

Council/Agency Meeting Held: _____	City Clerk's Signature
Deferred/Continued to: _____	
<input type="checkbox"/> Approved <input type="checkbox"/> Conditionally Approved <input type="checkbox"/> Denied	
Council Meeting Date: 3/7/2005	Department ID Number: LS 05-01

**CITY OF HUNTINGTON BEACH
REQUEST FOR CITY COUNCIL ACTION**

SUBMITTED TO: HONORABLE MAYOR CITY COUNCIL MEMBERS

SUBMITTED BY: *Penelope Culbreth*
PENELOPE CULBRETH-GRAFT, CITY ADMINISTRATOR

PREPARED BY: RON HAYDEN, DIRECTOR OF LIBRARY SERVICES
BEHZAD ZAMANIAN, ACTING INFORMATION SERVICES DIRECTOR

SUBJECT: APPROVE LEASE/USE AGREEMENTS TO REPLACE THE LIBRARY'S
COMPUTER AND PHOTOCOPIING SYSTEMS

2005 FEB 23 P 5:27
HUNTINGTON BEACH, CA
CITY CLERK
CITY OF
PENNELOPE CULBRETH-GRAFT

Statement of Issue, Funding Source, Recommended Action, Alternative Action(s), Analysis, Environmental Status, Attachment(s)

Statement of Issue: The computer system for the Library, including the circulation system and photocopiers, is over 10 years old and needs to be replaced because the current system is antiquated and no longer serviceable.

Funding Source:

- \$150,000 FY03-05 Equipment replacement - account 10400211.84000 - 10042154C
- \$ 7,500 California State Library Grant for the purchase of a library server
- \$161,790 FY02-05 Library equipment replacement - account 88050151.84000
- \$319,290 Total combined equipment replacement funding in current budget.

Recommended Action:

- 1) Motion to approve and authorize the execution by the Mayor and City Clerk of the license/use agreement between the city of Huntington Beach and Dynix Corporation for application software to replace the Library's automated circulation system. (See Attachment #1)
- 2) Motion to approve and authorize the execution by the Mayor and City Clerk of the license/use agreement between the city of Huntington Beach and the CMS lease agreement for copiers. (See Attachment #2)

Alternative Action(s):

1. Do not approve the Dynix or CMS agreements and select other vendors.

Analysis: The Huntington Beach Public Library currently has an automated computer system from the GEAC Company. This system is 10 years old. Throughout the past four years, staff have done all they could to preserve the GEAC computer for as long as possible. Due to its age, parts and maintenance are difficult to obtain. It needs to be replaced. The following are the primary justifications for recommending the replacement of the GEAC computer system and the current photocopiers:

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- Huntington Beach is one of only two California libraries to use GEAC. The other city library, Altadena Public Library, is in the process of selecting another system. Therefore, Huntington Beach will soon be the only California public library using GEAC.
- GEAC is more costly to manage, less reliable, and more prone to catastrophic failure.
- If GEAC is not replaced, the Library is susceptible to significant loss of data, including over 250,000 resident records, 1 million circulation records, and 400,000 item records. GEAC was "down" 12 times in the last two years and unavailable for patron use for up to a week at a time.
- Library computer peripherals such as printers and copiers are over 10 years old. There have been many patron complaints about the frequency of out-of-order signs on the aging equipment.
- The server hardware is an IBM RS/6000 Powerserver purchased in 1994 and is no longer in production. Replacement parts are difficult to obtain.
- The server had to be serviced 4 times in the last 6 months making it costly to maintain.
- In December 2005, the Library's current book ordering system will no longer be supported. Therefore, we will not be able to order books electronically and economically without a new system.
- In July 2005, the Library's cataloging software will no longer be supported. In addition to not being able to order books, the staff will not be able to edit and add book inventory data.

The Library Department has been planning for a new system for five years. A development and evaluation committee comprised of Library staff prepared specifications, conducted site visits to other public libraries, and offered recommendations to the Library Director for the purchase of the new circulation system. Additionally, a review, selection and negotiating committee was established which included staff from the Library Department, Information Systems Department, Administrative Services Department – Purchasing and Finance Divisions, and City Attorney. This committee analyzed the vendor responses to the Request for Proposal (See Exhibit B). The following are the bidding companies, with their respective bids (See Exhibit A for Dynix RFP Responses):

Company	RFP Bid
1. Gaylord Information Systems	\$150,682
2. The Library Corporation	\$193,037
3. Dynix – recommended by staff	\$209,517
4. Sirsi	\$286,195
5. Innovative Interfaces Inc	\$329,731

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After an extensive analysis of the bid responses, staff is recommending to the City Council that Dynix be selected for the Library's new computer system. The Purchasing Division, with the assistance of the Finance Officer, conducted a comprehensive review of the financial background of Dynix and concluded that the company is in good financial condition and a reputable company. Dynix was established in 1983 and is the largest company of the five bidders with 406 employees. Dynix also has the largest number of libraries with 4,272 public libraries and 5,494 non-public libraries as clients. A number of local cities selected Dynix for their public library circulation system including Newport Beach, Long Beach, Anaheim, Fullerton, Pasadena-Glendale, Redondo Beach, Buena Park and Downey.

Dynix will provide an efficient and effective computer system. The new Dynix system will have the following benefits:

- Improve customer service to library patrons by increasing system reliability and availability, faster system response times, and adding new features that are easier to use.
- Provide more reliability with new computer servers, workstations, copiers, and printers.
- Provide user-friendly software which makes it easier for staff and patrons to use. The new catalog will have an easy to use modern interface similar to Amazon.com.
- Save approximately \$23,000 annually in annual maintenance costs due to reduced staff time to maintain.
- Provide more security by using the latest technology to encrypt sensitive information which protects patron's circulation records and Library processing records.
- Reduce staff time needed to support the new system. Many tasks can be automated such as scheduling reports, processing transactions and back up activities.
- Provide a "Kids Informational Portal" which draws children into a world of exploration through colorful icons and easy to use navigation of the Library's collection.
- Allow staff to do an inventory of the collection, which will result in more accurate circulation data, reduced mistakes in overdues and missing books.
- Provide faster response time when searching for materials. (Currently staff and patrons must wait for the 10-year-old server to respond.)
- Provide more compatibility with surrounding libraries that have modern computer systems such as Dynix. The library will be able to more efficiently share data with other libraries such as borrowing material or interlibrary loans.

The costs related to the replacement of the Library's computer with the Dynix and CMS systems is \$319,290. They are entirely funded within FY03/04 and FY04/05 budget approved by the City Council. Additionally, a California State Library grant in the amount of \$ 7,500 will be applied to the new computer system.

Along with the new Dynix library system, the library's obsolete computers, copiers, and printers will be replaced. The new system includes an arrangement for new copiers with five at the Central Library and one refurbished at each of the four branches. The current copiers are over eight years old and are heavily used. Working with Administrative Services and Information Services departments, library staff is recommending a lease agreement with CMS to provide copiers and printers for the public. Many public libraries use CMS.

With the assistance of the Information Systems Department and Administrative Services Department – Central Services Division, it was determined that CMS provided a unique product which is used by many local public libraries. Since CMS has proprietary software for this program, it is the recommendation of Central Services to lease the proposed equipment, under CMS, in order to reduce administrative costs and eliminate troubleshooting problems. The cost of the CMS equipment is \$2,010.61 per month for a 60-month lease (a total of \$120,637).

After City Council approval, the implementation will begin in March. The following are critical dates for the project, including the "go live" or use by the public on July 27, 2005.

Project Start	March 7, 2005
First Payment Delivery of Programs (30%)	March 14, 2005
Second Payment Complete Test Data Load (30%)	June 27, 2005
Third Payment Delivery of Server (30%)	July 19, 2005
Go Live	July 27, 2005
Final Payment (10%)	August 10, 2005

In conclusion, the Library's 10-year-old computer system and photocopiers must be replaced. After an extensive evaluation by a number of city departments, staff is recommending that Dynix be selected for the new automated circulation system. Staff is also recommending that CMS be selected for the leasing of the photocopiers. The costs for the entire system \$319,290 and is fully funded in the current budget and by a California State grant.

Environmental Status: N/A

Attachment(s):

City Clerk's Page Number	No.	Description
5	1.	License/use agreement between the city of Huntington Beach and Dynix Corporation for application software
37	2.	CMS Document Management and Support Services Agreement <i>with Exhibit A (Proposal) on File for Public Review in the City Clerk's Office (Pages)</i>

RCA author: Hayden

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ATTACHMENT #1

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**LICENSE/USE AGREEMENT BETWEEN THE
CITY OF HUNTINGTON BEACH AND
DYNIX CORPORATION
FOR APPLICATION SOFTWARE**

THIS AGREEMENT ("Agreement") is made and entered into by and between the City of Huntington Beach, a municipal corporation of the State of California, hereinafter referred to as "CITY," and Dynix Corporation, a Utah corporation, hereinafter referred to as "LICENSOR."

WHEREAS, CITY desires to engage the services of a software provider to provide a integrated library system for CITY'S public library; and

Pursuant to documentation on file in the office of the City Clerk, the provisions of the Huntington Beach Municipal Code, Chapter 3.03 relating to procurement of professional service contracts have been complied with; and

LICENSOR has been selected to perform these services,

NOW, THEREFORE, it is agreed by CITY and LICENSOR as follows:

1.00 DEFINITIONS

1.01 DEFINITION OF TERMS. It is the CITY'S understanding that, within the limits of common usage, a word in a contract means what the contract says it means. For purposes of this Agreement, the following are defined terms:

A. The term "System" shall mean the Licensed Programs and Materials, and software licensed specifically under this Agreement to be delivered by the LICENSOR in response to the Project Definition detailed herein.

B. The term "Project System" shall include any and all computer code in both printed and machine readable form developed or modified under the scope of this Agreement, its translated or compiled version, and all specifications and other written documentation (in printed or machine readable form) relating thereto as well as any additional hardware, hardware component, or peripheral device directly associated with the items covered by this Agreement.

C. The term "Licensed Programs" shall mean each LICENSOR-developed or LICENSOR-owned software product, which may include third-party technology, as listed in Exhibit C, including machine-readable object code (not source code) for such product, any user documentation for such product, and any other related materials which are furnished to CITY by LICENSOR for use in connection with such product, as well as any subsequent releases and error corrections for Licensed Programs previously licensed to CITY.

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D. The term "Licensed Materials" shall mean any materials related to the Licensed Programs including, without limitations, user's guides, technical guides, training materials, LICENSOR guidelines and CITY support instructions provided for use in connection with the Licensed Programs. (It is the CITY'S understanding that the term "Materials" is intended to be broader in scope than "documentation" which is often employed in computer agreements as the term "documentation" is deemed to be too limiting in scope).

E. The term "Licensed Programs and Materials" shall mean both the Licensed Programs and Licensed Materials as defined above.

F. The term "System Software" shall mean hardware manufacturer-supplied or other third-party licensed programs and materials that control hardware functions, commonly referred to as "operating systems", and file management utilities, compilers and programming languages, etc. that will be provided by LICENSOR to CITY under this Agreement.

G. The term "Functional Specifications" shall mean a written description of the CITY'S procedures that are to be automated by virtue of the Licensed Programs proposed by the LICENSOR in response to the Technical Specifications detailed herein.

H. The term "Technical Specifications" shall mean the written description of the Systems to be purchased, leased or licensed as included in the CITY'S Request for Proposal (RFP) dated April, 2004, any amendments thereto, and the LICENSOR'S entire proposal, and any amendments thereto. The technical specifications and the LICENSOR'S proposal regarding the technical specifications are deemed included as part of the Agreement as is the entire RFP, as amended. In addition, any written descriptions, reports, or examples of CITY systems made available to LICENSOR during the RFP process for review are deemed included as part of the Agreement.

I. The term "Enhancement" shall mean any program, any part thereof, or any materials not included in the Licensed Programs and Materials at the time of execution of this Agreement that add significant new functions or substantially improved performance thereto by changes in system design or coding.

J. The term "Use" shall include, but not be limited to, copying any portion of the Licensed Programs or Licensed Materials into a computer or transmitting them to a computer for processing of the instructions or statements contained in the Licensed Programs or Materials.

K. The term "Updates" shall mean program logic and documentation changes and improvements to correct known defects and maintain the operational quality of the Licensed Program and changes required to keep it current with current versions of the System Software or other environmental software, firmware, or hardware as specified by the hardware manufacturer.

L. The term "Project Definition" shall include the CITY'S Functional Specifications, Technical Specifications, and the LICENSOR'S proposal for scope and content of work, including cost and timelines. Such documents are incorporated into this Agreement by reference.

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M. The term "Source Code" shall mean all of the instructions, in both printed and machine-readable form, needed to compile, link, and execute any or all of the software covered by this Agreement. It must include, by definition, all of the code necessary to take the raw instructions that are convertible and convert them into usable, executable Object Code on the hardware environment(s) at the CITY'S site(s). Any third party development software utilities not directly available from LICENSOR will be commercially available to CITY. The CITY is responsible for acquiring said development software utilities either through LICENSOR, if available, or directly from company who developed and/or has rights to said utilities.

N. The term "Object Code" shall mean the machine-readable, executable form of the software covered by this Agreement that enables the hardware environment at the CITY'S site(s) to perform the functions as defined by the Project Definition.

O. The term "Module" shall mean a subset of the packaged License Programs that relate to a specific set of functions as defined in the Request for Proposal document and assigned a specific paragraph number.

P. The term "Power User" shall mean a CITY designated application expert or lead person with above average technical skills who shall receive additional application training. A Power User is entitled to coordinate questions and problems with LICENSOR trainers and support staff.

1.02 TERM. The license to use the Licensed Programs is in perpetuity, notwithstanding provisions for termination of this Agreement detailed elsewhere herein.

1.03 INCLUDED DOCUMENTS. This Agreement includes the following Exhibits, all of which are incorporated herein by reference; however, should there be any conflict between the terms of this Agreement and any of the following Exhibits, then this Agreement shall control. If there should be any conflict between the terms of any of the following Exhibits, they shall control in the following order of precedence:

Exhibit A: LICENSOR'S response to the RFP, and any amendments thereto.

Exhibit B: CITY'S RFP, and any amendments thereto.

Exhibit C: Project Scope of Work/Price Quote

Exhibit D: Schedule of Performance and Payment

Exhibit E: Training schedule

Exhibit F: Customizations

1.04 THIRD PARTY AGREEMENTS. LICENSOR hereby accepts full responsibility for the obligations outlined by this Agreement. Nonetheless, certain requirements of the proposed System must be provided by third-party vendors with which the CITY will contract directly so

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that the System will perform all of the functions as proposed. LICENSOR agrees that if CITY purchases and installs said third party products according to LICENSOR specifications provided herein or in the future, LICENSOR is responsible for the performance of all elements of the System including, but not limited to such third party products, as proposed and warranted herein.

The following third party products are identified herein and may be supplemented or substituted by mutual agreement:

- a) Microsoft SQL (see Exhibit C)
- b) CompuType

105. **TERMINATION.** CITY shall have the right to terminate maintenance and support services under this Agreement upon not less than 60 days advance written notice. CITY shall nonetheless remain obligated to pay all accrued charges owed at the time of termination under this Agreement.

The LICENSOR shall have the right to terminate the support services under this Agreement when CITY fails to pay charges due within forty-five (45) days of notice and demand. The LICENSOR shall thereafter reinstate services under this Agreement only upon payment of all past due charges plus any additional late fees. However, after the third such termination for non-payment, LICENSOR shall have the right to refuse reinstatement of the support services provided under this Agreement. Such refusal shall not relieve the CITY of its obligations to pay any outstanding charges and associated late fees.

2.00 PROPERTY RIGHTS

2.01 **WARRANTY OF OWNERSHIP/RIGHT TO SELL SOFTWARE.** LICENSOR hereby stipulates that it is the sole owner of all Licensed Programs and Materials, or that it has the right to sell, lease, or grant and support such Licensed Programs and materials, free and clear of any liens and encumbrances. Any and all legal actions regarding the Licensed Programs and licensed materials, or any previous version of them under any name, in the past fifteen years has been fully disclosed to the CITY.

2.02 **HOLD HARMLESS AND INDEMNIFICATION-SOFTWARE.** In the event of a claim that the Licensed Programs constitute an infringement of a copyright or patent, LICENSOR shall hold harmless and indemnify CITY and its officers, employees and agents, from every claim or demand resulting there from. LICENSOR shall, at its own cost, risk and expenses, defend any claim on behalf of CITY and its officers, employees and agents and satisfy any judgment rendered against any of them, provided CITY:

- (a) promptly notifies LICENSOR in writing of such claim at which time LICENSOR may then be responsible for and conduct its own defense against said claim;
- (b) gives LICENSOR sole control of the defense and settlement of the claim;
- (c) provides LICENSOR, at LICENSOR'S expense, with all available information and assistance relating to the claim and legal proceeding; and
- (d) not compromise or settle such claim.

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If such materials are found to infringe, or in the reasonable opinion of LICENSOR are likely to be the subject of a claim, LICENSOR will, at its option:

- (a) obtain for CITY the right to use such materials;
- (b) replace or modify the materials so they become non-infringing; or
- (c) if neither (a) nor (b) is reasonably achievable, remove such materials and refund their net book value based on a straight-line basis over a five year period commencing on the date the allegedly infringing item(s) were first delivered to CITY.

Licensor has no obligation to the extent any claim results from:

- (a) modification of the materials other than at the direction of LICENSOR, or
- (b) use of an allegedly infringing version of the materials, if the infringement could have been avoided by the use of a different version made available to CITY.

THIS SECTION STATES LICENSOR'S ENTIRE OBLIGATION TO CITY AND CITY'S SOLE REMEDY FOR ANY CLAIM OF INFRINGEMENT.

2.03 COPYRIGHT NOTICE. It is the CITY'S understanding that under the Copyright Act of 1978, immediate and automatic copyright protection occurs upon completion of a work in a tangible form. LICENSOR has actionable right to claim infringement of its copyright of the Licensed Programs and Materials and/or System Software for up to two (2) years after any infringement thereof regardless of notice or lack thereof. LICENSOR will mark all copies of the Licensed Programs and Materials with a copyright notice indicating LICENSOR'S ownership. Placing of such copyright notice shall not be deemed a publication or placement in the public domain.

Any and all modifications or enhancements made to the System shall become and remain the sole property of the LICENSOR. Any such modifications or enhancements made by LICENSOR shall be incorporated into the System and shall be supported by LICENSOR in a manner consistent with support of the rest of the System.

LICENSOR reserves the right to impose additional support charges on any CITY requested modifications or enhancements if in the LICENSOR'S sole opinion, said modifications and enhancements may increase the effort required to provide this support. LICENSOR agrees to notify CITY of the intent to impose support charges on modifications or enhancements before beginning work on those modifications or enhancements.

3.00 PROPRIETARY AND TRADE SECRET INFORMATION

3.01 CITY'S PROTECTION OF LICENSED PROGRAMS. It is the CITY'S understanding that Licensed Programs and Materials, which the LICENSOR considers to be proprietary and a trade secret, will be treated by the courts as a trade secret if the LICENSOR'S behavior toward the Licensed Programs and Materials show an effort to preserve the secret.

CITY will make reasonable effort by giving instruction to its employees to protect the confidential nature of the Licensed Programs and Materials and System Software by establishing written procedures for its employees and other persons permitted access to the Licensed Programs and Materials and System Software to follow in order to protect the Licensed Program and Materials and System Software from being acquired by unauthorized persons.

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3.02 DESIGNATION OF CONFIDENTIALITY. Confidential information shall mean all matters relating to the CITY'S business, which are disclosed by CITY to LICENSOR pursuant to the Agreement. All confidential information will be safeguarded and kept confidential by LICENSOR during the term of the Agreement to the same extent that LICENSOR safeguards confidential information relating to its own business. LICENSOR will instruct its employees to use the same care and discretion with respect to the CITY'S confidential information that they use with respect to the LICENSOR'S confidential information.

CITY acknowledges that the Licensed Programs and Materials contain proprietary and confidential information. LICENSOR'S corporate financial statements are considered to be confidential. Regardless, any legal claims for disclosure of such information will be honored by the CITY pursuant to law, but the LICENSOR will be notified in advance of release of such information and the LICENSOR, at its own cost, may challenge and defend its disclosure. Information received by CITY under the Agreement will not be considered confidential if:

- (a) The information was in CITY'S possession prior to the execution of the Agreement and not designated as confidential in the LICENSOR'S Proposal;
- (b) The information was legally acquired from third parties and did not originate with LICENSOR or was in the public domain at the time it was disclosed;
- (c) The information was independently developed by CITY;
- (d) The information was disclosed to CITY by a third party with LICENSOR'S approval.

3.03 CITY'S RIGHTS TO COPY LICENSED PROGRAMS. CITY shall not, without prior written consent of LICENSOR, copy in whole or in part, the Licensed Programs and Materials provided by LICENSOR under the Agreement for other than the CITY'S need for a copy of the Licensed Programs and Materials for back-up purposes or installation of System under the provisions of this Agreement.

4.00 LICENSE GRANT

4.01 SCOPE OF LICENSE. LICENSOR hereby grants to CITY, for the term of the Agreement, a non-exclusive, nontransferable license (without the right of sublicense), to:

Install, store, read, use, and execute the Licensed Program on computers owned or leased and used by CITY at its facilities, for up to 60 concurrent staff users for the sole and express purpose of supporting the internal business activities of CITY; and

Use the Licensed Materials only in conjunction with installation and use of the Licensed Program.

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All rights in the Licensed Program not expressly granted to CITY are reserved to LICENSOR. LICENSOR retains title to all copies of the Licensed Program; all training and procedural materials developed by LICENSOR in conjunction with the Licensed Program; and any additions and supplements to the Licensed Program which may be developed for CITY through the reimbursed or unreimbursed efforts of LICENSOR employees or agents. CITY may not alter or obscure any proprietary rights notice, including the phrase "powered by Dynix," appearing on any LICENSOR-supplied materials and must include such notices on any copies.

4.02 LICENSED MATERIALS. At the point of delivery/installation, the LICENSOR shall furnish the CITY one (1) copy (on CD-ROM) of the Licensed Materials, which materials shall describe the LICENSOR'S recommended use and application of the Licensed Programs.

4.03 SCOPE OF SERVICES. LICENSOR shall provide services as defined in the Project Scope of Work attached hereto as Exhibit D.

4.04 SITE OF SERVICES. LICENSOR'S services are to be performed at location(s) within CITY unless specific work assignment calls for services to be performed at LICENSOR location(s). If services are provided at LICENSOR'S location(s), LICENSOR shall provide office space and facilities to CITY staff commensurate with that provided its own employees engaged in similar activities. If services are provided at CITY'S location(s), CITY shall provide office space and facilities to LICENSOR'S staff commensurate with that provided to its own employees engaged in similar activities.

4.05 MODIFICATION OF SCOPE. Services specified in any future Project Scope of Work may be agreed to between the parties. Such services may include special studies; database and program conversion; data conversion; implementation planning, procedures and programs; installation evaluation; technical and user training; and specification preparation. CITY shall request such services in writing on a LICENSOR-developed, CITY-approved form and shall specify:

- a) Nature of work to be performed;
- b) Category of experience of each resource;
- c) Date on which assignment is to begin;
- d) Location of assignment;
- e) Length of assignment, including due date;
- f) Source of funds (Account Number and authorized approval); and
- g) Individual(s) who will coordinate for CITY and LICENSOR.

LICENSOR shall use its best efforts to provide a quotation for each service request and will provide a written quote within ten (10) working days following receipt by the LICENSOR of the

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CITY'S request. Acceptance by CITY of LICENSOR'S quotation for each service request is subject to compliance with CITY'S then existing purchasing ordinances and policies. Upon acceptance by CITY and LICENSOR, such request shall be called "additional work assignment".

Each additional work assignment shall be governed by the terms and conditions of this Agreement, the terms and conditions of the additional work assignment, and by such supplementary written amendments of this Agreement or the work assignment as may be, from time to time, executed between the parties.

In the event of a conflict between the terms and conditions of the Agreement and the terms and conditions of any additional work assignment, the terms and conditions of the work assignment shall govern.

No oral request for modification of services shall be binding on either party.

Further, the LICENSOR agrees that its responsibilities under the Agreement will not be assigned or licensed by the LICENSOR without the prior written consent of the CITY.

LICENSOR is willing to provide modifications of service at the same rates outlined in its Proposal and included as Exhibits in this Agreement for a period of one year from the date of this Agreement. After one year has lapsed, rates for service will be based upon LICENSOR'S then current rates (for similar agencies and similar services).

LICENSOR shall have the right to decline to perform work associated with a service request if in LICENSOR'S sole opinion, LICENSOR believes that the product resulting from said service request will not result in an appropriate addition to the System or if LICENSOR does not have sufficient resources to properly complete the service request. If LICENSOR elects not to perform work contained in a service request, LICENSOR will notify CITY within ten (10) working days. If completion of the service request will result in increased support charges, LICENSOR agrees to notify CITY of the amount by which the support fees will increase as a result of said work. LICENSOR will provide this notification as a part of the quotation of costs.

4.06 MINIMUM HARDWARE AND SOFTWARE REQUIREMENTS. CITY agrees that future versions of the Licensed Programs may have different hardware and System Software requirements than those presently in effect. The acquisition of necessary hardware and System Software meeting the LICENSOR requirements then in effect shall be the sole responsibility of the CITY. LICENSOR shall provide CITY with a list of the hardware and System Software items and a reasonable amount of time (up to 180 days) in which to acquire said items.

4.07 NECESSITY FOR THIRD-PARTY SYSTEM SOFTWARE. CITY acknowledges that in order to be executed, the Licensed Program requires certain third-party system software not provided by LICENSOR that is specified in Exhibit C, i.e., Microsoft SQL Server 2000. The acquisition of necessary licenses and support for this software shall be the sole responsibility of CITY. As part of the on-going support services defined herein, LICENSOR agrees to keep all Licensed Programs and Materials current with then current LICENSOR-supported versions of

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the third party system software defined in Exhibit C. CITY acknowledges that LICENSOR software support does not cover third party software unless otherwise specified.

4.08 OTHER THIRD-PARTY SOFTWARE. In addition to LICENSOR-developed and supplied software, certain specific modules have been proposed that are supplied by third-party LICENSORS acting as sub-contractor to LICENSOR. It is understood that the CITY may enter into an agreement for the purchase of this software independently, but that the interface and integration of the third party LICENSOR modules with the LICENSOR-developed software is essential to this Agreement.

5.00 PROGRAM SUPPORT SERVICES

5.01 ON-GOING SUPPORT FOR LICENSED PROGRAMS. LICENSOR shall provide continuing on-going support services necessary to repair systematic program bugs or identified logic and operational problems and to keep the Licensed Programs compatible with then-current LICENSOR-supported versions of the platform (third party operating systems, database engines, and utilities) software specified in this Agreement.

5.02 DATA CONVERSION. LICENSOR shall be responsible for conversion of CITY'S current data in machine-readable form, if any, to the format required by the Licensed Programs. The cost of data conversion as quoted in the RFP includes loading data extracted by the CITY. CITY shall provide all requested data for conversion using formats specified by LICENSOR. In the event that the CITY is unable to provide requested data in the format specified by LICENSOR, LICENSOR may request a Modification of Scope for an additional work assignment to assist CITY in transforming the requested data to the prescribed format.

5.03 TRAINING. LICENSOR shall provide installation and operation training as specified in Exhibit C. Additional training at CITY request will be available at LICENSOR'S then current rates (for similar agencies and similar services). Trainers shall be experienced and knowledgeable in the specific LICENSOR topics they are teaching and familiar with the procedures in similar municipal environments to the CITY'S. Furthermore, course outlines and student guides will be made available following execution of this Agreement on LICENSOR'S customer website for each course listed on Exhibit C. LICENSOR shall also provide at least two weeks prior to the start of the session showing the course outline, who should attend, and course objectives. If any modifications need to be made by the customer to the outline, the modifications must be approved by LICENSOR'S Manager of Education services and must be submitted one month prior to the training. Any modifications must still follow the standard outline and can only pertain to the presentation order or emphasis on a particular topic, and its use at CITY. LICENSOR cannot customize training documentation or customization to a database to accommodate a particular request.

5.04 SYSTEM SUPPORT SERVICES. In addition to training services, LICENSOR will provide system support services which shall include, but not be limited to, setting up tables and parameters for CITY'S unique installation, preparing backup scripts to back up the databases for the applications, and training CITY'S technical staff how to perform these tasks as well as diagnostic troubleshooting techniques for the LICENSOR'S Licensed Programs. Should

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additional system support services be required, LICENSOR will respond to each CITY request as outlined in Section 4.05 of this Agreement entitled "MODIFICATION OF SCOPE."

5.05 SCOPE OF SUPPORT SERVICES. LICENSOR will maintain an organization and process to provide support for the System as follows. The method of resolving problems shall be determined at LICENSOR'S sole discretion.

A. TELEPHONE SUPPORT. LICENSOR will provide telephone support as follows:

1. **Standard Support.** 8:00 a.m. to 8:00 p.m. ET, Monday through Friday. Standard coverage is not available on the following holidays: New Year's Day, Labor Day, and Christmas Day. Holidays falling on Saturday will be observed on the preceding Friday; holidays falling on Sunday will be observed on the following Monday.

2. **Emergency Support.** 24x7; onsite service dependent on level of service acquired from Server or other third party vendor. "Emergency Support" means support offered when no client workstation can connect to the database server; the System cannot check-in or check-out; transaction processing has failed; or the System fails to allow searching of the local bibliographic database.

B. LOG EXPRESS. LICENSOR will provide an Internet based support system for logging support issues which generally shall be available seven (7) days a week, twenty-four (24) hours a day.

C. SYSTEM ACCESS. For diagnosis of problems, LICENSOR technical personnel shall be able to access the System directly via a dedicated data-grade phone line or via direct IP address. CITY shall be responsible for maintaining: (1) an auto-answer approved modem attached to a port for the exclusive use of LICENSOR together with an "outside" data grade phone line for the modem to be used in dial-up diagnostics and maintenance; (2) direct IP access including access through any security measures; and (3) a PC Anywhere connection. LICENSOR and CITY, working together, shall establish reasonable parameters for determining whether access to the System is sufficient for support.

D. LICENSED PROGRAM SUPPORT

1. Licensed Program support shall include diagnosis and resolution of problems or performance deficiencies of the Licensed Programs.

2. Should CITY be one major release back from the current release of the Licensed Program, CITY may experience delays in receiving support. If CITY is more than one major release back from the current release and does not agree to upgrade to the current Licensed Program release, then LICENSOR shall have no further obligation to provide the maintenance and support services described in this Agreement. A major release is labeled as X.x, e.g., 7.3; 7.31 is classified as an interim release.

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E. THIRD PARTY SOFTWARE SUPPORT.

1. In order to receive support for Third Party Software, CITY must use the version of the Third Party Software that LICENSOR indicates is to be used with the Licensed Programs or hardware.

2. LICENSOR will diagnose problems with the Third Party Software as they relate to operation of the Licensed Programs and work with the third party vendors to resolve the problems.

3. LICENSOR will adjust Third Party Software parameters to ensure that they function with the Licensed Programs and servers.

4. Third Party Software support does not include the installation of patches or upgrades by LICENSOR.

F. SERVER SUPPORT

1. Server support shall consist of the diagnosis of Server problems. Following diagnosis, LICENSOR shall contact the Server maintenance vendor and onsite Server support shall be performed in accordance with the Server maintenance plan purchased by CITY.

2. In order to receive Server maintenance coverage, CITY must purchase and install, whether through LICENSOR or a different vendor, an uninterruptible power supply ("UPS") for each Server.

3. Server support includes the installation of patches or upgrades to the OS by either LICENSOR or CITY with the approval of both parties. Such services may be made available at LICENSOR'S sole discretion on a time and materials basis.

G. LICENSED PROGRAM MAINTENANCE. During the term of this Agreement, as long as CITY is current in its annual maintenance fees, LICENSOR will provide CITY at no additional charge with copyrighted patches, updates, and releases of the Licensed Program if and when released, along with appropriate documentation for successful installation and implementation thereof. These maintenance materials, including the Licensed Programs, may not be used to increase the licensed number of versions or copies of the Licensed Programs. All patches, updates, releases and new versions shall be subject to the license agreement relating to the Licensed Programs.

H. THIRD PARTY PRODUCT MAINTENANCE. Upgrades to Third Party Software, including OS, and maintenance of the Servers and Peripherals are subject to the terms and conditions relating thereto in any applicable agreement between LICENSOR and the third party maintenance vendor.

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I. SERVER UPGRADES. CITY shall be responsible for the purchase of any Server upgrades which may be required due to installation of patches, updates, and releases of the Licensed Programs or Third Party Software.

J. CONDITIONS OF LICENSOR'S OBLIGATIONS.

1. All maintenance services rendered by LICENSOR hereunder shall be limited to the items listed on LICENSOR'S maintenance audit document for CITY (which shall be provided to CITY prior to the start of each annual term) and shall be contingent upon CITY'S proper use of the System. Time spent by LICENSOR resolving or attempting to resolve problems subsequently determined to be caused by products not covered by this Agreement shall be billed to CITY at LICENSOR'S then-current rates. LICENSOR shall have no obligation to provide assistance in correcting errors or problems arising in connection with any modifications or alterations to any System component which have been made by or on behalf of CITY without LICENSOR'S express written consent, or for System components which were abused or used contrary to the manufacturer's specifications, or for any destruction, alteration or suspension of System operation due to natural disasters, communication line failure, failure by CITY to perform weekly System backups, or actions or decrees of governmental bodies.

2. All maintenance services provided hereunder are remedial only; no preventative maintenance services are offered.

K. OBLIGATIONS OF THE CITY.

1. CITY shall be responsible for maintaining sufficient staff and supplies to handle normal day-to-day operation and support for the System, including, but not limited to, such tasks as back-ups and report handling. It is acknowledged and understood that the maintenance and support service to be provided by LICENSOR hereunder is not intended to supplant CITY'S day-to-day operation and support for the System.

2. CITY shall provide LICENSOR full and free access to each item covered by maintenance to allow LICENSOR to provide maintenance service thereon as well as a suitable place in which to perform such service. A designated representative of CITY shall be in CITY'S premises whenever LICENSOR personnel are present.

3. CITY shall provide suitable environmental conditions for each System component in accordance with manufacturer's published specifications.

4. CITY shall not perform, nor attempt to perform, or cause to be performed, maintenance or repair to the System or any part thereof covered hereunder during the term of this Agreement except with the prior written or oral approval of LICENSOR.

5. CITY is solely responsible for verifying the success of all System and data backups. LICENSOR disclaims all liability for data loss including, but not limited to, data loss resulting from backups that were not verified by CITY.

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6. The movement of Servers without proper notification of LICENSOR may void CITY'S maintenance on those items. CITY shall be solely responsible for any damages to System components incurred by CITY'S movement thereof.

7. CITY will be allowed one CITY contact person and two designated CITY contact backups. Said contacts shall be the only CITY personnel contacting LICENSOR regarding maintenance issues.

8. The security of the System is CITY'S sole responsibility. Nothing in this Agreement shall be construed as making LICENSOR responsible for System security or liable for any damages resulting from security breaches.

9. Should CITY desire to renew maintenance coverage on any item previously terminated from coverage and should LICENSOR in its sole discretion decide to renew such maintenance, CITY and LICENSOR will negotiate an associate cost to renew maintenance with costs not to exceed 100% of the maintenance charges that would have been charged on the item during the period when maintenance coverage was terminated.

10. CITY is responsible for all CITY server infrastructure and changes required to enforce CITY'S standards. CITY shall notify and work with LICENSOR regarding any potential changes to the System/server configuration. LICENSOR will not be responsible for any problems with System performance or functionality resulting from actions taken by CITY without LICENSOR'S prior approval.

5.06 IMPLEMENTATION SUPPORT SERVICES. The scope and sequence of the final implementation schedule will be determined by mutual agreement at the project initiation kickoff meeting to be scheduled as soon as practical following the execution of this agreement. While it is not possible to define precisely what exact sequence will be followed for implementation, as a general rule, tasks will be accomplished and payment will be made according to the Schedule of Performance and Payment as set forth in Exhibit D.

5.07 FEES AND CHARGES FOR SUPPORT SERVICES. LICENSOR shall provide support services at no charge to CITY for the items listed in Exhibit C for one year from the date when CITY begins live operation of the System. The following year, CITY shall pay LICENSOR annual support charges based on the annual rate specified in Exhibit C. These support charges shall be pro-rated and paid to the end of the then-current calendar year (i.e. December). The annual rate on LICENSOR-developed software may be increased, with at least 30 days prior written notice, by three percent over the prior year's rates. This cap shall not apply to any other System components. Sixty days prior to the anniversary date, Dynix shall provide CITY with written notice of any rate increases for the following year and which items, if any, have reached end-of-life status and cannot receive continued support and maintenance.

5.08 CITY RESPONSIBILITIES. CITY shall be responsible for procuring, installing, and maintaining any computer equipment, telephone lines, communications interfaces, and other hardware necessary to operate the System other than that described in Exhibit C.

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5.09 PROPRIETARY RIGHTS. To the extent that LICENSOR may provide CITY with any Error Corrections or Enhancements or any other software, including any new software programs or components, or any compilations or derivative works of the Licensed Programs prepared by LICENSOR, CITY may (1) install copies of the Licensed Programs adequate to serve the concurrent users specified in this Agreement, in the most current form provided by LICENSOR, in CITY'S own facility; and (2) use such Licensed Programs in a manner consistent with the requirements of the Agreement, for purposes of serving CITY'S business needs. CITY may not use, copy, or modify the Licensed Program, or make any copy, adaptation, transcription, or merged portion thereof, except as expressly authorized by LICENSOR. Except as provided in paragraph 10.02 "BANKRUPTCY/SUPPORT CESSATION," the Licensed Programs are and shall remain the sole property of LICENSOR, regardless of whether CITY, its employees, or contractors may have contributed to the conception of such work, joined in the effort of its development, or paid LICENSOR for the use of the work product. CITY shall from time to time take any further action and execute and deliver any further instrument, including documents of assignment or acknowledgment that LICENSOR may reasonably request in order to establish and perfect its exclusive ownership rights in such works. CITY shall not assert any right, title, or interest in such works, except for the non-exclusive right of use granted to CITY at the time of its delivery or on-site development.

5.10 TERMINATION OF SUPPORT. Support may be terminated as follows:

- a) Upon 60 days prior written notification by CITY to the LICENSOR, before the end of any calendar year; or
- b) Upon 60 days prior written notice if the other party has materially breached the provisions of this Agreement and has not cured such breach within such notice period. Since annual support charges are paid annually in advance, termination before the end of a calendar year requires a pro-rated refund for the fees paid to the end of the calendar year.

Termination of support as provided herein shall not be deemed a termination of this Agreement.

5.11 TECHNICAL SUPPORT FOR THIRD PARTY SOFTWARE. CITY agrees to maintain all third party system software identified in paragraph 4.07 "NECESSITY FOR THIRD-PARTY SYSTEM SOFTWARE" at current levels supported by the LICENSOR. In addition, LICENSOR will provide technical support for the interaction of the Licensed Programs with the third party system software, including telephone support and contact with the manufacturer for troubleshooting reported problems with any of the Licensed Program module. Following is a current list of third party system software required before the Licensed Program can be executed: PSC Falcon PT40, Computype, Microstrategy, Syndetics Solution, MSSQL, TomCat5, Jboss, JRE 1.42. The CITY acknowledges that as the Licensed Program evolves there may be additional third party system software required.

5.12 PLATFORM PROTECTION. As long as the CITY maintains continuous software support with the LICENSOR for each of the Modules included herein, CITY shall have the right to transfer the licenses (defined as the Project System acquired under this Agreement) for any and all Modules to any new hardware/platform environment (hardware and System Software as

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defined herein) then currently marketed and supported by the LICENSOR. Transferring of Licensed Programs and Materials shall be done with no charge for licensing fees to the CITY by the LICENSOR. CITY agrees to pay for any installation, data conversion and retraining costs which shall not exceed the lesser of the hours required pursuant to this Agreement for initial installation, data conversion and training or those charged to similar CITY'S for similar tasks.

6.00 INSTALLATION, DELIVERY, AND ACCEPTANCE

6.01 DELIVERY AND INSTALLATION. The initial delivery will include a fully functional test database, not necessarily with CITY converted data, which the CITY can use as a test-bed for experimentation and technical review.

6.02 ACCEPTANCE AND PAYMENT. Acceptance will be based on two factors: 1) That the LICENSOR has delivered and configured the software proposed with converted CITY data, and 2) that the system performs at a functional level consistent and perform any or all features per LICENSOR Response to Request for Proposal.

Progress payments will be made as generally set forth in Exhibit D. LICENSOR will receive partial payment when Acceptance Testing is satisfactorily completed and final payment when Reliability Testing has been performed so that concurrent productive use of all Licensed Programs is demonstrated to function as proposed and demonstrated by the LICENSOR.

The CITY may terminate the Agreement, upon written notice effective immediately, at any time during the Acceptance Period for a material breach of the Evaluation Criteria and Technical Specifications as specified in the RFP (unless explicitly excluded in the LICENSOR'S proposal). Additional mutually agreed upon written acceptance criteria may be added by the CITY prior to the end of the Acceptance Period. The CITY shall accept the system at the close of the testing period by providing LICENSOR with written notification of acceptance unless LICENSOR fails to meet acceptance criteria.

If the CITY identifies any irregularities in the performance of the application software (not related to a CITY network, hardware or System Utility software malfunction) from what was specified by the CITY in its RFP (unless explicitly excluded in the LICENSOR'S proposal), the CITY shall require the following:

a) LICENSOR shall be given the opportunity to extend the Acceptance Testing Period for up to thirty (30) business days during which to bring such irregularities into compliance. If after such time the performance irregularity is not remedied as specified in Exhibit A, LICENSOR'S Response to the RFP, Section 5, the CITY may terminate the Agreement with a refund of any License Fees paid to that point, or

b) If the Acceptance Period extension referenced above does not produce a satisfactory remedy for the irregularity, CITY may chose, at its' sole option, from either of the following alternatives:

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1. At the CITY'S sole option, notwithstanding (a) above, relegate the non-compliant component as a Project to be completed at a mutually agreeable date and withhold an equitable portion of the monies owing under this Agreement, up to the total amount of fees for non-conforming component to reflect any reduction in the value of the Licensed Programs resulting from the uncorrected error.

Specifications for the delivery and acceptance for each such item will be the same as the acceptance provisions stated above and shall include appropriate due dates. CITY may then close the initial Acceptance Period for items delivered and functioning in accordance with their specifications, pay for accepted items only, and open new testing periods for non-delivered items backed by guarantees of performance in the form of cashier's checks. CITY shall then retain monies owing, until the items are delivered and accepted and have passed a 60-day Reliability Test. As each item is accepted, CITY will make payment for the item processed. If the agreed upon delivery dates are not met, or the item fails the acceptance provisions, the CITY may find an alternate solution. This procedure shall continue until all undelivered items are delivered and accepted or all outstanding monies paid or retained. Final Reliability Testing will not be complete until all such Projects are delivered and accepted by the CITY.

2. If LICENSOR is in material breach of the preceding paragraph, CITY shall have the right to terminate the Agreement according to Section 6.02 "ACCEPTANCE AND PAYMENT."

In the event the LICENSOR is rejected during the Acceptance Period, the CITY will agree to pay only those delivery, installation, configuration, conversion, and training costs as specified in the LICENSOR'S Proposal. Costs for system removal, additional labor, insurance, etc. will not be paid by the CITY.

6.02.1 ACCEPTANCE TESTING. Once the Licensed Programs have been delivered, installed, and configured, and the LICENSOR has converted any relevant CITY data and trained the designated CITY System Manager and one backup person to operate the basic components of the proposed Licensed Programs, the Acceptance Period can begin. During the Acceptance Period, CITY will test all delivered modules by executing any or all of the features contained in the feature responses in the system requirements document. During this time, the LICENSOR will provide access (at no additional charge) to a qualified technician either on-site or via telephone and dial-in modem to assist City in the testing of the applications. Failure by the CITY to report any failures within 60 days of the start of Acceptance Testing shall mean tacit acceptance and will be treated as if the CITY has accepted the Module(s) in its entirety.

If any part of the awarded subsystems should fail (i.e. not perform according to the LICENSOR'S Compliance score), City may designate that portion as a Project for delivery at a later date or apply other remedies as specified in 6.02 "ACCEPTANCE AND PAYMENT" above.

6.02.2 RELIABILITY TESTING. Once the Licensed Programs and Projects have passed the Acceptance Tests, the implementation into productive use will begin. This includes training of all primary users and final conversion of all relevant data. Once the LICENSOR has designated a

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subsystem as available for productive use (in writing), a 60 day Reliability Test will begin. During this period all of the data, workstations, software, and peripherals must be available to all designated users at least 90% of the time. This will be determined by determining that any workstation or device that is not available because of any malfunction of the Licensed Programs for more than 30 minutes during any 24-hour period shall be deemed unavailable. (Problems caused by the City's network or computer hardware shall not be included). If the total number of unavailable devices divided by the total number of devices is more than .10, the Reliability Test will be deemed to have failed. Functional performance of the overall system will be measured, in a mutually agreed to benchmark, such that during this period any user will experience the same or better performance as demonstrated in LICENSOR presentations.

6.02.3 PAYMENT SCHEDULE. Progress payments will be made in conformance with Exhibit D and upon dual written authorization of CITY'S Director of Information Services and CITY'S Director of Library Services. Ten percent of the total purchase price shall be withheld by CITY until the successful completion of the Acceptance Period. Installation support and training services (including technical configuration, process consulting, project management and training) will be processed upon completion of the designated tasks and presentation to the CITY of an itemized invoice showing the specific tasks completed and the resources involved in each.

6.03 APPLICABLE TAXES. The software, hardware, supplies, and shipping listed in Exhibit C are assumed to be taxable. All other fees, except for maintenance fees, are assumed to be labor-related and thus non-taxable. The CITY will pay taxes on only those items so indicated at the rates prescribed by law at the time of payment. Taxes based upon net income or any other tax normally paid by the LICENSOR shall be the sole responsibility of the LICENSOR. Items subject to taxes not indicated in the Agreement as taxable which may subsequently be charged to the LICENSOR by any taxing agency with reference to the purchase, lease/purchase or license included in the Agreement(s) shall be the sole responsibility of the LICENSOR and will not be paid by CITY. Taxes based upon net income or any other tax normally paid by the LICENSOR shall be the sole responsibility of the LICENSOR. LICENSOR shall obtain and maintain during the duration of this Agreement, a City Business License as required by the Municipal Code.

6.04 CITY CHANGE REQUEST. Any change in the scope of the systems requested by the CITY shall be made in writing on a LICENSOR-designed, CITY-accepted form. The LICENSOR shall immediately notify the CITY of changes required in the purchase price or delivery of the systems resulting from such change. The CITY may, then, at its sole option, authorize, or cancel the change request.

6.05 DISCOUNTS. LICENSOR shall identify applicable discounts and discount time periods from published list prices for future Licensed Programs or additional copies of purchased Licensed Programs. Should any discounts be announced that would normally apply to the CITY after the LICENSOR'S proposal but before the Agreement is signed, the CITY reserves the right to take the lesser of the proposed prices or the discounted prices.

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7.00 CITY RESPONSIBILITIES

7.01 CITY SUPPORT OF LICENSOR. CITY shall provide the following resources for LICENSOR'S use in fulfillment of the Agreement:

- a) One qualified CITY staff coordinator assigned to work with the LICENSOR'S representative on the installation of the Licensed Programs, acceptance, training, conversion and maintenance. CITY'S representative shall have sufficient authority to make decisions for CITY consistent with City Council direction. CITY understands that LICENSOR will rely upon a staff member having such authority.
- b) The availability of CITY'S personnel upon reasonable request of LICENSOR to answer questions and advise LICENSOR on CITY'S facilities, operations and requirements.
- c) Adequate office space at CITY'S premises for LICENSOR personnel.
- d) CITY shall provide input data in accordance with the agreed upon test and acceptance plan and procedures for use by the LICENSOR in acceptance testing.
- e) The CITY shall provide all requested data for conversion using formats specified by LICENSOR.
- f) Upon completion of installation and training, and once final acceptance is signed off by the CITY, CITY shall be solely responsible for the operation and management of the Licensed Programs and Projects.

8.00 WARRANTY OF PERFORMANCE

8.01 WARRANTY OF PERFORMANCE. As long as CITY maintains continuous support for the Licensed Programs included herein, the LICENSOR shall warrant for a period equal to the term of the Agreement, commencing with the CITY'S acceptance of the Licensed Programs, that the Licensed Programs will perform in accordance with its specifications as set forth in the Licensed Materials, if properly used in the operating environment specified in the LICENSOR'S Proposal. The LICENSOR warrants that all components are interoperable. The LICENSOR shall further warrant that the System will perform as set forth in Exhibit A, LICENSOR'S Response to Proposal. The LICENSOR'S warranty of performance shall be based on the specifications, terms and conditions contained in the Agreement as a whole, including the RFP and LICENSOR'S Proposal.

CITY shall promptly provide to LICENSOR such computer time and services as LICENSOR may require to permit investigation and, if necessary, correction and verification of error(s).

8.02 CITY and LICENSOR are not responsible for failure to fulfill their obligation under the Agreement due to causes beyond their reasonable control without the fault or negligence of such party. In the event that failure to meet the established deadline(s) is outside the control of both parties, the deadline(s) will be extended to mutually agreeable date(s) as soon as possible. Such

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dates shall be attached, as amendment(s), to the final Agreement. CITY and LICENSOR shall mutually and reasonably agree on which causes are out of the LICENSOR'S control.

8.04 CORRECTION OF ERRORS UNDER THE WARRANTY. At no charge to the CITY, the LICENSOR will promptly correct technical errors or defects (as defined in Section 5.05 SCOPE OF SUPPORT SERVICES) in the Licensed Programs according to the terms of this Agreement so that the Licensed Programs will perform as described in the Licensed Materials and LICENSOR'S Proposal.

8.05 EXCLUSIVE REMEDY. If CITY believes there has been a breach of an express warranty and so notifies LICENSOR, then LICENSOR will promptly investigate the matter to determine the nature of the suspected error. If there has been a breach of this warranty, then LICENSOR'S sole obligation and CITY'S exclusive remedy will be for LICENSOR to correct or modify the Software to make it perform as warranted or to re-perform the services. If LICENSOR is unable, after repeated efforts, to correct a breach of warranty, CITY will be entitled to an equitable adjustment in the monies owing under this Agreement, up to the total amount of payments for either the Software or services received over the prior twelve month period, to reflect any reduction in the value of the Licensed Software or services as a result of the uncorrected error.

8.05 ORAL REPRESENTATIONS. No CITY or LICENSOR employee has the authority to bind either party to any oral representation or warranty.

8.06 PROGRESS REPORTS. The LICENSOR will design a progress report form that itemizes the activities accomplished to date, the activities planned and any problems which have occurred or are anticipated from the point of contract signing until Final Acceptance. The forms' design and adequacy will be subject to CITY approval. Progress reports will be prepared weekly prior to Acceptance and bi-weekly thereafter by the LICENSOR and either mailed or e-mailed to the CITY. Progress reports will be discontinued when the CITY, in its sole judgment, deems the system to be complete and in conformance with LICENSOR'S Proposal and any subsequently agreed upon necessary modifications, and deems LICENSOR'S commitments to be completed.

8.07 TERMINATION. LICENSOR shall have the right to terminate this Agreement when CITY fails to pay charges due within forty-five (45) days of notice and demand. The LICENSOR shall thereafter reinstate services under this Agreement only upon payment of all past due charges plus any additional late fees (as defined as 1% per month on uncontested invoices).

LICENSOR shall have the right to terminate this Agreement if CITY fails to implement all changes, corrections, and Updates to the Licensed Programs within 90 days of the release of said corrections or Updates or twelve (12) months from notification of upcoming, but not released, Updates.

In the event the LICENSOR ceases to provide maintenance and support for the Licensed Program(s) (including any LICENSOR-supplied updates) for reasons other than CITY'S failure to pay support fees as described in section 5.07, then CITY shall be entitled to access the Source Code in escrow if CITY is a registered licensee with the escrow agent. CITY may, at its own

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cost, become a registered licensee either directly with the escrow agent or by becoming a member of the Horizon software users' group which is itself a registered licensee.

Upon termination of this Agreement at the election of the CITY, or at the election of the LICENSOR due to a breach by CITY of the provisions of this Agreement, CITY shall immediately cease use of, and return forthwith to LICENSOR, the Licensed Programs Materials, and any copies or portions thereof, including Maintenance Modifications or Enhancements.

8.08 NO DISABLING CODE. LICENSOR warrants that all Licensed Programs contain no disabling or corrupting code which would either prevent productive use of the software during the term of this agreement or that would damage or destroy CITY'S data.

8.08 COMPATIBILITY WITH KRONOS SOFTWARE. LICENSOR warrants that it has tested the Horizon Licensed Program with Kronos version 4.3 and found no compatibility issues between the two software programs.

8.09 THE WARRANTIES SET FORTH IN THIS AGREEMENT ARE IN LIEU OF, AND THIS AGREEMENT EXPRESSLY EXCLUDES TO THE MAXIMUM EXTENT PERMITTED BY LAW, ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, ORAL OR WRITTEN, INCLUDING, WITHOUT LIMITATION, (i) ANY WARRANTY THAT THE LICENSED SOFTWARE IS ERROR-FREE; AND (ii) ANY AND ALL IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT, AND (iii) ANY AND ALL IMPLIED WARRANTIES ARISING FROM STATUTE, COURSE OF DEALING, COURSE OF PERFORMANCE OR USAGE OF TRADE. NO ADVICE, STATEMENT OR INFORMATION GIVEN BY LICENSOR, ITS AFFILIATES, CONTRACTORS OR EMPLOYEES SHALL CREATE OR CHANGE ANY WARRANTY.

9.00 LIABILITY, INDEMNIFICATION AND DEFAULT

9.01 INDEMNIFICATION AND HOLD HARMLESS. LICENSOR hereby agrees to protect, defend, indemnify and hold harmless CITY, its officers, elected or appointed officials, employees, agents and volunteers from and against any and all claims, damages, losses, expenses, demands and defense costs (including, without limitation, costs and fees of litigation of every nature or liability of any kind or nature) arising out of or in connection with LICENSOR'S performance of this Agreement or its failure to comply with any of its obligations contained in this Agreement by LICENSOR, its officers, agents or employees except such loss or damage which was caused by the CITY. LICENSOR will conduct all defenses at its sole cost and expense. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by LICENSOR.

LICENSOR'S TOTAL LIABILITY TO CITY UNDER THIS AGREEMENT, EXCLUDING LIABILITY FOR PERSONAL INJURY, DAMAGE TO REAL PROPERTY AND TANGIBLE PERSONAL PROPERTY, AND LIABILITY PURSUANT

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TO CLAIMS OF INFRINGEMENT, WILL BE LIMITED TO THE ACTUAL DAMAGES INCURRED FOR THE PRODUCT OR SERVICE WHICH IS THE SUBJECT MATTER OF THE CLAIM. IN NO EVENT WILL LICENSOR BE LIABLE TO CITY FOR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES (INCLUDING, WITHOUT LIMITATION, LOSS OF BUSINESS, REVENUE, PROFITS, GOODWILL, USE, DATA, OR OTHER ECONOMIC ADVANTAGE), WHETHER BASED ON BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), PRODUCT LIABILITY, OR OTHERWISE, AND WHETHER OR NOT LICENSOR HAS PREVIOUSLY BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THIS SECTION SHALL SURVIVE FAILURE OF ANY EXCLUSIVE REMEDY.

9.02 BANKRUPTCY/SUPPORT CESSATION. The term "default" as used in this Agreement shall include the institution of proceedings by or against LICENSOR under federal or state bankruptcy laws and assignment or receivership for the benefit of creditors. CITY rights to a complete and documented copy of all related Source Code corresponding to the then current released version of the System/Utility Software (for internal use and not for resale) shall precede any bankruptcy proceedings and stand before any trustee's claims for the benefit of creditors. In the event that the LICENSOR ceases to provide support for the System/Utility Software for reasons other than CITY'S failure to pay support fees as described in section 1.07, the CITY shall have the same rights as if the LICENSOR had declared bankruptcy.

9.03 INSURANCE

9.03.1 WORKERS' COMPENSATION INSURANCE. Pursuant to *California Labor Code* section 1861, LICENSOR acknowledges awareness of Section 3700 *et seq.* of said Code, which requires every employer to be insured against liability for workers' compensation; LICENSOR covenants that it will comply with such provisions prior to commencing performance of the work hereunder.

LICENSOR shall maintain workers' compensation insurance in an amount of not less than One Hundred Thousand Dollars (\$100,000) bodily injury by accident, each occurrence, One Hundred Thousand Dollars (\$100,000) bodily injury by disease, each employee, Two Hundred Fifty Thousand Dollars (\$250,000) bodily injury by disease, policy limit.

LICENSOR shall require all sub-licensors to provide such workers' compensation insurance for all of the sub-licensors' employees. LICENSOR shall furnish to CITY a certificate of waiver of subrogation under the terms of the workers' compensation insurance and LICENSOR shall similarly require all sub-licensors to waive subrogation.

9.03.2 GENERAL LIABILITY INSURANCE. In addition to the workers' compensation insurance and LICENSOR'S covenant to indemnify CITY, LICENSOR shall obtain and furnish to CITY, a policy of general public liability insurance, including motor vehicle coverage covering the PROJECT. Said policy shall indemnify LICENSOR, its officers, agents and employees, while acting within the scope of their duties, against any and all claims of arising out of or in connection with the PROJECT, and shall provide coverage in not less than the following

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amount: combined single limit bodily injury and property damage, including products/completed operations liability and blanket contractual liability, of \$1,000,000 per occurrence. If coverage is provided under a form which includes a designated general aggregate limit, the aggregate limit must be no less than \$1,000,000. Said policy shall name CITY, its officers, and employees as Additional Insureds, and shall specifically provide that any other insurance coverage which may be applicable to the PROJECT shall be deemed excess coverage and that LICENSOR'S insurance shall be primary.

Under no circumstances shall said above-mentioned insurance contain a self-insured retention, or a "deductible" or any other similar form of limitation on the required coverage.

9.03.3 CERTIFICATES OF INSURANCE; ADDITIONAL INSURED

ENDORSEMENTS. Prior to commencing performance of the work hereunder, LICENSOR shall furnish to CITY certificates of insurance subject to approval of the CITY Attorney evidencing the foregoing insurance coverages as required by this Agreement; said certificates shall:

- a) provide the name and policy number of each carrier and policy;
- b) shall state that the policy is currently in force;
- c) shall state that insurer shall endeavor to provide that such policies will not be canceled or modified without thirty (30) days' prior written notice of CITY; and
- d) shall state as follows: "*The above-detailed coverage is not subject to any deductible or self-insured retention, or any other form of similar-type limitation.*"

LICENSOR shall maintain the foregoing insurance coverages in force until the work under this Agreement is fully completed and accepted by CITY.

The requirement for carrying the foregoing insurance coverages shall not derogate from the provisions for indemnification of CITY by LICENSOR under the Agreement. CITY or its representative shall at all times have the right to demand the original or a copy of all said policies of insurance. LICENSOR shall pay, in a prompt and timely manner, the premiums on all insurance hereinabove required.

A separate copy of the additional insured endorsement to each of LICENSOR's insurance policies, naming the CITY, its officers and employees as Additional Insureds shall be provided to the CITY Attorney for approval prior to any payment hereunder.

10.00 GENERAL PROVISIONS

10.01 ASSIGNMENT. This Agreement may be assigned by LICENSOR to another person or organization that acquires all or substantially all of the assets of LICENSOR as long as all contractual provisions and responsibilities are assumed by the acquiring person or organization. Any other assignment by LICENSOR shall be made only with the prior written consent of CITY,

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which consent shall not be unreasonably withheld provided that in the event of such assignment the proposed assignee has agreed to be fully responsible for LICENSOR obligations under this Agreement.

10.02 GOVERNING LAW. This Agreement shall be governed by and construed in accordance with the laws of the state of California. Legal actions concerning any dispute, claim, or matter arising out of or in relation to this Agreement shall be instituted in the Superior Court of the County of Orange, State of California, or any other appropriate court in such county, and the parties covenant and agree to submit to the personal jurisdiction of such court in the event of such action.

10.03 COSTS AND ATTORNEYS FEES. LICENSOR and CITY agree that CITY is not liable for payment of any subcontractor work involving legal services, and that such legal services are expressly outside the scope of services contemplated hereunder. LICENSOR understands that pursuant to *Huntington Beach City Charter* Section 309, the City Attorney is the exclusive legal counsel for CITY; and CITY shall not be liable for payment of any legal services expenses incurred by LICENSOR.

In the event suit is brought by either party to construe, interpret and/or enforce the terms and/or provisions of this Agreement or to secure the performance hereof, each party shall bear its own attorney's fees, such that the prevailing party shall not be entitled to recover its attorney's fees from the non-prevailing party.

10.04 INDEPENDENT CONTRACTOR. LICENSOR is, and shall be, acting at all times in the performance of this Agreement as an independent contractor herein and not as an employee of CITY. LICENSOR shall secure at its own cost and expense, and be responsible for any and all payment of all taxes, social security, state disability insurance compensation, unemployment compensation and other payroll deductions for LICENSOR and its officers, agents and employees and all business licenses, if any, in connection with the PROJECT and/or the services to be performed hereunder.

10.05 CITY EMPLOYEES AND OFFICIALS. LICENSOR shall employ no CITY official nor any regular CITY employee in the work performed pursuant to this Agreement. No officer or employee of CITY shall have any financial interest in this Agreement in violation of the applicable provisions of the *California Government Code*.

10.06 NON-RECRUITMENT. LICENSOR agrees not to employ, either directly or indirectly, as an employee or contractor or otherwise, or to solicit the employment or services of any current or former CITY employee for a period of one (1) year after the completion of the last services provided by LICENSOR for CITY.

10.07 CONSENT. When CITY'S consent/approval is required under this Agreement, its consent/approval for one transaction or event shall not be deemed to be a consent/approval to any subsequent occurrence of the same or any other transaction or event.

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10.08 MODIFICATION. No waiver or modification of any language in this Agreement shall be valid unless in writing and duly executed by both parties.

10.09 SECTION HEADINGS. The titles, captions, section, paragraph and subject headings, and descriptive phrases at the beginning of the various sections in this Agreement are merely descriptive and are included solely for convenience of reference only and are not representative of matters included or excluded from such provisions, and do not interpret, define, limit or describe, or construe the intent of the parties or affect the construction or interpretation of any provision of this Agreement.

10.10 INTERPRETATION OF THIS AGREEMENT. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties. If any provision of this Agreement is held by an arbitrator or court of competent jurisdiction to be unenforceable, void, illegal or invalid, such holding shall not invalidate or affect the remaining covenants and provisions of this Agreement. No covenant or provision shall be deemed dependent upon any other unless so expressly provided here. As used in this Agreement, the masculine or neuter gender and singular or plural number shall be deemed to include the other whenever the context so indicates or requires. Nothing contained herein shall be construed so as to require the commission of any act contrary to law, and wherever there is any conflict between any provision contained herein and any present or future statute, law, ordinance or regulation contrary to which the parties have no right to contract, then the latter shall prevail, and the provision of this Agreement which is hereby affected shall be curtailed and limited only to the extent necessary to bring it within the requirements of the law.

10.11 DUPLICATE ORIGINAL. The original of this Agreement and one or more copies hereto have been prepared and signed in counterparts as duplicate originals, each of which so executed shall, irrespective of the date of its execution and delivery, be deemed an original. Each duplicate original shall be deemed an original instrument as against any party who has signed it.

10.12 IMMIGRATION. LICENSOR shall be responsible for full compliance with the immigration and naturalization laws of the United States and shall, in particular, comply with the provisions of the *United States Code* regarding employment verification.

10.13 SERVICE OF NOTICE. Any notices, certificates, or other communications hereunder shall be given either by personal delivery to LICENSOR'S agent (as designated) or to CITY as the situation shall warrant, or by enclosing the same in a sealed envelope, postage prepaid, and depositing the same in the United States Postal Service, to the addresses specified below; provided that LICENSOR and CITY, by notice given hereunder, may designate different addresses to which subsequent notices, certificates or other communications will be sent:

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TO CITY:

City of Huntington Beach
ATTN: Director of _____
2000 Main Street
Huntington Beach, CA 92648

TO LICENSOR:

Dynix Corporation
ATTN: Chief Operating Officer
400 Dynix Drive
Provo, UT 84604

10.14 ENTIRE AGREEMENT; AMENDMENTS. The parties acknowledge and agree that they are entering into this Agreement freely and voluntarily following extensive arm's length negotiation, and that each has had the opportunity to consult with legal counsel prior to executing this Agreement. The parties also acknowledge and agree that no representations, inducements, promises, agreements or warranties, oral or otherwise, have been made by that party or anyone acting on that party's behalf, which are not embodied in this Agreement, and that that party has not executed this Agreement in reliance on any representation, inducement, promise, agreement, warranty, fact or circumstance not expressly set forth in this Agreement. This Agreement, and the attached exhibits, contain the entire agreement between the parties respecting the subject matter of this Agreement, and supercedes all prior understandings and agreements whether oral or in writing between the parties respecting the subject matter hereof.

REMAINDER OF PAGE INTENTIONALLY LEFT BLANK

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10.15 SURVIVAL. Terms and conditions of this Agreement, which by their sense and context survive the expiration or termination of this Agreement shall so survive.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by and through their authorized officers on _____, 2005.

DYNIX CORPORATION, a Utah corporation:

CITY OF HUNTINGTON BEACH, a municipal corporation of the State of California

By: [Signature]
JACK Blount
print name

ITS: (circle one) Chairman/President/Vice President

AND
By: [Signature]
BILL KONNOOY
print name

ITS: (circle one) Secretary/Chief Financial Officer/Asst. Secretary - Treasurer

Mayor

City Clerk

APPROVED AS TO FORM:
[Signature]
City Attorney
PC 2-17-05

INITIATED AND APPROVED:
[Signature]
Director of Library Services

[Signature]
Director of Information Services

REVIEWED AND APPROVED:
[Signature]
City Administrator

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ACORD CERTIFICATE OF LIABILITY INSURANCE

OP ID PC
DYNIX-1

DATE (MM/DD/YYYY)
02/18/05

PRODUCER
Diversified Ins Technology Group
 136 E. South Temple # 2300
 Salt Lake City UT 84111
 Phone: 801-325-5000 Fax: 801-532-2804

INSURED
 Dvnx Corporation
 400 West Dvnx Drive
 Provo UT 84604

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

INSURERS AFFORDING COVERAGE		NAIC #
INSURER A:	Federal Insurance Company	20281
INSURER B:		
INSURER C:		
INSURER D:		
INSURER E:		

COVERAGES

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	ADD'L INSRD	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS
A	X	GENERAL LIABILITY <input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input type="checkbox"/> PRO-JECT <input type="checkbox"/> LOC	35818216	06/01/04	06/01/05	EACH OCCURRENCE \$ 1,000,000 DAMAGE TO RENTED PREMISES (Ea occurrence) \$ 1,000,000 MED EXP (Any one person) \$ 10,000 PERSONAL & ADV INJURY \$ 1,000,000 GENERAL AGGREGATE \$ 2,000,000 PRODUCTS - COMP/OP AGG \$ 2,000,000
A		AUTOMOBILE LIABILITY <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input checked="" type="checkbox"/> HIRED AUTOS <input checked="" type="checkbox"/> NON-OWNED AUTOS	74969906	06/01/04	06/01/05	COMBINED SINGLE LIMIT (Ea accident) \$ 1,000,000 BODILY INJURY (Per person) \$ BODILY INJURY (Per accident) \$ PROPERTY DAMAGE (Per accident) \$
		GARAGE LIABILITY <input type="checkbox"/> ANY AUTO	APPROVED AS TO FORM JENNIFER McGRATH, City Attorney <i>[Signature]</i> 2-17-05 By Paul D'Alessandro Assistant City Attorney <i>[Signature]</i>			AUTO ONLY - EA ACCIDENT \$ OTHER THAN AUTO ONLY: EA ACC \$ AGG \$
A		EXCESS/UMBRELLA LIABILITY <input checked="" type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> DEDUCTIBLE RETENTION \$ 0	79821693	06/01/04	06/01/05	EACH OCCURRENCE \$ 1,000,000 AGGREGATE \$ 1,000,000 \$ \$ \$
A		WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED? If yes, describe under SPECIAL PROVISIONS below	71719073	12/15/04	06/01/05	<input checked="" type="checkbox"/> WC STATUTORY LIMITS <input type="checkbox"/> OTH-ER E.L. EACH ACCIDENT \$ 1,000,000 E.L. DISEASE - EA EMPLOYEE \$ 1,000,000 E.L. DISEASE - POLICY LIMIT \$ 1,000,000
		OTHER				

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES / EXCLUSIONS ADDED BY ENDORSEMENT / SPECIAL PROVISIONS
 Huntington Beach Public Library, the city, it's officers, and employees are named as Additional Insured with respects to written contract with the insured. The above detailed coverage is not subject to any deductible or self-retention, or any other form of similar type of limitation.

CERTIFICATE HOLDER

HUNBEAC

Huntington Beach Public Library
 Attn: Cam Ha
 7111 Talbert Ave.
 Huntington Beach CA 92648

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

AUTHORIZED REPRESENTATIVE

Pamela M. Christen

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INSURANCE AND INDEMNIFICATION WAIVER MODIFICATION REQUEST

- Requested by: Ron Hayden
- Date: February 10, 2005
- Name of contractor/permittee: Dynix Corporation
- Description of work to be performed: Turnkey Library Computer System
- Value and length of contract: \$188,000 contract length 1 year with annual maintenance
- Waiver/modification request: Dynix's requested changes are attached
- Reason for request and why it should be granted: Consistent with industry standards
- Identify the risks to the City in approving this waiver/modification: City's ability to recover damages in case of breach is limited to amounts paid by City for product/services; City responsible for its own concurrent negligence; modification to language requiring notification of policy cancellation is not substantive.

actual damages for 2/16/05
2/10/05

Department Head Signature

Date:

APPROVALS

Approvals must be obtained in the order listed on this form. Two approvals are required for a request to be granted. Approval from the City Administrator's Office is only required if Risk Management and the City Attorney's Office disagree.

1. Risk Management

Approved Denied

Signature

2/10/05
Date

2. City Attorney's Office

Approved Denied

Signature

2/16/05
Date

3. City Administrator's Office

Approved Denied

Signature

Date

If approved, the completed waiver/modification request is to be submitted to the City Attorney's Office along with the contract for approval. Once the contract has been approved, this form is to be filed with the Risk Management Division of Administrative Services

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9.00 LIABILITY, INDEMNIFICATION AND DEFAULT

9.01 INDEMNIFICATION AND HOLD HARMLESS. LICENSOR hereby agrees to protect, defend, indemnify and hold harmless CITY, its officers, elected or appointed officials, employees, agents and volunteers from and against any and all claims, damages, losses, expenses, demands and defense costs (including, without limitation, costs and fees of litigation of every nature or liability of any kind or nature) arising out of or in connection with LICENSOR'S performance of this Agreement or its failure to comply with any of its obligations contained in this Agreement by LICENSOR, its officers, agents or employees except such loss or damage which was caused by the CITY. LICENSOR will conduct all defense at its sole cost and expense. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by LICENSOR.

LICENSOR'S TOTAL LIABILITY TO CITY UNDER THIS AGREEMENT, EXCLUDING LIABILITY FOR PERSONAL INJURY, DAMAGE TO REAL PROPERTY AND TANGIBLE PERSONAL PROPERTY, AND LIABILITY PURSUANT TO CLAIMS OF INFRINGEMENT, WILL BE LIMITED TO THE ~~PAYMENTS MADE BY CITY DURING THE PREVIOUS 12 MONTHS~~ FOR THE PRODUCT OR SERVICE WHICH IS THE SUBJECT MATTER OF THE CLAIM. IN NO EVENT WILL LICENSOR BE LIABLE TO CITY FOR ANY INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES (INCLUDING, WITHOUT LIMITATION, LOSS OF BUSINESS, REVENUE, PROFITS, GOODWILL, USE, DATA, OR OTHER ECONOMIC ADVANTAGE), WHETHER BASED ON BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), PRODUCT LIABILITY, OR OTHERWISE, AND WHETHER OR NOT LICENSOR HAS PREVIOUSLY BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THIS SECTION SHALL SURVIVE FAILURE OF ANY EXCLUSIVE REMEDY.

ACTUAL
DAMAGES
INCURRED

(Vendor has
agreed to
remove
12 mo. paym
copy)
P
2/16/11

9.02 BANKRUPTCY/SUPPORT CESSATION. The term "default" as used in this Agreement shall include the institution of proceedings by or against LICENSOR under federal or state bankruptcy laws and assignment or receivership for the benefit of creditors. CITY rights to a complete and documented copy of all related Source Code corresponding to the then current released version of the System/Utility Software (for internal use and not for resale) shall precede any bankruptcy proceedings and stand before any trustee's claims for the benefit of creditors. In the event that the LICENSOR ceases to provide support for the System/Utility Software for reasons other than CITY'S failure to pay support fees as described in section 1.07, the CITY shall have the same rights as if the LICENSOR had declared bankruptcy.

9.03 INSURANCE

9.03.1 WORKERS' COMPENSATION INSURANCE. Pursuant to *California Labor Code* section 1861, LICENSOR acknowledges awareness of Section 3700 *et seq.* of said

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Code, which requires every employer to be insured against liability for workers' compensation; LICENSOR covenants that it will comply with such provisions prior to commencing performance of the work hereunder.

LICENSOR shall maintain workers' compensation insurance in an amount of not less than One Hundred Thousand Dollars (\$100,000) bodily injury by accident, each occurrence, One Hundred Thousand Dollars (\$100,000) bodily injury by disease, each employee, Two Hundred Fifty Thousand Dollars (\$250,000) bodily injury by disease, policy limit.

LICENSOR shall require all sub-licensors to provide such workers' compensation insurance for all of the sub-licensors' employees. LICENSOR shall furnish to CITY a certificate of waiver of subrogation under the terms of the workers' compensation insurance and LICENSOR shall similarly require all sub-licensors to waive subrogation.

9.03.2 GENERAL LIABILITY INSURANCE. In addition to the workers' compensation insurance and LICENSOR'S covenant to indemnify CITY, LICENSOR shall obtain and furnish to CITY, a policy of general public liability insurance, including motor vehicle coverage covering the PROJECT. Said policy shall indemnify LICENSOR, its officers, agents and employees, while acting within the scope of their duties, against any and all claims of arising out of or in connection with the PROJECT, and shall provide coverage in not less than the following amount: combined single limit bodily injury and property damage, including products/completed operations liability and blanket contractual liability, of \$1,000,000 per occurrence. If coverage is provided under a form which includes a designated general aggregate limit, the aggregate limit must be no less than \$1,000,000. Said policy shall name CITY, its officers, and employees as Additional Insureds, and shall specifically provide that any other insurance coverage which may be applicable to the PROJECT shall be deemed excess coverage and that LICENSOR'S insurance shall be primary.

Under no circumstances shall said above-mentioned insurance contain a self-insured retention, or a "deductible" or any other similar form of limitation on the required coverage.

9.03.3 CERTIFICATES OF INSURANCE; ADDITIONAL INSURED ENDORSEMENTS. Prior to commencing performance of the work hereunder, LICENSOR shall furnish to CITY certificates of insurance subject to approval of the CITY Attorney evidencing the foregoing insurance coverages as required by this Agreement; said certificates shall:

- a) provide the name and policy number of each carrier and policy;
- b) shall state that the policy is currently in force;
- c) shall state that insurer shall endeavor to provide that such policies will not be canceled or modified without thirty (30) days' prior written notice of CITY; and

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d) shall state as follows: ***"The above-detailed coverage is not subject to any deductible or self-insured retention, or any other form of similar-type limitation."***

LICENSOR shall maintain the foregoing insurance coverages in force until the work under this Agreement is fully completed and accepted by CITY.

The requirement for carrying the foregoing insurance coverages shall not derogate from the provisions for indemnification of CITY by LICENSOR under the Agreement. CITY or its representative shall at all times have the right to demand the original or a copy of all said policies of insurance. LICENSOR shall pay, in a prompt and timely manner, the premiums on all insurance hereinabove required.

A separate copy of the additional insured endorsement to each of LICENSOR's insurance policies, naming the CITY, its officers and employees as Additional Insureds shall be provided to the CITY Attorney for approval prior to any payment hereunder.

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