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**AGREEMENT FOR INFORMATION TECHNOLOGY PRODUCTS &  
SERVICES**

**Agreement No. 311872**

**THIS AGREEMENT FOR INFORMATION TECHNOLOGY PRODUCTS & SERVICES** (“Agreement”), dated for reference purposes as of JULY 1, 2016 by and between the **CITY OF LONG BEACH**, a municipal corporation (“City”) and **ENVIRONMENTAL SYSTEMS RESEARCH INSTITUTE, INC.**, a California corporation, with a principal place of business at 380 New York Street, Redlands, California 92373, Telephone (909) 793-2853 (“Consultant”).

WHEREAS, City requires the professional, expert, and technical information systems consulting services of Consultant to assist City with GIS consulting services; and

WHEREAS, Consultant possesses extensive experience in GIS consulting and software development as required by City; and

WHEREAS, Consultant, by virtue of training and experience, is well qualified to provide such services to City; and

WHEREAS, City does not employ personnel with the required professional, expert, and technical information systems expertise;

**NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

**1. DEFINITIONS**

Capitalized terms used in this Agreement shall have the following meanings:

- a) **“Authorized Subcontractor”** shall mean a subcontractor or service provider of Consultant who has been approved by the City beforehand and in writing to carry out any part of Consultant’s obligations under this Agreement.
- b) **“Board”** shall mean the Board of City.
- c) **“Change Order”** shall have the meaning assigned to it in SECTION 3 (“CHANGE ORDER PROCESS”).
- d) **INTENTIONALLY OMITTED.**
- e) **“City Work Product”** shall have the meaning assigned to it in Section 14(a) (“Disclosure of Work Product”).
- f) **INTENTIONALLY OMITTED.**
- g) **“Confidential Information”** shall have the meaning assigned to it in Section 15(a)

("Protection").

- h) ***"Contract Administrator"*** shall mean the City's representative who has been identified as such from time to time by the City, and who shall have authority to act for the City under this Agreement.
- i) ***"Deliverables"*** shall mean collectively all items provided or to be provided by Consultant hereunder, including without limitation all Software and Services.
- j) ***"Developed Software"*** shall mean Software, in both Object Code and Source Code formats, which is not Existing Software, and which is identified as such in a Statement of Work. Developed Software shall also specifically include databases and the data residing in those databases.
- k) ***"Disclosing Party"*** shall have the meaning assigned to it in Section 15(a) ("Protection").
- l) ***"Documentation"*** shall mean all information reasonably necessary or desirable, or as described in a Statement of Work, to be provided to Consultant by the City which describes the form, features or operation of the Deliverables and which is contained in a tangible medium, such as written format, tape, magnetic or other media, and including without limitation all Updates of Documentation and Documentation which the City may require at any time.
- m) ***"Effective Date"*** shall mean the first date upon which all of the following shall have occurred:
  - (a) this Agreement has been signed by the City by the person authorized by the City to sign on its behalf and also signed by the Consultant's authorized representative;
  - (b) this Agreement has been approved by the Board, or by the City's Executive Director when authorized to give such approval; and (c) the Office of the City Attorney has indicated in writing its approval of this Agreement as to form.
- n) ***"Error"*** shall mean any material failure of any Deliverable to conform to its Specifications.
- o) ***"Existing Software"*** shall mean that Software, excluding Consultant's COTS Software, in Object Code format or Source code format, which exists as of the Effective Date and which is identified as such in the Statement of Work, and includes Documentation and Updates.
- p) ***"Fees"*** shall mean those amounts to be paid to Consultant hereunder, and which are described as such in the Statement of Work.
- q) ***"Force Majeure"*** shall have the meaning assigned to it in SECTION 9 ("FORCE MAJEURE").
- r) **INTENTIONALLY OMITTED.**
- s) ***"Indemnified Parties"*** shall have the meaning assigned to it in SECTION 16 ("INTELLECTUAL PROPERTY AND DELIVERABLES INDEMNITY").
- t) ***"Invention"*** shall mean any and all trade secrets, inventions, mask works, ideas, processes, formulae, Source Codes, Object Codes, programs, other works of authorship, know-how, improvements, discoveries, developments, designs and techniques existing as of the Effective

Date or coming into existence thereafter.

- u) **“Invoice”** shall have the meaning assigned to it in Section 10 (c) (“Invoices”).
- v) **“Job Cost Report”** shall mean detailed, written or electronic records of the Consultant which describe fully Consultant’s costs in its performance under this Agreement, and including all periodic and cumulative amounts to date of revenue, costs, gross profit and billing information against bid projected costs, and sub-accounts for the different types of all cost categories.
- w) **INTENTIONALLY OMITTED..**
- x) **“Object Code”** shall mean computer software programs, not readily perceivable by humans, and which are suitable for machine execution without the intervening steps of interpretation or compilation.
- y) **“Pre-existing Materials”** shall mean the materials described on Exhibit A, attached hereto and incorporated herein by reference.
- z) **“Project Plan”** shall mean that portion of the SOW specifying the Deliverables and the Schedule (including without limitation all start and end dates for all Tasks).
- aa) **“Receiving Party”** shall have the meaning assigned to it in Section 15(a) (“Protection”).
- bb) **“Schedule”** shall mean the schedule of Deliverables, dates and Fees described as such in a Statement of Work.
- cc) **“Services”** shall mean collectively, the Tasks described in each Statement of Work.
- dd) **“Shrink-Wrap Agreement”** shall mean any form of license or other agreement included with any Deliverables hereunder, and including without limitation any embedded “click-wrap” license agreement, or any license agreement which is presented under shrink-wrap or other plastic coverings the removal of which may be deemed to effect agreement with the terms of such license agreement.
- ee) **“Software”** shall mean collectively: (i) Existing Software; and (ii) Developed Software, and in all cases including all Documentation.
- ff) **“Source Code”** shall mean any sequence of statements or declarations written in human-readable computer programming language that is not in machine readable format and which is not suitable for machine execution without the intervening steps of interpretation or compilation.
- gg) **“Specifications”** shall mean collectively all operational, functional or other specifications with respect to any Deliverables, including without limitation all Documentation and those specifications described as such in the Statement of Work.
- hh) **“Statement of Work”** or **“SOW”** shall mean the description of the work to be carried out by Consultant, the Deliverables to be provided by Consultant, the Schedule to be met by Consultant, and the Fees to be paid which are incorporated by this reference (“STATEMENT OF

WORK”).

- ii) **“Task Order”** shall mean a written description of work activity provided by the City describing work to be carried out by Consultant, and consisting of at least one (1) Task and an associated Fee. A sample task order format is provided in Exhibit B of the Agreement.
- jj) **“Tasks”** shall mean the smallest units of work activity described under each Statement of Work.
- kk) **“Update”** shall mean any modification of or addition to the Software or Documentation, including without limitation all new releases, versions, sub-versions, corrections, “patches” and maintenance releases, which Consultant may prepare, obtain, or have prepared at any time.
- ll) **“Viruses”** shall have the meaning assigned to it in Section 17(d) (“Viruses”).
- mm) **“Work Product”** shall have the meaning assigned to it in SECTION 14 (“RIGHTS IN WORK PRODUCT AND LICENSES”).
- oo) **“Esri Enterprise Advantage Program” or “EEAP”** shall mean an Esri program consisting of consulting services, training, and Premium Support Services (PSS) that provides City with the flexibility to select components that best meet its needs. The EEAP is not designed for Consultant to provide project-specific professional services (e.g., custom application or database development for solutions or applications). The EEAP is further described in Exhibit D of this Agreement.

## 2. DELIVERABLES.

- a) **Services.** Consultant shall perform Services, strictly in accordance with the Statement of Work and approved Task Orders.
- b) **Software.**
  - i) **Existing Software.** Consultant shall provide Existing Software according to the Statement of Work, but in no event later than the delivery of any Developed Software with which such Existing Software is to be integrated pursuant to such Statement of Work.
  - ii) **Developed Software.** Consultant shall prepare and deliver to the City all Developed Software, strictly in accordance with each Schedule.
- c) **Documentation.** Consultant shall prepare and deliver to the City all Documentation, strictly in accordance with each Schedule.
- d) **Authorized Subcontractors.** With prior approval of the City, the Consultant may enter into contracts and agreements with Authorized Subcontractors for the performance of portions of this Agreement. The Consultant shall at all times be responsible for the acts, errors or omissions of its Authorized Subcontractors and persons directly or indirectly employed by them. Nothing in this Agreement shall constitute any contractual relationship between any others and the City or any obligation on the part of the City to pay, or to be responsible for the payment of, any

sums to any Authorized Subcontractors or any other third party. No such Authorized Subcontractor shall be a third party beneficiary of this Agreement. Upon written request from the Contract Administrator, the Consultant shall promptly supply the City with all subcontractor agreements.

- e) **Site Visits by Consultant.** All visits by Consultant to the City's facilities must have prior approval by the Contract Administrator. Visiting Consultant representatives must carry City-issued identification badges, and conform to such security, safety and other requirements as the City may from time to time impose.
- f) **Permits.** The Consultant and its Authorized Subcontractors, officers, agents and employees shall obtain and maintain all permits and licenses necessary for the Consultant's performance hereunder and shall pay any third-party fees required therefor.
- g) **Intentionally Omitted.**

### 3. CHANGE ORDER PROCESS.

- a) **Process.** Unless expressly agreed to otherwise in a Statement of Work, the Specifications, the Schedule and the Fees are as described in such Statement of Work, and shall not be changed without the prior, written consent of the City. Provided, however, that in the event that the City wishes to change the Specifications or the Schedule, then the City shall so notify the Consultant in writing, describing the changes to be made and including written confirmation from the City Risk Manager that no insurance is required for this change other than the insurance required in Exhibit "C.". The Consultant shall respond to such notification promptly in writing (and in no event later than ten (10) days thereafter) describing any increase in Fees which the Consultant seeks with respect to such changes. If thereafter agreed to by the parties, the parties shall record their agreement with respect to such changes, and increase in Fees (if any) in a written change order ("Change Order"), to be signed by the parties, and which will amend this Agreement. Invoices for Fees pursuant to Change Orders will be identified and issued separately from other Invoices.
- b) **No Obligation.** EXCEPT AS PROVIDED IN THIS SECTION 3 ("CHANGE ORDER PROCESS"), THE CITY SHALL HAVE NO OBLIGATION TO PAY, AND SHALL NOT PAY, ANY INCREASE IN FEES REGARDLESS OF ANY ADDITIONAL WORK CARRIED OUT UNDER THIS AGREEMENT BEYOND THAT WHICH IS EXPRESSLY DESCRIBED IN THE STATEMENT OF WORK.

### 4. SUBSTITUTIONS AND QUALITY.

- a) **Substitutions.** Substitution of any other goods or services for Deliverables called for in any Statement of Work may not be tendered without the prior, written consent of the Contract Administrator. Consultant shall not use any specification in lieu of the Specifications contained in each Statement of Work without the prior, written consent of the City.
- b) **Quality.** The Consultant's work shall reflect competent professional knowledge, judgment, and accepted industry practice. Subject to SECTION 11 ("TERM AND TERMINATION"), the Consultant shall promptly correct, or remedy any work, errors, or omissions, at its sole expense, which do not conform to the provisions of this Agreement.

**5. DELIVERY, INSPECTION, ACCEPTANCE AND REJECTION.**

- a) Delivery.** Consultant shall deliver all Deliverables according to the Schedule to such addresses as may be from time to time specified by the City. Consultant shall strictly adhere to the Schedule specified in this Agreement. Time shall be of the essence of Consultant's performance under this Agreement. Time, if stated as a number of days, shall mean calendar days unless otherwise specified. The quantities of Deliverables specified herein are the only quantities required. If Consultant delivers in excess of the quantities of Deliverables specified herein, the City shall not be required to make any payment for the excess Deliverables, and may at the City's discretion dispose of such excess Deliverables, return such excess Deliverables to Consultant at Consultant's expense and risk, or make such excess Deliverables available for pick-up by Consultant.
- b) Inspection.** The City shall have a reasonable period, in no event less than thirty (30) days, commencing with the date of delivery of Deliverables to inspect and test such Deliverables to ensure that such Deliverables fully conform to this Agreement, fully conform to their Specifications, fully conform to their Documentation, and fully comply with all representations and statements made by Consultant with respect thereto. Consultant shall fully cooperate and assist the City in the course of such inspection and delivery at no cost to the City. In the event of any failure of such Deliverables to so fully comply with any of the foregoing (each such condition to be considered an "Error"), the City may, at its discretion and upon notice, reject any or all such Deliverables. In such case, Consultant shall, within forty-eight (48) hours of such notice, and if the notice so provides, remove all such Deliverables from the City's premises (at Consultant's sole expense), and replace such Deliverables with conforming Deliverables promptly (and in no event later than five (5) business days thereafter).
- c) Acceptance and Rejection.** Upon the completion of the inspection and testing described in Section 5(b) ("Inspection"), the City shall inform Consultant of whether the corresponding Deliverables are accepted by the City. Any failure of the City to provide such notice within sixty (60) days of delivery shall be deemed a rejection thereof. The Consultant shall remove all rejected Deliverables promptly, and in no event later than five (5) days after such rejection. The City shall be free to dispose of any Deliverables which are not so removed. Acceptance of Deliverables shall not be construed to waive any warranty rights that the City might have at law or by this Agreement.

**6. SAMPLES.**

Consultant shall promptly provide to the City upon reasonable request from time to time, and without cost, samples or demonstrations of Deliverables for inspection and testing. Such samples must be identical in all respects to the Deliverables specified in each corresponding Statement of Work. Such samples, if not destroyed by tests, may, upon request made at the time the sample is furnished, be returned to Consultant at Consultant's risk and expense.

- 7. SAFETY AND ACCIDENT PREVENTION.** The City agrees to provide a suitable and safe environment at its facilities with respect to Services to be provided under this Agreement. In performing work under this Agreement, Consultant shall conform to all specific safety

requirements contained in the Agreement and as required by law or regulation. Consultant shall take any additional precautions as the City may reasonably require for safety and accident prevention purposes, and shall at all times exercise reasonable and prudent judgment with respect thereto. Any violation of such requirements, laws or regulations shall be cured promptly.

**8. PERSONNEL.**

- a) **Information.** The City shall provide reasonably necessary representatives with authority to act on the City's behalf with respect to approvals, requests, and meeting scheduling.
- b) **Capacity.** Consultant warrants that the size of the staff employed by the Consultant in its performance hereunder shall be reasonably adequate in number and quality at all times to perform the work required by this Agreement and to add such addition personnel as are necessary to accomplish any work required by any Change Order.
- c) **Identification.** The Consultant shall furnish the City from time to time upon request the names, titles, and qualifications of its key project personnel and subcontractors, including without limitation individual resumes, and the tasks to be performed by such individuals. Upon receipt of such request, the Consultant shall respond within two (2) business days.
- d) **Approval.** The Contract Administrator shall have the right to interview and approve all personnel of Consultant and Authorized Subcontractors. Resumes of individual personnel will be reviewed and approved by the City's Contract Administrator before the individual shall be assigned work. The Consultant shall minimize changes to any Consultant personnel with respect to any Statement of Work. Any unreasonable assignment or discharge of such personnel may, at the City's option, be deemed a material breach of this Agreement by Consultant. The City shall have the right to request key personnel changes and to review and approve key personnel changes proposed by the Consultant. No change can be made without City's approval. The City shall have the right to require removal of any personnel with or without cause, which removal shall be effected no later than seventy-two (72) hours, or in the case of any removal requested for security or work rule reasons, immediately.
- e) **Control.** The Consultant's and the Authorized Subcontractors' personnel shall at all times remain under the control of the Consultant.

**9. FORCE MAJEURE.** If either party is unable to perform its obligations because of strikes, lockouts, labor disputes, embargos, terrorist attacks, acts of God, governmental regulations, judicial orders, enemy or hostile governmental action beyond the reasonable control of the Consultant or its Authorized Subcontractors ("Force Majeure"), then such party shall immediately notify the other party in writing, and such party's performance shall be suspended for the period equal to the period time of such cause for suspension of performance.

**10. FEES, INVOICES AND PAYMENT.**

- a) **Fees.** The City shall pay the Fees described in each Task Order for Services, Deliverables, and EEAP, which have been accepted by the City. Any Fees called for in any Statement of Work or Task Order shall not increase unless expressly agreed to otherwise by the City. Unless expressly stated in a Statement of Work, all salaries, wages, or other payments (including

without limitation any overtime) to any third parties, Authorized Subcontractors or employees, shall be the sole responsibility of the Consultant, and the Consultant hereby agrees to fully indemnify, defend and hold harmless the City with respect thereto.

- b) **Travel and Costs.** Travel time of the Consultant's personnel shall not be charged to, or paid by, the City unless specifically provided for in the Statement of Work. Any allowed travel time shall be at the City's own normal rates, without allowance for premium or overtime.
- c) **Invoices.** Upon the City's acceptance of each delivery of Deliverables (including without limitation acceptance of completed Services), the City shall so notify Consultant, and Consultant shall issue a written invoice ("Invoice") to the City with respect thereto. Each such Invoice shall contain the contract/purchase order number, the vendor code number, and the identification of material, equipment and/or services covered by the Invoices. In all cases the amount of applicable sales tax or use tax shall be separately stated on the Invoice. All Invoices shall be accompanied by such written documentation as the City may reasonably require in order to support the amount and calculation of all corresponding Fees. Invoices for Services shall be issued monthly for all Services provided during the immediately preceding month.

**For Time and Materials Task Orders.**

Consultant shall prepare and submit to Licensee written monthly invoices showing the compensation due for work performed, under Task Orders to the City address listed on the Task Order. The amount invoiced will be equal to the number of hours expended during the previous month multiplied by the labor rates for labor categories set forth in each Task Order.. Meals will be invoiced on a "per diem" basis in accordance with the full daily limits stated in the most current Federal Travel Regulations. Other direct costs (ODCs), including travel-related expenses and meal per diem, will include a fifteen percent (15%) burden. Consultant may reallocate the budget between activities, labor categories, and ODCs as necessary to facilitate the work effort, provided the overall price is not exceeded. In the event Consultant reaches the funded not-to-exceed Task Order value and the activities are not completed, City may increase the order funding to allow additional work to be performed, or Consultant stop work without further obligation or liability.

**For Firm Fixed Price Task Orders.**

Unless otherwise specified in a Task Order, Consultant shall prepare and submit monthly invoices based on the percent complete for each Deliverable as of the end of the preceding month, or based on milestone complete. Upon acceptance of all Deliverables or upon completion of the milestones under a Task Order, the unpaid balance of the total Task Order value is due.

**For EEAP Task Orders.**

Upon execution of each Task Order for EEAP or the inception of a Renewal Period, Consultant shall invoice City for the EEAP subscription annually in advance. Fees for additional Learning and Services Credits or Technical Advisor Services will be invoiced upon receipt of City's order. Pricing for annual program renewals and new or additional Consultant service offerings will be in accordance with Consultant's most current price schedule at the time of purchase or renewal. City may use Learning and Services Credits to pay for Consultant travel-related expenses including a standard handling fee.



- d) **Payment.** Such Invoices, if correct, will be certified, and paid within thirty (30) days after receipt of Invoice. Invoice payments will not be made if the Invoice is received more than six (6) months after acceptance of corresponding Deliverables. No such Invoice shall be certified for payment, or paid, unless and until it shall first conform to Section 10(c) (“Invoices”) above. In the event of any dispute of any Fees under any Invoices, the City agrees to make payment of all undisputed amounts as hereinabove provided.
- e) **Business Tax Registration.** Consultant shall register and remain in compliance with during the Term of this Agreement the City of Long Beach Municipal Code Titles 3 and 5.
- f) **Taxpayer Identification Number (“TIN”).** Consultant hereby represents and warrants that its TIN is 95-2775732. No Fees shall be payable or paid to Consultant unless and until such TIN is verified by the City as valid.
- g) **Third Party Claims.** The Consultant shall promptly pay, when due, all amounts payable for labor and materials furnished in the performance of this Agreement so as to prevent any lien or other claim under any provision of law from arising against any City property (including reports, documents, and other tangible matter or Deliverables produced hereunder), against the Consultant’s rights to payments hereunder, or against the City, and shall pay all amounts due under the Unemployment Insurance Act with respect to such labor.
- h) **Retention.** Due to the substantial complexity of the Work, the City will not deduct retention.
- i) **Payment No Waiver.** City’s payment of an Invoice shall not constitute acceptance of Work not in accordance with the Agreement.

**11. TERM AND TERMINATION.**

- a) **Term.** The term of this Agreement (“Initial Term”) shall commence upon the Effective Date and shall expire upon the later to occur of (i) the delivery of the last scheduled Deliverable or Service as specified in the Task Orders executed under this Agreement or (ii) on August 31, 2021. The parties may by mutual agreement extend the Term by executing an Amendment to this Agreement.
- b) **Termination without Cause.** This Agreement may be terminated by the City, without cause, upon written notice. Upon receipt of such notice, the Consultant shall immediately stop all work under this Agreement. The Consultant shall be entitled to payment of Fees for all Deliverables completed and work performed, including Services provided (in all cases where accepted by the City), until the date of such notice, and also to reimbursement for reasonable and documented re-stocking charges imposed on Consultant by third party suppliers due to such termination, where such charges have been called to the City’s attention beforehand and in writing. The Consultant shall then deliver to the City, in an organized and usable form, all Deliverables “work in process” as of such date.
- c) **Termination for Material Breach.** Either party may terminate this Agreement upon notice, in whole or in part, for the material breach of this Agreement by the other party (including without limitation, in the case of Consultant, any such breach by Consultant’s Authorized Subcontractors) which has remained uncured for a period of ten (10) days from the date of

notice thereof to the breaching party. Without limiting the generality of the foregoing: (i) any late payment of Fees by the City shall not, in and of itself, be deemed a material breach of this Agreement; and (ii) any failure of Consultant to timely perform Services or deliver other Deliverables according to any Schedule and this Agreement, shall not, in and of itself, be deemed a material breach hereof. In such case the City shall also have the right to reject all such Deliverables. Also, in the event the Agreement is terminated in accordance with this Section 11(c) ("Termination for Material Breach"), the City may also take possession of all Deliverables in process and of all materials, tools, equipment, and property of the Consultant, which have been provided in connection with the work, and may complete the work by whatever method or means the City may select. The cost of completing the work shall be deducted from the balance which would have been due the Consultant had the Agreement not been terminated and the work completed in accordance with the Agreement.

- d) **Disqualification.** In the event Consultant receives one (1) or more notices of material breach as described in Section 11(c) ("Termination for Material Breach"), whether such material breaches are cured or not, the City may consider such material breaches in making any subsequent determination of responsibility with respect to future awards.
  - e) **Remedies Not Exclusive.** Any election by the City to seek any remedy under this SECTION 11 ("TERM AND TERMINATION"), including without limitation any right to reject Deliverables or to require expedited shipping, shall not limit any other rights or remedies which the City may have with respect to any breach of this Agreement.
  - f) **Right of Offset.** The City reserves the right to offset any and all costs and damages suffered by the City under this Agreement against any outstanding invoices or amounts otherwise owed to the Consultant or to make a claim against the Consultant therefor.
  - g) **Suspension of Work.** The Contract Administrator may orally direct the Consultant to suspend, and to subsequently resume performance of all or any part of the work. Such direction shall be confirmed in writing. An equitable adjustment in the work completion schedule and corresponding Fees (if fixed price) shall be negotiated and confirmed by a Change Order or a revision to a task assignment if such suspension impacts the cost of the work and/or work completion schedule. The City shall pay the Fees due for the suspended work up to the effective date of suspension notice and shall resume Fee payments effective as of the work resumption date.
  - h) **Errors and Omissions.** The Consultant will be responsible for correcting or remedying any errors or omissions which occur in performance of the services under this Agreement and which are the result of the Consultant's negligence, action or omission, regardless of whether the foregoing are a material breach hereof or not. The cost of correcting or remedying any such error or omission shall be borne by the Consultant. Revising Consultant-prepared documents at the request of the City to incorporate comments by the public or by agencies having jurisdiction in matters of the particular task assignment is not considered to be a remedy of errors or omissions, but is considered an integral part of document preparation which may be called for by a Task Assignment.
12. **TAXES.** Unless otherwise required by law, the City is exempt from Federal excise taxes. The City will only pay for any State or local sales or use taxes on the Services rendered or other Deliverables supplied to the City pursuant to this Agreement.

### 13. RECORDS AND AUDIT.

- a) **Records and Audits.** The Consultant shall maintain books, records, documents and other evidence showing all costs and expenses incurred by the Consultant for this Agreement. The City shall have the right, upon twenty-four (24) hours' notice, to audit such project related books, records, documents, and other evidence, and Consultant's accounting procedures and practices, as determined by the City, to verify all Fees and any costs and expenses claimed. The City may also request, and the Consultant shall provide, on two (2) business days' notice, full and complete Job Cost Reports. The City retain this right for at least three (3) years after final payment of any Fee hereunder and until all disputes, appeals, litigation, or claims have been resolved. This right shall also include audit of Consultant's project related records, at reasonable times at the Consultant's office or facilities which are engaged in the performance of the Agreement. In addition, the Consultant shall, at no cost or expense to the City, furnish reasonable facilities and assistance for such an audit. Upon request, Consultant shall also provide copies of documents applicable to this Agreement. The City shall have the right to use and disclose all audit findings, including without limitation any Job Cost Reports, to the extent reasonably necessary or desirable in order to enforce the City's rights under this Agreement.
- b) **Progress Reports.** The Consultant shall, as required by the Contract Administrator from time to time, submit reports summarizing all the Tasks under this Agreement, the work accomplished, work left to be done, work to be done in the coming months, and the estimated completion dates, including without limitation any deviations or reasonably likely deviations from the Schedule. Each such report shall be organized by Task and shall include the Task number, Task coordinator, Task title, the authorized Fee, the start date and completion date, and the total of Fees received to date by the Consultant. Such report shall also show the total Fees received by the Consultant under this Agreement.
- c) **Right to Review.** The City reserves the right to review any portion of the Services performed by the Consultant under this Agreement, and the Consultant agrees to cooperate to the fullest extent. Consultant shall furnish to the City such reports, statistical data, and other information pertaining to the Consultant's Services as shall be reasonably required by the City. The right of the City to conduct such review shall not relieve the Consultant of any obligation set forth herein.

### 14. RIGHTS IN WORK PRODUCT AND LICENSES.

- a) **Disclosure of Work Product.** For purposes of this Agreement, "Work Product" shall mean any Invention whether or not patentable, and all related know-how, designs, mask works, trademarks, formulae, processes, manufacturing techniques, trade secrets, ideas, artwork, Developed Software (including without limitation any website or other works). Consultant shall disclose promptly in writing to the City, or any person designated by the City, all Work Product which is solely or jointly conceived, made, reduced to practice, or learned by Consultant in the course of any work performed hereunder ("City Work Product"). Consultant hereby represents and warrants that any Work Product relating to the City's business or any project which Consultant has made, conceived, learned or reduced to practice prior to the Effective Date of this Agreement ("Prior Work Product") has been disclosed in writing to the City and attached to this Agreement as EXHIBIT A ("PRE-EXISTING MATERIALS"). If disclosure

of any such Prior Work Product would cause Consultant to violate any prior confidentiality agreement, Consultant shall not list such Prior Work Product, but shall instead disclose a cursory, non-confidential name for each such item, a listing of the party(ies) to whom it belongs, and the fact that full disclosure as to such Prior Work Product has not been made for that reason. Consultant agrees that in execution of its duties under this Agreement it will exercise due care not to use Prior Work Product in which third parties would have a claim of ownership or breach of confidentiality agreements involving confidential information of others. Consultant agrees that any and all Inventions made, learned, derived, conceived, written, created or first reduced to practice in the performance of work under this Agreement shall be the sole and exclusive property of the City.

- b) **Assignment and License.** Consultant hereby irrevocably assigns and agrees to assign to the City all right, title and interest worldwide in and to City Work Product and all applicable intellectual property rights related to City Work Product including without limitation all copyrights, mask work rights, trademarks, service marks, trade secrets, patents (including original applications, divisional applications, continuation applications, continuation-in-part applications, reissues, reexamination certificates, rights of priority, and utility models), moral rights, and contract and licensing rights, however and wherever arising (collectively, the “Proprietary Rights”). Except as set forth below, Consultant retains no right to use the City Work Product and agrees not to challenge the validity of any patent, copyright, trade secret, or trademark owned by the City or resulting from the City’s ownership of the City Work Product. Consultant hereby grants to the City a nonexclusive, fully transferable, perpetual, fully paid up, irrevocable, worldwide license, with rights to sublicense through multiple tiers of sublicensees, to reproduce, make derivative works of, distribute copies to the public by sale or other transfer of ownership, or by rental, lease, or lending, publicly perform, and publicly display in any form or medium, whether now known or later developed, digitally perform, distribute, make, have made, use, lease, offer for sale, import and sell Pre-Existing Materials incorporated or used in the City Work Product for the purpose of developing and marketing City’s products, and carrying on the City’s business. City grants Consultant a nonexclusive fully transferable, perpetual, fully paid up, irrevocable, worldwide license, to use City Work Product in its ongoing business operations.
- c) **Waiver or Assignment of Rights.** If Consultant has any rights to the City Work Product which cannot be assigned to the City, Consultant unconditionally and irrevocably waives the enforcement of such rights, and all claims and causes of action of any kind against the City with respect to such rights, and agrees, at the City’s request and expense, to consent to and join in any action to enforce such rights. If Consultant has any right to the City Work Product which cannot be assigned to the City or waived by Consultant, Consultant unconditionally and irrevocably grants to the City during the term of such rights, an exclusive (both as to Consultant and all third parties), fully-transferable, irrevocable, perpetual, worldwide, fully paid up license, with rights to sublicense through multiple tiers of sublicensees, to reproduce, make derivative works of, distribute copies to the public by sale or other transfer of ownership, or by rental, lease, or lending, publicly perform, and publicly display in any form or medium, whether now known or later developed, digitally perform, distribute, make, have made, use, lease, offer for sale, import and sell goods and services under such rights. Consultant hereby waives and quitclaims to the City any and all claims, of any nature whatsoever, which Consultant now has or may hereafter have for infringement of any Proprietary Rights assigned hereunder to the City.

- d) **Continuing Assurances and Enforcement.** Consultant agrees to cooperate with the City or its designee(s), both during and after the Term of this Agreement, in the procurement and maintenance of the City's rights in the City Work Product and to execute, when requested, any other documents deemed necessary by the City to carry out the purpose of this Agreement. Without limiting the generality of the foregoing, for its employees and agents assigned to design the Deliverables, Consultant agrees to cause them to enter into agreements obligating them to assign Work Product to the Consultant in a format reasonably required by the City, for simultaneous or subsequent assignment of such Work Product to the City by the Consultant. To the extent the Consultant is unable to procure assignment of the rights in the Work Product, Consultant hereby irrevocably appoints the City as its attorney in fact to take all such actions and to secure execution of relevant copyright, patent, trademark, and trade secret documents and assignment of rights therein to the City. Consultant shall assist the City in every proper way to obtain, and from time to time enforce, United States and foreign Proprietary Rights relating to the City Work Product in any and all countries. To that end Consultant shall execute, verify and deliver such documents and perform such other acts (including appearances as a witness) as the City may reasonably request for use in applying for, obtaining, perfecting, evidencing, sustaining, maintaining, and enforcing such Proprietary Rights and the assignment thereof. In addition, Consultant shall execute, verify and deliver assignments of such Proprietary Rights to the City or its designee. Consultant's obligation to assist the City with respect to Proprietary Rights relating to such the City Work Product in any and all countries shall continue beyond the expiration or termination of this Agreement, but the City shall compensate Consultant at a reasonable rate after such expiration or termination for the time actually spent by Consultant at the City's request on such assistance and for reasonable expenses.
- e) **Existing Software License.** Consultant hereby grants to the City a worldwide, perpetual, irrevocable, non-exclusive, fully paid up, transferable license, including the right to grant sublicenses through multiple tiers, with respect to the Existing Software in order to use, have others use, copy, execute, publicly perform, and publicly display the Existing Software.
- f) **Documentation License.** Consultant hereby grants to the City a worldwide, perpetual, irrevocable, non-exclusive, fully paid up, transferable license, including the right to grant sublicenses through multiple tiers, with respect to the Documentation in order to use, copy, execute, distribute copies to the public by sale or other transfer of ownership, or by rental, lease, or lending, publicly perform, publicly display, digitally perform and create derivative works of the Documentation solely in connection with the City's exercise of its rights under this Agreement.
- g) **Tradenames, Trademarks, and Service Marks.** The parties understand that the City intend to brand certain products and/or services with Port of Long Beach logos and marks (collectively "Marks.") Consultant agrees that any use of these or confusingly similar Marks shall not inure to the benefit of Consultant but shall only inure to the benefit of City. Consultant agrees to refrain from using the Marks or any confusingly similar marks in its business unless authorized in writing by City. Consultant hereby acknowledges City's exclusive rights in the MARKS. Consultant further acknowledges that the MARKS are unique and original to the City and that City is the sole and exclusive owner thereof. Consultant shall not, at any time during or after the effective Term of the Agreement, dispute or contest, directly or indirectly, City's exclusive right and title to the MARKS or the validity thereof.

**15. CONFIDENTIAL INFORMATION.**

- a) Protection.** Each party (the “Disclosing Party”) may from time to time during the term of this Agreement disclose to the other party (the “Receiving Party”) certain non-public information regarding the Disclosing Party’s business, including technical, marketing, financial, personnel, planning and other information (“Confidential Information”). The Disclosing Party shall mark all such Confidential Information in tangible form with the legend ‘confidential’, ‘proprietary’, or with similar legend. With respect to Confidential Information disclosed orally, the Disclosing Party shall describe such Confidential Information as such in writing within thirty (30) days after the date of oral disclosure. Regardless of whether so marked, however, any non-public information regarding the Developed Software (in Source Code and Object Code formats), shall be deemed to be the Confidential Information of the City.
- b) Protection of Confidential Information.** Except as expressly permitted by this Agreement, the Receiving Party shall not disclose the Confidential Information of the Disclosing Party (using the same degree of care which the Receiving Party ordinarily uses with respect to its own proprietary information, but in no event with less than reasonable care). The Receiving Party shall also not use the Confidential Information of the Disclosing Party for any purpose not expressly permitted by this Agreement, and shall limit the disclosure of the Confidential Information of the Disclosing Party to the employees or agents of the Receiving Party who have a need to know such Confidential Information of the Disclosing Party to the employees or agents of the Receiving Party who have a need to know such Confidential Information for purposes of this Agreement, and who are, with respect to the Confidential Information of the Disclosing Party, bound in writing by confidentiality terms no less restrictive than those contained herein. The Receiving Party shall provide copies of such agreements to the Disclosing Party upon request; provided, however, that such agreement copies shall themselves be deemed Confidential Information of the Receiving Party. Notwithstanding the foregoing, after the expiration or termination of this Agreement and the return by the Receiving Party of the Confidential Information of the Disclosing Party as provided in Section 15(d) (“Return of Confidential Information”), the Receiving Party shall be free to use internally (but not disclose) any ideas, concepts and know-how contained in such Confidential Information: (i) which relate to the business of the Receiving Party; and (ii) which have been retained mentally by employees of the Receiving Party through the course of their performance under this Agreement.
- c) Exceptions.** Notwithstanding anything herein to the contrary, Confidential Information shall not be deemed to include any information which: (i) was already lawfully known to the Receiving Party at the time of disclosure by the Disclosing Party as reflected in the written records of the Receiving Party; (ii) was or has been disclosed by the Disclosing Party to a third party without obligation of confidence; (iii) was or becomes lawfully known to the general public without breach of this Agreement; (iv) is independently developed by the Receiving Party without access to, or use of, the Confidential Information; (v) is approved in writing by the Disclosing Party for disclosure by the Receiving Party; (vi) is required to be disclosed in order for the Receiving Party to enforce its rights under this Agreement; or (vii) in the opinion of the City Attorney of Long Beach is required to be disclosed by law or by the order of a court or similar judicial or administrative body; provided, however, that the Receiving Party shall notify the Disclosing Party of such requirement immediately and in writing, and shall cooperate reasonably with the Disclosing Party, at the Disclosing Party’s expense, in the obtaining of a protective or similar order with respect thereto.

- d) **Return of Confidential Information.** The Receiving Party shall return to the Disclosing Party, destroy or erase all Confidential Information of the Disclosing Party in tangible form upon the written request of the Disclosing Party (except for Deliverables and any other items which the City is otherwise entitled to retain under this Agreement) and the Receiving Party shall certify promptly and in writing that it has done so.

**16. INTELLECTUAL PROPERTY AND DELIVERABLES INDEMNITY.**

- a) **Statement of Indemnity.** Consultant agrees that from and after the Effective Date it shall fully indemnify, defend and hold harmless the City, and its affiliates, officers, directors, agents, employees, customers and assigns (the "Indemnified Parties") from and against any and all claims, losses, liabilities, damages and costs (including attorneys' fees and court costs) arising from or relating to any Deliverables or arising from or relating to any claim, demand, threat, suit or proceeding by any third party regarding the Deliverables, including without limitation any claims of injury to persons or property, illness, or death, or of intellectual property infringement or misappropriation, by any third party. The indemnity given by Consultant herein shall not include any claims, losses, liabilities, damages and costs (including attorneys' fees and court costs) arising from or relating to the data content, or the City's use of the data that is contained in the database(s) that comprise the City Work Product or the Deliverables, provided that the alleged claim are not the result of a failure of Consultant to perform the Deliverables or its obligations herein. The City shall notify Consultant promptly of any third party claim in connection with the foregoing, shall cooperate reasonably with Consultant in connection therewith (at Consultant's expense), in the defense or settlement of the foregoing. The City shall have the right at its own expense to be represented in any action related to the foregoing by counsel of its own choice, and shall cooperate reasonably with Consultant with respect to such litigation.
- b) **Control.** In Consultant's defense of the City, negotiation, compromise, and settlement of any foregoing infringement or misappropriation action, the City shall retain discretion in and control of the litigation, negotiation, compromise, settlement, and appeals therefrom.
- c) **Intentionally Omitted.**
- d) **Claims and Remediation.** If Consultant receives notice of a claim, demand, threat, suit or proceeding regarding alleged intellectual property infringement or misappropriation by the Deliverables, or if in Consultant's judgment such a claim is likely, Consultant may, at its sole expense, procure for City ownership of, or the right to continue using, the Deliverables, modify the Deliverables so that they are no longer infringing, or replace the Deliverables with other items of the same technical specifications and the same or better functionality and performance, which shall, upon acceptance by the City, be considered Deliverables.
- e) **Use of Funds.** Consultant certifies that it has appropriate systems and controls in place to ensure that City's funds will not be used in the performance of this Agreement for the acquisition, operation or maintenance of computer software in violation of copyright laws.

**17. WARRANTIES.**

- a) **Deliverables.** Consultant hereby represents and warrants that the Deliverables (including without limitation all Software, but not including Services) shall materially conform to their

corresponding Specifications (including without limitation all Documentation) in normal use for a period of twelve months from the date of their acceptance by the City. In the event of any breach of the foregoing warranty, the City shall promptly notify Consultant, and Consultant shall immediately either replace or, if commercially reasonable, repair such non-conforming Deliverables, and provide the same immediately to the City. Any failure of Consultant to carry out the foregoing in a manner reasonably satisfactory to the City, may, at the City's option, be considered a material breach of this Agreement for purposes of SECTION 11 ("TERM AND TERMINATION"). Any such repaired or replaced Deliverables shall continue to have the balance of their warranty period as hereinabove stated; provided, however, that such warranty period shall in no event be less than ninety (90) days.

- b) Services.** Consultant represents and warrants that Consultant shall perform the Services in a professional and workmanlike manner, in accordance with the best practices of Consultant's industry, and in material conformity with corresponding Specifications (including without limitation all Documentation). In the event of any breach of the foregoing warranty, the City shall promptly notify Consultant, and Consultant shall immediately re-perform the non-conforming Services. Any failure of Consultant to carry out the foregoing in a manner reasonably satisfactory to the City, may, at the City's option, be considered a material breach of this Agreement for purposes of SECTION 11 ("TERM AND TERMINATION").
- c) General.** Consultant represents and warrants that: (i) Consultant has full power and authority to enter into this Agreement and the person signing the Agreement on Consultant's behalf has been duly authorized and empowered to enter into this Agreement; (ii) the Deliverables shall not contain any materials which are unlawful, defamatory, libelous, threatening or abusive, (iii) Neither the Deliverables (including without limitation the provision of Services) nor any element thereof, infringes or shall infringe or misappropriate the intellectual property rights of any third party, including without limitation any patent, copyright, trademark, or trade secret rights; (iv) the Deliverables shall not be subject to any restrictions, including without limitation any liens, mortgages, pledges, security interests, encumbrances, or encroachments; (v) Consultant is not under, and shall not enter into any, obligation or obligations inconsistent with the provisions of this Agreement; and (vi) Consultant shall not violate any law, statute, ordinance, or regulation in the course of its performance under this Agreement.
- d) Viruses.** Consultant represents and warrants that it has exercised and shall exercise its most diligent efforts to ensure that no viruses, "Trojan Horses", "Worms" or other damaging, dangerous or objectionable code (collectively, "Viruses") are included with the Deliverables. If at any time a Virus may be found to exist in or have emanated from the Deliverables, or any electronic data, information or report generated thereby, Consultant agrees, at its sole expense, to exercise its most diligent efforts (including but not limited to providing appropriate replacement products, software, installation, and diagnostic testing) to remove such Virus within five (5) days of City's notice.
- e) Disclaimer.** EXCEPT AS EXPRESSLY STATED IN THIS AGREEMENT, CONSULTANT HEREBY DISCLAIMS (i) ANY WARRANTY THAT THE DELIVERABLES ARE ERROR FREE, WILL OPERATE WITHOUT INTERRUPTION, OR ARE COMPATIBLE WITH ALL SOFTWARE CONFIGURATIONS, AND (ii) WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

## **18. LIMITATION OF LIABILITY**



**A. Disclaimer of Certain Types of Liability.** IN NO EVENT SHALL CONSULTANT OR ITS LICENSOR(S) BE LIABLE TO THE CITY FOR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES; LOST PROFITS; LOST SALES OR BUSINESS EXPENDITURES; INVESTMENTS; OR COMMITMENTS IN CONNECTION WITH ANY BUSINESS, LOSS OF ANY GOODWILL, OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT OR USE OF THE DELIVERABLES OR SERVICES OUTPUT, HOWEVER CAUSED, ON ANY THEORY OF LIABILITY, AND WHETHER OR NOT CONSULTANT OR ITS LICENSOR(S) HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE. THESE LIMITATIONS SHALL APPLY NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY REMEDY.

**B. General Limitation of Liability.** EXCEPT FOR CONSULTANT'S INDEMNIFICATION OBLIGATIONS UNDER EXHIBIT C, IN NO EVENT WILL CONSULTANT'S TOTAL CUMULATIVE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT OR USE OF THE DELIVERABLES OR SERVICES OUTPUT, FROM ALL CAUSES OF ACTION OF ANY KIND, INCLUDING, BUT NOT LIMITED TO, CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, BREACH OF WARRANTY, MISREPRESENTATION, OR OTHERWISE, EXCEED THE AMOUNTS PAID TO CONSULTANT BY THE CITY FOR THE DELIVERABLES OR SERVICES OUTPUT FROM WHICH THE LIABILITY DIRECTLY AROSE.

**C. Applicability of Disclaimers and Limitations.** The City agrees that the limitations of liability and disclaimers set forth in this Agreement will apply regardless of whether the City has accepted the Deliverables, or any other product or service delivered by the Consultant. The parties agree that Consultant has set its prices and entered into this Agreement in reliance upon the disclaimers and limitations set forth herein, that the same reflect an allocation of risk between the parties (including the risk that a contract remedy may fail of its essential purpose or cause consequential loss), and that the same form an essential basis of the bargain between the parties.

**18. INDEMNITY AND INSURANCE.** Consultant shall comply with the indemnity and insurance requirements in Exhibit C.

**19. SURVIVAL AND ORDER OF PRECEDENCE.** In the event of any expiration or termination of this Agreement, the provisions of Section 1 ("Definitions"), Section 3(b) ("No Obligation"), Section 11 ("Term and Termination"), Section 13 ("Records and Audit"), Section 14 ("Rights in Work Product and Licenses"), Section 15 ("Confidential Information"), Section 16 ("Intellectual Property and Deliverables Indemnity"), Section 17("Warranties"), Section 18 ("Indemnity and Insurance"), Section 19 ("Survival and Order of Precedence"), and Section 20 ("General") shall survive and shall continue to bind the parties. In the event of any conflict between the terms of this Agreement and the terms of any exhibit, the terms of the exhibit shall control. In the event of any conflict between the following documents, all of which are hereby incorporated by reference into this Agreement, the order of precedence shall be as follows:

(a) Latest Change Order

- (b) Latest Task Order
- (c) Statement of Work
- (d) Agreement
- (e) Other referenced documents.

**20. GENERAL.**

- a) Governing Law.** This Agreement shall be governed in all respects by the laws of the United States of America and the State of California without regard to conflicts of law principles. The parties agree that the United Nations Convention on Contracts for the International Sale of Goods is specifically excluded from application to this Agreement.
- b) Attorneys' Fees.** In the event any proceeding or lawsuit is brought by the City or Consultant in connection with this Agreement, each party shall bear its own attorneys' fees and costs.
- c) Forum.** Each party's performance hereunder shall comply with all applicable laws of the United States of America, the State of California, and the City of Long Beach. The State and Federal Courts located in the City of Los Angeles shall have exclusive jurisdiction over any disputes under this Agreement, and the parties hereby submit to the personal jurisdiction of such courts.
- d) Injunctive Relief.** It is understood and agreed that, notwithstanding any other provisions of this Agreement, breach of the provisions of this Agreement by either party will cause the non-breaching party irreparable damage for which recovery of money damages would be inadequate, and that the non-breaching party shall therefore be entitled to obtain timely injunctive relief to protect its rights under this Agreement in addition to any and all remedies available at law.
- e) Notices.** All notices or reports permitted or required under this Agreement shall be in writing and shall be delivered by personal delivery or by certified or registered mail, return receipt requested, and shall be deemed given upon personal delivery or five (5) days after deposit in the mail. Any such notice or report directed to the City shall be delivered to:

**CITY OF LONG BEACH**

Justine M. Francisco, Administrative Analyst  
Department of Technology and Innovation  
333 W. Ocean Blvd. 12<sup>th</sup> Floor  
Long Beach, CA 90802

Any such notice or report directed to the Consultant shall be delivered to the following:

Environmental Systems Research Institute, Inc.  
380 New York Street  
Redlands, CA 92373-8100  
USA

Project/Technical Notice- Attn: Jasmine Deo, Contract Administrator  
Telephone: 909-793-2853 x 4309  
Fax: 909-307-3034  
Legal Notice – Attn: Contract Manager  
Telephone: 909-793-2853 x 1133

Fax: 909-307-3034

With a copy to Jasmine Deo, Contract Administrator

Either party, by written notice, may designate different or additional person(s) or different addresses.

- f) **Agency.** Nothing contained herein shall be construed as creating any agency, partnership, or other form of joint enterprise between the parties.
- g) **Waiver.** The failure of either party to require performance by the other party of any provision hereof shall not affect the full right to require such performance at any time thereafter; nor shall the waiver by either party of a breach of any provision hereof be taken or held to be a waiver of the provision itself.
- h) **Severability.** In the event that any provision of this Agreement shall be unenforceable or invalid under any applicable law or be so held by applicable court decision, such unenforceability or invalidity shall not render this Agreement unenforceable or invalid as a whole, and, in such event, such provision shall be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law or applicable court decisions.
- i) **Headings.** The section headings appearing in this Agreement are inserted only as a matter of convenience and in no way define, limit, construe, or describe the scope or extent of such section or in any way affect this Agreement.
- j) **Assignment.** Neither this Agreement nor any rights or obligations of Consultant hereunder may be assigned by Consultant in whole or in part without the prior written approval of City. Such approval may be withheld for any reason or no reason as this Agreement is a personal services contract and was awarded to Consultant based on the qualities of Consultant. For the purposes of this Subsection 20(j) ("Assignment"), a change in the persons or entities who control fifty percent (50%) or more of the equity securities or voting interest of Consultant shall be considered an assignment of Consultant's rights and obligations. City's rights and obligations, in whole or in part, under this Agreement may be assigned by City. City may exercise full transfer and assignment rights in any manner at City's sole discretion.
- k) **Counterparts.** This Agreement may be executed simultaneously in two (2) or more counterparts, each of which will be considered an original, but all of which together will constitute one and the same instrument.
- l) **Relationship of the Parties.** The Consultant is acting hereunder as an independent Consultant and not as an agent or employee of City. The Consultant shall not represent or otherwise hold out itself or any of its directors, officers, partners, employees, or agents to be an agent or employee of City.
- m) **Entire Agreement.** This Agreement together with the Exhibits hereto completely and exclusively states the agreement of the parties regarding its subject matter. This Agreement supersedes, and its terms govern, all prior proposals, agreements, or other communications between the parties, oral or written, regarding such subject matter. The terms of any Shrink-Wrap Agreement accompanying any Software delivered to City hereunder shall, to the extent

inconsistent with the terms of this Agreement, have no effect whatsoever. This Agreement shall not be modified except by a subsequently dated written amendment or exhibit signed on behalf of City and Consultant by their duly authorized representatives. Any purported oral amendment to this Agreement shall have no effect.

n) Intentionally Omitted.

AGREED TO:

CITY OF LONG BEACH, a municipal corporation

By: T. Bull Assistant City Manager

Date: 8/30/16 EXECUTED PURSUANT TO SECTION 301 OF THE CITY CHARTER.

CONSULTANT:

ENVIRONMENTAL SYSTEMS RESEARCH INSTITUTE, INC., a California corporation

By: Chris Johnson Print Name and Title  
Manager, Commercial & Government Contracts

Date: 25 August, 2016

By \_\_\_\_\_ Consultant

APPROVED AS TO FORM \_\_\_\_\_, 20\_\_\_\_  
City Attorney  
By \_\_\_\_\_ Principal Deputy

APPROVED AS TO FORM  
Aug. 29, 2016  
CHARLES PARKIN, City Attorney  
By Amy R. Webber  
AMY R. WEBBER  
DEPUTY CITY ATTORNEY

- Exhibit A - Pre-Existing Materials
- Exhibit B - Sample Task Order Template
- Exhibit C - General Indemnity and Insurance Terms
- Exhibit D - Esri Enterprise Advantage Program Addendum

**Agreement No. 311872**

**Exhibit A – Pre-Existing Materials\***

Esri	<ul style="list-style-type: none"><li>• Esri Commercial off the Shelf (COTS) Products - Please reference Esri ELA agreement and software contents</li><li>• Adobe Flex Homeland Security Framework</li><li>• Adobe Flex Context Aware Framework</li><li>• Microsoft Silverlight Common Operational Picture Framework</li><li>• Mobile GIS Solution Toolkit</li><li>• Critical Infrastructure Protection Framework</li><li>• GPS/Radio Integration Framework</li></ul>
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\*Consultant reserves the right to amend this list and update it on a periodic basis as needed.

**Agreement No. 311872**

**Exhibit B**

**SAMPLE TASK ORDER**

Task Order No. \_\_\_\_\_

In accordance with the terms and conditions of the above-referenced Agreement between Consultant, and City, this Task Order authorizes preparation and provision of the Services Output and/or Deliverables, or EEAP, described and in accordance with the terms, schedule, and start/end date(s) specified below.

1. Scope of Work: [As applicable, specifically identify and describe Services Output or Deliverables including Custom Code, Map Data, and Technical Data (including Technical Assistance) and the resources to be provided by Licensee (including Licensee-supplied personnel, software, hardware, and digital or hard-copy data), and place of delivery and location where technical assistance will be provided.]

In addition to the foregoing, City agrees that its employees, representatives, and subcontractors will cooperate and communicate with Consultant during performance of this Task Order. Without cost to Consultant, City shall provide, allow access to, or assist Consultant in obtaining all data Consultant requests for performance of this Task Order, including, but not limited to, (1) copies of previously prepared reports, maps, plans, surveys, records, and other documents in the control or possession of City and (2) copies of ordinances, codes, regulations, or other governmental documents.

2. Contract Type [Firm Fixed Price (FFP), Time and Materials (T&M), or EEAP]:
3. Total Task Order Value (if FFP), Not-to-Exceed Value (if T&M), or for EEAP:
4. City Address for the Receipt of Esri Invoices:
5. Delivery Schedule or Start/End Date(s) for Each Deliverable:
6. Special Considerations:
7. Consultant Project Manager: (insert name, telephone, fax, and e-mail address)  
 Consultant Contract Administrator: (insert name, telephone, fax, and e-mail address)  
 City Project Manager: (insert name, telephone, fax, and e-mail address)  
 City Contract Administrator: (insert name, telephone, fax, and e-mail address)

ACCEPTED AND AGREED:  
CITY OF LONG BEACH  
(City)

ENVIRONMENTAL SYSTEMS RESEARCH  
INSTITUTE, INC. (Esri or Consultant)

Signature: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

Signature: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

## Agreement No. 311872

### Exhibit C

#### General Indemnity and Insurance Terms

- (a) Consultant shall indemnify, protect and hold harmless City and their officials, employees and agents (“Indemnified Parties”), from and against any and all liability, claims, demands, damage, loss, obligations, causes of action, proceedings, awards, fines, judgments, penalties, costs and expenses, including attorneys’ fees, court costs, expert and witness fees, and other costs and fees of litigation, arising out of third party claims for injury, illness, death, or property destruction or alleged to have arisen, in whole or in part, out of or in connection with negligent or willful bad acts, errors, omissions or misrepresentations committed by Consultant, its officers, employees, agents, subcontractors, or anyone under Consultant’s control, in the performance of work or services under this contract (collectively “Claims” or individually “Claim”).
- (b) In addition to Consultant’s duty to indemnify, Consultant shall have a separate and wholly independent duty to defend Indemnified Parties at Consultant’s expense from and against all Claims, and shall continue this defense until the Claims are resolved, whether by settlement, judgment or otherwise. City shall notify Consultant of any Claim, shall tender the defense of the Claim to Consultant, and shall assist Consultant, as may be reasonably requested, in the defense.
- (c) If a court of competent jurisdiction determines that a Claim was caused by the negligence or willful misconduct of Indemnified Parties, Consultant’s costs of defense and indemnity shall be (1) reimbursed in full if the court determines sole negligence by the Indemnified Parties, or (2) reduced by the percentage of negligence or willful misconduct attributed by the court to the Indemnified Parties.
- (d) The provisions of this paragraph shall survive the expiration or termination of this contract.

#### INSURANCE

As a condition precedent to the effectiveness of this contract, Consultant shall procure and maintain in full force and effect during the term of this Agreement the following types and levels of insurance:

- (a) Commercial General Liability Insurance which affords coverage at least as broad as Insurance Services Office “occurrence” form CG 00 01 with minimum limits of at least \$1,000,000 per occurrence, and if written with an aggregate, the aggregate shall be double the per occurrence limit. The policy shall contain no provisions or endorsements limiting coverage for (1) products - completed operations; (2) contractual liability; (3) independent contractors; (4) third party action over claims; and (5) defense costs shall be excess limits.
- (b) Automobile Liability Insurance with coverage at least as broad as Insurance Service Office Form CA 0001 covering “Any Auto” (Symbol 1) with minimum limits of \$1,000,000 each accident.
- (c) Workers’ Compensation Insurance, as required by the State of California and Employer’s Liability Insurance with a limit of not less than \$1,000,000 per accident for bodily injury and

disease.

- (d) Professional Liability Insurance with minimum limits of \$1,000,000. Covered Professional Services shall include all work to be performed under the contract and without any exclusions that may potentially affect the work to be performed under the contract.

Insurance policies will not be in compliance if they include any limiting endorsement that has not been approved in writing by City.

The policy or policies of insurance for Commercial General Liability and Automobile Liability shall contain the following provisions or be endorsed to provide the following:

- (1) The Indemnified Parties shall be added as direct loss payees via endorsement with regard to liability and defense of suits or claims arising out of the performance of the Agreement. Additional insured endorsements shall not:
  - i. Be limited to ongoing operations;
  - ii. Exclude contractual liability;
  - iii. Restrict coverage to the sole liability of Consultant;
  - iv. Contain any other exclusion contrary to the Agreement.
- (2) This insurance shall be primary and any other insurance, deductible, or self-insurance maintained by the Indemnified Parties shall not contribute with this primary insurance.
- (3) The policy shall not be canceled or the coverage reduced until a thirty (30) day written notice of cancellation has been served upon the Executive Director except notice of ten (10) days shall be allowed for non-payment of premium.

The policy or policies of insurance for Workers' Compensation shall be endorsed, as follows:

- (1) A waiver of subrogation stating that the insurer waives all rights of subrogation against the Indemnified Parties.
- (2) The policy or policies shall not be canceled or the coverage reduced.

The policy or policies of insurance required for Professional Liability shall be endorsed as follows:

- (1) The policy or policies shall not be canceled or the coverage reduced.

Any deductible or self-insured retention must be approved in writing by the Executive Director and shall protect the Indemnified Parties in the same manner and to the same extent as they would have been protected had the policy or policies not contained a deductible or self-insured retention.

Consultant shall deliver either certified copies of the required policies or endorsements on forms approved by the City ("evidence of insurance") to the Executive Director for approval as to sufficiency and as to form. At least fifteen (15) days prior to the expiration of any such policy, evidence of insurance showing that such insurance coverage has been renewed or extended shall be filed with the Executive Director. If such coverage is canceled or reduced, Consultant shall, within ten (10) days after receipt of written notice of such cancellation or reduction of coverage, file with the Executive Director



evidence of insurance showing that the required insurance has been reinstated or has been provided through another insurance company or companies.

The coverage provided shall apply to the obligations assumed by the Consultant under the indemnity provisions of this Agreement but this insurance provision in no way limits the indemnity provisions and the indemnity provisions in no way limit this insurance provision.

Consultant agrees to suspend and cease all operations hereunder during such period of time as the required insurance coverage is not in effect and evidence of insurance has not been approved by City. City has the right to withhold all payments due Consultant until Consultant has complied fully with this insurance provision.

Each such policy shall be from a company or companies with a current A.M. Best's rating of no less than A:VII and authorized to do business in the State of California, or otherwise allowed to place insurance through surplus line brokers under applicable provisions of the California Insurance Code or any federal law.

If coverage is written on a claims-made basis, the retroactive date on such insurance and all subsequent insurance shall coincide with or precede the effective date of the contract and continuous coverage shall be maintained or Consultant shall obtain and submit an extended reporting period endorsement of at least three (3) years from termination or expiration of this contract. Upon expiration or termination of coverage of required insurance, Consultant shall procure and submit to City evidence of "tail" coverage or an extended reporting period endorsement of at least three (3) years from termination or expiration of this contract.

**Agreement No. 311872**

**EXHIBIT D**

**Esri Enterprise Advantage Program Addendum**

This Esri Enterprise Advantage Program (EEAP) Addendum adds additional terms and conditions to the Agreement with respect to the EEAP. The EEAP is an Esri program consisting of consulting services, training, and Premium Support Services (PSS) that provides City with the flexibility to select components that best meet its needs. The EEAP is not designed for Consultant to provide project-specific professional services (e.g., custom application or database development for solutions or applications). City may purchase the EEAP subscription services by mutually executing a Task Order for EEAP with Consultant, subject to the terms of the Agreement and the EEAP Addendum. The EEAP Addendum does not modify the terms of the License Agreement governing City's use of Software, Data, Online Services, and Documentation.

**Article 1 - Definitions**

**"Activity Description"** means the confirmation email or document received from City that describes the number of Learning and Services Credits Consultant estimates is required to perform an activity and authorizes Consultant to begin work based on such estimate.

**"Authorized EEAP Contact"** means the City point of contact identified in the applicable Task Order for EEAP.

**"Esri Mobile Lab"** means Consultant hardware, shipped to City site training events if City does not have the required hardware to host a scheduled training event, consisting of laptops preconfigured with Consultant Software, Training Materials, hard drives, power cords, and network switches.

**"License Agreement"** means the applicable license agreement incorporated by this reference that is a signed license agreement between Consultant and City.

**"City Authorized Contact(s)" or "CAC"** means up to two individuals selected by City to report Premium Support Reports and work directly with Consultant's Technical Account Manager (TAM) regarding all such reports. A City that has purchased unlimited PSS may designate additional CAC upon payment of additional fees.

**"Premium Support Report(s)"** means a communication via telephone or email by City to Support Services regarding technical problems with Software, Data, or Documentation.

**"Protected Information"** means any information, whether in written or digital format, that incorporates content from a protected category, including, but not limited to, personally identifiable information, Customer Proprietary Network Information (CPNI), Protected Health Information (as it is defined by the Health Insurance Portability and Accountability Act of 1996 [HIPAA]), Unclassified Controlled Technical Information (as it is defined by DFARS Section 204.73), and data controlled by the International Traffic and Arms Regulations (ITAR) classified as other than EAR99, all of which may require a greater degree of control, monitoring, and security.

**"PSS"** means Premium Support Services, which is a prioritized incident management and technical support program as further described at <http://support.esri.com/en/support/premium>.

**"Renewal Period"** means any one (1)-year extension of the applicable Task Order for EEAP.

**"Secure Formats"** means object code, executable code, or similar formats.

**"Student(s)"** means a registered participant for a specific training course, City coaching services, or training-related services.

**"Technical Account Manager"** (TAM) means a designated support resource who acts as the primary point of contact to City for the purpose of coordinating Premium Support Reports through Consultant's support processes.

**"Term"** means the initial term of the Task Order for EEAP.

**"Training Materials"** means digital or print content required to complete a course, which may include, but is not limited to, workbooks, data, concepts, exercises, and exams.

## **Article 2 – Esri Enterprise Advantage Program**

**2.1 Esri Enterprise Advantage Program Description.** The EEAP includes the following components as further described at [www.esri.com/services/eeap/components](http://www.esri.com/services/eeap/components), which may be changed from time to time.

- a. *Technical Advisor.* City will receive up to the number of Technical Advisor hours ordered. Licensee may elect to retain additional Technical Advisor hours for a supplemental price.
- b. *Annual Account Planning Session.* A one (1)-day annual account planning and review meeting.
- c. *Technical Work Plan.* A collaboratively developed document designed to drive the program's implementation through definition of City's GIS vision, goals, and objectives.
- d. *Learning and Services Credits.* Licensee will receive the number of Learning and Services Credits ordered. City may use the credits toward any combination of consulting services support, training, PSS, or related travel expenses. City may order, for an additional price, additional Learning and Services Credits. Learning and Services Credits may be exchanged as described at the following website: <http://www.esri.com/services/eeap/components#learning>. Consultant will provide the Authorized EEAP Contact with a monthly report outlining usage of Esri Enterprise Advantage Program Learning and Services Credits to date.
- e. *Quarterly Technology Webcast.* Consultant will provide an email invitation to the Authorized EEAP Contact for a quarterly webcast presenting business and technical information related to enterprise GIS.

## **2.2 Learning and Services Credit Use**

**2.2.1 Current on Maintenance.** City must remain current on standard maintenance during the Term of the applicable Task Order for EEAP. Standard maintenance is described at <http://www.esri.com/legal>, which may be changed from time to time.

**2.2.2 Authorization of Credit Use.** City will contact its Account Manager or Technical Advisor to consume Learning and Services Credits for a particular request. Consultant will submit to City a Learning and Services Credit estimate by email for confirmation and authorization to use the credits. This confirmation email or document is hereafter referred to as an Activity Description. The total credits quoted in the Activity Description will be drawn from the unused Learning and Services Credits available, in a single transaction, upon Consultant's receipt of approval via email from the Authorized EEAP Contact.

**2.2.3 Travel and Per Diem.** Any Consultant travel and per diem will be quoted separately. City may direct Consultant to use credits for travel and per diem, as stated in Consultant EEAP Description, Section 2.1 above.

**2.2.4 Notification of Consumed Credits.** Consultant will notify City in the event the authorized Learning and Services Credits are consumed prior to completion of the requested work. Licensee may elect to direct use of additional credits, if available; procure additional Learning and Services Credits; or notify Consultant to stop work on such requested work. Consultant reserves the right to discontinue work when the authorized credits are consumed.

**2.2.5 Review of Proposed Activities.** Any activities proposed to be completed under the EEAP will be subject to review and approval by Consultant to ensure alignment with the intent of the program.

**2.3 Defense or Military Application.** At the time the Learning and Services Credits are requested or before any services are provided by the Technical Advisor, City will inform Consultant if any of the requested services, consulting, training, or support provided by Consultant is directly related to a defense article or for a military application.

### **Article 3 – Ownership of Training Materials**

#### **3.1 For Training**

**3.1.1 Software.** The terms of the Consultant License Agreement shall be applicable to all City course participants and for all of Consultant's Software, Data, Online Services, and Documentation used by Student during any training event. Consultant may issue temporary Software licenses when there is an insufficient number of Software licenses available at City's training facility. Upon conclusion of the training event, City shall uninstall the temporary Software licenses and return to Consultant any media provided.

**3.1.2 Training Materials.** This EEAP Addendum gives Student certain limited rights to use electronic and tangible versions of the Training Materials. Consultant and its licensor(s) retain exclusive rights, title, and ownership to the copy of Training Materials licensed under this Addendum. Training Materials are protected by United States copyright laws and applicable international copyright treaties and/or conventions. All rights not specifically granted in this Addendum are reserved to Consultant and its licensor(s). Consultant grants to Student a personal, nonexclusive, nontransferable license to use Training Materials for Student's own training purposes. Student may run and install one (1) copy of Training Materials and reproduce one (1) copy of Training Materials. Student may make one (1) additional copy of the original Training Materials for archive purposes only, unless Consultant grants in writing the right to make additional copies.

**3.1.3 Prohibited Uses.** Training Materials are intended solely for the use of the training of the individual Student who registered and attended a specific training course. Student may not

- a. Separate the component parts of the Training Materials for use on multiple systems or in the cloud, use in conjunction with any other software package, and/or merge and compile into a separate database(s) or documents for other analytical uses;
- b. Make any attempt to circumvent the technological measure(s) (e.g., software or hardware key) that effectively controls access to Training Materials;
- c. Remove or obscure any copyright, trademark, and/or proprietary rights notices of Consultant or its licensor(s); or
- d. Use audio and/or video recording equipment during a training course.

**3.1.4 City-Supplied Training Data.** City will retain ownership of any City-supplied data.

## **Article 4 – Premium Support Services Terms and Conditions**

The terms and conditions of the License Agreement for the affected Software will govern any updates, patches, hot fixes, or software provided pursuant to Consultant's performance of the PSS ordered under this EEAP Addendum.

**4.1 Application.** Should City choose to use Learning and Services Credits for PSS, the terms of this Article 4 shall also apply.

**4.2 PSS Availability.** City may use Learning and Services Credits for PSS (annually) for any product covered under Consultant's standard maintenance subscription, provided that City is current on maintenance for applicable Consultant Software. Consultant shall provide PSS for the Term of the EEAP Task Order as further described at <http://support.esri.com/en/support/premium>.

**4.3 Premium Support Description.** PSS shall provide

- a. A designated TAM;
- b. The ability for LAC to submit Premium Support Reports or escalate standard technical support incidents to Premium Support Reports via telephone or the Consultant My Support Portal twenty-four (24) hours per day, seven (7) days per week, three hundred sixty-five (365) days per year;
- c. Priority Incident Management; and
- d. Additional enhanced support and services, as described at <http://support.Consultant.com/en/support/premium>.

### **4.4 PSS Restrictions and Exclusions**

**4.4.1 Excluded Software.** PSS is not available for third-party software. Consultant is not responsible for errors attributable to third-party software used in conjunction with or built on Software.

**4.4.2 English Language.** All communications will be conducted in the English language except by agreement of both parties.

**4.4.3 Acknowledgment.** City acknowledges and agrees that the report of an error or defect of any Software is not a guarantee that it can or will be corrected. At Consultant's sole discretion, Software is corrected on a priority basis and is subject to release schedules determined by Consultant.

**4.4.4 Exceptions to PSS.** The following are not covered by PSS:

- a. Any problem resulting from City's misuse, improper use, unauthorized modification, or damage of the Software or City's combining or merging the Software with any hardware or software not supplied or identified as compatible by Consultant;
- b. Any problem resulting from third-party hardware or software;
- c. Errors in any version of the Software other than the officially supported version of Software; and
- d. Any support or implementation services, on-site or otherwise, including, but not limited to, those provided by Consultant Professional Services or any third party.

## **Article 5 – Training Terms and Conditions**

**5.1 Application.** Should City choose to use Learning and Services Credits for training or coaching services, the terms of this Article 5 shall also apply.

**5.2 Training Descriptions.** Consultant offers instructor-led training and client coaching services in the use of Consultant's Software as described below:

- a. Instructor-led training is offered online in a cloud-based environment, at a City site, or at an Consultant Learning Center. Course information, location, dates, number of maximum participants, and registration requirements can be found in the Consultant Training catalog located at <http://training.esri.com>. Courses are conducted in close conformance with the course description outlined in the Consultant Training catalog and are subject to change due to limitations or constraints including, but not limited to, technical capabilities and City's needs.
- b. Client coaching services are available for City to enhance the learning experience by providing extra time to review and practice course concepts with an instructor's on-site guidance.

**5.3 Consultant's Responsibilities.** Consultant will

- a. Provide the training in a manner consistent with the technical and professional standards of the industry.
- b. Provide an instructor qualified to conduct the course(s).
- c. Provide all necessary training materials for Student(s).
- d. Confirm class approximately ten (10) business days prior to the scheduled start date. For City site and private classes, confirmation is dependent on receipt of the completed City site training request form and intended method of payment.

**5.4 City's Obligations; Limitations**

**5.4.1** City will

- a. Ensure that all Students have received confirmation from Consultant to participate in an Consultant training event. Unregistered student(s) will not be permitted to view or participate in an Online Classroom training event. Consultant reserves the right to disconnect any Student who permits access to unregistered student(s).
- b. Confirm that all Students meet the minimum prerequisites for the applicable training event set forth on Consultant's Training website.
- c. Submit registrations with a confirmed payment commitment at least seven (7) business days prior to the scheduled start date. Registrations submitted without payment commitment will not be guaranteed a reservation and will be added to a wait list pending payment confirmation. All wait list reservations are subject to availability.
- d. Submit to the Consultant Training Event Assistant a list of the names and email addresses of Students that are to attend a City site or private training event at least three (3) business days prior to the scheduled start date. Subject to compliance with US Export Control Regulations, any Student that is a resident of a US embargoed country or found on any of the various US Government Lists of Parties of Concern or Specially Designated Nationals lists will not be permitted to attend the training event.
- e. Be responsible for all Student travel arrangements. Consultant is not responsible for losses from nonrefundable travel arrangements due to the denial of a Student's participation based on US government export regulation requirements, course scheduling changes, or cancellations.
- f. Complete and submit an Consultant City site training request form, if applicable, and ensure that the class environment adheres to the requirements for Consultant Training as found online at <http://training.Consultant.com/gateway/index.cfm?fa=classroom.requirements>.
- g. Ensure that Student use of Training Materials provided by Consultant complies with the terms of this Agreement.

- h. Assume full responsibility for Student attending training course(s) under this Agreement. City agrees to indemnify Consultant, its officers, directors, and employees for any and all claims, liabilities, and expenses (including reasonable legal fees) arising out of or based on any uncured material breach by Student of the terms and conditions of this Agreement.
- i. Ensure that Student does not use audio and/or video recording equipment within the classroom without prior written approval from Consultant.

**5.4.2** The Consultant Mobile Lab option is available for domestic US City site training events if City does not have the required hardware to host a scheduled class. If the Consultant Mobile Lab is used, City will

- a. Immediately report any damage to the Consultant Mobile Lab equipment to the Training Event Assistant upon receipt of the equipment.
- b. Keep the Consultant Mobile Lab equipment in a secure, locked area between training event sessions.
- c. Ensure that only Students use the Consultant Mobile Lab equipment.
- d. Be responsible for loss of, damage to, and/or theft of the Consultant Mobile Lab equipment while in City's possession.
- e. Warrant that it maintains sufficient insurance coverage obligations created by this Addendum and required by law.
- f. Allow the Consultant instructor to check all Consultant Mobile Lab equipment following the completion of training. Any damage to the Consultant Mobile Lab equipment due to Student use, excluding normal wear and tear, will be brought to the attention of City by written notice. City hereby agrees to be financially responsible for any repair or replacement of equipment resulting from such damage.
- g. Make the Consultant Mobile Lab equipment available for freight pickup upon the conclusion of the training event.

## **5.5 Student Registration and Training Event Change Policy**

**5.5.1 Individual Student Seats.** City will provide written notice to Consultant's Customer Service department at [service@esri.com](mailto:service@esri.com) of any Student transfer, cancellation, or substitution requests at least three (3) business days before the scheduled start date, subject to the following conditions:

- a. Multiple requests and any requests that occur without the three (3) business days' advance notice are subject to a fee, as determined by Consultant.
- b. Cancellation of Student registrations that occur without the three (3) business days' advance notice is subject to the full training event fee.
- c. Substitute Students must be from the same organization as the Student being replaced.

**5.5.2 City Site/Private Class/Client Coaching Services (Training Event).** City will provide written notice to Consultant's Customer Service department at [service@esri.com](mailto:service@esri.com) of any training event reschedule, cancellation, or Student substitution requirements at least three (3) business days before the scheduled start date.

- a. Training event reschedules and cancellations that occur without the three (3) business days' advance notice are subject to the full training event fee. City will be responsible for all of Consultant's reasonable travel expenses and shipping costs (including Consultant Mobile Lab), for all rescheduled or canceled training events.
- b. Student substitutions that occur without the three (3) business days' advance notice are subject to a fee. Substitute Students must be from the same organization as the student being replaced.

**5.5.3** If cancellation of a training event is necessary due to Force Majeure, the affected party is released in full from the three (3)-business-day notification requirement. The affected party will either reschedule or cancel the training without that affected party incurring any liability.

**5.5.4** If Consultant is unable to conduct the training on the scheduled date, Consultant will notify City at least three (3) business days before the scheduled start date.

**5.6** Unless specifically authorized in writing by Consultant, City is not authorized to resell seat(s) to a Consultant training event.

## **Article 6 – EEAP Warranties and Disclaimers**

### **6.1 Warranties**

**6.1.1** Consultant will perform its obligation under this EEAP Addendum in a professional and workmanlike manner.

**6.1.2** Consultant warrants for a period of ninety (90) days after delivery of the services that the services will conform to professional and technical standards of the software industry.

**6.1.3** Consultant warrants that the media upon which Training Materials is provided will be free from defects in materials and workmanship under normal use and service for a period of ninety (90) days from the date of receipt. City's exclusive remedy and Consultant's entire liability for breach of the limited warranties set forth in this Article 6 shall be limited, at Consultant's sole discretion, to

- a. Replacement of any defective Training Materials;
- b. Repair, correction, or a workaround for Training Materials; or
- c. Return of the fees paid by City for Training Materials that do not meet Consultant's limited warranty, provided that City uninstalls, removes, and destroys all copies of the Training Materials and executes and delivers evidence of such actions to Consultant.