



**PURCHASING ITEM
FOR
COUNCIL AGENDA
Memo No. MUA16-060**

1. Agenda Item Number:
13
2. Council Meeting Date:
March 17, 2016

TO: MAYOR AND COUNCIL
THROUGH: CITY MANAGER

3. Date Prepared: March 2, 2016
4. Requesting Department: Municipal Utilities

5. SUBJECT: Software License and Support Agreement with iWater, Inc., for infraMAP Software

6. RECOMMENDATION: Staff recommends City Council approve a Software License and Support Agreement, with iWater, Inc., for implementation of a hydrant and valve inspection software system, through HD Supply Waterworks, in the amount of \$99,000.

7. BACKGROUND/DISCUSSION: In 2014, the Municipal Utilities and Information Technology (IT) Departments identified the need to replace two outdated software applications used by staff to implement the hydrant and valve inspection and maintenance program. The software, no longer supported by IT, was developed by a former City staff member. Staff researched solutions that could replace the hydrant and valve inspection software while providing integration with Lucity, the City's asset management system, and combining the two applications into one. The only solution found was the iWater infraMAP software.

A sole source pilot program, consisting of Lucity integration, software installation, and training, was approved by the IT Department and Purchasing Division in August 2014, in the amount of \$18,000. The pilot was deemed successful when it was verified that infraMAP interfaced with Lucity, and it was able to operate valve and hydrant equipment, record activity data, capture permanent data of field work, and increase overall efficiency.

To take the project from the pilot phase to full implementation, a Software License and Support Agreement with iWater, Inc., for the purchase of twenty infraMAP software licenses, through HD Supply Waterworks, is needed.

8. EVALUATION: Staff researched all possible solutions to replace the outdated hydrant and valve inspection software. The iWater infraMAP software was the only solution that could meet all of the City's requirements and is available only through HD Supply Waterworks, the sole authorized distributor.

The first year of software support is included with the cost of software implementation. Thereafter, the cost of optional annual support will be \$20,000 per year, which will be paid out of annual operating funds.

9. FINANCIAL IMPLICATIONS:

Cost: \$99,000
Savings: N/A
Long Term Costs: N/A

Fund Source:

Acct. No.:	Fund:	Program Name:	CIP Funded:	Amount:
601.3820.5346.6WA023	Water Bond	Main & Valve Replacements	Yes	\$99,000

10. PROPOSED MOTION: Move City Council approve a Software License and Support Agreement, with iWater, Inc., for implementation of a hydrant and valve inspection software system, through HD Supply Waterworks, in the amount of \$99,000.

ATTACHMENTS: Agreement

APPROVALS

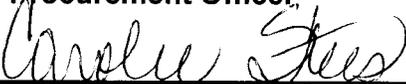
11. Requesting Department


Jackson Kelso, Business Systems Support Analyst

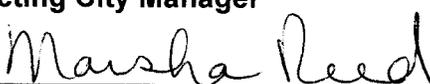
13. Department Head


Gregg Capps, Acting Municipal Utilities Director

12. Procurement Officer


Carolee Stees, CPPB

14. Acting City Manager


Marsha Reed

This agreement effective as of the last date signed below (the "Effective Date") is between iWater, Inc. ("iWater"), and _____ ("Licensee") and consists of this infraMAP® Software License and Support Agreement and the attached iWater Proposal (collectively, "Agreement").

SCOPE OF LICENSE GRANT

Licensors hereby grants to Licensee, and Licensee hereby accepts, a nonexclusive, non-transferable license to use the iWater infraMAP® Software and Related Materials (collectively, the "Software") as defined in, and in accordance with the terms of this Agreement.

SUPPORT AND MAINTENANCE

iWater shall, for a one (1) year period, effective after date of purchase of infraMAP® software, provide Software Maintenance & Support as detailed below for no additional fee. Thereafter, at the sole option of the Licensee, Maintenance & Support may be purchased in one (1) year increments. Software Maintenance & Support services include:

1. Improvements, updates, or modifications to the infraMAP® Software product purchased that iWater makes generally available as a minor release or update.
2. Access to iWater's Technical Support Team ("Help Desk") to answer questions, provide email and telephone support, as well as assistance during normal business hours for current versions of infraMAP® software. iWater will investigate all questions and problems promptly. Licensee agrees to provide adequate information to iWater to assist in the investigation and to confirm that any problems have been resolved. If deemed necessary, iWater may also provide on-site support.

GENERAL PROVISIONS AND DEFINITIONS

1. **Software:** "Software," as used in this Agreement, includes the following infraMAP® software products and extensions thereof: infraMAP®, infraMAP® Enterprise, infraMAP® Field, infraMAP® Manager, infraMAP® NOW, infraMAP® PLUS, infraMAP® Standard, infraMAP® Desktop, infraMAP® IOS, infraMAP® Android, infraMAP® Server, (individually and collectively, "Licensed Products" or "Software"), and additional or successor Software products marketed or licensed.
2. **License Use:** Licensee shall not copy the License Products or Software, nor shall the Licensee allow their use by others, without the express and written permission of iWater, excluding the use for backup, archival, and in-house disaster recovery purposes. Licensee furthermore agrees not to:
 - A. Reverse engineer any part of the Licensed Products, in part or in their entirety;
 - B. Distribute, sell, or otherwise transfer any part of the Licensed Products.
 - C. Create any derivative works or products based on or derived from the Licensed Products or documentation or modify any Licensed Products or documentation without the prior written consent of iWater. In the event of a breach of this provision, said modification, derivative work, or product based on the Licensed Products or documentation is hereby deemed assigned to iWater (without limiting their remedies).
3. **Protection of Intellectual Property Rights:** Licensee will reproduce and include any copyright, patent, trademark, or restrictive legends or notices on all items licensed under this Agreement and shall take other necessary steps to protect iWater's and its licensor's intellectual property rights.
4. **No Implied Waivers:** The failure of either party to uphold or enforce any provision of this Agreement shall not be deemed a waiver of the provisions or of the right of such party thereafter to enforce that or any other provision.
5. **Severability:** The parties mutually agree that if any provision of this Agreement is held to be unenforceable for any reason, such provision shall be reformed only to the extent necessary to make the intent of the language enforceable.
6. **Independent Contractor:** iWater is, and at all times will be, an independent contractor. Nothing in this Agreement shall be deemed to create an employer/employee, principal/agent, or joint venture relationship. Neither party has the authority to enter into any contracts on behalf of the other party or otherwise act on behalf of the other party.
7. **Force Majeure:** If the performance of this Agreement or any obligation except the making of payments, is prevented, restricted, or interfered with by reason of fire, flood, earthquake, explosion, or other casualty or accident; strikes or labor disputes; inability to procure or obtain delivery of parts, supplies, or power; war, terrorist act, cyber-attack, or other violence; any law, order, proclamation, regulation, ordinance, demand, or requirement of any governmental agency; or any act or condition whatsoever beyond the reasonable control of the affected party; the party so affected, upon giving prompt notice to the other party, shall be excused from such performance to the extent of such prevention, restriction, or interference.

8. **Counterparts:** This Agreement may be executed in counterparts, all of which, taken together, shall be deemed one (1) original document.
9. **Successor and Assigns:** Neither iWater nor Licensee shall assign, sublicense, or transfer its rights nor delegate its obligations under this Agreement without the other party's prior written consent, which shall not be unreasonably withheld, and any attempt to do so without consent shall be void. This Agreement shall be binding upon the respective successors and assigns of the parties to this Agreement.
10. **Equitable Relief:** The parties agree that any breach of this Agreement by one party may cause irreparable damage to the non-breaching party and that, in the event of such breach, in addition to any and all remedies at law, the non-breaching party shall have the right to seek an injunction, specific performance, or other equitable relief in any court of competent jurisdiction to prevent violation of these terms and without the requirement of posting a bond or undertaking or proving injury as a condition for relief.
11. **Governing Law:** This Agreement shall be governed by and construed in accordance with the laws of the State of California without reference to conflict of laws principles. Either party may give the other party written notice of any dispute not resolved in the normal course of business. The parties shall thereupon attempt in good faith to resolve such a dispute promptly by negotiations between executives who have the authority to settle the dispute. If the dispute has not been resolved within sixty (60) days, after such written notice is given, either party may avail itself of any process or means legally available to it to resolve the dispute.
12. **Insurance:** iWater shall maintain during the performance of this Agreement policies of insurance as follows:
- General Liability:** iWater shall maintain commercial general liability (CGL) insurance written on Insurance Services Office form CG 00 01 or equivalent and shall cover claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work or services hereunder by iWater, its agents, employees, representatives, or subcontractors. The limit for this insurance shall be not less than \$1,000,000.00 per occurrence, and \$2,000,000 in the annual aggregate.
- Automobile Liability:** iWater shall maintain business automobile liability insurance with coverage for vehicles including those owned, hired, and non-owned. The limit amount for this insurance shall be not less than \$1,000,000.00 per occurrence, combined single limit for bodily injury and property damage.
- Workers' Compensation:** iWater shall maintain Workers' Compensation insurance, as required by law in the State of California, and Employers' Liability Insurance in an amount not less than \$1,000,000.00 per occurrence.
- Professional Liability:** iWater shall maintain professional liability insurance with coverage for wrongful acts, errors, or omissions committed by iWater in the course of work performed for Licensee under this Agreement. This insurance shall include coverage for liability assumed under this Agreement when iWater's wrongful acts, errors, or omissions cause such liability. The limit for this insurance shall be not less than \$1,000,000.00 per claim.
- Insurers shall have a current A.M. Best's rating of no less than A:6 or equivalent unless otherwise approved by Licensee in writing. In addition, all insurers must be authorized to conduct business in the State of California, as evidenced by a listing in the official publication of the Department of Insurance of the State of California.
- The premiums for insurance coverage shall be paid in full by iWater, exclusive of any waivers of subrogation.
- If iWater fails to maintain required insurance coverage during the term of this Agreement, Licensee, at its sole option, may terminate this Agreement.
- Upon written request, Certificates of insurance and endorsements, verifying the insurance coverage required by this Agreement, shall be provided to Licensee within five (5) calendar days.
13. **Pricing and Sales Tax:** Pricing for Software, Installation and Training shall be reflected in Attachment A. Licensee shall be responsible for all state or local sales tax, whether or not specified on Attachment A.
14. **Term and Termination:**
- A. iWater has the unilateral right, but not obligation, to terminate this Agreement and the corresponding right to use Software, without further action or notice and without refund, immediately upon any material breach by Licensee of any provision of this Agreement. In this case, Licensee shall promptly uninstall and return all Software and Related Materials to iWater, and permanently erase all from any computer and storage media, and provide proof thereof.
 - B. Licensee may terminate this Agreement at any time for its convenience upon 30 days written notice to iWater. Licensee agrees to pay iWater in full for all Software and services provided prior to termination of Agreement.
 - C. Upon termination of this Agreement for any reason, all obligations and fees that accrued prior to the effective date of termination and any remedies for breach of this Agreement shall survive any termination.

15. **Notices:** All notices, demands, requests, or approvals to be given under this Agreement, shall be given in writing and shall be deemed served when delivered personally or on the third business day after confirmed email or the deposit thereof in the United States mail, postage prepaid, registered or certified, addressed as hereinafter provided.

To iWater:

iWater, Inc.
12 Goodyear, Suite 130
Irvine, CA 92618
Attn: Julie Rhodes, CFO
Email: jrhodes@iwater.org

To Licensee:

Licensee: _____
Address: _____

Attn: _____
Email: _____

The parties acknowledge that they have read and understand this Agreement and agree to be bound by its terms and conditions.

This Agreement constitutes the sole and entire agreement of the parties as to the subject matter set forth herein and supersedes any previous agreements, understandings, and arrangements between the parties relating to such subject matter. Any modifications or amendments to this Agreement must be in writing and signed by an authorized representative of each party.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed and effective as of the last date written below.

(Licensee)

By: _____
Authorized Signature

Printed Name: _____

Title: _____

Date: _____

iWater, Inc.
(iWater, Inc.)

By: *jrhodes*
Authorized Signature

Printed Name: Julie Rhodes

Title: CFO

Date: March 9, 2016

Attachments: **APPROVED AS TO FORM**

EXHIBIT A



City of Chandler
 Bid Date: 03/03/2016
 HD Supply Bid #: 41212

HD Supply Waterworks
 1820 Metcalf Ave
 Thomasville, GA 31799
 Phone: 229-226-1433
 Fax: 229-226-1740

Seq#	Qty	Description	Units	Price	Ext Price
20		20 USER PACKAGE			
30	20	INFRAMAP ENTERPRISE SOFTWARE	EA	4,950.00	99,000.00
40		ANNUAL SUPPORT - \$20,000 STARTING ON YEAR 2			
60		25 USER PACKAGE			
70	25	INFRAMAP ENTERPRISE SOFTWARE	EA	4,950.00	123,750.00
80		ANNUAL SUPPORT - \$25,000 STARTING ON YEAR 2			
100		30 USER PACKAGE			
110	30	INFRAMAP ENTERPRISE SOFTWARE	EA	4,950.00	148,500.00
120		ANNUAL SUPPORT - \$30,000 STARTING ON YEAR 2			

TERMS AND CONDITIONS OF SALE ("Terms")

1. All references in this document to "Seller" shall include HD Supply, Inc. and / or any parent, subsidiary or affiliate of HD Supply, Inc. (including any division of the foregoing) whether or not performing any or all of the scope hereunder or specifically identified herein. All references to "Buyer" shall include all parent(s), subsidiaries and affiliates of the entity placing the order. Buyer and Seller may be referred to individually as a "Party" and collectively as "Parties".
2. All sales to Buyer are subject to these Terms, which shall prevail over any inconsistent terms of Buyer's purchase order or other documents. Additional or different terms and conditions in any way altering or modifying these Terms are expressly objected to and shall not be binding upon Seller unless specifically accepted in writing by Seller's authorized representative. No modification or alteration of these Terms shall result by Seller's shipment of goods following receipt of Buyer's purchase order, or other documents containing additional, conflicting or inconsistent terms. There are no terms, conditions, understandings, or agreements other than those stated herein, and all prior proposals and negotiations are merged herein. These Terms are binding on the Parties, their successors, and permitted assigns.
3. Prices on Seller website, catalogs or in Seller quotes are subject to change without notice, and all such prices expire and become invalid if not accepted within 10 calendar days from the date of issue, unless otherwise noted by Seller in writing. Price extensions if made are for Buyer's convenience only, and they, as well as any mathematical, stenographic or clerical errors, are not binding on Seller. Prices shown do not include any sales, excise, or other governmental tax or charge payable by Seller to any federal, state or local authority. Any taxes now or hereafter imposed upon sales or shipments will be added to the purchase price, and Buyer shall reimburse Seller for any such tax or provide Seller with an acceptable tax exemption certificate. All prices and other terms provided to Buyer shall be kept confidential except to the extent a Party is required by law to disclose the same.
4. Seller shall not be liable for delay or default in delivery resulting from any cause beyond Seller's reasonable control, including, but not limited to, governmental action, strikes or other labor troubles, fire, damage or destruction of goods, wars (declared or undeclared), acts of terrorism, manufacturers' shortages, availability or timeliness of transportation, materials, fuels, or supplies, and acts of God (each a "Force Majeure Event"). Upon the occurrence of a Force Majeure Event: (a) the time for Seller's performance shall be extended reasonably and the Parties shall adjust all affected dates accordingly; (b) the purchase price shall be adjusted for any increased costs to Seller resulting from such Force Majeure Event; and (c) Buyer shall not be entitled to any other remedy.
5. Seller is a reseller of goods only, and as such does not provide any warranty for the goods it supplies hereunder. Notwithstanding this As-Is limitation, Seller shall pass through to Buyer any transferable manufacturer's standard warranties with respect to goods purchased hereunder. BUYER AND PERSONS CLAIMING THROUGH BUYER SHALL SEEK RECOURSE EXCLUSIVELY FROM MANUFACTURERS IN CONNECTION WITH ANY DEFECTS IN OR FAILURES OF GOODS, AND THIS SHALL BE THE EXCLUSIVE RECOURSE OF BUYER AND PERSONS CLAIMING THROUGH BUYER FOR DEFECTIVE GOODS, WHETHER THE CLAIM OF BUYER OR THE PERSON CLAIMING THROUGH BUYER SHALL SOUND IN CONTRACT, TORT, STRICT LIABILITY, PURSUANT TO STATUTE, OR FOR NEGLIGENCE. BUYER SHALL PASS THESE TERMS TO SUBSEQUENT BUYERS AND USERS OF GOODS. SELLER EXCLUDES AND DISCLAIMS ALL OTHER EXPRESS AND IMPLIED WARRANTIES, INCLUDING, BUT NOT LIMITED TO, ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. SELLER ASSUMES NO RESPONSIBILITY WHATSOEVER FOR SELLER'S INTERPRETATION OF PLANS OR SPECIFICATIONS PROVIDED BY BUYER, AND BUYER'S ACCEPTANCE AND USE OF GOODS SUPPLIED HEREUNDER SHALL BE PREMISED ON FINAL APPROVAL BY BUYER OR BY BUYER'S RELIANCE ON ARCHITECTS, ENGINEERS, OR OTHER THIRD PARTIES RATHER THAN ON SELLER'S INTERPRETATION. TO THE EXTENT NOT PROHIBITED BY APPLICABLE LAW, IN NO EVENT, WHETHER IN CONTRACT, WARRANTY, INDEMNITY, TORT (INCLUDING, BUT NOT LIMITED TO, NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, ARISING DIRECTLY OR INDIRECTLY OUT OF THE PERFORMANCE OR BREACH OF THESE TERMS, SHALL SELLER BE LIABLE FOR (a) ANY INCIDENTAL, INDIRECT, PUNITIVE, SPECIAL, CONSEQUENTIAL OR SIMILAR DAMAGES SUCH AS LOSS OF USE, LOST PROFITS, ATTORNEYS' FEES OR DELAY DAMAGES, EVEN IF SUCH DAMAGES WERE FORESEEABLE OR CAUSED BY SELLER'S BREACH OF THIS AGREEMENT, (b) ANY CLAIM THAT PROPERLY IS A CLAIM AGAINST THE MANUFACTURER, OR (c) ANY AMOUNT EXCEEDING THE AMOUNT PAID TO SELLER FOR GOODS FURNISHED TO BUYER WHICH ARE THE SUBJECT OF SUCH CLAIM(S). ALL CLAIMS MUST BE BROUGHT WITHIN ONE YEAR OF ACCRUAL OF A CAUSE OF ACTION.
6. Buyer shall indemnify, defend, and hold Seller its officers, directors, employees and agents harmless from any and all costs (including attorneys' and accountants' fees and expenses), liabilities and damages resulting from or related to any third party (including Buyer's employees) claim, complaint and/or judgment arising from Buyer's use of any goods furnished hereunder, as well as any negligent, intentional, or tortious act or omission of Buyer or any material breach by Buyer of these Terms.
7. When goods are delivered to Buyer in Seller's own vehicles, the F.O.B. point shall be Buyer's designated delivery site. In all other cases the F.O.B. point shall be Seller's store or warehouse and all responsibility and costs of shipping and delivery beyond the applicable F.O.B. point shall be borne by Buyer. Title and risk of loss shall pass to Buyer at the applicable F.O.B. point, which for goods not delivered in Seller's own vehicles shall be when Seller delivers the goods to the common carrier. All claims for shortage of goods or for loss or damage to goods as to which Seller has the risk of loss shall be waived unless Buyer, within 10 calendar days after receipt of the short or damaged shipment, gives Seller written notice fully describing the alleged shortage or damage. Partial shipments are permitted at Seller's discretion.
8. Any change in product specifications, quantities, destinations, shipping schedules, or any other aspect of the scope of goods must be agreed to in writing by Seller, and may result in a price and delivery adjustment by Seller. No credit for goods returned by Buyer shall be given without Seller's written authorization. All returns are subject to a restocking charge.
9. Unless otherwise agreed in writing, payment terms are net 30 days from delivery, payable in United States of America ("U.S.") dollars. Notwithstanding the foregoing, all orders are subject to Seller's continuing approval of Buyer's credit. If Buyer's credit is not approved or becomes unsatisfactory to Seller then Seller, in its sole discretion, may suspend or cancel performance, or require different payment terms, including but not limited to cash on delivery or in advance of shipment. In addition, Seller may in its discretion require an advance deposit of up to 100% of Seller's selling price for any specially manufactured goods ordered by Buyer hereunder. Payments due hereunder shall be made in the form of cash, check, or money order, or other tender approved in writing by Seller. Seller may, in its sole discretion, apply Buyer's payment against any open charges. Past due accounts bear interest at the lesser of 1.5% per month or the maximum rate permitted by applicable law, continuing after Seller obtains judgment against Buyer. Seller may exercise setoff or recoupment to apply to or satisfy Buyer's outstanding debt. Buyer shall have no right of setoff hereunder, the same being expressly waived hereby.
10. Buyer shall not export or re-export, directly or indirectly, all or any part of the goods or related technology obtained from Seller under these Terms except in accordance with applicable export laws and regulations of the U.S. Further, a Buyer that is a non-U.S. company or citizen shall similarly limit any export or re-export activity to that which would be deemed compliant with U.S. export laws and regulations if performed by a U.S. company or citizen.
11. Buyer shall pay Seller all costs and expenses of collection, suit, or other legal action brought as a result of the commercial relationship between them, including, but not limited to, all actual attorneys' and paralegals' fees, and collection costs, incurred pre-suit, through trial, on appeal, and in any administrative or bankruptcy proceedings. Any cause of action that Seller has against Buyer may be assigned without Buyer's consent to HD Supply, Inc. or to any affiliate, parent or subsidiary of HD Supply, Inc.
12. This Agreement, Buyer's account, and the business relationship between Buyer and Seller shall be governed by and construed in accordance with the laws of Georgia without regard to conflicts of laws rules, and specifically excluding the UN Convention on Contracts for the International Sale of Goods. The Parties agree that any legal action arising under or related to this Agreement shall be brought in Cobb County, Georgia, and any right to object to such venue or to assert the inconvenience of such forum is hereby waived.
13. If Buyer fails to comply with these Terms, Seller may terminate or restrict any order immediately upon notice to Buyer. Buyer certifies that it is solvent and that it will advise Seller immediately if it becomes insolvent. Buyer agrees to send Seller written notice of any changes in the form of ownership of Buyer's business within 5 days of such changes. Buyer and Seller are the only intended beneficiaries of this document, and there are no third party beneficiaries.
14. The invalidity or unenforceability of all or part of these Terms will not affect the validity or enforceability of the other terms. The parties agree to replace any void or unenforceable term with a new term that achieves substantially the same practical and economic effect and is valid and enforceable.
15. The following provisions shall survive termination, cancellation and completed performance of this Agreement as long as necessary to allow the aggrieved party to fully enforce such clauses: 5, 6, 9, 10, 11 and 12.