



Amendment No. 2
to
Contract No. MA 1100 NS200000007
for
SmarteBuilding Software Subscription and Support Services
between
High Performance SmarteBuilding, LLC
dba, PicoTera Systems
and the
City of Austin, Texas

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

| | From | To |
|-------------|--|--|
| Vendor Name | High Performance SmarteBuilding, LLC dba PicoTera Systems | PicoTera Systems, LLC dba, PicoTera Systems |
| Vendor Code | VS0000030362 | V00000944422 |
| FEIN | [REDACTED] | [REDACTED] |

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

BY THE SIGNATURES affixed below, this Amendment is hereby incorporated into and made a part of the Contract.

Vendor Representative/Title (Print Name): Michael Cation
Signature/Date: Michael Cation 1/19/2023

City of Austin Representative/Title (Print Name): Matthew Duree
Signature/Date: _____

Digitally signed by
Matthew Duree
Date: 2023.01.19
15:24:40 -06'00'



Amendment No. 1
to
Contract No. NS200000007
for
SmarteBuilding Software Subscription and Support Services
between
High Performance SmarteBuilding, LLC dba SmarteBuilding
and the
City of Austin, Texas

1.0 The City hereby amends the above referenced contract to add the Salesforce Backup feature for 3 years at an annual amount of \$2,457.60 for a total not to exceed amount of \$7,372.80 as per attached Quote No. 20210201-001 Exhibit A, dated February 1, 2021. The effective date for this feature is 01 February, 2021 to 31 January, 2024.

2.0 The total Contract amount is recapped below:

| Term | Contract Amount for the Item | Total Contract Amount |
|---|------------------------------|-----------------------|
| Initial Term: 02/28/2020-02/27/2025 | \$1,995,000.00 | \$1,995,000.00 |
| Amendment No. 1: Add Salesforce Backup Feature (Quote 20210201-001) 02/08/2021 | \$7,372.80 | \$2,002,372.80 |

3.0 MBE/WBE goals were not established for this contract.

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

5.0 ALL OTHER TERMS AND CONDITIONS REMAIN THE SAME.

BY THE SIGNATURE(S) affixed below, this Amendment is hereby incorporated and made a part of the above referenced contract.

Signature & Date:

 2/22/2021

Printed Name: Michael K Cation
Authorized Representative

Michael Cation
SmarteBuilding Software Subscription & Support
Services
109 Las Lomas Drive,
Austin, TX 78746
Michael.Cation@SmarteBuilding.com

Signature & Date:

Paula Barriffe Digitally signed by Paula Barriffe
Date: 2021.02.22 15:55 01 06:00

Paula Barriffe,
Procurement Specialist III
City of Austin
Purchasing Office

Signature: Sai Xoomsai Purcell Digitally signed by
Sai Xoomsai Purcell
Date: 2021.02.23
07:24:57 -06'00'

Sai Purcell
Interim Procurement Manager
City of Austin
Purchasing Office

Date: _____

**CONTRACT BETWEEN THE CITY OF AUSTIN
AND
HIGH PERFORMANCE SMARTEBUILDING, LLC DBA SmarteBuilding
For
SMARTEBUILDING SOFTWARE SUBSCRIPTION AND SUPPORT SERVICES
MA 1100 NS200000007**

This Contract is made by and between the City of Austin ("City"), a home-rule municipality incorporated by the State of Texas, and High Performance Smartebuilding, LLC dba/ SmarteBuilding ("Contractor"), having offices at 109 Las Lomas Drive, Austin, TX 78746.

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 Michael Cation, Phone: (512) 565-1419, Email Address: Michael.Cation@SmarteBuilding.com. The City's Contract Manager for the engagement shall be Liz Jambor, Phone: (512) 322-6353, Email Address: Elizabeth.Jambor@austinenenergy.com. 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 in the Scope of Work 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.

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 amount not-to-exceed \$1,995,000 including all fees and expenses.

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 mailed to the below address:

| | |
|-----------------------|-------------------------|
| | City of Austin |
| Department | Austin Energy |
| Attn: | Liz Jambor |
| Address | 811 Barton Springs Road |
| City, State, Zip Code | Austin, Texas 78704 |

3.2.2 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.

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

3.2.4 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 will be in effect for an initial term of 60 months.

4.1.1 Upon expiration of the initial term or any period of extension, the Contractor agrees to hold over under the terms and conditions of this Contract for such a period of time as is reasonably necessary for the City to re-solicit and/or complete the deliverables due under this Contract (not 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 material default by the Contractor, the City shall have the right to terminate the Contract for cause, by written notice effective thirty (30) business days after the date of such notice, unless the Contractor, within such thirty (30) 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. 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, reasonable attorneys' fees, court costs, and prejudgment and post-judgment interest at the maximum lawful rate. If the termination of this Contract results from a breach of any material obligation of Contractor hereunder, no further payment shall be due by the City from the effective date of termination. Upon termination of this Contract by the City due to Contractor's breach, provided the City has paid Contractor all license fees due and owing for its then current use of the Software, the City shall have the right to continue to use the Software. Finally, in the event of a default by the Contractor, the City may remove the Contractor from the City's vendor list for three (3) years and any Offer submitted by the Contractor may be disqualified for up to three (3) years. All rights and remedies under the Contract are cumulative and are not exclusive of any other right or remedy provided by law.

Contractor actions that may be considered a material default include, but are not limited to:

4.4.1 Withdrawal or announcing an intention to withdraw from the marketplace for work of the type called for under the Contract. Contractor shall notify Purchaser in writing within five (5) calendar days of its intention to withdraw from the marketplace.

4.4.2 Refusing or neglecting to supply sufficient engineers, programmers, and other skilled personnel; acceptable materials of specified quantity; or equipment necessary to perform the Work hereunder.

4.4.3 Failing in any respect to prosecute any portion of the Work hereunder with promptness, diligence, or in accordance with all of the provisions set forth herein. Contractor shall notify Purchaser in writing within five (5) calendar days of its failure to prosecute any portion of the Work.

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

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 \$1,000,000 for coverages A (Bodily Injury and Property Damage) and B (Personal and Advertising Injuries). The policy shall contain the following provisions and endorsements.

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

5.1.2.1.2 Contractor/Subcontracted Work.

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

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

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

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

5.1.2.2 **Business Automobile Liability Insurance.** The Contractor shall provide coverage for all owned, non-owned and hired vehicles with a minimum combined single limit of \$1,000,000 per occurrence for bodily injury and property damage. The policy shall contain the following endorsements:

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

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

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

5.1.2.3 **Worker's Compensation and Employers' Liability Insurance.** Coverage shall be consistent with statutory benefits outlined in the Texas Worker's Compensation Act (Section 401). The minimum policy limits for Employer's Liability are \$1,000,000 bodily injury each accident, \$1,000,000 bodily injury by disease policy limit and \$1,000,000 bodily injury by disease each employee. The policy shall contain the following provisions and endorsements:

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

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

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

5.1.2.4 **Professional Liability Insurance.** The Contractor shall provide coverage, at a minimum limit of \$1,000,000 per claim, to pay on behalf of the assured all sums which the assured shall become legally obligated to pay as damages by reason of any negligent act, error, or omission arising out of the performance of professional services under this Agreement.

If coverage is written on a claims-made basis, the retroactive date shall be prior to or coincident with the date of the Contract and the certificate of insurance shall state that the coverage is claims-made and indicate the retroactive date. This coverage shall be continuous and will be provided for 24 months following the completion of the contract.

5.1.2.5 **Cyber Liability Insurance.** coverage of not less than \$1,000,000 each claim and annual aggregate providing coverage for claims arising from (1) breach of network security, (2) alteration, corruption, destruction or deletion of information stored or processed on a computer system, (3) invasion of privacy, including identity theft and unauthorized transmission or publication of personal information, (4) unauthorized access and use of computer systems, including hackers (5) the transmission of malicious code, (6) website content, including claims of libel, slander, trade libel, defamation, infringement of copyright, trademark and trade dress and invasion of privacy and (7) Contractors acts, errors and omissions in delivering or failing to deliver its professional services.

5.1.2.6 **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 **Interested Parties Disclosure.** As a condition to entering the Contract, the Business Entity constituting the Offeror must provide the following disclosure of Interested Parties to the City prior to the award of a contract with the City on Form 1295 "Certificate of Interested Parties" as prescribed by the Texas Ethics Commission for any contract award requiring council authorization. The Certificate of Interested Parties Form must be completed on the Texas Ethics Commission website, printed, and signed by the authorized agent of the Business Entity with acknowledgment that disclosure is made under oath and under penalty of perjury. The City will submit the "Certificate of Interested Parties" to the Texas Ethics Commission within 30 days of receipt from the Offeror. Link to Texas Ethics Commission Form 1295 process and procedures below:

<https://www.ethics.state.tx.us/File/>

5.4 **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.

5.5 **Delays.**

5.5.1 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.

5.5.2 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.

5.6 **Ownership And Use Of Deliverables.** The City shall own all rights, titles, and interests throughout the world in and to the deliverables.

5.6.1 **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.

5.6.2 **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.

5.6.3 **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.

5.7 **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.

5.7.1 **Documentation Reproduction.** City reserves the right, subject to any software subscription restrictions, to reproduce any and all documentation received from Contractor under the Agreement, for Purchaser's use in connection with the work, notwithstanding any notice to the contrary appearing on the documentation.

5.8 **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, the

terms, conditions, and covenants of the Contract, and all applicable Federal, State and local laws, rules or regulations.

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

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

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

SECTION 7. MISCELLANEOUS

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

7.2 Workforce.

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

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

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

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

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

7.3 Workforce Security Clearance and Identification (ID):

7.3.1 Contractors are required to obtain a certified criminal background report with fingerprinting (referred to as the "report") for all persons performing on the contract, including all Contractor, Subcontractor, and Supplier personnel (for convenience referred to as "Contractor's personnel").

7.3.2 The report may be obtained by reporting to one of the below governmental entities, submitting to fingerprinting and requesting the report [requestors may anticipate a two-week delay for State reports and up to a four to six-week delay for receipt of a Federal report].

7.3.2.1 Texas Department of Public Safety for any person currently residing in the State of Texas and having a valid Texas driver's license or photo ID card;

7.3.2.2 The appropriate governmental agency from either the U.S. state or foreign nation in which the person resides and holds either a valid U.S. state-issued or foreign national driver's license or photo ID card; or

7.3.2.3 A Federal Agency. A current Federal security clearance obtained from and certified by a Federal agency may be substituted.

7.3.3 Contractor shall obtain the reports at least 30 days prior to any onsite work commencement. Contractor also shall attach to each report the project name, Contractor's personnel name(s), current address(es), and a copy of the U.S. state-issued or foreign national driver's license or photo ID card.

7.3.4 Contractor shall provide the City a Certified Criminal Background Report affirming that Contractor has conducted required security screening of Contractor's personnel to determine those appropriate for execution of the work and for presence on the City's property. A list of all Contractor Personnel requiring access to the City's site shall be attached to the affidavit.

7.3.5 Upon receipt by the City of Contractor's affidavit described in (D) above and the list of the Contractor's personnel, the City will provide each of Contractor's personnel a contractor ID badge that is required for access to City property that shall be worn at all times by Contractor's personnel during the execution of the work.

7.3.6 The City reserves the right to deny an ID badge to any Contractor personnel for reasonable cause, including failure of a Criminal History background check. The City will notify the Contractor of any such denial no more than twenty (20) days after receipt of the Contractor's reports. Where denial of access by a particular person may cause the Contractor to be unable to perform any portion of the work of the contract, the Contractor shall so notify the City's Contract Manager, in writing, within ten (10) calendar days of the receipt of notification of denial.

7.3.7 Contractor's personnel will be required to wear the ID badge at all times while on the work site. Failure to wear or produce the ID badge may be cause for removal of an individual from the work site, without regard to Contractor's schedule. Lost ID badges shall be reported to the City's Contract Manager. Contractor shall reimburse the City for all costs incurred in providing additional ID badges to Contractor Personnel.

7.3.8 ID badges to enter and/or work on the City property may be revoked by the City at any time. ID badges must be returned to the City at the time of project completion and acceptance or upon removal of an individual from the work site.

7.3.9 Contractor is not required to obtain reports for delivery personnel, including but not limited to FedEx, UPS, Roadway, or other materials delivery persons, however all delivery personnel must present company/employer-issued photo ID and be accompanied by at least one of Contractor's personnel at all times while at the work site.

7.3.10 The Contractor shall retain the reports and make them available for audit by the City during regular business hours (reference paragraph 17 in Section 0300, entitled Right to Audit).

7.4 **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.

7.5 Data Handling Controls: Contractor hereby agrees to the “Data Handling Controls” attached as Exhibit C to this Contract, which constitute the Contractor’s minimum required data security program to safeguard the integrity of City Data received by Contractor.

7.6 Fair and Accurate Credit Transactions Act of 2003(FACTA)

The City requires Offerors submitting Offers on any Solicitation which may utilize or access City Customer Account Information, directly or indirectly, to provide a signed affidavit certifying that the Offeror has reviewed the provisions of the Fair and Accurate Credit Transactions Act (FACTA) (16 CFR 681) and agrees to exercise due diligence, in accordance with reasonable policies and procedures, to detect, deter and prevent the risk of identity theft (See Exhibit D, FACTA Affidavit). By signing the Affidavit, the Offeror affirms to the City that it maintains its own identity theft prevention program. The City may only award a Contract, to which this provision applies, once the signed and notarized Affidavit is received.

7.7 Network Access:

Contractor shall execute Austin Energy’s Network Connection Agreement, attached as Exhibit E of the Contract. Contractor shall submit a Remote Access Request Form for each Contractor or Subcontractor employee requiring access to the Austin Energy Network.

7.8 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:

7.8.1 disposal of major assets;

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

7.8.3 any significant termination or addition of provider contracts;

7.8.4 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;

7.8.5 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;

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

7.8.7 known or anticipated sale, merger, or acquisition;

7.8.8 known, planned or anticipated stock sales;

7.8.9 any litigation against the Contractor; or

7.8.10 significant change in market share or product focus.

7.9 Audits and Records.

7.9.1 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.

7.9.2 Records Retention:

7.9.2.1 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.

7.9.2.2 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.

7.9.3 The Contractor shall include sections 7.5.1 and 7.5.2 above in all subcontractor agreements entered into in connection with this Contract.

7.10 **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.

7.11 **Indemnity.**

7.11.1 Definitions:

7.11.1.1 "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:

7.11.1.1.1 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;

7.11.1.1.2 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),

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

7.11.2 **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.**

7.12 **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 2nd Street, 4th Floor, Austin, Texas 78701, and mail delivery shall be to P.O. Box 1088, Austin, Texas 78767.

7.13 **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: Contract Administrator

P O Box 1088

Austin, TX 78767

To the Contractor:

High Performance SmarteBuilding, LLC dba
SmarteBuilding

ATTN: Michael Cation, Contract Manager

109 Las Lomas Drive

Austin, TX 78746

7.14 Confidentiality. In order to provide the Deliverables under this Contract, Contractor will require access to the City's Confidential Information. Contractor acknowledges and agrees that the Confidential Information is the valuable property of the City and contains sensitive information regarding the City's critical electric infrastructure, financial information, competitive market data, and any unauthorized use, disclosure, dissemination, or other release of the Confidential Information will substantially injure the City and the security of its electric system.

7.14.1 "Confidential Information" includes, but is not limited to, all information regarding the operation, location, and security of the City's electric system, infrastructure, and IT systems, and all documents, reports, studies, memoranda, analyses, summaries, trade secrets, project descriptions, computer programs and models, computer model inputs and outputs, commercial data, customer information, financial data and projections, pricing proposals, and cost analyses, whether in tangible form or orally or visually conveyed to, or acquired by, Contractor in the course of its work under this Contract. Confidential Information may be in any medium and may be written or oral.

7.14.2 Contractor agrees: (i) not to use Confidential Information for any reason other than for the purpose of providing or receiving the Deliverables, (ii) not to disclose Confidential Information to any third party other than to its employees who have a need to know the Confidential Information for furtherance of the providing the Deliverables, (iii) to promptly notify City of any request for Confidential Information to be disclosed under any law or order of any court or other governmental authority with proper jurisdiction, so as to permit City reasonable time to seek an appropriate protective order, and (iv) to use measures to protect the Confidential Information that are no less stringent than 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.

7.14.3 All Confidential Information and derivations thereof shall remain the sole and exclusive property of City, and no license or other right to the Confidential Information or intellectual property is granted or implied hereby. Upon the written request of City, Contractor shall promptly return to City all tangible items of Confidential Information furnished by City and all copies thereof or certify in writing that all Confidential Information, including all copies, has been destroyed.

7.14.4 No expiration or termination of this contract shall affect either party's rights or obligations with respect to Confidential Information.

7.14.5 The parties acknowledge and agree that any breach or threatened breach of this Contract could cause harm for which money damages may not provide an adequate remedy. The parties agree that in the event of such a breach or threatened breach of this Contract, in addition to any other available remedies, City may seek temporary and permanent injunctive relief restraining the Contractor from disclosing or using, in whole or in part, any Confidential Information.

7.15 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.

7.16 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.

7.17 **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.

7.18 **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.

7.19 **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.

7.20 **Assignment-Delegation.** The Contract shall be binding upon and ensure 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.

7.21 **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.

7.22 **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.

7.23 **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.

7.24 **Dispute Resolution.**

7.24.1 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.

7.24.2 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.

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

7.25.1 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.

7.25.2 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.**

7.25.3 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.

7.26 Subcontractors.

7.26.1 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.

7.26.2 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:

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

7.26.2.2 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;

7.26.2.3 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;

7.26.2.4 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

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

7.26.3 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.

7.26.4 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.

7.27 **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.

7.28 **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.

7.29 **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.

7.30 **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.

7.31 **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.

7.32 **Incorporation of Documents.** **Section 0100, Standard Purchase Definitions**, is hereby incorporated into this Contract by reference, with the same force and effect as if they were incorporated in full text. The full text versions of this Section are available, on the Internet at the following online address:

https://assets.austintexas.gov/purchase/downloads/standard_purchase_definitions.pdf

7.33 **PROHIBITION OF BOYCOTT ISRAEL VERIFICATION**

Pursuant to Texas Government Code §2270.002, the City is prohibited from contracting with any “company” for goods or services unless the following verification is included in this **Contract**.

- A. For the purposes of this Section only, the terms “company” and “boycott Israel” have the meaning assigned by Texas Government Code §2270.001.
- B. If the **Principal Artist** qualifies as a “company”, then the **Principal Artist** verifies that he:
 - i. does not “boycott Israel”; and
 - ii. will not “boycott Israel” during the term of this **Contract**.
- C. The **Principal Artist’s** obligations under this Section, if any exist, will automatically cease or be reduced to the extent that the requirements of Texas Government Code Chapter 2270 are subsequently repealed, reduced, or declared unenforceable or invalid in whole or in part by any court or tribunal of competent jurisdiction or by the Texas Attorney General, without any further impact on the validity or continuity of this Contract.

7.34 **Order of Precedence.** Any inconsistency or conflict in the Contract documents shall be resolved by giving precedence in the following order:

7.34.1 This Contract

7.34.2 Scope of Work

7.34.3 High Performance SmarteBuilding, LLC dba SmarteBuilding’s Offer dated September 24, 2019, incorporated herein and attached as Exhibit A hereto.

7.34.4 Non-Discrimination Certification, incorporated herein and attached as Exhibit B hereto.

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

HIGH PERFORMANCE SMARETBUILDING, LLC
dba SMARTEBUILDING

By: Michael Cation
Signature

Name: Michael Cation
Printed Name

Title: CEO

Date: Nov. 21, 2019

CITY OF AUSTIN

By: Paula Barriffe
Signature

Name: Paula Barriffe
Printed Name

Title: Procurement Specialist III

Date: 02/28/2020

CITY OF AUSTIN

By: Sai Purcell
Signature

Name: Sai Purcell
Printed Name

Title: Procurement Supervisor

Date: 2/28/2020

List of Exhibits

| | |
|-----------|---|
| Exhibit A | High Performance SmarteBuilding, LLC dba SmarteBuilding's Offer date September 24, 2019 |
| Exhibit B | Non-Discrimination Certification, Section 0800 |
| Exhibit C | Austin Energy Data Handling Controls |
| Exhibit D | FACTA Affidavit of Compliance |
| Exhibit E | Austin Energy Consultant Remote Access Request |

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1. AUSTIN ENERGY WEB APPLICATION SUBSCRIPTION and SUPPORT SERVICES

1.1 Objective

The contract will provide consistent data capabilities and analytics to improve the ability to manage and monitor resource productivity and increase energy efficiency and conservation measures as part of peak demand utility usage. This contract will address consumer driven utility usage activity and reduce peak-time demand, assisting in reaching Austin Energy's 2025 goals for energy conservation.

The contractor will provide software subscription and application services for a customer meter data reporting methodology on utility usage and the display of near real-time data meter usage activity to customers allowing Austin Energy to distribute meter usage activity reports to their customers via a social network multi-use solution.

1.2 Information Management System

The Information Management System software subscription service is required to calculate and analyze utility usage data from the following Austin Energy Program Data Sets:

- 1.2.1 ECAD Portfolio Manager
- 1.2.2 Key Accounts Portfolio Manager
- 1.2.3 Residential Utility Rate Awareness
- 1.2.4 Commercial Utility Rate Awareness
- 1.2.5 Quality Assurances for Utility Data:
- 1.2.6 Targeted Utility Efficiency Manager
- 1.2.7 Web Application Storage Computing

1.3 Subscription Services and Data Management Application Requirements

The Contractor shall provide a cloud-based Information Management System to include subscription services and data management application.

Data Management shall include, but not limited to:

- Collection of structure and unstructured data,
- Data manipulation and retrieval; manipulation of relational databases using arithmetical and logical operations,
- Data situation analysis.

The application will provide Austin Energy the "go to" for customer utility usage along with a rate awareness and public messaging component aimed at getting customers throughout the service area to engage in energy conservation consumption activity through the use of the software application. The goal of data management is to ensure a high level of data quality.

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data integrity, data authentication, and data accessibility for business intelligence and big data analytics applications.

The expected results of the application performances are described below:

- 1.3.1 ECAD Portfolio Manager: the application shall be required to automatically integrate and populate data sets and have the ability to aggregate and format energy usage data for baseline and compliance reporting for both internal and external customers and deliver information on a web-enabled device.
- 1.3.2 Key Accounts Portfolio Manager: the application(s) shall be required to automatically integrate and populate data sets and have the ability to calculate energy usage data and forecasting billing estimates for budgeting purposes for both internal and external customers and deliver information on a web-enabled device.
- 1.3.3 Residential Utility Rate Awareness: the application(s) shall be required to automatically integrate and populate data sets and have the ability to calculate residential customers with daily energy usage, historical comparisons, and the ability to create alerts for better energy use management at the consumer level and deliver information on a web-enabled device.
- 1.3.4 Commercial Utility Rate Awareness: the application(s) shall be required to automatically integrate and populate data sets and have the ability to calculate commercial customers with daily energy usage, historical comparisons, and the ability to create alerts for better energy use and peak demand management and deliver information on a web-enabled device.
- 1.3.5 Quality Assurance for Utility Data: the application(s) shall extract data from legacy systems and other resources; cleaning, scrubbing and preparing data for decision support; maintaining data in appropriate data stores; accessing and analyzing data using a variety of end-user tools; and analyze data for significant energy efficiency cost relationships for the collection and redistribution of data through all modules.
- 1.3.6 Targeted Utility Efficiency Manager: the modified application(s) shall be required to automatically integrate and populate data sets and have the ability to calculate and provide analytical solutions for internal and external customers with targeted measures, detailed information on energy usage, variances related to building inefficiencies, and projected savings resulting from predicted energy efficiency measures and deliver information on a web-enabled device.
- 1.3.7 Web Application Storage Computing Services: the storage computing module shall host up to 3 Terabytes of data as a web analysis computing environment and third party licenses necessary to support access to large-scale and scalable computing capabilities dedicated to the 6 modules identified in Section 1.3.1 through 1.3.6 above.

1.4 Information Management System Site Goals

- 1.4.1 Enhance Utility Rate Awareness/energy conservation and Austin Energy's public image.

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- 1.4.2 Increase public awareness about individual energy consumption activities at a particular address or within a particular space.
- 1.4.3 Inform Austin Energy customers about their energy consumption activities and steps to reduce consumption if so desired.
- 1.4.4 Create opportunities for the public to interact with their energy consumption activities and reduce billing prior to moving to an advance tier energy rate.
- 1.4.5 Reflect authority, accuracy, freshness and currency/timeliness in providing meter date information.
- 1.5 Modified Information Management System Functionality
 - 1.5.1 Cloud-based modified application(s) shall include but not limited to content organization, presentation, adoption of common software, web publishing tools, use of hosted server, micro sites, plug-ins, addressing schema, file-naming conventions, establishing consistency and appropriate page lengths.
 - 1.5.2 Cloud-based modified application(s) deployment shall promote and serve as a primary information delivery mechanism for Austin Energy customer engagement and program promotion with and without Austin Energy legacy systems. Content features on the application shall support the public relations and Utility advertising messages with the approval of Austin Energy.
 - 1.5.3 Cloud-based modified application(s) shall maintain data storage capacity that is optimized for distribution and analysis to Austin Energy Customers. Application/Module (Tool) shall collect and store integrated sets of historical data from multiple operational systems and feed them to one or more data applications and system software platform. Tool shall provide end-user access to support social network views of energy usage data.
 - 1.5.4 Cloud-based modified application(s) shall extract data from Austin Energy's legacy systems and other resources; cleaning, scrubbing and preparing data for decision support; maintaining data in appropriate data stores; accessing and analyzing data using a variety of end-user tools; and analyze data for significant energy efficiency cost relationships.
 - 1.5.5 Cloud-based modified application(s) shall function as a sub-set of the software platform system subscription and applications with tools that facilitate multidimensional analysis. Tool(s) will incorporate data acquisition, data access, data manipulation, data validation or any combination thereof.
 - 1.5.6 Cloud-based modified application shall use a method by which multi-dimensional analysis occurs. Tool(s) shall have the ability to manipulate information by a variety of relevant categories or "dimensions" to facilitate analysis and understanding of the underlying data. It is also sometimes referred to as "drilling-down," "drilling-across" and "slicing and dicing".
 - 1.5.7 Cloud-based Subscription based software platform and application modification shall be mutually agreed in writing prior to any modifications/changes, enhancements,

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conversions and upgrades based on business requirements of Austin Energy. Software Platform Subscription Service and application(s) modification shall include 6 stand-alone modules and subsystems that will be developed and maintained annually through SmarteBuilding Inc subscription service.

1.6 Web Application Storage and Support

The Contractor shall provide web Application scalability and transaction speed environments that are fully automated and near instantaneous, allowing for smooth operation of service. The Application shall have the ability to add or remove data resources based upon performance metrics and load thresholds of modules. The web hosting services shall allow Austin Energy to post web pages and provides technologies and services needed for website to be viewed on the Internet.

- 1.6.1 Web server front-ends shall be maintained 24 hours, 365 days and accessible via web subscription-based services and from web browsers at Austin Energy.
- 1.6.2 User Accounts and permissions shall be maintained and managed so that only authorized Austin Energy employees, or designated contractors or customers, will have access to only the data they are authorized to access.
- 1.6.3 A redundant service module shall be utilized as part of the provided service so that data is duplicated on separate storage media for redundancy and back-up.

1.7 Maintenance and Technical Support

Information Management System Subscription Service shall provide system subscription software maintenance and technical support services ("Support") as described below:

Contractor shall support the technical maintenance and all related modifications made to software platform subscription and add program features or functions not originally within the software application and that are provided as part of the annual subscription service for applicable fees for such services. See Table 1 - for Support Services to be provided under the contract.

- 1.7.1 Resolve issues within subscription system and sub-set modified platform subscription and applications and system tool validation for Austin Energy as it relates to application delivery to the customer.
- 1.7.2 Resolve problems and research questions which cannot be answered through Product reference as it relates to application delivery to the customer.
- 1.7.3 Resolve ongoing documentation, support and technical knowledge base and other support materials. Inform Austin Energy of new releases and service packs and advise on installation process needed for the term of the Contract.
- 1.7.4 Resolve Austin Energy system connectivity issues, in conjunction with Austin Energy resources as it relates to software performance for application delivery.
- 1.7.5 Responsible for interpreting wireless traces and other diagnostic information captured for Austin Energy on system tool.

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- 1.7.6 Responsible for detecting defect and provide User Support with the following software performance requirements: (i) to collect and record details regarding the reported problem; (ii) to verify and reproduce the problem; (iii) to resolve the problem if possible by reference to Product Documentation and User Support training and materials; See Table 2 – for Defect Services.

2. DELIVERABLES

- 2.1 The Contractor shall provide a schedule of services for deployment of system and sub-system modifications and maintenance in order to assure an effective program delivery for Austin Energy Customers.
- 2.2 Contractor shall submit a Project Management Plan for the completion of all required tasks and deliverables under this contract to be submitted 30 days after contract award.
- 2.2.1 Marketing objectives, task/activity, project schedule for programs referenced in Section 1.2 are to be included as part of the Project Management Plan and coordinated with Austin Energy after contract award.

This includes two main areas of emphasis: 1) Delivery of 6 turnkey cloud-based modules with modifications that calculate customer energy usage data along with tier rate awareness for Austin Energy customers, and 2) Deployment and maintenance of 6 turnkey cloud-based modules as referenced in Section 2 for Austin Energy, including training on software application use instructions for staff.

3. PROJECT MANAGEMENT PLAN

- 3.1 Contractor shall provide a detailed outline for supporting tasks and deliverables as part of the project management plan.
- 3.2 Contractor shall provide the Project Management Plan to be reviewed and approved by Austin Energy within 10 working days of contract award. The Project Management Plan shall serve as an interim deliverable and shall progressively evolve to complete the implementation of module modifications for social network performance delivery.
- 3.3 Contractor shall develop a separate Project Management Plan for each modification based on the functional specifications in Section 1 and shall be responsible for the delivery of a group of applications that perform tasks that can be tailored to a specific users program activity and ensures the adequacy, effectiveness, security and overall functionality of data activity. The Project Management Plan shall contain a listing of the nature and timing of tasks.

4. ACCEPTANCE OF WORK

- 4.1 The Software Application modifications shall be deemed accepted by Austin Energy once they are installed on the Austin Energy App web server(s) and are accessible by Austin Energy customers and by Austin Energy employees via the Austin Energy App web server(s). Austin Energy will notify Contractor upon discovery of any specification non-conformities detected in testing or in use. Contractor shall correct any such specification non-conformities

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without further charge to Austin Energy within a reasonable time of such notice or an agreed upon time designated by the Project Management Manager

- 4.2 Austin Energy will notify Contractor upon discovery of any specification non-conformities disclosed by such in testing or and use. Contractor shall correct any such specification non-conformities without further charge to Austin Energy within timeline as mutually agreed by both parties.

5. CONTRACTOR RESPONSIBILITIES

The contractor shall:

- 5.1 Comply with standard industry practices which align with the Software Engineering Institute's Capability Maturity Model – SEI-CMM;
- 5.2 Develop and document procedures to meet program specifications as contracted;
- 5.3 Consult with Austin Energy to resolve all discrepancies and ambiguities prior to proceeding with work;
- 5.4 Meet scheduled project goals by providing formal written and graphical progress submittals at 10%, 30%, 70% & 90%. Milestone period is based on 365 days. Estimate milestone submittals are 36 days, 109 days, 255 days, 328 days; reporting period shall start after contract award;
- 5.5 Maintain source material security;
- 5.6 Provide all labor, materials, equipment, tools and other incidentals necessary to perform the work;
- 5.7 Supply all source code for all interfaces, extracts and custom tools to Austin Energy;
- 5.8 Provide access to Contractor's Cloud-base release of all data formats for Austin Energy staff use;
- 5.9 Obtain a written approval from Austin Energy Project Manager prior to using Austin Energy's data sets.

6. AUSTIN ENERGY RESPONSIBILITIES

Austin Energy will:

- 6.1 Supply of all source data and materials as specified in this document;
- 6.2 Provide access to third party software for interface if applicable;
- 6.3 Consult with Contractor to resolve all discrepancies and ambiguities prior to proceeding with work;
- 6.4 Quality control inspection and data acceptance and/or rejection of deliverables;

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- 6.5 Review and provide acceptance of all vendor deliverables;
- 6.6 Provide necessary internal resources and subject matter experts as needed to complete modifications and implementations successfully.

7. AUSTIN ENERGY TECHNOLOGY ENVIRONMENT

The Contractor shall provide the City with a software subscription that is secure from both internal and external threats. The application shall be secured, and data shall be protected to mitigate risk of loss or accidental / malicious damage. The system shall be resilient to avoid unplanned down-time, which can have an immediate negative impact on the City.

8. DATA ASSURANCE

- 8.1 Ownership: Austin Energy owns all Austin Energy data residing within the cloud environment. This includes rights to data related to developed data for corporate use and held by the Contractor.
- 8.2 Access to Data: Throughout the term of the contract, the Contractor shall provide Austin Energy access and process on retrieving its data stored in the cloud. Austin Energy reserve the right to retrieve all data resulting from scope of work of this contract, regardless of who created the content and for what purpose at any time including an emergency and time-sensitive situation.
- 8.3 Disposition of Data upon Request: The Contractor shall provide Austin Energy with a mechanism to destroy all records as per State of Texas Record Retention Schedule and shall not have additional copies of the records residing in other locations.
- 8.4 Disposition of Data upon Contract Termination: Austin Energy will provide instructions on how data will be returned or retrieved in the event of contract termination. Timeframes for such provisions will occur at the time of request and Contractor shall provide data in common format for data return/retrieval, such as XML. Austin Energy has the right to conduct an audit to ensure the data has been destroyed as per the contract terms.
- 8.5 Data Breaches: In the event of data breach or unauthorized access to the Contractor's system, the Contractor shall immediately provide notify in writing to Austin Energy. At minimum, the written notification shall include specified timeline, details about the breach such as its nature, the data compromised, the involved parties, mitigation efforts, and corrective actions to be taken by the Contractor. The contract specifies indemnification in the event of the breach, as the data breach relates to specific legal, regulatory, and operating agreement provisions. The Contractor shall be responsible for all damages, fines, etc. including litigation costs related to an unauthorized breach.
- 8.6 Data Storage Location: The physical storage of Austin Energy data is to remain within the United States.

9. USE OF SUBSCRIPTION SERVICES

- 9.1 Definitions applicable to this subscription

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- 9.2 Subscription software platforms and applications: refers singularly and/or collectively to *patented copyrighted software platform subscription service and application(s)* and data management solutions provided by the Contractor (including 3rd party software) and shall include any improvements modifications or developments provided by the Contractor under the terms of this Contract.
- 9.3 Host: means any computer that has full two-way access to other computers on the Internet. A host has a specific "local or host number" that, together with the network number, forms its unique IP address. Point-to-Point Protocol is used to access your unique IP address for the duration of any connection you make to the Internet and your system as the host for the contract period. In this context serve as the "host" for the modified modules under this Contract.
- 9.4 Object Code: means the compiled form of the subscription software.
- 9.5 Source Code: means textual source form of the subscription software.
- 9.6 Software Documentation: means any material or documentation relating to the data solutions developed and implemented for database management of energy usage under the terms of this Contract.
- 9.7 Data: means a collection of programs or information that is organized by fields, records, and files in such a way that a computer application can quickly select desired pieces of data for analysis.
- 9.8 A Defect: Is defined as a failure to perform any function specified in the current published documentation of the subscription software. A limitation in performance shall not be construed as a Defect.
- 9.9 Information Management Systems: a *patented copyrighted software platform subscription service and application(s)*.
- 9.9.1 Right to Use: In consideration of payment for the use of subscription service by Austin Energy to the Contractor as provided in this Contract, Contractor grants to Austin Energy, a non-exclusive right, to use of the *patented copyrighted software platform subscription services and application(s)* and solution documentation for the contract period subject to the terms and conditions in this Contract. The subscription is for use throughout Austin Energy organization.
- 9.9.2 Title: Title, copyright and other proprietary rights to the *patented copyrighted software platform subscription and application(s)*, manuals and all parts and copies thereof shall remain vested with the Contractor. Ownership applies to AE on all data raw or developed in the use of software platform subscription service and application(s) shall remain vested with Austin Energy.
- 9.9.3 Number of Subscriptions: Contractor under this Agreement authorizes the Austin Energy to use *patented copyrighted software platform subscription service and application(s)* for six modules, subject to the obligations of confidence set forth in this Contract, and to permit others to use within the Austin Energy's organization.
- 9.9.4 No Reverse Engineering: The right to reverse engineer or disassemble the *patented*

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copyrighted software platform subscription service and application(s) is specifically excluded, except to the extent that such exclusion is not permitted under the law of the country of authorized use. Austin Energy will *do* nothing to disenable any security device.

- 9.9.5 Limited Right to Copy: Austin Energy may copy the *patented copyrighted software platform subscription service and application(s)* for the purpose of making back-up copies of the subscription supplied under this Contract. *Software Platform Subscription Service and Application(s)* may not be copied for the purpose of error correction.
- 9.9.6 Third Party Access: Austin Energy may grant access to the *patented copyrighted software platform subscription services and application(s)* to consultants and contractors acting on behalf of Austin Energy who agree to substantially similar obligations and conditions of confidence as those binding Austin Energy under this Contract.
- 9.9.7 Enhancements: Means software modifications necessary to allow for the implementation of the software platform subscription service and application(s) to meet the business requirements of Austin Energy under this Contract.
- 9.9.8 Derivative Works: Contractor agrees to create derivative works based on the *patented copyrighted software platform subscriptions services and application(s)* with Austin Energy data for the authorized purpose of data analysis of energy consumption and program documentation on data delivery of solutions for Austin Energy as defined in this Contract.
- 9.9.9 Documentation: Austin Energy will hold the *patented copyrighted software platform subscription services and application* and program documentation in confidence. The foregoing obligation of confidence will not apply to Information in the public domain or information derived or received by the Austin Energy independently of this Contract or to any information required to be released pursuant to applicable Law.
- 9.9.10 Return of Information: Upon the expiration or termination of the contract, Austin Energy requests that (i) return all documents, samples, tapes, magnetic disks, CDs, and other data items containing or representing Austin Energy's Confidential Information and all copies thereof in whatever form; (ii) erase or destroy all of Austin Energy's Confidential Information contained in computer memory or data storage apparatus; and (iii) certify to the Austin Energy in writing signed by a duly-authorized officer that has complied with the terms of this section.
- 9.9.11 Audit Right: Upon reasonable request and during regular business hours as agreed by the parties, Austin Energy will permit Contractor the right to audit Austin Energy to ensure *patented copyrighted software platform subscription services and application(s)* are being used in accordance with the terms of this Contract.

10. UPDATES AND UPGRADES

As part of maintenance services for the Software ("Maintenance Services"), Contractor shall make Updates and Upgrades available to Customer as Contractor or the third-party manufacturer makes them generally available to its other customers. "Update" means

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changes in the software that typically provide maintenance corrections only and shall be provided at no additional charge. "Upgrade" means changes in the Software that typically provide substantially increased or additional functionality to the Software. Contractor shall provide any Upgrade to Customer at a rate that does not exceed Contractor's lowest charge for said Upgrade paid by its other customers. Rights to upgrades shall be included as part of the Warranty and any support & maintenance extensions and be provided at Contractor's standard upgrade rates. Rights to Updates will be included as part of the Warranty and any support & maintenance extensions. Contractor service costs to install the update are not included and will be charged at Contractor's standard rates. During the term of this Contract, if Customer implements an Update and as a result of that action one or more of other purchased deliverables (either Software or Hardware) must be upgraded to maintain functionality at the level previously operating (but not less than that originally purchased), then Contractor shall provide the necessary Upgrade(s) at no additional charge as part of its Maintenance Services.

11. FAILURE LEVELS AND RESPONSE TIMES

- 11.1 Major Failure - the system is down or where such a substantial portion of the functionality of the Software is compromised that the City is unable to conduct its daily business using the Software to do the function for which it was purchased. A Major Failure is the same as a Priority 1 defect. Requirements covering Major Failures are more particularly defined in the Statement of Work.
- 11.2 Minor Failure -the core application functionality remains unaffected but there is a peripheral problem that is compromising a non-substantial function of the Software. Response times for Minor Failures shall be in accordance with the Statement of Work, Table 1 - Support Services and Table 2 – Defect Services of the contract.

12. NOTICE OF DELAY AND EXTENSION OF TIME

Should Contractor's timely performance of the schedule of Work under this Contract be delayed by the unavailability of personnel, data, or equipment to be provided by Purchaser, Contractor shall immediately notify Purchaser in writing no later than fourteen (14) calendar days from the Contractor's knowledge of the delay, of the facts and circumstances which are contributing to such delay. Furthermore, if Contractor is delayed at any time in the progress of the Work by any neglect of Purchaser, or by changes in the Work; by unusual delay in transportation; by delay authorized by Purchaser pending arbitration; or by any cause which Purchaser considers may justify the delay, then Purchaser may extend the time of completion for such reasonable time as Purchaser may consider appropriate. Within five business days of receipt of this notification, Purchaser shall advise Contractor in writing of the action which shall be taken to remedy the situation.

Contractor shall advise Project Manager in writing of any impending failure to meet established milestones or delivery dates caused by Contractor's failure to perform, and the action which shall be taken to remedy the situation, which must be reviewed and approved by Purchaser prior to implementation. Notice shall be provided as soon as but not later than five business days after Contractor is aware of the situation; however, such notice shall not relieve Contractor from any existing obligations regarding performance or delivery, and there shall be no waiver of performance by Purchaser.

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13. PROGRESS REPORTS

The Contractor shall coordinate delivery of work with Data Analytics and Business Intelligence, (DABI) of Austin Energy. The Contractor shall provide:

- 13.1 Monthly progress reports due on the last business day of every month or a mutually agreed upon format and shall include:
- 13.1.1 Activities initiated, ongoing or completed during the reporting period
 - 13.1.2 Activities planned for the coming period
 - 13.1.3 Problems encountered and actions taken or recommended to remedy the problems
 - 13.1.4 Relationships to the approved schedule and Project Plan
 - 13.1.5 describe significant achievements and opportunities that may have potential effect on project schedule and/or costs.
 - 13.1.6 provide detailed to assure that directions are being pursued and comply with established and/or projected system solutions.
 - 13.1.7 include a cloud-base metrics on Austin Energy's customer interaction and action specific components of application(s), but are not limited to operational reports, web analytics and other reports to be defined by Austin Energy Project Manager in the course of the project.
 - 13.1.8 Overall status, including a tabulation of percentage complete by task showing the
- 13.2 Reporting Deliverables
- Summary of Statistical Reports for 6 Modules
 - Reporting Software Performance Specifications for Commercial Sector
 - Reporting Software Performance Specifications for Multifamily Sector
 - Reporting Software Performance Specifications for Residential Sector
 - Summary of Statistical Analysis of Utility Usage
 - Summary of Customer Usage
 - Summary of Customer touch engagement with solutions

The table provides a summary listing of the reports needed from the data. Each report tracks a single measurement or set of related measurements over time to show the effects of occupant driven energy usage and is intended to answer questions that relate to customer energy usage over time and provide decision points for energy management for the present and in future.

| Delivery | Report Title | Report Description |
|----------|--|--|
| Monthly | Summary of Statistical Reports for 6 Modules | Summarize all data collected for all 6 modules |

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| | | |
|---------|---|--|
| Monthly | Reporting Software Performance Specifications for Commercial Sector | Map out the data ecosystem to include Master Data List, Data Groupings, and Benchmarking trends collected |
| Monthly | Reporting Software Performance Specifications for Multifamily Sector | Map out the data ecosystem to include Master Data List, Data Groupings, and Benchmarking trends collected |
| Monthly | Reporting Software Performance Specifications for Residential Sector | Map out the data ecosystem to include Master Data List, Data Groupings, and Benchmarking trends collected |
| Annual | Summary of Statistical Analysis of Utility Usage | Summarize utility savings against alert applications |
| Annual | Summary of Customer Usage | Show data for 6 and 12 month changes in utility usage before and after application usage by customer and total of number of app users by application and aggregate |
| Monthly | Summary of Customer touch engagement with solutions for key benchmarking trends on energy usage | Summarize recommendations on utility efficiency benchmarking tools against key data collected by app users |

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PRICING SCHEDULE

| Program Title | Work Performed | Term | Fees |
|--|----------------------------------|-------------------|---------------------|
| ECAD Portfolio Manager | Maintenance & Support | Annually | \$57,000.00 |
| Key Accounts Portfolio Manager | Maintenance & Support | Annually | \$57,000.00 |
| Residential Utility Awareness | Maintenance & Support | Annually | \$57,000.00 |
| Commercial Utility Awareness | Maintenance & Support | Annually | \$57,000.00 |
| Quality Assurances for Utility Data | Maintenance & Support | Annually | \$57,000.00 |
| Target Utility Efficiency Manager | Maintenance & Support | Annually | \$57,000.00 |
| Web Application Computing Storage | Maintenance & Support | Annually | \$57,000.00 |
| | Annually | Total Fees | \$399,000.00 |

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Table 1

| Table 1: Support Services | Service Level |
|--|--|
| Subscription Software Maintenance | Software Updates includes bug fixes and patch releases |
| Subscription Modification | 6 applications and sub-sets |
| Data Migration and transfer , including mapping documents | 6 applications and sub-sets |
| Comprehensive Testing Plans | 6 applications and sub-sets |
| End User Training to Support Implementation | 6 applications and sub-sets |
| Deployment (Go Live) Support | 6 applications and sub-sets |
| Weekly Team Meetings; Regularly scheduled and ad hoc On-Site meetings; <ul style="list-style-type: none"> • Conference calls; • Email; | As agreed upon in the Project Management Plan |
| Issue identification, tracking and resolution per application | As agreed upon in this Agreement |
| Maintenance Support | As agreed upon in this Agreement |
| Firmware updates | As agreed upon in this Agreement |
| Installation of remedial updates | As agreed upon in this Agreement |
| Support Availability i.e. Telephone and Email | 8 am – 5 pm CST |
| Emergency Incidents Availability | 24 hours, 7 Days, 365 Days |
| Number of Designated Support Contact | 2 - 3 |
| Support Web Access | 24 hours, 7 Days, 365 Days |
| Technical Support | 560 hours |
| Telephone Support Number | |
| Email Support Address | support@smartebuilding.com |
| | |
| | |
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| | |
| | |

Table 2: Defect Service Level

| Level | Definition/Description | Austin Energy Response Requirements | Resolution Targets |
|----------------------|--|---|--|
| SYSTEM OUTAGE | A system outage prevents users from accessing the system to complete any action or task. | <p>If the system outage occurs on or after 5:00 am CT and before or including 9:00 pm CT Vendor shall notify designated AE Support Staff within 15 minutes of system outage.</p> <p>If the system outage occurs after 9:00 pm CT and before 5:00 am CT, the outage should be recorded in the monitoring reports for monthly submission to AE for review against target metrics.</p> <p>If an outage occurs prior to 5:00 am CT and the outage continues until after 5:00 am CT Vendor shall notify AE Support Staff no later than 5:15 am CT.</p> | <p>Vendor shall apply Commercially Reasonable Efforts to:</p> <ul style="list-style-type: none"> • Return the System to service immediately. • If the system outage continues for one hour Vendor shall send a written email notice to AE Support Staff detailing progress and the estimated time for the system to return to full function. • If the system outage continues for two hours Vendor shall send a written email notice to AE Support Staff detailing progress and the estimated time for the system to return to full function. • If the system outage continues beyond two hours Vendor shall send written email notices to AE Support Staff each hour detailing the progress and estimated time for the system to return to full function. Vendor shall continue to send written email notices to AE Support Staff every hour until the System is returned to full function. |

Table 2: Defect Service Level

| Level | Definition/Description | Austin Energy Response Requirements | Resolution Targets |
|----------|--|---|--|
| CRITICAL | <p>Critical Defects render the system, application, or function unusable. Specifically, the defect</p> <p>(a) stop(s) or significantly delays AE operations by more than 2 hours; or,</p> <p>(b) prevents an application from continuing to the next step. (This excludes any issues that are due to Austin Energy); or,</p> <p>(c) results in incorrect calculations - ex. (This excludes any calculation issues that arise due to look-up table values changed by AE); or,</p> <p>(d) results in loss of data entered in the system by any user; or,</p> <p>(e) results in corruption of data.</p> <p>Additional examples of critical defects includes <u>the inability</u> to:</p> <ul style="list-style-type: none"> • Enter data, • Calculate data • View data <p>A suitable emergency patch or workaround that allows operations to continue will lower the severity level. If an immediate workaround is not available then immediate escalation is required. Permanent correction of the Defect may take longer, but the emergency patch or workaround gets immediate attention</p> | <p>Vendor shall:</p> <ul style="list-style-type: none"> • Respond within forty-five (45) minutes after the IR is duly reported by Austin Energy. • Within two (2) hours after receipt of the Defect notice, confirm to Austin Energy that knowledgeable resources are working on a permanent fix or an emergency patch/ workaround in the Vendor development/testing environment. • Provide status report to Austin Energy through electronic mail every hour until the Defect is no longer a Critical Defect. | <p>Vendor shall apply Commercially Reasonable Efforts to:</p> <ul style="list-style-type: none"> • Within four (4) hours after providing confirmation that Vendor is working on a solution, release the permanent fix/ workaround/ emergency patch that has been successfully tested by Vendor to Austin Energy for testing. • If a permanent fix/ workaround/ emergency patch has not been released to Austin Energy as described above, continue to work on a permanent basis to fix the Defect until it is no longer a Critical Defect. • Develop and test a permanent fix as soon as reasonably possible and, upon confirming the permanent fix, release it to Austin Energy designated representative for testing. |

Table 2: Defect Service Level

| Level | Definition/Description | Austin Energy Response Requirements | Resolution Targets |
|--------------|---|---|---|
| MAJOR | <p>Major Defects indicate severe impairment in operations using one or more functions that are integral parts of the release.</p> <p>Typically planned operations or processing is significantly impaired or unable to proceed with selected functions or dependents (i.e., not all operations or processing stop, but a major portion is adversely impacted).</p> <p>A suitable emergency patch or workaround that allows planned operations and processing to continue will lower the severity level.</p> | <p>Vendor shall:</p> <ul style="list-style-type: none"> Respond within one hour after the incident is duly reported by Austin Energy. Within two hours after receipt of the Defect notice, confirm to Austin Energy that knowledgeable resources are working on a permanent fix and a workaround or emergency patch in the Vendor development/testing environment. Provide status reports every day to Austin Energy through electronic mail until Defect is no longer a Major Defect. | <p>Vendor shall apply Commercially Reasonable Efforts to:</p> <ul style="list-style-type: none"> Develop and test a permanent fix/ workaround/ emergency patch as soon as reasonably possible and, upon confirming the permanent fix/ workaround/ emergency patch, release it to Austin Energy for testing. Within eight (8) hours after providing confirmation that Vendor is working on a solution, release the permanent fix, workaround or emergency patch that has been successfully tested by Vendor to Austin Energy for testing. If a permanent fix, workaround, or emergency patch has not been released to Austin Energy, continue to work until the Defect is no longer a Major Defect. |

Table 2: Defect Service Level

| Level | Definition/Description | Austin Energy Response Requirements | Resolution Targets |
|----------------|---|--|---|
| MINOR | <p>Minor Defects indicate less serious functional deficiencies as determined by Austin Energy, or a Critical or Major Defect for which an adequate emergency patch or workaround has been implemented.</p> <p>In general, Minor Defects involve restricted functional capability or quality problems, without interrupting or hindering operations or processing. Temporary patch or workaround may be available.</p> | <p>Vendor shall:</p> <ul style="list-style-type: none"> Respond within twenty-four (24) hours after receipt of the Defect notice. Provide status report to Austin Energy during periodic testing status calls/meetings. | <p>Vendor shall apply Commercially Reasonable Efforts to:</p> <ul style="list-style-type: none"> Test any existing workaround or temporary patch. Release to Austin Energy for testing, any such existing workaround or temporary patch that has been successfully tested by Vendor. Where reasonably possible, correct Minor Defects in the next available Patch. |
| TRIVIAL | <p>Trivial Defects indicate a minor inconvenience or cosmetic issue as determined by Austin Energy that does not impair operations or processing.</p> | <p>Vendor shall:</p> <ul style="list-style-type: none"> Acknowledge receipt of Defect notice from Austin Energy within two (2) business days. Provide status report to Austin Energy during periodic testing, status calls, or meetings. | <p>Vendor shall apply Commercially Reasonable Efforts to:</p> <ul style="list-style-type: none"> Resolve Trivial Defects after more serious Defects have been fixed and schedule the fix for release accordingly. Vendor shall prioritize Defects according to AE authorized prioritization. |

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 21st day of November, 2019

CONTRACTOR
Authorized
Signature

SmarteBuilding

Michael Cation

Title

Michael Cation, CEO

| Austin Energy Data Handling Controls | |
|---|--|
| Rev. No.: 2.0 | Date: October 5, 2018 |
| Owner: Enterprise Information Security | Category: Information Security |
| Author: Michael Goin | SME: Mike Goin, AE Risk Management, AE Legal |
| | Doc Type: Contract Exhibit |

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1. DATA HANDLING CONTROLS: SECURITY DIRECTIVES AND REQUIREMENTS

1.1. Contractor Responsibilities regarding treatment of City Data

- 1.1.1. The City requires that controls (“Data Handling Controls” or “DHC”) be in place to manage risk to the confidentiality, integrity and availability of City Confidential Information in any form in the care, custody or control of Contractor. These Data Handling Controls represent a minimum standard for protection. Additional controls required under applicable laws, regulations, or standards governing specific forms of data (e.g., health information, credit cardholder data) may also apply.
- 1.1.2. Contractor agrees to comply with these Data Handling Controls in performing the Services (including information technology-based Services) and in providing the Deliverables under the Contract. Contractor accepts all responsibility and liability for the security, integrity and protection of all City Data in its custody or control, including but not limited to when City Data is received, transmitted, processed, stored, backed up, archived, returned, or as occurs otherwise during performance of Services, including that involving a subcontractor. Contractor agrees that any damages or liability arising from any violation of these Data Handling Controls, including damage to City Data as well as all work to restore City Data and its integrity, are Contractor’s responsibility. Contractor agrees that compliance with these Data Handling Controls is not an affirmative defense to any losses, disclosures, corruption or other damage to City Data which may occur for which Contractor is responsible, as Contractor acknowledges and agrees that there may be situations for which the Data Handling Controls may be inadequate to reasonably protect City Data as a project matures during the term of the Contract, and Contractor agrees to use appropriate additional measures in its reasonable judgment to protect City Data in such situations.

1.2. Location Parameters

- 1.2.1. The authorized geographical data center region for the storage and processing of City Data under this Contract is the contiguous United States.
- 1.2.2. Contractor may utilize non-US based personnel but must ensure that City Confidential Information cannot be stored, viewed, downloaded, or transported outside the contiguous United States.

1.3. Specific Security Directives

- 1.3.1. For access to City Data, Contractor must ensure that only the minimum amount of rights is granted to an Authorized Person as required to perform Contractor’s contractual duties.

EXHIBIT C

- 1.3.2. Unless otherwise approved by the City in advance, in writing, Contractor must encrypt all City Confidential Information. Only an Authorized Person within the Secure Service Area may view unencrypted City Confidential Information.
 - 1.3.2.1. Contractor employees and subcontractors who have provided written certification showing they meet the minimum requirements of these Data Handling Controls are allowed to view unencrypted City Confidential Information if necessary to provide the Services.
 - 1.3.2.2. The Secure Service Area shall be designed in such a way as to prohibit the unauthorized viewing, modification, or destruction of any unencrypted City Confidential Information (including any image). Contractor may not remove City Confidential Information from the Secure Service Area unless approved by the City in advance in writing.
- 1.3.3. Unencrypted City Confidential Information may not be stored on any Contractor or subcontractor Endpoint Device.
- 1.3.4. Contractor must have in place its own internal security program that includes policies using applicable industry best practices. Contractor will provide documentation of these policies and procedures within ten business days of written request by the City.
- 1.3.5. Contractor must detach all removable storage media containing City Confidential Information from any device when not in use and store the media in Contractor's physically-secure location.
- 1.3.6. Contractor must ensure that only an Authorized Person may access devices containing City Data.

1.4. Data Disposition

- 1.4.1. Contractor agrees to return all City Data obtained under this Contract (including this DHC) or otherwise in its care, custody or control to the originating City department, and to delete any remaining copies from Contractor's storage/production/use/possession at the end of the engagement, including:
 - 1.4.1.1. as stated in any scope of work and/or
 - 1.4.1.2. at City's request, or upon
 - 1.4.1.3. Contractor's failure to follow the compliance directives of this Data Handling Controls document.

1.5. General Compliance Requirements

- 1.5.1 Contractor's failure to comply with any provision of these Data Handling Controls is a material default under the Contract.

1.5.2 Contractor agrees that City or its authorized representatives may audit or review Contractor's compliance with these Data Handling Controls under Contract Section 0300, Paragraph 17, Audits and Records. Except in an emergency (including a Breach or Security Incident), such audit or review shall be conducted only during normal business hours and without disrupting normal business practice, and City shall provide reasonable advance notice of exercising its right of audit or review.

Audits or reviews may include, but are not limited to:

- system, security, application, operating system, and database logs;
- physical access logs at all data centers;
- data center location or ownership changes;
- access control procedures;
- procedures for the physical and digital destruction of media;
- environment changes that have the potential for outages;
- workplace inspections for compliance with these Data Handling Controls and review of any Vendor supplied documentation submitted to document/demonstrate compliance; and
- procedures for and evidence of routine testing and updating of systems to prevent against attacks.

1.6. Logging/Auditing Requirements

1.6.1. Contractor must create system, security, application, operating system, and database logs:

- 1.6.1.1. when Contractor creates, reads, updates, or deletes City Data;
- 1.6.1.2. when Contractor initiates a network connection;
- 1.6.1.3. when Contractor accepts a network connection;
- 1.6.1.4. at user authentication and authorization, including failed access attempts;
- 1.6.1.5. for user login and logout;
- 1.6.1.6. when Contractor grants, modifies, or revokes access rights, privilege levels, and permissions, firewall rules, and user passwords;

EXHIBIT C

- 1.6.1.7. when Contractor makes any system, network, or services configuration changes, including installation of software patches and updates, other installed software changes, operating system and Hypervisor activity;
- 1.6.1.8. at application process startup, shutdown, or restart;
- 1.6.1.9. in the case of any application process abort, failure, or abnormal end, especially due to resource exhaustion or reaching a resource limit or threshold (such as for CPU, memory, network connections, network bandwidth, disk space, or other resources), and in cases of failure of network services, such as DHCP or DNS, or hardware fault; and
- 1.6.1.10. if contractor detects suspicious or malicious activity, such as from an Intrusion Detection or Prevention System (IDS/IPS), anti-virus system, or anti-spyware system.
- 1.6.2. Contractor will retain system activity logs (and make all such logs available to City) for a period of three years after final payment on this Contract, or three years after all forensic, audit and litigation matters are resolved, whichever is longer.
- 1.6.3. Contractor will review all relevant security logs for anomalies for potential Security Incidents and forensic analysis.

1.7. Media Reuse

- 1.7.1. Contractor must promptly Securely Erase all City Confidential Information from any permanent or non-volatile storage media:
 - 1.7.1.1. once immediate use of such media is no longer necessary,
 - 1.7.1.2. at City's request, or
 - 1.7.1.3. within 30 days of termination of the Contract.
- 1.7.2. For all endpoint and mobile devices containing City Data, Contractor agrees to utilize full disk encryption with pre-boot authentication methodologies to ensure all City Confidential Data is encrypted at rest.
- 1.7.3. Contractor shall Securely Erase all City Data by destructively overwriting all City Data to ensure that even deleted files cannot be recovered from the media.

1.8. Security

- 1.8.1. Contractor must limit access to the Hypervisor to only those qualified and pre-approved staff who have job functions dedicated to performing work on the Hypervisor. All access logs to the Hypervisor must only be reviewed by qualified personnel approved by Contractor and City.

- 1.8.2. City retains ownership over all City Data.
- 1.8.3. Contractor must use industry best practices for encryption of City Confidential Information at rest and in transit.
- 1.8.4. Contractor will ensure that all electronic and physical access to City Data is secured. Contractor must verify the identification, authentication, and authorization of each user and their specific role and access level, and Contractor must immediately block all physical and electronic access to City Data for any terminated employee.
- 1.8.5. Contractor must use due diligence to evaluate and respond to potential Security Incidents and events that create suspicions of unauthorized disclosure, modification, or destruction of City Data. The response must restore the confidentiality, integrity, and availability of the environment(s) compromised or potentially compromised, and establish root causes and remediation steps and determine the nature and extent of the event. If Contractor determines that there has been a Security Incident involving City Data (including City Confidential Information), Contractor shall report such Security Incident to the City PM within four (4) hours of determination.
- 1.8.6. Upon written request, Contractor shall make its then current key management policy for encryption keys and certificates available to the City within 10 business days.

2. DATA HANDLING CONTROLS: ADDITIONAL COMPLIANCE REQUIREMENTS

2.1. Contractor Practices

- 2.1.1. In addition to any other requirements of these Data Handling Controls, Contractor agrees it shall maintain and enforce its own reasonable and adequate security procedures during the term of the Contract for the protection of City Data, which procedures must be designed to protect City Data (especially City Confidential Information) and the hosting environment from a Security Incident, including using Contractor's best efforts to avoid the unauthorized access, modification or loss during transmission and storage, including the use of data encryption techniques described herein.
- 2.1.2. Contractor confirms that all use, transmission, storage, and destruction of City Confidential Information shall be in strict accordance with all terms, covenants, and conditions of the Contract and all applicable Federal, State, and local laws, rules, and regulations.
- 2.1.3. Contractor agrees that City may conduct, at no extra cost to City, network penetration tests of all systems at Contractor's facilities used for the processing,

EXHIBIT C

storage or transmission of City Data. City may also, at its discretion, contract out penetration testing services to a third party. City shall provide reasonable notice of each network penetration test and shall conduct each network penetration test at reasonable times. If, following any testing, vulnerabilities are identified, Contractor shall promptly document Contractor's remediation action plan and provide it to the City PM within three business days, including at a minimum:

- 2.1.3.1.1. nature of the vulnerability including scope and breadth,
 - 2.1.3.1.2. potential impact to service of vulnerability and subsequent mitigation,
 - 2.1.3.1.3. summary of mitigation, and
 - 2.1.3.1.4. known or suspected loss of City Data and ability to recover; and
- 2.1.3.2. implement the remediation action plan not later than three business days after delivery of the plan unless otherwise approved by City in writing. The implementation of remediation activity must be communicated to and approved by the City in advance, ensuring the avoidance of unplanned outages; and
- 2.1.3.3. provide City with written documentation and reports on the status of all modifications to correct such vulnerabilities, including interim and final reports.
- 2.1.4. Contractor shall perform appropriate background checks on its employees and subcontractors with access to City Confidential Information.
- 2.1.5. Contractor shall prohibit access to City Confidential Information for Contractor employees and subcontractors who fit into any of the following classifications:
- 2.1.5.1. Anyone who has been convicted of a felony offense;
 - 2.1.5.2. Anyone who has been convicted of a misdemeanor offense related to computer security, theft, fraud or violence; or
 - 2.1.5.3. Anyone who is currently awaiting trial for any of the above-stated offenses.
- 2.1.6. The COA CISO may, at any time in writing, require Contractor's employees and subcontractors to submit to additional background checks. Continued access to City Data, including City Confidential Information, and secured facilities shall be contingent on the Contractor's employee's agreement to submit to a background check and the results of the background check. Refusal shall be grounds for immediate termination of the User ID and password, and where applicable, access to COA premises and networks, and any ID badge issued shall immediately be decommissioned.

2.2. Security Incident Reporting Procedures

- 2.2.1. Contractor must telephone the City PM and e-mail AE-Exec-Info-Sec@austinenergy.com within four business hours of when Contractor discovers, is notified of, or otherwise has knowledge of any Security Incident. Contractor must include the following information in the report emailed:
 - 2.2.1.1. person reporting the Security Incident ;
 - 2.2.1.2. person who discovered the Security Incident;
 - 2.2.1.3. date and time the Security Incident was discovered;
 - 2.2.1.4. nature of the Security Incident;
 - 2.2.1.5. actions taken and by whom;
 - 2.2.1.6. involved system and possible interconnectivity with other systems;
 - 2.2.1.7. description of the information lost or compromised, or potentially lost or compromised;
 - 2.2.1.8. storage medium from which information was lost or compromised;
 - 2.2.1.9. controls in place to prevent unauthorized use of the lost or compromised information;
 - 2.2.1.10. number of individuals potentially affected;
 - 2.2.1.11. whether law enforcement or other external agencies were involved for any reason and, if so, those contacted; and
 - 2.2.1.12. any other relevant information pertaining to the Security Incident.
- 2.2.2. Within four hours of discovering the Security Incident, the Contractor shall contain the Security Incident.
- 2.2.3. Contractor shall investigate (with City's participation, if so desired by City) the Security Incident, perform a root cause analysis, and create and provide to the City a remediation plan within seven days of becoming aware of the Security Incident.

2.3. Remediation

- 2.3.1. As soon as practicable, and at no additional cost to the City, Contractor will remedy the source of the Security Incident, as required by the remediation plan.
- 2.3.2. The Contractor shall reimburse the City for all costs to City associated with the Security Incident.

2.4. Recovery

- 2.4.1. Within seven days of completing the remediation plan, Contractor must provide the City reasonable written assurance declaring full system recovery, signed by an executive with proper authority, attesting that the Security Incident is remediated and shall not recur.

2.5. Lessons Learned

- 2.5.1. Contractor shall, at no cost to the City and as part of the Services, update policies, procedures, or enforcement methods in a manner designed to prevent similar Security Incidents from recurring and provide summary of updates to City within 14 days of declaring full system recovery.

3. Definitions

- 3.1.1. **Authorized Person** – Contractor personnel (including subcontractor personnel) located in the contiguous United States having successfully completed the required background check and related requirements of the Contract
- 3.1.2. **City Project Manager or City PM** – City of Austin project manager, or their designee, assigned to this Contract
- 3.1.3. **City Data** - data or information (in any form) regarding the City or its customers that is created, collected, provided, obtained, or otherwise made available in connection with this Contract to an Authorized Person. City Data may be either non-confidential information or City Confidential Information.
- 3.1.4. **City Confidential Information** – includes: (A) information provided by City that is marked or identified as confidential, (B) information of City including software, computer programs, documentation, processes, procedures, techniques, technical, financial, customer, personnel and other business information of a non-public nature that would reasonably be understood to be confidential whether or not marked or identified as confidential, (C) information generated by Contractor (or subcontractor) that contains, reflects, or is derived from confidential information, (D) Personal Identifying Information, (E) Sensitive Personal Information, and (F) all other information made confidential by federal, state or local law or regulation. City Confidential Information is a subset of City Data.
- 3.1.5. **Data Center Region** – means the authorized geographical region for the storage and processing of City Data, and is presently only the contiguous United States.
- 3.1.6. **Data Handling Controls** – this document
- 3.1.7. **Endpoint Device** – Any network-capable computer hardware device including, but not limited to desktop computers, laptops, smart phones, tablets, thin

clients, printers or other specialized hardware such POS terminals and smart meters.

3.1.8. **Hypervisor** – a piece of computer software, firmware or hardware that controls the flow of instructions between guest Operating Systems and the physical hardware such as CPU, disk storage, memory, and network interface cards within a virtual environment

3.1.9. **Personal Identifying Information (“PII”)** – means any information that, either alone or in conjunction with other information, identifies an individual, including an individual’s:

3.1.9.1. name, social security number, date of birth, or government-issued identification number;

3.1.9.2. mother's maiden name;

3.1.9.3. unique biometric data, including the individual's fingerprint, voice print, and retina or iris image; or

3.1.9.4. unique electronic identification number, address, or routing code

3.1.10. **Sensitive Personal Information (“SPI”)** – means

A. an individual’s first name or first initial and last name in combination with any one or more of the following items, if the name and the items are not encrypted:

(i) Social Security Number;

(ii) Driver’s License Number or government-issued ID; or

(iii) an individual's account number or credit or debit card number in combination with any required security code, access code, or password that would permit access to an individual's financial account, or

B. information that identifies an individual and relates to the physical or mental health or condition of the individual, or the provision of health care to the individual.

C. SPI does not include publicly available information.

3.1.11. **Securely Erase** – secure deletion of any information, including a recognized destructive delete algorithm, for example, at least seven overwrites with pseudorandom data or at least seven overwrites with zeroes

EXHIBIT C

- 3.1.12. **Security Incident** – any actual or potential unauthorized disclosure of, or unauthorized access to, City Confidential Information; or a violation or imminent threat of violation of computer security policies, acceptable use policies, or compliance requirements under these Data Handling Controls; or violation or imminent threat of violation of industry standard security practices
- 3.1.13. **Secure Service Area** – a physically and electronically secured area, with secure communications, within Contractor's facility where unencrypted City Confidential Information is secured from unauthorized access

EXHIBIT D

FACTA AFFIDAVIT OF COMPLIANCE

I HEREBY AFFIRM that I, [name] Michael Cation, am the [title] CEO, and the duly authorized representative of SmarteBuilding ("Company"). I am over 18 years of age, of sound mind, capable of making this affidavit, personally acquainted with the facts stated in it, and I possess the legal authority to make this affidavit on behalf of myself and the Company.

I ACKNOWLEDGE that, in accordance with the Fair and Accurate Credit Transactions Act (FACTA), the City of Austin ("City") is required to ensure that the activities of entities that contract with the City to provide the City services related to the billing accounts of the City's utility customers, are conducted in accordance with reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft.

I ACKNOWLEDGE that, the City has provided the Company with a list of red flags that the City has identified as potential indicators of unauthorized access to consumer information and malicious account activity. A list of the red flags is attached here as Exhibit A.

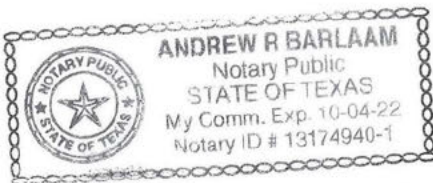
I FURTHER AFFIRM that, to the extent applicable to the services provided to the City by the Company, the Company has in place reasonable policies and procedures designed to detect, prevent, and mitigate the risk of identity theft.

Signed this the 27th day of February, 2020
~~Nov~~, ~~2019~~

Michael Cation
Signature of Affiant

BEFORE ME, the undersigned authority, personally appeared Michael Cation, who being by me duly sworn, stated that the contents of this affidavit are true and correct.

SWORN TO AND SUBSCRIBED before me on the 27th day of February, 2020



Andrew R Barlaam
Notary Public in and for the State of Texas

My commission expires: 10/4/22

EXHIBIT D

EXHIBIT A – LIST OF APPLICABLE RED FLAGS

- Documents provided by a customer or potential customer to verify identification appear altered or forged.
- The photo or physical description on an identification document (“ID”) is not consistent with the appearance of the customer.
- Other information given to open the account is not consistent with the ID of the customer
- An application or supporting document appears to have been forged or altered, or gives the appearance of having been destroyed and reassembled.
- The ID is inconsistent with external information sources; i.e., the address does not match a consumer report, or a social security (SS) number has not been issued or is listed on the SS Administration Death Master File.
- The ID provided is associated with an existing identity theft case on file.
- The SS number is the same as customers opening other accounts (or previously used to open an account when the customer states that they have not previously had an account.)
- The customer fails to provide all personal identification information upon request.
- The ID is inconsistent with existing records.
- Change of billing address is followed by multiple change requests to the account.
- Payments are made in a manner associated with fraud. For example, a deposit or initial payment is made and no payments are made thereafter.
- Existing account with a stable history shows irregularities.
- An account that has been inactive for a reasonable period of time is suddenly used.
- The utility is notified of unauthorized changes or transactions in connection with an account.



Consultant Remote Access Request

For Consultants/Vendors Doing Business with Austin Energy

- Complete this form to request remote access connection to the AE network and computer and information systems.
- Sign and obtain your Delegated Agent signature. Send form to your AE IT sponsor or AE Business Unit contact.
- AE IT sponsor or AE Business Unit contact will submit form to the AE Technology Control Center (TCC) for processing.
- For online completion, use TAB or SHIFT+TAB to advance or return to entry fields.
- If completed manually, print using BLACK or BLUE ink.

| | |
|--|----------------------------------|
| Consultant Employee Name (First Last): | Job Role: |
| Consultant Company Name: | Employee Phone: |
| <input type="checkbox"/> US Citizen/Permanent Resident | <u>Work location</u> |
| <input type="checkbox"/> Temporary Worker; Classification: | City: |
| <input type="checkbox"/> Temporary Visitor for Business; Classification: | State: Country: |
| AE Business Unit Contact: | AE Contact Work Phone: |
| IT Sponsor Name: | IT Sponsor Work Phone: |
| Start Date: | End Date: |
| Project or contract name: | Anticipated frequency of access: |

Business Justification:

- **Consultants are prohibited from access to the Austin Energy network while they are outside the U.S.**
- Allow maximum of 10 business days for your account to be processed.
- Technical support is available 6AM-6PM business days. After-hours support is available 24/7 for critical or emergency situations. Call the TCC at (512) 322-6077.
- **Remote access is limited to 6-month increments.** Call the TCC on or near expiration date to extend if contract is still active.
- The system may be unavailable during some hours due to maintenance.
- The AE IT Security Manager is responsible for review and final approval.

Remote access privileges are subject to all responsibilities and limitations as agreed to by Consultant Company in the AE Network Connection Agreement and AE Consultant/Vendor Acceptable Use Policy. Consultant Delegated Agent has made a copy of the Agreement and Policy available to the undersigned Consultant Employee.

| | | |
|---|--------------------|---------------|
| _____ Consultant Employee Name (Print) | _____ Signature | _____ Date |
| _____ Consultant Delegated Agent Name (Print) | _____ Signature | _____ Date |
| _____ Business Unit Process Manager Name (Print) | _____ Signature | _____ Date |
| _____ IT Sponsor Name (Print) | _____ Signature | _____ Date |

List all server names, folders, and files.

| | |
|----------------------|---------------------------|
| _____ Server Name | _____ Folder path/name |
| _____ Server Name | _____ Folder path/name |
| _____ Server Name | _____ Folder path/name |
| _____ Server Name | _____ Folder path/name |

CERTIFICATE OF INTERESTED PARTIES

FORM 1295

1 of 1

Complete Nos. 1 - 4 and 6 if there are interested parties.
Complete Nos. 1, 2, 3, 5, and 6 if there are no interested parties.

OFFICE USE ONLY CERTIFICATION OF FILING

1 Name of business entity filing form, and the city, state and country of the business entity's place of business.

SmarteBuilding
Austin, TX United States

Certificate Number:
2019-564161

Date Filed:
11/21/2019

Date Acknowledged:

2 Name of governmental entity or state agency that is a party to the contract for which the form is being filed.

City of Austin

3 Provide the identification number used by the governmental entity or state agency to track or identify the contract, and provide a description of the services, goods, or other property to be provided under the contract.

MA 1100 NS200000007
Information Management System software subscription service to calculate and analyze utility data.

| 4 | Name of Interested Party | City, State, Country (place of business) | Nature of interest (check applicable) | |
|---|--------------------------|--|--|--------------|
| | | | Controlling | Intermediary |
| | | | | |
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| | | | | |

5 Check only if there is NO Interested Party.



6 UNSWORN DECLARATION

My name is _____, and my date of birth is _____.

My address is _____, _____, _____, _____, _____.
(street) (city) (state) (zip code) (country)

I declare under penalty of perjury that the foregoing is true and correct.

Executed in _____ County, State of _____, on the _____ day of _____, 20____.
(month) (year)

Signature of authorized agent of contracting business entity
(Declarant)