



# **Information Technology Hardware and Maintenance with Lease- Rental Options Contract**

between

The Virginia Information Technologies Agency

on behalf of

The Commonwealth of Virginia

and

ELECTRONIC SYSTEMS, INC.

**INFORMATION TECHNOLOGY HARDWARE AND MAINTENANCE WITH LEASE-RENTAL  
OPTIONSCONTRACT  
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## INFORMATION TECHNOLOGY HARDWARE AND MAINTENANCE WITH LEASE-RENTAL OPTIONS CONTRACT

THIS INFORMATION TECHNOLOGY Hardware and Maintenance with Lease-Rental Options CONTRACT ("**Contract**") is entered into by and between the Virginia Information Technologies Agency ("**VITA**"), pursuant to § 2.2-2012 of the *Code of Virginia* ("**Code**") and on behalf of the Commonwealth of Virginia ("**Commonwealth**"), and Electronic Systems, Inc. ("**Supplier**"), a corporation headquartered at 10406 Lakeridge Parkway, Suite 1000, Ashland, VA 23005 to be effective as of Contract Award Date November 21, 2019 ("**Effective Date**").

### 1. PURPOSE AND SCOPE

VITA, on behalf of the Commonwealth, is seeking services that will provide purchase/rental/lease of print devices, related Software, accessories and supplies. This contract will also allow for Services and Maintenance for devices and Managed Print Services. This Contract sets forth the terms and conditions under which Supplier shall provide Print Devices and Managed Print Services to the Authorized Users.

### 2. DEFINITIONS

#### A. Acceptance

Successful delivery and performance by the Supplier of its contractual commitments at the location(s) designated in the applicable Statement of Work ("SOW") or order, including completed and successful acceptance testing in conformance with the Requirements as determined by the Authorized User in the applicable SOW or order.

#### B. Agent

Any third party independent agent of any Authorized User.

#### C. Application

The software programs in object code and other related data, including intellectual data, proprietary information and Documentation contained and applicable to Licensed Services hosted and supported by Supplier under the Contract, as described in Exhibit A or as described in any SOW or order issued under the Contract, including any Updates, enhancements, and replacements to the Application.

#### D. Authorized Users

All public bodies, including VITA, as defined by Code § 2.2-4301 and referenced by Code §§ 2.2-4304 and 2.2-2012, authorized to participate in the procurement of information technology under this Contract. Authorized Users include private institutions of higher education that are listed at: <http://www.cicv.org/Our-Colleges/Profiles.aspx>.

#### E. Claim

Any and all losses, damages, claims, demands, proceedings, suits and actions, including any related liabilities, obligations, losses, damages, assessments, fines, penalties (whether criminal or civil), judgments, settlements, expenses (including attorneys' and accountants' fees and disbursements), and costs. Collectively, "Claims".

#### F. Code

The Code of Virginia, as amended, and all laws in the titles, chapters, articles and sections contained therein.

#### G. Commercial Off-The-Shelf ("COTS") Software

Software that is general in nature, not broad enterprise applications, which can be purchased and used immediately "as is," without modification, in the same form in which it was sold in the commercial marketplace. Standard options are not considered modifications.

#### H. Commonwealth

The Commonwealth of Virginia.

**I. Commonwealth Indemnified Parties**

Means, collectively and individually, the Commonwealth, VITA, any Authorized User, their officers, directors, agents, and employees.

**J. Component**

Any part or service of the Solution, Software, or Deliverable delivered by Supplier under this Contract, including under all orders or SOWs.

**K. Computer Virus**

Any malicious code, program, or other internal component (e.g., computer virus, computer worm, computer time bomb, or similar component), which could damage, destroy, alter or disrupt any computer program, firmware, or hardware or which could, in any manner, reveal, damage, destroy, alter or disrupt any data or other information accessed through or processed by such software in any manner.

**L. Confidential Information**

Any confidential or proprietary information of a Party that is disclosed in any manner, including oral or written, graphic, machine readable or other tangible form, to any other Party in connection with or as a result of discussions related to this Contract or any order or SOW issued hereunder, and which at the time of disclosure either:

(i) is marked as being "Confidential" or "Proprietary";

(ii) is otherwise reasonably identifiable as the confidential or proprietary information of the disclosing Party; or

(iii) under the circumstances of disclosure should reasonably be considered as confidential or proprietary information of the disclosing Party; or

(iv) is identifiable or should be reasonably considered as protected health information;

(v) any personally identifiable information, including information about VITA's employees, contractors, and customers, that is protected by statute or other applicable law.

**M. Consumables**

Toner, drums, fuser agent, developer, ink cartridges, maintenance kits, feeder rollers, transfer kits, waste toner boxes and cleaning kits, and other products which may be needed for the operation of the devices provided by the Supplier on behalf of the Authorized User in order to fulfill the services.

**N. Contract**

This agreement, including all exhibits, schedules, and attachments, including any modifications or amendments thereto, entered into by VITA and Supplier.

**O. Contractor**

The use of the term "Contractor" in any of the following terms, conditions, links, or IRS Publication 1075 means the same as the term "Supplier" as defined and used in this Contract.

**P. Deliverable**

The embodiment of the work performed by Supplier or any combination of Services, Maintenance Services, Licensed Services, Application, Solution, Solution Component, Software, System Software, plans, reports, data, Product, Supplier Product, and Updates, including any and all components, provided or delivered by the Supplier in fulfilling its obligations under the Contract or as identified in the applicable SOW or order. "Deliverable" also means the development or creation of Work Product, if Work Product is authorized under the Contract.

**Q. Documentation**

Those materials (including user manuals, training materials, guides, product descriptions, technical manuals, product specifications, supporting materials and Updates) detailing the information and instructions needed in order to allow any Authorized User and its agents to make productive use of the Application, Software, Solution, Product, Service, Licensed Services or Deliverable, including any and all components, and to implement and develop self-sufficiency with

regard to the Application, Software, Solution, Product, Service, Licensed Services or Deliverable, including any and all components, provided by Supplier in fulfilling its obligations under the Contract or as may be specified in any SOW or order issued pursuant to this Contract.

**R. Effective Date**

The date this Contract goes into full force and effect as set forth in the preamble of this Contract above.

**S. Federal Tax Information (“FTI”)**

FTI consists of federal tax returns and return information (and information derived from it) that is in the possession or control of any Authorized User, which is covered by the confidentiality protections of the Internal Revenue Code (“IRC”) and subject to the IRC § 6103(p)(4) safeguarding requirements including IRS oversight. FTI is categorized as “Sensitive” but “Unclassified” information and may contain personally identifiable information.

**T. Industrial Funding Adjustment (“IFA”)**

The fee paid by Supplier to VITA to compensate VITA for the cost of procuring and managing the Contract.

**U. Lease Agreement**

The signed agreement between an Authorized User and the Supplier for the lease of Product(s), pursuant to the terms and conditions of this Contract.

**V. Lease Term**

The fixed, non-cancelable period of time that Supplier leases a Product to an Authorized User., Each Lease Term will include the initial, agreed-to period of time plus all periods (i) covered by bargain renewal options; (ii) for which failure to renew the lease would impose a penalty sufficient to make the renewal reasonably assured; (iii) covered by ordinary renewal options during which the Supplier guarantees the Authorized User’s debt with respect to the leased property; (iv) covered by ordinary renewal portions up to the date a bargain purchase option becomes exercisable; and (v) renewals or extensions of the lease, which are at the Authorized User’s option.

**W. Maintenance Coverage Period (“MCP”)**

The period of time during which Supplier is obligated to provide Maintenance Services for a unit of Software or Product.

**X. Maintenance Level**

The defined parameters of Maintenance Services, including the times during which, and time-frames in which, Supplier shall respond to a request for Maintenance Services. The available Maintenance Levels are defined in Exhibit B to this Contract or as defined in any Statement of Work or order issued pursuant to this Contract. The actual Maintenance Level for a unit of Software or Product will be set forth in the signed order or Statement of Work for Maintenance Services of that Software or Product referencing this Contract.

**Y. Maintenance Services**

Those services, preventive and remedial, provided or performed by Supplier under the Contract or for an Authorized User in order to ensure continued operation of the Product, Hardware, or Software, including Software Updates. Maintenance Services include support services. Maintenance Services for Software may include the development of Work Product, if so authorized in the Contract.

**Z. Multifunction Device (“MFD”)**

A device which includes various capabilities, including by not limited to, copying, printing, faxing and scanning as determined by the applicable original equipment manufacturers specifications.

**AA. Operating Condition**

The condition that allows the Software or Product to function in a normal, acceptable working manner, as designed by the Software or Product manufacturer, and, if applicable, in compliance

with any service levels established in the Contract or any SOW or order issued under the Contract.

**BB. Party**

Any combination of Supplier, VITA, or the Commonwealth. In an SOW, any Authorized User is also a "Party". Collectively, "Parties".

**CC. Performance Changes**

Any engineering changes that affect the ability of the Product(s) provided by Supplier pursuant to this Contract to meet the published specifications.

**DD. Preventative Maintenance**

Maintenance that can be performed in advance of an actual problem or malfunction through the monitoring of internal diagnostic reports generated automatically by print output devices.

**EE. Product**

Hardware, peripherals, and any other equipment, including the System Software, all upgrades, all applicable user documentation, and related accessories as set forth on Exhibit B or as specified in any Statement of Work or order provided pursuant to the Contract.

**FF. Prompt Payment Act**

The Virginia Prompt Payment Act, Code §§ 2.2-4347 et seq., as amended.

**GG. Realized Sales**

Sales under this Contract for which Supplier has received full and complete payment from an Authorized User.

**HH. Receipt**

An Authorized User has physically received or has unfettered access to any Deliverable at the correct "ship-to" location.

**II. Rental Agreement**

The signed agreement between an Authorized User and the Supplier for the rental of a MFD, Product, or Software, as well as any related accessories, pursuant to the terms and conditions of this Contract.

**JJ. Rental Services**

Those Services, preventive and remedial, including support services, performed by Supplier at an Authorized User's request in order to ensure continued operation of the rented Product. Unless otherwise specified in the Contract, Rental Services include, but are not limited to: telephone support, next business day on-site repair and other maintenance and repair services as required. In the case of printers, Rental Services include the provision of toner.

**KK. Rental Term**

The period of time during which Supplier rents a unit of Product to an Authorized User. The Rental Term will begin at Acceptance and last for the period of months agreed to in the applicable order or SOW, plus and any extension(s) or renewal(s) allowable pursuant to this Contract, unless canceled or terminated in accordance with this Contract.

**LL. Requirements**

The functional, performance, operational, compatibility, Acceptance testing criteria, and other parameters and characteristics of the Product, Software, Solution, Service(s), Application and Licensed Services and Deliverables, including any and all components, as authorized by any combination of the Contract, as set forth in Exhibit A or the applicable SOW or order, and such other parameters, characteristics, or performance standards that may be agreed upon in writing by the Parties.



**MM. Response Time**

The time between Supplier's receipt of Authorized User's request for Maintenance and the time Supplier has notified Authorized User that it has commenced repair and resolution of the reported problem.

**NN. Safety Changes**

Any engineering changes that affect the safety of the Product(s) provided pursuant to this Contract.

**OO. Services**

Any work performed or service provided by Supplier – including the design and development of software and modifications, software updates, solution, products, implementation, installation, maintenance, support, testing, training, or other provision – in fulfilling its obligations under the Contract or, as applicable, any Statement of Work or order authorized by the scope of the Contract. "Services" includes all functions, responsibilities, activities, and tasks of the Supplier that are an inherent, necessary, or customary part of the Services, or are required for the proper performance or provision of the Services. As permitted by the scope of the Contract, "Services" may include the discovery, creation, or development of Work Product. This definition does not include Licensed Services.

**PP. Software**

The programs and code provided by Supplier under the Contract or any order or SOW issued hereunder as a component(s) of any Deliverable or component of any Solution, and any subsequent modification of such programs and code, excluding Work Product. For COTS Software, "Software" means the programs and code, and any subsequent releases, provided by Supplier under this Contract as set forth in Exhibit B or as described on Supplier's US and International price lists in effect at time of Authorized User's placement of order or Statement of Work. If this Contract is for Software Maintenance, "Software" also includes the programs and code provided by Supplier under the Contract or any order or SOW issued pursuant to the Contract in the form of Software Updates.

**QQ. Software Publisher**

The third-party licensor of the Software, other than the Supplier, provided by Supplier under this Contract.

**RR. Solution**

The Supplier's contractually committed technical approach for solving an information technology business objective and associated Requirements as defined and authorized by the scope of the Contract or any order or Statement of Work issued under the Contract. Solution means all Supplier and Supplier's third-party providers' components making up the Solution, including but not limited to Software, Product, configuration design, implementation, Supplier-developed interfaces, Services and Work Product.

**SS. Statement of Work ("SOW")**

Any document in substantially the form of Exhibit C (describing the deliverables, due dates, assignment duration, Acceptance criteria, and payment obligations for a specific project, engagement, or assignment that Supplier commits to provide to an Authorized User), which, upon signing by both Parties, is made a part of the Contract.

**TT. Subcontractor**

Any group or person that furnishes supplies or services to the Commonwealth, VITA, or any Authorized User on behalf of Supplier or another Subcontractor in performance of this Contract.

**UU. Supplier**

The entity set forth in the preamble of this Contract and any entity that controls, is controlled by, or is under common control with Supplier.



**VV. Supplier Personnel**

Any and all of Supplier's employees, agents, contractors, or subcontractors performing under this Contract.

**WW. Supplier Reporting System ("SRS")**

The VITA system used by Supplier to fulfill reporting obligations under this Contract. The SRS can be accessed at the following URL(s): <http://vita2.virginia.gov/procurement/srs/>, or any successor URL(s).

**XX. SWaM**

Any entity certified by the Commonwealth's Department of Small Business and Supplier Diversity as a small, women-owned, minority-owned, or service disabled veteran-owned business, as defined in Code §§ 2.2-2000.1 and 2.2-4310, or a certified micro business as defined in Executive Order Number 20 (2014).

**YY. System Software**

The operating system code, including software, firmware and microcode, (object code version) for each Product, including any subsequent revisions, as well as any applicable documentation.

**ZZ. Term**

The period of time beginning with the Effective Date and lasting for the length of time, including any extension periods, set forth in the "Contract Term" section below during which this Contract will be in full force and effect.

**AAA. Update**

Any update, modification or new release of the Software, System Software, Application, Documentation, or Supplier Product that Supplier makes generally available to its customers at no additional cost. Software Updates include patches, fixes, upgrades, enhancements, improvements, or access mode, including without limitation additional capabilities to or otherwise improve the functionality, increase the speed, efficiency, or base operation of the Software.

**BBB. VITA**

The Virginia Information Technologies Agency, an agency of the Commonwealth of Virginia pursuant to Chapter 20.1 (§§ 2.2-2005 et seq.) of the Code, or any successor agency.

**CCC. Warranty Period**

The period of time during which Supplier is obligated to provide maintenance for a unit of Software or Product.

**DDD. Work Product**

Inventions, combinations, machines, methods, formulae, techniques, processes, improvements, software designs, computer programs, strategies, specific computer-related know-how, data and original works of authorship discovered, created, or developed by Supplier, or jointly by Supplier and an Authorized User(s) in the performance of this Contract. Work Product does not include configuration of software, nor does it include anything developed by Supplier prior to, or outside of, this Contract.

**3. TERM AND TERMINATION**

**A. Contract Term**

This Contract is effective and legally binding as of the Effective Date and, unless terminated as provided for in this section, will be effective and legally binding for a period of three (3) years ("Term"). VITA, in its sole discretion, may extend this Contract for up to three (3) additional one (1) year periods after the expiration of the initial Term. VITA will issue a written notification to the Supplier stating VITA's intention to exercise the extension period no less than 30 calendar days prior to the expiration of any current term. In addition, performance of an order or SOW issued during the Term of this Contract may survive the expiration of the Term of this Contract, in which case all contractual terms and conditions required for the operation of such order or SOW will

remain in full force and effect until all of Supplier's obligations pursuant to such order or SOW have met the final Acceptance criteria of the applicable Authorized User.

**B. Termination for Convenience**

VITA may terminate this Contract, in whole or in part, at any time and for any reason upon not less than 30 calendar days prior written notice to Supplier. Except for orders or SOWs placed in conjunction with a Lease Agreement or Rental Agreement, an Authorized User may terminate an order or SOW, in whole or in part, at any time and for any reason upon not less than 30 calendar days prior written notice to Supplier. Any termination under this provision will not affect the rights and obligations attending any order or SOW outstanding at the termination date.

**C. Termination for Breach**

In the event of breach by the Supplier, VITA will have the right to terminate this Contract, in whole or in part, and an Authorized User may terminate an order or SOW issued hereunder, in whole or in part. Supplier will be deemed in breach in the event that Supplier fails to meet any material obligation set forth in this Contract or in any order or SOW issued hereunder. Any termination under the provisions of this section will be deemed a "Termination for Breach".

If VITA deems the Supplier to be in breach, VITA shall provide Supplier with notice of breach and allow Supplier 30 business days to cure the breach. If Supplier fails to cure the breach as noted, VITA may immediately terminate this Contract or any order or SOW issued pursuant to this Contract, in whole or in part. If an Authorized User deems the Supplier to be in breach of an order or SOW, that Authorized User shall provide Supplier with notice of breach and allow Supplier 15 business days to cure the breach. If Supplier fails to cure the breach as noted, the Authorized User may immediately terminate its order or SOW, in whole or in part. In addition, if Supplier is found by a court of competent jurisdiction to be in violation of or to have violated 31 U.S.C. § 1352, or if Supplier becomes a party excluded from Federal Procurement and Nonprocurement Programs, VITA may immediately terminate this Contract, in whole or in part, for breach, and VITA shall provide written notice to Supplier of such termination. Supplier shall provide prompt written notice to VITA if Supplier is charged with violation of 31 U.S.C. § 1352, or if federal debarment proceedings are instituted against Supplier.

**D. Termination for Non-Appropriation of Funds**

All payment obligations from public bodies under this Contract are subject to the availability of legislative appropriations at the federal, state, or local level for this purpose. In the event of non-appropriation of funds, irrespective of the source of funds, for the items under this Contract, VITA may terminate this Contract, in whole or in part, or any order or SOW, in whole or in part, or an Authorized User may terminate an order or SOW, in whole or in part, for those goods or services for which funds have not been appropriated. Written notice will be provided to the Supplier as soon as possible after legislative action is completed.

**E. Effect of Termination**

Upon termination, neither the Commonwealth, nor VITA, nor any Authorized User will have any future liability except for Deliverables accepted by an Authorized User or Services (including any applicable Licensed Services and Maintenance Services) rendered by Supplier and accepted by the Authorized User prior to the termination date.

In the event of a Termination for Breach, Supplier shall accept return of any Deliverable that was not accepted by the Authorized User, and Supplier shall refund any monies paid by any Authorized User for the unaccepted Deliverable. [[Following sentence is optional depending on nature of what is being purchased, delete if not applicable]] The Authorized User will also have the right, in its sole discretion, to return any accepted Deliverable and Supplier shall refund any monies paid for the accepted Deliverable, less a reasonable value for the use of those components. [[END optional sentence]] Supplier will bear all costs of de-installation and return of Deliverables.

**F. Termination by Supplier**

In no instance will termination by Supplier be considered. Failure by an Authorized User to make timely payments owed to Supplier for its performance under this Contract will constitute a breach

by that Authorized User. Supplier's remedy for a breach is limited to the remedies set forth in Code § 2.2-4363 and the "Remedies" section of this Contract below.

**G. Transition of Services**

At the request of an Authorized User prior to or upon expiration or termination of this Contract, Supplier shall provide all assistance as the Authorized User may reasonably require to transition the Supplier's contractual obligations, or any portion thereof, to any other supplier with whom the Authorized User contracts for provision of same. This Transition Period obligation may extend beyond expiration or termination of the Contract for a period of twelve (12) months. If this Contract includes Supplier's provision of licensed products, Supplier shall take no action to restrict or terminate the use of such licensed products after the date of expiration or termination of the Contract or during any Transition Period, or both. Authorized Users shall pay for any additional maintenance or licensing fees during any Transition Period at the hourly rate or at a fee agreed upon by Supplier and the applicable Authorized User. Supplier shall provide all reasonable transition assistance requested by the applicable Authorized User to allow for the expired or terminated portion of the Services to continue without interruption or adverse effect, and to facilitate the orderly transfer of such Services to Authorized User. The transition assistance will be deemed by the parties to be governed by the terms and conditions of this Contract, except for those terms or conditions that do not reasonably apply to transition assistance. Further, any Transition Period will not affect any Authorized User's rights in regards to any purchased Software perpetual licenses which are paid in full.

**H. Contract Kick-Off Meeting**

Within 30 calendar days of the Effective Date, Supplier may be required to attend a contract orientation meeting, along with the VITA contract manager/administrator, Authorized User project manager(s) or authorized representative(s), and any other significant stakeholders who have a part in the successful performance of this Contract. The purpose of this meeting will be to review all contractual obligations for both parties, all administrative and reporting requirements, and to discuss any other relationship, responsibility, communication and performance criteria set forth in the Contract.

**I. Contract Closeout**

Prior to the Contract's expiration date, Supplier may be provided contract closeout documentation by VITA. If contract closeout documentation is provided, then Supplier shall complete, sign, and return to VITA Supply Chain Management any required documentation within 30 calendar days of receipt to ensure completion of closeout administration and to maintain a positive performance reputation with the Commonwealth. Any required closeout documentation not received within 30 calendar days of Supplier's receipt of the Commonwealth's request will be documented in the contract file as Supplier non-compliance. Supplier's non-compliance may affect any pending payments due to the Supplier, including final payment, until the documentation is returned to VITA.

**4. SUPPLIER PERSONNEL**

**A. Selection and Management of Supplier Personnel**

Supplier shall ensure that all Supplier Personnel performing under this Contract are competent and knowledgeable of the contractual arrangements and the applicable order or SOW between Authorized User and Supplier. Supplier acknowledges that Supplier is the employer of all Supplier employees and shall have the sole responsibility to supervise, counsel, discipline, review, evaluate, set the pay rates of, provide (to the extent required by law) health care and other benefits for, and terminate the employment of Supplier employees. Supplier shall be solely responsible for the supervision and conduct of Supplier Personnel, including all acts, omissions, gross negligence, and willful misconduct of Supplier Personnel. Additionally, Supplier shall ensure that Supplier Personnel comply with the appropriate Authorized User's site security, information security and personnel conduct rules, as well as applicable federal, state and local laws, including export regulations. Authorized User reserves the right to require the immediate removal from such Authorized User's premises of any Supplier Personnel whom such Authorized User believes has failed to comply with the above or whose conduct or behavior is unacceptable or unprofessional or results in a security or safety breach.

**B. Key Personnel**

An order or SOW may designate certain of Supplier's personnel as "Key Personnel" or "Project Managers". Supplier's obligations with respect to Key Personnel and Project Managers will be described in the applicable order or SOW. Any changes to Key Personnel must be mutually agreed to in writing by Supplier and Authorized User. Failure of Supplier to perform in accordance with such obligations may be deemed a breach of this Contract or of the applicable order or SOW.

**C. Subcontractors**

Supplier shall not use Subcontractors to perform its contractual obligations or any order or SOW issued pursuant to the Contract unless specifically authorized in writing to do so by the Authorized User. If an order or SOW issued pursuant to this Contract is supported in whole or in part with federal funds, Supplier may not subcontract to any Subcontractor that is a party excluded from Federal Procurement and Nonprocurement Programs. In no event may Supplier subcontract to any Subcontractor that is debarred by the Commonwealth or that owes back taxes to the Commonwealth and has not made arrangements with the Commonwealth for payment of such back taxes.

If Supplier subcontracts the provision of any performance obligation under this Contract to any other party, Supplier shall (i) act as prime contractor and will be the sole point of contact with regard to all obligations under this Contract; and (ii) represent and warrant that any authorized Subcontractors shall perform in accordance with the warranties set forth in this Contract.

**5. NEW TECHNOLOGY**

**A. Access to New Technology**

Supplier will bring to VITA's attention any new products or services within the scope of the Contract that Supplier believes will be of interest to VITA and will work to develop proposals for the provision of any such products or services as VITA requests.

**B. New Service Offerings Not Available from Supplier**

If new or replacement product or service offerings become available and cannot be competitively provided by the Supplier under the scope of this Contract, VITA will have the right to purchase the new or replacement products or services from a third party. If VITA elects to use such new or replacement product or service offerings, Supplier will reasonably assist VITA to migrate to such products or services.

If VITA elects to acquire new products or services as described in the paragraph above and such services replace existing Supplier-provided services, discount tiers and any commitments (as applicable per the Contract) will be reduced to reflect reductions in purchases of the replaced products or services.

**6. GENERAL WARRANTY**

THE OBLIGATIONS OF SUPPLIER UNDER THIS GENERAL WARRANTY SECTION ARE MATERIAL. SUPPLIER MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY CONCERNING MERCHANTABILITY OR FITNESS FOR ANY OTHER PARTICULAR PURPOSE.

Supplier warrants and represents to VITA that Supplier will fulfill its contractual obligations and meet all needed Requirements as described in Exhibit A. Supplier warrants and represents to VITA that:

**A. Ownership**

Supplier has the right to perform and provide all contractual obligations and provide all needed services or products without violating or infringing any law, rule, regulation, copyright, patent, trade secret, or other proprietary right of any third party. Supplier is the owner of the Product or otherwise has, to the best of its knowledge, the right to grant to the Commonwealth or any Authorized User title or the right to use the Product provided pursuant to this Contract. Upon Supplier's receipt of payment, the Commonwealth or ordering Authorized User, as applicable, will obtain good and clear title to the Product, excluding the System Software, free and clear of all liens, claims, security interests, and encumbrances.

**B. Coverage Period**

During the manufacturer's Warranty or as specified in the applicable order or SOW, Supplier warrants that any Deliverables provided by Supplier under this Contract will meet or exceed the Requirements. Supplier shall correct, at no additional cost to any Authorized User, all errors identified during the warranty period that result in supplier's failure to meet the Requirement, or its contractual obligations.

**C. Performance Warranty**

With respect to Supplier's performance under this Contract:

i. Supplier shall perform all contractual obligations with the care, skill and diligence, consistent with or above applicable professional standards currently recognized in Supplier's profession, and Supplier shall be responsible for the professional quality, technical accuracy, completeness, and coordination of all plans, information, specifications, Deliverables, and Services furnished under this Contract; and

ii. Supplier shall ensure that any contractually-obligated Services or Deliverables, or both, meet or exceed the Requirements and that any Product will function in conformance with the Requirements.

**D. Documentation and Deliverables**

i. Any required Documentation Supplier is obligated to provide under this Contract will be sufficient in detail and content to allow an appropriately trained user/programmer to understand and fully utilize, as applicable, the Deliverables without reference to any other materials or information.

ii. All Deliverables provided or delivered pursuant to this Contract are at the current release level unless an Authorized User specifies an older version in its order or SOW.

iii. No Update, engineering change, or revision made to any Supplier-provided Deliverables will (a) degrade the performance of any Deliverable or its components to a level below that defined in the Requirements or the Product manufacturer's or Software Publisher's published specifications, as applicable; (b) cause any other warranty to be breached; or (c) require an Authorized User to acquire additional hardware equipment or software.

**E. Malicious Code**

Supplier has used commercially reasonable efforts through quality assurance procedures to verify that there are no Computer Viruses or undocumented features in any of the Deliverables, as obligated and provided by Supplier under the order or SOW, at the time of delivery to the Authorized User. Supplier has used the best available means to scan any media provided to the Authorized User. Supplier warrants that the Deliverables, as obligated and provided by Supplier under the order or SOW, do not contain any embedded device or code (e.g., time bomb) that is intended to obstruct or prevent any Authorized User's use of the Deliverables.

Notwithstanding any rights granted under this Contract or at law, Supplier waives, under any and all circumstances, any right it has or may have in the future to exercise its license termination rights by electronic means. Supplier agrees that an Authorized User may pursue all remedies provided under law in the event of a breach or threatened breach of this section, including injunctive or other equitable relief.

**F. Open Source**

Supplier will notify all Authorized Users if any Deliverables, as obligated and provided by Supplier, contain any Open Source code and identify the specific Open Source License that applies to any embedded code dependent on Open Source code, provided by Supplier under this Contract.

**G. Supplier's Viability**

Supplier has the financial capacity to perform and continue to perform its obligations under this Contract. Supplier has no constructive or actual knowledge of a potential legal proceeding being brought against Supplier that could materially adversely affect performance of this Contract. Further, Supplier is not prohibited by any contract, or order by any court of competent jurisdiction from entering into this Contract.



**H. Supplier's Past Experience**

Supplier has met similar contractual obligations and fulfilled the Requirements as set forth in Exhibit A and in this Contract, in similar or greater complexity, to other customers without significant problems due to Supplier's performance and without causing a contractual breach or default claim by any customer.

**7. SCOPE OF USE**

Any Authorized User may use the Product, and any Software licensed in connection with the Product, on a worldwide basis for the benefit of itself and its agents. Supplier further authorizes use of the Product by third parties who are under contract with an Authorized User to provide outsourcing services. If the Commonwealth or an Authorized User takes title under the terms of this Contract to any Products with System Software that is integral to the Products, there will be no restrictions on subsequent resale or distribution of the Products and System Software by the Commonwealth or the Authorized User.

**8. SYSTEM SOFTWARE LICENSE**

VITA will consider Supplier-provided language ONLY when Supplier is a reseller of the Software and the software publisher requires an End User License Agreement (EULA). In such case, Supplier is advised that VITA will require an addendum to such EULA to address terms and conditions in such EULA with which VITA, as a government entity, by law or by policy, cannot agree.]]Any and all license rights granted pursuant to this Contract will be held pursuant to the terms of the "Licensing within the Commonwealth" section of this Contract below.

**A. License Grant**

Any System Software provided by Supplier as part of its Product that is licensed directly from the Software Publisher through an End User Licensing Agreement ("EULA") is subject to the License Agreement Addendum ("LAA"), as amended, attached to this Contract as Exhibit F. Supplier shall have sole responsibility for ensuring that any such Software Publisher executes the LAA. The Software Publisher's EULA, along with the LAA executed by Software Publisher will added to Exhibit F for reference, but will not become a part of this Contract. [[END Option 2]]

**B. Limitations on Copying and Disclosure**

**C. Business Continuity and Recovery**

**D. Authorized User Compliance**

Compliance with the terms and conditions of any license granted pursuant to this Contract is solely the responsibility of the Authorized User that purchased the license. VITA will have no responsibility for compliance with the terms and conditions of the purchased license, unless VITA purchased the license on its own behalf.

**E. No Subsequent, Unilateral Modifications of Terms by Supplier ("Shrink-Wrap")**

The terms and conditions set forth in this section supersede and govern the licensing and delivery of all Products and Services in this Contract. The terms and conditions of this Contract supersede any other provision or other unilateral license terms that may be issued by Supplier after the Effective Date, regardless of when those provisions were proposed, or the fact that another agreement may be affixed to, or accompany, System Software upon delivery.

**F. Reservation of Rights**

Nothing contained in this section will be construed to restrict or limit the rights of the Commonwealth or any Authorized User to use any technical data that the Commonwealth or Authorized User may already possess or acquire under proper authorization from other sources.

**9. DELIVERY AND INSTALLATION**

**A. Delivery Procedure**

Supplier shall deliver all Products F.O.B. destination, with the destination being the "ship to" address specified in the applicable order or SOW. Title will pass for purchases upon delivery and installation, after the equipment successfully runs all required diagnostic routines, and the

equipment is turned over to the Authorized User for use in accordance with the requirements. If the order or SOW stipulates that the Supplier will not provide installation of the Product, Supplier will bear all risk of loss or damage to the Product until Receipt. In all cases, Supplier shall arrange and pay for all transportation and insurance sufficient to fully protect the Product while in transit. Each shipment must include a packing slip indicating this Contract number, the Authorized User's order number, the SOW number, if applicable, the part number, a description of the Product shipped and the quantity shipped. Each package in any shipment must (i) be numbered; (ii) have a description stenciled on the outside indicating the quantity of Product contained by part number and description; and (iii) must conspicuously display the number of the package in that shipment which contains the packing slip. If required by the Authorized User, Supplier shall bar code all packages shipped. If any loss to, or damage of, the Product occurs prior to Acceptance by the Authorized User, Supplier shall immediately provide a replacement item. Title to Product, excluding System Software, will pass upon Acceptance.

Supplier will make available all appropriate and required Documentation at the time of delivery of the first unit of each different Product type. Product delivered without the appropriate and required Documentation will be considered "shipped short" until the applicable documentation has been received.

**B. Late Delivery**

Supplier acknowledges and agrees that failure to deliver the Product ordered in strict accordance with the agreed upon delivery schedule as set forth in this Section will constitute a material breach of this Contract resulting in damages to the ordering Authorized User, the total sum of which would be impracticable or impossible to ascertain as of the Effective Date of this Contract. As an estimate of the minimum amount of damages such Authorized User will suffer, Supplier agrees to credit the Authorized User an amount equal to one-half of one percent (.05%) of the total purchase price for each day that the Product is undelivered or nonoperational for a period of thirty (30) calendar days following the agreed upon delivery date, or if none specified, following the date order or SOW was received by Supplier. If the delay lasts longer than thirty (30) calendar days, the Authorized User may immediately cancel the order or SOW and collect as late delivery damages one-half of one percent (.05%) of the total purchase price. Any credit due the Authorized User will be applied to the next periodic invoice. Should late delivery occur outside of supplier's control, penalties will be waived if suitable short-term loaner can be provided.

In addition, in the event the Supplier fails for any reason to deliver the Product within 30 calendar days of the agreed upon delivery date set forth in the order/schedule, or if no date was specified, following the date the order or SOW was received by Supplier, then the ordering Authorized User, at its own discretion, may give Supplier oral or written notice of breach regarding the subject order or SOW. Once notice by the Authorized User is sent or given, the Authorized User may immediately procure the undelivered items, or substantially similar items, from another source. Once the Authorized User has effected a purchase from an alternate source, the Authorized User may charge-back Supplier. Supplier agrees to reimburse the Authorized User for any difference in cost between the original contract price and the Authorized User's cost to cover from the alternate source. In no event will any Authorized User be held to pay Supplier any costs incurred by Supplier, including but not limited to ordering, marketing, manufacturing, or delivering the item(s), which are subject of such Authorized User's notice of breach. Further, the Authorized User reserves any and all other remedies available at law or in equity.

**C. Product Trade-in and Upgrade**

[[To be determined prior to contract execution. Supplier to provide trade-in/upgrade parameters]]

**D. Product Installation**

Unless otherwise agreed, Supplier shall provide the initial installation of all Product at no additional charge. Installation will include: unpacking, removal of all shipping/packing materials, positioning, connecting to internal utility services, testing, and related necessary services to allow for Acceptance by the Authorized User.

All Product installations shall comply with building and facilities standards established by the ordering Authorized User. If Authorized User installs the Product, Supplier shall provide all reasonably necessary telephone assistance at no charge.

## **10. ACCEPTANCE**

### **A. Product Acceptance**

Product will be deemed accepted upon delivery and installation, after the equipment successfully runs all required diagnostic routines, and the equipment is turned over to the Authorized User for use in accordance with the requirements.

Authorized User shall provide to Supplier written notice of Acceptance upon successful Acceptance testing. Should Authorized User fail to provide Supplier written notice of successful or unsuccessful Acceptance testing within five (5) calendar days following the Acceptance testing period, the Product(s) will be deemed Accepted.

Throughout the Acceptance testing period, Supplier shall provide to the Authorized User any assistance and advice as the Authorized User may reasonably require. Supplier shall provide this assistance and advice at no additional cost, other than pre-approved travel expenses incurred which are reimbursable by the Authorized User pursuant to the terms and conditions of the "Reimbursement of Expenses" section of this Contract below.

### **B. Cure Period**

Supplier shall correct any non-conformities identified during Acceptance testing and re-submit the corrected Product for re-testing within seven (7) calendar days of Supplier's receipt of a written notice of non-conformance, or as otherwise agreed between the Authorized User and Supplier in the applicable order or SOW. If Supplier fails to cure the non-conformity or deliver Product that meets the Requirements, the Authorized User may, in its sole discretion: (i) reject the Product in its entirety and recover amounts previously paid to Supplier; (ii) issue a "partial Acceptance" of the Product with an equitable adjustment in the price to account for such deficiency; or (iii) conditionally accept the applicable Product while reserving its right to revoke Acceptance if timely correction is not forthcoming. Failure of a Product to meet, in all material respects, the Requirements after the second set of acceptance tests may constitute a breach by Supplier. In the event of such breach, the Authorized User may, at its sole discretion, terminate its order or SOW, in whole or in part, for the Product and any Services to be provided by Supplier.

## **11. PERFORMANCE LEVELS FOR PURCHASED AND RENTED PRODUCTS**

### **A. Purchased Product**

Any Product(s) purchased by an Authorized User and covered continuously by Maintenance Services or Rental Services, as applicable, are required to operate satisfactorily and produce acceptable printed quality at a 90% effectiveness level during any month of the first five (5) years following Product Acceptance.

The effectiveness level for a unit of Product will be computed by dividing the total productive time by the sum of that time plus any Product failure downtime. Product failure downtime does not include malfunction due to operator error or preventive maintenance calls. In addition, the Product failure rate must not, during any three (3) month period, average more than two (2) malfunctions (breakdowns) per month requiring Supplier correction. No unit of Product may require six (6) or more service calls in any three (3) month period. The Product failure rate calculation does not include service calls for malfunction due to operator error or preventive maintenance.

In the event that the Product does not meet the performance requirements of this section, (i) during the first year of the MCP, Supplier shall replace the non-compliant unit of Product with a new unit of Product matching all Requirements of the original unit of Product, at no additional cost to the Authorized User, or (b) during subsequent years of the MCP, Supplier shall replace the non-compliant unit of Product with a unit of Product having equal or greater features.

### **B. Leased or Rented Product**

Any Product(s) rented by an Authorized User are required to operate satisfactorily and produce acceptable printed quality at a 90% effectiveness level during any month during the Rental Term.

The effectiveness level for a unit of Product will be computed by dividing the total productive time by the sum of that time plus any Product failure downtime. Product failure downtime shall not include malfunction due to operator error or preventive maintenance calls. In addition, the Product failure rate must not, during any three (3) month period, average more than two (2) malfunctions



(breakdowns) per month requiring Supplier correction. No unit of Product may require six (6) or more service calls in any three (3) month period. The Product failure rate calculation shall not include service calls for malfunction due to operator error or preventive maintenance.

In the event that the Product does not meet the performance Requirements of this section, the Supplier shall replace the non-complaint unit of Product with a new unit of Product matching all requirements of the original unit of Product. Should Supplier fail to replace the unit of Product in accordance with this section, the Authorized User may immediately terminate the applicable order or SOW without penalty, and Supplier shall, at its own expense, immediately remove the unit of Product from the Authorized User's premises.

**C. Removal of Lease or Rental Hardware**

Supplier shall remove all off-lease Hardware within 30 days of the expiration of the Hardware's Lease. If Supplier fails to remove the Hardware, the Authorized User shall send written notice to the Supplier requesting removal of the equipment within 30 calendar days of its receipt of the notice. If the Hardware is not removed by Supplier following this 30-day period, the Authorized User shall send a second written notice to Supplier requesting removal of the Hardware within 30 calendar days of the second notice. If the Hardware has not been removed after the second notice by Authorized User and subsequent 30 day period, the Authorized User may deem the Hardware to have been abandoned by the Supplier and Authorized User may dispose of the Hardware at its sole discretion without further liability to the Supplier.

**D. Return of Product**

At the expiration or termination of a Lease Agreement or Rental Agreement or for the return or removal of any Product to Supplier, the Authorized User will cooperate with Supplier in arranging pickup of the Product. If the leased or rented Product contains a hard drive, the Authorized User and Supplier will ensure compliance with Commonwealth Data Removal standard before the equipment is removed from the Authorized User's location. The requirements for compliance are located at the following URL:

[http://www.vita.virginia.gov/uploadedFiles/Library/PSGs/Data\\_Removal\\_Standard\\_514\\_03%2010\\_07\\_2008\\_r3.pdf](http://www.vita.virginia.gov/uploadedFiles/Library/PSGs/Data_Removal_Standard_514_03%2010_07_2008_r3.pdf)). If the Supplier performs the cleaning of the hard drive, the Supplier will provide written certification to the Authorized User that the hard drive has been cleaned in full compliance with the Commonwealth Data Removal standard.

## **12. SERVICES FOR PURCHASED AND RENTED PRODUCTS**

**A. Service Offerings**

Supplier shall offer for rent and purchase all Product types identified in Exhibit B and shall offer Maintenance Services for all Product(s) purchased pursuant to this Contract. No Authorized User is obligated to continue Maintenance Services on Product that has been removed from service, provided Supplier has been notified in writing of the removal.

During the MCP or Rental Term, Supplier shall provide all Services required to maintain the Product in operating condition and to ensure Authorized User has sufficient supplies available at all times. Services will include, but are not limited to, performing Maintenance Services, providing replacement parts, maintaining sufficient inventory of spare parts to support the Authorized User's installed base, and correcting any malfunctions or defects in any unit of Product.

**B. Performance of Maintenance Services or Rental Services**

Supplier shall perform Preventive Maintenance during regular business hours unless Preventive Maintenance affects the Hardware processing; in these instances, Preventive Maintenance will be performed as mutually agreed and at no additional cost to an Authorized User.

Supplier shall respond to calls for Maintenance Services or Rental Services Monday through Friday, 7 am through 6 pm local time, excluding Commonwealth holidays. Supplier shall respond to problems with the Product identified by an Authorized User in no more than four (4) hours after notification. Repairs shall be made within twelve (12) working hours of the first notification by the Authorized User.

Calls dispatched outside the times specified in this section may be subject to additional charges. If Maintenance Services or Rental Services are requested for a unit of Product within the 48-hour

period immediately following remedial maintenance performed on the same unit of Product for the same problem, Supplier shall provide the Maintenance Services or Rental Services at no charge.

Supplier's response may be on-site or remote, as required to resolve the problem. Supplier shall utilize the most expeditious methods of restoring the Hardware to its original operating condition, which may include part or whole unit replacement. Supplier shall ship replacement Hardware or any components within 24 hours of receipt of failed Hardware or component. Supplier shall provide any labor, parts, firmware upgrades and software upgrades and return shipping required to perform advanced replacement services at any time during the MCP or Rental Term. Any replacement parts Supplier provides in fulfilling its obligations under this section must be new parts.

**C. Defects or Malfunctions**

Supplier shall promptly notify all Authorized Users of any defects or malfunctions in the Product or Documentation that Supplier learns from any source. Supplier shall correct any defects or malfunctions, or provide a workaround until corrected, within five (5) business days of knowledge of any defect or malfunction. Supplier shall also provide all Authorized Users with corrections of the defects or malfunctions at no additional cost. Supplier shall provide all parts, components and services required to correct the design defect and restore the item or replace it, so that it functions as warranted.

For purchased Product, any replacement Hardware will become the sole property of the Authorized User and any defective Hardware will become the sole property of Supplier. In all instances, Supplier shall be solely responsible for all shipping costs.

**13. PRODUCT SUPPORT AND ADDITIONAL SERVICES**

**A. Authorized User or Third Party Support**

**1. Documentation and Support Availability**

In the event that VITA terminates this Contract, Supplier shall provide all the necessary user and installation Documentation and maintenance and repair training reasonably required to enable any Authorized User to maintain and repair the Product itself, or to obtain support and Maintenance Services from a third-party. Supplier shall also provide the Documentation and training necessary to allow any Authorized User to self-maintain to the subcomponent level. In addition, Supplier agrees to provide, for a period of five (5) years from the date of the last purchase, spare parts and components at the cost set forth in Exhibit B, including those solely sourced by Supplier, so as to enable any Authorized User or its designated third-party maintenance provider to provide full maintenance and repair of the Product.

**2. Timeliness and Price**

Supplier agrees to make the above-referenced Documentation, training, and spare parts and components available within 15 business days following receipt of a written request, and at a price set forth in Exhibit B. In addition, Supplier shall sell the Product to any Authorized User's third-party maintenance provider under contract with the Authorized User, at the prices as set forth in Exhibit B, for the sole purpose of supporting the Authorized User's installed inventory. Supplier shall document and provide to all Authorized Users, in a timely manner, any and all revisions to information and parts and components lists as they are developed or supplied by Supplier.

**B. Engineering Changes and Product Modification**

Product processing or operating capability, they will be scheduled at the Authorized User's request as to time and at the Authorized User's option. The Authorized User will have the option to waive or pre-approve all other engineering changes planned by Supplier on the Product delivered or planned for delivery to the Authorized User.

**C. Parts and Maintenance Support**

Supplier shall provide new or certifiable as new spare parts and the Maintenance Services identified in the "Maintenance Services" section of this Contract and Exhibit B attached to this Contract for each Product type ordered by an Authorized User. Supplier's obligation under this section will last for five (5) years from the expiration of the initial Warranty Period of the last unit of

any given Product type provided by Supplier to the Authorized User. After this 5-year period, Supplier shall advise the Authorized User of its intent to discontinue either certain parts or Maintenance Services for any Product type ordered by the Authorized User.

Supplier shall notify the Authorized User one (1) year prior to the effective date of any such discontinuance, and shall provide to the Authorized User the opportunity to purchase spare parts in a quantity adequate to support its installed base. Should Supplier advise the Authorized User of its intent to discontinue certain parts for any Product type ordered by the Authorized User, the Authorized User has the option to request and Supplier has the obligation to provide, all documentation, including source code, required to ensure ongoing support, including full maintenance and repair by the Authorized User or its designated third-party maintenance provider within 30 calendar days prior to the discontinuance date, or to replace the unsupported Product with a supported Product at a cost to the Authorized User of no more than the cost delta between the supported Product and the unsupported Product.

**D. Inventory Record**

Supplier shall maintain the Inventory Record at no additional cost or reduction in the Warranty Period. Product quantities and types may vary as Product is added or deleted from coverage. Authorized User shall notify Supplier in writing of any Product relocated, added, or removed from service. Upon receipt of this notification, Supplier will amend the Inventory Record to reflect the relocation, addition, or deletion of the Product. Supplier shall provide, at no additional cost, a copy of the most current Inventory Record to any Authorized User upon request.

**E. Product Service Record**

Supplier shall maintain, at no additional cost, a Product Service Record for each unit of Product covered under warranty or maintenance. The Product Service Record must include the following records for each unit of Product: (i) installation/ relocation/ removal/ modifications; (ii) remedial actions; (iii) preventive actions; and (iv) any additional services not covered by warranty or maintenance. Upon request by the Authorized User, Supplier shall provide, at no additional cost, a copy of the Product Service Record.

**F. Product Discontinuation**

During the Term of this Contract, if any Product listed on Exhibit B is discontinued and Supplier does not offer a substitute acceptable to VITA, then Supplier shall continue to meet such Authorized User's needs for the discontinued Product for not less than twelve (12) months, for each Authorized User who purchased the discontinued Product. Additionally, Supplier shall make maintenance parts for the discontinued Product available to the Authorized User for a period of five (5) years from the date of discontinuation. In every event, Supplier will provide any Authorized User with 120 days advance written notice of its intent to discontinue any Product type previously ordered by such Authorized User.

**G. Additional Services**

Upon request of an Authorized User by means of an order or SOW issued in accordance with the ordering provisions of this Contract, Supplier will provide additional on-site services which may include: (i) relocation of previously installed hardware; (ii) assistance to Authorized User's communications department in mutually acceptable duties related to the warranty or Maintenance Services provided under this Contract; and (iii) cabling, if applicable. The Authorized User shall compensate Supplier for such additional on-site services in accordance with the prices identified in Exhibit B. These additional on-site services will be in addition to any existing on-site Warranty Services or Maintenance Services obligations of Supplier.

Upon request of an Authorized User by means of an order or SOW issued in accordance with the ordering provisions of this Contract, Supplier will also provide the following services beyond those identified as Warranty Services or Maintenance Services offerings: (i) service on equipment not covered by this Contract; (ii) repair of damage or replacement of parts of Hardware resulting from changes in the hardware environment, extraordinary use of the hardware, or interconnected devices; or (iii) service outside the applicable hours of service specified in an executed order or SOW referencing this Contract. The charge for such services will be at the hourly rate specified in Exhibit B and will be inclusive of all expenses. Warranty Services or Maintenance Services requested for a unit of hardware within the 48-hour period immediately following Remedial

Maintenance (as set forth below) performed on the same unit of hardware for the same problem, will not be considered an additional service and will be provided at no charge. Requests for additional services will only be approved for payment by the Authorized User when a Product's service record is included with the applicable invoice.

#### **14. WARRANTY AND REMEDY OF PRODUCT**

##### **A. Compatibility**

Supplier warrants that each Product provided pursuant to this Contract is, and will continue to be, data, program, and upward compatible with any other Product available or to be made available from Supplier within the same family of Products. Supplier warrants that, as a result of this compatibility, each Product can be utilized without adaptation of the other Products, and so that programs written for the Product shall operate on the next generation of Products, and not result in the need for alteration, emulation, or other loss of efficiency for a period of not less than five (5) years.

##### **B. Product**

Supplier warrants the following with respect to the Product:

- i. The Product will be free of defects in material, design, and workmanship;
- ii. Upon delivery, the Product will be new and in Operating Condition and will have all engineering changes released to date already installed;
- iii. Supplier shall not disable any Authorized User's use of System Software through remote access or otherwise. If the System Software contains authorization codes allowing access to a data base or other software, Supplier warrants that such codes will be perpetual and non-expiring.

##### **C. Warranty Services**

During the manufacturer's warranty or as specified in the applicable order or SOW, Supplier warrants that the Product will meet or exceed the Requirements. Supplier shall provide Warranty Services (including unlimited telephonic support and all necessary travel and labor) during the warranty period at the prices set forth in Exhibit B of this Contract. Supplier shall correct, at no additional cost to any Authorized User, all errors identified during the Warranty Period that result in a failure of the Product to meet the Requirements.

Exhibit B provides detailed descriptions of the Supplier's warranty and maintenance offerings and responsibilities as well as remedies available to the Authorized User in the event Supplier fails to perform its warranty and maintenance obligations. Any remedies will be paid to the Authorized User on a quarterly basis. Exhibit B defines coverage periods, response times, and restore times.

If multiple warranty levels are available, an Authorized User may elect, at any time, an alternative warranty level offered by Supplier. Any amendment to the warranty level will take effect within thirty (30) calendar days following Supplier's receipt of Authorized User's written notice, in the form of a modification to an order or SOW.

Authorized User's designated control organization will have the exclusive authority to request Warranty Services. Supplier shall not respond to calls for service from any other source without prior written approval of Authorized User's agreement administrator designated on the relevant order.

##### **1. Product Covered**

Exhibit B lists all Product types covered under warranty.

##### **2. Preventive Maintenance**

Supplier's Preventive Maintenance offerings and responsibilities, and the Authorized User's associated remedies, are described in Exhibit B.

##### **3. Remedial Maintenance**

Supplier's Remedial Maintenance offerings and responsibilities, and the Authorized User's associated remedies, are described in Exhibit B.



#### 4. Replacement Parts

Supplier's offerings and responsibilities related to Replacement Parts, and the Authorized User's associated remedies, are described in Exhibit B.

#### 5. Spares

Supplier's offerings and responsibilities related to Spares, and the Authorized User's associated remedies, are described in Exhibit B.

#### 6. Notification and Correction of Defects

Supplier's offerings and responsibilities related to notification and correction of defects, and the Authorized User's associated remedies, are described in Exhibit B.

#### 7. One-year Depot Warranty

Supplier's depot warranty offerings and responsibilities are described in Exhibit B.

#### 8. On-site Warranty

Supplier's on-site warranty offerings and responsibilities are described in Exhibit B.

#### 9. System Software Warranty

As part of the standard manufacturer's warranty offering, beginning on the date of Acceptance, Supplier shall provide the following warranty services (including unlimited telephonic support and all necessary travel and labor) without additional charge to any Authorized User to maintain the System Software in accordance with the Requirements:

##### a) New Releases

Supplier's responsibilities related to new releases of System Software and Documentation are described in Exhibit B.

##### b) Coverage

Supplier's offerings and responsibilities related to coverage for telephonic and written consultation in connection with use, problems, and operation of the System Software are described in Exhibit B.

##### c) Response and Restore Times

Supplier's response and restore times related to use, problems, and operation of the System Software, and Authorized User's associated remedies, are described in Exhibit B.

##### d) Software Evolution

Should Supplier or Software Publisher merge or splinter the System Software previously provided to any Authorized User, such action on the part of Supplier or Software Publisher shall not in any way result in any Authorized User being charged additional license or support fees in order to receive enhancements, releases, upgrades or support for the System Software.

If Supplier or Software Publisher reduces or replaces functionality contained in a licensed System Software product and provides the same or substantially similar functionality as or within a separate or renamed System Software product, then the Commonwealth or the Authorized User will be entitled to license such System Software product at no additional license or maintenance fee, and subject to the terms and conditions herein.

If Supplier or Software Publisher releases an option, future System Software product or other release that has substantially the same functionality as the Software products provided under this Contract, and Software Publisher and/or Supplier ceases to provide maintenance for the older System Software product, then Supplier shall offer the Commonwealth or the Authorized User the option to exchange licenses for such replacement System Software product or function at no additional charge.

#### 10. Escalation Procedures

[[TBD based on Supplier proposal.]]

#### 11. Remedies

In addition to any remedies described in Exhibit B, if Supplier is unable to make the Product, including System Software, conform, in all material respects to the Requirements, within thirty (30) calendar days following notification by an Authorized User, Supplier shall, at such Authorized User's request, either (i) replace the non-conforming Product or (ii) accept return of the non-conforming Product and return all monies paid by such Authorized User for the returned Product.

Notwithstanding anything to the contrary in this Contract or in any exhibit hereto, VITA and any Authorized User retain all rights and remedies available at law or in equity.

#### **12. Product Maintenance Services and Renewal Options**

At least sixty (60) calendar days prior to the expiration of the warranty period, Supplier shall notify the Authorized User, and the Authorized User, at its sole discretion, may order from Supplier Maintenance Services, including System Software Maintenance Services for a period of one (1) year and for the annual fee identified in Exhibit B. Supplier warrants that it shall make Maintenance Services available for all the Products, including System Software, listed in Exhibit B, or which are components of Products listed in Exhibit B, for a period of at least five (5) years from the expiration of the initial warranty period of any Product provided to an Authorized User pursuant to this Contract. Termination of this Contract or cancellation of Maintenance Services, including System Software Maintenance Services if provided as a separate offering from Supplier, by an Authorized User shall not affect this Contract or the grant of any license pursuant thereto.

THE OBLIGATIONS OF SUPPLIER UNDER THIS WARRANTY AND REMEDY SECTION ARE MATERIAL. SUPPLIER MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY CONCERNING MERCHANTABILITY OR FITNESS FOR ANY OTHER PARTICULAR PURPOSE.

#### **15. MAINTENANCE SERVICES**

Supplier shall provide Maintenance Services (including unlimited telephonic support and all necessary travel and labor) during the MCP at the prices identified in Exhibit B without additional charge to maintain the Product in accordance with the Requirements.

Exhibit B attached to this Contract provides detailed descriptions of the Supplier's warranty and maintenance offerings and responsibilities, as well as remedies available to the Authorized User in the event Supplier fails to perform its warranty and maintenance obligations. Any remedies will be paid to the Authorized User on a quarterly basis. Exhibit B also defines coverage periods, response times, and restore times.

Authorized User's designated control organization will have the exclusive authority to request maintenance services. Supplier shall not respond to calls for service from any other source without prior written approval of Authorized User's agreement administrator designated on the relevant order or SOW.

##### **A. Ordering**

See the "Fees, Ordering, and Payment Procedure" section of this Contract below.

##### **B. Renewal**

At least 60 calendar days prior to the expiration of the MCP for each unit of Product, Supplier shall notify the Authorized User in writing of such expiration. Authorized User may, at its sole discretion, issue an order or SOW to Supplier to renew the Maintenance Services, including System Software Maintenance Services, for an additional one (1) year period. Any increase in the annual fee for Maintenance Services may not exceed the lesser of (i) three percent (3%), or (ii) the annual change in CPI, as defined in the "Fees, Ordering and Payment Procedures" section of this Contract below, in effect at the time of renewal. Termination of this Contract or cancellation of Maintenance Services, including System Software Maintenance Services if provided as a separate offering from Supplier, by an Authorized User will not affect this Contract or the grant of any license pursuant to the Contract.

##### **C. Offered Services**

Maintenance Services will include:

## 1. Product Covered

Exhibit B lists all Product types for which Supplier offers Maintenance Services. No Authorized User is obligated to continue Maintenance Services on Product(s) that has been removed from service, provided Supplier has been notified in writing of such removal.

## 2. Preventive Maintenance

Supplier's Preventive Maintenance offerings and responsibilities, and the Authorized User's associated remedies, are described in Exhibit B.

## 3. Remedial Maintenance

Supplier's Remedial Maintenance offerings and responsibilities, and the Authorized User's associated remedies, are described in Exhibit B.

## 4. Replacement Parts

Supplier's offerings and responsibilities related to Replacement Parts, and the Authorized User's associated remedies, are described in Exhibit B.

## 5. Spares

Supplier's offerings and responsibilities related to Spares, and the Authorized User's associated remedies, are described in Exhibit B.

## 6. Notification and Correction of Defects

Supplier's offerings and responsibilities related to notification and correction of defects, and the Authorized User's associated remedies, are described in Exhibit B.

## 7. Advanced Replacement Services

Supplier's advanced replacement service offerings and responsibilities are described in Exhibit B.

## 8. On-site Maintenance Services

Supplier's on-site Maintenance Services offerings and responsibilities are described in Exhibit B.

## 9. System Software Maintenance

During the MCP and as part of the standard Maintenance Services offering, Supplier shall provide the following Maintenance Services (including unlimited telephonic support and all necessary travel and labor) without additional charge to any Authorized User to maintain the System Software in accordance with the Requirements:

### a) New Releases

Supplier's responsibilities related to new releases of System Software and Documentation are described in Exhibit B.

### b) Coverage

Supplier's offerings and responsibilities related to coverage for telephonic and written consultation in connection with use, problems, and operation of the System Software are described in Exhibit B.

### c) Response and Restore Times

Supplier's response and restore times related to use, problems, and operation of the System Software, and any associated remedies, are described in Exhibit B.

### d) Software Evolution

If Supplier merges or splinters the System Software previously provided to any Authorized User, in no event will the merger or splinter on the part of Supplier result in any Authorized User being charged additional license or Maintenance fees in order to receive enhancements, releases, upgrades, or support for the System Software.

If Supplier or Software Publisher reduces or replaces functionality contained in a licensed System Software product and provides the same or substantially similar functionality as or within a separate or renamed System Software product, then the Commonwealth or the Authorized User

will be entitled to license such System Software product at no additional license or maintenance fee, and subject to the terms and conditions herein.

If Supplier or Software Publisher releases an option, future System Software product or other release that has substantially the same functionality as the Software products provided under this Contract, and the Software Publisher, the Supplier, or both, ceases to provide maintenance for the older System Software product, then Supplier shall offer the Commonwealth or the Authorized User the option to exchange licenses for such replacement System Software product or function at no additional charge.

#### 10. Escalation Procedures

[[TBD based on Supplier proposal.]]

#### 11. Remedies

In addition to any remedies described in Exhibit B, if the Product, including the System Software, fails to conform, in all material respects, to the Requirements, Authorized User shall provide written notice to the Supplier of the failure. If within 30 calendar days of its receipt of Authorized User's notice the Supplier is unable to make the Product, including the System Software, conform, in all material respects, to the Requirements, Supplier shall, at Authorized User's request, either (i) provide a replacement Product at no additional cost to the Authorized User, or (ii) accept return of the Product and return all monies paid by such Authorized User (a) for Maintenance Services for the returned Product, including System Software, pro-rated on a monthly basis as of the date the Authorized User reported the non-conformity, and (b) for the Product, including System Software, pro-rated on a monthly basis as of the date the Authorized User reported the non-conformity and based on the average life of the Product.

In addition to the remedies set forth in this Contract and any exhibits, VITA and any Authorized User retain all rights and remedies available at law or in equity.

#### **D. Services for MCP, Lease Term, or Rental Term**

During any MCP, Lease Term, or Rental Term, Supplier shall provide all Services required to maintain the Product in operating condition and to ensure Authorized User has sufficient supplies available at all times. Such Services include, but are not limited to, performing Preventive Maintenance and remedial maintenance, providing replacement parts, maintaining sufficient inventory of spare parts to support the Authorized User's installed base, and correcting any malfunctions or defects in any unit of Product.

#### **16. RENEWAL OF LEASE OR RENTAL PRODUCT**

At least 60 calendar days prior to the expiration of the Lease Term or Rental Term for each unit of Product, Supplier shall notify the Authorized User of the expiration. Authorized User, at its sole discretion, may issue an order to Supplier to extend the Lease Term or Rental Term in accordance with the provisions of this section.

An Authorized User may elect to renew a 12-month, 36-month, 48-month, or 60-month Lease Agreement or Rental Agreement for one (1) year beyond the initial Lease Term or Rental Term. In order to enter into a one-year renewal agreement for the existing unit of Product, the Supplier shall reduce the rental rate charged to the Authorized User not less than five percent (5%). Only one (1) renewal term is allowable pursuant to this Contract for a 12/36/48/60-month initial Lease Term Rental Term. Following the one renewal term, an Authorized User must enter into a new Lease Agreement or Rental Agreement using a current contract.

#### **17. HARDWARE-SPECIFIC PROVISIONS**

Supplier shall offer all Product types identified in Exhibit B and shall offer Maintenance Services for all Product purchased hereunder. No Authorized User is obligated to continue Maintenance Services on Product that has been removed from service, provided Supplier has been notified in writing of such removal.

During any MCP, Lease Term or Rental Term, Supplier shall provide all Services required to maintain the Product in Operating Condition and to ensure Authorized User has sufficient supplies available at all times. Such Services include, but are not limited to, performing preventive and remedial



maintenance, providing replacement parts, maintaining sufficient inventory of spare parts to support the Authorized User's installed base, and correcting any malfunctions or defects in any unit of Product.

**A. Trial Period for MFD's**

At an Authorized User's request, Supplier shall provide Authorized User a unit of Product for a thirty (30) day trial period. If a unit of Product is offered for a trial period the Authorized User shall issue an order for the monthly rental rate of that unit of Product and state that such order is for a thirty (30) day trial. The trial period shall start when the Supplier has completed installation and has made the unit of Product ready for normal use. If during such trial period the unit is deemed to be unacceptable by the Authorized User, the Authorized User may cancel the order and Supplier shall remove such unit at no cost to such Authorized User.

Following the trial period, Authorized User may, at its option, continue or discontinue use of Supplier's Product. Should Authorized User elect to purchase or rent Supplier's Product, Authorized User shall issue an order for purchase or rental of the Product, and Supplier shall credit the trial period price charged to the Authorized User toward the purchase or rental of the unit. If the trial unit provided to such Authorized User was a new unit, the Authorized User shall retain such unit at its location; however, if the trial unit provided to such Authorized User was a demonstration unit (i.e., one which had made any number of copies prior to installation), Supplier shall remove the demonstration unit and deliver a new unit upon receipt of Authorized User's order for purchase or rental of Supplier's Product. Should Authorized User elect to discontinue use of Supplier's Product, Authorized User shall so notify Supplier and Supplier shall de-install and remove the trial unit from the Authorized User's premises at no additional cost to the Authorized User.

**18. FEES, ORDERING, AND PAYMENT PROCEDURE**

**A. Fees and Charges**

In consideration for the Supplier's performance obligations under this Contract, an Authorized User shall pay Supplier the fee(s) owed pursuant to the schedule of fees and charges as set forth on Exhibit B attached to this Contract. Supplier will only be entitled to those fees owed for Supplier's performance obligations and any additional Products and Services provided to an Authorized User in accordance with the scope of this Contract and the Requirements, as authorized by Exhibit A, and per the Authorized User's order or SOW. The fees, and any associated discounts, will be applicable throughout the Term of this Contract unless modified pursuant to the terms and conditions below. In the event the fees or discounts apply for any period less than the entire Term, Supplier agrees that it will not increase the fees during the first twelve (12) month period following the Effective Date, and will not increase the fees more than once in any subsequent twelve (12) month period thereafter. No increase in fee amounts will exceed the lesser of three percent (3%) or the annual increase in the Consumer Price Index for All Urban Consumers (CPI-U), U.S. City Average, All Items, Not Seasonally Adjusted, as published by the Bureau of Labor Statistics of the Department of Labor (<http://www.bls.gov/cpi/home.htm>) for the period ending 60 to 90 days prior to the effective date of the increase compared with the same index one (1) year prior. Supplier must submit any change in price in writing to VITA and to the Authorized User if the change impacts any SOW or order and in accordance with the above and will not become effective for 60 calendar days thereafter. Supplier agrees to offer price reductions to ensure compliance with the "Competitive Pricing" section of this Contract below.

**B. Reproduction Rights for Supplier-Provided Software**

At an Authorized User's request, Supplier shall provide the Authorized User with a reproducible, portable data storage device (e.g. CD-ROM or USB flash drive) of Software and Updates. The Authorized User will be responsible for making copies and distributing the Software and Updates as required. Within 30 calendar days of the end of each calendar quarter, the Authorized User shall provide to Supplier a report of the net number of additional copies of the Software or Updates or both deployed during the quarter. Supplier will invoice such Authorized User for the net number of new licenses reported as deployed.

**C. Demonstration and/or Evaluation**

If the Supplier's contractual obligations include the provision of a Solution, an Application and Licensed Services, or Software-as-a-Service, at the request of any Authorized User, then Supplier shall perform any reasonable demonstration of its Solution, Application and Licensed Services, or Software-as-a Service at the Authorized User's location and at no charge.

If the Supplier's contractual obligations include the provision of Software, then the Supplier shall provide the Software to any Authorized User for evaluation purposes at no charge. The evaluation period will be determined by the complexity of testing but will be a period not less than 30 calendar days. Each new project is entitled to an evaluation copy regardless of whether an Authorized User has previously purchased the Software.

**D. Supplier Quote and Request for Quote**

An Authorized User, may at its sole discretion, issue a Request for Quote ("RFQ") for any combination of the Solution, Product, or Services provided under this Contract. Supplier shall respond to the RFQ by providing a written quote. Supplier's quote must include (a) a detailed description of each product or service proposed, including any applicable components, at the Exhibit B line item fee level; (b) the quantity of each line item; (c) the total contract price; (d) any additional percentage discount offered; (e) an extended price; (f) any optional or alternate pricing; and (g) any pricing assumptions. If requested by the Authorized User, Supplier's quote must also include a detailed description of the approach Supplier plans to take in developing, implementing, and maintaining its offering pursuant to the RFQ for the Authorized User. If Supplier is unable to meet the requirements of the RFQ, Supplier shall notify the Authorized User in writing of its inability to perform the work requested by the Authorized User, and provide the reasons for its inability to perform, prior to the due date for the submission of quotes in response to the RFQ. Supplier's failure to respond to an RFQ may be deemed a breach of this Contract.

**E. Competitive Request for Quotes**

If an Authorized User determines that a competitive process is required to ensure it receives the best value for any combination of its needed Solution, Product, or Services under this Contract, then the Authorized User may, at its sole discretion, use a Competitive Request for Quote ("CRFQ") process to obtain identical or similar Solutions, Products, or Services to those provided by Supplier pursuant to this Contract. The CRFQ will clearly outline the project timing and requirements. If the Authorized User is not able to identify the exact specifications required, then the CRFQ respondents will be given the opportunity to identify and propose their recommended specifications.

**F. Ordering**

All Authorized Users have the right to license or purchase Supplier's Products or Services under this Contract, but Authorized Users have no obligation to purchase or license from Supplier any of Supplier's Products or Services. [[Modify the following sentence only if this Contract is mandatory use for any Authorized User]] This Contract is optional use and non-exclusive, and all Authorized Users may, at their sole discretion, purchase, license or otherwise receive benefits from third party suppliers of products and services similar to, or in competition with, the Products and Services provided by Supplier. Supplier shall accept any order or placed by an Authorized User through the Commonwealth's electronic procurement website portal, eVA (<http://www.eva.virginia.gov/>). Agencies, as defined by Code § 2.2-2006, and legislative, judicial, and independent agencies of the Commonwealth, must order through eVA. All other Authorized Users are encouraged to order through eVA, but may order through the following means:

- i. Purchase Order ("PO"): An official PO form issued by an Authorized User.
- ii. Any other order/payment charge or credit card process, such as AMEX, MASTERCARD, or VISA under contract for use by an Authorized User. This ordering authority is limited to issuing orders or SOWs for the contractual offerings and Requirements available under the scope of this Contract. No Authorized User have the authority to modify this Contract under any circumstances. An order or SOW from an Authorized User may contain additional terms and conditions. In the event that the terms and conditions of the Authorized User's order or SOW are inconsistent with the terms and conditions of this Contract, the terms of this Contract will supersede.



If the Contract allows for the provision of hardware Product, an Authorized User may order Maintenance Services for any Product at any time during the Term of the Contract, irrespective of whether such Product is covered under warranty or maintenance at the time the order is issued to Supplier. Each order will identify:

- iii. Product and, if applicable, serial number, for which Maintenance Services will be provided,
- iv. Maintenance Level to be provided, and
- v. MCP for the Product Maintenance. Authorized User may elect, at any time, another Maintenance Level offered by Supplier. Such amendment will take effect within 30 calendar days following Supplier's receipt of Authorized User's written notice, in the form of a modification to an order or SOW. Unless otherwise agreed to by the Authorized User and Supplier, the MCP for a unit of Product will be one (1) year from the effective date of any signed order or SOW for Maintenance on such Product.

Supplier shall not accept any order or SOW from an Authorized User if the order or SOW is to be funded, in whole or in part, by federal funds and if, at the time the order or SOW is placed, Supplier is not eligible to be the recipient of federal funds as may be noted on any of the Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs.

ALL CONTRACTUAL OBLIGATIONS UNDER THIS CONTRACT IN CONNECTION WITH AN ORDER OR SOW PLACED BY ANY AUTHORIZED USER ARE THE SOLE OBLIGATION OF SUCH AUTHORIZED USER AND NOT THE RESPONSIBILITY OF VITA UNLESS THE AUTHORIZED USER IS VITA.

#### **G. Orders for Lease-Rental Products or MPS**

If an Authorized User places an order or SOW to lease or rent Product(s) provided by the Supplier, the Authorized User must comply with the Virginia Department of Accounts ("DOA") CAPP Manual and the Treasury Board's Master Equipment Leasing Program ("MELP"), as applicable. This requirement does not apply to Authorized Users who are private institutions of higher education. The Supplier shall provide relevant information and completion of related Documentation in a timely manner as required by the Authorized User to satisfy compliance. Title to any lease or rental Products will remain with Supplier during the Lease Term or Rental Term, including any renewals.

Commonwealth localities and private institutions of higher education are exempt from the DOA CAPP Manual and the Treasury Board's MELP requirements referenced in this section. Commonwealth localities and private institutions of higher education may have specific requirements that must be included in their order or SOW to ensure Supplier compliance.

Supplier may not assign such purchase order(s) and Lease(s) to a third party.

Authorized Users may not sign any leasing or rental documents supplied by Supplier or any third party representing Supplier. For MPS agreements, the terms of this contract take precedence over any such MPS agreement.

#### **H. Orders for Lease-Purchase Products**

If an Authorized User places an order or SOW to Lease-Purchase Product(s) provided by the Supplier, the Authorized User must comply with the DOACAPP Manual and the Treasury Board's MELP, as applicable. This requirement does not apply to Authorized Users who are private institutions of higher education. The Supplier shall provide relevant information and completion of related documentation in a timely manner as required by the Authorized User to satisfy compliance.

Suppliers will be required to fill in their Fixed Spread Rate (in decimal format) in each category that they wish to offer leasing. The Fixed Spread Rate amount entered will be added to current US Treasury Interest Rate Swap rate when leasing arrangements are made.

Lease pricing will be based on the Supplier's Fixed Spread Rate as specified in the appropriate category in Exhibit B, "Pricing" attached to this Contract, and added to the appropriate last business day of the most recent quarter current Interest Rate Swap rate located at:

<http://www.interestrateswapstoday.com/swap-rates.html>

In a Lease-Purchase transaction, the purchase price offered to the Authorized User shall be based on a fair market value for buyout as defined in and in accordance with the rules and regulations found at: [http://www.doa.virginia.gov/Admin\\_Services/CAPP/CAPP\\_Topics/31205.pdf](http://www.doa.virginia.gov/Admin_Services/CAPP/CAPP_Topics/31205.pdf) at the end of the Lease Term. Private institutions of higher education are not subject to these rules and regulations.

Further, if a financing arrangement is involved, the financing term for the Product(s) shall be determined by the Product(s)' useful life, as defined in the CAPP link in the paragraph above.

Commonwealth localities and private institutions of higher education are exempt from DOA CAPP Manual and the Treasury Board's MELP requirements referenced in this section; however, may have specific requirements that must be included in their order or SOW to ensure Supplier compliance.

**I. Orders that Include Trade-in Products**

If an Authorized User is agency, as defined by Code § 2.2-2006 and legislative, judicial and independent agencies of the Commonwealth, and places an order or SOW for Products, where a trade-in of old products is included, the Authorized User must comply with the DOA CAPP Manual and must adhere to the rules and regulations in the Agency Procurement and Surplus Property Manual, published by the Division of Purchases and Supply ("DPS"), Department of General Services ("DGS"). The Supplier agrees to provide relevant information and completion of related documentation in a timely manner as required by the Authorized User to satisfy compliance. Commonwealth localities are exempt from the requirements of this provision but may have specific requirements that must be included in their order or SOW to ensure Supplier compliance.

**J. Statement of Work**

A SOW, in the format provided for in Exhibit C attached to this Contract, is required for any orders placed by an Authorized User pursuant to this Contract. Supplier shall perform any and all contractual obligations at the times and locations set forth in the applicable SOW and at the rates set forth in Exhibit B to this Contract. All SOWs will be of a fixed price type unless VITA issues a written authorization for a time and materials type SOW. The fixed price SOWs may, with the written approval of VITA, contain a cost-reimbursable line item(s) for pre-approved travel expenses pursuant to the provisions of the "Reimbursement of Expenses" subsection below. If a time and materials type SOW is authorized, Supplier Personnel shall maintain daily time records of hours and tasks performed that must be submitted or made available for inspection by the Authorized User upon 48 hours advance written notice.

Any change to an SOW must be described in a written change request, in the format provided in Exhibit D. Either Party to an SOW may issue a change request that will be subject to written approval of the other Party before it becomes part of this Contract. In no event will any SOW or any modification require the Supplier to provide any Products or Services that are beyond the scope of this Contract as such scope is defined in Exhibit A, which is attached to this Contract and incorporated by reference.

**K. Invoice Procedures**

Supplier shall remit each invoice to the "bill-to" address provided with the order promptly after all Supplier's performance obligations have been accepted and in accordance with the milestone payment schedule, if any, in the applicable order or SOW. Payment for any support services, as authorized in the Contract and the Authorized User's applicable order or SOW, will be annually in arrears unless otherwise stated in this Contract, or in any order or SOW referencing this Contract. No invoice may include any costs other than those identified in the signed order or SOW, and those costs must be in accordance with the schedule of fees listed on Exhibit B. Without limiting the foregoing, all shipping costs are the Supplier's responsibility except to the extent shipping charges are identified in Exhibit B and noted in any signed order or SOW referencing this Contract. Supplier shall issue invoices that identify, at a minimum:

- i. Dates/periods that invoice covers, including any service or subscription periods, as applicable.
- ii. Line item description of the Deliverable(s) applicable to this Contract, including any components or service type, and, if applicable, the project milestone.

- iii. Quantity, charge and extended pricing for each line item
- iv. Applicable date of the order or SOW or both
- v. This Contract number and the applicable order number or SOW number or both
- vi. Supplier's Federal Employer Identification Number ("FEIN")

Any terms included on Supplier's invoice will have no force or effect and will in no way bind the Authorized User.

ESI standard policy is to bill monthly for lease, rental, service and MPS agreements. Overage reconciliation for service/MPS agreements can be monthly, quarterly, semi-annually or annually. ESI bills annually in advance for fixed price agreements.

**L. Purchase Payment Terms**

Supplier is responsible for the accuracy of its billing information. Supplier may not issue invoices pursuant to this Contract until all of Supplier's performance obligations have been accepted and are in accordance with the milestone payment schedule in the applicable order or SOW, or until after services have been rendered. Charges for Deliverables, Components or Services accepted more than 90 calendar days prior to receipt of a valid invoice may not be paid. In the event Supplier repeatedly over-bills an Authorized User, the Authorized User may assess a one percent (1%) charge for the amount over-billed for each month that such over-billing continues.

**M. Payment for Lease or Rental Products or MPS**

The ordering Authorized User shall pay the applicable monthly or annual payment for the Product(s) as specified in the executed Lease Agreement, Rental Agreement or MPS agreement. Payment shall be made by the ordering Authorized User unless the purchase order is terminated by the Authorized User pursuant to the Term and Termination provisions in Section 3 of this Contract.

**N. Additional Leasing Terms for Wide Format, High Speed Printers**

**1. General**

Pursuant to these Leasing Terms and Conditions ("Terms and Conditions") the Supplier shall lease Product(s) covered by the Contract in Exhibit B. Authorized Users shall, in addition to the outright purchase of Product, have the option to lease and/or finance Product from the Supplier. The ordering Authorized User shall indicate its election to lease Product (each such lease transaction hereinafter called a "Lease") on the applicable purchase order issued to the Supplier. Such Lease may also include financed Product that is financed (in either case "Financed Items").

The Supplier may not assign such purchase order and Lease to a third party.

Authorized Users are not allowed to sign any leasing documents supplied by Supplier or any third party representing Supplier.

**2. Lease Pricing Plans**

Supplier agrees to provide the Product and Financed Items covered in Exhibit B of the Contract, as specified in Authorized User's purchase order, through at least one of the pricing plans below. The leasing plan selected by the Authorized User is identified on the purchase order.

- i. Thirty-six (36) month Lease with Fair Market Value Option
- ii. Forty-eight (48) month Lease with Fair Market Value Option
- iii. Sixty (60) month Lease with Fair Market Value Option
- iv. Seventy-two (72) month Lease with Fair Market Value Option
- v. Eighty-Four (84) month Lease with Fair Market Value Option

**3. Commencement of Lease Term**

The term of each lease shall commence on the date the Product and/or Financed Items are accepted under the section "Acceptance and Cure Period."

**4. Title**



Title in or to the Product shall not pass to the Authorized User but shall remain with the Supplier. The Product shall remain personal property and shall not become a fixture or affixed to real property. The Authorized User is not responsible for personal property tax on devices that are rented or leased. The Authorized User will keep the Product free and clear of all encumbrances except the Supplier's security interest.

#### **5. Risk of Loss**

Supplier shall assume and bear the risk of loss, damage, or theft to the Product and all component parts thereof while same is in the Authorized User's possession, unless it could have been prevented by the Authorized User's exercise of reasonable care or diligence in the use, protection, or care of the Product. No loss or damage to the Product shall impair any obligation of the Supplier or of the Authorized User, except as hereinafter expressly provided. Unless the damage could have been prevented by the Authorized User's exercise of reasonable care or diligence in the use, protection, or care of the equipment, the Supplier shall repair or cause to be repaired all damages to the Product, if the Supplier determines the equipment can be economically repaired. In the event that the Product is stolen, destroyed or rendered irreparable, unusable, or damaged as determined by Supplier, the Lease shall terminate and the Authorized User's obligation to pay for the Product shall be deemed to have ceased as of the date of the loss. Unless the loss, destruction and/or damage to the product are due to the negligence of the Authorized User.

#### **6. Purchase Option**

If the Authorized User is not in default, it shall have the right to buy the equipment "as is with no additional warranty" at the expiration of the Lease term by tendering the purchase option amount. For Lease with Fair Market Value option, the Fair Market Value of the equipment shall be as established by the Supplier which shall not exceed the then purchase price of the equipment as established. Upon the Authorized User's exercise of this purchase option, all right, title and interest in the equipment shall pass to the Authorized User upon payment.

#### **7. Extension**

If the Authorized User has not elected to purchase the equipment at the expiration of a lease term, and as long as the Authorized User is not in default under the Lease, the Lease (other than Leases that expire five years or greater from date of installation) may be extended for one additional year upon written notice from the Authorized User. The extension will be under the same terms and conditions then in effect.

### **O. Reimbursement of Expenses**

Authorized User shall pay, or reimburse Supplier, for all reasonable and actual travel-related expenses for greater than 30 miles from portal to portal incurred by Supplier during the relevant period. An Authorized User will only be liable to pay for Supplier's travel-related expenses, including transportation, meals, lodging and incidental expenses, that have been authorized by the Authorized User in advance in the order or SOW. The travel-related expenses will be reimbursable at the then-current per diem amounts as published by the Virginia Department of Accounts (<http://www.doa.virginia.gov/>). Authorized Users who are not public bodies may have their own per diem amounts applicable to Supplier's pre-approved travel expenses.

All reimbursed expenses will be billed to the Authorized User on a pass-through basis without any markup by Supplier. At Authorized User's request, Supplier shall provide copies of receipts for all travel expenses over US\$30.00.

### **P. Disputed Charges**

If, before payment of an invoice, an Authorized User notifies the Supplier in writing of a disputed charge, Authorized User will have the right to withhold payment of the disputed amount until the dispute is settled or finally resolved. Supplier shall respond in writing to Authorized User's notification of a disputed charge acknowledging Supplier's receipt of the dispute within five (5) business days. Any charges disputed by Authorized User will be resolved (whether by credit or explanation of the charge to the Authorized User's satisfaction) in the Authorized User's required format within two (2) billing cycles (60 calendar days) following Authorized User's written notification. In the absence of the Supplier's written evidence identifying the merit of the disputed amounts, Authorized User will not be obligated to pay the disputed amounts and may consider the matter concerning the specific identified amounts closed. Authorized User will not pay any

disputed amounts that remain unresolved after 120 calendar days. If a disputed charge is reversed, Supplier shall reverse all associated surcharges, regulatory charges and taxes.

## **19. SUPPLIER SPONSORED PROMOTIONS**

The Supplier, at its discretion, may sponsor Product and Service promotions during the Term or any extensions. In the event that Supplier chooses to sponsor such a promotion, Supplier shall provide in writing to VITA, at least five (5) days prior to the promotion, the following information: (i) the dates of the promotion or the duration of the promotion to include the commencement date and the ending date; (ii) the exact Products or Services covered in the promotion; and (iii) the pricing or percentage discount offered during the promotion. VITA will communicate to Supplier in writing its agreement to the promotion.

Supplier shall make all sponsored Product or Service promotions available to all Authorized Users. Should the Supplier request a promotion that would be limiting, either through product configuration or quantities of Products and Services, VITA, at its sole discretion, may not provide a written agreement. VITA and Supplier agree that promotions will not target any one Authorized User, or a few Authorized Users.

VITA and Authorized Users may, at their discretion, assist in advertising the promotion. This assistance may consist of advertising space on Authorized User web sites, or other assistance at an Authorized User's discretion.

If Supplier fails to obtain the prior written agreement of VITA for the promotion, proposes prices different from those in the Contract without VITA's consent, or otherwise does not adhere to the provisions of this section, Supplier will be deemed to be in breach of this Contract. VITA will have all remedies for this breach available under the Contract as well as in law and in equity.

## **20. REPORTING**

Supplier shall submit to VITA a monthly report containing data on:

- i. Amount of Realized Sales; and
- ii. Small Business Procurement and Subcontracting Spend

This report must be submitted in accordance with the instructions and further detailed requirements, and on the templates set forth on the "Supplier Reporting" webpage located at the following URL: <https://www.vita.virginia.gov/supply-chain/supplier-reporting/>, or any successor URL(s). Supplier is encouraged to review the site periodically for updates on Supplier reporting requirements and methods. Supplier's failure to comply with all reporting, payment, and other requirements in this section may be deemed by VITA, in its sole discretion, to be a breach of the Contract.

### **A. Amount of Realized Sales**

Supplier shall submit to VITA a monthly report of all Realized Sales under this Contract.

In connection to the monthly report of Realized Sales, Supplier shall pay to VITA the following monthly fees in accordance with instructions described on the "Supplier Reporting" webpage located at: <https://www.vita.virginia.gov/supply-chain/supplier-reporting/>. The monthly report of Realized Sales must include these fees and percentages:

- IFA: 2% of monthly sales

### **B. Small Business Procurement and Subcontracting Spend**

Supplier shall provide to VITA a report of monthly subcontracting spend data. This data must include Supplier's total spend with all Subcontractors who provide direct performance for obligations under this Contract. Supplier's monthly subcontracting spend data must be submitted via the SRS webpage located at: <http://vita2.virginia.gov/procurement/srs/>.

In addition, every six (6) months following the Effective Date, Supplier shall submit to VITA a "SWaM Subcontracting Certification of Compliance" ("SSCC") certifying that Supplier has fully complied with the Contract's Supplier Procurement and Subcontracting Plan ("Plan"). A copy of Supplier's Plan is attached to this Contract as Exhibit H, and is incorporated by reference. The SSCC must include a written explanation of any variances of greater than 20% between the Plan and the actual subcontractor spend by Supplier. Supplier's SSCC will be maintained by VITA in



the Supplier's procurement file. Supplier must submit the SSCC to the following address: SCMLInfo@vita.virginia.gov. In the event that Supplier fails to comply with its contractually obligated Plan spend or fails to report its contractually obligated Plan spend, VITA may, at its sole discretion, prohibit or delay any renewals or extensions of the Contract, withhold any final payments due, or both. Supplier's failure to comply will be considered in the prospective award of any future contracts with Supplier.

## **21. POLICIES AND PROCEDURES GUIDE**

Within 30 calendar days of the Effective Date of the Contract, Supplier will provide VITA will a policy and procedures guide that describes how the Supplier and VITA will work together and how performance, including Deliverables and Services, is to be measured. The guide will provide process diagram details, working activities, and interface points with VITA and Supplier deliverables. Updated versions of the guide will be provided by Supplier to VITA and all Authorized Users every six (6) months during the Term, including any extensions, of the Contract.

## **22. TRAINING AND DOCUMENTATION**

### **A. Training**

In addition to any online tutorial training Supplier may make available, Supplier's fee, unless expressly excluded, includes all costs for any and all training as agreed upon for the training of one (1) Authorized User trainer per order or SOW. In order to allow Authorized User the full benefit of the applicable Deliverable, the training will cover the use and operation of the Deliverable provided to Authorized User including instruction in any necessary conversion, manipulation, or movement of such Authorized User's data. Supplier shall provide personnel sufficiently experienced and qualified to conduct such training at a time and location mutually agreeable to Supplier and Authorized User. Available additional and optional training, and applicable pricing and discounts, are described in Exhibit B.

### **B. Documentation**

Supplier shall deliver to Authorized User complete copies of any Documentation applicable to the Deliverable(s) provided to Authorized User, in a quantity and media format as agreed upon by the Parties under an order or SOW. Should Supplier revise or replace the Documentation, or should Documentation be modified to reflect Updates, Supplier shall deliver to the Authorized User copies of the updated or replacement Documentation, in the same quantity and media format as originally requested by the Authorized User, or as agreed upon between the Parties. Any Authorized User will have the right, as part of any license grant, to make as many additional copies of the Documentation, in whole or in part, for its own use as required. This Documentation must include, but is not limited to, overview descriptions of all major functions, detailed step-by-step installation and operating procedures for each screen and activity, and technical reference manuals. Such Documentation must be revised to reflect any modifications, fixes or updates made by Supplier. Any Authorized User, at its own discretion, will have the right, as part of the license granted by Supplier, to modify or completely customize all or part of the Documentation in support of the authorized use of the licensed Application or Software. The Authorized User may also duplicate such Documentation and include it in such Authorized User's document or platform. All Authorized Users shall continue to include Supplier's copyright notice.

### **C. Training for Non-MFDs**

Only if Authorized User's order or SOW includes Supplier's training services, Supplier is not responsible for initial training. Pursuant to a mutually agreed upon schedule, Supplier shall provide sufficient personnel experienced and qualified to conduct such training. Available optional training, and applicable pricing and discounts, are described in Exhibit B of this Contract.

## **23. AUTHORIZED USER SELF-SUFFICIENCY**

At Authorized User's request, and pursuant to an order or SOW for Supplier's Services issued under this Contract, Supplier shall provide all assistance reasonably required by Authorized User to develop Authorized User's self-sufficiency in operating and managing any combination of the Solution, Software, Products, or Services that Supplier provided to Authorized User under the applicable order or SOW. During or after the Transition Period, Authorized User may, at its sole discretion, elect to order or continue Maintenance Services from Supplier, if authorized under the scope of the Contract,



for any of the Software or hardware Product, Components, or Solution Components delivered to Authorized User by Supplier.

## **24. COMPETITIVE PRICING**

Supplier warrants that each of the prices, charges, economic or product terms, or warranties granted under this Contract are fair, reasonable, and commensurate with the price, charge, economic or product term or warranty being offered by Supplier to other government customers that purchase substantially similar services or products, at similar volumes, and under substantially similar terms and conditions. Supplier shall notify VITA of any new services or products that become generally available to all government customers during the Term of this Contract. New products and services are subject to the commercial terms associated with those products and services and must be formally added to this Contract before they can be purchased. Supplier shall also offer VITA commercially available national government products and services promotions and rates available at the time of purchase under the terms of those promotions.

## **25. CONFIDENTIALITY**

### **A. Treatment and Protection**

Each Party shall:

- i. hold in strict confidence all Confidential Information of any other Party;
- ii. use the Confidential Information solely to perform or to exercise its rights under this Contract; and
- iii. not transfer, display, convey or otherwise disclose or make available all or any part of the other Party's Confidential Information to any third-party.

An Authorized User may, however, disclose the Confidential Information as delivered by Supplier to subcontractors, contractors, or agents of the Authorized User that are bound by non-disclosure agreements with the Authorized User. Each Party shall take the same measures to protect against the disclosure or misuse of the Confidential Information as it takes to protect its own proprietary or confidential information, but in no event will such measures be less than reasonable care.

### **B. Exclusions**

The term "Confidential Information" does not include information that is:

- i. in the public domain through no fault of the receiving Party or of any other person or entity that is similarly contractually or otherwise obligated;
- ii. obtained independently from a third-party without an obligation of confidentiality to the disclosing Party and without breach of this Contract;
- iii. developed independently by the receiving Party without reference to the Confidential Information of the other Party; or
- iv. required to be disclosed under The Virginia Freedom of Information Act (Code §§ 2.2-3700 et seq.) or similar laws or pursuant to a court order.

### **C. Return or Destruction**

Upon the termination or expiration of this Contract, or upon the earlier request of the disclosing Authorized User, Supplier shall, at its own expense,

- i. promptly return all tangible Confidential Information (and all copies thereof except the record required by law) to the disclosing Authorized User; or
- ii. upon written request from the disclosing Authorized User, destroy any Confidential Information in Supplier's possession or control, and provide the disclosing Authorized User with written certification of the destruction.

Additionally, Supplier shall cease all further use of the Authorized User's Confidential Information, whether in tangible or intangible form.

The Authorized User shall retain and dispose of Supplier's Confidential Information in accordance with the Commonwealth's records retention policies or, if Authorized User is not subject to the Commonwealth's policies, in accordance with the Authorized User's own records retention policies.

**D. Confidentiality Statement**

All Supplier Personnel performing Services pursuant to this Contract are required to sign a confidentiality statement or non-disclosure agreement. Any violation of the statement or agreement will be deemed a breach of this Contract and may result in termination of the Contract or any order or SOW issued hereunder.

**E. Freedom of Information Act Acknowledgement**

All Supplier documents now or later comprising the Contract may be released in their entirety under the Virginia Freedom of Information Act, and Supplier agrees that any confidentiality or similar stamps or legends that are attached to any future documents or information may be ignored to the extent they claim confidentiality beyond that permitted by the Virginia Freedom of Information Act.

**26. INDEMNIFICATION**

**A. Indemnification Generally**

Supplier shall defend, indemnify, and hold harmless all Commonwealth Indemnified Parties from and against any third-party Claims to the extent the Claims in any way relate to, arise out of, or result from:

- i. any negligent act, negligent omission, or intentional or willful conduct of Supplier or any Supplier Personnel;
- ii. a breach of any representation, warranty, covenant, or obligation of Supplier contained in this Contract;
- iii. any defect in the Supplier-provided products or services; or
- iv. any actual or alleged infringement or misappropriation of any third party's intellectual property rights by any of the Supplier-provided products or services.

**B. Defense of Claims**

Supplier will be solely responsible for all costs and expenses associated with the defense of all third-party Claims against Commonwealth Indemnified Parties. Selection and approval of counsel, and approval of any settlement, shall be accomplished in accordance with all applicable laws, rules, and regulations. For state agencies, the applicable laws include §§ 2.2-510 and 2.2-514 of the Code.

**C. Duty to Replace or Reimburse**

In the event of a Claim pursuant to any actual or alleged infringement or misappropriation of any third party's intellectual property rights by any of the Supplier-provided products or services, or Supplier's performance, Supplier shall, at its expense and option, either (a) procure the right to continue use of such infringing products or services, or any components thereof; or (b) replace or modify the infringing products or services, or any components thereof, with non-infringing products or services satisfactory to VITA.

In the event that an Authorized User cannot use the affected Deliverable, Product, Licensed Services, or Services, including any Components, then Supplier shall reimburse such Authorized User for the reasonable costs incurred by such Authorized User in obtaining an alternative product or service.

**D. Supplier Dispute of Obligation to Indemnify**

If a Claim is commenced against any Commonwealth Indemnified Parties by a third party alleging an infringement of the third party's intellectual property rights and Supplier is of the opinion that the allegations in the third-party Claim, in whole or in part, are not covered by the indemnification provision in this Contract, then In the event that Supplier disputes any of its obligations to defend or indemnify any Commonwealth Indemnified Party, then Supplier shall immediately notify VITA

and the affected Authorized User(s) in writing and shall, nonetheless, take all reasonable steps to protect the rights, remedies, and interests of the Commonwealth Indemnified Parties in the defense of the Claim, including to secure a continuance to permit VITA and the affected Authorized User(s) to appear and defend their interests in cooperation with Supplier as is appropriate, including any jurisdictional defenses VITA or the affected Authorized User(s) may have.

## **27. LIABILITY**

### **A. Supplier Liability**

Except for liability arising from any combination of:

- i. any intentional or willful misconduct, fraud, or recklessness of Supplier or any Supplier Personnel;
- ii. any act or omission of Supplier or any Supplier Personnel that results in Claims for bodily injury, including death, and damage to real property or tangible property resulting from the negligence of a Supplier or any Supplier Personnel; or
- iii. Supplier's indemnification, confidentiality, security compliance, or data privacy and security obligations as specified in this Contract,

Supplier's indemnification obligations and liability shall not exceed, in aggregate, twice the value of the Contract. This limitation will apply on a per-incident basis; it being understood that multiple losses stemming from the same root cause constitute a single incident.

### **B. Limitation of Liability**

Supplier will be liable for damages caused by its employees, agents, or subcontractors. Except for liability arising out of a Party's negligence or willful misconduct, neither Party will be liable to the other Party for any indirect, incidental, consequential, or punitive damages, including (without limitation) loss of profit, income, or savings, even if advised of the possibility of these damages.

## **28. INSURANCE**

In addition to the insurance coverage required by law as referenced in the "Incorporated Contractual Provisions" section of this Contract below, Supplier shall carry:

Errors and omissions insurance coverage in the amount of \$2,000,000 per occurrence.

## **29. SECURITY COMPLIANCE**

Supplier shall comply with all provisions of the then-current Commonwealth security procedures, published by VITA and which may be found at: <https://www.vita.virginia.gov/it-governance/itrm-policies-standards/>, or any successor URL(s), as are pertinent to Supplier's operation. Further, Supplier shall comply with all applicable provisions of the relevant Authorized User's then-current security procedures as are pertinent to Supplier's operation and that have been provided to Supplier by the Authorized User. Supplier shall also comply with all applicable federal, state, and local laws and regulations.

Any unauthorized release of any Confidential Information, or Commonwealth proprietary or personal information, by the Supplier or Supplier Personnel constitutes a breach of Supplier's obligations under the Contract. Supplier shall notify VITA and any affected Authorized User within 24 hours of discovery of, or when Supplier should have discovered, any breach of "unencrypted" and "unredacted" personal information, as those terms are defined in Code § 18.2-186.6, and other confidential or personal identifying information provided to the Supplier by VITA or an Authorized User. To the extent permitted by law, Supplier shall provide VITA and any affected Authorized User the opportunity to participate in the investigation of the breach and to exercise control over reporting the unauthorized disclosure.

Supplier shall ensure performance of an audit of Supplier's environment at least annually to provide assurance of "Controls Relevant to Security, Availability, Processing Integrity, Confidentiality or Privacy" in accordance with the then-current standards set forth by the American Institute of CPAs.



### **30. IMPORT/EXPORT**

Supplier shall comply with all data export laws and regulations. In addition, VITA policy requires that any data deemed “restricted” or “sensitive” by either federal or state authorities, may only be collected, developed, analyzed, or otherwise used or obtained by persons or entities working within the boundaries of the United States.

### **31. BANKRUPTCY**

If Supplier becomes insolvent, takes any step leading to its cessation as a going concern, fails to pay its debts as they become due, or ceases business operations continuously for longer than 15 business days, then VITA may immediately terminate this Contract, and an Authorized User may terminate an order or SOW, on notice to Supplier unless Supplier immediately gives VITA or such Authorized User adequate assurance of the future performance of this Contract or the applicable order or SOW. If this Contract has not been otherwise terminated and bankruptcy proceedings are commenced with respect to Supplier, then VITA may suspend all further performance of this Contract until Supplier assumes this Contract and provides adequate assurance of its performance of Supplier’s contractual obligations or rejects this Contract pursuant to Section 365 of the Bankruptcy Code or any similar or successor provision, it being agreed by VITA and Supplier that this is an executory contract. Any suspension of further performance by VITA or Authorized User pending Supplier’s assumption or rejection will not be a breach of this Contract, and will not affect the rights of VITA or any Authorized User to pursue or enforce any of its rights under this Contract or otherwise.

### **32. GENERAL PROVISIONS**

#### **A. Relationship Between VITA and Authorized User and Supplier**

Supplier has no authority to contract for, bind or commit to any agreement of any kind, or to assume any liabilities of any nature in the name of or on behalf of VITA or any Authorized User. Under no circumstances will Supplier, or any Supplier Personnel, hold itself out as or be considered an agent or an employee of VITA or any Authorized User, and neither VITA nor any Authorized User will have any duty to provide or maintain any insurance or other employee benefits on behalf of Supplier or any Supplier Personnel. Supplier represents and warrants that it is an independent contractor for purposes of federal, state, and local employment taxes, and agrees that neither VITA nor any Authorized User is responsible to collect or withhold for Supplier any federal, state, or local employment taxes, including, but not limited to, income tax withholding and social security contributions. Supplier shall pay or withhold any and all taxes, interest or penalties (including, but not limited to, any federal, state, or local withholding or employment taxes, and any penalties related to health care or employee benefits laws) that are imposed, assessed, or levied as a result of this Contract or Services performed pursuant to this Contract. Supplier shall reimburse VITA or any Authorized User in the event that any taxes, interest or penalties are assessed against and paid by VITA or any Authorized User as a result of this Contract.

#### **B. Licensing Within the Commonwealth**

Any and all licenses granted or provided pursuant to this Contract, whether to Work Product, System Software, COTS Software, or any other Software will be held by:

- i. the Commonwealth, if the Authorized User is an agency as defined by Code § 2.2-2006 or a legislative, judicial and independent agency of the Commonwealth, board, commission, or other quasi-political entity of the Commonwealth of Virginia or other body referenced in Title 2.2 of the Code;
- ii. the applicable public body, if the Authorized User is a locality, municipality, school, school system, college, university, local board, local commission, or local quasi-political entity; or
- iii. the applicable private institution of higher education, if the Authorized User is a private institution of higher education listed at: <http://www.cicv.org/Our-Colleges/Profiles.aspx>

#### **C. Incorporated Contractual Provisions**

In addition to the terms, conditions, and obligations of this Contract, Supplier agrees to the VITA “Mandatory Contract Terms” which consist of the VITA:

- “Core Contractual Terms”;

- “Required eVA Terms and Conditions”; and
- “Mandatory Internal Revenue Service (IRS) Publication 1075 (required for FTI data only)”

Each of these Mandatory Contract Terms are set forth at the following URL and incorporated into this Contract by reference: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/mandatory-contract-terms/>.

Supplier agrees that non-compliance with the above-referenced Mandatory Contract Terms and IRS Publication 1075 may be deemed, solely by VITA, as a material breach of the applicable order or SOW or of the Contract. Supplier is responsible for verifying the correct and current version of this IRS publication and related safeguarding terms language and acknowledges that any Authorized User issuing the order or SOW will be held harmless.

The terms and conditions set forth in documents posted at the URL above, and any successor URL(s), are subject to change pursuant to action by the legislature of the Commonwealth, change in VITA policy, adoption of revised eVA business requirements, or change to IRS Publication 1075. If a change is made to any of the Mandatory Contract Terms documents, a new effective date will be noted in the applicable document title. Supplier is advised to check the URLs, or their successors, periodically.

**D. Compliance with the Federal Lobbying Act**

Supplier’s signed certification of compliance with 31 U.S.C. § 1352 (entitled “Limitation on use of appropriated funds to influence certain Federal Contracting and financial transactions”) or by the regulations issued from time to time thereunder is incorporated as Exhibit G to this Contract.

**E. Ethics in Public Contracting**

By signing this Contract, Supplier warrants that its assent to this Contract is made without collusion or fraud, and that Supplier has not offered or received any kickbacks or inducements from any other bidder, supplier, manufacturer or subcontractor in connection with their proposal or the terms of this Contract. Further, Supplier warrants that it has not conferred any payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, on any public employee having official responsibility for this procurement transaction, unless consideration of substantially equal or greater value was exchanged. In addition, Supplier warrants that it will notify VITA if it becomes aware of a potential conflict of interest in the future.

**F. Governing Law**

This Contract is governed by and will be construed in accordance with the laws of the Commonwealth of Virginia without regard to that body of law controlling choice of law. Any and all litigation relating to this Contract must be brought in the circuit courts of the Commonwealth of Virginia. The English language version of this Contract prevails when interpreting this Contract. The United Nations Convention on Contracts for the International Sale of Goods and all other laws and international treaties or conventions relating to the sale of goods are expressly disclaimed. The Uniform Computer Information Transactions Act applies to this Contract only to the extent required by Code § 59.1-501.15.

**G. Dispute Resolution**

In accordance with Code § 2.2-4363, contractual claims, whether for money or other relief, must be submitted in writing to the public body from whom the relief is sought no later than 60 calendar days after final payment; however, written notice of the Supplier’s intention to file such claim must be given to such public body at the time of the occurrence or beginning of the work upon which the claim is based. Pendency of claims will not delay payment of amounts agreed due in the final payment. The relevant public body shall render a final decision in writing within 30 calendar days after its receipt of the Supplier’s written claim.

The Supplier may not invoke any available administrative procedure under the Code nor institute legal action prior to receipt of the decision of the relevant public body on the claim, unless that public body fails to render its decision within 30 calendar days. The decision of the relevant public body will be final and conclusive unless the Supplier, within six (6) months of the date of the final decision on the claim, invokes appropriate action under Code § 2.2-4364 or the administrative procedure authorized by Code § 2.2-4365.



Upon request from the public body from whom the relief is sought, Supplier shall submit any and all contractual disputes arising from this Contract to the public body's alternative dispute resolution ("ADR") procedures, if any. Supplier may invoke such public body's ADR procedures, if any, at any time and concurrently with any other statutory remedies prescribed by the Code.

In the event of any breach by a Commonwealth agency, Supplier's remedies will be limited to claims for damages and interest allowable under the Prompt Payment Act and, if available and warranted, equitable relief. All such claims to be processed pursuant to this Section. In no event will Supplier's remedies include the right to terminate any license or support services hereunder.

**H. Assignment**

This Contract is binding upon and will inure to the benefit of the permitted successors and assigns of VITA and Supplier. Supplier may not assign, subcontract, delegate or otherwise convey this Contract or any of its rights and obligations under this Contract, to any entity without the prior written consent of VITA, and any attempted assignment or subcontracting without consent will be void. VITA may assign this Contract to any entity, so long as the assignee agrees in writing to be bound by the all the terms and conditions of this Contract.

If any law limits the right of VITA or Supplier to prohibit assignment or nonconsensual assignments, the effective date of the assignment will be 30 calendar days after the Supplier gives VITA prompt written notice of the assignment, signed by authorized representatives of both the Supplier and the assignee. Any payments made prior to receipt of such notification will not be covered by this assignment.

**I. Severability**

Invalidity of any term of this Contract, in whole or in part, will not affect the validity of any other term. VITA and Supplier further agree that in the event such provision is an essential part of this Contract, they shall immediately begin negotiations for a suitable replacement provision.

**J. Survival**

Any provisions of this Contract regarding Software License, Rights To Work Product, Warranty, Escrow, Confidentiality, Content Privacy and Security, Liability, Indemnification, Transition of Services, the right to purchase Maintenance Services, and the General Provisions will survive the expiration or termination of this Contract.

**K. Force Majeure**

No Party will be responsible for the delay or failure to meet its obligations under this Contract if the delay or failure arises from causes beyond the reasonable control and without the fault or negligence of the obligated Party. If any performance date under this Contract is postponed or extended pursuant to this Section for longer than 30 calendar days, VITA, by written notice given during the postponement or extension, may terminate Supplier's right to render further performance after the effective date of termination without liability for that termination, and in addition an Authorized User may terminate any order or SOW affected by such postponement or delay.

**L. No Waiver**

Any failure to enforce any terms of this Contract will not constitute a waiver.

**M. Remedies**

The remedies set forth in this Contract are intended to be cumulative. In addition to any specific remedy, VITA and all Authorized Users reserve any and all other remedies that may be available at law or in equity.

**N. Right to Audit**

VITA reserves the right to audit those Supplier records that relate to the Contract or any SOWs or orders issued there under. VITA's right to audit is limited as follows:

- i. three (3) years from end date of the Contract;
- ii. at VITA's expense;
- iii. no more than once per every twelve (12) months;



iv. performed at Supplier's premises, during normal business hours at mutually agreed upon times; and

v. access to Supplier cost information is excluded.

In no event will Supplier have the right to audit, or require to have audited, VITA or any Authorized User.

**O. Taxes**

The Commonwealth is exempt from Federal excise and all State and Local taxes and any such taxes may not be included in Contract prices. Tax certificates of exemption, Form ST-12 can be obtained from Authorized Users upon request. Deliveries against this Contract shall be free of Federal excise and transportation taxes. The Commonwealth's excise tax exemption registration number is 54-73-0076K.

**P. Currency**

All prices, costs, or fees in this Contract and all exhibits, schedules, orders, or SOWs will be in United States dollars.

**Q. Advertising and Use of Proprietary Marks**

No Party may use the name of the other Party or refer to the other Party, directly or indirectly, in any press release or formal advertisement without receiving prior written consent of the other Party. In no event may any Party use a proprietary mark of the other Party without receiving the prior written consent of the other Party.

**R. Notices**

Any notice required or permitted to be given under this Contract must be in writing and will be deemed to have been sufficiently given if delivered in person, or if deposited in the U.S. mails, postage prepaid, for mailing by registered, certified mail, or overnight courier service addressed:

i. To VITA and to Supplier, if Supplier is incorporated or formed pursuant to the laws of the Commonwealth, to the addresses shown on the signature page.

ii. To Supplier, if Supplier is incorporated or formed outside the Commonwealth, to the address shown on the signature page and to the Registered Agent registered with the Virginia State Corporation Commission.

Pursuant to Title 13.1 of the Code, VITA or Supplier may change its address for notice purposes by giving the other Party notice of such change in accordance with this Section.

Administrative contract renewals, modifications or non-claim related notices are excluded from the above requirement. Such written, or signed, or both, contract administration actions may be processed by the assigned VITA and Supplier points of contact for this Contract and may be given in person, via U.S. mail, courier service or electronically.

**S. Offers of Employment**

During the first twelve (12) months of the Contract, should Supplier hire an employee of any Authorized User who has substantially worked on any project covered by this Contract without prior written consent, the Supplier will be billed for 50% of the employee's annual salary in effect at the time of termination.

**T. Contract Administration**

Supplier agrees that at all times during the term of this Contract an account executive, at Supplier's senior management level, will be assigned and available to VITA. Supplier reserves the right to change such account executive upon reasonable advance written notice to VITA.

**U. Captions**

The captions of sections and subsections of this Contract are for convenience and in no way define, limit, or enlarge the scope of this Contract or any of its sections.

**V. Entire Contract**

The following exhibits, including all subparts thereof, are attached to this Contract and are made a part of this Contract for all purposes:

Exhibit A – Requirements & SLAs

Exhibit B – Pricing

Exhibit C – Statement of Work (SOW) Template

Exhibit D – Change Order Template

Exhibit E – Awarded Categories

Exhibit F – End User Licensing Agreement

Exhibit G – Certification Regarding Lobbying

Exhibit H – Supplier Procurement and Subcontracting Plan

This Contract, its exhibits, and any prior non-disclosure agreement constitute the entire agreement between VITA and Supplier and supersede any and all previous representations, understandings, discussions or agreements between VITA and Supplier as to the subject matter of this Contract. Any and all terms and conditions contained in, incorporated into or referenced by the Supplier's proposal are deemed invalid. The provisions of the Virginia Department of General Services, Division of Purchases and Supply Vendor's Manual will not apply to this Contract or any order issued pursuant to the Contract. This Contract may only be amended by an instrument in writing signed by VITA and Supplier.

An Authorized User and Supplier may enter into an ordering agreement pursuant to this Contract. To the extent that an ordering agreement, or any order or SOW issued pursuant to this Contract, includes any terms and conditions inconsistent with the terms and conditions of this Contract, the terms and conditions of the order or SOW will be of no force and effect.

**W. Order of Precedence**

In the event of a conflict, the following order of precedence shall apply: this Contract document, Exhibit A, any individual SOW, Exhibit B, Exhibit F, Exhibit G, Exhibit H and then any project specific order. In the event of a conflict or inconsistency between the negotiated terms of this Contract and any provision incorporated by reference into the Contract (e.g., a section of a License Agreement), the negotiated terms of this Contract will take precedence. For purposes of this section, a "conflict" exists with respect to a subject that has been comprehensively addressed in the Contract when supplementary terms contained in a provision incorporated by reference would alter the rights and obligations of the Parties set forth in the Contract.

**X. Counterparts and Electronic Signatures**

This Contract may be executed in multiple counterparts, each of which, when assembled to include an original signature for each of Supplier and VITA, will constitute a complete and fully executed original. All fully executed original counterparts will collectively constitute a single agreement. Signatures transmitted by fax or electronic mail (in portable data format ("PDF")) are also permitted as binding signatures to this Contract.

**Y. Opportunity to Review**

VITA and Supplier each acknowledge that it has had the opportunity to review this Contract and to obtain appropriate legal review if it so chose.

[SIGNATURE PAGE(S) TO FOLLOW]

Signed by the undersigned authorized representatives of VITA and Supplier and effective as of the Effective Date set forth in the preamble of this Contract above.

ELECTRONIC SYSTEMS, INC.

By: N. Joyce Chapman  
(Signature)

Name: N. Joyce Chapman  
(Print)

Title: Corporate Secretary

Date: November 11, 2019

Address for Notice:  
369 Edwin Drive  
Virginia Beach, VA 23462

Attention: Supplier Contact

VITA, on behalf of the  
COMMONWEALTH OF VIRGINIA

By: Nelson P. Moe  
(Signature)

Name: NELSON P. MOE  
(Print)

Title: CIO

Date: 11/21/19

Address for Notice:  
11751 MEADOWVILLE LN  
CHESTER VA 23836

Attention: Contract Administrator