

**SOFTWARE LICENSE AND SERVICES AGREEMENT BETWEEN  
CITY OF YAKIMA AND FILEONQ**

**THIS SOFTWARE LICENSE AND SERVICES AGREEMENT** is made this 8<sup>th</sup> day of January 2020, FileOnQ, by and between the City of Yakima, a municipal corporation (the "City" or "Licensee"), and FileOnQ, Inc., incorporated under the laws of the State of Washington, and duly licensed to conduct business in Washington State (the "Contractor," the "Vendor," or "FileOnQ").

WHEREAS, the City and Snohomish County, Washington, entered into an Intergovernmental Cooperative Purchasing Agreement on October 10, 2013, which provides that each of the parties to the Purchasing Agreement may utilize the other party's competitively awarded contracts where appropriate; and

WHEREAS, that Purchasing Agreement extends to the parties the right to purchase pursuant to public bids and/or competitive solicitations for supplies, materials, equipment, and services pursuant to such bids and contracts to the extent permitted by law and agreed upon between the awarding party and its bidders; and

WHEREAS, Snohomish County conducted a request for proposal (RFP 20-18SB) for law enforcement evidence room software solutions and FileOnQ submitted the winning proposal as part of that competitive process; and

WHEREAS, FileOnQ has developed and owns certain proprietary software for use in law enforcement evidence and the City desires to purchase a license from FileOnQ to use such software, as well as support, enhancements and maintenance services, based on the RFP response provided to Snohomish County; and

WHEREAS, FileOnQ agrees to extend its bid to the City pursuant to the Purchasing Agreement and license such software to the City and perform the services on the terms and conditions set forth herein pursuant to the RFP response;

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein, the parties agree as follows:

**1. Definitions**

**A. Acceptance** of the System shall occur only when: (a) the Contractor has provided to the City all Deliverables required to be provided to the City; (b) the Contractor provides to the applicable City Project Manager a written notice stating that all Material Defects have been corrected; and (c) the City notifies the Contractor in writing that all acceptance testing for the System has been completed successfully in accordance with the Software Acceptance Plan and the terms of this Agreement. Nothing else, including payment for any portion of the System or the City's use of the System, or any portion thereof; in a live, operational environment, shall constitute Acceptance (under contract law or the Uniform Commercial Code of the State of Washington) of any portion of the System.

**B. Critical Defect** means any Defect that (1) severely impacts the City's ability to use the Software or the System or the Contractor's ability to provide Services, or (2) has a significant financial impact on the City.

**C. Custom Software** means those Deliverables that are classified in Exhibit C as Custom Software, as well as the documentation related thereto; an exhaustive list of Custom Software is set forth in Exhibit C. Custom Software shall be considered Work Product.

**D. Defect** means (1) any failure of the Software to operate in accordance with the Documentation, Functional Specifications, or Performance Standards; and/or (2) any failure of the Contractor to perform the Services in accordance with the Service Level Standards.

**E. Deliverable** means the Hardware, Software, Documentation, and Services to be delivered under this Agreement.

**F. Documentation** means collectively: (a) all of the written, printed, electronic, or other format materials published or otherwise made available by the Contractor that relate to the functional, operational and/or performance capabilities of the System and/or any Software; (b) all user, operator, system administration, technical, support, and other manuals and all other written, printed electronic, or other format materials published or otherwise made available by the Contractor that describe the functional, operational, and/or performance capabilities of the System and/or any Software, including but not limited to the Functional Specifications and Software Acceptance Plan; and (c) any other Deliverable that is not Hardware or Software. Documentation shall not include Source Code.

**G. Functional Specifications** shall mean those specifications to which the Software and the System shall conform as set forth in Exhibit D.

**H. Hardware** means those Deliverables that are classified in Exhibit B, section As Needed Equipment, as Hardware, as well as the documentation furnished therewith in the normal course of business.

**I. License(s)** shall mean any license or licenses granted by the Contractor to the City under this Agreement.

**J. Material Defect** means Critical Defect and/or Medium Defects.

**K. Medium Defect** means any Defect that adversely affects the City's ability to use the Software or System or the Contractor's ability to provide services, even if an alternative temporary solution or workaround acceptable to the City may be accomplished.

**L. Object Code** shall mean the binary machine-readable version of the Software.

**M. Performance Standards** means, collectively the warranties and performance standards set forth in Section 10.C and Exhibit A.

**N. Regulatory Requirements** means compliance to the Criminal Justice Information Services (CJIS) rules.

**O. Services** means, individually or collectively, all installation, implementation, integration, testing, development, conversion, training, consulting, Support and Maintenance Services, and any other professional or other services that may be provided by the Contractor to the City under this Agreement.

**P. Service Level Standards** means the service level standards set forth in Section 10.D and Exhibit A.

**Q. Site** shall mean the City's facilities in the City of Yakima and Yakima County, Washington.

**R. Software** means the aggregate of the Standard Software and the Custom Software; all upgrades, maintenance releases, bug fixes or patches, and other modifications or additions provided under this Agreement.

**S. Software Acceptance Plan** shall mean that plan set forth in Exhibit C.

**T. Source Code** means computer software in the form of source statements for the Software (excluding Third Party Software) including, without limitation, all software in the form of electronic and printed human-readable, mnemonic or English-like program listings, including printed and on-line descriptions of the design or such software including, without limitation, data definition models, indices, structure tables, system flow charts, program flow charts, defined terms, file layouts, program narratives, global documentation (including global variables) and program listings.

**U. Standard Software** means those Deliverables that are classified, in Exhibit B as Standard Software, as well as the documentation furnished therewith by the Contractor or its subcontractors in the normal course of business; an exhaustive list of the Standard Software is set forth in Exhibit B.

**V. System** means the Deliverables to be installed and integrated so as to be operational at the City Site.

**W. Warranty Period** means the period commencing upon Acceptance and continuing for 12 months.

**X. Work Product** means all products, devices, computer programs, techniques, know-how, algorithms, procedures, discoveries or inventions, and all materials, texts, drawings, specifications, source code and other recorded information, in preliminary or final form and on any whatsoever, that are conceived, reduced to practice, developed, discovered, authored, designed, programmed, invented or otherwise created or made by Contractor (whether solely or jointly with others) in connection with or as a result of its performance of the Services.

## **2. Scope of This Agreement**

**A. Scope.** This Agreement defines the terms and conditions under which the Contractor will design, develop, integrate, deliver, install, train and support the Software and other Deliverables.

**B. Turn-key Basis.** The parties acknowledge that the performance by the Contractor of its obligations under this Agreement is to be done on a "turn-key basis." This expression is understood to mean that the Contractor is fully responsible, pursuant to the terms and conditions of this Agreement, for the delivery of the Deliverables in full conformity with the terms and conditions hereof, and that the Deliverables shall function in conformity with the performance criteria stipulated herein upon delivery, upon Acceptance of the System, throughout the Warranty Period, and throughout the term of the ongoing Support and Maintenance Services.

## **3. Software and Services**

**A. License Grant.** The Contractor hereby grants the City a nonexclusive, nontransferable and perpetual license to use the Software and Documentation.

**B. Work Product.**

1. **Ownership.** The City will be the exclusive owner of all Work Product. To the extent permitted under the U.S. Copyright Act, and any successor statute thereto, Work Product will constitute "works made for hire," and the ownership of such Work Product will vest in the City at the time they are created. In any event, Contractor hereby assigns and transfers to the City, without separate compensation, all right, title, and interest that the Contractor may now or hereafter have in the Work Product, including, without limitation, all copyright, trademark, trade secret, patent and other intellectual property and proprietary rights (collectively "Intellectual Property Rights") therein. To the maximum extent allowed, the Contractor hereby irrevocably and unconditionally waives, in perpetuity, any rights it may have with respect to the Work Product under any law relating to "the moral rights of authors" or any similar law throughout the world. The Contractor will promptly disclose to the City all Work Product.

2. **Non-Employees.** If any individual or entity who is not a direct employee of Contractor performs or otherwise participates in any Services, Contractor will obtain from such non-employee a legally binding, written assignment sufficient to transfer to the City all of the non-employee's rights, title and interest in and to the Work Product. Upon the City's request, Contractor will provide the City with copies of all such assignments.

3. **Further Acts.** Contractor, its employees, agents, subcontractors and affiliates, will take such action as the City reasonably may request to evidence, transfer, vest or confirm the City's right, title and interest in the Work Product.

4. **Use.** Except as required for Contractor's performance of the Services or as authorized in writing by the City, Contractor will not use, disclose, publish or distribute any Work Product. Contractor will hold all Work Product in trust for the City and will deliver them to the City upon request and in any event upon the expiration or termination of this Agreement.

**C. Reverse Engineering.** Except as expressly provided in this Agreement, the City shall not translate, reverse engineer, decompile, recompile, update, or modify all or any part of the Software or merge the Software into any other software.

**D. Service Level Standards.** The Contractor shall provide the Software and Services according to the performance criteria and Service Level Standards set forth in Exhibit A.

**E. Service Level Credits.** In the event that the Contractor fails to meet the Service Level Standards, the City shall be entitled to receive from the Contractor service level credits ("Service Level Credits"), which shall be in the amounts and according to the terms set forth in Exhibit A. The City shall have the right to set off any undisputed amounts owed to the Contractor against any Service Level Credits assessed by the City against the Contractor.

**F. Liquidated Damages.**

1. For each day after the date fixed for Acceptance of the Software that the Software do not meet the Software Acceptance Plan, the Contractor shall pay the City the sum of \$720.00 per day fixed and agreed as liquidated damages, but not as a penalty. The

Contractor authorizes the City to deduct such liquidated damages from the amount due or to become due, under the Agreement. The Contractor further agrees that any such deduction shall not in any degree release the Contractor from further obligation and liabilities in regard to the fulfillment of the entire Agreement.

2. Notwithstanding the foregoing, liquidated damages shall not be charged when the delay in meeting the Software Acceptance Plan is due to a force majeure delay or when the City causes the delay.

3. Liquidated damages shall not exceed \$191.00. In the event that the maximum amount of liquidated damages is reached, the City shall have the right, but not the obligation, to terminate the Agreement under the provisions of Section 4.

#### **4. Term of Agreement**

**A. Term of Agreement.** The initial term of the Agreement shall commence upon execution and continue for five (5) years from the date of Acceptance of the System, and may be extended by the City for five (5) additional one (1) year option terms by providing written notice subject to termination as provided in this Agreement.

1. The Warranty Period begins at Acceptance for period of 12 months, and thereafter ongoing Support and Maintenance Services shall continue throughout the term of the Agreement.

2. The maximum term for this Agreement, consisting of the initial term and all option term(s), is ten (10) years from Acceptance unless extended by written agreement signed by all parties.

3. Notwithstanding termination of this Agreement for any reason, the Software License granted in the Agreement shall be perpetual.

#### **B. Termination**

1. **Termination for Default.** If the Contractor defaults by failing to perform any of the obligations of the Agreement or becomes insolvent or is declared bankrupt or commits any act of bankruptcy or insolvency or makes an assignment for the benefit of creditors, the City may terminate the Agreement if the Contractor has not cured following a thirty (30) day written notice to the Contractor sent certified mail, return receipt requested. If the Agreement is terminated for default, the City may obtain performance of the work elsewhere, and the Contractor shall not be entitled to receive any further payments under the Agreement until all work called for has been fully performed. The Contractor shall only be paid for work delivered and accepted, or work performed in accordance with the manner of performance set forth in the Agreement less any extra cost or damages to the City caused by or arising from such default(s), which shall be deducted from any money due or coming due to the Contractor. The Contractor shall bear any reasonable extra expenses incurred by the City in completing the work, including all increased costs for completing the work, and all damage sustained, or which may be sustained by the City by reason of such default. The termination of this Agreement for default shall in no way relieve the Contractor from any of its obligations under this Agreement. If a notice of termination for default has been issued and it is later determined for any reason that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the notice of termination had been issued as a Termination for Convenience.

2. Termination for Convenience. The City for its convenience may terminate this Agreement, in whole or in part, at any time by providing written notice sent certified mail, return receipt requested, to the Contractor. After receipt of a Notice of Termination, and except as directed by the City, The Contractor shall immediately stop work as directed in the notice, and comply with all other requirements in the notice. Whenever the Agreement is terminated for convenience, the Contractor shall be entitled to payment for actual work satisfactorily performed up to the date of termination at unit contract prices for completed items of work and an equitable portion thereof the partially completed items, but shall not be entitled to payment for loss or anticipated profit on deleted or uncompleted work. The Contractor shall promptly submit its request for termination payment, together with detailed supporting documentation. If the Contractor has any property in its possession belonging to the City, the Contractors shall account for the same and dispose of it in the manner the City directs. All termination payment requests may be subject to determine reasonableness and compliance with the Agreement, applicable laws and regulations.

3. Termination for Non-Appropriation. In the event that sufficient funds are not appropriated or allocated for payment under this Agreement for any future fiscal period, the City may terminate this Agreement as a matter of public convenience as provided herein. The City will not be obligated to make payments for services or amounts incurred after the end fo the current fiscal period, provided the City provides the Contractor written notice prior to the end of the current fiscal period that non-allocation of funds is probable and provides a Notice of Termination within 14 days after the end of the fiscal period.

4. Effect of Termination. The termination of this Agreement shall not affect the accrued rights of the City under any other section or paragraph of this Agreement or limit the rights and remedies of the City hereunder in any manner.

## **5. Acceptance Testing.**

**A.** Within thirty (30) days of the Contractor providing notice to the City that the System has been installed and City personnel have been trained in accordance with the Agreement, the City shall begin the acceptance testing process at the City Site according to the Software Acceptance Plan.

**B.** The acceptance testing shall include thirty (30) days of continuous operation of the System without Material Defect in accordance with all Functional Specifications, Performance Standards, and Documentation in the City's fully implemented production environment.

**C.** If the City Accepts the work, the City will send a notice of Acceptance to the Contractor.

**D.** If the City determines that the work is not acceptable, the City shall notify the Contractor in writing, describing the deficiencies.

**E.** The Contractor shall either provide a detailed, written plan to achieve Acceptance or to make correction or replacements within a mutually agreed upon time with no charge to the City. The parties shall mutually agree on a start date for beginning another Acceptance testing period.

F. Another thirty (30) day successful operation period shall follow any corrections or replacements. A third or additional Acceptance testing period may occur if mutually agreed to by the parties.

G. If the City Accepts the System following a second or subsequent Acceptance testing period, the City will send a notice of Acceptance to the Contractor.

H. If the Contractor does not correct or replace the unacceptable aspects of the System, the City may declare a breach of the Agreement.

## **6. Price and Payment.**

A. The City shall pay the Contractor One Hundred Ninety-One Thousand Four Hundred Fifty-Four and 49/100ths dollars (\$191,454.49), inclusive of applicable tax for the Deliverables required to be provided by the Contractor through the end of the Warranty Period as stated in the schedule of payments described in Exhibit B. Annual recurring charges for Support and Maintenance Services in year 2 shall not exceed \$8,990.00 plus applicable tax per year. This dollar amount is subject to a two percent annual increase, plus applicable tax for the remaining years of the Agreement.

B. Where the Contractor requires payments by the City, payment shall be based upon billings, supported by documentation of units of work actually performed and amounts earned, including where appropriate, the actual number of days worked each month, total number of hours for the month, and the total dollar payment requested. Unless specifically stated in Exhibit B, or approved in writing in advance by the official executing this Agreement for the City (hereinafter referred to as the "Contracting Officer"), the City will not reimburse the Contractor for any costs or expenses incurred by the Contractor in the performance of this Agreement.

C. The City shall, upon receipt of appropriate documentation, compensate the Contractor no more often than monthly, through the City system for the Contractor's service pursuant to Exhibit B. Payment shall be made on a net thirty (30) day basis. This is a "Fixed-Price" contract based upon the Deliverables identified in Exhibit B.

D. **Dispute.** Should the City dispute any of the charges, it shall notify Contractor of such disputed charges in writing. The notice shall set forth all details concerning the disputed charges and reasons for the dispute. The Contractor and the City shall attempt in good faith to resolve any objection to the invoiced amount prior to the payment due date. The City shall pay the invoiced amount minus the disputed amount on the due date of the original invoice. If the dispute is subsequently resolved in favor of the Contractor, the Contractor shall re-invoice the disputed amount owed, and the City shall pay all amounts agreed or found to be owing to the Contractor within thirty (30) days of the date of the reissued invoice.

## **7. Support Services.**

**Training.** Contractor will provide on-site training of City's evidence staff for a minimum of four days. Contractor shall train evidence staff in the property and evidence unit if possible to provide "hands-on" training experience. Training will include training materials and written processes. Contractor will assess the City's current evidence management policies and procedures and make appropriate recommendations as requested. The City will ensure the appropriate

evidence personnel are available for the training on site without interruption that would take them away from training.

Contractor will create a personalized, recorded training video for the City to deploy to sworn personnel. Contractor will also provide written training documents and power point presentation for disbursement to sworn personnel. If necessary, the Contractor will provide five (5) in person training sessions for sworn personnel to be conducted in a lecture type environment.

**Installation services.** Contractor will install and configure the EvidenceOnQ and DigitalOnQ software and peripheral hardware in the test environment and/or production environment. To streamline the process, the software systems may be installed into the City's production environment, giving them a test database to use in initial testing and then keep in place for testing any future upgrades.

The City will ready network and servers for installation of EvidenceOnQ and DigitalOnQ software components as detailed in System Requirements Verification Form. City will provide the appropriate IT personnel with the administrative rights necessary to assist Contractor with the installation and configuration of the software and related hardware as detailed above.

**Hardware and Software Support and Maintenance Services.** Contractor will provide maintenance and support services as outlined in Exhibit B attached.

## **8. Confidentiality and Public Disclosure.**

**A. Confidential Data.** The Contractor acknowledges that it may be provided access to confidential data of the City that is not subject to public disclosure pursuant to Washington State RCW Chapter 42.56 (the Public Disclosure Act). The Contractor shall use its best efforts: (1) not to, at any time, disclose or disseminate confidential data provided by the City to the Contractor to any other person, firm, organization, or employee who does not need to obtain access thereto consistent with the Contractor's obligations under this Agreement; (2) not to disclose or disseminate such confidential data to any third party not affiliated with this Agreement or for any other purpose not required by the Agreement; and (3) to ensure that all persons working for the Contractor, or provided access to the City's data for any reason, protect the City's confidential data against unauthorized use, dissemination, or disclosure. The Contractor's obligations under this section shall not apply to any information that is or becomes available without restriction to the general public by acts attributable to the City or its employees.

**B. Public Records Act.** This Agreement and all public records associated with this Agreement shall be available from the County for inspection and copying by the public where required by the Public Records Act, Chapter 42.56 RCW (the "Act"). To the extent that public records then in the custody of the Contractor are needed for the City to respond to a request under the Act, as determined by the City, the Contractor agrees to make them promptly available to the City. IF the Contractor considers any portion of any record provided to the City under this Agreement, whether in electronic or hard copy form, to be protected from disclosure under law, the Contractor shall clearly identify any specific information that it claims to be confidential or proprietary. If the City receives a request under the Act to inspect or copy the information so identified by the Contractor and the City determines that release of the



information is required by the Act or otherwise appropriate, the City's sole obligation shall be to notify the Contractor (a) of the request and (b) of the date that such information will be released to the requester unless the Contractor obtains a court order to enjoin that disclosure pursuant to RCW 42.56.540. If the Contractor fails to timely obtain a court order enjoining disclosure, the City will release the requested information the date specified.

The City has, and by this section assumes, no obligation on behalf of the Contractor to claim any exemption from disclosure under the Act. The City shall not be liable to the Contractor for releasing records not clearly identified by the Contractor as confidential or proprietary. The City shall not be liable to the Contractor for any records that the City releases in compliance with this section or in compliance with an order of a court of competent jurisdiction.

**C.** Contractor shall indemnify and hold harmless the City, its officials, agents and employees from all loss or expense, including, but not limited to settlements, judgments, set-offs, attorneys' fees and costs resulting from Contractor's breach of this provision.

## **9. Reproduction of Documentation and Object Code**

**A. Documentation.** The City shall have the right, at no additional charge, to reproduce solely for its own internal use, all Documentation furnished by the Contractor pursuant to this Agreement regardless of whether such Documentation is copyrighted by the Contractor. All Copies of Documentation made by the City shall include any proprietary notice or stamp that has been affixed by the Contractor. Contractor shall furnish for each license purchased by the City, and at no additional charge to the City, one (1) copy of the documentation sufficient to enable the City to operate the Software. All documentation shall be in the English language.

**B. Object Code.** The City may reproduce one copy of the Object Code, at no additional charge, solely for back-up or archival purposes.

## **10. Warranty Provisions.**

Unless otherwise extended or limited, the warranties and commitments contained in this Section shall remain in full force and effect throughout the term of this Agreement.

**A. General Warranties.** Contractor warrants that it owns all rights, title, and interest in and to the Software, or that in the case of any third party software that it has the right to grant a sublicense to use such third party software, that all Software shall conform to the Functional Specifications and Documentation, and that the Software and Services shall be free from material defects in workmanship and materials. This warrant coverage shall include any modifications made to the Software by the Contractor and shall survive the expiration or termination of this Agreement.

**B. System.** The Contractor represents and warrants to the City that the System shall function without Defect in accordance with the applicable specifications, Performance Standards, and Documentation.

**C. Software Performance.** Contractor represents and warrants to the City that the Software or System, as applicable, shall meet the Performance Standards set forth in Exhibit A, including the maximum response times and availability. The contractor shall correct any failure of the applicable Software and/or System to operate in accordance with the performance

warranties set forth in this Section by providing all additional software, equipment, and/or services to the City at no additional cost to the City. In the event that the Contractor is unable to correct such failure within a forty-eight (48) hour period the City shall receive from the Contractor credits in the amounts set forth in Exhibit A. In the event the Contractor is unable to correct such failure within thirty (30) calendar days, an Event of Default shall be deemed to have occurred.

**D. Services.** The Contractor represents and warrants to the City that it shall perform the Services and provide the Deliverables required by this Agreement in a workmanlike manner, in accordance with the standards of care and diligence and the level of skill, knowledge, and judgment normally practiced by nationally recognized information technology services firms in performing services of a similar nature. Provided, however, that where this Agreement specifies a particular standard or criteria for performance, this warranty is not intended to and does not diminish that standard or criteria for performance. Further, the Contractor represents, warrants, and covenants that it shall provide the services or create any Deliverables using only proven current technology or methods unless otherwise mutually agreed by the parties in a particular statement of work or Exhibit.

**E. Documentation.** The Contractor represents and warrants to the City that it has provided to the City all Documentation for the Software and the System and that such Documentation is detailed and complete and accurately describes the functional and operational characteristics of the Software and the System. The Contractor further represents and warrants that it will provide to the City updated versions of all such Documentation when it provides updates and other required Maintenance Services and that all such updated Documentation will be complete and accurate and will be at least as detailed as the Documentation issued to the City with the initial version of the Software and the System. The warranty and commitments contained in this Section shall remain in full force and effect for as long as the City continues to receive Support and Maintenance Services from the Contractor.

**F. Contractor.** Warrants that the Software will be compatible with the City's technical environment, including hardware, operating system(s), software application(s), CPUs, and networks specified by the City.

**G. Future Compatibility.** Contractor warrants that all updates, upgrades, and revisions to the Software furnished hereunder will be implemented in such a manner as to maintain backward compatibility with the previous version or release of the Software furnished under the Agreement, so that such previous versions or releases shall continue to be operable with the Software as updated, upgraded, or revised, in materially the same manner and with materially equivalent performance. Without limiting the foregoing, Contractor further warrants that future Support, Maintenance, and other Services will not degrade the Software, cause a breach of any other warranty, or require the County to purchase new or additional hardware or software for continued operation of the Software or System.

**H. Software Obsolescence.** The Contractor acknowledges that the City is making a significant resource commitment in order to acquire the Software and that the City does not want to move involuntarily to a new system at a later date. Having acknowledged the foregoing, the Contractor represents and warrants to the City that it will continue to enhance the Software (meaning adding new feature and functionality, in addition to ordinary course defect

corrections), as long as the City continues to receive Maintenance and Support Services from the Contractor.

**I. Latest Versions.** Contractor warrants that all Software as delivered will be the most current release or version that the Contractor has made commercially available to its customers, unless the City, after being advised by the Contractor of the availability of a newer release or version, expressly elects to acquire and deploy an older one.

**J. Virus Warranty.** The Contractor warrants that the Software does not contain any malicious code, program or other internal component (e.g., computer virus, computer worm, computer time bomb, or similar component), that could damage, destroy, or alter any computer program, firmware, or hardware or which could, in any manner, reveal damage, destroy, or alter any data or other information accessed through or processed by the Software in any manner. The Contractor shall immediately advise the City, in writing, upon reasonable suspicion or actual knowledge that the Software may result in the harm described above. The Contractor shall indemnify and hold the City harmless from any damage resulting from the harm described above. This warranty shall survive the expiration or termination of this Agreement.

**K. Disabling or Restrictive Code.** Without limiting any other provision to the Agreement, the Contractor warrants that the Software does not contain and the Contractor will not introduce any code, data block, time-bomb, Trojan horse, encrypted software keys, back door, or remote disabling function that may restrict the City's use of or access to the Software or the System or related data or equipment. The Contractor understands and agrees that the City's inability to use the Software or System or its related data or equipment will cause substantial injury or harm to the public health or safety or grave harm to the public interest substantially affecting third persons. No limitation of liability, whether contractual or statutory, shall apply to a breach of this warranty. This warranty shall survive the expiration or termination of this Agreement.

**L. Media.** Contractor warrants that through the period ending 90 days from the date of Acceptance that the media used to store and deliver the Software to the Customer shall be free from defects in manufacture and material. Should the media fail to be free of defects in manufacture or material during the warranty period, the Contractor shall replace the defective media. Defective media shipped to the Contractor with a shipping date within the warranty period will be replaced at no charge including shipping.

**M. Intellectual Property.** The Contractor represents and warrants to the City that the City's use of the Software does not and shall not infringe upon any United States or Canadian patent, trademark, copyright, trade secret or other intellectual property, or proprietary right of any third party, and there is currently no actual or threatened suit against the Contractor by any third party based on an alleged violation of such right. This warranty shall survive the expiration or termination of this Agreement.

**N. Third Party Warranties and Indemnities.** For any third party Software provided by the Contractor to the City, Contractor hereby assigns to the City all end-user warranties and indemnities relating to such third party Software. To the extent that the Contractor is not permitted to assign any of such end-user warranties and indemnities through to the City, the Contractor shall enforce such warranties and indemnities on behalf of the City to the extent the Contractor is permitted to do so under the terms of the applicable third party agreements. This warranty shall survive the expiration or termination of this Agreement.

**O. Authority.** Each Party represents and warrants to the other that it has the right to enter into this Agreement. Contractor further represents and warrants that there are no outstanding assignments, grants, licenses, encumbrances, obligations, or agreements (whether written, oral, or implied) that are inconsistent with this Agreement and the rights granted or transferred herein. This warranty shall survive the expiration or termination of this Agreement.

**P. Privacy.** Contractor acknowledges that the City data may contain personal data, health data, and/or medical records data, the use of which data is subject to various Privacy Laws, including all state, federal, and international laws and regulations and state, federal, and national government agency orders and decrees to which the City may be subject ("Privacy Laws"), as well as certain restrictions imposed on the City data by the data subjects or other third party data providers. The Contractor agrees to strictly abide by all such restrictions pertaining to the City data, as they are promulgated and applied, currently and in the future. Furthermore, Contractor shall in good faith execute any and all agreements that the City is required to have the Contractor execute in order that the City may comply with any Privacy Laws. If the Contractor's use (whether directly or indirectly) of the City data is contrary to any Privacy Law, or contrary to any of the restrictions set forth in this Agreement, the City shall have the right to: (1) terminate this Agreement for cause if such breach has not been cured within five (5) days of receipt by the Contractor of written notice, and (2) pursue any other legal and equitable remedies.

**Q. Regulatory Requirements.** Contractor represents and warrants to the City that the Software meets and satisfies all Regulatory Requirements. Contractor further warrants that the Contractor, its employees, agents, and subcontractors shall comply with the Regulatory Requirements.

## **11. Indemnification.**

**A. General Indemnification.** The Contractor shall hold harmless from and indemnify the City, its elected and appointed officials, employees, volunteers and agents, against all claims, losses, suits, actions, costs, attorneys' fees, litigation costs, expenses, damages, judgments, or decrees by reason of damage to any property of any person or party and/or any death, injury or disability to or of any person or party, including any employee, arising out of or suffered, directly or indirectly, by reason of the performance of this Agreement or any act, error or omission of the Contractor, Contractor's employees, agents, or subcontractors, whether by negligence or otherwise; provided, that if the claims for damages arise out of bodily injury to persons or damage to property and caused by or result from the concurrent negligence: (1) of the City and its elected or appointed officials, employees, volunteers, or agents, and (2) the Contractor and its agents, employees, or subcontractors, the hold harmless and indemnity provisions of this Agreement shall be valid and enforceable only to the extent of the negligence of the Contractor, its agents, employees, or subcontractors. The Contractor's obligations shall include, but not be limited to, investigating, adjusting, and defending all claims alleging loss from action, error, or omission or breach of any common law, statutory or other delegated duty by the Contractor, Contractor's employees, agents, or subcontractors.

With respect to the performance of this Agreement and as to claims against the City, its officers, agents, volunteers, and employees, the Contractor expressly waives its immunity under Title 51 of the Revised Code of Washington, the Industrial Insurance Act, and any similar law of any other jurisdiction, for injuries to its employees and agrees that the obligations to indemnify,

defend and hold harmless provided in this Agreement extend to any claim brought by or on behalf of any employee of the Contractor. This waiver is mutually negotiated by the parties to this Agreement.

## **B. Patent and Other Proprietary Rights Indemnification**

1. Indemnification. Contractor will indemnify and hold the City harmless from and against any and all claims, losses, liability, damages, costs, and expenses (including attorneys' fees, expert witness fees, and court costs) directly or indirectly arising from or related to any actual or alleged infringement (including contributory infringement), misappropriation, or violation of any third party's patents, copyrights, trade secret rights, trademarks, or other intellectual property or proprietary rights of any nature in any jurisdiction in the world, resulting from the use of the Software by the City. If the City's continued use of the Software is restricted or prohibited as a result of any such infringement, misappropriation, or violation of third party rights, the Contractor shall, at the City's option and at no charge to the City, and in addition to the City's other rights and remedies, (1) secure for the City the right to continue using the Software as allowed under this Agreement, (2) modify or replace the infringing components of the Software so that they are non-infringing with no loss or degradation of features, functionality, or performance, or (3) refund to the City all amounts paid by the City for the Software.

2. Exclusions. Notwithstanding the foregoing, the Contractor will not be obligated to indemnify the City to the extent that an infringement or misappropriation claim is based upon (1) use of the Software in breach of this Agreement, if such infringement or misappropriation would not have occurred but for such breach; (2) use of the Software in combination with other products not supplied or recommended by the Contractor or specified by the Contractor as being compatible with the Software, if such infringement or misappropriation would not have occurred but for such combined use; (3) use of any release of the Software other than the most current release made available to the City, if the most current release was furnished to the City specifically to avoid such infringement or misappropriation and if such infringement or misappropriation would have been avoided by use of the most current release; or (4) any modification of the Software made by the City (other than at the Contractor's direction), if such infringement or misappropriation would not have occurred but for such modification.

## **12. Insurance.**

**A. No Limitation.** Contractor's maintenance of insurance as required by this Agreement shall not be construed to limit the liability of the Contractor to the coverage provided by insurance or to limit the City's recourse to any remedy indemnification and payment to the City under the terms of a required insurance policy.

**B. Minimum Scope of Insurance and Limits.** The Contractor shall obtain and maintain continuously and for the duration of the Agreement, and for three years following termination, the following insurance:

1. Commercial General Liability Insurance with a minimum limit of \$2,000,000 per occurrence, \$2,000,000 general aggregate, and endorsed to include the City of Yakima, its officers, elected and appointed officials, agents, volunteers and employees as an additional insured with respect to the work performed for the City. Insurance shall be written on ISO occurrence form CG 00 01 or a substitute form providing equivalent coverage.

2. Worker's Compensation Coverage as required by the industrial insurance laws of the State of Washington. The Contractor's obligations shall extend to itself and any subcontractors working on behalf of the Contractor and must be obtained before performing any work under the Agreement. The City will not be responsible for payment of workers' compensation premiums or for any other claim or benefit for the Contractor, its employees, consultants, or subcontractor that might arise under the Washington State Industrial Insurance laws.

3. Technology Errors & Omission (E&O) Insurance including but not limited to security and privacy liability with minimum limit of \$5,000,000 each claim. The policy shall have a retroactive date prior to or coincident with the date of the Agreement, and the Contractor shall maintain coverage from the duration of the Agreement and for three years following termination of the Agreement.

4. Information Technology—Cyber Liability (Network Security Liability and Privacy Liability) with minimum limit of \$5,000,000 per occurrence and in the aggregate. Coverage shall include, but not be limited to, coverage for any actual or alleged breach of duty, neglect, error, act, mistake, omission, or failure arising out of Contractor's internet and network activities including coverage for, but not limited to, the following events: an attack that has the intent to affect, alter, copy, corrupt, destroy, disrupt, damage, or provide unauthorized access or unauthorized use of City's or Contractor's computer system; computer crime or information theft; denial of service; extortion; introduction, implantation, or spread of a computer virus; loss of service; identify theft; infringement; electronic data loss and restoration; unauthorized access or use, including the gaining of access to Contractor's or City's computer systems by an unauthorized person or persons or an authorized person in an unauthorized manner. Coverage shall include notification and other expenses incurred in remedying a privacy breach and costs to investigate and restore data.

### **C. Other Insurance Provisions.**

1. The Contractor's insurance coverage shall be placed with insurance carriers licensed to do business in the state of Washington with a current A.M. Best rating of not less than A:VII.

2. The Contractor's insurance coverage shall be primary insurance with respect to the City. Any insurance or self-insurance coverage maintained by the City shall be in excess of the Contractor's insurance and shall not contribute with it. The City reserves the right to receive a certified copy of required insurance policies and to approve any deductible.

3. The Contractor's insurance shall be endorsed to state that the insurer shall provide at least thirty days prior written notice by certified mail, return receipt requested, of any impending cancellation, non-renewal, expiration, or reduction in coverage.

4. Contractor shall furnish the City with original certificates and a copy of the amendatory endorsements, including but not necessarily limited to the additional insured endorsement, evidencing the insurance requirements of the Contractor before commencement of the work. The City reserves the right to receive a certified copy of required insurance policies and to approve any deductible.

### **13. Obligations that Survive Termination.**

In addition to any other specific provisions that so state, the parties recognize and agree that their obligations under Sections 6 (Price and Payment), 8 (Confidentiality and Public Disclosure), 11 (Indemnification), 15 (Assignment and Transfer), 16 (Independent Contractor), 18 (Compliance with Laws), 21 (Governing Law and Venue), 22 (Applicability of Uniform Commercial Code), 23 (No Waiver), 26 (Covenant of Good Faith), 28 (Third Party Beneficiaries), 29 (No Construction Against Drafter), and 31 (Records) of this Agreement survive the cancellation, termination, or expiration of this Agreement.

#### **14. Amendments.**

No modification or amendment to this Agreement will be valid or binding unless reduced to writing and duly executed by authorized representatives of both parties.

#### **15. Assignment and Transfer.**

No party may assign, delegate, or otherwise transfer any rights or obligations under this Agreement without the prior written consent of the other party, which may be granted or withheld in the other party's sole discretion. In the event that Contractor assigns, or otherwise transfers this Agreement, or any part hereof, or delegates any of its duties hereunder to any third party or affiliate and, within eighteen (18) months after such transfer, the City, in its sole discretion, is not satisfied with the level of service provided under this Agreement, the City shall have the right to terminate this Agreement for convenience and transition to a new vendor. All Services provided by Contractor's assignee during the transition period shall be provided at no cost.

#### **16. Independent Contractor.**

All work performed by the Contractor in connection with the Software and/or Services described in this Agreement shall be performed by the Contractor as an independent contractor and not as the agent or employee of the City. All persons furnished by the Contractor shall be for all purposes solely Contractor's employees or agents and shall not be deemed to be employees of the City for any purpose whatsoever. The Contractor shall furnish, employ, and have exclusive control over all persons to be engaged in performing Services under this Agreement and shall prescribe and control the means and methods of performing such Services by providing adequate and proper supervision. The Contractor shall be solely responsible for compliance with all rules, laws, and regulations relating to employment of labor, hours of Social Security, and other payroll taxes including applicable contributions from such persons when required by law.

#### **17. Acceptance and Removal of Contractor Personnel and Subcontractors.**

All Contractor personnel, representatives, agents and subcontractors assigned to perform Services hereunder will be subject to acceptance by the City in the City's sole discretion. Services will be performed at a location specified by the City. The City in its discretion may request removal of any Contractor personnel, representative, agents or subcontractor providing Services hereunder, and Contractor will remove said personnel or subcontractor in accordance with each such request. The City may immediately remove any Contractor personnel, representative, agents or subcontractor in the City's sole discretion. Contractor will manage the transition of replacement personnel or subcontractor to minimize impact on any given project. Contractor may not subcontract the Services or any portion of the Services under this

Agreement to any third party (including any independent contractor) without the prior written consent of the City, which consent may be withheld in the City's sole discretion. If the City consents to the use of a subcontractor, then (1) Contractor guarantees the subcontractor's performance, (2) Contractor remains obligated under this Agreement for the performance of the subcontracted Services, (3) Contractor must enter into a written agreement with the subcontractor obligating the subcontractor to comply with the Contractor's obligations under this Agreement, and (4) the City has no obligations under this Agreement to the subcontractor and the subcontractor has no rights or remedies against the City under this Agreement or otherwise. Contractor may not impose on the City a surcharge for any subcontractor fees.

#### **18. Compliance with Laws.**

The Contractor shall comply with all applicable federal, state, county, city and local laws, ordinances, regulations, and codes including, but not limited to its obligations as an employer with regard to health, safety, and payment of its employees, and identification and procurement of required permits, licenses, certificates, approvals and inspections in the Contractor's performance of this Agreement.

#### **19. Other Public Agency Orders.**

The Washington State Interlocal Cooperation Act, chapter 39.34 RCW, provides that other governmental agencies may purchase goods or services on this solicitation or contract in accordance with the terms and prices indicated therein if all parties agree. The City does not accept any responsibility or involvement in the purchase orders or contracts issued by other public agencies.

#### **20. Non-Discrimination.**

It is a policy of the City to reject discrimination which denies equal treatment to any individual because of his or her race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability as provided in Washington's Law Against Discrimination, Chapter 49.60 RCW. These laws protect against specific forms of discrimination in employment, credit transactions, public accommodation, housing, city facilities and services, and contracts.

The City assures that no persons shall on the grounds of race, color, national origin, or sex as provided by the Civil Rights Act of 1964 (Pub. L. No. 88-352), as amended, and the Civil Rights Restoration Act of 1987 (Pub. L. No. 100-259) be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any City sponsored program or activity.

#### **21. Security, Access, and Safety Requirements.**

The Contractor shall instruct its employees, agents, and subcontractors that they shall comply with the City's security, access, and safety requirements for the protection of the City's facilities and employees while on the City's premises.

#### **22. Governing Law and Venue.**

The validity, construction, interpretation, and performance of this Agreement shall be governed by and construed in accordance with the domestic laws of the State of Washington, except as to



its principals of conflicts of laws, and the parties hereto submit to the exclusive venue of the Superior Court, Yakima County, Washington, to resolve any disputes arising hereunder or related hereto, except that the City may waive the venue provision and submit a dispute to any state superior court or federal district court of competent jurisdiction in the State of Washington.

### **23. Applicability of the Uniform Commercial Code.**

To the extent this Agreement entails the delivery of Software or software products, such Software or software products shall be deemed “goods” within the meaning of Article 2 of the Uniform Commercial Code, Title 62A RCW, except when deeming services as “goods” would cause an unreasonable result. This Agreement shall control where there is a conflict with the UCC.

### **24. No Waiver.**

No action or failure to act by the City shall constitute a waiver of any right or duty afforded to the City under this Agreement, nor shall any such action or failure to act by the City constitute an approval of, or acquiescence in, any breach hereunder except as may be specifically provided in writing and signed by an authorized representative of the City.

### **25. Force Majeure.**

Neither party shall be responsible for any delay or failure in performance of any part of this Agreement to the extent that such delay or failure is caused by fire, flood, explosion, war, embargo, civil or military authority, act of God, or other similar causes beyond its control. If any party is rendered unable, wholly or in part by such a force majeure event to perform or comply with any obligation or condition of this Agreement, upon giving notice and reasonably full particulars to the other party, such obligation or condition shall be suspended only for the time and to the extent commercially practicable to restore normal operations. In the event the Contractor ceases to be excused pursuant to this provision, then the City shall be entitled to exercise any remedies otherwise provided for in this Agreement, including Termination for Default. Whenever a force majeure event causes the Contractor to allocate limited resources between or among the Contractor’s customers, the City shall receive no less priority in respect to such allocation as any of the Contractor’s other customers.

### **26. Disaster Recovery.**

Contractor represents and warrants to the City that the Contractor has a City specific disaster and recovery plan designed to safeguard the City’s data and data processing capabilities, and the Contractor’s ongoing ability to perform its obligations under this Agreement in the event of a disaster affecting (1) Contractor’s host site; and/or (2) the City. The Contractor further represents and warrants to the City that the plan comes with all applicable industry standards and regulations (including AICPA requirements) and includes, without limitation, the following:

**A. City Hot Site.** The Contractor will provide the City with the software and related materials for the City to run an independent disaster recovery facility. The Contractor also shall test concurrently, on at least an annual basis, the “Hot Site” arrangements of the City or, alternatively, the Contractor shall provide the disaster recovery services using its own Hot Site.

**B. Cold Site.** The Contractor shall maintain a contract or otherwise provide for a “Cold Site” disaster recovery arrangement, which Cold Site will provide sufficient capacity to

restore one hundred percent (100%) of the Contractor's processing services within one (1) hour of the declaration of a disaster.

**C. Costs.** Costs for implementing the disaster and recovery plan shall be limited to actual incurred services costs related to disk generation, disk media charges, external hard drive shipping and other services authorized by the City.

**27. Covenant of Good Faith.**

Each party agrees that, in its respective dealings with the other party under or in connection with this Agreement, it shall act in good faith.

**28. Time is of the Essence.**

The parties acknowledge that the performance by the Contractor and the City of their obligations hereunder is to be performed on a "time is of the essence" basis. This expression is understood to mean that the Contractor and the City are to deliver their respective Deliverables no later than the delivery dates therefore and that any delay in connection therewith will cause the other party damage; it is for this reason that the parties have agreed that liquidated damages, as outlined herein, may be imposed if delays are experienced.

**29. Third Party Beneficiaries.**

This Agreement is entered into solely for the benefit of the City and the Contractor. No third party shall have the right to make any claim or assert any right under it, and no third party shall be deemed a beneficiary of this Agreement and, as such, subject to the terms and conditions of this Agreement, to all remedies entitled to third-party beneficiaries under law.

**30. No Construction Against Drafter.**

The parties agree that any principle of construction or rule of law that provides that an agreement shall be construed against the drafter of the agreement in the event of any inconsistency or ambiguity in such agreement shall not apply to the terms and conditions of this Agreement.

**31. Notices.**

All notices, demands, or other communications herein provided to be given or that may be given by any party to the other under this Agreement shall be deemed to have been duly given when made in writing and delivered in person or the date of recorded receipt if deposited in the United States mail, postage prepaid, certified mail, return receipt requested, as follows:

City of Yakima  
Department of Information Technology  
129 N. 2<sup>nd</sup> Street  
Yakima, WA 98901

Copy to: City of Yakima Legal Department  
200 S. 3<sup>rd</sup> Street  
Yakima, WA 98901

FileOnQ

3410 832 Industry Dr.  
Seattle, WA 98188

Or to such address as the parties may provide by notice to each other from time to time.

### **32. Access to Books and Records.**

The Contractor agrees that an authorized representative of the City shall, upon reasonable notice, have access to and the right to examine any pertinent books and records of the Contractor related to the performance of this Agreement. The Contractor shall maintain such books and records for this purpose for no less than six (6) years after the termination or expiration of this Agreement.

The records relating to the Services and this Agreement shall, at all times, be subject to inspection by and with the approval of the City, but the making of (or failure or delay in making) such inspection or approval shall not relieve Contractor of responsibility for performance of the Services in accordance with this Contract, notwithstanding the City's knowledge of defective or non-complying performance, its substantiality or the ease of its discovery. Contractor shall provide the City sufficient, safe, and proper facilities, and/or send copies of the requested documents to the City. Contractor's records relating to the Services will be provided to the City upon the City's request.

Contractor shall promptly furnish the City with such information and records which are related to the Services of this Agreement as may be requested by the City. Until the expiration of six (6) years after the term of this Agreement, or for a longer period if required by law or by the Washington Secretary of State's record retention schedule, Contractor shall retain and provide the City access to (and the City shall have the right to examine, audit and copy) all of Contractor's books, documents, papers and records which are related to the Services performed by Contractor under this Agreement.

All records relating to Contractor's Services under this Agreement must be made available to the City, and the records relating to the Services are City of Yakima records. They must be produced to third parties, if required pursuant to the Washington State Public Records Act, Chapter 42.56 RCW, or by law. All records relating to Contractor's services under this Agreement must be retained by Contractor for the minimum period of time required pursuant to the Washington Secretary of State's records retention schedule.

### **33. Source Code Escrow.**

Contractor agrees to place current copies of its Source Code, including all relevant commentary, explanation 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 the Contractor (the "Escrowed Material") into an escrow account with an escrow agent, subject to the terms of a software escrow agreement that must first be approved by the City. The Contractor shall update these copies within forty-five (45) calendar days of each major product release and all product fixes installed in the City System. The Contractor will provide the Escrowed Material as required herein before Acceptance. The City may access the Escrowed Material upon the occurrence of any one of the following instances of default:

- A.** Contractor ceases its ongoing business operations;
- B.** Contractor suffers any act of insolvency or bankruptcy; or
- C.** Contractor fails to maintain technical staff capable of providing ongoing Support and Maintenance Services.

Any escrowed material furnished under this provision shall be considered licensed under this Agreement.

### **34. Severability.**

Whenever possible, each provision of this Agreement shall be interpreted to be effective and valid under applicable law. If any provision is found to be invalid, illegal or unenforceable, then such provision or portion thereof shall be modified to the extent necessary to render it legal, valid and enforceable and have the intent and economic effect as close as possible to the invalid, illegal and unenforceable provision. If it is not possible to modify the provision to render it legal, valid and enforceable, then the provision shall be severed from the rest of this Agreement. The invalidity, illegality or unenforceability of any provision shall not affect the validity, legality or enforceability of any other provision of this Agreement, which shall remain valid and binding.

### **35. Incorporation of Exhibits.**

Exhibits A through C referred to in this Agreement and attached hereto are integral parts of this Agreement and are incorporated herein by reference.

### **36. Entire Agreement and Order of Precedence.**

This written Agreement and its corresponding Exhibits constitutes the entire agreement between the parties with respect to the subject matter contained herein, superseding all previous agreements, statements or understandings pertaining to such subject matter. In the event of any conflict between this Agreement and any of the attached Exhibits, the precedence of documents shall be as follows:

1. Agreement itself;
2. Exhibit A: Support Services Policy;
3. Exhibit B: Payment Schedule;
4. Exhibit C: Statement of Work;
5. Exhibit D: Functional Specifications.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day of the year first written above.

CITY OF YAKIMA

CONTRACTOR: FILEONQ

\_\_\_\_\_  
Alex Meyerhoff, Interim City Manager

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

Print Title:

*Kim Webley*  
CEO

ATTEST:

\_\_\_\_\_  
Sonya Claar Tee, City Clerk

Resolution Number: \_\_\_\_\_

Contract Number: \_\_\_\_\_

**EXHIBIT A**  
**SERVICE LEVEL STANDARDS**

**EXHIBIT B**  
**COMPENSATION SCHEDULE**

**EXHIBIT C**  
**STATEMENT OF WORK**