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FEB 25 2016



**MEMORANDUM**

**Information Technology - Memo IT16-10**

**DATE:** FEBRUARY 25, 2016

**TO:** MAYOR AND COUNCIL

**THRU:** MARSHA REED, ACTING CITY MANAGER *MR*  
DEBRA STAPLETON, HUMAN RESOURCES DIRECTOR *MS*

**FROM:** STEVEN PHILBRICK, CHIEF INFORMATION OFFICER *SP*

**SUBJECT:** SOFTWARE LICENSE AGREEMENT WITH E-PLAN, INC., THROUGH ACCELA, INC., FOR ELECTRONIC DOCUMENT REVIEW SOFTWARE

RECOMMENDATION: Staff recommends City Council authorize a Software License Agreement with E-Plan, Inc., through Accela, Inc.

BACKGROUND: At the January 14, 2016, City Council meeting, City Council approved a Master Services Agreement with Accela, Inc., for the implementation of an electronic document review system. The agenda item included the purchase of ePlanCheck software to assist in the markup and handling of submitted plans and documents. In order to complete the purchase, an Accela order form must be signed, accepting the terms and conditions of the E-Plan software license agreement. This requirement was not known until after the item went forward for City Council approval, so it is now being brought forward for approval so the order can be processed. This software license grants City staff the ability to use the ePlanCheck software to electronically review submitted plans. Staff has reviewed the agreement and accepts its terms.

PROPOSED MOTION: Move City Council authorize a Software License Agreement with E-Plan, Inc., through Accela, Inc., for electronic document review software.

Attachments: ePlanCheck Order Form and ePlan Software License Agreement

## EPLAN SOFTWARE LICENSE AGREEMENT

"Authorized Users" means only end user ("Customer") employees, owners, officers, contractors, consultants, and representatives, third parties that are submitting construction plans, documents and data for approval by Customer, and third parties that are collaborating with Customer in preparing construction plans, documents and data for use by the Customer with respect to a construction project that the Customer is engaged in or is bidding to participate in.

"Concurrent Authorized Users" means Authorized Users who use the software at the same time in accordance with the terms of this Agreement.

"Documentation" means user manuals and technical specifications shipped with the Software or made available through electronic means by E-PLAN to Customer.

"Software" means the E-PLAN Software including Documentation.

### 1. LICENSE

E-PLAN hereby grants Customer a non-exclusive, non-transferable, worldwide license, without right to sublicense, to allow up to (but not to exceed) the number of Concurrent Authorized Users for which the Customer has paid the applicable License Fee to use the Software as installed by E-PLAN or its agent on a Customer server, subject to the terms of this Agreement. Customer acknowledges and agrees that the Software is proprietary to E-PLAN and that this Agreement grants Customer no title or right of ownership in the Software.

### 2. RESTRICTED USE

Customer may not translate, publish, disclose, decipher, decompile, reverse engineer, disassemble, or modify the Software or allow others to do so. The Software shall not be used by third parties except as expressly permitted by this Agreement. Customer acknowledges and agrees that, as between Customer and E-PLAN, Customer shall be responsible for all acts and omissions of Authorized Users, and any act or omission by an Authorized User which, if undertaken by Customer, would constitute a breach of this Agreement, shall be deemed a breach of this Agreement by Customer.

### 3. COPY RESTRICTIONS

The Software and Documentation are protected by copyright. Customer may make one copy of the machine-readable form of the Software for backup or archive purposes as permitted in 17 U.S.C. § 117. Customer must reproduce the original copyright notice with the copy. This clause does not provide any rights beyond those provided by 17 U.S.C. § 117.

### 4. TRANSFER RESTRICTIONS

The copy of the Software provided to Customer is personal to Customer and may not be assigned (by operation of law or otherwise) or transferred without the prior written consent of EPLAN. Customer may not transfer, assign, rent, lease, sell, or otherwise dispose of the Software on a temporary basis except as expressly provided herein.

### 5. OWNERSHIP

E-PLAN retains title and ownership of the E-PLAN Software and Documentation recorded on the original media and all subsequent copies thereof regardless of the form or media in or on which the original and other copies may exist. Customer agrees not to reproduce the E-PLAN Software except for the purposes of backup. This license is not a sale of the original Software nor any copy.

## **6. TERMS AND TERMINATION**

This License is effective until terminated. Customer may terminate this License at any time by destroying all copies of Software including any documentation. This License will terminate immediately without notice from E-PLAN if Customer fails to comply with any provision of this License. Upon termination, Customer must destroy all copies of Software.

## **7. WARRANTY**

LIMITED WARRANTY – E-PLAN WARRANTS THAT COMMENCING FROM THE DATE OF SHIPMENT TO CUSTOMER OR THE DATE OF ELECTRONIC AVAILABILITY TO CUSTOMER, AS APPLICABLE, AND CONTINUING FOR A PERIOD OF ONE (1) YEAR: (A) THE MEDIA ON WHICH THE SOFTWARE IS FURNISHED WILL BE FREE OF DEFECTS IN MATERIALS AND WORKMANSHIP UNDER NORMAL USE; AND (B) THE SOFTWARE SUBSTANTIALLY CONFORMS TO ITS PUBLISHED SPECIFICATIONS. EXCEPT FOR THE FOREGOING, THE SOFTWARE IS PROVIDED AS IS. THIS LIMITED WARRANTY EXTENDS ONLY TO CUSTOMER AS THE ORIGINAL LICENSEE. THIS LIMITED WARRANTY IS THE ONLY WARRANTY MADE BY THE E-PLAN. E-PLAN MAKES NO OTHER EXPRESS OR IMPLIED WARRANTY AND EXPRESSLY DISCLAIMS ALL WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. WITHOUT LIMITING THE FOREGOING SENTENCE, E-PLAN DOES NOT WARRANT THAT THE SOFTWARE OR ANY OTHER PRODUCT OR SERVICE PROVIDED HEREUNDER WILL ENSURE OR CHECK FOR COMPLIANCE WITH GOVERNMENT REGULATIONS, LAWS OR CODES (INCLUDING BUILDING CODES). THIS WARRANTY DOES NOT APPLY IF THE SOFTWARE HAS BEEN ALTERED, EXCEPT BY E-PLAN, HAS NOT BEEN INSTALLED, OPERATED, REPAIRED, OR MAINTAINED IN ACCORDANCE WITH INSTRUCTIONS SUPPLIED BY E-PLAN, HAS BEEN SUBJECTED TO ABNORMAL PHYSICAL OR ELECTRICAL STRESS, MISUSE, NEGLIGENCE, OR ACCIDENT, OR IS USED IN ULTRA-HAZARDOUS ACTIVITIES.

THE ABOVE WARRANTY DOES NOT APPLY TO ANY BETA SOFTWARE, ANY SOFTWARE MADE AVAILABLE FOR TESTING OR DEMONSTRATION PURPOSES, ANY TEMPORARY SOFTWARE MODULES OR ANY SOFTWARE FOR WHICH E-PLAN DOES NOT RECEIVE A LICENSE FEE. ALL SUCH SOFTWARE PRODUCTS ARE PROVIDED AS IS WITHOUT ANY WARRANTY WHATSOEVER.

THE FOREGOING LIMITATIONS AND EXCLUSIONS APPLY TO THE EXTENT PERMITTED BY APPLICABLE LAW IN CUSTOMER'S JURISDICTION. THIS LIMITATION OF LIABILITY MAY NOT BE VALID IN SOME STATES. YOU MAY HAVE RIGHTS THAT CANNOT BE WAIVED UNDER CONSUMER PROTECTION AND OTHER LAWS. E-PLAN DOES NOT SEEK TO LIMIT CUSTOMER'S WARRANTY OR REMEDIES TO ANY EXTENT NOT PERMITTED BY LAW.

## **8. SOFTWARE MAINTENANCE AND UPGRADES**

E-PLAN, will from time to time, make minor maintenance updates of the Software and, from time to time, upgrades to the Software which add new functionality. For a period of one (1) year from the Effective date, E-PLAN will promptly make the minor maintenance updates of the Software and upgrades to the Software available at no charge to Customer when generally released to other licensees. With respect to maintenance updates of, and upgrades to the Software after the one (1) year period, upon payment of a recurring yearly maintenance fee, EPLAN will promptly make such minor maintenance releases of the Software and upgrades to the Software available at no additional charge to Customer when generally released to other licensees.

## **9. IMPLEMENTATION AND SUPPORT SERVICES**

### **A. Customization and Implementation Services**

E-PLAN will perform services as listed in Exhibit A and in the signed statement of work if applicable.

**B. SUPPORT AND TRAINING**

For a period of one (1) year from the Effective date, as part of the license fee, Licensor agrees to provide Customer with of telephone support. Any other telephone support, training, installation, or other support activities shall be provided to Customer at the rates specified in Schedule A.

**10. INDEMNIFICATION**

**A. Indemnification by E-Plan.**

(a) E-PLAN represents that it has sufficient right, title and interest in the Software to grant the licenses provided in this Agreement. E-PLAN agrees to defend at its expense any suit against Customer based upon a claim that E-PLAN does not have sufficient right, title, and interest in Software to grant the license contained in this Agreement, or that Software infringe(s) any United States patent, copyright, or other intellectual property interest and to pay the amount of any settlement or the costs incurred and damages finally awarded after appeal, if any, in such suit. E-PLAN's obligations under this indemnification are expressly conditioned on the following: (i) Customer must promptly notify E-PLAN of any such claim; (ii) Customer must promptly, in writing, grant E-PLAN sole control of the defense of any such claim and of all negotiations for its settlement or compromise; if Customer chooses to represent its own interests in any such action, Customer may do so at its own expense, but such representation must not prejudice EPLAN's right to control the defense of the claim and negotiate its settlement or compromise; and (iii) Customer must cooperate with E-PLAN to facilitate the settlement or defense of the claim.

(b) Notwithstanding the provisions of Section 11(a), E-PLAN shall have no obligation or liability to the extent that any claims of infringement or misappropriation arise from (i) the combination, operation, or use of the Software or other deliverables with products, services, information, materials, technologies, business methods or processes not furnished or recommended in writing (including in applicable documentation) by E-PLAN if such claim would have been avoided but for such combination use; (ii) modifications to the Software and/or software deliverables, which modifications are not made by E-PLAN, if such claim would have been avoided but for such modification; (iii) failure to use, within a commercially reasonable timeframe, updates to the Software having been provided by E-PLAN; or (iv) use of the Software and/or software deliverables except in accordance with any applicable user documentation or specifications, if such claim would have been avoided but for such use.

**B. Indemnification by Customer.**

Customer will defend, indemnify and hold harmless E-PLAN from and against any and all claims, actions, losses or other liability, including without limitation, reasonable attorneys' fees and costs (collectively "Losses") resulting from or arising out of Customer's breach of one of its representations, warranties or covenants set forth in this Agreement. Customer agrees not to settle any Loss without E-PLAN's written consent, which shall not be unreasonably withheld.

**11. LIMITATION OF LIABILITIES**

IN NO EVENT SHALL E-PLAN BE LIABLE FOR CONSEQUENTIAL, SPECIAL, INDIRECT OR INCIDENTAL DAMAGES, INCLUDING BUT NOT LIMITED TO DAMAGES RESULTING FROM LOSS OF DATA, LOSS OF OPERATIONS, OR ANY LOSS OF USE OR PROFITS ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, WHETHER IN AN ACTION BASED ON CONTRACT, TORT OR ANY OTHER LEGAL THEORY, EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. SAVE WHERE THE SAME CANNOT BE LAWFULLY EXCLUDED, UNDER NO CIRCUMSTANCES SHALL EPLAN'S AGGREGATE LIABILITY UNDER THIS AGREEMENT (IN RESPECT OF ANY EVENT OR SERIES OF CONNECTED EVENTS), WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, FOR WHATEVER REASON AND UNDER WHATEVER LEGAL THEORY, EXCEED THE AMOUNT E-PLAN HAS RECEIVED FROM CUSTOMER IN RESPECT OF LICENSE FEES DURING THE TWELVE (12) MONTH PERIOD PRIOR TO THE INCURRENCE OF SUCH LIABILITY. THIS LIMIT ALSO APPLIES TO E-PLAN'S SUPPLIERS AND RESELLERS. IT IS THE MAXIMUM FOR WHICH E-PLAN, ITS SUPPLIERS AND RESELLERS ARE COLLECTIVELY RESPONSIBLE.

**12. EXPORT RULES**

Customer shall comply with all applicable export laws, restrictions or regulations. If the Software is identified as an export controlled item under U.S. export law, the Customer represents and warrants that it is not a citizen of, or located within, an embargoed or otherwise restricted nation, and that you are not otherwise prohibited under U.S. export laws from receiving the Software.

**13. NONDISCLOSURE**

Customer acknowledges that the Software contains confidential and proprietary information and trade secrets belonging to E-PLAN and that such information and trade secrets are being provided to Customer on a confidential basis. Customer shall maintain the confidential nature of the Software and Documentation which are provided for Customer's own internal use under this license in the same manner Customer protects its own confidential material.

**14. NON- ASSIGNABILITY**

Neither this Agreement, nor any rights hereunder, may be assigned by Customer except in connection with the sale of substantially all of Customer's assets to a third party.

**15. NO THIRD PARTY BENEFICIARIES**

Customer and E-PLAN (the "Parties") acknowledge that the covenants set forth in this Agreement are intended solely for the benefit of the Parties, their successors and permitted assigns. Nothing herein, whether express or implied, shall confer upon any person or entity, other than the Parties, their successors and permitted assigns, any legal or equitable right whatsoever to enforce any provision of this Agreement.

**16. U.S. Government End-Users**

The Software is a "commercial item," as that term is defined in 48 C.F.R. 2.101, consisting of "commercial computer software" and "commercial computer software documentation," as such terms are used in 48 C.F.R. 12.212. Consistent with 48 C.F.R. 12.212 and 48 C.F.R. 227.7202-1 through 227.7202-4, all U.S. Government end users acquire the Software with only those rights set forth herein.

**17. WAIVER**

No waiver of any provision of this Agreement will be effective unless in writing and executed by the party waiving the right. Failure to properly demand compliance or performance will not constitute a waiver of a party's rights hereunder. The waiver by either party of a breach or right under this Agreement will not constitute a waiver of any subsequent breach or right.

**18. SEVERABILITY**

If any provision of this Agreement is found to be invalid or unenforceable by a court of competent jurisdiction, such provision shall be severed from the remainder of this Agreement, which will otherwise remain in full force and effect.

**19. GOVERNING LAW**

This Agreement shall be governed by, and construed in accordance with, the substantive laws of the State of California without regard to conflict of law principles. The federal and state courts situated in Los Angeles County, California or Orange County, California shall have exclusive jurisdiction for the resolution of all disputes related to this Agreement.



Attn: Kerstin Nold  
 SOF Number: Q-05104  
 Date: January 07, 2016  
 Customer: City of Chandler, Arizona  
 Proposed By: Lynn Keough

**Customer Information**

**Bill To:**

The City of Chandler, Arizona  
 275 E. Buffalo  
 Chandler, Arizona 85225

**Ship To:**

The City of Chandler, Arizona  
 275 E. Buffalo  
 Chandler, Arizona 85225

**Payment Terms & Conditions:**

Payment Term: Net 30  
 Proposal is valid until: March 30, 2016

Service Start Date: On Delivery Date  
 Service End Date: Maintenance – One year from signature  
 No. of Annual Terms: One  
 Billing Frequency: Maintenance - Annual

**Other Terms & Conditions:**

- This Order Form is subject to the terms and conditions of the attached ePlan Software License and Service Terms ("ePlan Software").
- Customer will be responsible for payment or reimbursement to Accela, Inc. any and all federal, state, provincial and local taxes and duties that are applicable, except those based on Accela's net income.
- If the Agency requires additional on-site assistance, a separate estimate and Statement of Work will be provided.
- Annual Subscription fees do not include hardware or equipment. Please contact your selected hardware vendor for additional hardware or software costs.
- Total Subscription fees are due in full per the initial invoice. The service is non-cancelable and the prepaid fees are non-refundable.
- Accela is reselling the third-party products and services identified on this Order Form. Accela is not responsible for and expressly disclaims all warranties of any kind with respect to the ePlan Software. This Order Form does not amend or modify any other agreement between Accela and Customer. Accela will not be responsible for any loss or damages incurred due to Customers access or use of this third-party product.

**Alternative Terms Disclaimed:** The parties expressly disclaim any alternative terms and conditions accompanying drafts and/or purchase orders issued by Customer.

ePlan Software

PART #	PRODUCT NAME	QTY	UNIT PRICE	EXTENDED	NET PRICE
LCEPCEPCUSR3P01	ePlanCheck Named User License	25	USD 1,695.0000	USD 203,400.00	USD 42,375.00
MIEPCEPCUSR3P01	ePlanCheck Maintenance and Supp Initial	1	USD 8,475.00	USD 8,475.00	USD 8,475.00
	Subtotal				USD 50,850.00

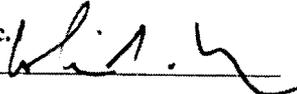
<b>TOTAL:</b>	USD 50,850.00
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Customer  
Signature \_\_\_\_\_

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

Title \_\_\_\_\_

Date \_\_\_\_\_

Accela, Inc.  
Signature 

Print Name CALIN SAMUELS

Title ASST. CORP. SECRETARY

Date 10 FEBRUARY 2016

Fax: Attn. of Contracts Administration at (925) 407-2722.  
Email: [contractsadmin@accela.com](mailto:contractsadmin@accela.com)  
Mail To: Accela, Inc. 2633 Camino Ramon, Suite 500, San Ramon, CA 94583

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APPROVED AS TO FORM

CITY ATTORNEY 