customer is responsible for the installation and maintenance, and regular replacement of all hardware (network cabling, switches, servers and workstations, backup power supplies and all other matters commonly the responsibility of the Customer) and for ensuring that all major operating software and database service packs are kept current after FDM has recommended their installation.
The Customer is responsible for ensuring that all workstations and servers are kept free of viruses, worms or other non FDM approved software which may affect the operation of the supplied software.The Customer is responsible for ensuring the

accuracy and integrity and privacy of the data which supports the functioning of the Software. This data includes, but is not limited to:

a. Accurate and correct department information.
b. Accurate and correct resource information (departmental vehicles and station locations)
c. Accurate and valid GIS data (where available).
d. Accurate and correct location (property) information.

The Customer is responsible for performing and testing the integrity of regular database backups and redundancy process. The Customer is responsible for database administration functions and for ensuring the proper maintenance of the database (as per the database supplier's instructions).

The Customer is responsible for properly testing and applying routine virus updates and security patches without the need for additional FDM notification and for testing those updates before applying them to the Customer's production environment. Except for emergency replacement of a failing server, the Customer shall communicate with FDM prior to replacing a server on which Software is being used. For workstations running Software, the Customer acknowledges responsibility to test new workstation configurations, software service packs, new releases or versions of software, and new software products prior to implementation. FDM recommends that the Customer doesn't install other software on the server running the FDM Software. Support and Maintenance activities for systems configured outside of FDM's recommendations may be subject to additional fees. ($200/hour for time and material)
Customer represents and agrees that it shall ensure that all persons operating the Software during times when life or property are at risk are properly qualified, supervised, trained, and have demonstrated effectively that the operator is proficient in the use of the hardware and software and the Software. Customer warrants that its operators will not rely solely upon recommendations presented by the Software when making decisions in situations where life or property could be at risk. Customer warrants that it shall maintain a manual or mechanical software adequate to back up the equipment and software should they become unavailable for use, either planned or unplanned.

4.2 Access to Data and Software

The Customer shall provide FDM with monitored access to the Software, and with sufficient test time on the Customer's hardware and software to duplicate the problem, to certify that the problem is with the Software, and to certify that the problem has been corrected.
The Customer shall make reasonable efforts to upgrade the Software in its entirety to a release version that is not more than one (1) release version older than the most recent version of the Software, but will not exceed two (2) release versions older than the most recent version of the Software. FDM is not obligated to provide Updates and Upgrades for release versions that are more than two (2) release versions older. FDM will provide clear upgrade path to the Customer.
The Customer will upgrade the computer operating software, hardware and underlying database engines of the Software as necessary to meet the changing requirements of the Software as specified by FDM as part of a current release of the Software, or as the parties mutually agree. The parties agree that FDM is not obligated to ensure that its new release of the Software is compatible with outdated (namely, exceeding three (3) versions from date of initial release) hardware, computer operating software or database engines nor is FDM responsible to maintain the Software if Customer has failed to comply with the requirements of this paragraph.

4.3 Software Administrator

The Customer shall appoint a minimum one contact person who is authorized to make use of the Support and Maintenance Services provided ("Software Administrator"). The Customer must ensure that the Software Administrator has adequate expertise and experience to make accurate description of the malfunctions and make it possible for FDM to handle them efficiently. The Software Administrator must have successfully completed FDM product training and must have knowledge of the Customer's operating software, network, hardware and other system software. The Customer agrees to promptly notify FDM of any replacement of a Software Administrator.

4.4 Remote Access

The Customer will permit FDM to electronically access the Customer's hardware and software via the remote tools used by FDM or the tool provided by the Customer. The Customer shall pay for the installation and maintenance of their remote tools. The tool will provide secure, auditable remote access to the Customer's Software, in order for FDM Customer Support personnel to effectively troubleshoot critical or complex problems and to expedite resolution of such issues. The Software Administrator should be available to assist FDM Customer Support personnel as needed during the entire process. Customer Support will only access the Customer's Software with the Administrator monitoring their actions knowledge and consent of the Customer.

4.5 Transferring Database

From time to time, FDM may require a copy of the Customer database. In order to protect sensitive data, FDM provides a tool to remove, scramble, and/or make unreadable such sensitive data. It is the Customer's responsibility to ensure that all database sent to FDM have been created using this tool and to ensure that the tool is properly configured to eliminate any data the Customer considers sensitive.

5 CONFIDENTIALITY

5.1 Defined

Confidential information includes, without limitation, any tangible and intangible material such as written or printed documents specifically identified to be confidential, samples, data structures, links, architecture, implementations of the Software, software, information obtained through access to an electronic database, and any oral disclosures. All confidential information submitted by either party to the other is subject to the terms of this Agreement, provided that the confidential nature of the information has been clearly marked, or when disclosed orally has been identified as confidential information at the time. The receiving party has no obligation or restriction with respect to confidential information which is in the public domain through no wrongful act or omission of the receiving party, has been lawfully received from a third party without obligations of confidentiality, or is independently developed in good faith by the receiving party (with the burden of proof being on the receiving party).

5.2 Recipient's Responsibilities

All information disclosed to a receiving party shall be protected and kept in confidence forever by the receiving party, who agrees to use the degree of care and employ safeguards as are reasonable for such information. The receiving party can disclose the confidential information only to persons within the receiving party's organization on a need-to-know basis. Such persons shall be informed of the confidential nature of the information, and if necessary shall be required to sign a similar agreement of non-disclosure. The receiving party shall segregate all confidential information from other material in order to prevent co-mingling, and the receiving party shall not use the confidential information in whole or in part for any purpose other than the purposes of this Agreement. The receiving party shall not reverse engineer, decompile, translate, modify or disassemble any Software disclosed to it. All confidential information shall be returned to the disclosing party upon the termination or expiration of this Agreement, unless it is reasonably required with respect to the ongoing use by Customer of the Software.

5.3 Rights to Confidential Information

It is expressly understood and agreed by the parties that the disclosure of confidential information under this Agreement will not be construed as granting to the receiving party any rights or interest whether express or implied by license or otherwise to the matters or inventions to which such confidential information pertains or to any patent, industrial design, copyright, trade-mark or trade secret rights beyond the rights expressly granted by this Agreement. The receiving party may only use confidential information disclosed under this Agreement in furtherance of this Agreement.

5.4 Freedom of Information

FDM acknowledges and agrees that the Customer may be subject to laws providing for free access to government information, commonly referred to as Freedom of Information statutes, with respect to information under its custody and control. Accordingly all documents and information provided by FDM to the Customer under and pursuant to this Agreement may potentially be available to the public by operation of law. Customer acknowledges that FDM has requested that all confidential information not be disclosed to the public and that Customer will use its best efforts and work with FDM to allow FDM to take advantage of all statutory exemptions from involuntary disclosure. Customer agrees to use reasonable efforts to notify FDM of any request to access confidential information.

5.5 Privacy

Notwithstanding that any personally identifiable information collected by Customer may end up in the joint custody of FDM on account of this support agreement. Customer agrees that it remains liable for all compliance (including the cost of compliance) with all relevant privacy legislation, rules and regulations.

6 INTELLECTUAL PROPERTY RIGHTS

6.1 FDM

Customer acknowledges and agrees that FDM retains legal ownership of the Intellectual Property, including without limitation the Software and Documentation, including without limitation all copyrights and other Intellectual Property rights that may exist now or in the future. Without limiting the generality of the foregoing, the data structures and architecture of the Software, and any application code provided by FDM and contained within any database, are owned by FDM. Customizations are the sole property of FDM and will be deemed to be part of the Software for the purpose of this Agreement.

6.2 Customer

FDM acknowledges and agrees that: (a) the data contained within the database provided by the Customer is and will remain the exclusive property of the Customer; and (b) the Customer retains full and complete rights to use such data. FDM shall not disclose, transfer or sell any data contained in the Database to any person and shall comply with the confidentiality requirements set forth in this Agreement.

6.3 Trade-marks

Nothing contained in this Agreement shall be construed as licensing either party to use any trade-mark or trade name owned or used by the other party without its prior written consent.

7 LIMITATION OF LIABILITY

Neither party will be liable to the other party for (i) any indirect, incidental, special, consequential or exemplary damages, including but not limited to, damages for loss or revenues, profits, goodwill, use, data, failure to realize expected savings, or (ii) other losses resulting from error, omission, or negligence of the other party with respect to the use of the Software, including but not limited to, in the case of the Customer, the data entered by the Customer and/or dispatched by the Customer pursuant to the data entered by the Customer. FDM disclaims all warranties not expressly provided in this Agreement including without limitation warranties of merchantability and fitness for a particular purpose.
To the extent permitted by law~~,~~ and with the exception of FDM's indemnity obligations, neither party's liability to the other party in connection with any cause of action (excluding copyright infringement by either party or non-payment by Customer), whether in contract, tort, or under statute, relating to this Agreement shall in no event exceed the greater of the total price paid for Support and Maintenance in the twelve month period preceding the event giving rise to the claim or the amount payable pursuant to amount of coverage for such loss in effect pursuant to the policy of insurance in effect under this Agreement.

The limitations of ~~Customer's~~ liability contained in this section do not apply to any claims ~~that FDM may have against Customer~~ with respect to intellectual property infringement, or amounts owing to FDM. ~~or to Customers obligation to indemnify FDM for claims made against FDM as a result of Customer breaching its obligations pursuant to this Agreement.~~

8 TERM AND TERMINATION

8.1 Term

The term of this Agreement commences January 2016 and ends December 31st 2018. ~~This Agreement will automatically renew for two (2) additional periods of one (1) year provided that either party has not given the other written notice on or before October 31st in that year of its intention to terminate the Agreement at the expiration of the then current term.~~

Commented [LC5]: The pricing shows 2016-2018 with an option to renew for 2019 and 2020. Shouldn't we explain that it can be renewed for 2 additional years at the price listed? If not, shouldn't we take out the reference to 2019 and 2020 in pricing?

8.2 Limitations

FDM may at its sole discretion limit or suspend Customer's access to Support, pursuant to this Agreement, where (1) Customer is in material default under the terms of this Agreement or the license from FDM authorizing Customer to use the Software (non-payment is deemed to be a material default), or (2) it appears that the need for Support is based upon the failure of Customer to provide a knowledgeable Software Administrator (who must be certified by FDM) to administer the Software.

8.3 Termination for Convenience

The Customer may terminate this Agreement at any time and for any reason upon thirty (30) calendar days prior written notice to FDM. Customer is not entitled to a refund of monies billed or paid for support for the period cancelled.

8.4 For Breach

If either party fails to fulfill one or more of its material obligations under this Agreement (non-payment is deemed to be a material default), the other party may, upon its election and in addition to any other remedies that it may have, at any time terminate all the rights granted by it hereunder by providing not less than one (1) month's written notice specifying any such breach, unless within the period of such notice all breaches specified have been remedied or that all reasonable steps are being taken to remedy such breaches. For greater certainty, if Customer is in material default under the terms of the license from FDM authorizing Customer to use the Software then Customer will be deemed to be in material default under this agreement.

Commented [RH6]: This is covered in the main agreement. Language can be changed to make termination apply to both parties.

8.5 Survival

Expiration or termination of this Agreement for any reason will not affect any obligations which, within the context of this Agreement, are intended to survive expiration or the sooner termination of this Agreement, including but not limited to Sections 1 (Definitions), 3 (Cost, Payment and Taxes), 5 (Confidentiality), 7 (Limitations of Liability), and 11.7 (Disputes).

9 INSURANCE

9.1 Limits

FDM shall comply with the following conditions and procure and keep in force during the term of this Agreement, at its own cost and expense.

a) Workers' Compensation Insurance or such insurance of a similar type as required by British Columbia law. If the Customer authorizes work by any subcontractors, FDM will require each subcontractor to provide Workers' Compensation Insurance or such insurance of a similar type for its employees, unless FDM covers such employees.

b) Commercial General Liability Insurance on an occurrence basis in an amount not less than $1,000,000 per occurrence and at least $1,000,000 in the annual aggregate, including but not limited to: premises/operations (including off-site operations), blanket contractual liability and broad form property damage.

c) Business Automobile Liability Insurance in an amount not less than $1,000,000 per occurrence, extending to any automobile. A statement certifying that no vehicle will be used in accomplishing this Agreement may be substituted for this insurance requirement.

The Customer shall be named as an additional insured under the FDM's Commercial General Liability Insurance coverage. FDM shall provide certificates of insurance to the Customer indicating compliance with this paragraph.
The above liability policies shall contain a provision that the policy will not be cancelled or materially changed without thirty (30) calendar days prior written notice to the Customer. No cancellation provision in any insurance policy will be construed in derogation of the continuous duty of FDM to furnish the required insurance during the term of this Agreement.
In case of the breach of any provision of this section, the Customer may, at its option and with no obligation to do so, provide and maintain at the expense of FDM, such types of insurance in the name of FDM, and with such insurers, as the Customer may deem proper, and may deduct the cost of providing and maintaining such insurance from any sums which may be found or become due to FDM under this Agreement or may demand FDM to promptly reimburse the Customer for such cost.

10 RELATIONSHIP

10.1 Independent Contractor

The Agreement shall not be construed as creating an agency, employer/employee relationship, a partnership, or a joint venture. FDM's services are those of an independent contractor.

10.2 FDM Employees

Any and all employees of and contractors to FDM, while engaged in the performance of any services hereunder, will be considered employees of FDM only and not of the Customer. FDM's employees are not entitled to any of the employment benefits of the Customer as a result of their performance of any obligations under this Agreement. Any and all claims that may or might arise under the worker's compensation legislation on behalf of said employees or FDM, while so engaged, and any and all claims made by a third party as a consequence of any negligent act or omission on the part of FDM's employees, while so engaged, will be the sole obligation and responsibility of FDM.

10.3 Personnel

The Customer, acting reasonably, may review, approve, or request a change of FDM's employees or subcontractors who provide services under this Agreement.
A party must not directly or indirectly induce an employee or contractor of the other party to terminate her contract with the other party, nor will Customer hire any of FDM's employees or contractors.
This section remains in force for six (6) months after the end of the expiration or termination of this Agreement.

10.4 FDM Standards of Employment

FDM warrants that it has not employed or retained any company or person, other than a bona fide employee, agent or contractor working for FDM, to solicit or secure this Agreement and that it has not paid or agreed to pay any company or person, other than a bona fide employee working solely for FDM, any fee, commission, percentage, brokerage fee, gifts, or any other consideration, contingent upon or resulting from the award or making of this Agreement. For breach or violation of this warranty, the Customer may terminate this Agreement without liability or, in its discretion, may deduct from the project price or otherwise recover the full amount of such fee, commission, percentage, brokerage fee, gift, or contingent fee.
FDM, with regard to the Support and Maintenance Services performed by it, will not discriminate on the grounds of race, religion, colour, national origin, or sex in the selection and retention of employees or independent contractors, including procurements of materials and leases of hardware.

11 MISCELLANEOUS

11.1 Addresses

Any statement, notice, request or other communication hereunder will be deemed to be sufficiently given to the addressee and any delivery hereunder deemed made three (3) calendar day after delivery or fax (with receipt confirmation) to the following addresses:

To the Customer:
Mark Tomasek, IT Systems Administrator
P.O. Box 1088
Austin, Texas 78767

To FDM:
Edward Colin, President and CEO
FDM Software, Ltd.
949 West 3rd Street, Ste. 113
North Vancouver, BC, Canada V7P 3P7
Fax number: 604-986-7130

or to such other address as the party may specify from time to time by notice given in accordance with this section.

11.2 Construction

Each party acknowledges that it has read this Agreement, understands it and agrees to be bound by its terms. Each party acknowledges that the Agreement should not be strictly construed against one party or the other, including the party that drafted it, but interpreted reasonably and fairly so as to give effect to the manifest intentions of the parties.

11.3 Modification

This Agreement may not be modified except by a written instrument duly executed by the parties hereto. The Customer may, from time to time, require changes in the scope of this Agreement. Such changes, including any increase or decrease in the amount of FDM's compensation, or services, will: (a) be made only in writing and signed by an authorized representative of the Customer, (b) be explicitly identified as a change to this Agreement, (c) be approved by FDM in writing and (d) become a part of this Agreement.

11.4 Force Majeure

Each party shall be excused from delays in performing or from its failure to perform hereunder to the extent that such delays or failures result from causes beyond the reasonable control of such party; provided that, in order to be excused from delay or failure to perform, such party must act diligently to remedy the cause or effect of such delay or failure to the extent the party is able. In the event of such delays, the timetables shall be extended by as many calendar days as the delay caused by forces outside the reasonable control of the parties.

11.5 Required Approvals

Unless otherwise specified herein, where agreement, approval, acceptance, or consent by either party is required by any provision of this Agreement, such action will not be unreasonably delayed or withheld.

11.6 Applicable Law and Choice of Forum

~~This Agreement and the parties' obligations hereunder is governed, construed, and enforced in accordance with the laws of the Province of British Columbia and the laws of Canada applicable therein. The parties agree that all disputes, subject to the dispute resolution set out below, will be submitted to a court of competent jurisdiction in the Province of British Columbia.~~

11.7 Disputes

With the exception of any claim relating to Intellectual Property rights or a breach of the confidentiality provisions set forth in this Agreement, if a dispute arises between the parties involving this Agreement or any provision thereof, then the parties shall conduct good faith negotiations to resolve such dispute, failing which, after seven (7) calendar days, either party may request by written notice to the other that the dispute be escalated to senior management as specified below ("Senior Management"). If such a request is made, then each party will make available its Senior Management who will meet or discuss within fifteen (15) calendar days after such request is made in an attempt to resolve the dispute. Either party may change its Senior Management appointee upon prior written notice to the other.

FDM	Edward Colin, President and CEO
Customer	Mark Tomasek, IT Systems Administrator

If Senior Management does not settle such dispute within an additional fifteen (15) calendar days, then either party may exercise its rights available at law. All negotiations and discussions to resolve such dispute will be treated as compromise and settlement negotiations between the parties and will not be subject to disclosure through discovery or any other process and will not be admissible into evidence in any proceeding.

Unless otherwise instructed by the Customer in writing, FDM will continue to perform its obligations pursuant to this Agreement during any mediation or litigation, unless the dispute is for material non-payment.

11.8 Severability of Agreement

In the event that any provision of this Agreement is held invalid, void, illegal or unenforceable, the remainder of this Agreement will not be impaired or affected thereby, and each term, provision, and part will continue in full force and effect and will be interpreted in a manner consistent with the intent of the parties.

11.9 Headings for Convenience.

The section and subsection headings used herein are for referral and convenience only, and will not enter into interpretation hereof. The exhibits referred to herein and attached, and to be attached hereto, are incorporated herein to the same extent as if set forth in full herein.

11.10 Assignment Barred

Neither party may assign its rights or duties under this Agreement without the prior written consent of the other party, which consent may be unreasonably withheld. This provision does not prevent FDM from engaging appropriate independent contractors to complete its work provided that Customer approves of such independent contractors, and such approval will not be unreasonably withheld or delayed. In such event, FDM will remain fully liable and responsible for such independent contractors and will not be relieved of any of its obligations hereunder.

11.11 Order of Precedence

~~In the event of any conflict between the clauses of this Agreement, its exhibits, and any of the documents incorporated by reference, the following order of precedence applies: (a) this Agreement; (b) exhibits to this Agreement; (c) the respective license for the Software which may be part of a master services agreement entered into with respect to Customer's license of the Software, (d) FDM's proposal and any changes thereto in reverse chronological order, (i.e., most recent modifies the earliest); and (e) any other documents incorporated by reference~~. Notwithstanding the foregoing, a specific reference in a clause takes precedence over a general reference, regardless of the order of precedence of the Agreement, exhibit or document that the clause is contained in.

11.12 Waiver of Rights

The waiver by either party of any term or condition of this Agreement will not be deemed to constitute a continuing waiver thereof nor of any further or additional right that such party may hold under this Agreement.

11.13 Successors and Assigns

This Agreement is binding on the parties, their successors and permitted assigns.

11.14 Entire Agreement

~~Except as expressly provided otherwise herein, this Agreement constitutes the entire agreement between the parties with respect to the subject matter herein and cancels and supersedes any prior understandings and agreements between the parties hereto with respect thereto. There are no representations, warranties, terms, conditions, undertakings or collateral agreements, express, implied or statutory, between the parties other than as expressly set forth in this Agreement.~~

11.15 Time of the Essence

Time is of the essence of this Agreement and of every part hereof, and no extension or variation of this Agreement will operate as a waiver of this provision.

11.16 Contra Proferentum

The parties understand, agree, and acknowledge that: (a) this Agreement has been freely negotiated by both parties; and (b) in any controversy, dispute, or contest over the meaning, interpretation, validity, or enforceability of this Agreement or any of its terms or conditions, there will be no inference, presumption, or conclusion drawn whatsoever against either party by virtue of that party having drafted this Agreement or any portion thereof.

IN WITNESS to this Agreement the parties have caused this Agreement to be executed and delivered without condition by their duly authorized representatives.

FDM SOFTWARE LTD.	CITY OF AUSTIN
(Authorized signing officer)	(Authorized signing officer)
Name and Title: Edward Colin, President and CEO	Name and Title: Gil Zilkha, Contract Administrator
Date:	Date:

SCHEDULE "A"

Hours of Support and Maintenance Service are as follows:

Regular Hours of Service (Pacific Time)	After Hours of Service (Pacific Time)
6:00am to 4:30 pm Monday to Friday	4:30 pm to 6:00 am Monday to Friday Saturdays & Sunday Federal and Provincial Statutory holidays in BC, currently New Year's Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day, Boxing Day.

Incident/Request for Service Priority

All Support and Maintenance incidents/ requests for service will be prioritized on the following basis:

Priority A (High)	Priority B (Medium)	Priority C (Low)
Work Outage		
The Software has failed and causes the users to be unable to work or perform some significant portion of their job. Examples could include such things as the Software is down and cannot be restarted, File Software Corruption.	Priority B issues are software faults where normal Software operation is affected to some degree and a workaround is not available, but users are still able to complete most other tasks. Examples could include such things as a user cannot extract data using a report, calculated column is not functioning as expected.	Priority C issues are for software faults where a fault was detected, but normal operation is not affected. Priority C calls also include enhancement requests for potential modification to Software. Examples could include "how to" reset passwords, changing default colours, etc.
ponse Time During Regular Hours of Service		
Within 30 minutes after receiving call from Client Administrator or designate.	Within three business days of FDM's receipt of verbal, written or electronic notice from Client Administrator or designate. FDM will work with the Client to come to a mutually agreed upon resolution date. .	For software related issues, this priority allows for work to be scheduled as part of a planned maintenance update.
Response Time During After Hours of Service		
Within 2 hours after receiving call from answering service	Not Available	Not Available

All Response Times are conditional upon Software Administrator being available without limitation during the promised Response Time.

Incident/Request for Service Reporting Procedure

All problems, queries or requests for assistance must be made to the FDM Client Service Department by phone at 1-877-986-9927 or by electronic mail at clientservices@fdmsoft.com.

When reporting an issue, be prepared to provide your name, phone number, workstations affected, where you can be reached, a description of the problem/service, and the impact of the problem. FDM will deal with problem/incident according to the priority assigned. In the case that a problem cannot be readily resolved, FDM will attempt to identify a work around. As soon as FDM corrects an Issue, FDM will notify the Customer that the Issue has been corrected by sending an electronic mail.

For all Priority A calls:

FDM will provide an update to the Customer regarding the status of the problem incident along with the action plan and anticipated resolution time within 2 hours after responding to the call and every 2 hours thereafter until the Software has been made operational or the issue is downgraded to a Priority B or Priority C call. FDM will provide resolution to the problem if the hardware, operating Software, network connectivity, SQL server software is functional ~~and software and database backups are available~~. FDM is not responsible for hardware, operating Software, SQL server or network connectivity related problems.

Escalation Process

a) If problem incident remains unresolved within 6 hours the Manager of Support or their designate at FDM will contact the Customer's Administrator to provide a verbal update and action plan.

b) If problem incident remains unresolved within 12 hours after responding to the call the President or CTO of FDM will contact the Fire Chief or the Director of ITS of the Customer to provide a verbal update and action plan. This process will continue every 12 hours thereafter.

c) If the problem incident remains unresolved within 48 hours after responding to the call then FDM agrees to provide an on-site staff resource until the problem is resolved or downgraded to a Priority B or Priority C call. All travel meal and lodging costs will be at the expense of FDM. If the Priority A issue is the result of a condition that is in the Customer's control (hardware, OS / database software, network connectivity or unauthorized changes to the database) FDM will be entitled for reimbursement of all expenses.

d) Upon resolution of the problem incident, a debriefing meeting will be held to discuss process for resolution, proposed improvements, and follow-up actions required.

Where temporary solutions are provided, FDM will provide a permanent fix within 30 calendar days or as mutually agreed but the application of the permanent fix will not exceed 6 months.

For Priority B and Priority C calls:

FDM shall provide, at the Customer's request, a report of call history and the status of any active Priority B and C calls including the anticipated resolution date.

PRIVACY NOTE: BEFORE SENDING ANY DATABASES TO FDM FOR SUPPORT PURPOSES, CUSTOMER MUST USE THE DATABASE ANONYMIZING TOOL PROVIDED BY FDM TO ENSURE THAT NO PERSONALLY IDENTIFIABLE DATA IS DISCLOSED TO FDM.

SCHEDULE "B"

FDM Licensed Modules:

- RMS Modules:
  - Properties
  - Personnel
  - Incident Reporting (Fire & EMS)
  - Training
  - Inspection
  - Permits

- FDM Administrator Tools and Utilities:
  - FDM Workflow Tools
  - FDM Report Writer and Report Builder (FDMrb)
  - FDM Importer
  - Gold Key
  - FDM eConnect

SCHEDULE "C"

Annual Support and Maintenance Pricing

Modules: (site license)	Annual Support and Maintenance Fee
Incident (Fire & EMS) Module	$34,912.60
Training Module	$18,375.00
Inspection Module	$22,050.00
Permit Module	$5,512.60
FDM Importer	$1,000.00
TriTech Interface	$4,800.00
Zoll Interface	$3,000.00
Workflow Tools	$2,000.00
Gold Key	$10,000.00
Source Code Escrow	$1,000.00
FDM Annual Conference	$5,000.00
Total	**$107,650.20**

	Total Annual Support and Maintenance
2016	$107,650.20
2017	$110,341.46
2018	$113,099.99
Optional 2019	$115,927.49
Optional 2020	$118,825.68

EXHIBIT B
City of Austin, Texas
EQUAL EMPLOYMENT/FAIR HOUSING OFFICE
NON-DISCRIMINATION CERTIFICATION

City of Austin, Texas
Human Rights Commission

To: City of Austin, Texas, ("OWNER")

I hereby certify that our firm conforms to the Code of the City of Austin, Section 5-4-2 as reiterated below:

Chapter 5-4. Discrimination in Employment by City Contractors.

Sec. 4-2 Discriminatory Employment Practices Prohibited. As an Equal Employment Opportunity (EEO) employer, the Contractor will conduct its personnel activities in accordance with established federal, state and local EEO laws and regulations and agrees:

(B) (1) Not to engage in any discriminatory employment practice defined in this chapter.

(2) To take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without discrimination being practiced against them as defined in this chapter. Such affirmative action shall include, but not be limited to: all aspects of employment, including hiring, placement, upgrading, transfer, demotion, recruitment, recruitment advertising; selection for training and apprenticeship, rates of pay or other form of compensation, and layoff or termination.

(3) To post in conspicuous places, available to employees and applicants for employment, notices to be provided by OWNER setting forth the provisions of this chapter.

(4) To state in all solicitations or advertisements for employees placed by or on behalf of the Contractor, that all qualified applicants will receive consideration for employment without regard to race, creed, color, religion, national origin, sexual orientation, gender identity, disability, veteran status, sex or age.

(5) To obtain a written statement from any labor union or labor organization furnishing labor or service to Contractors in which said union or organization has agreed not to engage in any discriminatory employment practices as defined in this chapter and to take affirmative action to implement policies and provisions of this chapter.

(6) To cooperate fully with OWNER's Human Rights Commission in connection with any investigation or conciliation effort of said Human Rights Commission to ensure that the purpose of the provisions against discriminatory employment practices are being carried out.

(7) To require compliance with provisions of this chapter by all subcontractors having fifteen or more employees who hold any subcontract providing for the expenditure of $2,000 or more in connection with any contract with OWNER subject to the terms of this chapter.

For the purposes of this Offer and any resulting Contract, Contractor adopts the provisions of the City's Minimum Standard Nondiscrimination Policy set forth below.

City of Austin
Minimum Standard Non-Discrimination in Employment Policy:

As an Equal Employment Opportunity (EEO) employer, the Contractor will conduct its personnel activities in accordance with established federal, state and local EEO laws and regulations.

The Contractor will not discriminate against any applicant or employee based on race, creed, color, national origin, sex, age, religion, veteran status, gender identity, disability, or sexual orientation. This policy covers all aspects of employment, including hiring, placement, upgrading, transfer, demotion, recruitment, recruitment advertising, selection for training and apprenticeship, rates of pay or other forms of compensation, and layoff or termination.

Further, employees who experience discrimination, sexual harassment, or another form of harassment should immediately report it to their supervisor. If this is not a suitable avenue for addressing their complaint, employees are advised to contact another member of management or their human resources representative. No employee shall be discriminated against, harassed, intimidated, nor suffer any reprisal as a result of reporting a violation of this policy. Furthermore, any employee, supervisor, or manager who becomes aware of any such discrimination or harassment should immediately report it to executive management or the human resources office to ensure that such conduct does not continue.

Contractor agrees that to the extent of any inconsistency, omission, or conflict with its current non-discrimination employment policy, the Contractor has expressly adopted the provisions of the City's Minimum Non-Discrimination Policy contained in Section 5-4-2 of the City Code and set forth above, as the Contractor's Non-Discrimination Policy or as an amendment to such Policy and such provisions are intended to not only supplement the Contractor's policy, but will also supersede the Contractor's policy to the extent of any conflict.

UPON CONTRACT AWARD, THE CONTRACTOR SHALL PROVIDE A COPY TO THE CITY OF THE CONTRACTOR'S NON-DISCRIMINATION POLICY ON COMPANY LETTERHEAD, WHICH CONFORMS IN FORM, SCOPE, AND CONTENT TO THE CITY'S MINIMUM NON-DISCRIMINATION POLICY, AS SET FORTH HEREIN, OR THIS NON-DISCRIMINATION POLICY, WHICH HAS BEEN ADOPTED BY THE CONTRACTOR FOR ALL PURPOSES (THE FORM OF WHICH HAS BEEN APPROVED BY THE CITY'S EQUAL EMPLOYMENT/FAIR HOUSING OFFICE), WILL BE CONSIDERED THE CONTRACTOR'S NON-DISCRIMINATION POLICY WITHOUT THE REQUIREMENT OF A SEPARATE SUBMITTAL

Sanctions:
Our firm understands that non-compliance with Chapter 5-4 may result in sanctions, including termination of the contract and suspension or debarment from participation in future City contracts until deemed compliant with the requirements of Chapter 5-4.

Term:
The Contractor agrees that this Section 0800 Non-Discrimination Certificate or the Contractor's separate conforming policy, which the Contractor has executed and filed with the Owner, will remain in force and effect for one year from the date of filing. The Contractor further agrees that, in consideration of the receipt of continued Contract payments, the Contractor's Non-Discrimination Policy will automatically renew from year-to-year for the term of the underlying Contract.

Dated this _____ day of _____, _____

CONTRACTOR _____

Authorized Signature _____

Title _____

City of Austin FSD Purchasing Office

Certificate of Exemption

DATE: 08/20/2015 DEPT: CTM, CTECC

TO: Purchasing Officer or Designee FROM: Stephen Elkins, CIO

BUYER: PHONE:

Chapter 252 of the Local Government Code requires that municipalities comply with the procedures established for competitive sealed bids or proposals before entering into a contract requiring an expenditure of $50,000 or more, unless the expenditure falls within an exemption listed in Section 252.022.

Senate Bill 7 amended Chapter 252 of the Local Government Code to exempt from the requirements of such Chapter expenditures made by a municipally owned electric utility for any purchases made by the municipally owned electric utility in accordance with procurement procedures adopted by a resolution of its governing body that sets out the public purpose to be achieved by those procedures. The Austin City Council has adopted Resolution No. 040610-02 to establish circumstances which could give rise to a finding of critical business need for Austin Energy.

This Certification of Exemption is executed and filed with the Purchasing Office as follows:

1. The undersigned is authorized to submit this certification.
2. The undersigned certifies that the following exemption is applicable to this purchase. (Please check which exemption you are certifying)

- ○ a procurement made because of a public calamity that requires the immediate appropriation of money to relieve the necessity of the municipality's residents or to preserve the property of the municipality
- ○ a procurement necessary to preserve or protect the public health or safety of municipality's residents
- ○ a procurement necessary because of unforeseen damage to public machinery, equipment, or other property
- ○ a procurement for personal, professional, or planning services
- ○ a procurement for work that is performed and paid for by the day as the work progresses
- ○ a purchase of land or right-of- way
- ◉ a procurement of items available from only one source, including: items that are available from only one source because of patents, copyrights, secret processes, or natural monopolies; films, manuscripts, or books; gas, water, and other utility services; captive replacement parts or components for equipment; books, papers, and other library materials for a public library that are available only from the persons holding exclusive distribution rights to the materials; and management services provided by a nonprofit organization to a municipal museum, park, zoo, or other facility to which the organization has provided significant financial or other benefits
- ○ a purchase of rare books, papers, and other library materials for a public library
- ○ paving, drainage, street widening and other public improvements, or related matters, if at least one- third of the cost is to be paid by or through special assessments levied on property that will benefit from the improvements
- ○ a public improvement project, already in progress, authorized by voters of the municipality, for which there is a deficiency of funds for completing the project in accordance with the plans and purposes as authorized by the voters

- ○ a payment under a contract by which a developer participates in the construction of a public improvement as provided by Subchapter C, Chapter 212
- ○ personal property sold: at an auction by a state licensed auctioneer; at a going out of business sale held in compliance with Subchapter F, Chapter 17, Business & Commerce Code; by a political subdivision of this state, a state agency of this state, or an entity of the federal government; or under an interlocal contract for cooperative purchasing administered by a regional planning commission established under Chapter 391
- ○ services performed by blind or severely disabled persons
- ○ goods purchased by a municipality for subsequent retail sale by the municipality
- ○ electricity
- ○ advertising, other than legal notices
- ○ Critical Business Need (Austin Energy Only)

3. The following facts as detailed below support an exemption according to Section 252.022 of the Local Government Code for this purchase. Please verify the steps taken to confirm these facts. If you are citing the following exemptions, please provide the additional information requested below. A more detailed explanation of these exemptions is attached.

   - **Preserve and Protect the Public Health and Safety** – Describe how this purchase will preserve and protect the public safety of residents.
   - **Sole Source** – Describe what patents, copyrights, secret processes, or natural monopolies exist. Attach a letter from vendor supporting the sole source. The letter must be on company letterhead and be signed by an authorized person in company management.
   - **Personal Services** – Describe those services to be performed personally by the individual contracted to perform them.
   - **Professional Services** – Describe what mainly mental or intellectual rather than physical or manual and/or disciplines requiring special knowledge or attainment and a high order of learning, skill, and intelligence are required to perform this service.
   - **Planning Services** – Describe the services primarily intended to guide governmental policy to ensure the orderly and coordinated development of the state or of municipal, county, metropolitan, or regional land areas.
   - **Critical Business Need** – Describe the procurement necessary to protect the competitive interests or position of Austin Energy.

4. Please attach any documentation that supports this exemption.

5. Please provide any evaluation conducted to support the recommendation. Include the efforts taken to ensure the selected vendor is responsible and will provide the best value to the City (Ex: evaluation of other firms, knowledge of market, etc).

This contract is for the continued maintenance and support of the FDM Records Management System (RMS) software and interfaces, which is utilized by the Austin Fire Department (AFD) and Austin Travis County Emergency Medical Services (ATCEMS) for records retention and management system. The FDM RMS is a critical application that has been heavily integrated into the day to day operations of both AFD and ATCEMS departments since its inception in 2000. The RMS tracks personnel records and shift data, incident data, fire inspections, facility data and produces mandated reports to the Texas Department of Health, Texas Fire Incident Reporting System, and Texas Emergency Management), federal agencies (Federal Emergency Management), and medical institutions that include statistics and trend data.
All versions of the FDM RMS are proprietary and FDM is the only authorized party to support and maintain the product.

6. Because the above facts and documentation support the requested exemption, the City of Austin intends to contract with FDM Software LTD.
which will cost approximately $565,844.82 (Provide estimate and/or breakdown of cost).

Recommended Certification	Originator	15Sep15 Date	
Approved Certification	Department Director or designee	9/15/2015 Date	
	Assistant City Manager / General Manager or designee (if applicable)	9/16/15 Date	
Purchasing Review (if applicable)	Buyer	9/22/15 Date	Manager Initials
Exemption Authorized (if applicable)	Purchasing Officer or designee	Date	

02/26/2013

FDM software

May 27, 2015

Sherry Goertz
IT Supervisor
City Of Austin
625 East 10th Street, 6th Floor
Austin, TX 78701
Sherry.Goertz@austintexas.gov

Dear Sherry:

Sole Source – FDM Software RMS system

FDM Software is the sole source for the RMS system, there is no competitive product. The service is a one-of-a-kind product, available from only one source.

This letter also serves to inform that all versions of the FDM Software system are proprietary and FDM Software is the only experienced and authorized party to work on upgrading, extending, migrating, supporting FDM Software's application code and data. No vendor is authorized to access, alter, migrate databases, or proprietary FDM Software code.

Yours truly,

Lettie Costea
Director of Finance

CITY OF AUSTIN AGENDA DATE: [illegible], 2015

RECOMMENDATION FOR COUNCIL ACTION PAGE 1 OF 3
VENDOR NAME: [illegible] Software [illegible]

SUBJECT: Authorize award, negotiation, and execution of a [illegible]-month contract with [illegible] SOFTWARE [illegible] for [illegible] maintenance, and support of the [illegible] software and interface system in an amount not to exceed $[illegible], with two 12-month extension options in an amount not to exceed $[illegible] for the first extension option and $[illegible] for the second extension option, for a total contract amount not to exceed $[illegible].

AMOUNT & SOURCE OF FUNDING: Funding in the amount of $[illegible] is available in the Fiscal Year 201[illegible]-201[illegible] Proposed Operating Budget of Communications and Technology Management, Combined Transportation, Emergency & Communications Center. Funding for the remaining [illegible] months of the initial contract and the extension options is contingent upon available funding in future budgets. [illegible]

FISCAL NOTE: There is no unanticipated fiscal impact. A fiscal note is not required.

FOR MORE INFORMATION CONTACT: Jonathan Harris, Senior Buyer Specialist, 512-974-1771

PRIOR COUNCIL ACTION: N/A

BOARD AND COMMISSION ACTION: N/A

PURCHASING: Sole Source

MBE/WBE: This contract will be awarded in compliance with Chapter 2-9C of the City Code (Minority-Owned and Women-Owned Business Enterprise Procurement Program). No subcontracting opportunities were identified; therefore, no goals were established for this solicitation.

This contract is for the continuance of maintenance and support for the [illegible] system [illegible], which is utilized by the [illegible] Austin Fire Department [illegible]-Austin Travis County Emergency Medical Services [illegible] [illegible] [illegible]

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This action includes :

- **Annual Software and Maintenance**: , as the author and copyright holder for the software package, provides annual maintenance services for the . These services include specialized technical support
- **Enhancement Support Services**: As the City's business needs change due to changes in law or policy, modification to may be necessary. This includes additional software licenses, the purchase of additional modules for the system and technical consulting services.

is the manufacturer of the system and is the sole provider of maintenance, support and enhancements of the system. It is critical that this new contract is executed prior to the current one expiring on .

Authorize negotiation and execution of a 36-month contract with FDM SOFTWARE LTD. for maintenance and support of the FDM Records Management System software and interface systems in an amount not to exceed $331,092, with two 12-month extension options in an amount not to exceed $115,927 for the first extension option and $118,826 for the second extension option, for a total contract amount not to exceed $565,845.
APPROVED ON CONSENT

SOFTWARE SUPPORT AND MAINTENANCE AGREEMENT

between

THE CITY OF AUSTIN

and

FDM SOFTWARE LTD.

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SUPPORT AND MAINTENANCE AGREEMENT

between

THE CITY OF AUSTIN

and

FDM SOFTWARE LTD.

THIS AGREEMENT for the support and maintenance of a Fire Department Records Management System (RMS) Software ("Agreement") is dated for reference this _____day of _____ 2015 between the City of Austin, a municipal corporation under the laws of the State of Texas, whose address is _____ ("Customer") and FDM Software Ltd., an existing British Columbia corporation, whose address is 949 West 3rd Street, Suite 113, North Vancouver, B.C., V7P 3P7 ("FDM").

RECITALS:

A. FDM has licensed to the Customer the use of certain modules of the Software, which modules are listed in Schedule B, and the Customer wishes to retain FDM to provide Support and Maintenance Services for the Software.

1 DEFINITIONS

The following terms have the following meanings for the purposes of this Agreement (including all Schedules):

a) CURRENT RELEASE. The term "Current Release" means the latest version of the Software offered for general commercial distribution at a given point in time and includes all Updates and Upgrades.

b) CUSTOMER SUPPORT. The term "Customer Support" means a person employed by or contracted by FDM to work on behalf of FDM to provide support services to the Customer.

c) CUSTOMIZATIONS. The term "Customizations" means all newly-developed software relating to the Software created for a separate fee by FDM or its subcontractors for the Customer, including but not limited to all interfaces between different components of the Software and Third Party Software.

d) DOCUMENTATION. The term "Documentation" means, without limitation, all written, electronic, or recorded works, that describe the use, functions, features, or purpose of the Software or any component thereof, and which are published or provided to the Customer by FDM or its subcontractors, including without limitation all end user manuals, training manuals, guides, program listings, data models, flow charts, logic diagrams, and other materials related to or for use with the Software.

e) INTELLECTUAL PROPERTY. The term "Intellectual Property" means all right, title, interest and benefit of a party in and to any registered or unregistered worldwide trade-marks, trade or brand names, service marks, copyrights, copyright applications, designs, logos, symbols, patents, patent applications, industrial design rights, circuit topographies or similar rights, rights in and to licences and sub-licences from third parties in any of the foregoing, confidential information, trade secrets, processes, know-how, technology and other intellectual or industrial property.

f) SOFTWARE. The term "Software" means all modules of the software described in Schedule B and all Updates, Upgrades and Customizations to the Software.

g) SOFTWARE ADMINISTRATOR. The term "Software Administrator" means the Customer's designated staff person who must have taken the training prescribed by FDM for the implementation and use of the Software.

h) SUPPORT AND MAINTENANCE SERVICES. The term "Support and Maintenance Services" means the support and maintenance services to be provided by FDM as described in this Agreement.

i) THIRD PARTY SOFTWARE. The term "Third Party Software" means all software not owned by FDM but included within the Software or required by FDM to be used as part of the Software requirements specified by FDM. The use of Third Party Software is subject to all of the terms and conditions of the third party's software license or agreement provided with the Third Party Software.

j) UPDATES. The term "Updates" means minor modifications to the Software to fix bugs and to minimally change current functionality.

k) UPGRADES. The term "Upgrades" means program changes to the Software made to add significant new functionality to the Software, most commonly given a new version number, that are made generally available without charge to FDM's licensees who have contracted for support and maintenance. For greater certainty, the "Upgrades" do not include separate modules that are separately licensed and priced and supported, or any replacement product that is developed and marketed and sold as a separate product by FDM.

2 SUPPORT AND MAINTENANCE SERVICES

During the term of this Agreement, FDM shall provide to the Customer the Support and Maintenance Services for the Software in accordance with the terms of this Agreement and the attached Schedules.

2.1 Scope of Support and Maintenance

Support and Maintenance means access to pre-defined Customer Support representative who may assist the Customer with:

- Access to website/FTP site
- Access to Documentation
- Access to the FDM online help desk
- Assisting with changes to the database
- Assisting with reports building
- Troubleshooting errors
- Assisting with configuration and testing problems
- Assisting with problems related to queries, advanced queries, calculated columns
- Supporting the Customer with issues that may arise from database upgrades to the latest FDM release
- Access to 24/7/365 Support for Software critical issues
- Assisting with up to three (3) upgrades per year

Support and Maintenance also includes the provision of Updates and Upgrades. Schedule B shall be deemed to have been amended without further action of the parties in the event that the Customer purchases the right

to use additional modules of the Software that include the right Support and Maintenance pursuant to this Agreement.

2.2 NFIRS

Support and Maintenance includes annual NFIRS reporting updates as issued by the US Fire Administration.

2.3 Billable Support Services

The following support services are not included in Support and Maintenance during the term of this Agreement and may be billed by FDM at its then current rates:

- Creating reports
- Creating new tables and/or columns
- Creating calculated columns
- Creating interfaces between FDM and other data sources or CAD systems
- Creating scripts to fix issues that were not caused by FDM
- Database customization review
- Database clean up
- Converting current database to another database software system
- Upgrading databases on client's behalf to latest FDM release, either at the Customer's site or at the FDM's location
- Additional training
- Custom programming or software development
- Services required because the Administrator is not available or is not trained on FDM products
- Services required due to failure of software or hardware not supplied by FDM and not covered in this Agreement
- Services required due to the Customer's use of hardware or software that does not meet FDM specifications or failure of the Customer to maintain or perform industry standard maintenance on the Customer's hardware or software
- Services required due to software or portions thereof that were incorrectly configured by the Customer
- Services required due to cases of force majeure, especially lightning strikes, fire or flood or other events not caused through FDM's fault
- Services required due to the Customer's failure to fulfill the Customer's Obligations set forth in Section 4
- On-site services

2.4 Hours of Support

FDM shall provide Support Services during the hours as described in Schedule A.

2.5 New Releases

FDM shall, from time-to-time issue new releases of the Software (Schedule B), and when it does, it will immediately make available to the Customer a copy of the release documentation, and updated user or Software documentation. FDM will assist and provide guidance for integrating pre-existing custom code into the new release. Any custom code and/or modules created outside the core functionality of the product is the responsibility of the Customer. FDM can offer professional services to integrate custom changes with new functionality. Such services will be billed at FDM's then current rates.

Commented [WR1]: Define Time to Time

2.6 FDM Exceptions

For greater certainty, FDM is responsible only for maintaining the Software as contemplated by this Agreement. Without limiting the generality of the foregoing, FDM is not responsible for (1) any hardware required to run the Software or to permit it to function, (2) any software required to run the hardware, including without limitation the operating Software and data base software, (3) maintaining unauthorized Customer modified portions of the Software, Customer data files or for maintaining portions of the Software affected by unauthorized Customer modified portions of the Software. The Customer shall cause the hardware on which the Software operates to be operating properly at all times and to be and continue to be properly maintained by the manufacturer of the equipment or a properly qualified service organization. Without limiting the generality of the foregoing, Customer will cause the hardware and underlying software to meet the minimum specifications for running the Software as declared by FDM from time to time. Corrections for difficulties or defects traceable to the Customer's errors or unauthorized changes, Customer's hardware, or conflicts with other software not identified by FDM as compatible or part of the recommended operating environment may be subject to billing at FDM's current rates. For greater certainty, FDM does not provide support for the Customer's database software application.

3 COST, PAYMENT AND TAXES

3.1 Annual Fee

The Customer shall pay the annual fee to FDM for Support and Maintenance Services as shown in Schedule C. All requests by the Customer for additional features or functionality that fall outside of FDM's ongoing policy of upgrading the Software will be quoted on separately.

Software version Updates and Upgrades are included in this Support and Maintenance Agreement and Customers are encouraged to keep their system up to date. A surcharge on the annual Support and Maintenance fee will be charged for systems that are two or more versions behind the current release version.

Commented [WR2]: What's the surcharge?

3.2 Additions to Support and Maintenance Agreement

In the event the Customer purchases additional licenses or additional modules from FDM during the term of this Agreement, FDM will provide a written quote that reflects the additional licenses or module, and the support and maintenance fee. The support and maintenance fees for additional licenses are due immediately, while the support and maintenance fees for additional modules are due upon the go live date of the module.

3.3 Removal of Modules

Either party may provide written notice to the other party at least sixty (60) calendar days prior to the end of the support and maintenance coverage period of its intent to remove any individual modules from the Agreement. Neither party may remove Software modules except upon Agreement renewal. Should the Customer desire to reinstate support and maintenance services for the modules that were removed from the Agreement, the Customer must pay the support and maintenance fees retroactively from the date of the cancellation or re-purchase the licenses at the then current list price.

3.4 Travel Expenses

The Customer shall reimburse FDM for any out-of-pocket expenses incurred at the Customer's request and authorization, including travel to and from the Customer site, lodgings, meals, telephone and shipping, as may be necessary in connection with the duties performed by FDM under this Agreement.

3.5 Payment

Support and Maintenance Services will be invoiced annually in advance on December 31st. Payment is due thirty (30) calendar days after invoice.

3.6 Taxes

Customer shall pay all federal, state or local sales, or use taxes, or import duties and taxes that may be imposed upon the amount invoiced to Customer under this Agreement, unless Customer has furnished FDM with a certificate of exemption Customer shall pay all such amounts directly to the taxing authority unless the taxing authority requires that FDM collect and remit payment, in which event Customer shall pay said amounts to FDM and FDM shall remit such amounts to the authority. Customer and FDM shall cooperate in taking all reasonable actions necessary to minimize, or to qualify for exemptions from, any such taxes, duties or liabilities, including the furnishing of certifications that purchases by Customer are for purposes of resale. Customer and FDM shall each have the right to protest or appeal any tax or charge assessed against it by any taxing authority.

4 CUSTOMER OBLIGATIONS

4.1 Customer's Responsibility

The Customer is responsible for the installation and maintenance, and regular replacement of all hardware (network cabling, switches, hubs, servers and workstations, backup power supplies and all other matters commonly the responsibility of the Customer) and for ensuring that all major operating software and database service packs are kept current after FDM has recommended their installation.

Commented [WR3]: Remove hubs

The Customer is responsible for ensuring that all workstations and servers are kept free of viruses, worms or other non FDM approved software which may affect the operation of the supplied software.

If the Customer purchases FDM CAD, the Customer is responsible for all the equipment and cabling necessary to get the incoming Telco 911 feed from the phone company's termination point to the server or workstation where the ANI/ALI interpreter resides.

Commented [WR4]: Remove we do not have the CAD system

The Customer is responsible for ensuring the accuracy and integrity and privacy of the data which supports the functioning of the Software. This data includes, but is not limited to:

a. Accurate and correct department information.
b. Accurate and correct resource information (departmental vehicles and station locations)
c. Accurate and valid GIS data (where available).
d. Accurate and correct location (property) information.

The Customer is responsible for performing and testing the integrity of regular database backups and redundancy process. The Customer is responsible for database administration functions and for ensuring the proper maintenance of the database (as per the database supplier's instructions).

The Customer is responsible for properly testing and applying routine virus updates and security patches without the need for additional FDM notification and for testing those updates before applying them to the Customer's production environment. Except for emergency replacement of a failing server, the Customer shall communicate with FDM prior to replacing a server on which Software is being used. For workstations running Software, the Customer acknowledges responsibility to test new workstation configurations, software service packs, new releases or versions of software, and new software products prior to implementation. FDM recommends that the Customer doesn't install other software on the server running the FDM Software. Support and Maintenance activities for systems configured outside of FDM's recommendations may be subject to additional fees.

Customer represents and agrees that it shall ensure that all persons operating the Software during times when life or property are at risk are properly qualified, supervised, trained, and have demonstrated effectively that the operator is proficient in the use of the hardware and software and the Software. Customer warrants that its operators will not rely solely upon recommendations presented by the Software when making decisions in situations where life or property could be at risk. Customer acknowledges that the Software may not operate totally without interruption and warrants that it shall maintain a manual or mechanical software adequate to back up the equipment and software should they become unavailable for use, either planned or unplanned.

4.2 Access to Data and Software

The Customer shall provide FDM with monitored access to the Software, and with sufficient test time on the Customer's hardware and software to duplicate the problem, to certify that the problem is with the Software, and to certify that the problem has been corrected.

The Customer shall make reasonable efforts to upgrade the Software in its entirety to a release version that is not more than one (1) release version older than the most recent version of the Software, but will not exceed two (2) release versions older than the most recent version of the Software. FDM is not obligated to provide Updates and Upgrades for release versions that are more than two (2) release versions older ADD (FDM must provide clear upgrade path to customer).

The Customer will upgrade the computer operating software, hardware and underlying database engines of the Software as necessary to meet the changing requirements of the Software as specified by FDM as part of a current release of the Software, or as the parties mutually agree. The parties agree that FDM is not obligated to ensure that its new release of the Software is compatible with outdated (namely, exceeding three (3) years from date of initial release) hardware, computer operating software or database engines nor is FDM responsible to maintain the Software if Customer has failed to comply with the requirements of this paragraph.

4.3 Software Administrator

The Customer shall appoint a minimum one contact person who is authorized to make use of the Support and Maintenance Services provided ("Software Administrator"). The Customer must ensure that the Software Administrator has adequate expertise and experience to make accurate description of the malfunctions and make it possible for FDM to handle them efficiently. The Software Administrator must have successfully completed FDM product training and must have knowledge of the Customer's operating software, network, hardware and other system software. The Customer agrees to promptly notify FDM of any replacement of a Software Administrator.

Commented [WR5]: What are the fees?

Commented [WR6]: I am ok with the mention of having backup systems, but not that the system will fail. I would like an up time mentioned.

Commented [WR7]: Add monitored

Commented [WR8]: FDM must provide clear upgrade path to customer

Commented [WR9]: I would like for this to read versions vs years

4.4 Remote Access

The Customer will permit FDM to electronically access the Customer's hardware and software via the remote tools used by FDM or the tool provided by the Customer. The Customer shall pay for the installation and maintenance of their remote tools. The tool will provide secure, auditable remote access to the Customer's Software, in order for FDM Customer Support personnel to effectively troubleshoot critical or complex problems and to expedite resolution of such issues. The Software Administrator should be available to assist FDM Customer Support personnel as needed during the entire process. Customer Support will only access the Customer's Software with the Administrator monitoring their actions knowledge and consent of the Customer.

Commented [WR10]: Add

Commented [WR11]: Remove

4.5 Transferring Database

From time to time, FDM may require a copy of the Customer database. In order to protect sensitive data, FDM provides a tool to remove, scramble, and/or make unreadable such sensitive data. It is the Customer's responsibility to ensure that all database sent to FDM have been created using this tool and to ensure that the tool is properly configured to eliminate any data the Customer considers sensitive.

5 CONFIDENTIALITY

5.1 Defined

Confidential information includes, without limitation, any tangible and intangible material such as written or printed documents specifically identified to be confidential, samples, data structures, links, architecture, implementations of the Software, software, information obtained through access to an electronic database, and any oral disclosures. All confidential information submitted by either party to the other is subject to the terms of this Agreement, provided that the confidential nature of the information has been clearly marked, or when disclosed orally has been identified as confidential information at the time. The receiving party has no obligation or restriction with respect to confidential information which is in the public domain through no wrongful act or omission of the receiving party, has been lawfully received from a third party without obligations of confidentiality, or is independently developed in good faith by the receiving party (with the burden of proof being on the receiving party).

5.2 Recipient's Responsibilities

All information disclosed to a receiving party shall be protected and kept in confidence forever by the receiving party, who agrees to use the degree of care and employ safeguards as are reasonable for such information. The receiving party can disclose the confidential information only to persons within the receiving party's organization on a need-to-know basis. Such persons shall be informed of the confidential nature of the information, and if necessary shall be required to sign a similar agreement of non-disclosure. The receiving party shall segregate all confidential information from other material in order to prevent co-mingling, and the receiving party shall not use the confidential information in whole or in part for any purpose other than the purposes of this Agreement. The receiving party shall not reverse engineer, decompile, translate, modify or disassemble any Software disclosed to it. All confidential information shall be returned to the disclosing party upon the termination or expiration of this Agreement, unless it is reasonably required with respect to the ongoing use by Customer of the Software.

5.3 Rights to Confidential Information

It is expressly understood and agreed by the parties that the disclosure of confidential information under this Agreement will not be construed as granting to the receiving party any rights or interest whether express or implied by license or otherwise to the matters or inventions to which such confidential information pertains or to any patent, industrial design, copyright, trade-mark or trade secret rights beyond the rights expressly granted by this Agreement. The receiving party may only use confidential information disclosed under this Agreement in furtherance of this Agreement.

5.4 Freedom of Information

FDM acknowledges and agrees that the Customer may be subject to laws providing for free access to government information, commonly referred to as Freedom of Information statutes, with respect to information under its custody and control. Accordingly all documents and information provided by FDM to the Customer under and pursuant to this Agreement may potentially be available to the public by operation of law. Customer acknowledges that FDM has requested that all confidential information not be disclosed to the public and that Customer will use its best efforts and work with FDM to allow FDM to take advantage of all statutory exemptions from involuntary disclosure. Customer agrees to use reasonable efforts to notify FDM of any request to access confidential information.

5.5 Privacy

Notwithstanding that any personally identifiable information collected by Customer may end up in the joint custody of FDM on account of this support agreement, Customer agrees that it remains liable for all compliance (including the cost of compliance) with all relevant privacy legislation, rules and regulations.

6 INTELLECTUAL PROPERTY RIGHTS

6.1 FDM

Customer acknowledges and agrees that FDM retains legal ownership of the Intellectual Property, including without limitation the Software and Documentation, including without limitation all copyrights and other Intellectual Property rights that may exist now or in the future. Without limiting the generality of the foregoing, the data structures and architecture of the Software, and any application code provided by FDM and contained within any database, are owned by FDM. Customizations are the sole property of FDM and will be deemed to be part of the Software for the purpose of this Agreement.

6.2 Customer

FDM acknowledges and agrees that: (a) the data contained within the database provided by the Customer is and will remain the exclusive property of the Customer; and (b) the Customer retains full and complete rights to use such data. FDM shall not disclose, transfer or sell any data contained in the Database to any person and shall comply with the confidentiality requirements set forth in this Agreement.

6.3 Trade-marks

Nothing contained in this Agreement shall be construed as licensing either party to use any trade-mark or trade name owned or used by the other party without its prior written consent.

7 LIMITATION OF LIABILITY

Neither party will be liable to the other party for (i) any indirect, incidental, special, consequential or exemplary damages, including but not limited to, damages for loss or revenues, profits, goodwill, use, data, failure to realize expected savings, or (ii) other losses resulting from error, omission, or negligence of the other party with respect to the use of the Software, including but not limited to, in the case of the Customer, the data entered by the Customer and/or dispatched by the Customer pursuant to the data entered by the Customer. FDM disclaims all warranties not expressly provided in this Agreement including without limitation warranties of merchantability and fitness for a particular purpose.

To the extent permitted by law, neither party's liability to the other party in connection with any cause of action (excluding copyright infringement by either party or non-payment by Customer), whether in contract, tort, or under statute, relating to this Agreement shall in no event exceed the greater of the total price paid for Support and Maintenance in the twelve month period preceding the event giving rise to the claim or the amount payable pursuant to amount of coverage for such loss in effect pursuant to the policy of insurance in effect under this Agreement.

The limitations of Customer's liability contained in this section do not apply to any claims that FDM may have against Customer with respect to intellectual property infringement, amounts owing to FDM, or to Customers obligation to indemnify FDM for claims made against FDM as a result of Customer breaching its obligations pursuant to this Agreement.

8 TERM AND TERMINATION

8.1 Term

The term of this Agreement commences January 2016 and ends December 31st 2018. This Agreement will automatically renew for two (2) additional periods of one (1) year provided that either party has not given the other written notice on or before October 31st in that year of its intention to terminate the Agreement at the expiration of the then current term.

8.2 Limitations

FDM may at its sole discretion limit or suspend Customer's access to Support, pursuant to this Agreement, where (1) Customer is in material default under the terms of this Agreement or the license from FDM authorizing Customer to use the Software (non-payment is deemed to be a material default), or (2) it appears that the need for Support is based upon the failure of Customer to provide a knowledgeable Software Administrator (who must be certified by FDM) to administer the Software.

8.3 Termination for Convenience

The Customer may terminate this Agreement at any time and for any reason upon thirty (30) calendar days prior written notice to FDM. Customer is not entitled to a refund of monies billed or paid for support for the period cancelled.

8.4 For Breach

If either party fails to fulfill one or more of its material obligations under this Agreement (non-payment is deemed to be a material default), the other party may, upon its election and in addition to any other remedies that it may have, at any time terminate all the rights granted by it hereunder by providing not less than one

(1) month's written notice specifying any such breach, unless within the period of such notice all breaches specified have been remedied or that all reasonable steps are being taken to remedy such breaches. For greater certainty, if Customer is in material default under the terms of the license from FDM authorizing Customer to use the Software then Customer will be deemed to be in material default under this agreement.

8.5 Survival

Expiration or termination of this Agreement for any reason will not affect any obligations which, within the context of this Agreement, are intended to survive expiration or the sooner termination of this Agreement, including but not limited to Sections 1 (Definitions), 3 (Cost, Payment and Taxes), 5 (Confidentiality), 7 (Limitations of Liability), and 11.7 (Disputes).

9 INSURANCE

9.1 Limits

FDM shall comply with the following conditions and procure and keep in force during the term of this Agreement, at its own cost and expense.

a) Workers' Compensation Insurance or such insurance of a similar type as required by British Columbia law. If the Customer authorizes work by any subcontractors, FDM will require each subcontractor to provide Workers' Compensation Insurance or such insurance of a similar type for its employees, unless FDM covers such employees.

b) Commercial General Liability Insurance on an occurrence basis in an amount not less than $1,000,000 per occurrence and at least $1,000,000 in the annual aggregate, including but not limited to: premises/operations (including off-site operations), blanket contractual liability and broad form property damage.

c) Business Automobile Liability Insurance in an amount not less than $1,000,000 per occurrence, extending to any automobile. A statement certifying that no vehicle will be used in accomplishing this Agreement may be substituted for this insurance requirement.

The Customer shall be named as an additional insured under the FDM's Commercial General Liability Insurance coverage. FDM shall provide certificates of insurance to the Customer indicating compliance with this paragraph.

The above liability policies shall contain a provision that the policy will not be cancelled or materially changed without thirty (30) calendar days prior written notice to the Customer. No cancellation provision in any insurance policy will be construed in derogation of the continuous duty of FDM to furnish the required insurance during the term of this Agreement.

In case of the breach of any provision of this section, the Customer may, at its option and with no obligation to do so, provide and maintain at the expense of FDM, such types of insurance in the name of FDM, and with such insurers, as the Customer may deem proper, and may deduct the cost of providing and maintaining such insurance from any sums which may be found or become due to FDM under this Agreement or may demand FDM to promptly reimburse the Customer for such cost.

10 RELATIONSHIP

10.1 Independent Contractor

The Agreement shall not be construed as creating an agency, employer/employee relationship, a partnership, or a joint venture. FDM's services are those of an independent contractor.

10.2 FDM Employees

Any and all employees of and contractors to FDM, while engaged in the performance of any services hereunder, will be considered employees of FDM only and not of the Customer. FDM's employees are not entitled to any of the employment benefits of the Customer as a result of their performance of any obligations under this Agreement. Any and all claims that may or might arise under the worker's compensation legislation on behalf of said employees or FDM, while so engaged, and any and all claims made by a third party as a consequence of any negligent act or omission on the part of FDM's employees, while so engaged, will be the sole obligation and responsibility of FDM.

10.3 Personnel

The Customer, acting reasonably, may review, approve, or request a change of FDM's employees or subcontractors who provide services under this Agreement.

A party must not directly or indirectly induce an employee or contractor of the other party to terminate her contract with the other party, nor will Customer hire any of FDM's employees or contractors.

This section remains in force for six (6) months after the end of the expiration or termination of this Agreement.

10.4 FDM Standards of Employment

FDM warrants that it has not employed or retained any company or person, other than a bona fide employee, agent or contractor working for FDM, to solicit or secure this Agreement and that it has not paid or agreed to pay any company or person, other than a bona fide employee working solely for FDM, any fee, commission, percentage, brokerage fee, gifts, or any other consideration, contingent upon or resulting from the award or making of this Agreement. For breach or violation of this warranty, the Customer may terminate this Agreement without liability or, in its discretion, may deduct from the project price or otherwise recover the full amount of such fee, commission, percentage, brokerage fee, gift, or contingent fee.

FDM, with regard to the Support and Maintenance Services performed by it, will not discriminate on the grounds of race, religion, colour, national origin, or sex in the selection and retention of employees or independent contractors, including procurements of materials and leases of hardware.

11 MISCELLANEOUS

11.1 Addresses

Any statement, notice, request or other communication hereunder will be deemed to be sufficiently given to the addressee and any delivery hereunder deemed made three (3) calendar day after delivery or fax (with receipt confirmation) to the following addresses:

To the Customer:

Mark Tomasek, IT Systems Administrator
<address>

To FDM:

Edward Colin, President and CEO
FDM Software, Ltd.
949 West 3rd Street, Ste. 113
North Vancouver, BC, Canada V7P 3P7
Fax number: 604-986-7130

or to such other address as the party may specify from time to time by notice given in accordance with this section.

11.2 **Construction**

Each party acknowledges that it has read this Agreement, understands it and agrees to be bound by its terms. Each party acknowledges that the Agreement should not be strictly construed against one party or the other, including the party that drafted it, but interpreted reasonably and fairly so as to give effect to the manifest intentions of the parties.

11.3 **Modification**

This Agreement may not be modified except by a written instrument duly executed by the parties hereto. The Customer may, from time to time, require changes in the scope of this Agreement. Such changes, including any increase or decrease in the amount of FDM's compensation, or services, will: (a) be made only in writing and signed by an authorized representative of the Customer, (b) be explicitly identified as a change to this Agreement, (c) be approved by FDM in writing and (d) become a part of this Agreement.

11.4 **Force Majeure**

Each party shall be excused from delays in performing or from its failure to perform hereunder to the extent that such delays or failures result from causes beyond the reasonable control of such party; provided that, in order to be excused from delay or failure to perform, such party must act diligently to remedy the cause or effect of such delay or failure to the extent the party is able. In the event of such delays, the timetables shall be extended by as many calendar days as the delay caused by forces outside the reasonable control of the parties.

11.5 **Required Approvals**

Unless otherwise specified herein, where agreement, approval, acceptance, or consent by either party is required by any provision of this Agreement, such action will not be unreasonably delayed or withheld.

11.6 **Applicable Law and Choice of Forum**

This Agreement and the parties' obligations hereunder is governed, construed, and enforced in accordance with the laws of the Province of British Columbia and the laws of Canada applicable therein. The parties agree that all disputes, subject to the dispute resolution set out below, will be submitted to a court of competent jurisdiction in the Province of British Columbia.

11.7 **Disputes**

With the exception of any claim relating to Intellectual Property rights or a breach of the confidentiality provisions set forth in this Agreement, if a dispute arises between the parties involving this Agreement or any provision thereof, then the parties shall conduct good faith negotiations to resolve such dispute, failing which, after seven (7) calendar days, either party may request by written notice to the other that the dispute be escalated to senior management as specified below ("Senior Management"). If such a request is made, then each party will make available its Senior Management who will meet or discuss within fifteen (15) calendar days after such request is made in an attempt to resolve the dispute. Either party may change its Senior Management appointee upon prior written notice to the other.

FDM	Edward Colin, President and CEO
Customer	(insert name and title)

If Senior Management does not settle such dispute within an additional fifteen (15) calendar days, then either party may exercise its rights available at law. All negotiations and discussions to resolve such dispute will be treated as compromise and settlement negotiations between the parties and will not be subject to disclosure through discovery or any other process and will not be admissible into evidence in any proceeding.

Unless otherwise instructed by the Customer in writing, FDM will continue to perform its obligations pursuant to this Agreement during any mediation or litigation, unless the dispute is for material non-payment.

11.8 **Severability of Agreement**

In the event that any provision of this Agreement is held invalid, void, illegal or unenforceable, the remainder of this Agreement will not be impaired or affected thereby, and each term, provision, and part will continue in full force and effect and will be interpreted in a manner consistent with the intent of the parties.

11.9 **Headings for Convenience.**

The section and subsection headings used herein are for referral and convenience only, and will not enter into interpretation hereof. The exhibits referred to herein and attached, and to be attached hereto, are incorporated herein to the same extent as if set forth in full herein.

11.10 **Assignment Barred**

Neither party may assign its rights or duties under this Agreement without the prior written consent of the other party, which consent may be unreasonably withheld. This provision does not prevent FDM from engaging appropriate independent contractors to complete its work provided that Customer approves of such independent contractors, and such approval will not be unreasonably withheld or delayed. In such event, FDM will remain fully liable and responsible for such independent contractors and will not be relieved of any of its obligations hereunder.

11.11 **Order of Precedence**

In the event of any conflict between the clauses of this Agreement, its exhibits, and any of the documents incorporated by reference, the following order of precedence applies: (a) this Agreement; (b) exhibits to this Agreement; (c) the respective license for the Software which may be part of a master services agreement entered into with respect to Customer's license of the Software, (d) FDM's proposal and any changes thereto in reverse chronological order, (i.e., most recent modifies the earliest); and (e) any other documents incorporated by reference. Notwithstanding the foregoing, a specific reference in a clause takes precedence over a general reference, regardless of the order of precedence of the Agreement, exhibit or document that the clause is contained in.

11.12 **Waiver of Rights**

The waiver by either party of any term or condition of this Agreement will not be deemed to constitute a continuing waiver thereof nor of any further or additional right that such party may hold under this Agreement.

11.13 **Successors and Assigns**

This Agreement is binding on the parties, their successors and permitted assigns.

11.14 **Entire Agreement**

Except as expressly provided otherwise herein, this Agreement constitutes the entire agreement between the parties with respect to the subject matter herein and cancels and supersedes any prior understandings and agreements between the parties hereto with respect thereto. There are no representations, warranties, terms, conditions, undertakings or collateral agreements, express, implied or statutory, between the parties other than as expressly set forth in this Agreement.

11.15 **Time of the Essence**

Time is of the essence of this Agreement and of every part hereof, and no extension or variation of this Agreement will operate as a waiver of this provision.

11.16 **Contra Proferentum**

The parties understand, agree, and acknowledge that: (a) this Agreement has been freely negotiated by both parties; and (b) in any controversy, dispute, or contest over the meaning, interpretation, validity, or enforceability of this Agreement or any of its terms or conditions, there will be no inference, presumption, or conclusion drawn whatsoever against either party by virtue of that party having drafted this Agreement or any portion thereof.

IN WITNESS to this Agreement the parties have caused this Agreement to be executed and delivered without condition by their duly authorized representatives.

FDM SOFTWARE LTD.	CITY OF AUSTIN
(Authorized signing officer)	(Authorized signing officer)
Name and Title: Edward Colin, President and CEO	Name and Title: (insert name and title)
Date:	Date:

SCHEDULE "A"

Hours of Support and Maintenance Service are as follows:

Regular Hours of Service (Pacific Time)	After Hours of Service (Pacific Time)
6:00am to 4:30 pm Monday to Friday	4:30 pm to 6:00 am Monday to Friday Saturdays & Sunday Federal and Provincial Statutory holidays in BC, currently New Year's Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day, Boxing Day.

Incident/Request for Service Priority

All Support and Maintenance incidents/ requests for service will be prioritized on the following basis:

Priority A (High)	Priority B (Medium)	Priority C (Low)
Work Outage		
The Software has failed and causes the users to be unable to work or perform some significant portion of their job. Examples could include such things as the Software is down and cannot be restarted, File Software Corruption.	Priority B issues are software faults where normal Software operation is affected to some degree and a workaround is not available, but users are still able to complete most other tasks. Examples could include such things as a user cannot extract data using a report, calculated column is not functioning as expected.	Priority C issues are for software faults where a fault was detected, but normal operation is not affected. Priority C calls also include enhancement requests for potential modification to Software. Examples could include "how to" reset passwords, changing default colours, etc.
Response Time During Regular Hours of Service		
Within 30 minutes after receiving call from Client Administrator or designate.	Within three business days of FDM's receipt of verbal, written or electronic notice from Client Administrator or designate. FDM will work with the Client to come to a mutually agreed upon resolution date. .	For software related issues, this priority allows for work to be scheduled as part of a planned maintenance update.
Response Time During After Hours of Service		
Within 2 hours after receiving call from answering service	Not Available	Not Available

All Response Times are conditional upon Software Administrator being available without limitation during the promised Response Time.

Commented [WR12]: I would like this to be 1 hour

Incident/Request for Service Reporting Procedure

All problems, queries or requests for assistance must be made to the FDM Client Service Department by phone at 1-877-986-9927 or by electronic mail at clientservices@fdmsoft.com.

When reporting an issue, be prepared to provide your name, phone number, workstations affected, where you can be reached, a description of the problem/service, and the impact of the problem. FDM will deal with problem/incident according to the priority assigned. In the case that a problem cannot be readily resolved, FDM will attempt to identify a work around. As soon as FDM corrects an Issue, FDM will notify the Customer that the Issue has been corrected by sending an electronic mail.

For all Priority A calls:

FDM will provide an update to the Customer regarding the status of the problem incident along with the action plan and anticipated resolution time within 2 hours after responding to the call and every 2 hours thereafter until the Software has been made operational or the issue is downgraded to a Priority B or Priority C call. FDM will provide resolution to the problem if the hardware, operating Software, network connectivity, SQL server software is functional and software and database backups are available. FDM is not responsible for hardware, operating Software, SQL server or network connectivity related problems.

Commented [WR13]: 1 hour

Commented [WR14]: 1 hour

Commented [WR15]: This needs to be removed.

Escalation Process

a) If problem incident remains unresolved within 6 hours the Manager of Support or their designate at FDM will contact the Customer's Administrator to provide a verbal update and action plan.

b) If problem incident remains unresolved within 12 hours after responding to the call the President or CTO of FDM will contact the Fire Chief or the Director of ITS of the Customer to provide a verbal update and action plan. This process will continue every 12 hours thereafter.

c) If the problem incident remains unresolved within 48 hours after responding to the call then FDM agrees to provide an on-site staff resource until the problem is resolved or downgraded to a Priority B or Priority C call. All travel meal and lodging costs will be at the expense of FDM. If the Priority A issue is the result of a condition that is in the Customer's control (hardware, OS / database software, network connectivity or unauthorized changes to the database) FDM will be entitled for reimbursement of all expenses.

d) Upon resolution of the problem incident, a debriefing meeting will be held to discuss process for resolution, proposed improvements, and follow-up actions required.

Where temporary solutions are provided, FDM will provide a permanent fix within 30 calendar days or as mutually agreed but the application of the permanent fix will not exceed 6 months.

For Priority B and Priority C calls:

FDM shall provide, at the Customer's request, a report of call history and the status of any active Priority B and C calls including the anticipated resolution date.

PRIVACY NOTE: BEFORE SENDING ANY DATABASES TO FDM FOR SUPPORT PURPOSES, CUSTOMER MUST USE THE DATABASE ANONYMIZING TOOL PROVIDED BY FDM TO ENSURE THAT NO PERSONALLY IDENTIFIABLE DATA IS DISCLOSED TO FDM.

SCHEDULE "B"

FDM Licensed Modules:

- RMS Modules:
  - Properties
  - Personnel
  - Incident Reporting (Fire & EMS)
  - Training
  - Inspection
  - Permits

- FDM Administrator Tools and Utilities:
  - FDM Workflow Tools
  - FDM eConnect
  - FDM Report Writer and Report Builder (FDMrb)
  - FDM Importer
  - Gold Key
- Ebiz
- Esync Utility
- Econnect rest

Commented [WR16]: What is gold key and how does it benefit us?

Commented [WR17]: Need to add contract.

SCHEDULE "C"

Annual Support and Maintenance Pricing

Modules: (site license)	Annual Support and Maintenance Fee
Incident (Fire & EMS) Module	$34,912.60
Training Module	$18,375.00
Inspection Module	$22,050.00
Permit Module	$5,512.60
FDM Importer	$1,000.00
TriTech Interface	$4,800.00
Zoll Interface	$3,000.00
Workflow Tools	$2,000.00
Gold Key	$10,000.00
Source Code Escrow	$1,000.00
FDM Annual Conference	$5,000.00
Total	**$107,650.20**

	Total Annual Support and Maintenance
2016	$107,650.20
2017	$110,341.46
2018	$113,099.99
Optional 2019	$115,927.49
Optional 2020	$118,825.68

City of Austin FSD Purchasing Office

Certificate of Exemption

DATE: 08/20/2015 DEPT: CTM, CTECC

TO: Purchasing Officer or Designee FROM: Stephen Elkins, CIO

BUYER: PHONE:

Chapter 252 of the Local Government Code requires that municipalities comply with the procedures established for competitive sealed bids or proposals before entering into a contract requiring an expenditure of $50,000 or more, unless the expenditure falls within an exemption listed in Section 252.022.

Senate Bill 7 amended Chapter 252 of the Local Government Code to exempt from the requirements of such Chapter expenditures made by a municipally owned electric utility for any purchases made by the municipally owned electric utility in accordance with procurement procedures adopted by a resolution of its governing body that sets out the public purpose to be achieved by those procedures. The Austin City Council has adopted Resolution No. 040610-02 to establish circumstances which could give rise to a finding of critical business need for Austin Energy.

This Certification of Exemption is executed and filed with the Purchasing Office as follows:

1. The undersigned is authorized to submit this certification.
2. The undersigned certifies that the following exemption is applicable to this purchase. (Please check which exemption you are certifying)

- ○ a procurement made because of a public calamity that requires the immediate appropriation of money to relieve the necessity of the municipality's residents or to preserve the property of the municipality
- ○ a procurement necessary to preserve or protect the public health or safety of municipality's residents
- ○ a procurement necessary because of unforeseen damage to public machinery, equipment, or other property
- ○ a procurement for personal, professional, or planning services
- ○ a procurement for work that is performed and paid for by the day as the work progresses
- ○ a purchase of land or right-of- way
- ◉ a procurement of items available from only one source, including: items that are available from only one source because of patents, copyrights, secret processes, or natural monopolies; films, manuscripts, or books; gas, water, and other utility services; captive replacement parts or components for equipment; books, papers, and other library materials for a public library that are available only from the persons holding exclusive distribution rights to the materials; and management services provided by a nonprofit organization to a municipal museum, park, zoo, or other facility to which the organization has provided significant financial or other benefits
- ○ a purchase of rare books, papers, and other library materials for a public library
- ○ paving, drainage, street widening and other public improvements, or related matters, if at least one- third of the cost is to be paid by or through special assessments levied on property that will benefit from the improvements
- ○ a public improvement project, already in progress, authorized by voters of the municipality, for which there is a deficiency of funds for completing the project in accordance with the plans and purposes as authorized by the voters

- ○ a payment under a contract by which a developer participates in the construction of a public improvement as provided by Subchapter C, Chapter 212
- ○ personal property sold: at an auction by a state licensed auctioneer; at a going out of business sale held in compliance with Subchapter F, Chapter 17, Business & Commerce Code; by a political subdivision of this state, a state agency of this state, or an entity of the federal government; or under an interlocal contract for cooperative purchasing administered by a regional planning commission established under Chapter 391
- ○ services performed by blind or severely disabled persons
- ○ goods purchased by a municipality for subsequent retail sale by the municipality
- ○ electricity
- ○ advertising, other than legal notices
- ○ Critical Business Need (Austin Energy Only)

3. The following facts as detailed below support an exemption according to Section 252.022 of the Local Government Code for this purchase. Please verify the steps taken to confirm these facts. If you are citing the following exemptions, please provide the additional information requested below. A more detailed explanation of these exemptions is attached.

   - **Preserve and Protect the Public Health and Safety** – Describe how this purchase will preserve and protect the public safety of residents.
   - **Sole Source** – Describe what patents, copyrights, secret processes, or natural monopolies exist. Attach a letter from vendor supporting the sole source. The letter must be on company letterhead and be signed by an authorized person in company management.
   - **Personal Services** – Describe those services to be performed personally by the individual contracted to perform them.
   - **Professional Services** – Describe what mainly mental or intellectual rather than physical or manual and/or disciplines requiring special knowledge or attainment and a high order of learning, skill, and intelligence are required to perform this service.
   - **Planning Services** – Describe the services primarily intended to guide governmental policy to ensure the orderly and coordinated development of the state or of municipal, county, metropolitan, or regional land areas.
   - **Critical Business Need** – Describe the procurement necessary to protect the competitive interests or position of Austin Energy.

4. Please attach any documentation that supports this exemption.

5. Please provide any evaluation conducted to support the recommendation. Include the efforts taken to ensure the selected vendor is responsible and will provide the best value to the City (Ex: evaluation of other firms, knowledge of market, etc).

This contract is for the continued maintenance and support of the FDM Records Management System (RMS) software and interfaces, which is utilized by the Austin Fire Department (AFD) and Austin Travis County Emergency Medical Services (ATCEMS) for records retention and management system. The FDM RMS is a critical application that has been heavily integrated into the day to day operations of both AFD and ATCEMS departments since its inception in 2000.
The RMS tracks personnel records and shift data, incident data, fire inspections, facility data and produces mandated reports to the Texas Department of Health, Texas Fire Incident Reporting System, and Texas Emergency Management), federal agencies (Federal Emergency Management), and medical institutions that include statistics and trend data.
All versions of the FDM RMS are proprietary and FDM is the only authorized party to support and maintain the product.

6. Because the above facts and documentation support the requested exemption, the City of Austin intends to contract with FDM Software LTD. which will cost approximately $565,844.82 (Provide estimate and/or breakdown of cost).

Recommended Certification	Originator	15Sep15 Date
Approved Certification	Department Director or designee	9/15/2015 Date
	Assistant City Manager / General Manager or designee (if applicable)	9/16/15 Date
Purchasing Review (if applicable)	Buyer	9/22/15 Date Manager Initials
Exemption Authorized (if applicable)	Purchasing Officer or designee	Date

02/26/2013