

**SERVICES AGREEMENT**

**BETWEEN THE**

**CITY OF SAN DIEGO**



**AND**

**CAPAX ARCHIVE SOLUTIONS, LLC**

**TO PROVIDE SERVICES TO MIGRATE FROM LEGACY  
NEARPOINT SYSTEM, AND PROVIDE EAS  
IMPLEMENTATION, SOFTWARE SUPPORT AND  
MAINTENANCE FOR THE CITY OF SAN DIEGO**

## SERVICES AGREEMENT

This Services Agreement (Agreement) is entered into by and between the City of San Diego, a municipal corporation (City), and Capax Archive Solutions, LLC (Contractor).

### RECITALS

City wishes to retain Contractor to provide EAS implementation, NearPoint migration, and software support and maintenance as further described in the Scope of Services (Services), attached hereto as Exhibit A.

Contractor has the expertise, experience, and personnel necessary to provide the Services.

City and Contractor (collectively, the "Parties") wish to enter into an agreement whereby City will retain Contractor to provide the Services.

This Agreement is exempt from competitive bidding requirements pursuant to San Diego Municipal Code (SDMC) section 22.3208(e) because the Purchasing Agent has certified that the award of a sole source contract is necessary under SDMC section 22.3016(a).]

For good and valuable consideration, the sufficiency of which is acknowledged, City and Contractor agree as follows:

### ARTICLE I CONTRACTOR SERVICES

**1.1 Scope of Services.** Contractor shall provide the Services to City as described in Exhibit A, Scope of Services, which is incorporated herein by reference.

**1.2 Contract Administrator.** The City of San Diego (Department) is the Contract Administrator for this Agreement. Contractor shall provide the Services under the direction of a designated representative of the Department as follows:

Jonathan Mui, Cyber Security Engineer  
1200 3<sup>rd</sup> Ave, 18<sup>th</sup> Floor, San Diego CA 92101  
(619) 533-3020  
JMui@sandiego.gov

**1.3 General Contract Terms and Conditions.** This Agreement incorporates by reference the General Contract Terms and Provisions, attached hereto as Exhibit B.

**1.4 Submittals Required with the Agreement.** Contractor is required to submit all forms and information delineated in Exhibit C before the Agreement is executed.

**ARTICLE II  
DURATION OF AGREEMENT**

**2.1 Term.** This Agreement shall be for a period not to exceed five (5) years beginning the date of execution through June 30, 2024. Unless otherwise terminated, this Agreement shall be effective until completion of the Scope of Services or June 30, 2024, whichever is earliest. The term of this Agreement shall not exceed five years unless approved by the City Council by ordinance.

**2.2 Effective Date.** This Agreement shall be effective on the date it is executed by the last Party to sign the Agreement, and approved by the City Attorney in accordance with San Diego Charter Section 40.

**ARTICLE III  
COMPENSATION**

**3.1 Amount of Compensation.** City shall pay Contractor for performance of all Services rendered in accordance with this Agreement in an amount not to exceed \$ 60,750.00 or the amount referenced in the Purchase Order.

**ARTICLE IV  
CONTRACT DOCUMENTS**

**4.1 Contract Documents.** This Agreement and its exhibits constitute the Contract Documents. The Contract Documents completely describes the goods and services to be provided.

**4.2 Counterparts.** This Agreement may be executed in counterparts, which when taken together shall constitute a single signed original as though all Parties had executed the same page.

IN WITNESS WHEREOF, this Agreement is executed by City and Contractor acting by and through their authorized officers.

Capex Archive Solutions, LLC.

CITY OF SAN DIEGO  
A Municipal Corporation

BY: M.A. Elliott

BY: Kristina Peraza

12-12-19  
DATE SIGNED

Print Name  
Kristina Peraza  
Director Purchasing & Contracting  
Department

13 DEC 2019  
DATE SIGNED

Approved as to form this \_\_\_ day of  
\_\_\_\_\_, 20\_\_.

MARA ELLIOTT, City Attorney

BY: \_\_\_\_\_  
Deputy City Attorney

## **EXHIBIT A SCOPE OF SERVICES**

### **A. OVERVIEW**

The City of San Diego (Department) seeks the replacement of the Department's end of life email archive system, NearPoint, which will no longer be supported by the contractor as of June 30, 2019. Capax Archive Solutions, LLC or Capax, is to provide EAS implementation, NearPoint migration, and software support and maintenance of contractor's product.

### **B. REQUIREMENTS AND TASKS**

Contractor to provide services and support outlined in EAS Implementation and NP Migration Statement of Work (SOW), attached as Exhibit D; and service, support and licensing as outlined on quotation dated 09/03/19, attached as Exhibit E.

### **C. ROLES AND RESPONSIBILITIES**

#### **1. Contractor's General Roles and Responsibilities**

With respect to all services provided to the Department, Contractor will fulfill the following operational roles and responsibilities as outlined in SOWs, attached as Exhibit D and Exhibit E.

#### **2. Department's General Roles and Responsibilities**

Department's general roles and responsibilities are outlined in SOWs, attached as Exhibit D and Exhibit E.

### **D. GENERAL CONTRACT TERMS AND PROVISIONS**

If any general terms and provisions differ between the City and Contractor, the City of San Diego's General Contract Terms and Provisions, attached as Exhibit B, shall prevail unless agreed upon by City and Contractor.

Specifically, notwithstanding sections 6.1 and 6.3 of Exhibit B, the City and Contractor agree the following terms shall prevail:

**Rights in Data.** If, in connection with the services performed under this Contract, Contractor or its employees, agents, or subcontractors create artwork, audio recordings, blueprints, designs, diagrams, documentation, photographs, plans, reports, software, source code, specifications, surveys, system designs, video recordings, or any other original works of authorship specifically for or at the direction of City as documented by a statement of work or work order, whether written or readable by machine (Deliverable Materials), all rights of Contractor or its subcontractors in the Deliverable Materials, including, but not limited to publication and registration of copyrights and trademarks in the Deliverable Materials, are the sole property of the City. Contractor, including its employees, agents, and subcontractors, may not use any Deliverable Material for purposes unrelated to Contractor's work on behalf of the

Agreement

Effective: October 13, 2014

OCA Document No. 788709\_3

City without written consent of City, Contractor may not publish or reproduce any Deliverable Materials, for purposes unrelated to Contractor's work on behalf of the City, without the prior written consent of the City.

**Contractor Works.** Contractor Works means tangible and intangible information and material that: (a) had already been conceived, invented, created, developed, or acquired by Contractor prior to the effective date of this Contract; or (b) were conceived, invented, created, or developed by Contractor after the effective date of this Contract unless developed specifically for or at the direction of the City as documented by a statement of work or work order. Contractor grants the City a royalty-free license to use certain Contractor Works and Deliverables during the Term of this Contract. All Contractor Works and all modifications or derivatives of such Contractor Works, including all intellectual property rights in or pertaining to the same, shall be owned solely and exclusively by Contractor.

**EXHIBIT B**



**THE CITY OF SAN DIEGO**  
**GENERAL CONTRACT TERMS AND PROVISIONS**  
**APPLICABLE TO GOODS, SERVICES, AND CONSULTANT CONTRACTS**

**ARTICLE I**  
**SCOPE AND TERM OF CONTRACT**

**1.1 Scope of Contract.** The scope of contract between the City and a provider of goods and/or services (Contractor) is described in the Contract Documents. The Contract Documents are comprised of the Request for Proposal, Invitation to Bid, or other solicitation document (Solicitation); the successful bid or proposal; the letter awarding the contract to Contractor; the City's written acceptance of exceptions or clarifications to the Solicitation, if any; and these General Contract Terms and Provisions.

**1.2 Effective Date.** A contract between the City and Contractor (Contract) is effective on the last date that the contract is signed by the parties and approved by the City Attorney in accordance with Charter section 40. Unless otherwise terminated, this Contract is effective until it is completed or as otherwise agreed upon in writing by the parties, whichever is the earliest. A Contract term cannot exceed five (5) years unless approved by the City Council by ordinance.

**1.3 Contract Extension.** The City may, in its sole discretion, unilaterally exercise an option to extend the Contract as described in the Contract Documents. In addition, the City may, in its sole discretion, unilaterally extend the Contract on a month-to-month basis following contract expiration if authorized under Charter section 99 and the Contract Documents. Contractor shall not increase its pricing in excess of the percentage increase described in the Contract.

**ARTICLE II**  
**CONTRACT ADMINISTRATOR**

**2.1 Contract Administrator.** The Purchasing Agent or designee is the Contract Administrator for purposes of this Contract, and has the responsibilities described in this Contract, in the San Diego Charter, and in Chapter 2, Article 2, Divisions 5, 30, and 32.

**2.1.1 Contractor Performance Evaluations.** The Contract Administrator will evaluate Contractor's performance as often as the Contract Administrator deems necessary throughout the term of the contract. This evaluation will be based on criteria including the quality of goods or services, the timeliness of performance, and adherence to applicable laws, including prevailing wage and living wage. City will provide Contractors who receive an unsatisfactory rating with a copy of the evaluation and an opportunity to respond. City may consider final evaluations, including Contractor's response, in evaluating future proposals and bids for contract award.

**2.2 Notices.** Unless otherwise specified, in all cases where written notice is required under this Contract, service shall be deemed sufficient if the notice is personally delivered or deposited in the United States mail, with first class postage paid, attention to the Purchasing Agent. Proper notice is effective on the date of personal delivery or five (5) days after deposit in a United States postal mailbox unless provided otherwise in the Contract. Notices to the City shall be sent to:



Purchasing Agent  
City of San Diego, Purchasing and Contracting Division  
1200 3<sup>rd</sup> Avenue, Suite 200  
San Diego, CA 92101-4195

### ARTICLE III COMPENSATION

**3.1 Manner of Payment.** Contractor will be paid monthly, in arrears, for goods and/or services provided in accordance with the terms and provisions specified in the Contract.

**3.2 Invoices.**

**3.2.1 Invoice Detail.** Contractor's invoice must be on Contractor's stationary with Contractor's name, address, and remittance address if different. Contractor's invoice must have a date, an invoice number, a purchase order number, a description of the goods or services provided, and an amount due.

**3.2.2 Service Contracts.** Contractor must submit invoices for services to City by the 10<sup>th</sup> of the month following the month in which Contractor provided services. Invoices must include the address of the location where services were performed and the dates in which services were provided.

**3.2.3 Goods Contracts.** Contractor must submit invoices for goods to City within seven days of the shipment. Invoices must describe the goods provided.

**3.2.4 Parts Contracts.** Contractor must submit invoices for parts to City within seven calendar (7) days of the date the parts are shipped. Invoices must include the manufacturer of the part, manufacturer's published list price, percentage discount applied in accordance with Pricing Page(s), the net price to City, and an item description, quantity, and extension.

**3.2.5 Extraordinary Work.** City will not pay Contractor for extraordinary work unless Contractor receives prior written authorization from the Contract Administrator. Failure to do so will result in payment being withheld for services. If approved, Contractor will include an invoice that describes the work performed and the location where the work was performed, and a copy of the Contract Administrator's written authorization.

**3.2.6 Reporting Requirements.** Contractor must submit the following reports using the City's web-based contract compliance portal. Incomplete and/or delinquent reports may cause payment delays, non-payment of invoice, or both. For questions, please view the City's online tutorials on how to utilize the City's web-based contract compliance portal.

**3.2.6.1 Monthly Employment Utilization Reports.** Contractor and Contractor's subcontractors and suppliers must submit Monthly Employment Utilization Reports by the fifth (5<sup>th</sup>) day of the subsequent month.

**3.2.6.2 Monthly Invoicing and Payments.** Contractor and Contractor's subcontractors and suppliers must submit Monthly Invoicing and Payment Reports by the fifth (5<sup>th</sup>) day of the subsequent month.

**3.3 Annual Appropriation of Funds.** Contractor acknowledges that the Contract term may extend over multiple City fiscal years, and that work and compensation under this Contract is contingent on the City Council appropriating funding for and authorizing such work and compensation for those fiscal years. This Contract may be terminated at the end of the fiscal year for which sufficient funding is not appropriated and authorized. City is not obligated to pay Contractor for any amounts not duly appropriated and authorized by City Council.

**3.4 Price Adjustments.** Based on Contractor's written request and justification, the City may approve an increase in unit prices on Contractor's pricing pages consistent with the amount requested in the justification in an amount not to exceed the increase in the Consumer Price Index, San Diego Area, for All Urban Customers (CPI-U) as published by the Bureau of Labor Statistics, or 5.0%, whichever is less, during the preceding one year term. If the CPI-U is a negative number, then the unit prices shall not be adjusted for that option year (the unit prices will not be decreased). A negative CPI-U shall be counted against any subsequent increases in the CPI-U when calculating the unit prices for later option years. Contractor must provide such written request and justification no less than sixty days before the date in which City may exercise the option to renew the contract, or sixty days before the anniversary date of the Contract. Justification in support of the written request must include a description of the basis for the adjustment, the proposed effective date and reasons for said date, and the amount of the adjustment requested with documentation to support the requested change (e.g. CPI-U or 5.0%, whichever is less). City's approval of this request must be in writing.

#### **ARTICLE IV SUSPENSION AND TERMINATION**

**4.1 City's Right to Suspend for Convenience.** City may suspend all or any portion of Contractor's performance under this Contract at its sole option and for its convenience for a reasonable period of time not to exceed six (6) months. City must first give ten (10) days' written notice to Contractor of such suspension. City will pay to Contractor a sum equivalent to the reasonable value of the goods and/or services satisfactorily provided up to the date of suspension. City may rescind the suspension prior to or at six (6) months by providing Contractor with written notice of the rescission, at which time Contractor would be required to resume performance in compliance with the terms and provisions of this Contract. Contractor will be entitled to an extension of time to complete performance under the Contract equal to the length of the suspension unless otherwise agreed to in writing by the Parties.

**4.2 City's Right to Terminate for Convenience.** City may, at its sole option and for its convenience, terminate all or any portion of this Contract by giving thirty (30) days' written notice of such termination to Contractor. The termination of the Contract shall be effective upon receipt of the notice by Contractor. After termination of all or any portion of the Contract, Contractor shall: (1) immediately discontinue all affected performance (unless the notice directs

otherwise); and (2) complete any and all additional work necessary for the orderly filing of documents and closing of Contractor's affected performance under the Contract. After filing of documents and completion of performance, Contractor shall deliver to City all data, drawings, specifications, reports, estimates, summaries, and such other information and materials created or received by Contractor in performing this Contract, whether completed or in process. By accepting payment for completion, filing, and delivering documents as called for in this section, Contractor discharges City of all of City's payment obligations and liabilities under this Contract with regard to the affected performance.

**4.3 City's Right to Terminate for Default.** Contractor's failure to satisfactorily perform any obligation required by this Contract constitutes a default. Examples of default include a determination by City that Contractor has: (1) failed to deliver goods and/or perform the services of the required quality or within the time specified; (2) failed to perform any of the obligations of this Contract; and (3) failed to make sufficient progress in performance which may jeopardize full performance.

**4.3.1** If Contractor fails to satisfactorily cure a default within ten (10) calendar days of receiving written notice from City specifying the nature of the default, City may immediately cancel and/or terminate this Contract, and terminate each and every right of Contractor, and any person claiming any rights by or through Contractor under this Contract.

**4.3.2** If City terminates this Contract, in whole or in part, City may procure, upon such terms and in such manner as the Purchasing Agent may deem appropriate, equivalent goods or services and Contractor shall be liable to City for any excess costs. Contractor shall also continue performance to the extent not terminated.

**4.4 Termination for Bankruptcy or Assignment for the Benefit of Creditors.** If Contractor files a voluntary petition in bankruptcy, is adjudicated bankrupt, or makes a general assignment for the benefit of creditors, the City may at its option and without further notice to, or demand upon Contractor, terminate this Contract, and terminate each and every right of Contractor, and any person claiming rights by and through Contractor under this Contract.

**4.5 Contractor's Right to Payment Following Contract Termination.**

**4.5.1 Termination for Convenience.** If the termination is for the convenience of City an equitable adjustment in the Contract price shall be made. No amount shall be allowed for anticipated profit on unperformed services, and no amount shall be paid for an as needed contract beyond the Contract termination date.

**4.5.2 Termination for Default.** If, after City gives notice of termination for failure to fulfill Contract obligations to Contractor, it is determined that Contractor had not so failed, the termination shall be deemed to have been effected for the convenience of City. In such event, adjustment in the Contract price shall be made as provided in Section 4.3.2. City's rights and remedies are in addition to any other rights and remedies provided by law or under this Contract.

**4.6 Remedies Cumulative.** City's remedies are cumulative and are not intended to be exclusive of any other remedies or means of redress to which City may be lawfully entitled in case of any breach or threatened breach of any provision of this Contract.

## **ARTICLE V ADDITIONAL CONTRACTOR OBLIGATIONS**

**5.1 Inspection and Acceptance.** The City will inspect and accept goods provided under this Contract at the shipment destination unless specified otherwise. Inspection will be made and acceptance will be determined by the City department shown in the shipping address of the Purchase Order or other duly authorized representative of City.

**5.2 Responsibility for Lost or Damaged Shipments.** Contractor bears the risk of loss or damage to goods prior to the time of their receipt and acceptance by City. City has no obligation to accept damaged shipments and reserves the right to return damaged goods, at Contractor's sole expense, even if the damage was not apparent or discovered until after receipt.

**5.3 Responsibility for Damages.** Contractor is responsible for all damage that occurs as a result of Contractor's fault or negligence or that of its' employees, agents, or representatives in connection with the performance of this Contract. Contractor shall immediately report any such damage to people and/or property to the Contract Administrator.

**5.4 Delivery.** Delivery shall be made on the delivery day specified in the Contract Documents. The City, in its sole discretion, may extend the time for delivery. The City may order, in writing, the suspension, delay or interruption of delivery of goods and/or services.

**5.5 Delay.** Unless otherwise specified herein, time is of the essence for each and every provision of the Contract. Contractor must immediately notify City in writing if there is, or it is anticipated that there will be, a delay in performance. The written notice must explain the cause for the delay and provide a reasonable estimate of the length of the delay. City may terminate this Contract as provided herein if City, in its sole discretion, determines the delay is material.

**5.5.1** If a delay in performance is caused by any unforeseen event(s) beyond the control of the parties, City may allow Contractor to a reasonable extension of time to complete performance, but Contractor will not be entitled to damages or additional compensation. Any such extension of time must be approved in writing by City. The following conditions may constitute such a delay: war; changes in law or government regulation; labor disputes; strikes; fires, floods, adverse weather or other similar condition of the elements necessitating cessation of the performance; inability to obtain materials, equipment or labor; or other specific reasons agreed to between City and Contractor. This provision does not apply to a delay caused by Contractor's acts or omissions. Contractor is not entitled to an extension of time to perform if a delay is caused by Contractor's inability to obtain materials, equipment, or labor unless City has received, in a timely manner, documentary proof satisfactory to City of Contractor's inability to obtain materials, equipment, or labor, in which case City's approval must be in writing.

**5.6 Restrictions and Regulations Requiring Contract Modification.** Contractor shall immediately notify City in writing of any regulations or restrictions that may or will require Contractor to alter the material, quality, workmanship, or performance of the goods and/or services to be provided. City reserves the right to accept any such alteration, including any resulting reasonable price adjustments, or to cancel the Contract at no expense to the City.

**5.7 Warranties.** All goods and/or services provided under the Contract must be warranted by Contractor or manufacturer for at least twelve (12) months after acceptance by City, except automotive equipment. Automotive equipment must be warranted for a minimum of 12,000 miles or 12 months, whichever occurs first, unless otherwise stated in the Contract. Contractor is responsible to City for all warranty service, parts, and labor. Contractor is required to ensure that warranty work is performed at a facility acceptable to City and that services, parts, and labor are available and provided to meet City's schedules and deadlines. Contractor may establish a warranty service contract with an agency satisfactory to City instead of performing the warranty service itself. If Contractor is not an authorized service center and causes any damage to equipment being serviced, which results in the existing warranty being voided, Contractor will be liable for all costs of repairs to the equipment, or the costs of replacing the equipment with new equipment that meets City's operational needs.

**5.8 Industry Standards.** Contractor shall provide goods and/or services acceptable to City in strict conformance with the Contract. Contractor shall also provide goods and/or services in accordance with the standards customarily adhered to by an experienced and competent provider of the goods and/or services called for under this Contract using the degree of care and skill ordinarily exercised by reputable providers of such goods and/or services. Where approval by City, the Mayor, or other representative of City is required, it is understood to be general approval only and does not relieve Contractor of responsibility for complying with all applicable laws, codes, policies, regulations, and good business practices.

**5.9 Records Retention and Examination.** Contractor shall retain, protect, and maintain in an accessible location all records and documents, including paper, electronic, and computer records, relating to this Contract for five (5) years after receipt of final payment by City under this Contract. Contractor shall make all such records and documents available for inspection, copying, or other reproduction, and auditing by authorized representatives of City, including the Purchasing Agent or designee. Contractor shall make available all requested data and records at reasonable locations within City or County of San Diego at any time during normal business hours, and as often as City deems necessary. If records are not made available within the City or County of San Diego, Contractor shall pay City's travel costs to the location where the records are maintained and shall pay for all related travel expenses. Failure to make requested records available for inspection, copying, or other reproduction, or auditing by the date requested may result in termination of the Contract. Contractor must include this provision in all subcontracts made in connection with this Contract.

**5.9.1** Contractor shall maintain records of all subcontracts entered into with all firms, all project invoices received from Subcontractors and Suppliers, all purchases of materials and services from Suppliers, and all joint venture participation. Records shall show name, telephone number including area code, and business address of each Subcontractor and Supplier, and joint venture partner, and the total amount actually paid to each firm. Project relevant records, regardless of tier, may be periodically reviewed by the City.

**5.10 Quality Assurance Meetings.** Upon City's request, Contractor shall schedule one or more quality assurance meetings with City's Contract Administrator to discuss Contractor's performance. If requested, Contractor shall schedule the first quality assurance meeting no later than eight (8) weeks from the date of commencement of work under the Contract. At the quality assurance meeting(s), City's Contract Administrator will provide Contractor with feedback, will note any deficiencies in Contract performance, and provide Contractor with an opportunity to address and correct such deficiencies. The total number of quality assurance meetings that may be required by City will depend upon Contractor's performance.

**5.11 Duty to Cooperate with Auditor.** The City Auditor may, in his sole discretion, at no cost to the City, and for purposes of performing his responsibilities under Charter section 39.2, review Contractor's records to confirm contract compliance. Contractor shall make reasonable efforts to cooperate with Auditor's requests.

**5.12 Safety Data Sheets.** If specified by City in the solicitation or otherwise required by this Contract, Contractor must send with each shipment one (1) copy of the Safety Data Sheet (SDS) for each item shipped. Failure to comply with this procedure will be cause for immediate termination of the Contract for violation of safety procedures.

**5.13 Project Personnel.** Except as formally approved by the City, the key personnel identified in Contractor's bid or proposal shall be the individuals who will actually complete the work. Changes in staffing must be reported in writing and approved by the City.

**5.13.1 Criminal Background Certification.** Contractor certifies that all employees working on this Contract have had a criminal background check and that said employees are clear of any sexual and drug related convictions. Contractor further certifies that all employees hired by Contractor or a subcontractor shall be free from any felony convictions.

**5.13.2 Photo Identification Badge.** Contractor shall provide a company photo identification badge to any individual assigned by Contractor or subcontractor to perform services or deliver goods on City premises. Such badge must be worn at all times while on City premises. City reserves the right to require Contractor to pay fingerprinting fees for personnel assigned to work in sensitive areas. All employees shall turn in their photo identification badges to Contractor upon completion of services and prior to final payment of invoice.

**5.14 Standards of Conduct.** Contractor is responsible for maintaining standards of employee competence, conduct, courtesy, appearance, honesty, and integrity satisfactory to the City.

**5.14.1 Supervision.** Contractor shall provide adequate and competent supervision at all times during the Contract term. Contractor shall be readily available to meet with the City. Contractor shall provide the telephone numbers where its representative(s) can be reached.

**5.14.2 City Premises.** Contractor's employees and agents shall comply with all City rules and regulations while on City premises.

**5.14.3 Removal of Employees.** City may request Contractor immediately remove from assignment to the City any employee found unfit to perform duties at the City. Contractor shall comply with all such requests.

**5.15 Licenses and Permits.** Contractor shall, without additional expense to the City, be responsible for obtaining any necessary licenses, permits, certifications, accreditations, fees and approvals for complying with any federal, state, county, municipal, and other laws, codes, and regulations applicable to Contract performance. This includes, but is not limited to, any laws or regulations requiring the use of licensed contractors to perform parts of the work.

**5.16 Contractor and Subcontractor Registration Requirements.** Prior to the award of the Contract or Task Order, Contractor and Contractor's subcontractors and suppliers must register with the City's web-based vendor registration and bid management system. The City may not award the Contract until registration of all subcontractors and suppliers is complete. In the event this requirement is not met within the time frame specified by the City, the City reserves the right to rescind the Contract award and to make the award to the next responsive and responsible proposer of bidder.

## **ARTICLE VI INTELLECTUAL PROPERTY RIGHTS**

**6.1 Rights in Data.** If, in connection with the services performed under this Contract, Contractor or its employees, agents, or subcontractors, create artwork, audio recordings, blueprints, designs, diagrams, documentation, photographs, plans, reports, software, source code, specifications, surveys, system designs, video recordings, or any other original works of authorship, whether written or readable by machine (Deliverable Materials), all rights of Contractor or its subcontractors in the Deliverable Materials, including, but not limited to publication, and registration of copyrights, and trademarks in the Deliverable Materials, are the sole property of City. Contractor, including its employees, agents, and subcontractors, may not use any Deliverable Material for purposes unrelated to Contractor's work on behalf of the City without prior written consent of City. Contractor may not publish or reproduce any Deliverable Materials, for purposes unrelated to Contractor's work on behalf of the City, without the prior written consent of the City.

**6.2 Intellectual Property Rights Assignment.** For no additional compensation, Contractor hereby assigns to City all of Contractor's rights, title, and interest in and to the content of the Deliverable Materials created by Contractor or its employees, agents, or subcontractors, including copyrights, in connection with the services performed under this Contract. Contractor

shall promptly execute and deliver, and shall cause its employees, agents, and subcontractors to promptly execute and deliver, upon request by the City or any of its successors or assigns at any time and without further compensation of any kind, any power of attorney, assignment, application for copyright, patent, trademark or other intellectual property right protection, or other papers or instruments which may be necessary or desirable to fully secure, perfect or otherwise protect to or for the City, its successors and assigns, all right, title and interest in and to the content of the Deliverable Materials. Contractor also shall cooperate and assist in the prosecution of any action or opposition proceeding involving such intellectual property rights and any adjudication of those rights.

**6.3 Contractor Works.** Contractor Works means tangible and intangible information and material that: (a) had already been conceived, invented, created, developed or acquired by Contractor prior to the effective date of this Contract; or (b) were conceived, invented, created, or developed by Contractor after the effective date of this Contract, but only to the extent such information and material do not constitute part or all of the Deliverable Materials called for in this Contract. All Contractor Works, and all modifications or derivatives of such Contractor Works, including all intellectual property rights in or pertaining to the same, shall be owned solely and exclusively by Contractor.

**6.4 Subcontracting.** In the event that Contractor utilizes a subcontractor(s) for any portion of the work that comprises the whole or part of the specified Deliverable Materials to the City, the agreement between Contractor and the subcontractor shall include a statement that identifies the Deliverable Materials as a "works for hire" as described in the United States Copyright Act of 1976, as amended, and that all intellectual property rights in the Deliverable Materials, whether arising in copyright, trademark, service mark or other forms of intellectual property rights, belong to and shall vest solely with the City. Further, the agreement between Contractor and its subcontractor shall require that the subcontractor, if necessary, shall grant, transfer, sell and assign, free of charge, exclusively to City, all titles, rights and interests in and to the Deliverable Materials, including all copyrights, trademarks and other intellectual property rights. City shall have the right to review any such agreement for compliance with this provision.

**6.5 Intellectual Property Warranty and Indemnification.** Contractor represents and warrants that any materials or deliverables, including all Deliverable Materials, provided under this Contract are either original, or not encumbered, and do not infringe upon the copyright, trademark, patent or other intellectual property rights of any third party, or are in the public domain. If Deliverable Materials provided hereunder become the subject of a claim, suit or allegation of copyright, trademark or patent infringement, City shall have the right, in its sole discretion, to require Contractor to produce, at Contractor's own expense, new non-infringing materials, deliverables or works as a means of remedying any claim of infringement in addition to any other remedy available to the City under law or equity. Contractor further agrees to indemnify, defend, and hold harmless the City, its officers, employees and agents from and against any and all claims, actions, costs, judgments or damages, of any type, alleging or threatening that any Deliverable Materials, supplies, equipment, services or works provided under this contract infringe the copyright, trademark, patent or other intellectual property or



proprietary rights of any third party (Third Party Claim of Infringement). If a Third Party Claim of Infringement is threatened or made before Contractor receives payment under this Contract, City shall be entitled, upon written notice to Contractor, to withhold some or all of such payment.

**6.6 Software Licensing.** Contractor represents and warrants that the software, if any, as delivered to City, does not contain any program code, virus, worm, trap door, back door, time or clock that would erase data or programming or otherwise cause the software to become inoperable, inaccessible, or incapable of being used in accordance with its user manuals, either automatically, upon the occurrence of licensor-selected conditions or manually on command. Contractor further represents and warrants that all third party software, delivered to City or used by Contractor in the performance of the Contract, is fully licensed by the appropriate licensor.

**6.7 Publication.** Contractor may not publish or reproduce any Deliverable Materials, for purposes unrelated to Contractor's work on behalf of the City without prior written consent from the City.

**6.8 Royalties, Licenses, and Patents.** Unless otherwise specified, Contractor shall pay all royalties, license, and patent fees associated with the goods that are the subject of this solicitation. Contractor warrants that the goods, materials, supplies, and equipment to be supplied do not infringe upon any patent, trademark, or copyright, and further agrees to defend any and all suits, actions and claims for infringement that are brought against the City, and to defend, indemnify and hold harmless the City, its elected officials, officers, and employees from all liability, loss and damages, whether general, exemplary or punitive, suffered as a result of any actual or claimed infringement asserted against the City, Contractor, or those furnishing goods, materials, supplies, or equipment to Contractor under the Contract.

## ARTICLE VII INDEMNIFICATION AND INSURANCE

**7.1 Indemnification.** To the fullest extent permitted by law, Contractor shall defend (with legal counsel reasonably acceptable to City), indemnify, protect, and hold harmless City and its elected officials, officers, employees, agents, and representatives (Indemnified Parties) from and against any and all claims, losses, costs, damages, injuries (including, without limitation, injury to or death of an employee of Contractor or its subcontractors), expense, and liability of every kind, nature and description (including, without limitation, incidental and consequential damages, court costs, and litigation expenses and fees of expert consultants or expert witnesses incurred in connection therewith and costs of investigation) that arise out of, pertain to, or relate to, directly or indirectly, in whole or in part, any goods provided or performance of services under this Contract by Contractor, any subcontractor, anyone directly or indirectly employed by either of them, or anyone that either of them control. Contractor's duty to defend, indemnify, protect and hold harmless shall not include any claims or liabilities arising from the sole negligence or willful misconduct of the Indemnified Parties.

**7.2 Insurance.** Contractor shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder and the results of that work by Contractor, his agents, representatives, employees or subcontractors.

Contractor shall provide, at a minimum, the following:

**7.2.1 Commercial General Liability.** Insurance Services Office Form CG 00 01 covering CGL on an "occurrence" basis, including products and completed operations, property damage, bodily injury, and personal and advertising injury with limits no less than \$1,000,000 per occurrence. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location (ISO CG 25 03 or 25 04) or the general aggregate limit shall be twice the required occurrence limit.

**7.2.2 Commercial Automobile Liability.** Insurance Services Office Form Number CA 0001 covering Code 1 (any auto) or, if Contractor has no owned autos, Code 8 (hired) and 9 (non-owned), with limit no less than \$1,000,000 per accident for bodily injury and property damage.

**7.2.3 Workers' Compensation.** Insurance as required by the State of California, with Statutory Limits, and Employer's Liability Insurance with limit of no less than \$1,000,000 per accident for bodily injury or disease.

**7.2.4 Professional Liability (Errors and Omissions).** For consultant contracts, insurance appropriate to Consultant's profession, with limit no less than \$1,000,000 per occurrence or claim, \$2,000,000 aggregate.

If Contractor maintains broader coverage and/or higher limits than the minimums shown above, City requires and shall be entitled to the broader coverage and/or the higher limits maintained by Contractor. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be available to City.

**7.2.5 Other Insurance Provisions.** The insurance policies are to contain, or be endorsed to contain, the following provisions:

**7.2.5.1 Additional Insured Status.** The City, its officers, officials, employees, and volunteers are to be covered as additional insureds on the CGL policy with respect to liability arising out of work or operations performed by or on behalf of Contractor including materials, parts, or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an endorsement to Contractor's insurance (at least as broad as ISO Form CG 20 10 11 85 or if not available, through the addition of both CG 20 10, CG 20 26, CG 20 33, or CG 20 38; and CG 20 37 if a later edition is used).

**7.2.5.2 Primary Coverage.** For any claims related to this contract, Contractor's insurance coverage shall be primary coverage at least as broad as ISO CG 20 01 04 13 as respects the City, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by City, its officers, officials, employees, or volunteers shall be excess of Contractor's insurance and shall not contribute with it.

**7.2.5.3 Notice of Cancellation.** Each insurance policy required above shall provide that coverage shall not be canceled, except with notice to City.

**7.2.5.4 Waiver of Subrogation.** Contractor hereby grants to City a waiver of any right to subrogation which the Workers' Compensation insurer of said Contractor may acquire against City by virtue of the payment of any loss under such insurance. Contractor agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this provision applies regardless of whether or not the City has received a waiver of subrogation endorsement from the insurer.

**7.2.5.5 Claims Made Policies (applicable only to professional liability).** The Retroactive Date must be shown, and must be before the date of the contract or the beginning of contract work. Insurance must be maintained and evidence of insurance must be provided for at least five (5) years after completion of the contract of work. If coverage is canceled or non-renewed, and not replaced with another claims-made policy form with a Retroactive Date prior to the contract effective date, Contractor must purchase "extended reporting" coverage for a minimum of five (5) years after completion of work.

**7.3 Self Insured Retentions.** Self-insured retentions must be declared to and approved by City. City may require Contractor to purchase coverage with a lower retention or provide proof of ability to pay losses and related investigations, claim administration, and defense expenses within the retention. The policy language shall provide, or be endorsed to provide, that the self-insured retention may be satisfied by either the named insured or City.

**7.4 Acceptability of Insurers.** Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A-VI, unless otherwise acceptable to City.

City will accept insurance provided by non-admitted, "surplus lines" carriers only if the carrier is authorized to do business in the State of California and is included on the List of Approved Surplus Lines Insurers (LASLI list). All policies of insurance carried by non-admitted carriers are subject to all of the requirements for policies of insurance provided by admitted carriers described herein.

**7.5 Verification of Coverage.** Contractor shall furnish City with original certificates and amendatory endorsements or copies of the applicable policy language effecting coverage required by this clause. All certificates and endorsements are to be received and approved by City before work commences. However, failure to obtain the required documents prior to the work beginning shall not waive Contractor's obligation to provide them. City reserves the right

to require complete, certified copies of all required insurance policies, including endorsements required by these specifications, at any time.

**7.6 Special Risks or Circumstances.** City reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

**7.7 Additional Insurance.** Contractor may obtain additional insurance not required by this Contract.

**7.8 Excess Insurance.** All policies providing excess coverage to City shall follow the form of the primary policy or policies including but not limited to all endorsements.

**7.9 Subcontractors.** Contractor shall require and verify that all subcontractors maintain insurance meeting all the requirements stated herein, and Contractor shall ensure that City is an additional insured on insurance required from subcontractors. For CGL coverage, subcontractors shall provide coverage with a format at least as broad as the CG 20 38 04 13 endorsement.

## **ARTICLE VIII BONDS**

**8.1 Payment and Performance Bond.** Prior to the execution of this Contract, City may require Contractor to post a payment and performance bond (Bond). The Bond shall guarantee Contractor's faithful performance of this Contract and assure payment to contractors, subcontractors, and to persons furnishing goods and/or services under this Contract.

**8.1.1 Bond Amount.** The Bond shall be in a sum equal to twenty-five percent (25%) of the Contract amount, unless otherwise stated in the Specifications. City may file a claim against the Bond if Contractor fails or refuses to fulfill the terms and provisions of the Contract.

**8.1.2 Bond Term.** The Bond shall remain in full force and effect at least until complete performance of this Contract and payment of all claims for materials and labor, at which time it will convert to a ten percent (10%) warranty bond, which shall remain in place until the end of the warranty periods set forth in this Contract. The Bond shall be renewed annually, at least sixty (60) days in advance of its expiration, and Contractor shall provide timely proof of annual renewal to City.

**8.1.3 Bond Surety.** The Bond must be furnished by a company authorized by the State of California Department of Insurance to transact surety business in the State of California and which has a current A.M. Best rating of at least "A-, VIII."

**8.1.4 Non-Renewal or Cancellation.** The Bond must provide that City and Contractor shall be provided with sixty (60) days' advance written notice in the event of non-renewal, cancellation, or material change to its terms. In the event of non-renewal, cancellation, or

material change to the Bond terms, Contractor shall provide City with evidence of the new source of surety within twenty-one (21) calendar days after the date of the notice of non-renewal, cancellation, or material change. Failure to maintain the Bond, as required herein, in full force and effect as required under this Contract, will be a material breach of the Contract subject to termination of the Contract.

**8.2 Alternate Security.** City may, at its sole discretion, accept alternate security in the form of an endorsed certificate of deposit, a money order, a certified check drawn on a solvent bank, or other security acceptable to the Purchasing Agent in an amount equal to the required Bond.

## **ARTICLE IX CITY-MANDATED CLAUSES AND REQUIREMENTS**

**9.1 Contractor Certification of Compliance.** By signing this Contract, Contractor certifies that Contractor is aware of, and will comply with, these City-mandated clauses throughout the duration of the Contract.

**9.1.1 Drug-Free Workplace Certification.** Contractor shall comply with City's Drug-Free Workplace requirements set forth in Council Policy 100-17, which is incorporated into the Contract by this reference.

**9.1.2 Contractor Certification for Americans with Disabilities Act (ADA) and State Access Laws and Regulations:** Contractor shall comply with all accessibility requirements under the ADA and under Title 24 of the California Code of Regulations (Title 24). When a conflict exists between the ADA and Title 24, Contractor shall comply with the most restrictive requirement (i.e., that which provides the most access). Contractor also shall comply with the City's ADA Compliance/City Contractors requirements as set forth in Council Policy 100-04, which is incorporated into this Contract by reference. Contractor warrants and certifies compliance with all federal and state access laws and regulations and further certifies that any subcontract agreement for this contract contains language which indicates the subcontractor's agreement to abide by the provisions of the City's Council Policy and any applicable access laws and regulations.

### **9.1.3 Non-Discrimination Requirements.**

**9.1.3.1 Compliance with City's Equal Opportunity Contracting Program (EOCP).** Contractor shall comply with City's EOCP Requirements. Contractor shall not discriminate against any employee or applicant for employment on any basis prohibited by law. Contractor shall provide equal opportunity in all employment practices. Prime Contractors shall ensure that their subcontractors comply with this program. Nothing in this Section shall be interpreted to hold a Prime Contractor liable for any discriminatory practice of its subcontractors.

**9.1.3.2 Non-Discrimination Ordinance.** Contractor shall not discriminate on the basis of race, gender, gender expression, gender identity, religion, national origin, ethnicity, sexual orientation, age, or disability in the solicitation, selection, hiring or treatment of

subcontractors, vendors or suppliers. Contractor shall provide equal opportunity for subcontractors to participate in subcontracting opportunities. Contractor understands and agrees that violation of this clause shall be considered a material breach of the Contract and may result in Contract termination, debarment, or other sanctions. Contractor shall ensure that this language is included in contracts between Contractor and any subcontractors, vendors and suppliers.

**9.1.3.3 Compliance Investigations.** Upon City's request, Contractor agrees to provide to City, within sixty calendar days, a truthful and complete list of the names of all subcontractors, vendors, and suppliers that Contractor has used in the past five years on any of its contracts that were undertaken within San Diego County, including the total dollar amount paid by Contractor for each subcontract or supply contract. Contractor further agrees to fully cooperate in any investigation conducted by City pursuant to City's Nondiscrimination in Contracting Ordinance. Contractor understands and agrees that violation of this clause shall be considered a material breach of the Contract and may result in Contract termination, debarment, and other sanctions.

**9.1.4 Equal Benefits Ordinance Certification.** Unless an exception applies, Contractor shall comply with the Equal Benefits Ordinance (EBO) codified in the San Diego Municipal Code (SDMC). Failure to maintain equal benefits is a material breach of the Contract.

**9.1.5 Contractor Standards.** Contractor shall comply with Contractor Standards provisions codified in the SDMC. Contractor understands and agrees that violation of Contractor Standards may be considered a material breach of the Contract and may result in Contract termination, debarment, and other sanctions.

**9.1.6 Noise Abatement.** Contractor shall operate, conduct, or construct without violating the City's Noise Abatement Ordinance codified in the SDMC.

**9.1.7 Storm Water Pollution Prevention Program.** Contractor shall comply with the City's Storm Water Management and Discharge Control provisions codified in Division 3 of Chapter 4 of the SDMC, as may be amended, and any and all applicable Best Management Practice guidelines and pollution elimination requirements in performing or delivering services at City owned, leased, or managed property, or in performance of services and activities on behalf of City regardless of location.

Contractor shall comply with the City's Jurisdictional Urban Runoff Management Plan encompassing Citywide programs and activities designed to prevent and reduce storm water pollution within City boundaries as adopted by the City Council on January 22, 2008, via Resolution No. 303351, as may be amended.

Contractor shall comply with each City facility or work site's Storm Water Pollution Prevention Plan, as applicable, and institute all controls needed while completing the services to minimize any negative impact to the storm water collection system and environment.

**9.1.8 Service Worker Retention Ordinance.** If applicable, Contractor shall comply with the Service Worker Retention Ordinance (SWRO) codified in the SDMC.

**9.1.9 Product Endorsement.** Contractor shall comply with Council Policy 000-41 concerning product endorsement which requires that any advertisement referring to City as a user of a good or service will require the prior written approval of the Mayor.

**9.1.10 Business Tax Certificate.** Unless the City Treasurer determines in writing that a contractor is exempt from the payment of business tax, any contractor doing business with the City of San Diego is required to obtain a Business Tax Certificate (BTC) and to provide a copy of its BTC to the City before a Contract is executed.

**9.1.11 Equal Pay Ordinance.** Unless an exception applies, Contractor shall comply with the Equal Pay Ordinance codified in San Diego Municipal Code sections 22.4801 through 22.4809. Contractor shall certify in writing that it will comply with the requirements of the Equal Pay Ordinance throughout the duration of the Contract.

**9.1.11.1 Contractor and Subcontract Requirement.** The Equal Pay Ordinance applies to any subcontractor who performs work on behalf of a Contractor to the same extent as it would apply to that Contractor. Contractor shall require subcontractors performing work for contractor under their contract with the City to certify compliance with the Equal Pay Ordinance in their written subcontracts.

**9.1.11.2 Notice Requirement.** Contractor must post a notice informing its employees of their rights under the Equal Pay Ordinance in their workplace or job site.

## **ARTICLE X CONFLICT OF INTEREST AND VIOLATIONS OF LAW**

**10.1 Conflict of Interest Laws.** Contractor is subject to all federal, state and local conflict of interest laws, regulations, and policies applicable to public contracts and procurement practices including, but not limited to, California Government Code sections 1090, *et. seq.* and 81000, *et. seq.*, and the Ethics Ordinance, codified in the SDMC. City may determine that Contractor must complete one or more statements of economic interest disclosing relevant financial interests. Upon City's request, Contractor shall submit the necessary documents to City.

**10.2 Contractor's Responsibility for Employees and Agents.** Contractor is required to establish and make known to its employees and agents appropriate safeguards to prohibit employees from using their positions for a purpose that is, or that gives the appearance of being, motivated by the desire for private gain for themselves or others, particularly those with whom they have family, business or other relationships.

**10.3 Contractor's Financial or Organizational Interests.** In connection with any task, Contractor shall not recommend or specify any product, supplier, or contractor with whom

Contractor has a direct or indirect financial or organizational interest or relationship that would violate conflict of interest laws, regulations, or policies.

**10.4 Certification of Non-Collusion.** Contractor certifies that: (1) Contractor's bid or proposal was not made in the interest of or on behalf of any person, firm, or corporation not identified; (2) Contractor did not directly or indirectly induce or solicit any other bidder or proposer to put in a sham bid or proposal; (3) Contractor did not directly or indirectly induce or solicit any other person, firm or corporation to refrain from bidding; and (4) Contractor did not seek by collusion to secure any advantage over the other bidders or proposers.

**10.5 Hiring City Employees.** This Contract shall be unilaterally and immediately terminated by City if Contractor employs an individual who within the twelve (12) months immediately preceding such employment did in his/her capacity as a City officer or employee participate in negotiations with or otherwise have an influence on the selection of Contractor.

## **ARTICLE XI DISPUTE RESOLUTION**

**11.1 Mediation.** If a dispute arises out of or relates to this Contract and cannot be settled through normal contract negotiations, Contractor and City shall use mandatory non-binding mediation before having recourse in a court of law.

**11.2 Selection of Mediator.** A single mediator that is acceptable to both parties shall be used to mediate the dispute. The mediator will be knowledgeable in the subject matter of this Contract, if possible.

**11.3 Expenses.** The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the mediation, including required traveling and other expenses of the mediator, and the cost of any proofs or expert advice produced at the direct request of the mediator, shall be borne equally by the parties, unless they agree otherwise.

**11.4 Conduct of Mediation Sessions.** Mediation hearings will be conducted in an informal manner and discovery will not be allowed. The discussions, statements, writings and admissions will be confidential to the proceedings (pursuant to California Evidence Code sections 1115 through 1128) and will not be used for any other purpose unless otherwise agreed by the parties in writing. The parties may agree to exchange any information they deem necessary. Both parties shall have a representative attend the mediation who is authorized to settle the dispute, though City's recommendation of settlement may be subject to the approval of the Mayor and City Council. Either party may have attorneys, witnesses or experts present.

**11.5 Mediation Results.** Any agreements resulting from mediation shall be memorialized in writing. The results of the mediation shall not be final or binding unless otherwise agreed to in writing by the parties. Mediators shall not be subject to any subpoena or liability, and their actions shall not be subject to discovery.



**ARTICLE XII  
MANDATORY ASSISTANCE**

**12.1 Mandatory Assistance.** If a third party dispute or litigation, or both, arises out of, or relates in any way to the services provided to the City under a Contract, Contractor, its agents, officers, and employees agree to assist in resolving the dispute or litigation upon City's request. Contractor's assistance includes, but is not limited to, providing professional consultations, attending mediations, arbitrations, depositions, trials or any event related to the dispute resolution and/or litigation.

**12.2 Compensation for Mandatory Assistance.** City will compensate Contractor for fees incurred for providing Mandatory Assistance. If, however, the fees incurred for the Mandatory Assistance are determined, through resolution of the third party dispute or litigation, or both, to be attributable in whole, or in part, to the acts or omissions of Contractor, its agents, officers, and employees, Contractor shall reimburse City for all fees paid to Contractor, its agents, officers, and employees for Mandatory Assistance.

**12.3 Attorneys' Fees Related to Mandatory Assistance.** In providing City with dispute or litigation assistance, Contractor or its agents, officers, and employees may incur expenses and/or costs. Contractor agrees that any attorney fees it may incur as a result of assistance provided under Section 12.2 are not reimbursable.

**ARTICLE XIII  
MISCELLANEOUS**

**13.1 Headings.** All headings are for convenience only and shall not affect the interpretation of this Contract.

**13.2 Non-Assignment.** Contractor may not assign the obligations under this Contract, whether by express assignment or by sale of the company, nor any monies due or to become due under this Contract, without City's prior written approval. Any assignment in violation of this paragraph shall constitute a default and is grounds for termination of this Contract at the City's sole discretion. In no event shall any putative assignment create a contractual relationship between City and any putative assignee.

**13.3 Independent Contractors.** Contractor and any subcontractors employed by Contractor are independent contractors and not agents of City. Any provisions of this Contract that may appear to give City any right to direct Contractor concerning the details of performing or providing the goods and/or services, or to exercise any control over performance of the Contract, shall mean only that Contractor shall follow the direction of City concerning the end results of the performance.

**13.4 Subcontractors.** All persons assigned to perform any work related to this Contract, including any subcontractors, are deemed to be employees of Contractor, and Contractor shall be directly responsible for their work.

**13.5 Covenants and Conditions.** All provisions of this Contract expressed as either covenants or conditions on the part of City or Contractor shall be deemed to be both covenants and conditions.

**13.6 Compliance with Controlling Law.** Contractor shall comply with all applicable local, state, and federal laws, regulations, and policies. Contractor's act or omission in violation of applicable local, state, and federal laws, regulations, and policies is grounds for contract termination. In addition to all other remedies or damages allowed by law, Contractor is liable to City for all damages, including costs for substitute performance, sustained as a result of the violation. In addition, Contractor may be subject to suspension, debarment, or both.

**13.7 Governing Law.** The Contract shall be deemed to be made under, construed in accordance with, and governed by the laws of the State of California without regard to the conflicts or choice of law provisions thereof.

**13.8 Venue.** The venue for any suit concerning solicitations or the Contract, the interpretation of application of any of its terms and conditions, or any related disputes shall be in the County of San Diego, State of California.

**13.9 Successors in Interest.** This Contract and all rights and obligations created by this Contract shall be in force and effect whether or not any parties to the Contract have been succeeded by another entity, and all rights and obligations created by this Contract shall be vested and binding on any party's successor in interest.

**13.10 No Waiver.** No failure of either City or Contractor to insist upon the strict performance by the other of any covenant, term or condition of this Contract, nor any failure to exercise any right or remedy consequent upon a breach of any covenant, term, or condition of this Contract, shall constitute a waiver of any such breach of such covenant, term or condition. No waiver of any breach shall affect or alter this Contract, and each and every covenant, condition, and term hereof shall continue in full force and effect without respect to any existing or subsequent breach.

**13.11 Severability.** The unenforceability, invalidity, or illegality of any provision of this Contract shall not render any other provision of this Contract unenforceable, invalid, or illegal.

**13.12 Drafting Ambiguities.** The parties acknowledge that they have the right to be advised by legal counsel with respect to the negotiations, terms and conditions of this Contract, and the decision of whether to seek advice of legal counsel with respect to this Contract is the sole responsibility of each party. This Contract shall not be construed in favor of or against either party by reason of the extent to which each party participated in the drafting of the Contract.

**13.13 Amendments.** Neither this Contract nor any provision hereof may be changed, modified, amended or waived except by a written agreement executed by duly authorized representatives of City and Contractor. Any alleged oral amendments have no force or effect. The Purchasing Agent must sign all Contract amendments.

**13.14 Conflicts Between Terms.** If this Contract conflicts with an applicable local, state, or federal law, regulation, or court order, applicable local, state, or federal law, regulation, or court order shall control. Varying degrees of stringency among the main body of this Contract, the exhibits or attachments, and laws, regulations, or orders are not deemed conflicts, and the most stringent requirement shall control. Each party shall notify the other immediately upon the identification of any apparent conflict or inconsistency concerning this Contract.

**13.15 Survival of Obligations.** All representations, indemnifications, warranties, and guarantees made in, required by, or given in accordance with this Contract, as well as all continuing obligations indicated in this Contract, shall survive, completion and acceptance of performance and termination, expiration or completion of the Contract.

**13.16 Confidentiality of Services.** All services performed by Contractor, and any sub-contractor(s) if applicable, including but not limited to all drafts, data, information, correspondence, proposals, reports of any nature, estimates compiled or composed by Contractor, are for the sole use of City, its agents, and employees. Neither the documents nor their contents shall be released by Contractor or any subcontractor to any third party without the prior written consent of City. This provision does not apply to information that: (1) was publicly known, or otherwise known to Contractor, at the time it was disclosed to Contractor by City; (2) subsequently becomes publicly known through no act or omission of Contractor; or (3) otherwise becomes known to Contractor other than through disclosure by City.

**13.17 Insolvency.** If Contractor enters into proceedings relating to bankruptcy, whether voluntary or involuntary, Contractor agrees to furnish, by certified mail or electronic commerce method authorized by the Contract, written notification of the bankruptcy to the Purchasing Agent and the Contract Administrator responsible for administering the Contract. This notification shall be furnished within five (5) days of the initiation of the proceedings relating to bankruptcy filing. This notification shall include the date on which the bankruptcy petition was filed, the identity of the court in which the bankruptcy petition was filed, and a listing of City contract numbers and contracting offices for all City contracts against which final payment has not been made. This obligation remains in effect until final payment is made under this Contract.

**13.18 No Third Party Beneficiaries.** Except as may be specifically set forth in this Contract, none of the provisions of this Contract are intended to benefit any third party not specifically referenced herein. No party other than City and Contractor shall have the right to enforce any of the provisions of this Contract.

**13.19 Actions of City in its Governmental Capacity.** Nothing in this Contract shall be interpreted as limiting the rights and obligations of City in its governmental or regulatory capacity.

**EXHIBIT C**  
**CITY REQUIRED FORMS**

Contractor Standards Pledge of Compliance

Business Tax Certificate

Equal Opportunity Contracting forms, including Contractors Certification of Pending Actions and Work Force Report

Insurance Certificates with all endorsements, if applicable

Living Wage Certification form, if applicable

Taxpayer Identification Form W-9 (if not currently on file)

City of San Diego

EAS Implementation and NP  
Migration

Jonathan Mui

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SOW offer expires December 1, 2019.

# EAS Implementation and NP Migration SOW

## SUMMARY

The following Statement of Work (SOW) is subject to The City of San Diego General Contract Terms and Provisions Applicable to Goods, Services, and Consultant Contracts revised on December 18, 2017 subject to the Scope of Services (Exhibit A) attached hereto. The Scope of Services (Exhibit A) shall take precedence and govern for any conflicting terms between the above-referenced documents.

### **SOW ID: PM-CitySanDiegoEAS9.0ImpINPMig-01**

This Statement of Work describes the tasks, effort, and costs associated with implementing one (1) production EAS 9.0 system in the Client's environment, plus migrating up to 25 TB from the Client's legacy Nearpoint system. EAS to be configured to ingest O365 mailboxes. EAS deployment will be located in the City of San Diego's data center.

### **Client Environment (City of San Diego)**

The Client has the following in their production environment:

- NearPoint 4.2.2 ("NP")
  - 1 Master
  - 1 Peer
  - 2 SQL Servers
- Approximately 13273 total mailboxes archived.
  - 192 Active mailboxes
  - 13081 Inactive Mailboxes
  - 13273 mailboxes to be archived in EAS (Max EAS)
  - Approximately 25 TB total data volume compressed
  - Approximately 559M messages in Nearpoint
- Approximately 11000 total mailboxes within O365.
  - All Mailboxes to be archived from O365
  - Defined policies to be setup to determine the data to be ingested into EAS after the migration from NP
- Journaling to be Setup on the Exchange Hybrid Server
- Hybrid functionality to remain
- Exchange 2010 / 2016 (Hybrid) / O365
- Outlook 2013 / 2016
- 10% email growth per year
- 1 % user growth per year
- 5-year storage projection
- Need EAS Discovery

# EAS Implementation and NP Migration SOW

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## SCOPE

### Tasks

The Client has requested that one instance of EAS 9.0 ("EAS") be implemented in the Client's production environment to include the subsequent migration of up to 25 TB from the Client's legacy Nearpoint system to the new environment. In addition, Capax will configure EAS to ingest data from the Client's current O365 deployment. EAS deployment will be located in the City of San Diego Data Center.

Capax will perform the following tasks remotely at one or more of the following Capax locations:

Williamsville, NY  
Reston, VA  
Philadelphia, PA  
Ontario, Canada

It is estimated the project will begin 2 Weeks after the execution of this SOW or as mutually agreed upon by the parties. The delivery tasks are provided below. At project kick off the parties will validate dependencies and assign specific dates for activities.

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### Phase 1 – EAS Implementation (Duration – 3 Weeks from Design Session Kick-off)

1. Project Initiation –
  - Define project charter and objectives
  - Project planning
  - Change management
  - Risk assessment
  - Transition planning
  - Resources required from the Client
    - Exchange Administrator
    - Network Administrator
    - Storage Administrator
    - Systems Administrator
    - Nearpoint Administrator
    - SQL DBA
2. EAS Analysis and Design –
  - Project Kickoff Meeting



## EAS Implementation and NP Migration SOW

- Technical planning and design review
    - Data requirements plus growth rates (email only)
    - Security and networking
    - Windows hardware
    - Archive from Exchange only
    - Mailbox management for EAS mailboxes
    - Journal archiving (if required)
    - O365 Integration
    - EAS deployment located in the City of San Diego Data Center
    - Storage compatible with EAS
    - SQL servers are dedicated server or node
    - No High Availability (HA) or Disaster Recovery (DR).
  - Policy definition
    - Archive
    - Delete and purge
  - EAS Discovery
    - Legal holds and releases within EAS
    - Searching
    - Export to PST
  - EAS Anywhere
    - User Access
    - Searching
    - User retrieval
  - Pre-installation review
    - Licensing (per EULA)
    - Exchange and SQL Server access, admin accounts
    - Identify 2 sample test mailboxes
  - Generate Design Document
    - Note: depending upon Client requests, final design may change work effort, scope, or fees.
  - Review Design Document with Client
  - Client sign-off on Design Document before starting Build phase
3. Build – Production EAS Environment
- Verify readiness of production environment
    - Servers and software pre-requisites installed and ready for EAS install
    - Archive and SQL
    - Required permissions on Exchange, Local SQL, and archive
    - SQL connectivity
    - Licensing and required permissions
  - Install EAS (per Design Document)
  - Configure EAS (per Design Document)
  - No PST ingestion (i.e., no user PST's)



## EAS Implementation and NP Migration SOW

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- Unit Test
    - For testing purposes, up to 2 sample mailboxes, up to 2 GB each
    - Confirm archiving (email only).
    - Confirm retrieval.
    - Confirm indexing.
    - Confirm search.
    - EAS client
    - Document unit test results in standard Capax Test Plan
  - Assist with packaging EAS 9.0 Client and testing with customer.
    - Note: customer to deploy new EAS Client package to end users.
  - Assist Client with EAS testing (if needed).
    - Up to two (2) hours of knowledge transfer for EAS.
  - Confirm completion of EAS installation.
4. Generate SOLRCloud Index –
- Install SOLRCloud (Per Design Document)
  - Configure SOLRCloud (Per Design Document)
  - Add the Index to the EAS configuration.
  - Review and confirm mailboxes to index.
    - Client to identify any specific exclusions.
  - After Client confirms mailboxes to index, start the full index.
  - Perform periodic monitoring to confirm indexing is running satisfactorily.
  - Once the indexing is completed
    - Validate the archived messages were indexed.
    - Validate that “net-new” messages are getting indexed.
    - Confirm that the indexing queue backlog is not increasing.
      - Specifically, this will be when the EAS FT\_NOTIFY table count is equal to or less than the number of daily messages being added each day.
    - Perform testing of some searches.
  - Notify the Client that the indexing is completed.
  - If Index backup is implemented, confirm it is completing.
5. Build – Production Environment, EAS Discovery and EAS Anywhere
- Verify readiness of production environment
    - Servers and software pre-requisites installed and ready for EAS Discovery and Anywhere install
    - SQL and local storage for EAS Discovery and PST export storage
    - Required permissions on Local SQL and local storage
    - SQL connectivity
    - Licensing and required permissions
  - Install EAS Discovery and Anywhere (per Design Document)

## EAS Implementation and NP Migration SOW

- Configure EAS Discovery and Anywhere (per Design Document)
  - Unit Test EAS Discovery
    - Put emails on hold, release from hold, 1 test case
    - Search, 1 test case
    - Export to PST, 1 export
    - Document unit test results in standard Capax Test Plan
  - Unit Test EAS Anywhere
    - Ensure access to portal
    - Confirm testing of:
      - Preview of mails
      - Download of mails
      - Searching
6. System Test –
- Capax provides standard Test Plan
    - EAS, EAS Discovery, EAS Anywhere
    - Client performs any updates to Test Plan
  - Capax assists with confirming test data
  - Capax performs walk-through of Test Plan with Client
    - Capax recommends Client recording this session for future reference
  - Client performs any company required system, UAT, or any other testing
    - Capax provides assistance via Q&A, clarifying issues
  - **Client sign-off on Test Plan**
7. Launch
- Prepare final Composite Document (Capax template)
  - Review Composite Document with Client
    - Client sign-off of Composite Document
  - Knowledge transfer (KT) with IT team
    - One 1-hour session
    - Note: KT is not a substitute for EAS product training
  - Knowledge transfer (KT) with Legal team
    - One 1-hour session
    - Note: KT is not a substitute for EAS product training
  - Assist Client with Go-Live checklist
  - Provide remote assistance during Client’s rollout of EAS
    - Client adds users to EAS to enable archiving
    - Capax assistance with any issues is on a time & materials basis (which may exceed the estimated SOW fees)
  - Review standard EAS related backup procedures (EAS DB, EAS archive doc stores, Index, configuration settings)
    - Client implements backup (if required)

# EAS Implementation and NP Migration SOW

- Review standard EAS Discovery related backup procedures (local storage, export area, configuration settings)
  - Client implements backup (if required)
- Transition to Technical Support
- **Client sign-off on Phase 1 before starting Phase 2**

## **Phase 2a – Migration Setup (City of San Diego) – (Duration 1 Week)**

Capax will setup the NearPoint to EAS migration for (1) production environment and will perform the following high-level tasks and activities:

1. Analysis and Design –
  - Kick-off meeting
  - Project planning
  - Migration architecture and design sessions (up to 8 hours)
  - Generate Migration Process Document
    - Includes architecture and design
    - Functional steps
    - Acceptable migration percentage (e.g., 95% of all emails)
    - Export to PST only, PST's organized by mailbox
    - Note: only emails are exported and migrated. Holds, tags, calendar items, contacts, tasks, public folders, etc., are not exported and migrated.
  - Review Migration Process Document with Client
  - **Client sign-off Migration Process Document before starting Capax Migration Suite Installation and Configuration**
  
2. Capax Migration Suite (CMS) Installation and Configuration –
  - Preparation
    - Verify server software pre-requisites installed and ready
    - Verify storage ready, including EAS and local scratch space
    - Verify permissions
    - Client provides 2 test mailboxes with test email
  - Install CMS on one (1) target server (assumes NearPoint server)
  - Configure CMS per the Migration Process Document
  - With Client's assistance, configure other components supporting migration process
  - Perform unit test with test mailboxes
  - Document results in standard Test Plan
  
3. Migration Testing –
  - Client provides 10 test mailboxes
  - Calculate approximate export/migration rate for the Client's NearPoint environment
  - Review results with Client
  - Client and Capax generate priority for migrating all applicable mailboxes

## EAS Implementation and NP Migration SOW

- Client sign-off on Migration Testing before starting Phase 2b

### Phase 2b – Full Migration (City of San Diego) - (Duration 25 Weeks)

Capax will perform the migration from NearPoint to EAS for (1) production environment and will perform the following high-level tasks and activities:

#### 1. Full Migration –

- Client and Capax review migration order
- Confirm readiness to perform full migration
  - Total estimated email volume is defined in Customer Environment section.
  - NearPoint will be in read only mode during Full Migration
- Run full migration per the Migration Process Document
  - Up to Max EAS mailbox exports to EAS archive mailboxes
  - Remainder will be ingested into a shared folder in EAS.
- Provide periodic updates regarding migration progress
- Once complete, forward full results to Client for review
- Client sign-off on Full Migration

### Project Closure – (Duration 1 Week)

- Review any final project items with Client
- Client sign-off on SOW tasks

### Project Management

- Status updates
- Capax task management
- Capax resource management

### Client Responsibilities –

- Provide remote access (e.g., VPN, RDP, Citrix, or similar) to the EAS environment.
- Provisions any required hardware, operating system, and 3<sup>rd</sup> party software.
- Provides system administrative (SA) access to required servers and applications.
- Identify 2 sample mailboxes for o365 validation activities.
- Performs any company system testing, UAT, etc.
- Confirm any necessary backups before starting SOW tasks.

### Deliverables

Capax will provide the following Deliverable:

- **Design Document** – Captures architecture/design for the EAS system. This will be the guide for installation and configuration of EAS and EAS Discovery. Production environment only.



## EAS Implementation and NP Migration SOW

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- **Composite Document:** Documents the Client's EAS environment plus findings and any potential recommendations.
- **Migration Process Document:** Specifies the process for migrating from NP to EAS for City of San Diego.

### Acceptance

After Capax completes the initial draft of each Deliverable, Capax will perform one (1) update after the Client's review. The Client has five (5) business days to perform review and provide feedback on the Deliverable. If no feedback is provided within five (5) business days after Capax initially sends the Deliverable, the Deliverable will be considered as accepted.

### Out of Scope

The following specific items are out of scope for this SOW:

- Administration or backup of any software or data.
- Exporting any data, product training, or process consulting (except EAS software as defined in this SOW).
- File, SharePoint, or other archiving.
- Install, configure, upgrade, or update to any software or hardware (except EAS software as defined in this SOW).
- Implementing DR, HA, or DB mirroring as part of the EAS implementation.
- Troubleshooting or correcting Product software issues. If Client requests Capax Professional Services (PS) to troubleshoot Product software issues, then this will be billable time.
- The fees in this SOW do not include any hardware or software, which is purchased separately from this SOW.
- Other tasks not explicitly identified in this SOW.

# EAS Implementation and NP Migration SOW

## SOW ECONOMICS

The **Fixed Fee** and **invoice schedule** for Capax to complete SOW scope as defined in this document are as follows.

Invoicing Milestone	Fee
EAS Implementation including EAS Discovery and Anywhere (Phase 1)	\$ 22,000.00
NP to EAS Migration (Phase 2)	\$38,750.00
<b>Total:</b>	<b>\$ 60,750.00</b>

All currencies in this SOW are in United States dollars.  
 Capax will invoice Client at SOW signing for all fees.

If out of scope tasks are requested to be performed, then the Client or Capax will request the scope change using Addendum 1. Once this change order is submitted and approved by both Capax and Client it will serve to alter the original SOW.

All work is assumed to be performed during normal business hours 08:00 AM – 5 PM local time; Monday through Friday, ET. Any work performed outside of normal business hours will need to be scheduled one week prior to start, a maximum of 40 hours, not to exceed a rate of \$125.00/hour.

Travel and living expenses (if applicable) are not included in the Fixed Fee and will be billed as incurred. The Client will be billed for actual expenses which will be fair, reasonable, and aligned with standard business practices.

## EAS Implementation and NP Migration SOW

### ENGAGEMENT ASSUMPTIONS & RISKS

The following is a list of assumptions that the Client must meet:

- All Capax team members must have remote connectivity (e.g., VPN, Citrix, RDP or similar) to all relevant Client environments, systems.
- Provide a single person to serve as single point of contact for all requests, agreements, and project work. This person will provide access to and assign appropriate Client resources whether network, database, system, or business domain expert necessary to complete project tasks.
- Provide a clear Technical Lead to receive knowledge from Capax consultants.
- Provide office space for Capax personnel while/if onsite.
- Provide access to System Administration assistance for any hardware or database issues.
- Complete all tasks on time, which have been assigned to the Client as defined in the timetable, including testing.
- Current Product Environment is fully functional and stable.
- Backups are current for entire legacy archive environment.
- Client has required access to vendor SUPPORT account and valid license keys.

# EAS Implementation and NP Migration SOW

## PAYMENT AND INVOICING

The terms and conditions of the **Master Consulting Agreement** apply in full to the services provided under this Statement of Work (if executed by both parties). In the absence of such an agreement, Capax’s standard invoice terms and conditions will apply.

**Please complete the information below for all accounting and project personnel that should receive invoice copies for processing and approval purposes. This SOW will not be deemed completed until the table below is filled out in its entirety.**

<b>Contact Name(s):</b>	
<b>Phone Number:</b>	
<b>Email:</b>	
<b>Office Address:</b>	

*If Applicable:*

<b>Supplier Portal URL:</b>	
<b>Portal Contact Person:</b>	
<b>Special Invoice Instructions:</b>	

**PO Required** (circle one)?      YES | NO

To schedule a consulting engagement, Capax requires a signed copy of this SOW and a valid PO (if YES is circled above).

Please email fully completed to [pmellet@capaxdiscovery.com](mailto:pmellet@capaxdiscovery.com) , [ar@capaxdiscovery.com](mailto:ar@capaxdiscovery.com) and your account manager.

**IN WITNESS WHEREOF**, the parties hereto each acting with proper authority have executed this Statement of Work.





# EAS Implementation and NP Migration SOW

**Capax Archive Solutions, LLC**

**City of San Diego**

~~Peter Mellett~~ JJ Contessa  
\_\_\_\_\_  
Full name

\_\_\_\_\_  
Full name

~~President - PremCloud Services~~ EPO  
\_\_\_\_\_  
Title

\_\_\_\_\_  
Title

  
\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

12/13/2019  
\_\_\_\_\_  
Date

\_\_\_\_\_  
Date



# EAS Implementation and NP Migration SOW

**Capax Archive Solutions, LLC**

**City of San Diego**

~~Peter Mellett~~ JJ Contasa

Full name

Full name

~~President | PremCloud Services~~ CPO

Title

Title

Signature

Signature

Date

12/13/2019

Date



# EAS Implementation and NP Migration SOW

**Capax Archive Solutions, LLC**

**City of San Diego**

Peter Mellett *JJ Contessa*

Full name

Full name

*CPO*

President | ~~PremCloud Services~~

Title

Title

Signature

Signature

Date

*12/13/2019*

Date



# EAS Implementation and NP Migration SOW

## ADDENDUM 1

### SCOPE CHANGE REQUEST

The Services set forth in this Scope Change Request ("CR") are between Capax Archive Solutions, LLC ("CAPAX") and \_\_\_\_\_ ("CLIENT") and with respect to the Statement of Work ("SOW") entitled \_\_\_\_\_ (SOW ID: \_\_\_\_\_), signed \_\_\_\_\_.

1. Scope Change.

Insert scope change information.

2. Tasks to be performed.

Insert tasks information.

3. Fees.

Insert Fee information.

CAPAX will invoice CLIENT per the terms in the Master Consulting Agreement (if applicable) and the SOW.

**CAPAX Archive Solutions, LLC**

**City of San Diego**

Signature: \_\_\_\_\_ Signature: \_\_\_\_\_

Name: \_\_\_\_\_ Name: \_\_\_\_\_

Title: \_\_\_\_\_ Title: \_\_\_\_\_

Date: \_\_\_\_\_ Date: \_\_\_\_\_



# QUOTATION

Created Date 9/3/2019  
 Expiration Date 10/10/2019  
 Quote Number 00000881

Billing Entity Capax Archive Solutions LLC  
 Prepared By Trevor Berninger  
 Phone (716) 229-8921  
 Email tberninger@capaxdiscovery.com  
 Company Address 5110 Main Street  
 Williamsville, NY 14221  
 US

Account Name City of San Diego  
 Contact Name Darren Bennett  
 Phone 619.533.4840  
 Email dbennett@sandiego.gov  
 Bill To 1200 Third Avenue  
 San Diego, CA 92101  
 United States

Product Code	Product	Item Description	Sales Price	Quantity	Total Price
EAS_9.0_CL	EAS 9.0 Complete License	15,000 perpetual licenses for EAS 9.0 - City of San Diego Amnesty Nearpoint License Offer	USD 0.00	15,000.00	USD 0.00
SUP_EAS_9.0_STD	PremCloud - Standard Maintenance & Support - EAS 9.0	EAS Support - CoSD & SDPD (up to 15,000) users. No fee for year 1 support - period of performance 10.1.2019-7.1.2020.	USD 0.00	15,000.00	USD 0.00
SUP_EAS_9.0_STD	PremCloud - Standard Maintenance & Support - EAS 9.0	Budgetary Pricing for 2020-21 support. CoSD & SDPD, 15000 users. Period of Performance July 2, 2020 - July 1, 2021. Not to be invoiced until July 2020.	USD 7.00	15,000.00	USD 105,000.00
PRO_SERV_EAS_9.0	PremCloud Professional Services EAS 9.0	SOW ID: PM-CityForPDEAS9.0ImplNPMig-01	USD 47,600.00	1.00	USD 47,600.00
PRO_SERV_EAS_9.0	PremCloud Professional Services EAS 9.0	SOW ID: PM-CitySanDiegoEAS9.0ImplNPMig-01	USD 60,750.00	1.00	USD 60,750.00

Contract End Date 6/29/2019  
 Payment Terms 30

Grand Total USD 213,350.00  
 Total does not include taxes or shipping where applicable.