

Agreement

Between

**Des Moines Independent Community School
District**

And

AGREEMENT

This Agreement is entered into by and between the Des Moines Independent Community School District, an Iowa public school corporation ("the District"), and _____, _____ based ("Awardee"), with reference to the following facts:

- A. The District is responsible for providing public educational services to students in accordance with federal, state, and local law.
- B. Awardee is engaged generally in the business of providing products and services for access and secure management systems.
- C. The District has heretofore promulgated a Request for Proposals for the provision of a _____ (RFP# _____), to which several vendors responded including Awardee.
- D. Awardee has submitted a proposal to provide the District with products and services for a _____ system, consisting of developing, licensing, installing, and maintaining computer software and updates as well as related technical assistance, instruction, and materials, to effectuate the design, implementation, and ongoing support of a comprehensive _____ system.
- E. The parties have reached an agreement and understanding as to the specific products and services to be provided by Awardee to the District and the terms and conditions upon which such products and services will be provided.

NOW, THEREFORE, in consideration of the mutual promises of the parties and other good and valuable consideration, receipt of which is hereby acknowledged, the parties agree as follows:

1. Definitions

- 1.1 "Acceptance Test" shall mean the conduct of the series of tests and protocols specified in the Project Documents for a particular Deliverable, the successful completion of which signify the successful delivery of such Deliverable. In the case of a documentary Deliverable, the Acceptance Test for such Deliverable shall mean the review by the District of such documentary Deliverable and certification that such Deliverable complies in all material respects with the requirements for such documentary Deliverable.
- 1.2 "Additional School" shall mean any separately functioning school unit (whether an additional physical plant or a separately identified school unit operating within the same physical plant as another school unit) founded or created within the District after the date of execution of this Agreement.
- 1.3 "Agreement" shall mean the text of this agreement, together with all Exhibits and Schedules hereto and any amendments made in accordance with the terms hereof.
- 1.4 "Board of Education" shall mean the Board of Education of the District, as the same is constituted from time to time.
- 1.5 "Business Day" shall mean a day in which general business operations of the District are conducted, whether or not schools are open, but shall not include any day in which the general business offices of the District are closed. All other references to "days" refer to calendar days.
- 1.6 "Change Order" shall mean a modification or clarification of the Project Documents that is duly adopted by the Parties in accordance with the Scope Management Process.

1. Definitions

- 1.7 "Change Request" shall mean a request by a Party for a Change Order made in accordance with the Scope Management Process.
- 1.8 "Commencement Date" shall mean the date on which this Agreement is signed by both Parties.
- 1.9 "Confidential Information" shall mean and include (1) District student records that are confidential and exempt from disclosure under federal and/or state laws and regulations (2) District employee personnel files that are confidential and exempt from disclosure under federal and/or state laws and regulations, and (3) any other District information, record, or document that is confidential or subject to privacy protection as otherwise provided by law.
- 1.10 "Critical Deliverable" shall mean a Deliverable, the acceptance of which is necessary for the release of any significant component of Software into Production, as more specifically identified in the Project Documents.
- 1.11 "Defect" shall mean a characteristic or condition of the Licensed Software which results in the failure of such software to operate in accordance with the Specifications and/or which results in the input, storage, computation, transfer or display of erroneous information. Defects shall be characterized by their severity as set forth in the Software Maintenance Services Agreement.
- 1.12 "Deliverable" shall mean any unit of work required to be delivered by Awardee to the District as a Deliverable in the Statement of Work.
- 1.13 "Deliverable Date" shall be the deadline date for the delivery or completion of a Deliverable under this Agreement.
- 1.14 "Delivery" of a Deliverable shall be deemed to have taken place (or the Deliverable shall have been deemed "Delivered") as follows:
 - A. In the case of items to be delivered in tangible form, upon the transfer of possession of the item to the control of the respective District personnel designated to receive such possession at the designated time and place, or if no place is designated at such person's office.
 - B. In the case of items to be delivered by electronic transmission, upon the successful completion of such transmission to the designated District computer and verification of the accuracy of such transmission.
 - C. In the case of items for which payment is conditioned upon the completion of an acceptance test, upon the certification by the designated agent or employee of the District that such acceptance test has been completed to the reasonable satisfaction of such agent.
 - D. In all other cases, upon the completion of the Services encompassed by such Deliverable in all material respects as set forth in the applicable schedule to this Agreement.
- 1.15 "Dispute Resolution Process" shall mean the procedures for identifying and resolving issues related to the determination or interpretation of Project Documents, as set forth in Section 10 of this Agreement.
- 1.16 "Dispute Statement" shall mean a statement submitted by a Party under Section 10.3 below.

1. Definitions

- 1.17 "District" shall mean the Des Moines Independent Community School District, including each and every school, subdivision, or other unit thereof constituted now and in the future.
- 1.18 "District Features" shall mean those certain computer programs and program functions developed for delivery to and installation and use by the District.
- 1.19 "District Resource Plan" shall mean the schedule of personnel and other resources that the District has committed to provide in support of its obligations during the Project.
- 1.20 "District Supplied Software" shall mean and include any computer programs specified in the Statement of Work to be supplied by the District, either for use during development or during production.
- 1.21 "Documentation" shall mean all operator guides, operating procedures (including any special yearend procedures), user manuals, training aids, installation guides, functional and detailed specifications and other technical documents with respect to a System Deliverable or any portion or component thereof.
- 1.22 "End User" shall mean an individual who supplies, analyzes, and/or retrieves student, school, or related data by directly or indirectly invoking a computer program.
- 1.23 "Enhanced Software" shall mean those any and all future Releases of Awardee Product Title that will be developed by Awardee under this Agreement, but which will be made available by Awardee to other Persons in the future. Specifically, Enhanced Software shall include any Release of Awardee Product Title first made available to any customer or licensee of Awardee from and after the Commencement Date.
- 1.24 "Force Majeure Event" shall mean fire, flood, earthquake, elements of nature or acts of God; acts of war, terrorism, riots, civil disorders, rebellions or revolutions; strikes, lockouts, or labor difficulties, equipment failures, computer viruses, malicious acts of third parties, interruption of telecommunications service; or any other similar cause beyond the reasonable control of the respective Party, that could not have been prevented by reasonable precautions of the kind ordinarily taken by well-managed firms engaged in software development and maintenance (such as, by way of illustration and not limitation, regular software backups and regular use of commercial anti-virus software, but not including duplicate or parallel computer systems or on or off-site backup or disaster recovery equipment).
- 1.25 "License Fees" shall mean any fees paid or to be paid by the District to Awardee in respect of the right to copy, install, distribute use, or make derivative works from Licensed Software under this Agreement.
- 1.26 "Licensed Software" shall mean any and all computer software required for the operation of the Awardee Product Title, including without limitation software owned or licensed by Awardee or Third Party Software, but excepting Third Party Software specifically identified in the Statement of Work as being the responsibility of the District.
- 1.27 "Awardee Software Title" shall mean the suite of software (or individual components thereof) offered by Awardee, among other things, for employee, student, and school information management, whether offered under the current trademark or another mark.

1. Definitions

- 1.28 "Awardee Supported Software" shall mean the Awardee Software Title as the same is commercially available as of the Commencement Date and owned or licensed by Awardee, which computer programs will be licensed to the District as part of the Solution, as such programs shall be upgraded and enhanced by Awardee from time to time hereafter.
- 1.29 "Maintenance Materials" shall mean the Object Code, Source Code and Documentation for error corrections, minor enhancements, updates, and Releases of the Licensed Software supplied or to be supplied by Awardee pursuant to its responsibilities under the warranty or maintenance service provisions of this Agreement.
- 1.30 "Object Code" shall mean the form of a computer program that may be loaded for execution without intervening process other than the use of a program loader, linkage editor, or similar computer program.
- 1.31 "Party" shall mean the District and/or Awardee as the context requires.
- 1.32 "Person" shall mean any natural person or entity recognized by law.
- 1.33 "Platform Software" shall mean any computer program required for the operation, installation, debugging, or maintenance of another program, including without limitation, operating systems, database management systems, compilers, interpreters, runtime or execution environments, development environments and the like.
- 1.34 "Pricing Schedule" shall mean the schedule of prices and payments as set forth.
- 1.35 "Production" shall mean the use of the Awardee Product Title in the ordinary course of the operations of the District.
- 1.36 "Product Plan" shall mean the complete set of requirements and specifications for the Awardee Product Title as finalized in accordance with this Agreement.
- 1.37 "Project" shall mean and include all work to be performed under the terms of this Agreement, including without limitation all Services and all intangible and tangible Deliverables.
- 1.38 "Project Documents" shall mean the Statement of Work, the Pricing Schedule, the Specifications, together with any supporting charts, schedules, or documents specified in those documents or any Change Order approved by the parties.
- 1.39 "Project Manager" shall mean the individual designated by the respective Party.
- 1.40 "Proposal" shall mean Awardee's response to the RFP, together with all written clarifications exchanged by the Parties on or before the date hereof, including all text, graphics, summaries, and documents referred to in such Proposal, as set forth in Appendix D.
- 1.41 "Proprietary Information" shall mean all Awardee information which is recognized and protected as a trade secret in accordance with applicable law. Proprietary Information shall not include information which is public knowledge or which becomes public knowledge through no breach of this Agreement, or is required to be disclosed to the public by reason of a statute or by any public or regulatory authority. All Proprietary Information shall be marked as proprietary with an appropriate legend, marking, stamp, or other obvious written identification by Awardee prior to disclosure.

1. Definitions

- 1.42 "Release" when referring to computer software, shall mean a modification or addition to existing computer software that requires substantial reconfiguration and/or re-installation of computer software in Production. Releases shall include any and all new releases of existing software products and/or replacement products made available by Awardee that provide substantially all of the operational functions of the Licensed Software with paid Maintenance Agreement. No modification shall adversely affect the accuracy of any previously operational feature of the system.
- 1.43 "Resource" shall mean the time or effort of a Party or its employees or contractors or a quantity of components, supplies, software, software rights, or material to be supplied by or on behalf of a Party under this Agreement.
- 1.44 "RFE" shall mean the "Request for Enhancement."
- 1.45 "RFP" shall mean the District's Request for Proposal # 7295 to which Awardee responded.
- 1.46 "Scope Management Process" shall mean the provisions relating to processes for the modification or amendment of the Statement of Work and/or the pricing relating thereto.
- 1.47 "Services" shall mean, collectively, the Department Services, Requirements Services, Support Services, and Training, including, but not limited to, accurate and complete data conversion from the existing system, report development, and generation of forms and invoices.
- 1.48 "Software Maintenance Services Agreement" shall mean the description of maintenance services as set forth in this Agreement.
- 1.49 "Solution" shall mean the computer software and updates as well as related technical assistance, instruction, and materials, for a comprehensive system of instructional reform and professional development, the requirements for which are set forth in the RFP, Statement of Work, and Specifications.
- 1.50 "Source Code" shall mean a human-readable form of computer programming code that can be modified, compiled, and executed, and all related Source Code Documentation.
- 1.51 "Specifications" shall mean the detailed set of specifications for the System as set in the specifications document as set forth in the RFP.
- 1.52 "Statement of Work" shall mean the statement of work as set forth, as the same shall be modified or amended in accordance with the terms of this Agreement and/or the Scope Management Process.
- 1.53 "Test Environment" shall mean a configuration of hardware and Platform Software owned by the District and provided on District premises for the purpose of configuring and testing Deliverables and managing release for use in Production.
- 1.54 "Third Party Software" shall mean any computer program supplied by a Person other than Awardee, which is required for the operation of the Solution, including without limitation, any Platform Software and any applications software that will be dependent on the Awardee Supported Software, the Enhanced Software, or the District Features for its operation.
- 1.55 "Work Order" shall mean a request for small or routine services issued by the District pursuant to procedures set forth for Work Orders in the Scope Management Process.

2. Products and Services to be provided by Awardee

- 2.1 General Scope. Awardee shall provide to the District, on the terms and conditions set forth in this Agreement, all products and services required for the development, installation, and maintenance of the Awardee Product Title and services associated with the Solution, other than the provision of hardware and Third Party Software expressly excluded under the terms of this Agreement and the responsibilities expressly reserved to the District as set forth in the Statement of Work.
- 2.2 Specific Services and Deliverables. Awardee shall provide all those Services and Deliverables required with respect to the installation, customization, configuration, testing, training and maintenance of the Solution, except for those responsibilities allocated to District under this Agreement. Without limiting the generality of the foregoing, Awardee shall be responsible for all specific obligations identified in the Statement of Work, including, but not limited to: *Des Moines Public Schools* _____ *Scope of Work* provided to the District by the Awardee on ____/____, 2016.
- 2.3 Entire Agreement; Order of Precedence. This Agreement constitutes a complete understanding of the parties with respect to the subject matter herein and supersedes all prior understandings, promises, representations, and agreements, written or oral, relating thereto. Any actual or asserted ambiguity in this Agreement shall be resolved by reference first to the text of this Agreement (including the Statement of Work), second, the RFP, and, third, the Proposal.
- 2.4 Software Maintenance Services. During the term of this Agreement, Awardee shall provide all services required by the District to maintain and upgrade the Awardee Product Title as set forth in the Awardee Software Maintenance Agreement. Upon the expiration of the term of this Agreement, the District may elect to purchase annual Maintenance Services at a rate consistent with the pricing under this Agreement.
- 2.5 Software Maintenance Services
Nothing herein shall be deemed to obligate the District to purchase maintenance services from Awardee beyond the term of this Agreement.
- 2.6 Adoption of Updates, etc. In creating and delivering the Maintenance Materials, Awardee shall use its best efforts to avoid the need of the District to upgrade any Platform Software.
- 2.7 Delivery of Source Code and Documentation. In connection with the delivery of each component of Licensed Software for which Awardee has granted or is obligated to grant rights to the District with respect to Source Code, Awardee shall at the same time deliver Source Code in standard machine-readable formats sufficient to generate the Object Code of the Licensed Software or component thereof being delivered, together with all Documentation of such Source Code. Source code will be distributed at no cost via downloading from the secure Awardee website.
- 2.8 Electronic Delivery. All Deliverables of Licensed Software and Documentation required or permitted under the terms of this Agreement shall be delivered from a point of transmission outside of facilities owned or operated by the District by electronic transmission via common telecommunications carrier or the public Internet to and for storage within computing hardware and electronic storage devices owned or under the control of the District.

- 2.8 No tangible media Object Code, Source Code, or Documentation shall be delivered to the possession and/or ownership of the District.
- 2.9 Standard of Care. Awardee shall provide the Solution in accordance with best practices consistent with or exceeding industry standards.
- 2.10 Acceptance of Deliverables; No Waiver. Delivery of a Deliverable shall not be deemed complete unless and until the Deliverable shall have successfully completed the Acceptance Tests specified for such Deliverable. In the event that a Deliverable shall not satisfy the requirements of the applicable Acceptance Test, Awardee shall promptly correct and/or revise the Deliverable such that the Deliverable shall satisfy the requirements of the specified Acceptance Test and shall continue to correct and/or revise the Deliverable until such time as the Acceptance Test for such Deliverable shall have been completed successfully. No failure to object or inaction on the part of the District shall be deemed an acceptance of any Deliverable under this Agreement, nor to delay or waive the due date for any Critical Deliverable, except that the District's use of the Deliverable in Production shall be deemed its acceptance. In the event the District fails to meet its obligations for timely review of Deliverables, Awardee may notify the District in writing and, if five business days pass without District acceptance or rejection, Awardee may elect to invoke the Issue Resolution Process. Upon the invocation by Awardee of the Issue Resolution Process, the due date for any subsequent Deliverable that is dependent on the Deliverable for which District review is not yet complete shall be extended by the amount of time by which such delay by the District reasonably delays Awardee's ability to deliver such subsequent Deliverable.
- 2.11 Third Party Software Procurement. The District may elect to purchase licenses to one or more items of Third Party Software products itemized in the Pricing Schedule, by issuing a purchase order for the same to Awardee. Awardee shall thereafter arrange for the delivery of the same to the District, by electronic means to the maximum extent made possible by the licensor of such Third Party Software. In such event, the District shall pay the price for such items in accordance with the price, formula or method set forth in the Pricing Schedule. Provided that license rights for such Third Party Software shall run directly to the District from its respective licensor, the District's rights with respect to such Third Party Software shall be solely those rights (including rights to install, use and make derivative works) conveyed under the respective licensor's license agreements. In the event that Awardee acts as a sub-licensor to the District of such Third Party Software, Awardee shall assign to the District or otherwise assure to the District that the District has all rights to such software as it would have under the licensor's prevailing direct end user license agreements. Awardee shall arrange for the District to contract with the licensor of such software for customary maintenance and update services.
- 2.12 No Obligation of the District. Nothing herein, however, shall require the District to purchase any Third Party Software other than Licensed Software from Awardee and the District shall be free in its sole discretion to select any vendor it so chooses for such purchases.

2.13 Documentation Standards. In connection with the delivery to the District of each installment, component or version of the Licensed Software or Maintenance Materials, Awardee shall provide all Documentation reasonably required for the configuration, installation, testing, maintenance, and operation of such installment, component, or version, as required by the Statement of Work. Technical Documentation shall be in most cases in the form of electronic tutorials and written in a manner sufficient to enable a software engineer or programmer ordinarily skilled in the art and in the use of the Platform Software to maintain such software with commercially reasonable effort, to make reasonable modifications and enhancements for maintenance of existing functionality, and to aid in isolating and correcting design or functional errors in the Licensed Software. Documentation of user instructions shall be in accordance with best industry practices for similar software. Acceptance testing shall include review of associated Documentation for compliance with these standards.

3. Intellectual Property Rights and Confidential Information

- 3.0 Object Code License. Awardee grants to the District a perpetual, non-exclusive, non-transferable, non-refundable royalty-free right and license to install and use the Object Code of all Licensed Software on any, some or all computing devices used by or for the benefit of the District in connection with the operation of the District, effective on delivery of each component or installment thereof, subject only to payment therefore as provided in this Agreement and the Pricing Schedule.
- 3.1 The right granted by this paragraph shall extend to the right of contractors to the District, other government agencies, students, parents, health care providers, and other End Users who have a reasonable need to avail themselves of the services provided by the Awardee Product Title for the sole purpose of conducting District business, to use the Licensed Software by remote or local access, and to install and use any applets or plug-ins that are part of the Licensed Software and are provided for the purpose of using or facilitating the use of the Licensed Software or any portion thereof on a remote or client basis. The District shall not sublicense any rights granted to the District under this Agreement.
- 3.2 Source Code License. Effective upon each delivery to the District of Licensed Software to the District pursuant to this Agreement and subject to payment in full by the District of the License Fees set forth in the Pricing Schedule, Awardee grants to the District a perpetual, non-exclusive, non-transferable, non-refundable royalty-free right and license to copy, make derivative works, install and use such Licensed Software in Source Code form for the purpose of creating, modifying, testing, configuring, operating and maintaining the Licensed Software in Object Code form as permitted by Section 3.0 above. The rights to Source Code granted under this Section shall not include the right to deliver copies of such Source Code to independent contractors engaged by the District to perform activities for or on behalf of the District, except with Awardee's written approval which should not be unreasonably withheld. And further provided that such contractors are bound by obligations of confidentiality at least as strict as the obligations of confidentiality of the District to Awardee with respect to the particular materials being delivered or proposed to be delivered to such contractor and that no such independent contractor shall receive any rights to use such Licensed Software except for the sole benefit of the District.

- 3.3 Software License. Awardee grants to District and District accepts from Awardee a perpetual, non-exclusive, non-transferable, non-refundable royalty-free right and license to install and use the Software (including all object, source or executable codes related thereto) and/or System, subject to the conditions and restrictions contained herein. Except as otherwise provided in this Agreement, the Software and/or System shall be used only for District's internal business needs. Except as otherwise provided in this Agreement, District shall not permit any third party, to use the Software and/or System nor shall District grant any sublicense for the use of the Software and/or System. All modifications, enhancements, and updates to the Software provided by Awardee shall become part of the Software and be subject to the terms and conditions herein. District may use the Awardee Products to develop and use (for only the internal business needs of District) interfaces, Software modifications, or enhancements. Awardee will continue to own all Intellectual Property Rights to any object code, executable code or source code developed by Awardee.
- 3.4 Restrictions. District may not rent, lease or re-license the Software or use the Software to provide data processing, outsourcing, service bureau, hosting services or training to third parties. District will retain and include on each copy of the Software, all titles, trademarks, and copyright and restricted rights notices. District will not disassemble, decompile, decode or reverse engineer the Software, except as expressly permitted by applicable law or contract for the Awardee Products.
- 3.5 Support by Awardee. Awardee will provide District with Support for the Awardee Products, including, but not limited to (a) Repair, replace, or provide District with an upgrade of the Awardee-Supported Products to comply with the Product Warranty; (b) Make Awardee's standard telephone support available to persons authorized by District, including general technical information and assistance with problem determination, isolation, verification, and resolution during regular business hours; and (c) Provide District updates, enhancements, and new releases of the Awardee Supported Products when generally made available by Awardee for installation and use by District.
- 3.6 All Support provided by Awardee shall be performed by qualified and competent personnel using sound, professional practices.
- 3.7 Software Acquired from Third Parties. Awardee does not hold any third party source code.
- 3.8 Documentation License. Upon delivery to the District of Documentation other than documentation of Third Party Software, Awardee grants to the District a non-exclusive, perpetual, royalty-free right and license to copy, make derivative works, distribute and display such Documentation to authorized users of the Solution. In the case of Documentation containing Proprietary Information of Awardee, the distribution of copies of such Documentation shall be limited to Persons with a reasonable need to know such Proprietary Information in connection with their activities for the District who are bound by obligations of confidentiality at least as strict as the obligations of confidentiality of the District to Awardee with respect to the particular materials being delivered or proposed to be delivered.

- 3.9 Protection of Proprietary Information. The District agrees that it will not disclose Awardee's Proprietary Information to any Person, except to (a) the District's employees with a need to know who are bound by agreements or employment policies restricting the right of such employees to use or disclose such Proprietary Information for any purpose other than the Project, and (b) authorized contractors, in accordance with this Agreement. The District agrees to preserve the confidentiality of Awardee's Proprietary Information with the same level of care it uses with respect to its own Confidential Information, but in no event less than a reasonable level of care. The foregoing obligation does not apply to Proprietary Information which is (a) already known to the District at the time of its receipt from Awardee, (b) is disclosed to the District by a third party who had the right to make such disclosure without any confidentiality restrictions, (c) is, or through no fault of the District, has become generally available to the public, or (d) is independently developed by the District without access to, or use of, Awardee's Proprietary Information. Notwithstanding the foregoing, the District may disclose Proprietary Information of Awardee to the extent that such disclosure is (i) necessary for the District to enforce its rights under this Agreement, or (ii) required by law or by the order of a court or similar judicial or administrative body.
- 3.10 In the event the District receives a third party subpoena, notice to produce or other judicial or administrative request for disclosure, the District shall notify Awardee as soon as is reasonably practicable after the receipt of such request in order to permit Awardee to take such action as Awardee sees fit to obtain protective orders or other relief from the compulsion of process against the District to compel such disclosure. The Awardee will be responsible for all costs associated with this action.
- 3.11 Protection of Confidential Information. Awardee agrees that it will not disclose the District's Confidential Information to any Person, except to Awardee's employees with a need to know who are bound by agreements or employment policies restricting the right of such employees to use or disclose such Confidential Information for any purpose other than the Project. Awardee agrees to preserve the confidentiality of the District's Confidential Information with the same level of care it uses with respect to its own Proprietary Information, but in no event less than a reasonable level of care. Awardee shall implement commercially reasonable operating practices and procedures that will (i) maintain the confidentiality and assure the physical security of all Confidential Information, including, but not limited to, District student records and District employee personnel files, accessed and used in the course of providing professional services under this Agreement; (ii) prohibit the release or disclosure of Confidential Information to anyone except authorized personnel, (iii) prevent any unauthorized access to Confidential Information, and (iv) preclude the unauthorized use, release, or disclosure of Confidential Information. The foregoing obligation does not apply to Confidential Information which is required by law or by the order of a court or similar judicial or administrative body to be disclosed. In the event Awardee receives a third party subpoena, notice to produce or other judicial or administrative request for disclosure, Awardee shall notify the District as soon as is reasonably practicable after the receipt of such request in order to permit the District to take such action as the District sees fit to obtain protective orders or other relief from the compulsion of process against Awardee to compel such disclosure. Awardee shall immediately notify the District in the event of any security breach or other unauthorized access or disclosure of District information, and take all remedial steps as deemed necessary by the District.

- 3.12 Rights in Data. The District is and will remain the owner of all data provided to Awardee by the District pursuant to this Agreement. Awardee will not use such data for any purpose other than providing Services and support to customers under this Agreement, nor will any part of such data be sold, assigned, leased or otherwise disclosed to third parties (other than authorized subcontractors for purposes of performance of the Services) or commercially exploited by or on behalf of Awardee. Awardee will not possess or assert any lien or other right against such data. The District agrees not to provide or otherwise make the Licensed Software available in any form to any person, except in strict conformity with the licenses expressly granted under this Agreement.
- 3.13 Awardee Intellectual Property; Residual Rights. Except as otherwise provided in this Agreement, Awardee retains all right, title, and interest in and to any inventions (patentable or otherwise), discoveries, improvements or copyrightable works, and Licensed Software (whether the Awardee Supported Software, Enhanced Software or District Features) that Awardee creates or licenses to the District in connection with its performance of Services hereunder (collectively "Awardee Intellectual Property"). The District shall execute such truthful acknowledgments, affidavits or other documentation reasonably required by Awardee, during and for a reasonable period after the Term, to assist in proving Awardee creation and/or ownership of Awardee Intellectual Property. The District may seek compensation from the Awardee to defray all costs associated with this assistance. Subject to any restrictions expressed elsewhere in this Agreement, each Party and its respective subcontractors shall have the right to re-use any of their know-how, ideas, concepts, methods, processes, expressions, skill, experience or similar information, however characterized, whether in tangible or intangible form, and whether used by them during the Project or not, at any time and without limitation, provided that such use shall not infringe the patents, copyrights, or trade secrets of the other Party. Each Party further retains ownership of any and all of its respective intellectual property rights that existed prior to the effective date of this Agreement including, without limitation, all methods, concepts, designs, reports, programs, and templates, and any Third Party Software. Nothing in this Agreement will prevent Awardee or its authorized subcontractors from marketing, developing, using, and performing services similar to or competitive with the Services and products furnished under this Agreement, or will prevent the District from engaging other contractors to provide services of any sort to the District provided that the intellectual property rights of Awardee are not thereby infringed.

4. Warranties

- 4.0 Awardee Warranties. Awardee hereby warrants that all items supplied to the District, including all hardware, software, and/or any Deliverable, meet the standards of merchantability and is fit for the particular purpose for which it was supplied. The Solution will interoperate with the other software systems used by the District and comply with the District's interoperability standard as provided in the request for proposal. The Product media as provided by Awardee will be free of material defects. Before Product delivery by Awardee, Awardee will use up-to-date, commercially available virus scanning and cleaning products, and will not, based on the results of that scanning and cleaning, deliver to District Products containing any computer viruses, time bombs, harmful and malicious data, or other undocumented programs which inhibit Product use and operation. When properly installed, the unmodified Software provided by Awardee for the Awardee Supported Products will operate materially and substantially as described in the Documentation for that Software. The Solution will be available to the District at all times, except during times as may be mutually agreed upon by the parties in advance. Awardee shall provide the District with a pro-rated price credit in an amount based on the duration of any downtime or other periods that the Solution is not available.
- 4.1 Product Warranty or Support Remedies. Awardee will provide Support to repair or replace the Products to enable the Products to comply with the Product Warranty. If Awardee does not comply with the foregoing obligation, District may recover direct damages for the Awardee Supported Products subject to the damage claim, including up to a refund of the License Fees or Service Fees paid by District to Awardee. District may also elect to terminate Support, the Subscription Services, the License, or the Agreement if Awardee's breach is not cured in accordance with the provisions of this Agreement.
- 4.2 Software Escrow. The uninterrupted availability of the Software is mission-critical to District in the conduct of its business. To provide for the availability of the Software, Awardee agrees that, on the Commencement Date and every six (6) months thereafter, Awardee shall at its own expense deposit with an Escrow Agent the source code for the Software, including all relevant commentary, explanations and other documentation, as well as instructions to compile the source code, plus all revisions to the Software source code encompassing all corrections, changes, modifications and enhancements made to the Software by Awardee (the "Escrow Material"). The Escrow Agent shall be mutually acceptable to both parties. Control over access to the Escrow Material shall rest with Escrow Agent.
- 4.3 In the event Awardee commits a material breach of this Agreement that remains uncured, or in the event that Awardee becomes subject to any proceeding involving insolvency or the protection of or from creditors, or in the event of any other circumstance which demonstrates the inability or unwillingness of Awardee to fulfill its obligations to District, then District shall have the right to access the Escrow Material. In addition to the release of the Escrow Material as described herein, Awardee shall pay to District the following Liquidated Damages as a percentage of the total fees paid under this Agreement at the time of such release:

Year 1:	75%
Year 2:	60%
Year 3:	50%
Year 4:	40%
Year 5:	25%

- 4.4 Software Limitations. To the best of Awardee's knowledge, no software comprising a Deliverable or licensed hereunder shall contain any virus, "Trojan horse," timer, clock, counter, or other limiting design, instruction, or routine that would erase data or programming or cause the software or any hardware or computer system to become inoperable or otherwise incapable of being used in the full manner for which it was designed and created (a "Software Limitation"). Awardee shall not include any such Software Limitation in any Maintenance Materials provided to the District. Awardee also shall use all reasonable practices and security procedures necessary to avoid insertion of Software Limitations prior to installation of any Deliverable. Any Deliverable shall operate compatibly with major commercially available virus protection programs that District may use. Further, no Software Limitation shall be triggered by: (i) any Deliverable being used or copied a certain number of times, or after the lapse of a certain period of time; (ii) any Deliverable being installed on or moved to a central processing unit or system that has a serial number, model number, or other identification different from the central processing unit or system on which such Deliverable or licensed software originally was installed; or (iii) the occurrence or lapse of any similar triggering factor or event.
- 4.4 Accuracy of Documentation. All Documentation shall be complete and describe the applicable Deliverable and components thereof accurately so as to enable a staff consisting of a reasonable number of information systems professionals with ordinary skills and experience to utilize the Deliverable for the purposes for which it is being acquired by or intended for use by District.
- 4.5 Non-infringement. Awardee has full title and right to license and deliver to District, all Deliverables, including without limitation software owned by Awardee and Third Party Software (other than District Supplied Software). No Deliverable shall violate or infringe upon the rights of any third party, including, without limitation, any patent rights, copyright rights, trademark rights, trade secret rights, or other proprietary rights of any kind. Lawful use by the District Rights of the Awardee Product Title Software in accordance with the Specifications does not require the District to secure rights to use Platform Software or other Third Party Software (whether acquired through Awardee or through or from others) except for those specific items identified in the Statement of Work in the quantities and/or for the categories of users set forth in the Statement of Work.
- 4.7 Authority. Awardee has full power and authority to enter into this Agreement and to perform hereunder.
- 4.8 No Claims. There is no action, debarment, suit, proceeding, or material claim or investigation pending or threatened against it in any court, or by or before any federal, state, municipal, or other governmental department, commission, board, bureau, agency, or instrumentality, domestic or foreign, or before any arbitrator of any kind, that, if adversely determined, might adversely affect any Deliverable or restrict Awardee's ability to complete the transactions contemplated by this Agreement, or restrict District's right to use any Deliverable. Awardee knows of no basis for any such action, suit, claim, investigation, or proceeding.

- 4.9 Third Party Warranties. Awardee has the right to assign and transfer to District all of Awardee's rights under any and all warranties received from the supplier (other than Awardee) of any component of any Deliverable, and has the right to assign or transfer to District such supplier's warranties.

5. Obligations of the District

- 5.0 Development Facilities. During the term of this Agreement, the District shall provide Awardee's personnel with limited office space and certain other facilities as specifically described in the Statement of Work, subject to compliance by Awardee, its employees and permitted subcontractors with all applicable rules of occupancy of such facilities imposed by the lessor to the District of such facilities and all applicable rules, policies and procedures of the District as applied to District employees and other contractors using such facilities. In no event may such facilities be used for any purpose other than performing Services pursuant to this Agreement.
- 5.1 Except as expressly provided in the Statement of Work and/or the Pricing Schedule, Awardee shall be solely responsible for all other costs associated with its personnel, contractors, software development, computing equipment and other facilities as a specified in the response to the RFP.
- 5.2 Staffing. The District shall provide those certain personnel identified in the District Resource Plan to perform the functions therein stated, subject to reasonable coordination with their respective work schedules and responsibilities.
- 5.3 Testing Platforms. The District shall be responsible for supplying and operating at its expense, the Test Environment, including all hardware and Platform Software (other than software to be supplied by Awardee) required for the conduct of preliminary and final acceptance testing as described in the Statement of Work.
- 5.4 Awardee Product Title Operation. The District shall be responsible for the operation of the Awardee Product Title in Production, including without limitation, the following:
- 5.5 Awardee Product Title Operation.
- A. Installing the Licensed Software and Platform Software in the computing and telecommunications environment required for Production (with the assistance of Awardee during the initial release to Production, as well as any update or Upgrade involving a material change in hardware Platform Software that is required to be installed by the District under this Agreement).
 - B. Implementing proper procedures to assure security and accuracy of input and output, and restart and recovery in the event of a malfunction.
 - C. Establishing proper backup procedures.
 - D. Using reasonable efforts in the event of system malfunction to establish temporary operating procedures or work-arounds.
- 5.6 Installation of Releases. The District shall determine in its sole discretion whether and when to install updates or Releases of the Licensed Software provided such action or inaction will have no impact on the Project schedule. Awardee shall not be responsible for activities required for the actual installation of such updates or Releases unless so provided in the Statement of Work. The District shall be responsible for installing any Release from Awardee that is reasonably required because of the withdrawal of support by a third party for any Platform Software, state requirements or when such update or Release is required to support Awardee's commitment to the Project schedule.

- 5.7 Proprietary Notices. District agrees that any copies of the Licensed Software and Documentation that it makes pursuant to this Agreement shall bear all copyright, trademark, and other proprietary notices included therein by Awardee or the respective third party licensor. District may add its own copyright or other proprietary notice to any copy of the Licensed Software or Documentation that contains modifications made by District in accordance with the terms of this Agreement.
- 5.8 Indemnity. The District and its employees can neither agree to hold Awardee harmless nor agree to indemnify it and any contracts or provisions to the contrary are void.
- 5.9 Third Party Software. The District shall not be liable to Awardee in any fashion or to any extent for any claim brought against Awardee by or in the name of any licensor or supplier of Platform Software, based on the District's failure to purchase or maintain licenses to such Platform Software unless a) Awardee has identified clearly and unambiguously in the Statement of Work the requirement for such licenses and the specific basis of computation of any fees or other charges due such licensor or supplier, such that the amount of such charges is fully known as of the date of execution hereof.

6. Other Obligations of Awardee; Insurance, Indemnities

- 6.0 Compliance with Laws and Regulations. Awardee shall comply with applicable federal, state, and local laws and regulations in connection with the performance of this Agreement (including, but not limited to, laws regarding restrictions on sex offenders). The Awardee will be required to certify that any employee that may come in contact with a student(s) has not been convicted of crime of moral turpitude which has required them to be registered as a sex offender.
- 6.1 Awardee will use commercially reasonable efforts, in conjunction with input and assistance from the District, to cause the Licensed Software, as modified for the District, to provide the functionality to enable the District to comply with its obligations under applicable law.
- 6.2 Staffing and Management. During the term of this Agreement, Awardee shall not reassign or modify the operational authority of the management personnel listed in the Scope Management Process without the consent of the District, except (a) upon request by the District, (b) as the result of the termination by Awardee of the employment of the affected person, or (c) upon reasonable request initiated by such affected person. Awardee shall furthermore refrain from reassigning or reallocating work on the Project if a reasonably foreseeable consequence of such reassignment or reallocation would be to require the repetition of work or delay in the completion of the delivery of any Deliverable. Notwithstanding the foregoing, upon request by the District for a change in such management personnel, Awardee shall use commercially reasonable efforts to remove and replace such individual Awardee personnel assigned to the Project in a timely fashion. At no time will Awardee personnel be considered as employees of the District.

- 6.3 Use of Contractors. Prior to subcontracting any portion of the Services, Awardee shall notify the District of the proposed subcontract and proposed subcontractor, including without limitation any legal entity and/or any individual not in the exclusive employ of Awardee who would be involved in any manner in the Services, other than activities relating the development of the Awardee Product Title Software product. The notice should provide background information with respect to the proposed subcontractor that is appropriate to the nature and scope of the subcontractor's activities. In the event the District objects to such subcontractor, Awardee shall not use such subcontractor in connection with such work. No subcontractors have yet been approved by the District as of the execution of this Agreement. No subcontracting or other arrangement shall release Awardee from its responsibility for its obligations under this Agreement. No subcontractor may be engaged unless such subcontractor and each of its employees providing services on the relevant engagement certifies in writing such qualifications as are required by the District for contractors generally, and agrees in writing to guard the confidentiality of Confidential Information of the District to the same standard of care as binds Awardee under this Agreement and agrees in writing, prior to commencing work, that all work is a "work for hire" under the Copyright Laws of the United States and that in the event that such work is not eligible for treatment as such a work for hire, such subcontractor presently, prospectively and irrevocably assigns any copyrights in such work to Awardee. Use of such contractors shall also be conditioned on contractors' compliance with any insurance requirements otherwise applicable to Awardee, except that the applicable limit shall be \$2,000,000, combined limit. The District may require delivery of reasonable evidence of compliance as a condition of consent.
- 6.4 Financial Reporting; Audit and Inspection of Records. Awardee shall, on an annual basis, provide District with compiled financial information if District requests them in writing.
- 6.5 Awardee agrees that until the expiration of five years after expenditure of funds under this Agreement, the District and any of its duly authorized representatives shall have access to and the right to examine any and all directly pertinent books, documents, papers, and records of the Awardee involving transactions related to this Agreement. Awardee agrees that payments made under this Agreement shall be subject to reduction for amounts charged that are found on the basis of audit examination not to constitute allowable fees or costs. All required records shall be maintained until an audit is completed and all questions arising from such audit are resolved, or until five years after completion of all work under this Agreement.
- 6.6 Indemnity. Awardee shall defend, indemnify and hold harmless District, all members of the Board of Education, and their officers, employees, agents, and attorneys from and against any and all demands, claims, liabilities, damages, losses, and expenses, including reasonable attorney fees, suffered by District arising out of Awardee's violation of law or right of a third party (including, but not limited to, infringement of any copyright or other proprietary right), Awardee's breach of this Agreement, or Awardee's negligence, or otherwise arising in connection with Awardee's provision of the Solution, the Services, the Deliverables, or any component or part thereof, or Awardee's failure to provide the same. Awardee's indemnification obligations shall extend to the actions or omissions of its employees and subcontractors under this Agreement.

- 6.6 District shall notify Awardee in writing of the initial demand or claim brought against it. The selection of counsel, the conduct of the defense of any lawsuit, and any settlement shall be within Awardee's control; provided that District shall have the right to participate in the defense of any such demand or claim using counsel of its choice, at its expense. No settlement shall be made without notice to the District.
- 6.7 Use Disruption. If a third-party intellectual property claim causes the use of any Deliverable, any Documentation, or any component or part thereof to be seriously endangered or disrupted, Awardee shall, at the option of District, (i) replace the same without additional charge, buy compatible, functionally equivalent and non-infringing product(s); (ii) modify such Deliverable, Documentation, or component or part, to avoid the claim or infringement and retain all functionality; (iii) obtain license(s) for District to continue use of such Deliverable, Documentation, or component or part, and pay any additional fee required for such licenses Nothing in this section shall relieve Awardee from any obligation to deliver all material functions of the Awardee Product Title as required by the Project Documents.
- 6.8 General Insurance Requirements. Awardee shall secure and maintain, as a minimum, insurance as set forth below with insurance companies reasonably acceptable to the District to protect Awardee from claims which may arise from operations under the Agreement, whether such operations be by Awardee or anyone employed or subcontracted by Awardee. Awardee further shall furnish upon request of the District, certificates of such insurance, naming the District as a certificate holder, signed by an authorized representative of the insurance carrier, which shall include a minimum thirty-one (31) day cancellation clause. Failure to maintain the insurance and furnish the required certificates may be considered a breach of this Agreement by Awardee and the District may exercise any, some, or all of its rights on breach by Awardee.
- A. Workers' Compensation Insurance in accordance with provisions of applicable law.
 - B. Comprehensive Bodily Injury and Property Damage Liability Insurance for Combined Single Limit Bodily Injury and/or Property Damage Liability of not less than \$1,000,000 each occurrence, \$2,000,000 aggregate. The policy so secured and maintained shall include coverage for Contractual Liability, Products Liability or Completed Operations, and Owned, Hired, and Non-owned Automobiles Insurance; and shall be endorsed to name the District and the Board of Education as additional insureds and to provide specifically that any insurance carried by the District which may be applicable to any claim or loss shall be deemed excess and Awardee's insurance primary despite any conflicting provisions in Awardee's policy to the contrary.
- 6.9 Damage to Property. Awardee shall be responsible and liable for all damage to the property of the District which is caused by Awardee or its sub-contractors, or their respective employees, during the term of this Agreement and shall, at its own expense, repair, and/or replace all damaged property to its original condition.
- 6.10 Performance Bond. In the event of a significant problem in system performance prior to final acceptance that affects the day-to-day system operational effectiveness or delivery of function to the agreed upon schedule, District will document the issue to Awardee. Awardee will have 30 days to deliver a fix. If the fix is unacceptable, District will have the right to demand some financial contingency. This could take the form of an escrow amount or a performance bond. If a performance bond is requested, the amount will be based on the cumulative payment percentages at the current acceptance date as shown on the payment schedule. Awardee will pay for this performance bond.

6.11 Cost Recovery. In the event that the District institutes legal proceedings against Awardee to recover amounts due and owing under this Agreement, the District shall be entitled to recover from Awardee all costs related to such collection.

7. Pricing

7.0 Fees. The pricing for the Solution is based on a fee amount established for each year of the Agreement. All aspects of the Solution, including travel and other costs, are included in the amount. The pricing for the Solution is set forth in the agreement. In no event will the total amount paid by the District under this Agreement exceed the fee amounts stated therein.

8. Payment

8.0 Payment on Deliverables. For all software and Documentation deliverables, District shall pay to Awardee the fees and costs set forth beside the respective Deliverables on the Pricing Schedule.

8.1 Conditions to Payment. Payment to Awardee of the amounts due on account of each software Deliverable and Documentation Deliverable or group thereof under this Agreement shall be conditioned strictly upon satisfaction of the conditions for such payment set forth in the Pricing Schedule and specifically upon the successful and timely completion of the Acceptance Tests specified for the particular Deliverable.

8.2 Maintenance Services. The pricing for the Solution shall cover all Maintenance Services, updates and Releases to the Licensed Software during the term of this Agreement. No separate fee for Maintenance Services shall be assessed.

8.3 Time and Manner of Payment. The District shall pay each amount set forth in the Pricing Schedule on or before forty-five (45) days after its receipt of an invoice for the amount, which invoice shall have been rendered no earlier than the successful completion of the acceptance tests or criteria set forth as a condition of such payment. Except in the case of suspension of payments for failure to Deliver Critical Deliverables as provided in this Agreement, in the event the District disputes any amount due under an invoice, it shall nonetheless pay the amount with which it has not dispute and shall use the dispute resolution procedures provided by this Agreement to resolve any such dispute. The District reserves the right to pay all invoices using a virtual or procurement card or direct funds transfer.

8.4 Work Orders. In the event that an authorized representative of the District shall issue a Work Order for Services, Third Party Software and/or equipment under this Agreement, the District shall pay to Awardee an amount determined by the time and materials fee schedules under the Pricing Schedule, not to exceed the maximum cumulative amount for Work Orders under this Agreement, as set forth in the Scope Management Process and the Pricing Schedule. Amounts due under this paragraph shall be paid within thirty (30) days after receipt by the District of Awardee's statement for the respective Services, itemizing the time and materials expended on the particular Work Order for the month preceding and cumulatively for that Work Order and the aggregate of Work Orders to date.

8.5 Form of Invoicing. Invoices shall itemize services, dates, and deliverables consistent with the terms of this Agreement. Additional documentation shall be furnished by Awardee to the District upon request. Invoices shall be mailed to the Business Department at the District.

- 8.6 Change Orders. When quoting a price for a Change Order under this Agreement, Awardee shall determine the fee by the process and formula set forth in the Scope Management Process and Pricing Schedule.
- 8.7 Reduction of Scope. The District may determine to eliminate certain of the Services or Deliverables from the scope of the Project. In such event, the parties shall negotiate in good faith as to an equitable reduction in the applicable prices set forth in the Pricing Schedule.
- 8.8 Most Favored Customer. Awardee agrees to treat District as its most favored customer. Awardee represents that all of the fees and prices, warranties, benefits, and other terms being provided to District under this Agreement are equivalent to or better than the fees and prices, warranties, benefits, and other terms being offered by Awardee to any other customer for similar services under similar circumstances.
- 8.9 Suspension of Payments. In the event that any Critical Deliverable shall not be delivered or accepted on or before the applicable dates specified for such Critical Deliverable, all payment for Deliverables to be delivered subsequent to such delayed deliverable shall be suspended until the acceptance of all Critical Deliverables which have not been timely delivered or accepted. In no event shall the suspension of a payment under this paragraph relieve Awardee from any other date for delivery or acceptance.
- 8.10 Taxes. Awardee acknowledges that the District is exempt from sales and use taxes imposed under Iowa law. Except as expressly provided in the Statement of Work, all software Deliverables are presumed to be deliverable solely by electronic transmission and not on tangible media.
- 8.11 Allowance for Suspension or Delay Caused by District. In the event that the District shall suspend the Project, delay any Deliverable Date, fail to provide resources on a timely basis in accordance with the District Resource Plan, or fail to respond to a request for review and approval, the following provisions shall apply:
- A. The due date for any Deliverable set forth in the Statement of Work that is dependent on such performance by the District shall be deemed adjusted equitably to allow for the effect of such suspension or delay on Awardee's ability to supply or perform such Deliverable, taking into account a reasonable adjustment in assignment by Awardee of its resources to provide Deliverables under this Agreement

9. Term and Termination

- 9.0 Term. The term of this Agreement shall commence on the Commencement Date and shall continue thereafter until 6/30/2018, unless sooner terminated in accordance with this Agreement.
- 9.1 Termination for Funding Restriction. The District's approval of this Agreement is subject to a budget encumbrance intended to fund performance through June 30, 2017. Each fiscal year of the District thereafter, it is expected that the Board of Education will consider for allocation the amount set forth in the Pricing Schedule for the respective year of the term of this Agreement ("Fiscal Allocation"). Nothing herein, however, shall be construed so as to require the District to allocate any sums on this Agreement beyond the Initial Allocation.

- 9.1 If, in connection with the determination of the budget for the District for each successive year of the term of this Agreement, the Board of Education determines to allocate a smaller amount to the Project than the Fiscal Allocation for the year in question, the parties shall negotiate in good faith for a reasonable time, not to exceed sixty (60) days as to the reduction in Scope of Services reasonably required to accommodate the reduction in such allocation. If the District makes a determination that the reduction in scope to which Awardee has agreed is too large to be practicable, the District may either: (a) terminate this Agreement in full without further charge beyond amounts incurred in accordance with this Agreement or encumbered by District, (b) suspend the Agreement until such time that the Board of Education does encumber sufficient funds to continue, or (c) provided that the budget allocation by the Board of Education is sufficient, may continue the Agreement in part with selected Deliverables or Services and terminate all remaining Deliverables and Services. Such notice shall be given promptly following the expiration of the 60-day negotiation period specified in this Section. In no event shall the District be liable for any amounts beyond the Initial Allocation, unless the same shall have been duly appropriated by action of the Board of Education.
- 9.2 Termination for Convenience. The District may terminate this Agreement at any time without cause upon a minimum 30 days' written notice to Awardee, in which case the following provisions shall apply:
- A. The notice may be effective as of a date certain or may apply only after the delivery of certain enumerated Deliverables.
 - B. The District shall pay to Awardee upon receipt of an invoice from Awardee otherwise complying with this Agreement, for any Services in respect of a Deliverable not yet Delivered which have actually been performed by Awardee, pro-rated on a percentage completion basis based on Awardee's reconciliation of labor actually expended compared to labor originally estimated by Awardee in constructing its pricing.
 - C. No other payments shall be due to Awardee.
- 9.3 Failure to Progress. Awardee agrees to provide the Solution in an efficient and timely manner applying commercially reasonable standards. The Statement of Work provides certain Deliverable Dates for the delivery of certain Critical Deliverables identified therein. If Delivery of any Critical Deliverable shall not have been completed by the Deliverable Date for such Critical Deliverable, and such delay is not materially caused by any fault of District or a third party over which Awardee does not have the right to control, the District shall give Awardee notice providing a period of not less than thirty (30) days to complete Delivery of such Critical Deliverable. In the event that Awardee shall fail to complete Delivery of the Critical Deliverable identified in such notice within the stated cure period, the District may, in its sole discretion, thereafter either (a) extend the time for cure, or (b) declare an immediate termination of this Agreement (or Services related to such Critical Deliverable) for Failure to Progress without further payment obligation on the part of the District with respect to the portion so terminated (other than charges already due and owing). In the event of a termination for Failure to Progress in accordance with this section, the District shall have no further liability to Awardee with respect to any payments not yet due and owing that are related to the portion so terminated.

- 9.4 Termination for Breach. In the event that Awardee a) commits a material breach of this Agreement, that, if capable of being cured within thirty (30) days, is not cured within thirty (30) days after notice of breach from the District to Awardee; b) commits a material breach of this Agreement which is not capable of being cured within thirty (30) days and fails to (A) proceed promptly and diligently to correct the breach, and (B) cure the breach to the District's reasonable satisfaction within ninety (90) days after receiving notice; or c) commits a material breach of this Agreement which, by its nature, cannot be cured, then the District may (without limitation on other remedies that may be available to it under this Agreement, at law or in equity), by giving written notice to Awardee, terminate this Agreement, in whole or as to selected Deliverables or Services, as of a date specified in the notice of termination.
- 9.5 Material Breach. For the purposes of the foregoing provision "material breach" shall mean the failure of Awardee to perform any material obligation, including without limitation, the following:
- A. Failure to Deliver a Critical Deliverable within the notice period specified for a notice of Failure to Progress.
 - B. Chronic failures to deliver Deliverables on a timely basis, without such failures being materially caused by fault of the District, a third party over which Awardee does not have the legal right to control, or an event of Force Majeure.
 - C. Breach of any warranty given pursuant to 4.0, which breach materially affects the ability of the District to deploy and/or use the Awardee Product Title.
- 9.6 Termination for Nonpayment. If the District fails to pay Awardee when due any charges under the Contract within ninety (90) days after presentation of an invoice and fails to make such payment within thirty (30) days of notice from Awardee of the failure to make such payment, then Awardee may terminate this Agreement without further notice, provided, however, that such termination shall not relieve the District of its payment obligations to Awardee for services rendered and reimbursable expenses incurred through the effective date of the termination.
- 9.7 Termination for Bankruptcy. This Agreement may be terminated by the District, without notice, in the event that Awardee shall have ceased business, become the subject of an order for relief or insolvent under applicable bankruptcy laws or made an assignment for the benefit of creditors. All Source Code and Documentation will be transferred to the District for complete ownership.
- 9.8 Payment on Termination. In the event that the District terminates this Agreement or any portion thereof prior to its expiration on any basis other than for Awardee's material breach or Failure to Progress, the District shall pay Awardee for all Services and Deliverables Delivered prior to the effective date of termination and for partially completed Deliverables on a percentage completion basis. In the case of a termination for Failure to Progress, the District shall continue to be liable for Services not terminated, but shall not be liable for any amounts related to partial completion of Deliverables associated with the Critical Deliverable in question. In the case of a termination for material breach by Awardee, the District shall not be liable for any payments on account of Services and Deliverables not delivered as of the effective date of such termination. In no event shall the District be liable for any future payments, lost profits, costs, or expenses of Awardee, incurred with respect to Services and Deliverables not actually performed.

- 9.9 Transition on Termination. In the event of any expiration or termination of this Agreement, except as otherwise provided, the District shall nonetheless continue to have all rights to use and maintain for its own benefit any and all Deliverables already in Production or completed and delivered as if no termination had taken place, subject to payment for such Deliverables. The right to use the Awardee Product Title Software nonetheless shall be subject to full payment of license fees as set forth in the Pricing Schedule. Awardee shall provide transition services, to include return of all data, files, information, and records received from the District within 30 days of expiration or termination and any other services identified in the Statement of Work, and shall promptly assign to the District all of Awardee's rights to use Platform Software, which rights were acquired by Awardee primarily for the ability to provide the Services to the District under this Agreement. The District may thereafter engage such contractor or contractors as it determines in its sole discretion to provide any of the Services or Deliverables not yet provided by Awardee to the District or any other services the District determines in its sole discretion to be necessary or convenient to the development, maintenance and operation of the Solution, subject to compliance with provisions of this Agreement relating to the use of contractors to service the Licensed Software.
- 9.10 Force Majeure. Neither party shall be liable for any delay or failure to perform, to the extent caused by a Force Majeure Event. Upon occurrence of a Force Majeure Event, the non-performing Party shall be excused from any further performance or observance of the affected obligation(s) for as long as, and to the extent that the Force Majeure Event continues and the non-performing Party (i) continues to perform to the extent practicable; (ii) takes commercially reasonable measures to mitigate the effects of the Force Majeure Event; and (iii) uses commercially reasonable efforts to recommence performance or observance whenever and to whatever extent possible without delay. Any Party whose performance is affected by a Force Majeure Event will immediately notify the other Party by telephone (to be confirmed in writing within two (2) business days of the inception of such delay) and describe in reasonable detail the circumstances causing such delay.

10. Dispute Resolution and Remedies

- 10.1 Management of Project. The Project will be managed through active cooperation and communication between the Parties and the formation of working teams consisting of District Personnel and Awardee staff designated to support the Project.
- 10.2 Project Managers. All disputes, claims or controversies arising out of or relating to the validity, interpretation, performance, termination, breach, threatened breach of this Agreement, or any Failure to Progress ("Dispute(s)") shall initially be referred by the Party raising the Dispute to the Project Managers designated by the Parties.. If the Project Managers are unable through good faith discussions to resolve the Dispute within ten (10) Business Days after receiving written notice of the Dispute, the Dispute shall be submitted to the Senior Executives.

- 10.3 Senior Executives Resolution. If the Project Managers are unable to resolve the Dispute within 10 Business Days after submission by either or both Project Managers, the Dispute shall be referred to the Senior Executives. Each Project Manager will, within ten (10) business days after referral, provide to both of the Senior Executives a Dispute Statement describing in detail the substance of the Dispute and the Parties' respective positions, and supported by such documentation as may be appropriate to acquaint the Senior Executives with the issues. The Dispute Statements will not limit either Party's right to identify additional relevant issues at any time, or waive, prejudice or limit either Party's rights or remedies with respect to any issues. Dispute Statements will be provided without prejudice to the providing Party for settlement purposes, and shall not be admitted in evidence or otherwise used or referred to in litigation. For the purpose of this provision, the Senior Executives shall be the Executive Sponsor for the District and the President for Awardee. Either party may re-designate its Senior Executive from time to time during the term of this Agreement by thirty (30) days' notice to the other party, provided that once a dispute resolution procedure shall be commenced under this section, neither party may re-designate its Senior Executive without the consent of the other party as long as such Senior Executive remains in the employ of the respective party.
- 10.4 Mediation. Within ten (10) business days after delivery of the Dispute Statements, the Senior Executives of both parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All reasonable requests for information made by one party to the other will be honored. If the Senior Executives are unable to resolve the Dispute within twenty (20) business days of receipt of the Dispute Statements, the parties may pursue all claims based upon such Dispute as otherwise provided by law.
- 10.5 Continued Access. The parties agree as follows with respect to any dispute or disagreement concerning the Licensed Software or component thereof or any of the transactions arising out of or contemplated by this Agreement: during such dispute or disagreement under this Agreement or any proceeding to resolve such dispute, pending final resolution of such dispute or disagreement, Awardee shall not interfere with the access or use by the District of the Licensed Software. In addition, the Parties expressly agree that if any dispute or disagreement arises with respect to the performance of any of either Party's obligations which would otherwise delay the schedule for either Party's performance of any of its subsequent obligations, to the extent technically and operationally feasible, each Party shall proceed to the performance of such subsequent obligations according to the existing schedule as if such dispute or disagreement were non-existent, but shall be entitled to reimbursement or relief for delay as set forth in this Contract.
- 10.6 Governing Law and Forum. This Agreement shall be construed in accordance with and governed by the laws of the State of Iowa. The parties consent to the exclusive jurisdiction of the Iowa District Court for Polk County or the United States District Court for the Southern District of Iowa for the purpose of any and all litigation arising under this Agreement.

11. Miscellaneous Provisions

- 11.1 **Publicity.** Neither party shall make, issue or distribute a public statement announcing the existence of this Agreement or the Services except with the consent of the other party, which consent shall not be unreasonably withheld or delayed. Upon the execution of this Agreement, the parties shall confer and agree as to the information to be disclosed in press releases announcing the Agreement. Notwithstanding the foregoing, the Parties shall be entitled to discuss the Project publicly at any time after its submission for approval by the Board of Education in connection with obtaining such approval, any hearings thereon, of any requests by members of the public or media and Awardee shall be entitled to discuss the Project with potential customers and to disclose its existence in customer proposals. Either party shall be entitled to make such disclosures as are required by law.
- 11.2 **Entire Agreement.** This Agreement, including its Exhibits and Schedules and the documents incorporated by reference herein, constitutes the sole and entire understanding and agreement of the parties with respect to its subject matter, and supersedes and replaces all prior agreements, representations, and understanding of the parties.
- 11.3 **Amendment.** This Agreement may not be amended or modified, except by a written amendment approved and signed by authorized officers of the respective parties.
- 11.4 **Severability.** In the event that any portion of this Agreement shall be deemed unenforceable by any dispute resolution tribunal, the remainder of the Agreement shall remain in full force and effect.
- 11.5 **Assignment.** This Agreement may not be assigned by Awardee without the written consent of the District. Any assignment in contravention of this provision shall be void and no assignment shall relieve the assignor of any obligations under this Agreement. This Agreement shall be binding upon the Parties hereto their respective successors and assigns.
- 11.6 **Headings and Captions.** The captions and headings used in this document are for convenience of reading only and are not to be used in the interpretation or construction of this Agreement.
- 11.7 **Reasonable Behavior.** The parties shall deal with one another in good faith. Whenever this Agreement requires or contemplates any action, decision, consent or approval, the parties shall act reasonably and in good faith and (unless the parties have expressly agreed in writing to some other discretionary standard) and may not unreasonably withhold or delay any such action, decision, consent or approval.
- 11.8 **No Third Party Beneficiaries.** Nothing herein contained is intended to constitute any person a third party beneficiary under this agreement, nor to create any obligation on the part of either party to any person who is not a party to this Agreement.
- 11.9 **No Partnership or Agency.** Nothing in this Agreement shall be deemed to constitute either party the agent, joint venture, or partner of the other for any purpose and neither party shall be authorized to bind the other legally in any form. The relationship between the parties shall be that of independent contractor.
- 11.10 **Survival.** Any provisions of this Agreement which require performance subsequent to the termination or expiration of this Agreement shall survive such termination or expiration.

11.11 Notices. Any notices given under the terms of this Agreement shall be in writing and sent via a method which provides for proof of delivery, addressed to the parties as follows:

To the District:

Des Moines Public Schools
Attn: Chief Financial Officer
2323 Grand Avenue
Des Moines, IA. 50312

To Awardee:

Notices shall be effective upon receipt. Either party may from time to time substitute a new address or addresses for notices by delivery to the other party of a notice complying with this paragraph. This notice procedure is not intended to override or replace provisions of the Statement of Work or Scope Process related to operational communications during the term of this Agreement.

11.12 Non-Waiver of Timely Performance. Each party hereto may specifically waive any item(s) of performance under this Agreement by the other party, provided that no such waiver shall be binding or effective unless in writing and no such waiver shall constitute a continuing waiver of similar or other items of performance. A waiving party, at any time, and upon notice given in writing to the party whose performance has been waived, may direct future compliance with the waived term or terms.

11.13 Counterparts. This Agreement may be executed in duplicates and counterparts, each of which shall be effective as an original for all purposes.

IN WITNESS WHEREOF, the parties have approved and executed this Agreement as of the dates set forth next to their signatures below.

Des Moines Independent Community School District

_____.

By _____

By _____

Name _____

Name _____

Title _____

Title _____

Date _____

Date _____

Attached Appendices:

- A. Statement of Work
- B. District RFP