



**PURCHASING ITEM
FOR
COUNCIL AGENDA**

1. Agenda Item Number:

39

2. Council Meeting Date:

April 24, 2008

TO: MAYOR & COUNCIL

3. Date Prepared: February 22, 2008

THROUGH: CITY MANAGER

4. Requesting Department: Fire Department

5. SUBJECT: Approval of sole source agreements (license, professional services and maintenance) for the purchase of ESS Crisis software for the Emergency Operations Center (EOC) from Environmental Support Solutions, Inc. in an amount not to exceed \$39,045.

6. RECOMMENDATION: Recommend approval of sole source agreements (license, professional services and maintenance) for the purchase of ESS Crisis software for the EOC from Environmental Support Solutions, Inc. in an amount not to exceed \$39,045.

7. HISTORICAL BACKGROUND/DISCUSSION: The EOC is a critical facility for the security and safety of our City. During large-scale emergencies and disasters, the EOC will become the seat of government, and will serve as a central location where critical scene support, emergency operations decisions, and emergency declarations can be made. Technology is necessary as it will greatly enhance our communication and data collection abilities, improve the facilitation, coordination, and dissemination of vital information and services.

The EOC lacks a Crisis Management Information Systems software and Email capabilities. This project would provide the ability to purchase a commercially available Crisis Management Information Systems software application. This software is currently in use by surrounding cities in the area (Tempe, Mesa and Gilbert), and would allow Chandler to better communicate with the other cities during an emergency event.

Currently, a T1 line is being used to connect the EOC computers with the City network. This connection is slow, and will not meet the needs during an actual emergency event. The EOC has fiber available through the City's Traffic Division for use. This project will provide the means for fiber connectivity and hardware required. The hardware required is a high-end switch to allow communications to the City's network.

8. EVALUATION PROCESS: The ESS Crisis Solution product is proprietary and can only be purchased through Environmental Support Solutions, Inc.

9. FINANCIAL IMPLICATIONS: The account for a one time purchase is 101.1285.0000.5419.8IT039-Professional services.

10. PROPOSED MOTION: Move to approve sole source agreements (license, professional services and maintenance) for the purchase of ESS Crisis software for the EOC from Environmental Support Solutions, Inc. (ESS) in an amount not to exceed \$39,045.

APPROVALS

11. Requesting Department

Lance Trella, Battalion Chief

12. Department Head

Jim Roxburgh, Fire Chief

13. Procurement Officer

Carolee Stees, CPPB

14. City Manager

W. Mark Pentz

Environmental Support Solutions, Inc.
Software License Agreement
Software License Agreement Number:

This Agreement is made as of the ___ day of _____, 20__ between:

Environmental Support Solutions, Inc. (ESS) (An Arizona Corporation)
1620 W. Fountainhead Parkway, Suite 100
Tempe, AZ 85282

(Hereinafter "LICENSOR")

And City of Chandler (CITY)

A municipal corporation organized pursuant to the laws of the State of Arizona

(Hereinafter "LICENSEE")

I. INTRODUCTION

1.1 This Software License Agreement (the "Agreement") establishes the terms and conditions which the parties have agreed for the licensing of LICENSOR'S software products and accompanying documentation (the "PRODUCT(S)") attached hereto as Exhibit A and incorporated herein by reference. This Agreement is entered into for the purpose of establishing the General Terms and Conditions under which LICENSEE shall hereafter license PRODUCTS from LICENSOR.

II. LICENSE GRANT

2.1 *License.* Whenever LICENSEE licenses PRODUCTS from LICENSOR, LICENSOR and LICENSEE shall execute one or more ordering documents ("PRODUCT SCHEDULE"), which is attached hereto and incorporated herein by reference. In any such case, the Agreement between LICENSOR and LICENSEE for the licensing of such PRODUCTS shall consist of the applicable PRODUCT SCHEDULE, as it pertains to the specific PRODUCTS, and this Agreement. No PRODUCT shall be furnished to LICENSEE by virtue of this Agreement alone, but shall require the issuance of a PRODUCT SCHEDULE. Multiple PRODUCTS may be licensed to LICENSEE under the same PRODUCT SCHEDULE. In every case, a license number shall be designated therein for each PRODUCT Licensed under the PRODUCT SCHEDULE, and such License number shall be deemed to identify a separate and individual License for each such PRODUCT as if a separate instrument had been executed for each PRODUCT. Further, any reference in this Agreement to a License shall be deemed to refer solely to the License for an individual PRODUCT, even if such PRODUCT is Licensed to LICENSEE through the use of a PRODUCT SCHEDULE containing multiple Licenses. Preprinted terms and conditions of a purchase order from LICENSEE that is in addition or inconsistent with this Agreement shall not be binding and shall not modify this Agreement.

2.2 *License Grant.* Subject to the terms and conditions set forth in this Agreement, LICENSOR hereby grants to LICENSEE a perpetual, nontransferable and nonexclusive license (the "License") to use an object code version of the Software and the Documentation only for LICENSEE'S own internal use.

2.2.1 If the License is for a client server-based PRODUCT: (a) the License is granted solely on the Designated Computer at LICENSEE'S address or, if another address is indicated on a PRODUCT SCHEDULE, then at such other address (the "Designated Site"), and (b) unless the words "Enterprise License" are entered on the PRODUCT SCHEDULE, the PRODUCTS may be used only by the number of specific or concurrent users indicated on the PRODUCT SCHEDULE (the "Designated Users"). For purposes of this Agreement, "concurrent users" means the PRODUCT may be used simultaneously by that number of users regardless of their identity, whereas, the "specific users" means the PRODUCT may only be used by specific users identified to LICENSOR in advance.

2.2.2 If the License is for a browser-based PRODUCT (EHS version 6.0 and higher and/or Incident Master version 1.5 and higher), the term "Designated Site" shall mean one or more physical sites as set forth on

the applicable PRODUCT SCHEDULE, and the term "Designated Users" shall mean the specific number of Designated Users as set forth on the applicable PRODUCT SCHEDULE.

2.2.3 The Software may be accessed from another computer at the Designated Site: (i) if the Designated Computer is malfunctioning, but only for the period of such malfunction (not to exceed thirty (30) days without the prior written consent of LICENSOR); (ii) upon thirty (30) days written notice to LICENSOR, such notice specifying the date of transfer, and thereafter the Designated Computer shall be the computer designated in such notice; or (iii) in the event of a permissible transfer pursuant to Section 8.2 of this Agreement, at the transferee's location designated in the agreed upon notice. LICENSEE may license additional PRODUCTS, add additional computer(s) to the Designated Computer, add additional users to the number of Designated Users (if applicable) and/or add additional sites to the Designated Site, by executing a written addendum to this Agreement satisfactory in form and substance to, and signed by, LICENSOR.

2.3 *Outsourcing.* In the event that LICENSEE enters into an agreement with a third party outsourcer (the "Outsourcer") whereby the Outsourcer will use the PRODUCTS to provide LICENSEE with data processing services, LICENSEE may provide the Software to the Outsourcer solely for the purpose of permitting the Outsourcer to process LICENSEE's data provided that (i) LICENSEE notifies LICENSOR of the identity of the Outsourcer, the location where the processing will be performed, and the PRODUCT involved; (ii) LICENSEE has a written agreement with the Outsourcer to protect and safeguard the PRODUCT under terms of confidentiality which are no less restrictive than those in this Agreement; (iii) LICENSEE understands and agrees that transfer of the PRODUCT to a facility of Outsourcer will be subject to LICENSEE's and Outsourcer's execution of an agreement with LICENSOR regarding protection, use, resale, sublicensing, assignment and competitive protections.

License Fee. LICENSEE shall pay the License Fee, Twenty-one Thousand Five Hundred Dollars (\$21,500.00) set forth on the PRODUCT SCHEDULE to LICENSOR set forth on Exhibit A hereto.

2.5 *Delivery.* Upon execution of this agreement, LICENSOR shall deliver copies of the PRODUCT(s) to LICENSEE as outlined in the PRODUCT SCHEDULE, Exhibit A hereto.

III. CONFIDENTIALITY AND COPIES

3.1 *Confidentiality.* LICENSEE acknowledges that the PRODUCTS may be the trade secrets and confidential information of LICENSOR. None of the PRODUCTS or any physical media containing the PRODUCTS (software, services, training or accompanying documentation) may be used, copied, disclosed, broadcast, sold, re-licensed, distributed or otherwise published by LICENSEE except as expressly permitted by this Agreement. LICENSEE shall maintain the confidential nature of the PRODUCTS, except as provided for in 3.3, and shall at a minimum take those precautions that LICENSEE employs to protect its own confidential information.

3.2 *Copies.* LICENSEE may make one (1) additional copy of the PRODUCTS solely for use by LICENSEE as a back-up copy, provided such copy is not used in a general production environment for greater than fourteen (14) days in support of each recovery instance. Each copy of the PRODUCTS made by LICENSEE shall include the copyright, trademark and any other notices included on the copies thereof delivered to LICENSEE. LICENSEE shall not make or maintain any other copy of the PRODUCTS or any portion of them. LICENSEE shall not decompile, disassemble or reverse engineer the PRODUCT or attempt to do so.

3.3 The parties recognize that LICENSEE is a governmental entity that is subject to the Arizona Public Records Law, A.R.S. §§ 39-101 – 39-161 and that all of the provisions contained in sections 3.1 and 3.2 of this Agreement are subject to LICENSEE'S duties pursuant to the Arizona Public Records Law. The Arizona Attorney General has interpreted the Arizona Public Records Law to include trade secrets as public records in certain cases. If a request for public records which relates to information designated as proprietary by LICENSOR, LICENSEE will allow LICENSOR seven (7) days to obtain a court order from the Maricopa County Superior Court enjoining the release of such information. In no event will LICENSEE defend the release of any information sought pursuant to a Public Records Request.

IV. OWNERSHIP AND USE

4.1 *Ownership.* LICENSEE acknowledges that the PRODUCTS shall remain the exclusive property of LICENSOR and its successors and assignees. LICENSEE acknowledges that it has no right to or interest in the

Software PRODUCTS other than as expressly granted herein. LICENSEE shall not remove any identification or notices affixed to the PRODUCTS or their packaging.

4.2 *Modification.* LICENSEE shall not make any changes or modifications to the PRODUCTS without the advance written consent of LICENSOR. If LICENSEE violates the prohibition in the preceding sentence, then this Agreement (including the License) shall automatically terminate and LICENSOR shall have no further duties, liabilities or obligations with respect to the PRODUCTS.

V. WARRANTIES: LIMITATIONS AND LIABILITY

5.1 *Warranties.* LICENSOR warrants and represents to LICENSEE that: (i) LICENSOR has the right to license the PRODUCTS to LICENSEE without obtaining the consent of any other person; (ii) the PRODUCTS do not infringe upon any U.S. copyright; and (iii) the PRODUCTS will perform substantially in accordance with the Documentation; provided that the foregoing warranty shall not apply if LICENSEE modifies the Software or adds other software that interferes with the operation of the PRODUCTS. LICENSOR EXPRESSLY DISCLAIMS ANY AND ALL OTHER WARRANTIES, WHETHER EXPRESSED OR IMPLIED, INCLUDING ALL WARRANTIES OF MERCHANTABILITY AND WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE SOFTWARE PRODUCTS.

5.2 *Limitation of Liability.* LICENSOR shall not have any liability to LICENSEE or to any other person, in tort, contract or otherwise, for claims, losses, damages or injuries arising out of the use or licensing of the Software PRODUCTS or any services furnished by LICENSOR pursuant to this Agreement, except for the return by LICENSOR of an amount not in excess of the License Fee paid by LICENSEE. IN NO EVENT SHALL LICENSOR BE LIABLE TO LICENSEE OR ANY THIRD PARTY FOR ANY CONSEQUENTIAL OR SPECIAL DAMAGES OR LOST PROFITS, INCLUDING, WITHOUT LIMITATION, PUNITIVE, CONSEQUENTIAL OR SPECIAL DAMAGES FOR LOSS OF GOOD WILL, WORK STOPPAGE, COMPUTER FAILURE OR MALFUNCTION, LOSS OF WORK PRODUCT, OR ANY AND ALL OTHER COMMERCIAL DAMAGES OR LOSSES, DIRECT OR INDIRECT, EVEN IF LICENSOR HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR LOSSES.

5.3 *Remedy.* LICENSEE's sole and exclusive remedy for any damage or loss in any way connected with the PRODUCTS (other than infringement claims discussed in Sections 5.2 and 5.4) or any services furnished by LICENSOR, whether or not caused by LICENSOR's breach of warranty, negligence or any breach of any other duty, shall be, at LICENSOR's option, (i) replacement of the PRODUCTS, (ii) re-performance of the relevant services, or (iii) return or credit of the appropriate portion of any License Fee paid by LICENSEE with respect to such PRODUCTS or services.

5.4 *Copyrights.* LICENSOR shall, at its expense, indemnify, defend and hold LICENSEE harmless against any claim that the PRODUCTS infringe any U.S. copyright, provided that LICENSEE gives LICENSOR prompt, written notice of any such claim and allows LICENSOR to control the defense and all related settlement negotiations. LICENSEE shall allow LICENSOR, at LICENSOR's option and expense, if any infringement claim has occurred or in LICENSOR's reasonable judgment is likely to occur, to procure the right for LICENSEE to continue using the PRODUCTS or to replace or modify them so that they become non-infringing; and, if neither of the foregoing alternatives is available on terms that are reasonable, in LICENSOR's sole discretion, then LICENSEE shall, upon the request of LICENSOR, return the PRODUCTS to LICENSOR, whereupon LICENSOR shall return to LICENSEE the License Fee paid by LICENSEE. LICENSOR shall incur no liability to LICENSEE on account of such request and return, except for return of such License Fee as provided herein.

VI. TERMINATION

6.1 If LICENSEE: (a) fails to pay the License Fee or any taxes described in Section 8.1 when and as due; (b) makes or distributes, or fails to prevent others from making or distributing, copies of the PRODUCTS (except as expressly permitted by this Agreement), or derivations or modifications thereof; (c) uses the PRODUCTS in violation of the provisions of this Agreement; (d) uses the PRODUCTS on any computer other than a Designated Computer; (e) uses the PRODUCTS at any site other than a Designated Site; or (f) permits the PRODUCTS to be used by a number of users that exceeds the number of Designated Users (if applicable pursuant to the terms of Section 2 above), then this Agreement (including the License) shall terminate, and LICENSEE shall discontinue its use and certify to LICENSOR that it has returned or destroyed all copies of the PRODUCTS in its

possession or control, but LICENSEE's obligation to pay accrued charges and fees and to protect the confidentiality of the PRODUCTS shall continue.

6.2 LICENSEE shall, upon written request by LICENSOR, deliver a certificate stating LICENSEE has not: (a) made or distributed, copies of the PRODUCTS (except as expressly permitted by this Agreement), or derivations or modifications thereof; (b) used the PRODUCTS in violation of the provisions of this Agreement; (c) used the PRODUCTS on any computer other than a Designated Computer; (d) used the PRODUCTS at any site other than a Designated Site; or (e) permitted the PRODUCTS to be used by a number of users that exceeds the number of Designated Users (if applicable) (a "Use Certificate"). If LICENSEE under reports the use, or permitted use, of the PRODUCTS as described in (a) through (e) above, then LICENSEE shall pay LICENSOR for the actual use of the PRODUCTS at LICENSOR'S then current License Fees within thirty (30) days after the actual amount of use is discovered.

6.3 **Termination for Convenience:** LICENSEE reserves the right to terminate this Agreement or any part thereof for its sole convenience with thirty (30) days written notice. In the event of such termination, LICENSOR shall immediately stop all work hereunder, and shall immediately cause any of its suppliers and agents to cease such work. As compensation in full for services performed to the date of such termination, the LICENSOR shall receive a fee for the percentage of services actually performed. This fee shall be in the amount to be mutually agreed upon by the LICENSOR and LICENSEE, based on the agreed Scope of Work. If there is no mutual agreement, the Management Services Director shall determine the percentage of work performed under each task detailed in the Scope of Work and LICENSOR'S compensation shall be based upon such determination and LICENSOR'S fee schedule included herein.

6.1 **Termination for Cause:** LICENSEE may terminate this Agreement for Cause upon the occurrence of any one or more of the following events:

- 1) If LICENSOR fails to perform pursuant to the terms of this Agreement
- 2) If LICENSOR is adjudged a bankrupt or insolvent;
- 3) If LICENSOR makes a general assignment for the benefit of creditors;
- 4) If a trustee or receiver is appointed for LICENSOR or for any of LICENSOR'S property;
- 5) If LICENSOR files a petition to take advantage of any debtor's act, or to reorganize under the bankruptcy or similar laws;
- 6) If LICENSOR disregards laws, ordinances, rules, regulations or orders of any public body having jurisdiction;
- 7) Where Agreement has been so terminated by LICENSEE, the termination shall not affect any rights of LICENSEE against LICENSOR then existing or which may thereafter accrue.

VII. EXPORT

7.1 *Export Laws.* LICENSEE acknowledges that the PRODUCTS are subject to restrictions imposed by the United States Export Administration Act and the regulations thereunder (the "Act"). LICENSEE agrees that LICENSEE shall not acquire, ship, transport or re-export the PRODUCTS or any direct product thereof, directly or indirectly, into any country prohibited by the Act or use the PRODUCTS or any direct product thereof for any purpose prohibited by the Act.

7.2 *Export of Products.* LICENSEE acknowledges that any export of the PRODUCTS may only occur by LICENSEE when (i) prior notification is given to, and approval provided by, LICENSOR of intent to export (ii) LICENSEE pays any additional and applicable PRODUCT license fees that may occur as a result of such export

VIII. MISCELLANEOUS

8.1 *Taxes and Tariffs.* LICENSEE shall promptly pay all federal, national, state and local sales, use, excise, tariff, value added, ad valorem (including personal property) taxes and similar taxes (excluding any taxes due upon the net income of LICENSOR) billed to LICENSEE in connection with the licensing, use and/or delivery of the PRODUCTS and any related services.

8.2 *Sublicensing and Assignment Prohibition.* The License does not include the right to sublicense, and this Agreement may not be assigned by LICENSEE (except in connection with the transfer of substantially all of LICENSEE's business, and then only (i) to the transferee of such business, (ii) upon such transferee's prior written agreement to be bound by the terms hereof in a form acceptable to LICENSOR, and (iii) upon the prior written approval of LICENSOR).

8.3 *Consent to Suit.* Each of LICENSOR and LICENSEE hereby: (i) agrees that any legal proceeding arising out of or relating to this Agreement shall be instituted in the United States District Court for the State of Arizona or any court of general jurisdiction in the State of Arizona; (ii) consents to the personal and exclusive jurisdiction of such courts; and (iii) waives any objection that it may have to the laying of venue of any such proceeding and any claim or defense of inconvenient forum.

8.4 *Notices.* Any notice hereunder by either party shall be given by personal delivery or by sending such notice by certified mail, postage pre-paid, or telecopied, addressed or telecopied, as the case may be, to the other party at its address set forth in this License Agreement or at such other address designated by notice in the manner provided in this subsection. Such notice shall be deemed to have been received upon the date of actual delivery if personally delivered or, in the case of mailing, two (2) days after deposit in the mail, or, in the case of facsimile transmission, when confirmed by the facsimile machine report.

8.5 *Interpretation.* The validity and interpretation of this Agreement and the rights and obligations of the parties hereunder shall be governed by the laws of the state of Arizona, notwithstanding any conflict-of-law doctrines of Arizona or any other jurisdiction to the contrary.

8.6 *Severability.* If any provision of this Agreement shall be determined to be void, invalid, unenforceable or illegal for any reason, then the validity and enforceability of all of the remaining provisions hereof shall not be affected thereby.

8.7 *Failure to Exercise Rights.* The failure of either party to exercise any of its rights under this Agreement for a breach thereof shall not be deemed to be a waiver of such rights nor shall the same be deemed to be a waiver of any subsequent breach.

8.8 *Titles.* The titles of the Sections hereof are for convenience only and do not in any way limit or amplify the terms and conditions of this Agreement.

8.9 *Restricted Rights.* The PRODUCTS are provided as "restricted rights software" (as defined by FAR Section 52.227-14(a)). The use, reproduction or disclosure by the U.S. Department of Defense is governed by this Agreement. The use, reproduction or disclosure by any other U.S. Government department or agency is governed by the Restricted Rights Notice set forth at FAR Section 52.227-14.

8.10 *Complete Agreement.* This Agreement, together with the PRODUCT SCHEDULE attached hereto, constitutes the entire understanding between the parties with respect to the subject matter hereof and supersedes any and all prior understandings, statements, warranties, representations and agreements, oral and written, relating hereto. Any amendment hereof must be in writing and signed by both parties.

8.11 *Counterparts.* This Agreement may be executed in any number of counterparts, and each such counterpart shall be deemed to be an original instrument, but all such counterparts together shall constitute but one agreement.

8.12 *Survival.* Sections 3, 4, 5, 6, 7 and this Section 8 shall survive the termination or expiration of this Agreement.

IX. CONFLICT OF INTEREST

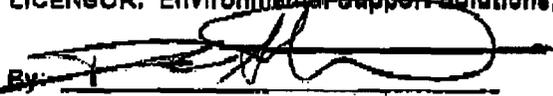
9.1 **No Kickback.** LICENSOR warrants that no person has been employed or retained to solicit or secure the Agreement upon an agreement or understanding for a commission, percentage, brokerage or contingent fee; and that no member of the City Council or any employee of LICENSEE has any interest, financially or otherwise, in the firm unless this interest has been declared pursuant to the provisions of A.R.S. section 38-501. Any such interests were disclosed in LICENSOR'S proposal to LICENSEE.

9.2 **Kickback Termination.** LICENSEE may cancel any contract or agreement, without penalty or obligation, if any person significantly involved in initiating, negotiating, securing, drafting or creating the agreement on behalf of LICENSEE is, at any time while the Agreement or any extension of the Agreement is in effect, an employee of any other party to the Agreement in any capacity or a LICENSOR to any other party to the Agreement with respect to the subject matter of the Agreement. The cancellation shall be effective when written notice for LICENSEE is received by all other parties, unless the notice specifies a later time (A.R.S. 38-511).

9.3 **No Conflict.** LICENSOR stipulates that its officers and employees do not now have a conflict of interest and it further agrees for itself, its officers and its employees that it will not contract for or accept employment for the performance of any work or services with any individual business, corporation or government unit that would create a conflict of interest in the performance of its obligations pursuant to this project.

IN WITNESS WHEREOF, the parties have hereunto subscribed their names to this day of
200

LICENSOR: Environmental Support Solutions, Inc. CITY OF CHANDLER

By: 

By: _____

Name: Ian Achterkirch

Name: _____

Title: Chief Revenue Officer

Title: _____

Date: 4-18-08

Date: _____

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

8.12 *Survival.* Sections 3, 4, 5, 6, 7 and this Section 8 shall survive the termination or expiration of this Agreement.

IX. CONFLICT OF INTEREST

9.1 No Kickback. LICENSOR warrants that no person has been employed or retained to solicit or secure the Agreement upon an agreement or understanding for a commission, percentage, brokerage or contingent fee; and that no member of the City Council or any employee of LICENSEE has any interest, financially or otherwise, in the firm unless this interest has been declared pursuant to the provisions of A.R.S. section 38-501. Any such interests were disclosed in LICENSOR'S proposal to LICENSEE.

9.2 Kickback Termination. LICENSEE may cancel any contract or agreement, without penalty or obligation, if any person significantly involved in initiating, negotiating, securing, drafting or creating the agreement on behalf of LICENSEE is, at any time while the Agreement or any extension of the Agreement is in effect, an employee of any other party to the Agreement in any capacity or a LICENSOR to any other party to the Agreement with respect to the subject matter of the Agreement. The cancellation shall be effective when written notice for LICENSEE is received by all other parties, unless the notice specifies a later time (A.R.S. 38-511).

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LICENSOR: Environmental Support Solutions, Inc. CITY OF CHANDLER

By: _____

By: _____

Name: Ian Achterkirch

Name: _____

Title: Chief Revenue Officer _____

Title: _____

Date: _____

Date: _____

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney *[Signature]*

CITY OF CHANDLER
PROFESSIONAL SERVICES AGREEMENT

Project Name: Emergency Operations Center (EOC) Computer Network Upgrade

THIS AGREEMENT is made and entered into this day of April, 2008, by and between the City of Chandler, a Municipal Corporation of the State of Arizona, hereinafter referred to as "CITY", and Environmental Support Solutions, Inc. , hereinafter referred to as "CONSULTANT".

WHEREAS, the Mayor and City Council of the City of Chandler is authorized and empowered by provisions of the City Charter to execute contracts for professional services; and

WHEREAS, CONSULTANT represents that CONSULTANT has the expertise and is qualified to perform the services described in the Agreement.

NOW THEREFORE, in consideration of the mutual promises and obligations set forth herein, the parties hereto agree as follows:

1. CONTRACT ADMINISTRATOR

1.1. To provide the professional services required by this Agreement CONSULTANT shall act under the authority and approval of the Information Technology Project Manager or designee, (the Contract Administrator), who shall oversee the execution of this Agreement, assist the CONSULTANT with any necessary information, audit billings, and approve payments. The CONSULTANT shall channel reports and special requests through the Contract Administrator.

1.2. CITY reserves the right to review and approve any/all changes to CONSULTANT'S key staff assigned to the CITY project by the firm during the term of this Agreement.

2. **SCOPE OF WORK:** CONSULTANT shall provide those services described in Exhibit A attached hereto and made a part hereof by reference.

3. **ACCEPTANCE AND DOCUMENTATION:** Each task, as provided for in Exhibit A Scope of Work, shall be reviewed and approved by CITY to determine acceptable completion within ten (10) days of completion. All documents, including but not limited to, data compilations, studies, and reports which are prepared in the performance of this Agreement, shall be and remain the property of CITY and shall be delivered to CITY before final payment is made to CONSULTANT.

4. **FEE SCHEDULE:** For the services described in paragraph 2 of this Agreement, CITY shall pay CONSULTANT a fee not to exceed the sum of Eleven Thousand Five Hundred dollars (\$11,500) in accordance with the fee schedule attached hereto as Exhibit B and incorporated herein by reference.

5. **TERM:** Following execution of this Agreement by CITY, CONSULTANT shall commence work upon notice to proceed and shall complete all services described herein within one hundred eighty (180) calendar days from the date hereof.

6. **TERMINATION:** CITY reserves the right to terminate this Agreement or any part thereof for its sole convenience with fifteen (15) days written notice. In the event of such termination, CONSULTANT shall immediately stop all work hereunder, and shall immediately cause any of its suppliers and subconsultants to cease such work. As

compensation in full for services performed to the date of such termination, the CONSULTANT shall receive a fee for the percentage of services actually completed.

7. **TERMINATION FOR CAUSE:** CITY may, upon written notice, terminate this Agreement for CONSULTANT'S failure to comply with the terms of this Agreement. CONSULTANT may, upon written notice, terminate this Agreement for CITY's failure to comply with the terms of this Agreement.

8. **INDEMNIFICATION:** The Consultant agrees to indemnify, defend, and save harmless the City of Chandler, its Mayor and Council, appointed boards and commissions, officials, officers, employees, individually and collectively; from all losses, claims, suits, actions, payments and judgments, demands, expenses, attorney's fees, defense costs, or actions of any kind and nature resulting from personal injury to any person, including employees of the Consultant or of any Sub Consultant employed by the Consultant (including bodily injury and death) or damages to any property, arising or alleged to have arisen out of the negligent performance of the Consultant for the work to be performed hereunder, except any such injury or damages arising out of the sole negligence of the City, its officers, agents or employees. IT IS THE INTENTION OF THE PARTIES to this contract that the City of Chandler, its Mayor and Council, appointed boards and commissions, officials, officers, employees, individually and collectively, are to be indemnified against their own negligence unless and except their negligence is found to be the sole cause of the injury to persons or damages to property.

The amount and type of insurance coverage requirements set forth herein will in no way be construed as limiting the scope of the indemnity in this paragraph.

9. **INSURANCE REQUIREMENTS:** CONSULTANT shall provide and maintain the insurance as listed in Exhibit C attached hereto and made a part hereof by reference.

10. **CONFIDENTIALITY:**

A. CONSULTANT INFORMATION

(a) Consultant Designated Proprietary Information. All technical data and proprietary information of Consultant, designated as confidential or proprietary, shall be and is confidential and proprietary to, and is the exclusive property of Consultant ("Proprietary Information"). Proprietary Information, regardless of its form (written, verbal or digital), may include but is not limited to information concerning the technical, engineering, operational, or economic aspects of Consultant's services and products. City recognizes that Consultant develops and licenses software which is protected as a trade secret and that of necessity, services related to Consultant's software products require the preservation of all confidences and trade secrets related to Consultant's software. Proprietary Information includes all knowledge and all tangible embodiments of that knowledge which are disclosed or revealed to the City by Consultant or which are created by Consultant in the course of performing services. Proprietary Information shall expressly include knowledge or insight which may be gleaned by observing Consultants personnel or otherwise made or developed by Consultant in the course of performing Consulting Services for City under this Contract. All Proprietary Information shall be received and maintained in strict confidence by City and shall not be disclosed, directly or indirectly by City without the written authorization of Consultant.

(b) The forgoing restrictions concerning designated Proprietary Information shall not apply in the following circumstances:

- (c) Information which was known to City and reduced to writing or fixation by City prior to the date of this Contract, and which was not first acquired, directly, or indirectly, from Consultant;
- (d) Information which is or becomes publicly available in issued patents, published patent applications or printed publications of general public circulation, provided such occurs independent of any act or omission by City; or
- (e) Information that City hereafter lawfully obtains without restriction from a third party, provided such third party breaches no contractual or legal obligation in obtaining such information.
- (f) With respect to designated Proprietary Information:
 - (1) City may reveal designated Proprietary Information to its employees, but only when and to the extent necessary for the performance of their usual duties. City agrees to advise all of its employees receiving access to the Proprietary Information of the restrictions of this Agreement and to bind them accordingly.
 - (2) City shall maintain all documents or other media (including computer programs or software) which contain designated Proprietary Information, and all copies thereof, in a secure location inaccessible to third parties and other not authorized to receive Proprietary Information.
 - (3) All writings, drawings, pictures, or other documents or other media, including copies thereof, which contain designated Proprietary Information, shall be identified to City by Consultant as such and shall be marked by Consultant with the legend "Confidential - Property of Environmental Support Solutions, Inc." City shall not reproduce these materials, regardless of method employed, without the prior written approval of Consultant. Upon request of Consultant, City shall return all materials received by City from Consultant which contain Proprietary Information.
 - (4) The obligations imposed on each party by this Section 10 shall continue in effect for a period of five (5) years from the date on which the last Consulting Services are performed by Consultant for City, and the obligations of this section shall survive any termination of this Contract.

The parties recognize that the City of Chandler is a governmental entity that is subject to the Arizona Public Records Law, A.R.S. §§ 39-101 – 39-161 and that all of the provisions contained in sections 9(a), 9(b), and 9(c) of this contract are subject to the City of Chandler's duties pursuant to the Arizona Public Records Law. The Arizona Attorney General has interpreted the Arizona Public Records Law to include trade secrets as public records in certain cases. If a request for public records which relates to information designated as proprietary by CONSULTANT, CITY will allow CONSULTANT seven (7) days to obtain a court order from the Maricopa County Superior Court enjoining the release of such information. In no event will the City defend the release of any information sought pursuant to a Public Records Request.

11. INTELLECTUAL PROPERTY RIGHTS:

Consultant is providing services to City that require the application of its expertise and knowledge of information resource management issues. City also recognizes that Consultant's work hereunder may involve the application and use of technologies that are part of and protected as Consultant Software products. All inventions and discoveries, including improvements to Proprietary Information and Consultant Software ("Inventions or Improvements") arising from Consultant's work hereunder are and shall

remain the sole property of Consultant regardless of the legal protections available for such Inventions. Notwithstanding the ownership by Consultant of all rights to all Inventions or Improvements, Consultant hereby grants to City a perpetual, worldwide, non-exclusive, royalty-free right to use those Inventions or Improvements which are created in the course of Consultant's performance hereunder. This license does not include any right to commercialize, sell or relicense the Inventions or Improvements to third parties, it being the intent of this Agreement that City use the rights granted for its own internal business use. With regard to all Inventions or Improvements, Consultant expressly reserves the right to reuse and employ commonly used code and data treatment techniques, procedures, algorithms and other skills generated by it as a result of its experience and familiarity with information technologies.

12. RESPONSIBILITIES AND LIMITATIONS OF LIABILITY:

- (a) Consultant's obligations under this Agreement shall be discharged and complete upon delivery to City of those reports, plans or upon completion of the deliverables and project activities as specified herein except with regard to duties relating to non-disclosure of information as set forth in Exhibit D attached hereto and incorporated herein by reference.
- (b) Consultant's total liability to City arising from any claim or cause of action arising from or in any way related to this Agreement, regardless of the basis of the claim, shall not exceed the total compensation received by Consultant under this Agreement and City, hereby irrevocably releases Consultant from any liability in excess thereof. Neither Consultant nor any of its subcontractors or vendors shall be liable to City for any indirect, economic, incidental, or consequential loss or damage, such as, but not limited to, loss of revenues, use, profits or time, regulatory agency fines, or penalties, or decreased property values, and City hereby releases Consultant and such subcontractors and vendors therefrom.

13. ENTIRE AGREEMENT: This Agreement constitutes one of three Agreements entered into with CONSULTANT which are executed simultaneously: this Agreement, a Software Maintenance Agreement, and a Software Licensing Agreement. None of these Agreements may not be modified or amended except by a written document, signed by authorized representatives or each party.

14. ARIZONA LAW: This Agreement shall be governed and interpreted according to the laws of the State of Arizona.

15. CONFLICT OF INTEREST:

15.1 No Kickback. CONSULTANT warrants that no person has been employed or retained to solicit or secure the Agreement upon an agreement or understanding for a commission, percentage, brokerage or contingent fee; and that no member of the City Council or any employee of the CITY has any interest, financially or otherwise, in the firm unless this interest has been declared pursuant to the provisions of A.R.S. section 38-501. Any such interests were disclosed in CONTRACTOR'S proposal to the CITY.

15.2 Kickback Termination. CITY may cancel any contract or agreement, without penalty or obligation, if any person significantly involved in initiating, negotiating, securing, drafting or creating the agreement on behalf of the CITY is, at any time while the Agreement or any extension of the Agreement is in effect, an employee of any other party to the Agreement in any capacity or a CONSULTANT to any other party to the Agreement with respect to the subject matter of the Agreement. The cancellation shall be effective when written notice for CITY is received by all other parties, unless the notice specifies a later time (A.R.S. 38-511).

15.3 **No Conflict.** CONSULTANT stipulates that its officers and employees do not now have a conflict of interest and it further agrees for itself, its officers and its employees that it will not contract for or accept employment for the performance of any work or services with any individual business, corporation or government unit that would create a conflict of interest in the performance of its obligations pursuant to this project.

16. **NOTICES:** All notices or demands required to be given pursuant to the terms of this Agreement shall be given to the other party in writing, delivered by hand or registered or certified mail, at the addresses set forth below, or to such other address as the parties may substitute by written notice given in the manner prescribed in this paragraph.

In the case of City:
City of Chandler
Purchasing Division
P.O. Box 4008, Mail Stop 901
Chandler, AZ 85244-4008
480.782. 2400

In the case of CONSULTANT:
Environmental Support Solutions, Inc.
Mark Wilson
1620 W. Fountainhead Parkway, Suite 100
Tempe, AZ 85252
800-999-5009

Notices shall be deemed received on date delivered, if delivered by hand, and on the delivery date indicated on receipt if delivered by certified or registered mail.

IN WITNESS WHEREOF, the parties have hereunto subscribed their names to this day of April 2008.

CITY OF CHANDLER

CONSULTANT

Mayor Date

By: _____
Title: Chief Revenue Officer

APPROVE AS TO FORM

ATTEST: If Corporation

City Attorney *SEM*

Secretary

ATTEST:

City Clerk

SEAL

15.3 **No Conflict.** CONSULTANT stipulates that its officers and employees do not now have a conflict of interest and it further agrees for itself, its officers and its employees that it will not contract for or accept employment for the performance of any work or services with any individual business, corporation or government unit that would create a conflict of interest in the performance of its obligations pursuant to this project.

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In the case of City:
City of Chandler
Purchasing Division
P.O. Box 4008, Mail Stop 901
Chandler, AZ 85244-4008
480.782.2400

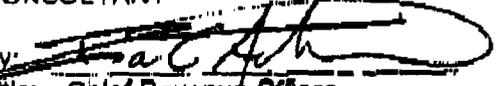
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CITY OF CHANDLER

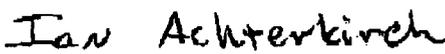
Mayor Date

CONSULTANT

By: 
Title: Chief Revenue Officer

APPROVE AS TO FORM

City Attorney 


ATTEST: If Corporation

ATTEST:

City Clerk

Secretary

SEAL

EXHIBIT A SCOPE OF WORK

1) PROJECT INITIATION

The Consultant with the assistance of the City:

- a) Shall conduct a one-hour project kickoff meeting at the City that shall explain the purpose of the project and processes to occur
- b) Shall review the project's charter and revise/modify charter if necessary
- c) Shall have a mutual understanding of the goals and objectives defined in the project's charter
- d) Shall finalize staffing project teams
- e) Shall establish communications plan, roles and responsibilities, status reporting and issues/risks plan
- f) Shall finalize the project's timeline with resources allocation

Deliverables

- One hour kickoff meeting
- One electronic copy (MS Word format) of the revised charter document
- One electronic copy (MS Word format) of the goals and objectives
- One electronic copy (MS Word format) of project teams staffing
- One electronic copy (MS Word format) of roles and responsibilities document
- One electronic copy (MS Word format) of the communications plan
- One electronic copy of weekly status reports
- One electronic copy of the issues/risks plan
- One electronic copy (MS Project) of the project's timeline (plan)

2) CONFIGURATION ANALYSIS

The Consultant with the assistance of the City:

- a) Shall evaluate infrastructure requirements and preparation to determine if minimum system requirements defined by Consultant have been met
- b) Shall configure the ESS Crisis system to serve the needs of the City Fire Department not to exceed the budget allowed in the Product Schedule
- c) Flow diagrams of all business processes relevant to the use of the software

Deliverables

- One electronic copy (MS Word format) and one pdf file of the infrastructure requirements and preparation
- Fully configured system complete with data ready for operations
- One electronic copy (MS Visio) and one pdf file of the workflow process documents

3) EXECUTION

The Consultant with the assistance of the City:

- a) Shall install ESS Crisis 7.1 on-site
- b) Shall conduct one day (8 hours) of Systems Administration Training (on-site)
- c) Shall conduct one day (8 hours) of Configuration and Data Population Training and Services (on-site)
- d) Shall conduct a two day (16 hours) End User Training (Train the Trainer)
- e) Shall provide consulting, customization, mapping and third party application integration services not to exceed the budget allowed in the Product Schedule

Deliverables

Fully operational ESS Crisis system
One day of Systems Administration Training (on-site)
One day of Configuration and Data Population Training (on-site)
Two days of End User Training
Consulting, customization, mapping and third party application integration services not to exceed the budget allowed in the Product Schedule

4) CLOSING PHASE

The Consultant with the assistance of the City:

- a) Shall obtain client acceptance on all completed deliverables listed herein in this Exhibit A Scope of Work.
- b) Shall conduct post-implementation audit

Deliverables

Client acceptance document
Post-implementation audit

**EXHIBIT B
FEE SCHEDULE**

The CITY shall pay CONSULTANT in an amount not to exceed \$11,500 per the following schedule:

Payment Milestone	Payment Amount
Project Initiation Phase Completion	\$ 5,000
Project Closing Phase Completion	\$ 6,500
Total Fee	\$11,500

EXHIBIT C
INSURANCE REQUIREMENTS

1. CONSULTANT, at its own expense, shall purchase and maintain insurance of the types and amounts required in this section, with companies possessing a current A.M. Best, Inc. rating of B++6, or better and legally authorized to do business in the State of Arizona with policies and forms satisfactory to CITY.
2. Policies written on a "Claims made" basis are not acceptable without written permission from the City's Risk Manager.
3. All insurance required herein shall be maintained in full force and effect until all work or services required to be performed under the terms of this Agreement is satisfactorily completed and formally accepted. Failure to do so may, at the sole discretion of CITY, constitute a material breach of this Agreement and may result in termination of this contract.
4. If any of the insurance policies are not renewed prior to expiration, payments to the CONSULTANT may be withheld until these requirements have been met, or at the option of the City, the City may pay the Renewal Premium and withhold such payments from any monies due the CONSULTANT.
5. All insurance policies, except Workers' Compensation and Professional Liability required by this Agreement, and self-insured retention or deductible portions, shall name, to the fullest extent permitted by law for claims arising out of the performance of this contract, the City of Chandler, its agents, representatives, officers, directors, officials and employees as Additional Insureds.
6. CONSULTANT's insurance shall be primary insurance over any insurance available to the CITY and as to any claims resulting from this contract, it being the intention of the parties that the insurance policies so effected shall protect both parties and be primary coverage for any and all losses covered by the described insurance.
7. The insurance policies, except Workers' Compensation, shall contain a waiver of transfer rights of recovery (subrogation) against CITY, its agents, representatives, officers, directors, officials and employees for any claims arising out of CONSULTANT's acts, errors, mistakes, omissions, work or service.
8. The insurance policies may provide coverage, which contain deductibles or self-insured retentions. Such deductible and/or self-insured retentions shall be assumed by and be for the account of, and at the sole risk of CONSULTANT. CONSULTANT shall be solely responsible for the deductible and/or self-insured retention. The amounts of any self-insured retentions shall be noted on the Certificate of Insurance. CITY, at its option, may require CONSULTANT to secure payment of such deductibles or self-insured retentions by a Surety Bond or an irrevocable and unconditional letter of credit. Self-insured retentions (SIR) in excess of \$25,000 will only be accepted with the permission of the Management Services Director/designee..
9. All policies and certificates shall contain an endorsement providing that the coverage afforded under such policies shall not be reduced, canceled or allowed to expire until at least thirty (30) days prior written notice has been given to CITY.
10. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the CONSULTANT with reasonable promptness in accordance with the CONSULTANT's information and belief.

11. In the event that claims in excess of the insured amounts provided herein, are filed by reason of any operations under this contract, the amount of excess of such claims, or any portion thereof, may be withheld from payment due or to become due the CONSULTANT until such time as the CONSULTANT shall furnish such additional security covering such claims as may be determined by the CITY.

C.1 PROOF OF INSURANCE - CERTIFICATES OF INSURANCE

1. Prior to commencing work or services under this Agreement, CONSULTANT shall furnish to CITY Certificates of Insurance, issued by CONSULTANT's insurer(s), as evidence that policies providing the required coverages, conditions and limits required by this Agreement are in full force and effect and obtain from the City's Risk Management Division approval of such Certificates.
2. If a policy does expire during the life of this Agreement, a renewal certificate must be sent to the City of Chandler five (5) days prior to the expiration date.
3. All Certificates of Insurance shall identify the policies in effect on behalf of CONSULTANT, their policy period(s), and limits of liability. Each Certificate shall include the job site and project number and title. Coverage shown on the Certificate of Insurance must coincide with the requirements in the text of the contract documents. Information required to be on the certificate of Insurance may be typed on the reverse of the Certificate and countersigned by an authorized representative of the insurance company.
4. CITY reserves the right to request and to receive, within 10 working days, certified copies of any or all of the herein required insurance policies and/or endorsements. CITY shall not be obligated, however, to review same or to advise CONSULTANT of any deficiencies in such policies and endorsements, and such receipt shall not relieve CONSULTANT from, or be deemed a waiver of CITY's right to insist on, strict fulfillment of CONSULTANT's obligations under this Agreement.

C.2 REQUIRED COVERAGE

1. Such insurance shall protect CONSULTANT from claims set forth below which may arise out of or result from the operations of CONSULTANT under this Contract and for which CONSULTANT may be legally liable, whether such operations be by the CONSULTANT or by a Sub-consultant or subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable. Coverage under the policy will be at least as broad as Insurance Services Office, Inc., policy form CG00011093 or equivalent thereof, including but not limited to severability of interest and waiver of subrogation clauses.
2. Claims under workers' compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed;
3. Claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor's employees;
4. Claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor's employees;
5. Claims for damages insured by usual personal injury liability coverage;
6. Claims for damages, other than to Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;

7. Claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle; Coverage will be at least as broad as Insurance Service Office, Inc., coverage Code "I" "any auto" policy form CA00011293 or equivalent thereof.
8. Claims for bodily injury or property damage arising out of completed operations;
9. Claims involving contractual liability insurance applicable to the Contractor's obligations under the Indemnification Agreement;
10. Claims for injury or damages in connection with one's professional services;
11. Claims involving construction projects while they are in progress. Such insurance shall include coverage for loading and off loading hazards. If any hazardous material, as defined by any local, state or federal authorities are to be transported, MCS 90 endorsement shall be included.

C.2.1 Commercial General Liability - Minimum Coverage Limits

The Commercial General Liability insurance required herein shall be written for not less than \$1,000,000 limits of liability or ten percent (10%) of the Contract Price, whichever coverage is greater. Any combination between general liability and excess general liability alone amounting to a minimum of \$1,000,000 per occurrence (or 10% per occurrence) and an aggregate of \$2,000,000 (or 20% whichever is greater) in coverage will be acceptable. The Commercial General Liability additional insured endorsement shall be as broad as the Insurance Services, Inc's (ISO) Additional Insured, Form B, CG 20101001, and shall include coverage for CONSULTANT's operations and products, and completed operations.

C.2.2 General Liability - Minimum Coverage Limits

The General Liability insurance required herein, including, Comprehensive Form, Premises-Operations, Contractual Insurance, Broad Form Property Damage, Independent Contractors, and Personal Injury shall be written for Bodily Injury and Property Damage Combined shall be written for not less than \$1,000,000 or 10% of the contract cost and with a \$2,000,000 aggregate.

C.2.3 Automobile Liability

CONSULTANT shall maintain Commercial/Business Automobile Liability insurance with a combined single limit for bodily injury and property damage of not less than \$1,000,000 each occurrence with respect to any owned, hired, and non-owned vehicles assigned to or used in performance of the CONSULTANT's work. Coverage shall be at least as broad as coverage code 1, "any auto", (Insurance Service Office, Inc. Policy Form CA 00011293, or any replacements thereof).

C.2.4 Worker's Compensation and Employer's Liability

CONSULTANT shall maintain Workers' Compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction over CONSULTANT's employees engaged in the performance of the work or services; and, Employer's Liability insurance of not less than \$1,000,000 for each accident, \$1,000,000 disease coverage for each employee, and \$1,000,000 disease policy limit.

In case any work is subcontracted, CONSULTANT will require the Subcontractor to provide Workers' Compensation and Employer's Liability to at least the same extent as required of CONSULTANT.

C.2.5 Professional Liability

CONSULTANT shall maintain Professional Liability insurance covering acts, errors, mistakes and omissions and Products/Completed Operations, arising out of the work or services performed by DESIGN CONSULTANT, or any person employed by CONSULTANT, with a claims made policy limit of not less than \$1,000,000.

Environmental Support Solutions, Inc.
Software License Agreement
Software License Agreement Number:

This Agreement is made as of the ___ day of _____, 20__ between:

Environmental Support Solutions, Inc. (ESS) (An Arizona Corporation)
1620 W. Fountainhead Parkway, Suite 100
Tempe, AZ 85282 (Hereinafter "LICENSOR")

And City of Chandler (CITY)
A municipal corporation organized pursuant to the laws of the State of Arizona
(Hereinafter "LICENSEE")

I. INTRODUCTION

1.1 This Software License Agreement (the "Agreement") establishes the terms and conditions which the parties have agreed for the licensing of LICENSOR'S software products and accompanying documentation (the "PRODUCT(S)") attached hereto as Exhibit A and incorporated herein by reference. This Agreement is entered into for the purpose of establishing the General Terms and Conditions under which LICENSEE shall hereafter license PRODUCTS from LICENSOR.

II. LICENSE GRANT

2.1 *License.* Whenever LICENSEE licenses PRODUCTS from LICENSOR, LICENSOR and LICENSEE shall execute one or more ordering documents ("PRODUCT SCHEDULE"), which is attached hereto and incorporated herein by reference. In any such case, the Agreement between LICENSOR and LICENSEE for the licensing of such PRODUCTS shall consist of the applicable PRODUCT SCHEDULE, as it pertains to the specific PRODUCTS, and this Agreement. No PRODUCT shall be furnished to LICENSEE by virtue of this Agreement alone, but shall require the issuance of a PRODUCT SCHEDULE. Multiple PRODUCTS may be licensed to LICENSEE under the same PRODUCT SCHEDULE. In every case, a license number shall be designated therein for each PRODUCT Licensed under the PRODUCT SCHEDULE, and such License number shall be deemed to identify a separate and individual License for each such PRODUCT as if a separate instrument had been executed for each PRODUCT. Further, any reference in this Agreement to a License shall be deemed to refer solely to the License for an individual PRODUCT, even if such PRODUCT is Licensed to LICENSEE through the use of a PRODUCT SCHEDULE containing multiple Licenses. Preprinted terms and conditions of a purchase order from LICENSEE that is in addition or inconsistent with this Agreement shall not be binding and shall not modify this Agreement.

2.2 *License Grant.* Subject to the terms and conditions set forth in this Agreement, LICENSOR hereby grants to LICENSEE a perpetual, nontransferable and nonexclusive license (the "License") to use an object code version of the Software and the Documentation only for LICENSEE'S own internal use.

2.2.1 If the License is for a client server-based PRODUCT: (a) the License is granted solely on the Designated Computer at LICENSEE'S address or, if another address is indicated on a PRODUCT SCHEDULE, then at such other address (the "Designated Site"), and (b) unless the words "Enterprise License" are entered on the PRODUCT SCHEDULE, the PRODUCTS may be used only by the number of specific or concurrent users indicated on the PRODUCT SCHEDULE (the "Designated Users"). For purposes of this Agreement, "concurrent users" means the PRODUCT may be used simultaneously by that number of users regardless of their identity, whereas, the "specific users" means the PRODUCT may only be used by specific users identified to LICENSOR in advance.

2.2.2 If the License is for a browser-based PRODUCT (EHS version 6.0 and higher and/or Incident Master version 1.5 and higher), the term "Designated Site" shall mean one or more physical sites as set forth on

the applicable PRODUCT SCHEDULE, and the term "Designated Users" shall mean the specific number of Designated Users as set forth on the applicable PRODUCT SCHEDULE.

2.2.3 The Software may be accessed from another computer at the Designated Site: (i) if the Designated Computer is malfunctioning, but only for the period of such malfunction (not to exceed thirty (30) days without the prior written consent of LICENSOR); (ii) upon thirty (30) days written notice to LICENSOR, such notice specifying the date of transfer, and thereafter the Designated Computer shall be the computer designated in such notice; or (iii) in the event of a permissible transfer pursuant to Section 8.2 of this Agreement, at the transferee's location designated in the agreed upon notice. LICENSEE may license additional PRODUCTS, add additional computer(s) to the Designated Computer, add additional users to the number of Designated Users (if applicable) and/or add additional sites to the Designated Site, by executing a written addendum to this Agreement satisfactory in form and substance to, and signed by, LICENSOR.

2.3 *Outsourcing.* In the event that LICENSEE enters into an agreement with a third party outsourcer (the "Outsourcer") whereby the Outsourcer will use the PRODUCTS to provide LICENSEE with data processing services, LICENSEE may provide the Software to the Outsourcer solely for the purpose of permitting the Outsourcer to process LICENSEE's data provided that (i) LICENSEE notifies LICENSOR of the identity of the Outsourcer, the location where the processing will be performed, and the PRODUCT involved; (ii) LICENSEE has a written agreement with the Outsourcer to protect and safeguard the PRODUCT under terms of confidentiality which are no less restrictive than those in this Agreement; (iii) LICENSEE understands and agrees that transfer of the PRODUCT to a facility of Outsourcer will be subject to LICENSEE's and Outsourcer's execution of an agreement with LICENSOR regarding protection, use, resale, sublicensing, assignment and competitive protections.

License Fee. LICENSEE shall pay the License Fee, Twenty-one Thousand Five Hundred Dollars (\$21,500.00) set forth on the PRODUCT SCHEDULE to LICENSOR set forth on Exhibit A hereto.

2.5 *Delivery.* Upon execution of this agreement, LICENSOR shall deliver copies of the PRODUCT(s) to LICENSEE as outlined in the PRODUCT SCHEDULE, Exhibit A hereto.

III. CONFIDENTIALITY AND COPIES

3.1 *Confidentiality.* LICENSEE acknowledges that the PRODUCTS may be the trade secrets and confidential information of LICENSOR. None of the PRODUCTS or any physical media containing the PRODUCTS (software, services, training or accompanying documentation) may be used, copied, disclosed, broadcast, sold, re-licensed, distributed or otherwise published by LICENSEE except as expressly permitted by this Agreement. LICENSEE shall maintain the confidential nature of the PRODUCTS, except as provided for in 3.3, and shall at a minimum take those precautions that LICENSEE employs to protect its own confidential information.

3.2 *Copies.* LICENSEE may make one (1) additional copy of the PRODUCTS solely for use by LICENSEE as a back-up copy, provided such copy is not used in a general production environment for greater than fourteen (14) days in support of each recovery instance. Each copy of the PRODUCTS made by LICENSEE shall include the copyright, trademark and any other notices included on the copies thereof delivered to LICENSEE. LICENSEE shall not make or maintain any other copy of the PRODUCTS or any portion of them. LICENSEE shall not decompile, disassemble or reverse engineer the PRODUCT or attempt to do so.

3.3 The parties recognize that LICENSEE is a governmental entity that is subject to the Arizona Public Records Law, A.R.S. §§ 39-101 – 39-161 and that all of the provisions contained in sections 3.1 and 3.2 of this Agreement are subject to LICENSEE'S duties pursuant to the Arizona Public Records Law. The Arizona Attorney General has interpreted the Arizona Public Records Law to include trade secrets as public records in certain cases. If a request for public records which relates to information designated as proprietary by LICENSOR, LICENSEE will allow LICENSOR seven (7) days to obtain a court order from the Maricopa County Superior Court enjoining the release of such information. In no event will LICENSEE defend the release of any information sought pursuant to a Public Records Request.

IV. OWNERSHIP AND USE

4.1 *Ownership.* LICENSEE acknowledges that the PRODUCTS shall remain the exclusive property of LICENSOR and its successors and assignees. LICENSEE acknowledges that it has no right to or interest in the

Software PRODUCTS other than as expressly granted herein. LICENSEE shall not remove any identification or notices affixed to the PRODUCTS or their packaging.

4.2 *Modification.* LICENSEE shall not make any changes or modifications to the PRODUCTS without the advance written consent of LICENSOR. If LICENSEE violates the prohibition in the preceding sentence, then this Agreement (including the License) shall automatically terminate and LICENSOR shall have no further duties, liabilities or obligations with respect to the PRODUCTS.

V. WARRANTIES: LIMITATIONS AND LIABILITY

5.1 *Warranties.* LICENSOR warrants and represents to LICENSEE that: (i) LICENSOR has the right to license the PRODUCTS to LICENSEE without obtaining the consent of any other person; (ii) the PRODUCTS do not infringe upon any U.S. copyright; and (iii) the PRODUCTS will perform substantially in accordance with the Documentation; provided that the foregoing warranty shall not apply if LICENSEE modifies the Software or adds other software that interferes with the operation of the PRODUCTS. LICENSOR EXPRESSLY DISCLAIMS ANY AND ALL OTHER WARRANTIES, WHETHER EXPRESSED OR IMPLIED, INCLUDING ALL WARRANTIES OF MERCHANTABILITY AND WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE SOFTWARE PRODUCTS.

5.2 *Limitation of Liability.* LICENSOR shall not have any liability to LICENSEE or to any other person, in tort, contract or otherwise, for claims, losses, damages or injuries arising out of the use or licensing of the Software PRODUCTS or any services furnished by LICENSOR pursuant to this Agreement, except for the return by LICENSOR of an amount not in excess of the License Fee paid by LICENSEE. IN NO EVENT SHALL LICENSOR BE LIABLE TO LICENSEE OR ANY THIRD PARTY FOR ANY CONSEQUENTIAL OR SPECIAL DAMAGES OR LOST PROFITS, INCLUDING, WITHOUT LIMITATION, PUNITIVE, CONSEQUENTIAL OR SPECIAL DAMAGES FOR LOSS OF GOOD WILL, WORK STOPPAGE, COMPUTER FAILURE OR MALFUNCTION, LOSS OF WORK PRODUCT, OR ANY AND ALL OTHER COMMERCIAL DAMAGES OR LOSSES, DIRECT OR INDIRECT, EVEN IF LICENSOR HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OR LOSSES.

5.3 *Remedy.* LICENSEE's sole and exclusive remedy for any damage or loss in any way connected with the PRODUCTS (other than infringement claims discussed in Sections 5.2 and 5.4) or any services furnished by LICENSOR, whether or not caused by LICENSOR's breach of warranty, negligence or any breach of any other duty, shall be, at LICENSOR's option, (i) replacement of the PRODUCTS, (ii) re-performance of the relevant services, or (iii) return or credit of the appropriate portion of any License Fee paid by LICENSEE with respect to such PRODUCTS or services.

5.4 *Copyrights.* LICENSOR shall, at its expense, indemnify, defend and hold LICENSEE harmless against any claim that the PRODUCTS infringe any U.S. copyright, provided that LICENSEE gives LICENSOR prompt, written notice of any such claim and allows LICENSOR to control the defense and all related settlement negotiations. LICENSEE shall allow LICENSOR, at LICENSOR's option and expense, if any infringement claim has occurred or in LICENSOR's reasonable judgment is likely to occur, to procure the right for LICENSEE to continue using the PRODUCTS or to replace or modify them so that they become non-infringing; and, if neither of the foregoing alternatives is available on terms that are reasonable, in LICENSOR's sole discretion, then LICENSEE shall, upon the request of LICENSOR, return the PRODUCTS to LICENSOR, whereupon LICENSOR shall return to LICENSEE the License Fee paid by LICENSEE. LICENSOR shall incur no liability to LICENSEE on account of such request and return, except for return of such License Fee as provided herein.

VI. TERMINATION

6.1 If LICENSEE: (a) fails to pay the License Fee or any taxes described in Section 8.1 when and as due; (b) makes or distributes, or fails to prevent others from making or distributing, copies of the PRODUCTS (except as expressly permitted by this Agreement), or derivations or modifications thereof; (c) uses the PRODUCTS in violation of the provisions of this Agreement; (d) uses the PRODUCTS on any computer other than a Designated Computer; (e) uses the PRODUCTS at any site other than a Designated Site; or (f) permits the PRODUCTS to be used by a number of users that exceeds the number of Designated Users (if applicable pursuant to the terms of Section 2 above), then this Agreement (including the License) shall terminate, and LICENSEE shall discontinue its use and certify to LICENSOR that it has returned or destroyed all copies of the PRODUCTS in its

possession or control, but LICENSEE's obligation to pay accrued charges and fees and to protect the confidentiality of the PRODUCTS shall continue.

6.2 LICENSEE shall, upon written request by LICENSOR, deliver a certificate stating LICENSEE has not: (a) made or distributed, copies of the PRODUCTS (except as expressly permitted by this Agreement), or derivations or modifications thereof; (b) used the PRODUCTS in violation of the provisions of this Agreement; (c) used the PRODUCTS on any computer other than a Designated Computer; (d) used the PRODUCTS at any site other than a Designated Site; or (e) permitted the PRODUCTS to be used by a number of users that exceeds the number of Designated Users (if applicable) (a "Use Certificate"). If LICENSEE under reports the use, or permitted use, of the PRODUCTS as described in (a) through (e) above, then LICENSEE shall pay LICENSOR for the actual use of the PRODUCTS at LICENSOR'S then current License Fees within thirty (30) days after the actual amount of use is discovered.

6.3 **Termination for Convenience:** LICENSEE reserves the right to terminate this Agreement or any part thereof for its sole convenience with thirty (30) days written notice. In the event of such termination, LICENSOR shall immediately stop all work hereunder, and shall immediately cause any of its suppliers and agents to cease such work. As compensation in full for services performed to the date of such termination, the LICENSOR shall receive a fee for the percentage of services actually performed. This fee shall be in the amount to be mutually agreed upon by the LICENSOR and LICENSEE, based on the agreed Scope of Work. If there is no mutual agreement, the Management Services Director shall determine the percentage of work performed under each task detailed in the Scope of Work and LICENSOR'S compensation shall be based upon such determination and LICENSOR'S fee schedule included herein.

6.1 **Termination for Cause:** LICENSEE may terminate this Agreement for Cause upon the occurrence of any one or more of the following events:

- 1) If LICENSOR fails to perform pursuant to the terms of this Agreement
- 2) If LICENSOR is adjudged a bankrupt or insolvent;
- 3) If LICENSOR makes a general assignment for the benefit of creditors;
- 4) If a trustee or receiver is appointed for LICENSOR or for any of LICENSOR'S property;
- 5) If LICENSOR files a petition to take advantage of any debtor's act, or to reorganize under the bankruptcy or similar laws;
- 6) If LICENSOR disregards laws, ordinances, rules, regulations or orders of any public body having jurisdiction;
- 7) Where Agreement has been so terminated by LICENSEE, the termination shall not affect any rights of LICENSEE against LICENSOR then existing or which may thereafter accrue.

VII. EXPORT

7.1 *Export Laws.* LICENSEE acknowledges that the PRODUCTS are subject to restrictions imposed by the United States Export Administration Act and the regulations thereunder (the "Act"). LICENSEE agrees that LICENSEE shall not acquire, ship, transport or re-export the PRODUCTS or any direct product thereof, directly or indirectly, into any country prohibited by the Act or use the PRODUCTS or any direct product thereof for any purpose prohibited by the Act.

7.2 *Export of Products.* LICENSEE acknowledges that any export of the PRODUCTS may only occur by LICENSEE when (i) prior notification is given to, and approval provided by, LICENSOR of intent to export (ii) LICENSEE pays any additional and applicable PRODUCT license fees that may occur as a result of such export

VIII. MISCELLANEOUS

8.1 *Taxes and Tariffs.* LICENSEE shall promptly pay all federal, national, state and local sales, use, excise, tariff, value added, ad valorem (including personal property) taxes and similar taxes (excluding any taxes due upon the net income of LICENSOR) billed to LICENSEE in connection with the licensing, use and/or delivery of the PRODUCTS and any related services.

8.2 *Sublicensing and Assignment Prohibition.* The License does not include the right to sublicense, and this Agreement may not be assigned by LICENSEE (except in connection with the transfer of substantially all of LICENSEE's business, and then only (i) to the transferee of such business, (ii) upon such transferee's prior written agreement to be bound by the terms hereof in a form acceptable to LICENSOR, and (iii) upon the prior written approval of LICENSOR).

8.3 *Consent to Suit.* Each of LICENSOR and LICENSEE hereby: (i) agrees that any legal proceeding arising out of or relating to this Agreement shall be instituted in the United States District Court for the State of Arizona or any court of general jurisdiction in the State of Arizona; (ii) consents to the personal and exclusive jurisdiction of such courts; and (iii) waives any objection that it may have to the laying of venue of any such proceeding and any claim or defense of inconvenient forum.

8.4 *Notices.* Any notice hereunder by either party shall be given by personal delivery or by sending such notice by certified mail, postage pre-paid, or telecopied, addressed or telecopied, as the case may be, to the other party at its address set forth in this License Agreement or at such other address designated by notice in the manner provided in this subsection. Such notice shall be deemed to have been received upon the date of actual delivery if personally delivered or, in the case of mailing, two (2) days after deposit in the mail, or, in the case of facsimile transmission, when confirmed by the facsimile machine report.

8.5 *Interpretation.* The validity and interpretation of this Agreement and the rights and obligations of the parties hereunder shall be governed by the laws of the state of Arizona, notwithstanding any conflict-of-law doctrines of Arizona or any other jurisdiction to the contrary.

8.6 *Severability.* If any provision of this Agreement shall be determined to be void, invalid, unenforceable or illegal for any reason, then the validity and enforceability of all of the remaining provisions hereof shall not be affected thereby.

8.7 *Failure to Exercise Rights.* The failure of either party to exercise any of its rights under this Agreement for a breach thereof shall not be deemed to be a waiver of such rights nor shall the same be deemed to be a waiver of any subsequent breach.

8.8 *Titles.* The titles of the Sections hereof are for convenience only and do not in any way limit or amplify the terms and conditions of this Agreement.

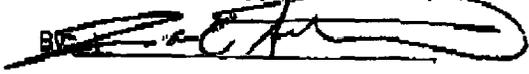
8.9 *Restricted Rights.* The PRODUCTS are provided as "restricted rights software" (as defined by FAR Section 52.227-14(a)). The use, reproduction or disclosure by the U.S. Department of Defense is governed by this Agreement. The use, reproduction or disclosure by any other U.S. Government department or agency is governed by the Restricted Rights Notice set forth at FAR Section 52.227-14.

8.10 *Complete Agreement.* This Agreement, together with the PRODUCT SCHEDULE attached hereto, constitutes the entire understanding between the parties with respect to the subject matter hereof and supersedes any and all prior understandings, statements, warranties, representations and agreements, oral and written, relating hereto. Any amendment hereof must be in writing and signed by both parties.

8.11 *Counterparts.* This Agreement may be executed in any number of counterparts, and each such counterpart shall be deemed to be an original instrument, but all such counterparts together shall constitute but one agreement.

authorized representatives as of the date set forth below.

Environmental Support Solutions, Inc.

By: 

Name: Ian Achterkirch _____

Title: Chief Revenue Officer _____

Date: 4-18-08 _____

CITY OF CHANDLER

By: _____

Name: _____

Title: _____

Date: _____

Attest:

City Clerk

Approved as to Form:

City Attorney

8.12 *Survival*. Sections 3, 4, 5, 6, 7 and this Section 8 shall survive the termination or expiration of this Agreement.

IX. CONFLICT OF INTEREST

9.1 No Kickback. LICENSOR warrants that no person has been employed or retained to solicit or secure the Agreement upon an agreement or understanding for a commission, percentage, brokerage or contingent fee; and that no member of the City Council or any employee of LICENSEE has any interest, financially or otherwise, in the firm unless this interest has been declared pursuant to the provisions of A.R.S. section 38-501. Any such interests were disclosed in LICENSOR'S proposal to LICENSEE.

9.2 Kickback Termination. LICENSEE may cancel any contract or agreement, without penalty or obligation, if any person significantly involved in initiating, negotiating, securing, drafting or creating the agreement on behalf of LICENSEE is, at any time while the Agreement or any extension of the Agreement is in effect, an employee of any other party to the Agreement in any capacity or a LICENSOR to any other party to the Agreement with respect to the subject matter of the Agreement. The cancellation shall be effective when written notice for LICENSEE is received by all other parties, unless the notice specifies a later time (A.R.S. 38-511).

9.3 No Conflict. LICENSOR stipulates that its officers and employees do not now have a conflict of interest and it further agrees for itself, its officers and its employees that it will not contract for or accept employment for the performance of any work or services with any individual business, corporation or government unit that would create a conflict of interest in the performance of its obligations pursuant to this project.

IN WITNESS WHEREOF, the parties have hereunto subscribed their names to this _____ day of _____ 200_____.

LICENSOR: Environmental Support Solutions, Inc. CITY OF CHANDLER

By: _____

By: _____

Name: Ian Achterkirch

Name: _____

Title: Chief Revenue Officer _____

Title: _____

Date: _____

Date: _____

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

