



## MEMORANDUM

**City of Austin  
Financial Services Department  
Purchasing Office**

**DATE:** November 16, 2018

**TO:** Memo to File

**FROM:** Mike Zambrano, Jr. – Contract Management Specialist III

**RE:** MA 6300 NS180000041

Josephine Archer of Watershed Protection Department (6300) requested that the amount of the annual funds allotted to this contract be revised per the attached quote from Kisters dated 02/13/2018 (Quote No. 3349r). These figures replace those in Appendix B of the contract found in EDIMS. Also attached is the email requesting this revision. These new figures are:

| Year | Term                    | Amount      | Notes  |
|------|-------------------------|-------------|--|
| 1    | 03/01/2018 – 02/28/2019 | \$15,266.50 |  |
| 2    | 03/01/2019 – 02/28/2020 | \$16,507.95 |  |
| 3    | 03/01/2020 – 02/28/2021 | \$17,003.80 | Total for first three years: \$48,778.25                             |
| 4    | 03/01/2021 – 02/28/2022 | \$17,513.90 |  |
| 5    | 03/01/2022 – 02/28/2023 | \$18,039.32 | Total of contract over five years. Not to exceed amount: \$84,331.47 |



Kisters North America  
7777 Greenback Lane, Suite 209  
Citrus Heights, CA 95610  
Tel 916-723-1441 Fax 916-723-1626

# Quote

| Date      | Quote No. |
|-----------|-----------|
| 2/13/2018 | 3349r     |

City of Austin  
Watershed Protection  
Attn: Accounts Payable  
PO Box 1088  
Austin, TX 78767-1088

## Ship To:

ATTN: Josephine Archer  
City of Austin  
Watershed Protection  
PO Box 1088  
Austin, TX 78767-1088 USA

|  |  |     |                |                    | Client Contact   |
|--|--|-----|----------------|--------------------|------------------|
|  |  |     |                |                    | Josephine Archer |
| Line No.   | Description  | Qty | Rate           | Total              |                  |
| 1  | Annual Support and Maintenance - Software Hydstra TS #1-7  | 1   | 10,895.00      | 10,895.00          |                  |
| 2  | Annual Support and Maintenance - Fee for 5803 extra lines of code (3137 lines before. 5803 lines as of 02.15.2018)                   | 1   | 2,901.50       | 2,901.50           |                  |
| 3  | Annual Support and Maintenance - Software Hydstra TS #8  | 1   | 1,470.00       | 1,470.00           |                  |
|  | Annual Support and Maintenance is for the support period <b>March 1, 2018 to February 28, 2019</b> and includes a 2.2% CPI increase. |     | <b>Year 1=</b> | <b>\$15,266.50</b> |                  |
| 4  | Annual Support and Maintenance - Software Hydstra TS #1-7  | 1   | 11,221.85      | 11,221.85          |                  |
| 5  | Annual Support and Maintenance - Fee for 5803 extra lines of code (3137 lines before. 5803 lines as of 02.15.2018)                   | 1   | 3,772.00       | 3,772.00           |                  |
| 6  | Annual Support and Maintenance - Software Hydstra TS #8  | 1   | 1,514.10       | 1,514.10           |                  |
|  | Annual Support and Maintenance is for the support period <b>March 1, 2019 to February 28, 2020</b> and includes a 3% CPI increase.   |     | <b>Year 2=</b> | <b>\$16,507.95</b> |                  |
| 7  | Annual Support and Maintenance - Software Hydstra TS #1-7  | 1   | 11,558.50      | 11,558.50          |                  |
| 8  | Annual Support and Maintenance - Fee for 5803 extra lines of code (3137 lines before. 5803 lines as of 02.15.2018)                   | 1   | 3,885.16       | 3,885.16           |                  |
| 9  | Annual Support and Maintenance - Software Hydstra TS #8  | 1   | 1,560.14       | 1,560.14           |                  |
|  | Annual Support and Maintenance is for the support period <b>March 1, 2020 to February 28, 2021</b> and includes a 3% CPI increase.   |     | 0.00           | 0.00               |                  |
|  |  |     | <b>Year 3=</b> | <b>\$17,003.80</b> |                  |
| Quotes are good for 90 days.<br>All amounts are in US Dollars. |  |     | <b>Total</b>   |                    |                  |



Kisters North America  
7777 Greenback Lane, Suite 209  
Citrus Heights, CA 95610  
Tel 916-723-1441 Fax 916-723-1626

## Quote

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|-----------|-----------|
| 2/13/2018 | 3349r     |

City of Austin  
Watershed Protection  
Attn: Accounts Payable  
PO Box 1088  
Austin, TX 78767-1088

Ship To:

ATTN: Josephine Archer  
City of Austin  
Watershed Protection  
PO Box 1088  
Austin, TX 78767-1088 USA

|  |  |              |                | Client Contact     |
|--|--|--------------|----------------|--------------------|
|  |  |              |                | Josephine Archer   |
| Line No.   | Description  | Qty          | Rate           | Total              |
| 10   | Annual Support and Maintenance - Software Hydstra TS #1-7  | 1            | 11,905.25      | 11,905.25          |
| 11   | Annual Support and Maintenance - Fee for 5803 extra lines of code (3137 lines before. 5803 lines as of 02.15.2018)                 | 1            | 4,001.71       | 4,001.71           |
| 12   | Annual Support and Maintenance - Software Hydstra TS #8  | 1            | 1,606.94       | 1,606.94           |
|  | Annual Support and Maintenance is for the support period <b>March 1, 2021 to February 28, 2022</b> and includes a 3% CPI increase. |              | <b>Year 4=</b> | <b>\$17,513.90</b> |
| 13   | Annual Support and Maintenance - Software Hydstra TS #1-7  | 1            | 12,262.41      | 12,262.41          |
| 14   | Annual Support and Maintenance - Fee for 5803 extra lines of code (3137 lines before. 5803 lines as of 02.15.2018)                 | 1            | 4,121.76       | 4,121.76           |
| 15   | Annual Support and Maintenance - Software Hydstra TS #8  | 1            | 1,655.15       | 1,655.15           |
|  | Annual Support and Maintenance is for the support period <b>March 1, 2022 to February 28, 2023</b> and includes a 3% CPI increase. |              | <b>Year 5=</b> | <b>\$18,039.32</b> |
|  | Out-of-state sale, exempt from sales tax   |              | 0.00%          | 0.00               |
| Quotes are good for 90 days.<br>All amounts are in US Dollars. |  | <b>Total</b> |                | USD 84,331.47      |

**CONTRACT BETWEEN THE CITY OF AUSTIN  
AND  
Kisters North America Inc.  
For  
Software Support and Maintenance (Hydstra TS)  
NS180000041**

This Contract is made by and between the City of Austin ("City"), a home-rule municipality incorporated by the State of Texas, and Kisters North America Inc. ("Contractor"), having offices at 7777 Greenback Lane, Suite 209, Citrus Heights, CA 95610.

**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 Julia Carroll, Phone: (916) 723-1441, Email Address: [Julia.carroll@kisters.net](mailto:Julia.carroll@kisters.net). The City's Contract Manager for the engagement shall be Josie Archer, Phone: (512) 974-9735, Email Address: [Josephine.archer@austintexas.gov](mailto:Josephine.archer@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 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.

2.2 **Tasks.**

2.2.1 In order to accomplish the work described herein, the Contractor shall perform the software maintenance and support services described in Exhibit A (License and Maintenance Agreement).

2.2.2 Upon written request from the City, Contractor shall perform code modifications to the software pursuant to a scope of work mutually agreed to by City and Contractor.

**SECTION 3. COMPENSATION**

3.1 **Contract Amount.** The Contractor will be paid as indicated herein upon the successful completion of the Scope of Work. In consideration for the services to be performed under this Contract, the Contractor shall be paid an estimated amount not-to-exceed \$81,051.92 for all fees and expenses. As shown in Exhibit A, the estimated annual not-to-exceed amounts are \$15,266.50 for the first year, \$15,724.50 for the second year, \$16,196.23 for the third year, \$16,682.12 for the fourth year and \$17,182.58 for the fifth year.



### 3.2 **Invoices.**

3.2.1 **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 e-mailed to the below address:

|                 |  |
|-----------------|--|
| E-mail Address: | <a href="mailto:WPDInvoices@austintexas.gov">WPDInvoices@austintexas.gov</a> |
| Attn:           | Chris Herrington   |

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

3.2.3 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.

### 3.3 **Payment.**

3.3.1 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.

3.3.2 **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.**

3.3.3 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:

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

3.3.3.2 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;

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

3.3.3.4 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;

3.3.3.5 reasonable evidence that the Contractor's obligations will not be completed within the time specified in the Contract, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay;

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

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

3.3.4 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.

3.3.5 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.

3.4 **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.

**3.5 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.

**3.5.1 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.

**3.5.2 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.

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

**3.6.1** The making and acceptance of final payment will constitute:

**3.6.1.1** 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

**3.6.1.2** 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 commence upon execution, unless otherwise specified, and shall remain in effect for a term of sixty (60) months.

**4.1.1** Upon expiration of the Contract term, the Contractor agrees to hold over under the terms and conditions of this Contract for such a period of time as is reasonably necessary for the City to re-solicit and/or complete the deliverables due under this Contract (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

OR

[PURInsuranceCompliance@austintexas.gov](mailto:PURInsuranceCompliance@austintexas.gov)

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 **Endorsements.** The specific insurance coverage endorsements specified above, or their equivalents must be provided. In the event that endorsements, which are the equivalent of the



required coverage, are proposed to be substituted for the required coverage, copies of the equivalent endorsements must be provided for the City's review and approval.

## 5.2 **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 Offer submitted to the City shall be considered, nor any Purchase Order issued, or any Contract awarded by the City unless the Offeror has executed and filed with the City Purchasing Office a current Non-Discrimination Certification. 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.

5.2.2 **Americans With Disabilities Act (ADA) Compliance.** No Contractor, or Contractor's agent, shall engage in any discriminatory practice against individuals with disabilities as defined in the ADA, including but not limited to: employment, accessibility to goods and services, reasonable accommodations, and effective communications.

5.3 **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.

## 5.4 **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.

5.4.2 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.

5.5 **Ownership And Use Of Deliverables.** 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 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.

5.5.2 **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.

**5.5.3 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.

**5.6 Rights to Proposal and Contractual Material.** All material submitted by the Contractor to the City 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.

**5.7 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.

**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 **Workforce.**

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

7.1.2 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:

7.1.2.1 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

7.1.2.2 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.

7.1.3 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.

7.2 **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.

7.3 **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:

7.3.1 disposal of major assets;

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

7.3.3 any significant termination or addition of provider contracts;

7.3.4 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;

7.3.5 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;

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

7.3.7 known or anticipated sale, merger, or acquisition;

7.3.8 known, planned or anticipated stock sales;

7.3.9 any litigation against the Contractor; or

7.3.10 significant change in market share or product focus.



## 7.4 **Audits and Records.**

7.4.1 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.

### 7.4.2 Records Retention:

7.4.2.1 Contractor is subject to City Code chapter 2-11 (Records Management), and as it may subsequently be amended. For purposes of this subsection, a Record means all books, accounts, reports, files, and other data recorded or created by a Contractor in fulfillment of the Contract whether in digital or physical format, except a record specifically relating to the Contractor's internal administration.

7.4.2.2 All Records are the property of the City. The Contractor may not dispose of or destroy a Record without City authorization and shall deliver the Records, in all requested formats and media, along with all finding aids and metadata, to the City at no cost when requested by the City.

7.4.3 The Contractor shall include sections 7.4.1 and 7.4.2 above in all subcontractor agreements entered into in connection with this Contract.

7.5 **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.

## 7.6 **Indemnity.**

### 7.6.1 Definitions:

7.6.1.1 "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:

7.6.1.1.1 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;

7.6.1.1.2 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),

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

7.6.2 **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.**

7.7 **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 effect 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 2<sup>nd</sup> Street, 4<sup>th</sup> Floor, Austin, Texas 78701, and mail delivery shall be to P.O. Box 1088, Austin, Texas 78767.

**7.8 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:

City of Austin, Purchasing Office

ATTN: Roger Stricklin, Procurement Specialist  
IV

P O Box 1088

Austin, TX 78767

To the Contractor:

Kisters North America Inc.

ATTN: Julia Carroll, Contract Manager

1520 Eureka Road, Suite 102

Roseville, CA 95661

**7.9 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.

**7.10 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.

**7.11 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.

**7.12 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.

**7.13 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.



7.14 **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.

7.15 **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.

7.16 **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.

7.17 **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.

7.18 **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.

7.19 **Dispute Resolution.**

7.19.1 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.

7.19.2 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.

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

7.20.1 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.

7.20.2 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.**

7.20.3 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.

**7.21 Subcontractors.**

7.21.1 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.

7.21.2 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:

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

7.21.2.2 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;

7.21.2.3 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;

7.21.2.4 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

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

7.21.3 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.

7.21.4 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.

**7.22 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.

7.23 **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.

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

| <u>Holiday</u>                     | <u>Date Observed</u>        |
|------------------------------------|-----------------------------|
| 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.

7.25 **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.

7.26 **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.

7.27 **Incorporation of Documents.** This Contract is composed of the following documents, in the order of precedence shown below:

7.27.1 This document;

7.27.2 Exhibit A;

7.27.3 Exhibit B;

7.27.4 **Section 0100, Standard Purchase Definitions**, available at:

[https://assets.austintexas.gov/purchase/downloads/standard\\_purchase\\_definitions.pdf](https://assets.austintexas.gov/purchase/downloads/standard_purchase_definitions.pdf)



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

KISTERS NORTH AMERICA INC.

By:   
Signature

Name: MARTI Ables  
Printed Name

Title: CEO

Date: 2018-08-01

CITY OF AUSTIN

By:   
Signature

Name: MARTI JAMES  
Printed Name

Title: PROCUREMENT SPECIALIST III

Date: 08-02-2018

## List of Exhibits

|           |  |
|-----------|--|
| Exhibit A | License and Maintenance Agreement                                  |
| Exhibit B | Non-Discrimination and Non-Retaliation Certification, Section 0800 |

**EXHIBIT B**  
**City of Austin, Texas**  
**NON-DISCRIMINATION AND NON-RETALIATION CERTIFICATION**

**City of Austin, Texas**

**Equal Employment/Fair Housing Office**

To: City of Austin, Texas,

I hereby certify that our firm complies with the Code of the City of Austin, Section 5-4-2 as reiterated below, and agrees:

- (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, including affirmative action relative to employment, promotion, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rate of pay or other forms of compensation, and selection for training or any other terms, conditions or privileges of employment.
- (3) To post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Equal Employment/Fair Housing Office 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, 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 City and the Equal Employment/Fair Housing Office in connection with any investigation or conciliation effort of the Equal Employment/Fair Housing Office to ensure that the purpose of the provisions against discriminatory employment practices are being carried out.
- (7) To require of all subcontractors having 15 or more employees who hold any subcontract providing for the expenditure of \$2,000 or more in connection with any contract with the City subject to the terms of this chapter that they do not engage in any discriminatory employment practice as defined in this chapter

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

**City of Austin**  
**Minimum Standard Non-Discrimination and Non-Retaliation 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.

The Contractor agrees to prohibit retaliation, discharge or otherwise discrimination against any employee or applicant for employment who has inquired about, discussed or disclosed their compensation.

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 and non-retaliation 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 THE CITY A COPY OF THE CONTRACTOR'S NON-DISCRIMINATION AND NON-RETALIATION POLICIES ON COMPANY LETTERHEAD, WHICH CONFORMS IN FORM, SCOPE, AND CONTENT TO THE CITY'S MINIMUM NON-DISCRIMINATION AND NON-RETALIATION POLICIES, AS SET FORTH HEREIN, **OR** THIS NON-DISCRIMINATION AND NON-RETALIATION POLICY, WHICH HAS BEEN ADOPTED BY THE CONTRACTOR FOR ALL PURPOSES WILL BE CONSIDERED THE CONTRACTOR'S NON-DISCRIMINATION AND NON-RETALIATION POLICY WITHOUT THE REQUIREMENT OF A SEPARATE SUBMITTAL.

**Sanctions:**

Our firm understands that non-compliance with Chapter 5-4 and the City's Non-Retaliation Policy 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 and the Non-Retaliation Policy.

**Term:**

The Contractor agrees that this Section 0800 Non-Discrimination and Non-Retaliation Certificate of the Contractor's separate conforming policy, which the Contractor has executed and filed with the City, 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 payment, the Contractor's Non-Discrimination and Non-Retaliation Policy will automatically renew from year-to-year for the term of the underlying Contract.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

CONTRACTOR

Authorized  
Signature



Title





KISTERS AG  
Pascalstraße 8+10  
52076 Aachen  
Germany  
Tel. +49 2408 9385 -0  
Fax +49 2408 9385 -555  
E-mail: [info@kisters.de](mailto:info@kisters.de)  
Internet: <http://www.kisters.de>



KISTERS AG · Pascalstraße 8+10 · 52076 Aachen · Germany

City of Austin – Watershed Protection  
c/o Mrs. Josie Archer  
PO BOX 1088  
Austin, TX 78767  
USA

Your reference and letter of

Our Reference

Contact Person  
*Klaus Kisters*

Ext. Nb.  
*+49 2408 9385 -104*

E-Mail  
*Klaus.Kisters@kisters.de*

Date  
*27. März 2018*

#### **Sole Source - KISTERS Environmental Data Management Software**

Dear Mrs. Archer,

Kisters North America, Inc. is the only representative in North America authorized to sell, install implement and to provide support and maintenance contracts for our line of time series based products Hydstra, WISKI, BelVis and AquisNet.

The software used by The City of Austin is WISKI and Hydstra. Currently there are no other companies trained or authorized to support this product. The performance, quality, features and/or uniqueness of the software may be compromised if supported by a vendor not familiar with the system. It is this unique capability and service that makes the purchase of the support and maintenance from Kisters essential to the project.

Best regards,

A handwritten signature in blue ink, appearing to read 'Klaus Kisters', written over a horizontal line.

Klaus Kisters

**HYDSYS PTY LTD**

**SOFTWARE LICENCE AND  
MAINTENANCE AGREEMENT**



**THIS AGREEMENT is made  
BETWEEN:**

HYDSYS PTY LIMITED a company duly incorporated in ACT and having its registered office at Unit 4a, 24 Mahony Court, Weston ACT 2611, Australia ("the Supplier") of the one part;

**AND:**

the person or persons named as the Customer in the Schedule hereto ("the Customer").

**WHEREAS:**

- (a) HYDSYS Pty Ltd owns all the right title and interest in the copyright of various items of computer programs and other software, documentation and materials known as the HYDRON/TS, HYDRON/WQ, HYDRON/GW, HYDRON/MA, HYDRON/MO and HYDRON/TE systems;
- (b) The Supplier and Customer have entered into this Agreement for the licensing, installation and maintenance of the HYDRON System.

**1. DEFINITIONS**

|                           |   |
|---------------------------|---|
| Acceptance date:          | the date upon which the Customer accepts or is deemed to accept the software under this agreement;  |
| Additional Charge:        | a charge in accordance with the Supplier's standard rates in effect from time to time payable by the Customer;  |
| Associated Documentation: | operating manuals and other printed or electronic materials including users' manuals, programming manuals, modification manuals, flow charts, drawings and software listings which are designed to assist or supplement the understanding or application of the software; |
| Commencement Date:        | the date specified in the Schedule;   |
| Delivery Date:            | the date agreed upon by the Customer and the Supplier for delivery of the completed software or components thereof;   |
| Designated Equipment:     | the computer equipment specified in the Schedule upon which the software shall be used;   |
| Force Majeure:            | an act, omission or circumstance over which the Supplier could not reasonably have exercised control;   |
| Installation Date:        | the date or period agreed upon by the Customer and the Supplier for installation of the software;   |
| Licensed Program:         | the Licensed Program or Programs specified in the Schedule and any authorised enhancement, modification or new release thereof;   |
| Licence Fee:              | the fee payable by the Customer to the Supplier specified in the Schedule;  |
| Maintenance Services:     | maintenance services relating to the Licensed Program to be performed under this agreement;   |
| New Releases:             | enhancements and new versions of and functional changes to the Licensed Program released after the commencement of this agreement;  |
| On-call maintenance:      | maintenance services carried out by the Supplier at the site at the request of the Customer;  |
| Operating Specifications: | specifications relating to the operation of the Licensed Program referred to in the Schedule;   |
| Site:                     | the location specified in the Schedule for delivery and installation of the Licensed Program;   |
| Software:                 | the software of the Licensed Program, including all configuration files and help files  |

## Telephone Support:

oral advice by the Supplier in response to a telephone call by the Customer relating to the Operation of the Licensed Program or to a suspected defect or error in the Licensed Program.

Unless the context otherwise requires, words importing the singular include the plural and vice versa and words of one gender include all other genders.

## **2. SCOPE OF THE AGREEMENT**

2.1 Subject to the terms and conditions of this Agreement, the Supplier:

- (a) grants to the Customer a non-transferable and non-exclusive licence to use the Licensed Program on the designated equipment at the site;
- (b) shall provide the Customer with New Releases; and
- (c) shall provide the Customer with maintenance services on reasonable notice from the Customer.

2.2 On execution of this Agreement the Customer shall pay to the Supplier the licence fee.

## **3. DURATION**

This Agreement commences on the commencement date and will continue until terminated pursuant to this agreement.

## **4. DOCUMENTATION**

- 4.1 Prior to the delivery, the Supplier shall notify the Customer of the specifications which define the operational characteristics of the Licensed Program. Specifications are defined by the latest release of the relevant manual which is delivered on the release CD-ROM.
- 4.2 The Supplier may alter, substitute or modify such specifications from time to time.
- 4.3 The Licensed Program will continue to be subject to this agreement notwithstanding any such alteration, substitution or modification.
- 4.4 The associated documentation is subject to the same restrictions on copying and modifications as are imposed in respect of the Licensed Program and shall not be used by the Customer except to assist in the normal use of the Licensed Program.

## **5. LICENCE**

- 5.1 The Supplier warrants it has the right and authority to grant the licence to the Customer.
- 5.2 The Customer may only use the Licensed Program in accordance with the normal operating procedures notified to it by the Supplier.
- 5.3 The Licensed Program may be used on equipment other than the designated equipment at the sole risk of the Customer with the written consent of the Supplier if the designated equipment is temporarily inoperable due to malfunction, maintenance or change of site or if the Supplier has otherwise given its consent in writing to such alternate use.
- 5.4 Only the Customer may use the Licensed Program under this agreement.
- 5.5 Any unauthorised use, alteration, modification, reproduction, publication, disclosure or transfer of the Licensed Program is a breach of this agreement entitling the Supplier to equitable relief against the Customer, including injunctive relief.

## **6. DELIVERY**

The Supplier shall use its best endeavours to deliver the software to the Customer on the delivery date at the site during the Customer's normal business hours.



## **7. INSTALLATION**

- 7.1 The Supplier shall use its best endeavours to install the software on the designated equipment at the site on or prior to the installation date.
- 7.2 Where delivery has been delayed for any reason the Supplier shall use its best endeavours to install the software within twenty one (21) days.
- 7.3 The Customer shall give the Supplier such reasonable assistance, including the provision of personnel and equipment, as the Supplier considers necessary to ensure satisfactory installation.

## **8. ACCEPTANCE TESTS**

- 8.1 The Supplier shall test the software in accordance with test specifications chosen by it in its discretion. If test specifications are set out in the Schedule, the Supplier shall test the software in accordance with them and in addition the Supplier shall test the software in accordance with such test specifications if any as are mutually agreed upon between the parties.
- 8.2 The Customer shall be deemed to have accepted the software unless written notification of any defect is received within thirty (30) days of delivery. If the defect notified is such that the software does not meet the test specifications, then the Supplier shall remedy the defect.
- 8.3 The Customer shall, upon request by the Supplier, provide notification in writing to the Supplier, acknowledging that the software has satisfied the test specifications referred to in clause 8.1 and has been accepted.

## **9. ACCESS**

- 9.1 The Customer shall ensure the Supplier and its employees have full and safe access to the designated equipment at all reasonable times for purposes associated with the installation, updating and development of the software. The Customer shall ensure the Supplier's employees are given such information, facilities, services and accessories as the Supplier requires to enable the Supplier to comply with its obligations under this agreement.
- 9.2 Access referred to in clause 9.1 includes use of the designated equipment if the Supplier's equipment becomes unavailable or inoperable.
- 9.3 The Customer shall provide on request a suitably qualified or informed representative, agent or employee, who shall be available on call during the Supplier's normal business hours to advise the Supplier on access, use of the Customer's resources and any other matter within the Customer's knowledge or control which may assist the Supplier in complying with its obligations under this agreement.

## **10. TITLE AND USE**

- 10.1 The Customer acknowledges that HYDSYS Pty Ltd remains the sole owner of all HYDRON software, and all industrial and intellectual property rights associated with the software, including trade secrets and copyright, and that the Supplier has the exclusive right to licence the use of the software.
- 10.2 If the Customer has fully complied with this agreement, the Supplier grants the Customer a non-exclusive and non-transferable licence to use the software on the designated equipment at the site in accordance with normal operating procedures notified to the Customer by the Supplier.
- 10.3 The Customer shall not copy, alter, modify or reproduce the software without the Supplier's prior written consent except for backup purposes.
- 10.4 The Customer shall not modify or alter the software or merge the software with other computer programs without the prior consent in writing of the Supplier.

- 10.5 The Customer shall not reverse assemble or reverse compile or attempt to do either of the above or permit another to reverse assemble or compile the software in whole or in part.
- 10.6 Any modifications or additional programs developed by the Supplier for the Customer will remain the property of the Supplier, unless specific agreement is made to the contrary.
- 10.7 Programs developed specifically for the Customer will attract an additional annual maintenance fee of \$0.20 per line of source code.

## **11. SECURITY**

- 11.1 The Customer shall ensure that the software is protected at all times from access or use by persons other than the Customer or its employees. The Customer shall ensure that the software is used only for purposes within the reasonable contemplation of the Supplier. The Customer shall ensure that the software is protected from misuse, damage or destruction.
- 11.2 The Customer shall ensure that all copies of the software contain a prominent notice stating that all industrial and intellectual property rights in the software belong to the Supplier. Any copy not bearing such a notice shall be presumed to be an infringing copy, and may at any time be seized and destroyed by the Supplier without compensation, and for this purpose the Supplier may enter into any premises in the possession of the Customer.
- 11.3 The Customer shall take all reasonable steps to restrict access to any source code stored on their premises. Only nominated Customer employees are to have access to source code, and all others are to be denied access if possible through the use of network security facilities, passwords, encryption, physical access controls or such other mechanisms as are available.

## **12. CONFIDENTIALITY**

- 12.1 The Customer acknowledges the confidential nature of, and the Supplier's intellectual and industrial property rights in, the software and in the associated documentation.
- 12.2 The Customer shall not without the Supplier's prior written consent copy the software, or cause it to be copied for any purpose other than the use of the software by the Customer. The Customer shall not disclose any details of the software to a third party, nor provide a copy of the software to a third party.
- 12.3 The Customer may only provide to its servants or agents such details of the software as are necessary to enable the software to be used in a manner reasonably contemplated by the Supplier.
- 12.4 The Customer acknowledges that any discoveries, inventions, patents, designs or other rights arising directly or indirectly out of or in the performance of this agreement are the property of the Supplier.
- 12.5 The Customer's obligations under this clause 12 shall survive the termination of this agreement.

## **13. EMPLOYEES AND CONTRACTORS**

- 13.1 Subject to the laws in force for the time being relating to the validity of restrictive covenants, the Customer shall not solicit for employment, whether directly or indirectly through an associated or subsidiary company or otherwise, or employ, engage or contract at the time of this agreement until the expiration of three (3) months after the termination of this agreement, any person who is employed or contracted by the Supplier during the term of this agreement.
- 13.2 If a person who is employed or contracted by a party seeks to be employed or contracted by the other party prior to the expiration of three (3) months after the termination of this agreement, that other party shall promptly advise the first party.



## **14. COPYRIGHT INDEMNITY**

- 14.1 The Supplier shall indemnify the customer against liability under any final judgment in proceedings brought by a third party against the Customer determining that the Customer's use of the software constitutes an infringement of an Australian Copyright.
- 14.2 The Supplier will not indemnify the Customer as provided in clause 14.1 unless the Customer:
- (a) notifies the Supplier in writing as soon as practicable of any infringement, suspected infringement or alleged infringement;
  - (b) gives the Supplier the option to conduct the defence of such a claim, including negotiations for settlement or compromise prior to the institution of legal proceedings;
  - (c) provides the Supplier with reasonable assistance in conducting the defence of such a claim;
  - (d) permits the Supplier to modify, alter or substitute the software, at its own expense, to render the software non-infringing; and
  - (e) authorises the Supplier to procure for the Customer the authority to continue the use and possession of the software.
- 14.3 The Supplier shall not indemnify the Customer if such infringement, suspected infringement or alleged infringement arises from:
- (a) use of the software in a combination by any means and in any form with computer programs or equipment not specifically approved by the Supplier;
  - (b) use of the software in a manner or for a purpose not reasonably contemplated by the Supplier;
  - (c) modification or alteration of the software without the prior consent in writing of the Supplier;
  - (d) any transaction entered into by the Customer relating to the software without the Supplier's prior consent in writing; and
  - (e) use of the software other than pursuant to this agreement.
- 14.4 The Customer shall indemnify and hold harmless the Supplier against any loss, costs, expenses, demands or liability, whether direct or indirect, arising out of a claim by a third party alleging such infringement if:
- (a) the claim arises from an event specified in clauses 14.3 (a) to (e);
  - (b) the ability of the Supplier to defend the claim has been prejudiced by the failure of the Customer to comply with the provisos in clause 14.2; or
  - (c) information provided to the Supplier by the Customer to enable the Supplier to develop the software encroaches upon any intellectual or industrial property rights of a third party.

## **15. WARRANTIES**

- 15.1 The Supplier does not warrant that:
- (a) the software is error free;
  - (b) the use of the software shall be uninterrupted;
  - (c) the software shall meet the Customer's requirements other than substantially as set out in the specifications; or
  - (d) the software shall provide any function not designated in the Customer's specifications.
- 15.2 The Supplier shall use its best endeavours to rectify or replace any software, at its own option and at its own expense, which in its reasonable discretion it finds to be defective and which defect has been notified in writing by the Customer within a period of three (3) months from the acceptance date.
- 15.3 The Supplier will not be liable to remedy any defect in the software if:

- (a) the defect does not result in the performance of the software significantly deviating from the Customer's specifications or the test specifications referred to in clause 8.1;
- (b) the defect is the result of alterations or modifications to the software not authorised in writing by the Supplier;
- (c) the defect is the result of use of the software in combination with equipment, programs or services not authorised in writing by the Supplier;
- (d) the defect is the result of use of the software other than in the operating environment recommended by the Supplier, or other than in accordance with the Supplier's directions;
- (e) the defect is the result of failure of the Customer to meet its obligations under this agreement or any other agreement relating to the software; or
- (f) the Customer is in breach of this agreement, and such breach is not remedied within seven (7) days.

15.4 Subject to clause 16.3, the Supplier makes no warranty of fitness for a particular purpose, apart from those purposes listed in the Schedule. The Customer acknowledges that the only purposes disclosed to the Supplier are those set out in the Schedule.

## **16. LIABILITY OF SUPPLIER**

16.1 The Supplier is bound by certain obligations pursuant to clause 16.3 hereof. The Customer acknowledges that this clause 16.1 is not intended to, and does not create any obligation or representation or modify the Supplier's obligations of whatever kind pursuant to clause 16.3. The Customer notes that the Supplier is a corporation, so that in transactions covered by the Trade Practices Act, the Supplier's obligations in general terms include the following:

- it must not engage in unconscionable conduct;
- it must not falsely represent that goods are of a particular standard, quality, grade, style or model;
- it must not falsely represent that services are of a particular standard, quality, grade, style or model;
- it must not represent that goods or services have performance characteristics, accessories, uses or benefits they do not have;
- it must not engage in conduct that is misleading or deceptive;
- there is an implied condition that a Supplier has the right to sell the goods;
- goods must be of merchantable quality;
- where a consumer makes known any particular purpose for which goods are acquired, there is an implied condition that the goods are fit for that purpose.

16.2 Except as expressly provided to the contrary in this agreement, all terms, conditions, warranties, undertakings, inducements or representations, whether express, implied, statutory or otherwise relating in any way to the Licensed Program or to this agreement, are excluded. Without limiting the generality of the preceding sentence, the Supplier shall not be under any liability to the Customer in respect of any loss or damage (including consequential loss or damage) however caused, which may be suffered or incurred or which may arise directly or indirectly in respect of the Licensed Program or the advice or services provided by the Supplier or the failure or omission on the part of the Supplier to comply with its obligations under this agreement.

16.3 Where any Act of Parliament implies in this agreement any term, condition or warranty, and the Act avoids or prohibits provisions in a contract excluding or modifying the application of, or exercise of, or liability under such term, condition or warranty, such term, condition or warranty shall be deemed to be included in this agreement. However, the liability of the Supplier for any breach of such term,



condition or warranty shall be limited, at the option of the Supplier, to any one or more of the following:

- (a) if the breach relates to goods:
  - (i) the replacement of the goods or the supply of equivalent goods;
  - (ii) the repair of such goods;
  - (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods; or
  - (iv) the payment of the cost of having the goods repaired; and
- (b) if the breach relates to services:
  - (i) the supplying of the services again; or
  - (ii) the payment of the cost of having the services supplied again.

16.4 The Customer warrants that it has not relied on any representation made by the Supplier which has not been stated expressly in this agreement nor has it relied upon any descriptions or illustrations or specifications contained in any document including any other catalogues or publicity material produced by the Supplier.

## **17. FORCE MAJEURE**

- 17.1 The Supplier shall not be liable for any delay or failure to perform its obligations if such failure or delay is due to force majeure.
- 17.2 The Supplier shall notify the Customer as soon as practicable of any anticipated delay due to force majeure. The performance of the Supplier's obligations under this agreement shall be suspended for the period of the delay due to force majeure.
- 17.3 If a delay due to force majeure exceeds ninety (90) days the Supplier may terminate this agreement immediately on providing notice to the Customer. If the Supplier gives such notice to the Customer:
  - (a) if delivery has taken place, the Customer shall comply with the Supplier's directions regarding the return or destruction of the software and manuals;
  - (b) the Supplier shall refund moneys previously paid by the Customer under this agreement for which no goods or services have been provided;
  - (c) the Customer shall pay the Supplier a reasonable sum in relation to services rendered, work performed on Software Development or costs and expenses incurred prior to termination; and
  - (d) the Supplier may deduct the charge or part of the charge referred to in clause 17.3 (c), from the sum, if any, referred to in clause 17.3 (b).

## **18. MAINTENANCE SERVICES**

- 18.1 The Supplier shall perform such services as it considers necessary to ensure the Licensed Program remains in substantial conformity with the operating specifications.
- 18.2 The Supplier shall provide support in the form of advice by telephone, fax or email in response to a notification by the Customer relating to a suspected defect or error in the Licensed Program causing the Licensed Program to substantially depart from the operating specifications.
- 18.3 The Customer shall ensure that before requesting support it has an adequate understanding of the Software.

## **19. MAINTENANCE AVAILABILITY**

- 19.1 The Supplier may provide maintenance services between 0800 hours and 1800 hours Canberra time on any day except Saturday, Sunday or a Canberra Public Holiday.
- 19.2 If the Customer requests the Supplier to provide on-call maintenance, the Supplier shall use reasonable endeavours to do so as soon as practicable.
- 19.3 The Supplier does not warrant that it will be capable of receiving, processing or otherwise acting on a request for on-call maintenance which is made or for services to be performed:
- (a) outside the Supplier's normal business hours;
  - (b) at a site located at a distance in excess of ten kilometres from the Australian Capital Territory, save upon 21 days notice.
- 19.4 Immediately after making a request for on-call maintenance, the Customer shall give the Supplier a documented example of the defect or error which it alleges prevents substantial conformity of the Licensed Program with the operating conditions similar to those present when any defect or error in the Licensed Program was discovered.

## **20. MAINTENANCE OF NEW RELEASES**

- 20.1 If the Customer acquires one or more new releases, this agreement and any other agreement between the parties relating to the Licensed Program will apply to the new releases as if the new releases were named as the Licensed Program under those agreements.

## **21. EXCLUSIONS**

- 21.1 Maintenance services to be provided by the Supplier under this agreement do not include:
- (a) correction of errors or defects caused by operation of the Licensed Program or the designated equipment in a manner other than that specified by the Supplier;
  - (b) correction of errors or defects caused by modification, revision, variation, translation or alteration of the Licensed Program not authorised by the Supplier;
  - (c) correction of errors or defects caused by the use of the Licensed Program or the designated equipment by a person not authorised by the Supplier;
  - (d) correction of errors caused by the use of computer programs not licensed by the Supplier to the Customer;
  - (e) correction of errors caused by the failure of the Customer to provide suitably qualified and adequately trained operating and programming staff for the operation of the Licensed Program;
  - (f) training of operating or programming staff;
  - (g) rectification of errors caused by incorrect use of the Licensed Program;
  - (h) rectification of errors caused by a fault in the designated equipment;
  - (i) equipment maintenance;
  - (j) diagnosis or rectification of faults not associated with the Licensed Program;
  - (k) enhancements designed to extend the Licensed Program to provide facilities not contained in the operating specifications or otherwise not contemplated by the parties at the commencement date;
  - (l) furnishing or maintenance of accessories, attachments, supplies, consumables or associated items, whether or not manufactured or distributed by the Supplier;



- (m) correction of errors arising directly or indirectly out of the Customer's failure to comply with this agreement or any other agreement between the parties relating to the Licensed Program;
- (n) maintenance made more difficult by the Customer's failure to comply with this agreement or any other agreement between the parties relating to the Licensed Program;
- (o) replacement or correction of programs or data where the loss was caused by inadequate backup procedures.

21.2 If the Customer requests in writing, the Supplier may at its option provide any of the services referred to in clause 21.1. The Supplier may make an additional charge for providing such services.

## **22. ACCESS FOR MAINTENANCE SERVICES**

- 22.1 The Customer shall ensure the Supplier's maintenance personnel have full and safe access to the Licensed Program and the designated equipment at all reasonable times for the purpose of providing the maintenance services. The Customer shall also ensure that the Supplier's maintenance personnel are provided with all information, facilities, services and accessories reasonably required by the Supplier to enable the Supplier to comply with its obligations under this agreement.
- 22.2 The Customer shall provide on request a suitably qualified or informed representative, agent or employee to accompany the Supplier's maintenance personnel and to advise the Supplier on access or on any other matter within the Customer's knowledge or control which will assist the Supplier in complying with its obligations under the agreement.

## **23. FEES AND CHARGES**

- 23.1 The Customer shall pay the maintenance fees specified in the Schedule annually in advance, following receipt of an invoice from the Supplier.
- 23.2 The Customer shall pay all additional charges payable by it under this agreement within 30 days of receipt of invoice.
- 23.3 The Customer shall pay an additional charge if the Customer requests the Supplier to provide:
  - (a) on-call maintenance;
  - (b) maintenance not referred to in clause 18;
  - (c) software development, information and documentation other than that encompassed in the Licensed Program, new releases and the associated documentation; or
  - (d) maintenance services which the Supplier considers to be unnecessary.
- 23.4 If the site is located at a distance in excess of ten (10) kilometres from the Australian Capital Territory, the Supplier may make an additional charge for the time and travelling expenses of its maintenance personnel in respect of travel to and from the site.
- 23.5 The Supplier may, by a dated notice in writing, increase the maintenance fees specified in the Schedule hereto annually after the expiration of twelve months from the commencement date in accordance with the following consumer price index formula:

$$\text{NMF} = \text{OMF} \times \frac{\text{NCPI}}{\text{OCPI}}$$

where NMF = the new maintenance fee payable by the Customer to the Supplier commencing from the date specified in the notice

OMF = the maintenance fee payable by the Customer to the Supplier during the year immediately preceding the increase

NCPI = the last published consumer price index prior to the increase

OCPI = the consumer price index as published for the corresponding period in the previous year.

In this clause the "consumer price index" means the consumer price index for Canberra (all groups) as published by the Australian Statistician. In the event that there is any suspension or discontinuance of the consumer price index by the Australian Statistician then the consumer price index shall mean the such index figure of statistics published at the relevant dates in the Australian Statistician's summary of Australian statistics which reflects fluctuations in the costs of living in Canberra. This clause shall apply notwithstanding that there may be significant changes over time in the composition and weighting of the items by reference to which the consumer price index is calculated.

- 23.6 The fees and charges payable by the Customer under this agreement are exclusive of any taxes, duties, fees or other government levies or charges which may be imposed on or in respect of the Licensed Program, its use or its maintenance under this agreement or otherwise. Such taxes, duties, fees or other government charges will be the responsibility of the Customer and shall be paid by the Customer immediately they become due and in any event, not later than 14 days after notice by the Supplier requiring such payment. The Customer shall fully indemnify and hold harmless the Supplier against all payments made by the Supplier which are the Customer's responsibility under this clause 23.
- 23.7 The Customer shall pay interest at the rate of ten (10) percent per annum on all overdue amounts from the due date until payment is made.
- 23.8 If any payment owing to the Supplier is not made within 14 days of the due date, the Supplier may, without further notice to the Customer:
- (a) suspend further services or its remaining obligations to the Customer under this agreement or any other agreement relating to the Licensed Program; and
  - (b) enter any premises owned, occupied, leased or controlled by the Customer where the Licensed Program is kept and repossess the Licensed Program.

## **24. TERMINATION**

- 24.1 Without limiting the generality of any other clause in this agreement, the Supplier may terminate this agreement immediately by notice in writing if:
- (a) any payment due from the Customer to the Supplier pursuant to this agreement remains unpaid for a period of twenty one (21) days;
  - (b) the Customer breaches any clause of this agreement and such breach is not remedied within twenty one (21) days of written notice by the Supplier; or
  - (c) the Customer disposes of the Licensed Program or the designated equipment.
- 24.2 Notwithstanding clause 24.1 the Supplier may terminate this agreement immediately on notice in writing to the Customer if:
- (a) the Customer becomes, threatens or resolves to become or is in jeopardy of becoming subject to any form of insolvency administration;
  - (b) the Customer, being a partnership, dissolves, threatens or resolves to dissolve or is in jeopardy of dissolving;
  - (c) the Customer, being a natural person, dies; or
  - (d) the Customer ceases or threatens to cease conducting its business in the normal manner.
- 24.3 If notice is given to the Customer pursuant to clauses 24.1 or 24.2, the Supplier may, in addition to terminating the agreement:
- (a) retain any moneys paid;
  - (b) charge a reasonable sum for work performed in respect of which work no sum has been previously charged;



- (c) be regarded as discharged from any further obligations under this agreement; and
- (d) pursue any additional or alternative remedies provided by law.

24.4

- (a) The Supplier may terminate this agreement upon sixty (60) days notice in writing if the Customer within thirty (30) days of being advised of a new release has not agreed to take it on the Supplier's usual terms.
- (b) The Customer may terminate this agreement upon ninety (90) days notice in writing.
- (c) Upon termination pursuant to clause 24.4(a) or (b) the Supplier shall have the rights specified in paragraphs (a) to (d) of clause 24.3, save that the Supplier shall refund that proportion of funds paid which relates to the period after the date of termination.
- (d) Upon termination the Customer shall comply with the Supplier's directions regarding the return or destruction of the software and manuals.

24.5 On termination the Supplier is entitled to all monies owing under this agreement and all rights and customer obligations contained in clauses 5, 9, 10, 14, 23, 24, 33, 34, and 35 survive termination.

## **25. ASSIGNMENT**

The benefit of this agreement shall not be dealt with in any way by the Customer (whether by assignment, sub-licensing or otherwise) without the Supplier's written consent.

## **26. SUB-CONTRACTS**

- 26.1 The Supplier may sub-contract for the performance of this agreement or any part of this agreement without notice to the Customer.
- 26.2 The Supplier's obligations pursuant to this agreement shall be the same as if the work had been conducted by the Supplier itself, and not by a sub-contractor.

## **27. WAIVER**

- 27.1 No right under this agreement shall be deemed to be waived except by notice in writing signed by each party.
- 27.2 A waiver by the Supplier pursuant to clause 27.1 will not prejudice its rights in respect of any subsequent breach of this agreement by the Customer.
- 27.3 Subject to clause 27.1 hereof, any failure by the Supplier to enforce any clause of this agreement, or any forbearance, delay or indulgence granted by the Supplier to the Customer, will not be construed as a waiver of the Supplier's rights under this agreement.

## **28. ENTIRE AGREEMENT**

This agreement constitutes the entire agreement between the parties. The Customer acknowledges that no representations or warranties were made by the Supplier other than those which are set out in this agreement. Any prior arrangements, agreements, representations or undertakings are superseded. No modification or alteration of any clause of this agreement will be valid except in writing signed by each party.

## **29. HEADINGS**

Headings used in this agreement are for convenience and ease of reference only, are not part of this agreement and shall not be relevant to or affect the meaning or interpretation of this agreement.

### **30. SEVERABILITY**

If any provision of this agreement is held invalid, unenforceable or illegal for any reason, this agreement shall remain otherwise in full force apart from the such provision which shall be deemed deleted.

### **31. GOVERNING LAW**

This agreement will be governed by and construed according to the law of the Australian Capital Territory.

### **32. NOTICES**

- (a) Notices under this agreement may be delivered by hand, by registered mail, by telex or by facsimile to the addresses specified in the Schedule.
- (b) Notices will be deemed given:
  - (i) in the case of hand delivery or registered mail, upon written acknowledgment or receipt by an officer or other duly authorised employee, agent or representative of the receiving party;
  - (ii) in the case of telex, upon receipt of answer-back;
  - (iii) in the case of facsimile, upon completion of transmission.

### **33. DISPUTES**

Any dispute arising in connection with this agreement which cannot be settled by negotiation between the parties or their representatives may be submitted to arbitration in accordance with the Rules for the Conduct of Commercial Arbitrations for the time being for the Institute of Arbitrators, Australia.

During such arbitration, both parties may be represented by a duly qualified legal practitioner.

All disputes raised by the Customer and arising in connection with this agreement whether before or after the execution of the work under the agreement shall be decided as follows:

- (a) the Customer shall submit the matter in issue in writing with detailed particulars to the Supplier within 14 days of the dispute arising;
- (b) the Supplier may within 28 days thereafter either refer the matter to arbitration, or advise the Customer that the dispute is not to be arbitrated.

Unless a claim is dealt with as permitted by this clause, proceedings upon it in any Court shall be barred, and where a claim is required to be submitted to arbitration pursuant to this clause, the making of an award shall be a condition precedent to any right of action in any Court, in respect of any of the matters required to be submitted to arbitration.

### **34. SUPPLIER'S RIGHTS**

Any express statement of a right of the Supplier under this agreement is without prejudice to any other right of the Supplier expressly stated in this agreement or arising at law.



EXECUTED AS AN AGREEMENT

Signed for and on behalf of  
HYDSYS Pty Ltd by :

  
DIRECTOR

in the presence of :



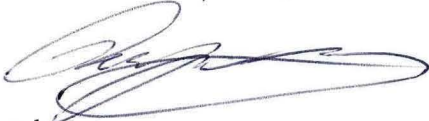
Dated:

7 DECEMBER 1999

Signed for and on behalf of  
the Customer by its authorised  
delegate :



in the presence of :



OR

Signed for the Customer by  
its lawful attorney/s pursuant to  
power of attorney No  
(and who has/have no notice of revocation) :

7 Jan 00

in the presence of :

Dated:

(Either delegate or attorney must sign, but not both)

## HYDRON SCHEDULE

**Customer:** City of Austin Watershed Protection Utility

| Licensed Systems               | HYDRON/TS | HYDRON/WQ | HYDRON/GW | HYDRON/MA | HYDRON/MO |
|--------------------------------|-----------|-----------|-----------|-----------|-----------|
| Number of Workstations         | 8         | N/A       | N/A       | N/A       | N/A       |
| Station limit                  | Unlimited | N/A       | N/A       | N/A       | N/A       |
| Licence fee - subsequent years | US\$7500  | N/A       | N/A       | N/A       | N/A       |

**Licensed Site:** 206 E.9th St, Suite 16.100, Austin, Texas 78701 USA

**Designated equipment:** Any PC owned and operated by the City of Austin Watershed Protection Utility at the licensed site.

**Special Conditions:** No more than eight concurrent users may access the HYDRON/TS software at any time.

**Signed for Supplier:**

  
DIRECTOR

**Witnessed:**



**Date:**

7 DECEMBER 1999.

**Signed for Customer:**



**Witnessed:**



**Date:**

7 JAN 00



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By submitting an Offer in response to the Solicitation, the Contractor agrees that the Contract shall be governed by the following terms and conditions. Unless otherwise specified in the Contract, Sections 3, 4, 5, 6, 7, 8, 20, 21, and 36 shall apply only to a Solicitation to purchase Goods, and Sections 9, 10, 11 and 22 shall apply only to a Solicitation to purchase Services to be performed principally at the City's premises or on public rights-of-way.

1. **CONTRACTOR'S OBLIGATIONS**. The Contractor shall fully and timely provide all Deliverables described in the Solicitation and in the Contractor's Offer in strict accordance with the terms, covenants, and conditions of the Contract and all applicable Federal, State, and local laws, rules, and regulations.
2. **EFFECTIVE DATE/TERM**. Unless otherwise specified in the Solicitation, this Contract shall be effective as of the date the contract is signed by the City, and shall continue in effect until all obligations are performed in accordance with the Contract.
3. **CONTRACTOR TO PACKAGE DELIVERABLES**: The Contractor will package Deliverables in accordance with good commercial practice and shall include a packing list showing the description of each item, the quantity and unit price. Unless otherwise provided in the Specifications or Supplemental Terms and Conditions, each shipping container shall be clearly and permanently marked as follows: (a) The Contractor's name and address, (b) the City's name, address and purchase order or purchase release number and the price agreement number if applicable, (c) Container number and total number of containers, e.g. box 1 of 4 boxes, and (d) the number of the container bearing the packing list. The Contractor shall bear cost of packaging. Deliverables shall be suitably packed to secure lowest transportation costs and to conform with requirements of common carriers and any applicable specifications. The City's count or weight shall be final and conclusive on shipments not accompanied by packing lists.
4. **SHIPMENT UNDER RESERVATION PROHIBITED**: The Contractor is not authorized to ship the Deliverables under reservation and no tender of a bill of lading will operate as a tender of Deliverables.
5. **TITLE & RISK OF LOSS**: Title to and risk of loss of the Deliverables shall pass to the City only when the City actually receives and accepts the Deliverables.
6. **DELIVERY TERMS AND TRANSPORTATION CHARGES**: Deliverables shall be shipped F.O.B. point of delivery unless otherwise specified in the Supplemental Terms and Conditions. Unless otherwise stated in the Offer, the Contractor's price shall be deemed to include all delivery and transportation charges. The City shall have the right to designate what method of transportation shall be used to ship the Deliverables. The place of delivery shall be that set forth in the block of the purchase order or purchase release entitled "Receiving Agency".
7. **RIGHT OF INSPECTION AND REJECTION**: The City expressly reserves all rights under law, including, but not limited to the Uniform Commercial Code, to inspect the Deliverables at delivery before accepting them, and to reject defective or non-conforming Deliverables. If the City has the right to inspect the Contractor's, or the Contractor's Subcontractor's, facilities, or the Deliverables at the Contractor's, or the Contractor's Subcontractor's, premises, the Contractor shall furnish, or cause to be furnished, without additional charge, all reasonable facilities and assistance to the City to facilitate such inspection.
8. **NO REPLACEMENT OF DEFECTIVE TENDER**: Every tender or delivery of Deliverables must fully comply with all provisions of the Contract as to time of delivery, quality, and quantity. Any non-complying tender shall constitute a breach and the Contractor shall not have the right to substitute a conforming tender; provided, where the time for performance has not yet expired, the Contractor may notify the City of the intention to cure and may then make a conforming tender within the time allotted in the contract.
9. **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

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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.

**10. WORKFORCE**

- A. The Contractor shall employ only orderly and competent workers, skilled in the performance of the services which they will perform under the Contract.
- B. 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 .
  - i. use or possess a firearm, including a concealed handgun that is licensed under state law, except as required by the terms of the contract; or
  - ii. 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.
- C. 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.

- 11. 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.

**12. INVOICES:**

- A. The Contractor shall submit separate invoices in duplicate on each purchase order or purchase release after each delivery. If partial shipments or deliveries are authorized by the City, a separate invoice must be sent for each shipment or delivery made.
- B. **Proper Invoices must include 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 and transportation charges, if any, shall be listed separately. A copy of the bill of lading and the freight waybill, when applicable, shall be attached to the invoice. The Contractor's name and, if applicable, the tax identification number on the invoice must exactly match the information in the Vendor's registration with the City. Unless otherwise instructed in writing, the City may rely on the remittance address specified on the Contractor's invoice.
- C. Invoices for labor shall include a copy of all time-sheets with trade labor rate and Deliverables order number clearly identified. Invoices shall also include a tabulation of work-hours at the appropriate rates and grouped by work order number. Time billed for labor shall be limited to hours actually worked at the work site.
- D. Unless otherwise expressly authorized in the Contract, the Contractor shall pass through all Subcontract and other authorized expenses at actual cost without markup.
- E. 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.



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**13. PAYMENT:**

- A. 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.
- B. **If payment is not timely made, (per paragraph A), 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.**
- C. If partial shipments or deliveries are authorized by the City, the Contractor will be paid for the partial shipment or delivery, as stated above, provided that the invoice matches the shipment or delivery.
- D. The City may withhold or set off the entire payment or part of any payment otherwise due the Contractor to such extent as may be necessary on account of:
  - i. delivery of defective or non-conforming Deliverables by the Contractor;
  - ii. 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;
  - iii. failure of the Contractor to pay Subcontractors, or for labor, materials or equipment;
  - iv. 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;
  - v. reasonable evidence that the Contractor's obligations will not be completed within the time specified in the Contract, and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay;
  - vi. failure of the Contractor to submit proper invoices with all required attachments and supporting documentation; or
  - vii. failure of the Contractor to comply with any material provision of the Contract Documents.
- E. 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.
- F. 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 funds transfer.
- G. 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.

- 14. 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 Solicitation will be reviewed against the City's Travel Policy as published and maintained by the City's Controller's Office 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>

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No amounts in excess of the Travel Policy or Rates shall be paid. All invoices must be accompanied by copies of detailed 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 Regulations.

**15. FINAL PAYMENT AND CLOSE-OUT:**

- A. If an MBE/WBE Program Compliance Plan is required by the Solicitation, and the Contractor has identified Subcontractors, the Contractor is required to submit a Contract Close-Out MBE/WBE Compliance Report to the Project manager or Contract manager no later than the 15th calendar day after completion of all work under the contract. Final payment, retainage, or both may be withheld if the Contractor is not in compliance with the requirements of the Compliance Plan as accepted by the City.
- B. The making and acceptance of final payment will constitute:
  - i. 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
  - ii. a waiver of all claims by the Contractor against the City other than those previously asserted in writing and not yet settled.

**16. SPECIAL TOOLS & TEST EQUIPMENT:** If the price stated on the Offer includes the cost of any special tooling or special test equipment fabricated or required by the Contractor for the purpose of filling this order, such special tooling equipment and any process sheets related thereto shall become the property of the City and shall be identified by the Contractor as such.

**17. AUDITS and RECORDS:**

- A. 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.
- B. Records Retention:
  - i. Contractor is subject to City Code chapter 2-11 (Records Management), and as it may subsequently be amended. For purposes of this subsection, a Record means all books, accounts, reports, files, and other data recorded or created by a Contractor in fulfillment of the Contract whether in digital or physical format, except a record specifically relating to the Contractor's internal administration.
  - ii. All Records are the property of the City. The Contractor may not dispose of or destroy a Record without City authorization and shall deliver the Records, in all requested formats and media, along with all finding aids and metadata, to the City at no cost when requested by the City
  - iii. The Contractor shall retain all 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.
- C. The Contractor shall include sections A and B above in all subcontractor agreements entered into in connection with this Contract.



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**18. SUBCONTRACTORS:**

- A. 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.
- B. 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:
  - i. require that all Deliverables to be provided by the Subcontractor be provided in strict accordance with the provisions, specifications and terms of the Contract;
  - ii. 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;
  - iii. 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;
  - iv. 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
  - v. require that the Subcontractor indemnify and hold the City harmless to the same extent as the Contractor is required to indemnify the City.
- C. 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.
- D. 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.

**19. WARRANTY-PRICE:**

- A. 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.
- B. 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.
- C. 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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20. **WARRANTY – TITLE:** The Contractor warrants that it has good and indefeasible title to all Deliverables furnished under the Contract, and that the Deliverables are free and clear of all liens, claims, security interests and encumbrances. The Contractor shall indemnify and hold the City harmless from and against all adverse title claims to the Deliverables.
21. **WARRANTY – DELIVERABLES:** The Contractor warrants and represents that all Deliverables sold the City under the Contract shall be free from defects in design, workmanship or manufacture, and conform in all material respects to the specifications, drawings, and descriptions in the Solicitation, to any samples furnished by the Contractor, to the terms, covenants and conditions of the Contract, and to all applicable State, Federal or local laws, rules, and regulations, and industry codes and standards. Unless otherwise stated in the Solicitation, the Deliverables shall be new or recycled merchandise, and not used or reconditioned.
- A. Recycled Deliverables shall be clearly identified as such.
  - B. 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.
  - C. Unless otherwise specified in the Contract, the warranty period shall be at least one year from the date of acceptance of the Deliverables or from the date of acceptance of any replacement Deliverables. If during the warranty period, one or more of the above warranties are breached, the Contractor shall promptly upon receipt of demand either repair the non-conforming Deliverables, or replace the non-conforming Deliverables with fully conforming Deliverables, at the City's option and at no additional cost to the City. All costs incidental to such repair or replacement, including but not limited to, any packaging and shipping costs, shall be borne exclusively 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.
  - D. If the Contractor is unable or unwilling to repair or replace defective or non-conforming Deliverables as required by the City, then in addition to any other available remedy, the City may reduce the quantity of Deliverables it may be required to purchase under the Contract from the Contractor, and purchase conforming Deliverables 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 Deliverables from another source.
  - E. If the Contractor is not the manufacturer, and the Deliverables are covered by a separate manufacturer's warranty, the Contractor shall transfer and assign such manufacturer's warranty to the City. If for any reason the manufacturer's warranty cannot be fully transferred to the City, the Contractor shall assist and cooperate with the City to the fullest extent to enforce such manufacturer's warranty for the benefit of the City.
22. **WARRANTY – SERVICES:** The Contractor warrants and represents that all services to be provided 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.
- A. 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.
  - B. 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 above 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 warranty, but failure to give timely notice shall not impair the City's rights under this section.
  - C. 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



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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.

23. **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.
24. **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.
25. **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.
26. **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 Paragraph 24, (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 the Contractor to the City.
27. **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.
28. **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.
29. **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.

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**30. DELAYS:**

- A. 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 in paragraph 48. However, nothing in this provision shall excuse the Contractor from delaying the delivery as notified.
- B. 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.

**31. INDEMNITY:**

- A. Definitions:
  - i. "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:
    - (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
    - (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),
  - ii. "Fault" shall include the sale of defective or non-conforming Deliverables, negligence, willful misconduct, or a breach of any legally imposed strict liability standard.
- B. **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.**

**32. INSURANCE:** (reference Section 0400 for specific coverage requirements). The following insurance requirement applies. (Revised March 2013).

**A. General Requirements.**

- i. The Contractor shall at a minimum carry insurance in the types and amounts indicated in Section 0400, Supplemental Purchase Provisions, for the duration of the Contract, including extension options and hold over periods, and during any warranty period.
- ii. The Contractor shall provide Certificates of Insurance with the coverages and endorsements required in Section 0400, Supplemental Purchase Provisions, to the City as verification of coverage prior to contract execution and within fourteen (14) calendar days after written request from the



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City. Failure to provide the required Certificate of Insurance may subject the Offer to disqualification from consideration for award. 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 hold over period is exercised, as verification of continuing coverage.

- iii. The Contractor shall not commence work until the required insurance is obtained and until such insurance has been reviewed by the 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.
- iv. 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.
- v. 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.
- vi. 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.
- vii. If insurance policies are not written for amounts specified in Section 0400, Supplemental Purchase Provisions, 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.
- viii. 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.
- ix. 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.
- x. 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.
- xi. The Contractor shall be responsible for premiums, deductibles and self-insured retentions, if any, stated in policies. Self-insured retentions shall be disclosed on the Certificate of Insurance.
- xii. The Contractor shall 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.
- xiii. The insurance coverages specified in Section 0400, Supplemental Purchase Provisions, are required minimums and are not intended to limit the responsibility or liability of the Contractor.

**B. Specific Coverage Requirements: Specific insurance requirements are contained in Section 0400, Supplemental Purchase Provisions**

33. **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

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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 2<sup>nd</sup> Street, 4<sup>th</sup> Floor, Austin, Texas 78701, and mail delivery shall be to P.O. Box 1088, Austin, Texas 78767.

34. **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 Contractor shall be sent to the address specified in the Contractor's Offer, or at such other address as a party may notify the other in writing. Notices to the City shall be addressed to the City at P.O. Box 1088, Austin, Texas 78767 and marked to the attention of the Contract Administrator.
35. **RIGHTS TO BID, PROPOSAL AND CONTRACTUAL MATERIAL:** All material submitted by the Contractor to the City 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.
36. **NO WARRANTY BY CITY AGAINST INFRINGEMENTS:** The Contractor represents and warrants to the City that: (i) the Contractor shall provide the City good and indefeasible title to the Deliverables and (ii) the Deliverables supplied by the Contractor in accordance with the specifications in the Contract will not infringe, directly or contributorily, any patent, trademark, copyright, trade secret, or any other intellectual property right of any kind of any third party; that no claims have been made by any person or entity with respect to the ownership or operation of the Deliverables and the Contractor does not know of any valid basis for any such claims. The Contractor shall, at its sole expense, defend, indemnify, and hold the City harmless from and against all liability, damages, and costs (including court costs and reasonable fees of attorneys and other professionals) arising out of or resulting from: (i) any claim that the City's exercise anywhere in the world of the rights associated with the City's ownership, and if applicable, license rights, and its use of the Deliverables infringes the intellectual property rights of any third party; or (ii) the Contractor's breach of any of Contractor's representations or warranties stated in this Contract. In the event of any such claim, the City shall have the right to monitor such claim or at its option engage its own separate counsel to act as co-counsel on the City's behalf. Further, Contractor agrees that the City's specifications regarding the Deliverables shall in no way diminish Contractor's warranties or obligations under this paragraph and the City makes no warranty that the production, development, or delivery of such Deliverables will not impact such warranties of Contractor.
37. **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 Agreement, 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.
38. **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.



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39. **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.
40. **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.
41. **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 of Austin 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.
42. **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.
43. **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.
44. **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.
45. **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.
46. **MODIFICATIONS**: The Contract can be modified or amended only by a writing signed by both parties. No pre-printed or similar terms on any the Contractor invoice, order or other document shall have any force or effect to change the terms, covenants, and conditions of the Contract.
47. **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.

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**48. DISPUTE RESOLUTION:**

- A. 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.
- B. 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.

**49. 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.

**50. 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.

**51. HOLIDAYS:** The following holidays are observed by the City:

| <u>Holiday</u>                     | <u>Date Observed</u>      |
|------------------------------------|---------------------------|
| 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               |



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|                           |                             |
|---------------------------|-----------------------------|
| 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.

52. **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.

53. **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.

54. **EQUAL OPPORTUNITY**

- A. **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 Offer submitted to the City shall be considered, nor any Purchase Order issued, or any Contract awarded by the City unless the Offeror has executed and filed with the City Purchasing Office a current Non-Discrimination Certification. 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.
- B. **Americans with Disabilities Act (ADA) Compliance:** No Contractor, or Contractor's agent, shall engage in any discriminatory practice against individuals with disabilities as defined in the ADA, including but not limited to: employment, accessibility to goods and services, reasonable accommodations, and effective communications.

55. **BUY AMERICAN ACT-SUPPLIES (Applicable to certain Federally funded requirements)**

- A. Definitions. As used in this paragraph –
- i. "Component" means an article, material, or supply incorporated directly into an end product.
  - ii. "Cost of components" means -
    - (1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
    - (2) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

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- iii. "Domestic end product" means-
  - (1) An unmanufactured end product mined or produced in the United States; or
  - (2) An end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic.
- iv. "End product" means those articles, materials, and supplies to be acquired under the contract for public use.
- v. "Foreign end product" means an end product other than a domestic end product.
- vi. "United States" means the 50 States, the District of Columbia, and outlying areas.
- B. The Buy American Act (41 U.S.C. 10a - 10d) provides a preference for domestic end products for supplies acquired for use in the United States.
- C. The City does not maintain a list of foreign articles that will be treated as domestic for this Contract; but will consider for approval foreign articles as domestic for this product if the articles are on a list approved by another Governmental Agency. The Offeror shall submit documentation with their Offer demonstrating that the article is on an approved Governmental list.
- D. The Contractor shall deliver only domestic end products except to the extent that it specified delivery of foreign end products in the provision of the Solicitation entitled "Buy American Act Certificate".





## City of Austin FSD Purchasing Office

### Certificate of Exemption

DATE: 03/14/2018

DEPT: Watershed Protection

TO: Purchasing Officer or Designee

FROM: Josie Archer

BUYER: Roger Stricklin

PHONE: (512) 974-9735

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.

Kisters North America is the owner and only source for sales of licenses, customization, and maintenance of their various software packages. The Water Quality Monitoring group in Watershed Protection has been using the Hydstra TS software suite for hydrological data management since 1998 and it is critical to the management of our stormwater monitoring program. Kisters' software has a proprietary format; we wouldn't be able to transfer over 25 years of data to another format without tremendous loss of functionality.



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).

On June 6, 2011, CTM gave approval for Watershed Protection to proceed with initiating the contract (MA-6300-NS110000037), which has now expired. We seek to replace this contract with the following 5 year initial term (with no extension options), as per the attached quote:

Year 1 (3/1/2018 - 2/28/2019): \$15,266.50  
 Year 2 (3/1/2019 - 2/28/2020): \$16,507.95  
 Year 3 (3/1/2020 - 2/28/2021): \$17,003.80  
 Year 4 (3/1/2021 - 2/28/2022): \$17,513.90  
 Year 5 (3/1/2022 - 2/28/2023): \$18,039.32  
 Total contract over 5 years = \$84,331.47

6. Because the above facts and documentation support the requested exemption, the City of Austin intends to contract with Kisters North America which will cost approximately \$ 84,331.47 (Provide estimate and/or breakdown of cost).

Recommended  
Certification

Joni Archer 3/14/2018  
 Originator Date

Approved  
Certification

William L. Personett 3/14/18  
 Department Director or designee Date

[Signature] 3/14/18  
 Assistant City Manager / General Manager Date  
 or designee (if applicable)

Purchasing Review  
(if applicable)

[Signature] 08/02/18  
 Buyer Date Manager Initials

Exemption Authorized  
(if applicable)

\_\_\_\_\_  
 Purchasing Officer or designee Date

02/26/2013



KISTERS North America.  
7777 Greenback Lane  
Suite 209  
Citrus Heights, CA 95  
USA  
Telephone: +1 (916) 723-14  
Facsimile: +1 (916) 723-16  
E-mail: KNA@kisters.ne  
Internet: www.kisters.ni

Josie Archer  
City of Austin – Watershed Protection  
PO BOX 1088  
Austin, TX 78767



February 13, 2018

**Subject: Sole Source- Kisters Environmental Data Management Software**

Dear Ms. Bliss

Kisters North America, Inc. is the only representative in North America authorized to sell, install implement and to provide support and maintenance contracts for our line of time series based products Hydstra, WISKI, BelVis and AquisNet.

The software used by The City of Austin is WISKI and Hydstra. Currently there are no other companies trained or authorized to support this product. The performance, quality, features and/or uniqueness of the software may be compromised if supported by a vendor not familiar with the system. It is this unique capability and service that makes the purchase of the support and maintenance from Kisters essential to the project.

Regards,

Julia Carroll

KISTERS North America, Inc.



Kisters North America  
7777 Greenback Lane, Suite 209  
Citrus Heights, CA 95610  
Tel 916-723-1441 Fax 916-723-1626

# Quote

| Date      | Quote No. |
|-----------|-----------|
| 2/13/2018 | 3349r     |

City of Austin  
Watershed Protection  
Attn: Accounts Payable  
PO Box 1088  
Austin, TX 78767-1088

Ship To:  
ATTN: Josephine Archer  
City of Austin  
Watershed Protection  
PO Box 1088  
Austin, TX 78767-1088 USA

| Client Contact   |
|------------------|
| Josephine Archer |

| Line No.   | Description   | Qty | Rate      | Total       |
|--|---|-----|-----------|-------------|
| 1  | Annual Support and Maintenance - Software Hydstra TS #1-7   | 1   | 10,895.00 | 10,895.00   |
| 2  | Annual Support and Maintenance - Fee for 5803 extra lines of code (3137 lines before. 5803 lines as of 02.15.2018)            | 1   | 2,901.50  | 2,901.50    |
| 3  | Annual Support and Maintenance - Software Hydstra TS #8   | 1   | 1,470.00  | 1,470.00    |
|  | Annual Support and Maintenance is for the support period March 1, 2018 to February 28, 2019 and includes a 2.2% CPI increase. |     | Year 1=   | \$15,266.50 |
| 4  | Annual Support and Maintenance - Software Hydstra TS #1-7   | 1   | 11,221.85 | 11,221.85   |
| 5  | Annual Support and Maintenance - Fee for 5803 extra lines of code (3137 lines before. 5803 lines as of 02.15.2018)            | 1   | 3,772.00  | 3,772.00    |
| 6  | Annual Support and Maintenance - Software Hydstra TS #8   | 1   | 1,514.10  | 1,514.10    |
|  | Annual Support and Maintenance is for the support period March 1, 2019 to February 28, 2020 and includes a 3% CPI increase.   |     | Year 2=   | \$16,507.95 |
| 7  | Annual Support and Maintenance - Software Hydstra TS #1-7   | 1   | 11,558.50 | 11,558.50   |
| 8  | Annual Support and Maintenance - Fee for 5803 extra lines of code (3137 lines before. 5803 lines as of 02.15.2018)            | 1   | 3,885.16  | 3,885.16    |
| 9  | Annual Support and Maintenance - Software Hydstra TS #8   | 1   | 1,560.14  | 1,560.14    |
|  | Annual Support and Maintenance is for the support period March 1, 2020 to February 28, 2021 and includes a 3% CPI increase.   |     | 0.00      | 0.00        |
|  |   |     | Year 3=   | \$17,003.80 |
| Quotes are good for 90 days.<br>All amounts are in US Dollars. |   |     | Total     |             |



Kisters North America  
7777 Greenback Lane, Suite 209  
Citrus Heights, CA 95610  
Tel 916-723-1441 Fax 916-723-1626

## Quote

| Date      | Quote No. |
|-----------|-----------|
| 2/13/2018 | 3349r     |

City of Austin  
Watershed Protection  
Attn: Accounts Payable  
PO Box 1088  
Austin, TX 78767-1088

Ship To:  
ATTN: Josephine Archer  
City of Austin  
Watershed Protection  
PO Box 1088  
Austin, TX 78767-1088 USA

| Client Contact   |
|------------------|
| Josephine Archer |

| Line No.   | Description  | Qty | Rate      | Total         |
|--|--|-----|-----------|---------------|
| 10   | Annual Support and Maintenance - Software Hydstra TS #1-7  | 1   | 11,905.25 | 11,905.25     |
| 11   | Annual Support and Maintenance - Fee for 5803 extra lines of code (3137 lines before. 5803 lines as of 02.15.2018)   | 1   | 4,001.71  | 4,001.71      |
| 12   | Annual Support and Maintenance - Software Hydstra TS #8<br>Annual Support and Maintenance is for the support period March 1, 2021 to February 28, 2022 and includes a 3% CPI increase. | 1   | 1,606.94  | 1,606.94      |
|  |  |     | Year 4=   | \$17,513.90   |
| 13   | Annual Support and Maintenance - Software Hydstra TS #1-7  | 1   | 12,262.41 | 12,262.41     |
| 14   | Annual Support and Maintenance - Fee for 5803 extra lines of code (3137 lines before. 5803 lines as of 02.15.2018)   | 1   | 4,121.76  | 4,121.76      |
| 15   | Annual Support and Maintenance - Software Hydstra TS #8<br>Annual Support and Maintenance is for the support period March 1, 2022 to February 28, 2023 and includes a 3% CPI increase. | 1   | 1,655.15  | 1,655.15      |
|  |  |     | Year 5=   | \$18,039.32   |
|  | Out-of-state sale, exempt from sales tax   |     | 0.00%     | 0.00          |
| Quotes are good for 90 days.<br>All amounts are in US Dollars. |  |     | Total     | USD 84,331.47 |



**City of Austin, Texas**  
**NON-DISCRIMINATION AND NON-RETALIATION CERTIFICATION**

**City of Austin, Texas**  
**Equal Employment/Fair Housing Office**

To: City of Austin, Texas,

I hereby certify that our firm complies with the Code of the City of Austin, Section 5-4-2 as reiterated below, and agrees:

- (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, including affirmative action relative to employment, promotion, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rate of pay or other forms of compensation, and selection for training or any other terms, conditions or privileges of employment.
- (3) To post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Equal Employment/Fair Housing Office 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, 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 City and the Equal Employment/Fair Housing Office in connection with any investigation or conciliation effort of the Equal Employment/Fair Housing Office to ensure that the purpose of the provisions against discriminatory employment practices are being carried out.
- (7) To require of all subcontractors having 15 or more employees who hold any subcontract providing for the expenditure of \$2,000 or more in connection with any contract with the City subject to the terms of this chapter that they do not engage in any discriminatory employment practice as defined in this chapter

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

**City of Austin**  
**Minimum Standard Non-Discrimination and Non-Retaliation 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.

The Contractor agrees to prohibit retaliation, discharge or otherwise discrimination against any employee or applicant for employment who has inquired about, discussed or disclosed their compensation.

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 and non-retaliation 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 THE CITY A COPY OF THE CONTRACTOR'S NON-DISCRIMINATION AND NON-RETALIATION POLICIES ON COMPANY LETTERHEAD, WHICH CONFORMS IN FORM, SCOPE, AND CONTENT TO THE CITY'S MINIMUM NON-DISCRIMINATION AND NON-RETALIATION POLICIES, AS SET FORTH HEREIN, OR THIS NON-DISCRIMINATION AND NON-RETALIATION POLICY, WHICH HAS BEEN ADOPTED BY THE CONTRACTOR FOR ALL PURPOSES WILL BE CONSIDERED THE CONTRACTOR'S NON-DISCRIMINATION AND NON-RETALIATION POLICY WITHOUT THE REQUIREMENT OF A SEPARATE SUBMITTAL.

**Sanctions:**


Our firm understands that non-compliance with Chapter 5-4 and the City's Non-Retaliation Policy 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 and the Non-Retaliation Policy.

**Term:**

The Contractor agrees that this Section 0800 Non-Discrimination and Non-Retaliation Certificate of the Contractor's separate conforming policy, which the Contractor has executed and filed with the City, 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 payment, the Contractor's Non-Discrimination and Non-Retaliation Policy will automatically renew from year-to-year for the term of the underlying Contract.

Dated this 13<sup>th</sup> day of February, 2018

CONTRACTOR  
Authorized  
Signature

Kristen North America  


Title

Accounting manager



**City of Austin, Texas**  
**NONRESIDENT BIDDER PROVISIONS**  
**SOLICITATION NO.**

- A. Bidder must answer the following questions in accordance with Vernon's Texas Statutes and Codes Annotated Government Code 2252.002, as amended:

Is the Bidder that is making and submitting this Bid a "Resident Bidder" or a "Non-resident Bidder"?

Answer: Non-Resident Bidder

- (1) Texas Resident Bidder – A Bidder whose principal place of business is in Texas and includes a Contractor whose ultimate parent company or majority owner has its principal place of business in Texas.
- (2) Nonresident Bidder – A Bidder who is not a Texas Resident Bidder.

- B. If the Bidder is a "Nonresident Bidder" does the state, in which the Nonresident Bidder's principal place of business is located, have a law requiring a Nonresident Bidder of that state to bid a certain amount or percentage under the Bid of a Resident Bidder of that state in order for the nonresident Bidder of that state to be awarded a Contract on such bid in said state.

Answer: No

Which State: California

- C. If the answer to Question B is "yes", then what amount or percentage must a Texas Resident Bidder bid under the bid price of a Resident Bidder of that state in order to be awarded a Contract on such bid in said state?

Answer: 0

Bidder's Name:

Kisters North America

Signature of Officer or  
Authorized  
Representative:



Date: 2/13/2018

Printed Name:

Anna Mirzoran

Title

Accounting manager




**City of Austin, Texas**  
**NON-SUSPENSION OR DEBARMENT CERTIFICATION**  
**SOLICITATION NO.**

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. Covered transactions include procurement contracts for goods or services equal to or in excess of \$25,000.00 and all non-procurement transactions. This certification is required for all Vendors on all City of Austin Contracts to be awarded and all contract extensions with values equal to or in excess of \$25,000.00 or more and all non-procurement transactions.

The Offeror hereby certifies that its firm and its principals are not currently suspended or debarred from bidding on any Federal, State, or City of Austin Contracts.

Contractor's Name: Kistors North America

Signature of Officer  
or Authorized  
Representative:  Date: 2/13/2018

Printed Name: Anna Mirzorian

Title: Accounting Manager