

## DocuSign City Council Transmittal Coversheet

FILE	6918
File Name	OPEN COUNTER SOFTWARE
Purchasing Contact	Adrian Brown
City Council Target Date	12/4/2018
Piggy Back Option	No
Contract Expiration	December 4, 2023
Ordinance	18-2047

**CONTRACT BY AND BETWEEN  
CITY OF DENTON, TEXAS AN OPEN COUNTER ENTERPRISES, INC.  
(CONTRACT #6918)**

**THIS CONTRACT** is made and entered into this date 12/5/2018, by and between OPEN COUNTER ENTERPRISES, INC., a DELAWARE corporation, whose address is 25 Taylor Street, San Francisco, CA, 94102, hereinafter referred to as "Contractor," and the **CITY OF DENTON, TEXAS**, a home rule municipal corporation, hereinafter referred to as "City," to be effective upon approval of the Denton City Council and subsequent execution of this Contract by the Denton City Manager or his duly authorized designee.

For and in consideration of the covenants and agreements contained herein, and for the mutual benefits to be obtained hereby, the parties agree as follows:

**SCOPE OF SERVICES**

Supplier shall provide products and/or services in accordance with the City's document – **CONTRACT #6918 – OPEN COUNTER ENTERPRISES, INC.**, a copy of which is on file at the office of Purchasing Agent and incorporated herein for all purposes. The Contract consists of this written agreement and the following items which are attached hereto and incorporated herein by reference:

- (a) Special Terms and Conditions (**Exhibit "A"**)
- (b) City of Denton Standard Terms and Conditions (**Exhibit "B"**)
- (c) Master Service Agreement (**Exhibit "C"**)
- (d) House Bill 89 Verification (**Exhibit "D"**)
- (e) Senate Bill 252 Certification (**Exhibit "E"**)
- (f) Form CIQ – Conflict of Interest Questionnaire (**Exhibit "F"**)

These documents make up the Contract documents and what is called for by one shall be as binding as if called for by all. In the event of an inconsistency or conflict in any of the provisions of the Contract documents, the inconsistency or conflict shall be resolved by giving precedence first to the written agreement then to the contract documents in the order in which they are listed above. These documents shall be referred to collectively as "Contract Documents."

The parties agree to transact business electronically. Any statutory requirements that certain terms be in writing will be satisfied using electronic documents and signing. Electronic signing of this document will be deemed an original for all legal purposes.

IN WITNESS WHEREOF, the parties of these presents have executed this agreement in the year and day first above written.

THIS AGREEMENT HAS BEEN BOTH REVIEWED AND APPROVED as to financial and operational obligations and business terms.

DocuSigned by: Caroline Booth Caroline Booth  
8EE4BC71C00B4B2...  
SIGNATURE PRINTED NAME  
Director of Economic Development  
TITLE  
Economic Development  
DEPARTMENT

ATTEST:  
JENNIFER WALTERS, CITY SECRETARY

DocuSigned by: Jane Richardson  
BY: F96137F96F3D4D3...

APPROVED AS TO LEGAL FORM:  
AARON LEAL, CITY ATTORNEY

DocuSigned by: Mack Peinward  
BY: 7F9D328BF0204E5...

**CONTRACTOR**

DocuSigned by: Peter Koht  
BY: 210B8375A83D486...  
PETER KOHT – OWNER

Date: 11/9/2018

Printed Name: Peter Koht

Title: COO

(800) 216-7360

**PHONE NUMBER**

peter@opencounter.com

**EMAIL ADDRESS**

contracts@opencounter.com

TEXAS ETHICS COMMISSION  
CERTIFICATE NUMBER

**CITY OF DENTON, TEXAS**

DocuSigned by: Todd Hileman  
BY: B776C711BA0D454...  
TODD HILEMAN  
CITY MANAGER

Date: 12/5/2018

**Exhibit A**  
**Special Terms and Conditions**

**1. Total Contract Amount**

The contract total for services shall not exceed \$125,000. Pricing shall be per Exhibit C attached.

**2. Contract Terms**

The contract term will be five (5) years, effective from date of award or notice to proceed as determined by the City of Denton Purchasing Department.

The contract shall commence upon the issuance of a Notice of Award by the City of Denton and shall automatically renew each year, from the date of award by City Council. At the sole option of the City of Denton, the contract may be further extended as needed, not to exceed a total of six (6) months.

**Exhibit B**  
**Standard Purchase Terms and Conditions**

These standard Terms and Conditions and the Terms and Conditions, Specifications, Drawings and other requirements included in the City of Denton's contract are applicable to contracts/purchase orders issued by the City of Denton hereinafter referred to as the City or Buyer and the Seller or respondent herein after referred to as Contractor or Supplier. Any deviations must be in writing and signed by a representative of the City's Procurement Department and the Supplier. No Terms and Conditions contained in the seller's proposal response, invoice or statement shall serve to modify the terms set forth herein. If there is a conflict between the provisions on the face of the contract/purchase order these written provisions will take precedence.

The Contractor agrees that the contract shall be governed by the following terms and conditions, unless exceptions are duly noted and fully negotiated. Unless otherwise specified in the contract, Sections 3, 4, 5, 6, 7, 8, 20, 21, and 36 shall apply only to a solicitation to purchase goods, and sections 9, 10, 11, 22 and 32 shall apply only to a solicitation to purchase services to be performed principally at the City's premises or on public rights-of-way.

1. **CONTRACTOR'S OBLIGATIONS.** The Contractor shall fully and timely provide all deliverables described in the Solicitation and in the Contractor's Offer in strict accordance with the terms, covenants, and conditions of the Contract and all applicable Federal, State, and local laws, rules, and regulations.

2. **EFFECTIVE DATE/TERM.** Unless otherwise specified in the Solicitation, this Contract shall be effective as of the date the contract is signed by the City, and shall continue in effect until all obligations are performed in accordance with the Contract.

3. **CONTRACTOR TO PACKAGE DELIVERABLES:** The Contractor will package deliverables in accordance with good commercial practice and shall include a packing list showing the description of each item, the quantity and unit price unless otherwise provided in the Specifications or Supplemental Terms and Conditions, each shipping container shall be clearly and permanently marked as follows: (a) The Contractor's name and address, (b) the City's name, address and purchase order or purchase release number and the price agreement number if applicable, (c) Container number and total number of containers, e.g. box 1 of 4 boxes, and (d) the number of the container bearing the packing list. The Contractor shall bear cost of packaging. Deliverables shall be suitably packed to secure lowest transportation costs and to conform to all the requirements of common carriers and any applicable specification. The City's count or weight shall be final and conclusive on shipments not accompanied by packing lists.

4. **SHIPMENT UNDER RESERVATION PROHIBITED:** The Contractor is not authorized to ship the deliverables under reservation and no tender of a bill of lading will operate as a tender of deliverables.

5. **TITLE & RISK OF LOSS:** Title to and risk of loss of the deliverables shall pass to the City only when the City actually receives and accepts the deliverables.

6. **DELIVERY TERMS AND TRANSPORTATION CHARGES:** Deliverables shall be

shipped F.O.B. point of delivery unless otherwise specified in the Supplemental Terms and Conditions. Unless otherwise stated in the Offer, the Contractor's price shall be deemed to include all delivery and transportation charges. The City shall have the right to designate what method of transportation shall be used to ship the deliverables. The place of delivery shall be that set forth the purchase order.

**7. RIGHT OF INSPECTION AND REJECTION:** The City expressly reserves all rights under law, including, but not limited to the Uniform Commercial Code, to inspect the deliverables at delivery before accepting them, and to reject defective or non-conforming deliverables. If the City has the right to inspect the Contractor's, or the Contractor's Subcontractor's, facilities, or the deliverables at the Contractor's, or the Contractor's Subcontractor's, premises, the Contractor shall furnish, or cause to be furnished, without additional charge, all reasonable facilities and assistance to the City to facilitate such inspection.

**8. NO REPLACEMENT OF DEFECTIVE TENDER:** Every tender or delivery of deliverables must fully comply with all provisions of the Contract as to time of delivery, quality, and quantity. Any non-complying tender shall constitute a breach and the Contractor shall not have the right to substitute a conforming tender; provided, where the time for performance has not yet expired, the Contractor may notify the City of the intention to cure and may then make a conforming tender within the time allotted in the contract.

**9. PLACE AND CONDITION OF WORK:** The City shall provide the Contractor access to the sites where the Contractor is to perform the services as required in order for the Contractor to perform the services in a timely and efficient manner, in accordance with and subject to the applicable security laws, rules, and regulations. The Contractor acknowledges that it has satisfied itself as to the nature of the City's service requirements and specifications, the location and essential characteristics of the work sites, the quality and quantity of materials, equipment, labor and facilities necessary to perform the services, and any other condition or state of fact which could in any way affect performance of the Contractor's obligations under the contract. The Contractor hereby releases and holds the City harmless from and against any liability or claim for damages of any kind or nature if the actual site or service conditions differ from expected conditions.

The contractor shall, at all times, exercise reasonable precautions for the safety of their employees, City Staff, participants and others on or near the City's facilities.

#### **10. WORKFORCE**

A. The Contractor shall employ only orderly and competent workers, skilled in the performance of the services which they will perform under the Contract.

B. The Contractor, its employees, subcontractors, and subcontractor's employees may not while engaged in participating or responding to a solicitation or while in the course and scope of delivering goods or services under a City of Denton contract or on the City's property .

i. use or possess a firearm, including a concealed handgun that is licensed under state law, except as required by the terms of the contract; or

ii. use or possess alcoholic or other intoxicating beverages, illegal drugs or controlled substances, nor may such workers be intoxicated, or under the influence of alcohol or drugs, on the job.

C. If the City or the City's representative notifies the Contractor that any worker is incompetent, disorderly or disobedient, has knowingly or repeatedly violated safety regulations, has possessed

any firearms, or has possessed or was under the influence of alcohol or drugs on the job, the Contractor shall immediately remove such worker from Contract services, and may not employ such worker again on Contract services without the City's prior written consent.

**Immigration:** The Contractor represents and warrants that it shall comply with the requirements of the Immigration Reform and Control Act of 1986 and 1990 regarding employment verification and retention of verification forms for any individuals hired on or after November 6, 1986, who will perform any labor or services under the Contract and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA) enacted on September 30, 1996.

**11. COMPLIANCE WITH HEALTH, SAFETY, AND ENVIRONMENTAL REGULATIONS:** The Contractor, its Subcontractors, and their respective employees, shall comply fully with all applicable federal, state, and local health, safety, and environmental laws, ordinances, rules and regulations in the performance of the services, including but not limited to those promulgated by the City and by the Occupational Safety and Health Administration (OSHA). In case of conflict, the most stringent safety requirement shall govern. The Contractor shall indemnify and hold the City harmless from and against all claims, demands, suits, actions, judgments, fines, penalties and liability of every kind arising from the breach of the Contractor's obligations under this paragraph.

**Environmental Protection:** The Respondent shall be in compliance with all applicable standards, orders, or regulations issued pursuant to the mandates of the Clean Air Act (42 U.S.C. §7401 *et seq.*) and the Federal Water Pollution Control Act, as amended, (33 U.S.C. §1251 *et seq.*).

**12. INVOICES:**

A. The Contractor shall submit separate invoices in duplicate on each purchase order or purchase release after each delivery. If partial shipments or deliveries are authorized by the City, a separate invoice must be sent for each shipment or delivery made.

**B. Proper Invoices must include a unique invoice number, the purchase order or delivery order number and the master agreement number if applicable, the Department's Name, and the name of the point of contact for the Department.** Invoices shall be itemized and transportation charges, if any, shall be listed separately. A copy of the bill of lading and the freight waybill, when applicable, shall be attached to the invoice. The Contractor's name, remittance address and, if applicable, the tax identification number on the invoice must exactly match the information in the Vendor's registration with the City. Unless otherwise instructed in writing, the City may rely on the remittance address specified on the Contractor's invoice.

C. Invoices for labor shall include a copy of all time-sheets with trade labor rate and deliverables order number clearly identified. Invoices shall also include a tabulation of work-hours at the appropriate rates and grouped by work order number. Time billed for labor shall be limited to hours actually worked at the work site.

D. Unless otherwise expressly authorized in the Contract, the Contractor shall pass through all Subcontract and other authorized expenses at actual cost without markup.

E. Federal excise taxes, State taxes, or City sales taxes must not be included in the invoiced amount.

The City will furnish a tax exemption certificate upon request.

**13. PAYMENT:**

A. All proper invoices need to be sent to Accounts Payable. Approved invoices will be paid within thirty (30) calendar days of the City's receipt of the deliverables or of the invoice being received

in Accounts Payable, whichever is later.

**B. If payment is not timely made, (per paragraph A); interest shall accrue on the unpaid balance at the lesser of the rate specified in Texas Government Code Section 2251.025 or the maximum lawful rate; except, if payment is not timely made for a reason for which the City may withhold payment hereunder, interest shall not accrue until ten (10) calendar days after the grounds for withholding payment have been resolved.**

C. If partial shipments or deliveries are authorized by the City, the Contractor will be paid for the partial shipment or delivery, as stated above, provided that the invoice matches the shipment or delivery.

D. The City may withhold or set off the entire payment or part of any payment otherwise due the Contractor to such extent as may be necessary on account of:

- i. delivery of defective or non-conforming deliverables by the Contractor;
- ii. third party claims, which are not covered by the insurance which the Contractor is required to provide, are filed or reasonable evidence indicating probable filing of such claims;
- iii. failure of the Contractor to pay Subcontractors, or for labor, materials or equipment;
- iv. damage to the property of the City or the City's agents, employees or contractors, which is not covered by insurance required to be provided by the Contractor;
- v. reasonable evidence that the Contractor's obligations will not be completed within the time specified in the Contract, and that the unpaid balance would not be adequate to cover actual or damages for the anticipated delay;
- vi. failure of the Contractor to submit proper invoices with purchase order number, with all required attachments and supporting documentation; or
- vii. failure of the Contractor to comply with any material provision of the Contract Documents.

E. Notice is hereby given that any awarded firm who is in arrears to the City of Denton for delinquent taxes, the City may offset indebtedness owed the City through payment withholding.

F. Payment will be made by check unless the parties mutually agree to payment by credit card or electronic transfer of funds. The Contractor agrees that there shall be no additional charges, surcharges, or penalties to the City for payments made by credit card or electronic funds transfer.

G. The awarding or continuation of this contract is dependent upon the availability of funding. The City's payment obligations are payable only and solely from funds Appropriated and available for this contract. The absence of Appropriated or other lawfully available funds shall render the Contract null and void to the extent funds are not Appropriated or available and any deliverables delivered but unpaid shall be returned to the Contractor. The City shall provide the Contractor written notice of the failure of the City to make an adequate Appropriation for any fiscal year to pay the amounts due under the Contract, or the reduction of any Appropriation to an amount insufficient to permit the City to pay its obligations under the Contract. In the event of none or inadequate appropriation of funds, there will be no penalty nor removal fees charged to the City.

**14. TRAVEL EXPENSES:** All travel, lodging and per diem expenses in connection with the Contract shall be paid by the Contractor, unless otherwise stated in the contract terms. During the term of this contract, the contractor shall bill and the City shall reimburse contractor for all reasonable and approved out of pocket expenses which are incurred in the connection with the performance of duties hereunder. Notwithstanding the foregoing, expenses for the time spent by the contractor in traveling to and from City facilities shall not be reimbursed, unless otherwise negotiated.



**15. FINAL PAYMENT AND CLOSE-OUT:**

A. If a DBE/MBE/WBE Program Plan is agreed to and the Contractor has identified Subcontractors, the Contractor is required to submit a Contract Close-Out MBE/WBE Compliance Report to the Purchasing Manager no later than the 15th calendar day after completion of all work under the contract. Final payment, retainage, or both may be withheld if the Contractor is not in compliance with the requirements as accepted by the City.

B. The making and acceptance of final payment will constitute:

i. a waiver of all claims by the City against the Contractor, except claims (1) which have been previously asserted in writing and not yet settled, (2) arising from defective work appearing after final inspection, (3) arising from failure of the Contractor to comply with the Contract or the terms of any warranty specified herein, (4) arising from the Contractor's continuing obligations under the Contract, including but not limited to indemnity and warranty obligations, or (5) arising under the City's right to audit; and ii. a waiver of all claims by the Contractor against the City other than those previously asserted in writing and not yet settled.

**16. SPECIAL TOOLS & TEST EQUIPMENT:** If the price stated on the Offer includes the cost of any special tooling or special test equipment fabricated or required by the Contractor for the purpose of filling this order, such special tooling equipment and any process sheets related thereto shall become the property of the City and shall be identified by the Contractor as such.

**17. RIGHT TO AUDIT:**

A. The City shall have the right to audit and make copies of the books, records and computations pertaining to the Contract. The Contractor shall retain such books, records, documents and other evidence pertaining to the Contract period and five years thereafter, except if an audit is in progress or audit findings are yet unresolved, in which case records shall be kept until all audit tasks are completed and resolved. These books, records, documents and other evidence shall be available, within ten (10) business days of written request. Further, the Contractor shall also require all Subcontractors, material suppliers, and other payees to retain all books, records, documents and other evidence pertaining to the Contract, and to allow the City similar access to those documents. All books and records will be made available within a 50 mile radius of the City of Denton. The cost of the audit will be borne by the City unless the audit reveals an overpayment of 1% or greater. If an overpayment of 1% or greater occurs, the reasonable cost of the audit, including any travel costs, must be borne by the Contractor which must be payable within five (5) business days of receipt of an invoice.

B. Failure to comply with the provisions of this section shall be a material breach of the Contract and shall constitute, in the City's sole discretion, grounds for termination thereof. Each of the terms "books", "records", "documents" and "other evidence", as used above, shall be construed to include drafts and electronic files, even if such drafts or electronic files are subsequently used to generate or prepare a final printed document.

**18. SUBCONTRACTORS:**

A. If the Contractor identified Subcontractors in a DBE/MBE/WBE agreed to Plan, the Contractor shall comply with all requirements approved by the City. The Contractor shall not initially employ any Subcontractor except as provided in the Contractor's Plan. The Contractor shall not substitute any Subcontractor identified in the Plan, unless the substitute has been accepted by the City in writing. No acceptance by the City of any Subcontractor shall constitute a waiver of any rights or remedies of the City with respect to defective deliverables provided by a Subcontractor. If a Plan has been approved, the Contractor is additionally required to submit a monthly Subcontract Contract # 6918

Awards and Expenditures Report to the Procurement Manager, no later than the tenth calendar day of each month.

B. Work performed for the Contractor by a Subcontractor shall be pursuant to a written contract between the Contractor and Subcontractor. The terms of the subcontract may not conflict with the terms of the

Contract, and shall contain provisions that:

- i. require that all deliverables to be provided by the Subcontractor be provided in strict accordance with the provisions, specifications and terms of the Contract;
- ii. prohibit the Subcontractor from further subcontracting any portion of the Contract without the prior written consent of the City and the Contractor. The City may require, as a condition to such further subcontracting, that the Subcontractor post a payment bond in form, substance and amount acceptable to the City;
- iii. require Subcontractors to submit all invoices and applications for payments, including any claims for additional payments, damages or otherwise, to the Contractor in sufficient time to enable the Contractor to include same with its invoice or application for payment to the City in accordance with the terms of the Contract;
- iv. require that all Subcontractors obtain and maintain, throughout the term of their contract, insurance in the type and amounts specified for the Contractor, with the City being a named insured as its interest shall appear; and
- v. require that the Subcontractor indemnify and hold the City harmless to the same extent as the Contractor is required to indemnify the City.

C. The Contractor shall be fully responsible to the City for all acts and omissions of the Subcontractors just as the Contractor is responsible for the Contractor's own acts and omissions. Nothing in the Contract shall create for the benefit of any such Subcontractor any contractual relationship between the City and any such Subcontractor, nor shall it create any obligation on the part of the City to pay or to see to the payment of any moneys due any such Subcontractor except as may otherwise be required by law.

D. The Contractor shall pay each Subcontractor its appropriate share of payments made to the Contractor not later than ten (10) calendar days after receipt of payment from the City.

**19. WARRANTY-PRICE:**

A. The Contractor warrants the prices quoted in the Offer are no higher than the Contractor's current prices on orders by others for like deliverables under similar terms of purchase.

B. The Contractor certifies that the prices in the Offer have been arrived at independently without consultation, communication, or agreement for the purpose of restricting competition, as to any matter relating to such fees with any other firm or with any competitor.

C. In addition to any other remedy available, the City may deduct from any amounts owed to the Contractor, or otherwise recover, any amounts paid for items in excess of the Contractor's current prices on orders by others for like deliverables under similar terms of purchase.

**20. WARRANTY – TITLE:** The Contractor warrants that it has good and indefeasible title to all deliverables furnished under the Contract, and that the deliverables are free and clear of all liens, claims, security interests and encumbrances. The Contractor shall indemnify and hold the City harmless from and against all adverse title claims to the deliverables.

**21. WARRANTY – DELIVERABLES:** The Contractor warrants and represents that all deliverables sold the City under the Contract shall be free from defects in design, workmanship or manufacture, and conform in all material respects to the specifications, drawings, and descriptions in the Solicitation, to any samples furnished by the Contractor, to the terms, covenants and

conditions of the Contract, and to all applicable State, Federal or local laws, rules, and regulations, and industry codes and standards. Unless otherwise stated in the Solicitation, the deliverables shall be new or recycled merchandise, and not used or reconditioned.

A. Recycled deliverables shall be clearly identified as such.

B. The Contractor may not limit, exclude or disclaim the foregoing warranty or any warranty implied by law; and any attempt to do so shall be without force or effect.

C. Unless otherwise specified in the Contract, the warranty period shall be at least one year from the date of acceptance of the deliverables or from the date of acceptance of any replacement deliverables. If during the warranty period, one or more of the above warranties are breached, the Contractor shall promptly upon receipt of demand either repair the non-conforming deliverables, or replace the non-conforming deliverables with fully conforming deliverables, at the City's option and at no additional cost to the City. All costs incidental to such repair or replacement, including but not limited to, any packaging and shipping costs shall be borne exclusively by the Contractor. The City shall endeavor to give the Contractor written notice of the breach of warranty within thirty (30) calendar days of discovery of the breach of warranty, but failure to give timely notice shall not impair the City's rights under this section.

D. If the Contractor is unable or unwilling to repair or replace defective or non-conforming deliverables as required by the City, then in addition to any other available remedy, the City may reduce the quantity of deliverables it may be required to purchase under the Contract from the Contractor, and purchase conforming deliverables from other sources. In such event, the Contractor shall pay to the City upon demand the increased cost, if any, incurred by the City to procure such deliverables from another source.

E. If the Contractor is not the manufacturer, and the deliverables are covered by a separate manufacturer's warranty, the Contractor shall transfer and assign such manufacturer's warranty to the City. If for any reason the manufacturer's warranty cannot be fully transferred to the City, the Contractor shall assist and cooperate with the City to the fullest extent to enforce such manufacturer's warranty for the benefit of the City.

**22. WARRANTY – SERVICES:** The Contractor warrants and represents that all services to be provided the City under the Contract will be fully and timely performed in a good and workmanlike manner in accordance with generally accepted industry standards and practices, the terms, conditions, and covenants of the Contract, and all applicable Federal, State and local laws, rules or regulations.

A. The Contractor may not limit, exclude or disclaim the foregoing warranty or any warranty implied by law, and any attempt to do so shall be without force or effect.

B. Unless otherwise specified in the Contract, the warranty period shall be at least one year from the Acceptance Date. If during the warranty period, one or more of the above warranties are breached, the Contractor shall promptly upon receipt of demand perform the services again in accordance with above standard at no additional cost to the City. All costs incidental to such additional performance shall be borne by the Contractor. The City shall endeavor to give the Contractor written notice of the breach of warranty within thirty (30) calendar days of discovery of the breach warranty, but failure to give timely notice shall not impair the City's rights under this section.

C. If the Contractor is unable or unwilling to perform its services in accordance with the above standard as required by the City, then in addition to any other available remedy, the City may reduce the amount of services it may be required to purchase under the Contract from the Contractor, and purchase conforming services from other sources. In such event, the Contractor

shall pay to the City upon demand the increased cost, if any, incurred by the City to procure such services from another source.

**23. ACCEPTANCE OF INCOMPLETE OR NON-CONFORMING DELIVERABLES:** If, instead of requiring immediate correction or removal and replacement of defective or non-conforming deliverables, the City prefers to accept it, the City may do so. The Contractor shall pay all claims, costs, losses and damages attributable to the City's evaluation of and determination to accept such defective or non-conforming deliverables. If any such acceptance occurs prior to final payment, the City may deduct such amounts as are necessary to compensate the City for the diminished value of the defective or non-conforming deliverables. If the acceptance occurs after final payment, such amount will be refunded to the City by the Contractor.

**24. RIGHT TO ASSURANCE:** Whenever one party to the Contract in good faith has reason to question the other party's intent to perform, demand may be made to the other party for written assurance of the intent to perform. In the event that no assurance is given within the time specified after demand is made, the demanding party may treat this failure as an anticipatory repudiation of the Contract.

**25. STOP WORK NOTICE:** The City may issue an immediate Stop Work Notice in the event the Contractor is observed performing in a manner that is in violation of Federal, State, or local guidelines, or in a manner that is determined by the City to be unsafe to either life or property. Upon notification, the Contractor will cease all work until notified by the City that the violation or unsafe condition has been corrected. The Contractor shall be liable for all costs incurred by the City as a result of the issuance of such Stop Work Notice.

**26. DEFAULT:** The Contractor shall be in default under the Contract if the Contractor (a) fails to fully, timely and faithfully perform any of its material obligations under the Contract, (b) fails to provide adequate assurance of performance under Paragraph 24, (c) becomes insolvent or seeks relief under the bankruptcy laws of the United States or (d) makes a material misrepresentation in Contractor's Offer, or in any report or deliverable required to be submitted by the Contractor to the City.

**27. TERMINATION FOR CAUSE:** In the event of a default by the Contractor, the City shall have the right to terminate the Contract for cause, by written notice effective ten (10) calendar days, unless otherwise specified, after the date of such notice, unless the Contractor, within such ten (10) day period, cures such default, or provides evidence sufficient to prove to the City's reasonable satisfaction that such default does not, in fact, exist. In addition to any other remedy available under law or in equity, the City shall be entitled to recover all actual damages, costs, losses and expenses, incurred by the City as a result of the Contractor's default, including, without limitation, cost of cover, reasonable attorneys' fees, court costs, and prejudgment and post-judgment interest at the maximum lawful rate. Additionally, in the event of a default by the Contractor, the City may remove the Contractor from the City's vendor list for three (3) years and any Offer submitted by the Contractor may be disqualified for up to three (3) years. All rights and remedies under the Contract are cumulative and are not exclusive of any other right or remedy provided by law.

**28. TERMINATION WITHOUT CAUSE:** The City shall have the right to terminate the Contract, in whole or in part, without cause any time upon thirty (30) calendar days' prior written notice. Upon receipt of a notice of termination, the Contractor shall promptly cease all further work pursuant to the Contract, with such exceptions, if any, specified in the notice of termination. The City shall pay the Contractor, to the extent of funds Appropriated or otherwise legally available  
Contract # 6918

for such purposes, for all goods delivered and services performed and obligations incurred prior to the date of termination in accordance with the terms hereof.

29. **FRAUD:** Fraudulent statements by the Contractor on any Offer or in any report or deliverable required to be submitted by the Contractor to the City shall be grounds for the termination of the Contract for cause by the City and may result in legal action.

30. **DELAYS:**

A. The City may delay scheduled delivery or other due dates by written notice to the Contractor if the City deems it is in its best interest. If such delay causes an increase in the cost of the work under the Contract, the City and the Contractor shall negotiate an equitable adjustment for costs incurred by the Contractor in the Contract price and execute an amendment to the Contract. The Contractor must assert its right to an adjustment within thirty (30) calendar days from the date of receipt of the notice of delay. Failure to agree on any adjusted price shall be handled under the Dispute Resolution process specified in paragraph 49. However, nothing in this provision shall excuse the Contractor from delaying the delivery as notified.

B. Neither party shall be liable for any default or delay in the performance of its obligations under this Contract if, while and to the extent such default or delay is caused by acts of God, fire, riots, civil commotion, labor disruptions, sabotage, sovereign conduct, or any other cause beyond the reasonable control of such Party. In the event of default or delay in contract performance due to any of the foregoing causes, then the time for completion of the services will be extended; provided, however, in such an event, a conference will be held within three (3) business days to establish a mutually agreeable period of time reasonably necessary to overcome the effect of such failure to perform.

31. **INDEMNITY:**

A. Definitions:

- i. "Indemnified Claims" shall include any and all claims, demands, suits, causes of action, judgments and liability of every character, type or description, including all reasonable costs and expenses of litigation, mediation or other alternate dispute resolution mechanism, including attorney and other professional fees for: (1) damage to or loss of the property of any person (including, but not limited to the City, the Contractor, their respective agents, officers, employees and subcontractors; the officers, agents, and employees of such subcontractors; and third parties); and/or (2) death, bodily injury, illness, disease, worker's compensation, loss of services, or loss of income or wages to any person (including but not limited to the agents, officers and employees of the City, the Contractor, the Contractor's subcontractors, and third parties), ii. "Fault" shall include the sale of defective or non-conforming deliverables, negligence, willful misconduct or a breach of any legally imposed strict liability standard.

**B. THE CONTRACTOR SHALL DEFEND (AT THE OPTION OF THE CITY), INDEMNIFY, AND HOLD THE CITY, ITS SUCCESSORS, ASSIGNS, OFFICERS, EMPLOYEES AND ELECTED OFFICIALS HARMLESS FROM AND AGAINST ALL INDEMNIFIED CLAIMS DIRECTLY ARISING OUT OF, INCIDENT TO, CONCERNING OR RESULTING FROM THE FAULT OF THE CONTRACTOR, OR THE CONTRACTOR'S AGENTS, EMPLOYEES OR SUBCONTRACTORS, IN THE PERFORMANCE OF THE CONTRACTOR'S OBLIGATIONS UNDER THE CONTRACT. NOTHING HEREIN SHALL BE DEEMED TO LIMIT THE RIGHTS OF**

**THE CITY OR THE CONTRACTOR (INCLUDING, BUT NOT LIMITED TO, THE RIGHT TO SEEK CONTRIBUTION) AGAINST ANY THIRD PARTY WHO MAY BE LIABLE FOR AN INDEMNIFIED CLAIM.**

32. **INSURANCE:** The following insurance requirements are applicable, in addition to the specific insurance requirements detailed in **Appendix A** for services only. The successful firm shall procure and maintain insurance of the types and in the minimum amounts acceptable to the City of Denton. The insurance shall be written by a company licensed to do business in the State of Texas and satisfactory to the City of Denton.

A. General Requirements:

- i. The Contractor shall at a minimum carry insurance in the types and amounts indicated and agreed to, as submitted to the City and approved by the City within the procurement process, for the duration of the Contract, including extension options and hold over periods, and during any warranty period.
- ii. The Contractor shall provide Certificates of Insurance with the coverage's and endorsements required to the City as verification of coverage prior to contract execution and within fourteen (14) calendar days after written request from the City. Failure to provide the required Certificate of Insurance may subject the Offer to disqualification from consideration for award. The Contractor must also forward a Certificate of Insurance to the City whenever a previously identified policy period has expired, or an extension option or hold over period is exercised, as verification of continuing coverage.
- iii. The Contractor shall not commence work until the required insurance is obtained and until such insurance has been reviewed by the City. Approval of insurance by the City shall not relieve or decrease the liability of the Contractor hereunder and shall not be construed to be a limitation of liability on the part of the Contractor.
- iv. The Contractor must submit certificates of insurance to the City for all subcontractors prior to the subcontractors commencing work on the project.
- v. The Contractor's and all subcontractors' insurance coverage shall be written by companies licensed to do business in the State of Texas at the time the policies are issued and shall be written by companies with A.M. Best ratings of **A- VII or better**. The City will accept workers' compensation coverage written by the Texas Workers' Compensation Insurance Fund.
- vi. All endorsements naming the City as additional insured, waivers, and notices of cancellation endorsements as well as the Certificate of Insurance shall contain the solicitation number and the following information:

City of Denton  
Materials Management Department  
901B Texas Street  
Denton, Texas 76209

- vii. The "other" insurance clause shall not apply to the City where the City is an additional insured shown on any policy. It is intended that policies required in the Contract, covering both the City and the Contractor, shall be considered primary coverage as applicable.
- viii. If insurance policies are not written for amounts agreed to with the City, the Contractor shall carry Umbrella or Excess Liability Insurance for any differences in amounts specified. If Excess Liability Insurance is provided, it shall follow the form of the primary coverage.
- ix. The City shall be entitled, upon request, at an agreed upon location, and without expense, to review certified copies of policies and endorsements thereto and may make any

reasonable requests for deletion or revision or modification of particular policy terms, conditions, limitations, or exclusions except where policy provisions are established by law or regulations binding upon either of the parties hereto or the underwriter on any such policies.

x. The City reserves the right to review the insurance requirements set forth during the effective period of the Contract and to make reasonable adjustments to insurance coverage, limits, and exclusions when deemed necessary and prudent by the City based upon changes in statutory law, court decisions, the claims history of the industry or financial condition of the insurance company as well as the Contractor.

xi. The Contractor shall not cause any insurance to be canceled nor permit any insurance to lapse during the term of the Contract or as required in the Contract.

xii. The Contractor shall be responsible for premiums, deductibles and self-insured retentions, if any, stated in policies. All deductibles or self-insured retentions shall be disclosed on the Certificate of Insurance.

xiii. The Contractor shall endeavor to provide the City thirty (30) calendar days' written notice of erosion of the aggregate limits below occurrence limits for all applicable coverage's indicated within the Contract.

xiv. The insurance coverage's specified in within the solicitation and requirements are required minimums and are not intended to limit the responsibility or liability of the Contractor.

B. Specific Coverage Requirements: Specific insurance requirements are contained in the solicitation instrument.

**33. CLAIMS:** If any claim, demand, suit, or other action is asserted against the Contractor which arises under or concerns the Contract, or which could have a material adverse effect on the Contractor's ability to perform thereunder, the Contractor shall give written notice thereof to the City within ten (10) calendar days after receipt of notice by the Contractor. Such notice to the City shall state the date of notification of any such claim, demand, suit, or other action; the names and addresses of the claimant(s); the basis thereof; and the name of each person against whom such claim is being asserted. Such notice shall be delivered personally or by mail and shall be sent to the City and to the Denton City Attorney. Personal delivery to the City Attorney shall be to City Hall, 215 East McKinney Street, Denton, Texas 76201.

**34. NOTICES:** Unless otherwise specified, all notices, requests, or other communications required or appropriate to be given under the Contract shall be in writing and shall be deemed delivered three (3) business days after postmarked if sent by U.S. Postal Service Certified or Registered Mail, Return Receipt Requested. Notices delivered by other means shall be deemed delivered upon receipt by the addressee. Routine communications may be made by first class mail, telefax, or other commercially accepted means. Notices to the Contractor shall be sent to the address specified in the Contractor's Offer, or at such other address as a party may notify the other in writing. Notices to the City shall be addressed to the City at 901B Texas Street, Denton, Texas 76209 and marked to the attention of the Purchasing Manager.

**35. RIGHTS TO BID, PROPOSAL AND CONTRACTUAL MATERIAL:** All material submitted by the Contractor to the City shall become property of the City upon receipt. Any portions of such material claimed by the Contractor to be proprietary must be clearly marked as such. Determination of the public nature of the material is subject to the Texas Public Information Act, Chapter 552, and Texas Government Code.

**36. NO WARRANTY BY CITY AGAINST INFRINGEMENTS:** The Contractor represents and warrants to the City that: (i) the Contractor shall provide the City good and indefeasible title to the deliverables and (ii) the deliverables supplied by the Contractor in accordance with the specifications in the Contract will not infringe, directly or contributorily, any patent, trademark, copyright, trade secret, or any other intellectual property right of any kind of any third party; that no claims have been made by any person or entity with respect to the ownership or operation of the deliverables and the Contractor does not know of any valid basis for any such claims. The Contractor shall, at its sole expense, defend, indemnify, and hold the City harmless from and against all liability, damages, and costs (including court costs and reasonable fees of attorneys and other professionals) arising out of or resulting from: (i) any claim that the City's exercise anywhere in the world of the rights associated with the City's ownership, and if applicable, license rights, and its use of the deliverables infringes the intellectual property rights of any third party; or (ii) the Contractor's breach of any of Contractor's representations or warranties stated in this Contract. In the event of any such claim, the City shall have the right to monitor such claim or at its option engage its own separate counsel to act as co-counsel on the City's behalf. Further, Contractor agrees that the City's specifications regarding the deliverables shall in no way diminish Contractor's warranties or obligations under this paragraph and the City makes no warranty that the production, development, or delivery of such deliverables will not impact such warranties of Contractor.

**37. CONFIDENTIALITY:** In order to provide the deliverables to the City, Contractor may require access to certain of the City's and/or its licensors' confidential information (including inventions, employee information, trade secrets, confidential know-how, confidential business information, and other information which the City or its licensors consider confidential) (collectively, "Confidential Information"). Contractor acknowledges and agrees that the Confidential Information is the valuable property of the City and/or its licensors and any unauthorized use, disclosure, dissemination, or other release of the Confidential Information will substantially injure the City and/or its licensors. The Contractor (including its employees, subcontractors, agents, or representatives) agrees that it will maintain the Confidential Information in strict confidence and shall not disclose, disseminate, copy, divulge, recreate, or otherwise use the Confidential Information without the prior written consent of the City or in a manner not expressly permitted under this Agreement, unless the Confidential Information is required to be disclosed by law or an order of any court or other governmental authority with proper jurisdiction, provided the Contractor promptly notifies the City before disclosing such information so as to permit the City reasonable time to seek an appropriate protective order. The Contractor agrees to use protective measures no less stringent than the Contractor uses within its own business to protect its own most valuable information, which protective measures shall under all circumstances be at least reasonable measures to ensure the continued confidentiality of the Confidential Information.

**38. OWNERSHIP AND USE OF DELIVERABLES:** The City shall own all rights, titles, and interests throughout the world in and to the deliverables.

A. Patents. As to any patentable subject matter contained in the deliverables, the Contractor agrees to disclose such patentable subject matter to the City. Further, if requested by the City, the Contractor agrees to assign and, if necessary, cause each of its employees to assign the entire right, title, and interest to specific inventions under such patentable subject matter to the City and to execute, acknowledge, and deliver and, if necessary, cause each of its employees to execute, acknowledge, and deliver an assignment of letters patent, in a form to be reasonably approved by



the City, to the City upon request by the City.

B. Copyrights. As to any deliverables containing copyrightable subject matter, the Contractor agrees that upon their creation, such deliverables shall be considered as work made-for-hire by the Contractor for the City and the City shall own all copyrights in and to such deliverables, provided however, that nothing in this Paragraph 38 shall negate the City's sole or joint ownership of any such deliverables arising by virtue of the City's sole or joint authorship of such deliverables. Should by operation of law, such deliverables not be considered works made-for-hire, the Contractor hereby assigns to the City (and agrees to cause each of its employees providing services to the City hereunder to execute, acknowledge, and deliver an assignment to the City of) all worldwide right, title, and interest in and to such deliverables. With respect to such work made-for-hire, the Contractor agrees to execute, acknowledge, and deliver and cause each of its employees providing services to the City hereunder to execute, acknowledge, and deliver a work-made-for-hire agreement, in a form to be reasonably approved by the City, to the City upon delivery of such deliverables to the City or at such other time as the City may request.

C. Additional Assignments. The Contractor further agrees to, and if applicable, cause each of its employees to, execute, acknowledge, and deliver all applications, specifications, oaths, assignments, and all other instruments which the City might reasonably deem necessary in order to apply for and obtain copyright protection, mask work registration, trademark registration and/or protection, letters patent, or any similar rights in any and all countries and in order to assign and convey to the City, its successors, assigns and nominees, the sole and exclusive right, title, and interest in and to the deliverables. The Contractor's obligations to execute, acknowledge, and deliver (or cause to be executed, acknowledged, and delivered) instruments or papers such as those described in this Paragraph 38 a., b., and c. shall continue after the termination of this Contract with respect to such deliverables. In the event the City should not seek to obtain copyright protection, mask work registration or patent protection for any of the deliverables, but should desire to keep the same secret, the Contractor agrees to treat the same as Confidential Information under the terms of Paragraph 37 above.

39. **PUBLICATIONS:** All published material and written reports submitted under the Contract must be originally developed material unless otherwise specifically provided in the Contract. When material not originally developed is included in a report in any form, the source shall be identified.

40. **ADVERTISING:** The Contractor shall not advertise or publish, without the City's prior consent, the fact that the City has entered into the Contract, except to the extent required by law.

41. **NO CONTINGENT FEES:** The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure the Contract upon any agreement or understanding for commission, percentage, brokerage, or contingent fee, excepting bona fide employees of bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty, the City shall have the right, in addition to any other remedy available, to cancel the Contract without liability and to deduct from any amounts owed to the Contractor, or otherwise recover, the full amount of such commission, percentage, brokerage or contingent fee.

42. **GRATUITIES:** The City may, by written notice to the Contractor, cancel the Contract without liability if it is determined by the City that gratuities were offered or given by the Contractor or  
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any agent or representative of the Contractor to any officer or employee of the City of Denton with a view toward securing the Contract or securing favorable treatment with respect to the awarding or amending or the making of any determinations with respect to the performing of such contract. In the event the Contract is canceled by the City pursuant to this provision, the City shall be entitled, in addition to any other rights and remedies, to recover or withhold the amount of the cost incurred by the Contractor in providing such gratuities.

**43. PROHIBITION AGAINST PERSONAL INTEREST IN CONTRACTS:** No officer, employee, independent consultant, or elected official of the City who is involved in the development, evaluation, or decision-making process of the performance of any solicitation shall have a financial interest, direct or indirect, in the Contract resulting from that solicitation. Any willful violation of this section shall constitute impropriety in office, and any officer or employee guilty thereof shall be subject to disciplinary action up to and including dismissal. Any violation of this provision, with the knowledge, expressed or implied, of the Contractor shall render the Contract voidable by the City. The Contractor shall complete and submit the City's Conflict of Interest Questionnaire.

**44. INDEPENDENT CONTRACTOR:** The Contract shall not be construed as creating an employer/employee relationship, a partnership, or a joint venture. The Contractor's services shall be those of an independent contractor. The Contractor agrees and understands that the Contract does not grant any rights or privileges established for employees of the City of Denton, Texas for the purposes of income tax, withholding, social security taxes, vacation or sick leave benefits, worker's compensation, or any other City employee benefit. The City shall not have supervision and control of the Contractor or any employee of the Contractor, and it is expressly understood that Contractor shall perform the services hereunder according to the attached specifications at the general direction of the City Manager of the City of Denton, Texas, or his designee under this agreement. The contractor is expressly free to advertise and perform services for other parties while performing services for the City.

**45. ASSIGNMENT-DELEGATION:** The Contract shall be binding upon and ensure to the benefit of the City and the Contractor and their respective successors and assigns, provided however, that no right or interest in the Contract shall be assigned and no obligation shall be delegated by the Contractor without the prior written consent of the City. Any attempted assignment or delegation by the Contractor shall be void unless made in conformity with this paragraph. The Contract is not intended to confer rights or benefits on any person, firm or entity not a party hereto; it being the intention of the parties that there are no third party beneficiaries to the Contract.

**46. WAIVER:** No claim or right arising out of a breach of the Contract can be discharged in whole or in part by a waiver or renunciation of the claim or right unless the waiver or renunciation is supported by consideration and is in writing signed by the aggrieved party. No waiver by either the Contractor or the City of any one or more events of default by the other party shall operate as, or be construed to be, a permanent waiver of any rights or obligations under the Contract, or an express or implied acceptance of any other existing or future default or defaults, whether of a similar or different character.

**47. MODIFICATIONS:** The Contract can be modified or amended only by a writing signed by both parties. No pre-printed or similar terms on any the Contractor invoice, order or other document shall have any force or effect to change the terms, covenants, and conditions of the Contract # 6918

Contract.

**48. INTERPRETATION:** The Contract is intended by the parties as a final, complete and exclusive statement of the terms of their agreement. No course of prior dealing between the parties or course of performance or usage of the trade shall be relevant to supplement or explain any term used in the Contract. Although the Contract may have been substantially drafted by one party, it is the intent of the parties that all provisions be construed in a manner to be fair to both parties, reading no provisions more strictly against one party or the other. Whenever a term defined by the Uniform Commercial Code, as enacted by the State of Texas, is used in the Contract, the UCC definition shall control, unless otherwise defined in the Contract.

**49. DISPUTE RESOLUTION:**

A. If a dispute arises out of or relates to the Contract, or the breach thereof, the parties agree to negotiate prior to prosecuting a suit for damages. However, this section does not prohibit the filing of a lawsuit to toll the running of a statute of limitations or to seek injunctive relief. Either party may make a written request for a meeting between representatives of each party within fourteen (14) calendar days after receipt of the request or such later period as agreed by the parties. Each party shall include, at a minimum, one (1) senior level individual with decision-making authority regarding the dispute. The purpose of this and any subsequent meeting is to attempt in good faith to negotiate a resolution of the dispute. If, within thirty (30) calendar days after such meeting, the parties have not succeeded in negotiating a resolution of the dispute, they will proceed directly to mediation as described below. Negotiation may be waived by a written agreement signed by both parties, in which event the parties may proceed directly to mediation as described below.

B. If the efforts to resolve the dispute through negotiation fail, or the parties waive the negotiation process, the parties may select, within thirty (30) calendar days, a mediator trained in mediation skills to assist with resolution of the dispute. Should they choose this option; the City and the Contractor agree to act in good faith in the selection of the mediator and to give consideration to qualified individuals nominated to act as mediator. Nothing in the Contract prevents the parties from relying on the skills of a person who is trained in the subject matter of the dispute or a contract interpretation expert. If the parties fail to agree on a mediator within thirty (30) calendar days of initiation of the mediation process, the mediator shall be selected by the Denton County Alternative Dispute Resolution Program (DCAP). The parties agree to participate in mediation in good faith for up to thirty (30) calendar days from the date of the first mediation session. The City and the Contractor will share the mediator's fees equally and the parties will bear their own costs of participation such as fees for any consultants or attorneys they may utilize to represent them or otherwise assist them in the mediation.

**50. JURISDICTION AND VENUE:** The Contract is made under and shall be governed by the laws of the State of Texas, including, when applicable, the Uniform Commercial Code as adopted in Texas, V.T.C.A., Bus. & Comm. Code, Chapter 1, excluding any rule or principle that would refer to and apply the substantive law of another state or jurisdiction. All issues arising from this Contract shall be resolved in the courts of Denton County, Texas and the parties agree to submit to the exclusive personal jurisdiction of such courts. The foregoing, however, shall not be construed or interpreted to limit or restrict the right or ability of the City to seek and secure injunctive relief from any competent authority as contemplated herein.

**51. INVALIDITY:** The invalidity, illegality, or unenforceability of any provision of the Contract shall in no way affect the validity or enforceability of any other portion or provision of the

Contract. Any void provision shall be deemed severed from the Contract and the balance of the Contract shall be construed and enforced as if the Contract did not contain the particular portion or provision held to be void. The parties further agree to reform the Contract to replace any stricken provision with a valid provision that comes as close as possible to the intent of the stricken provision. The provisions of this section shall not prevent this entire Contract from being void should a provision which is the essence of the Contract be determined to be void.

52. **HOLIDAYS:** The following holidays are observed by the City:

- |   |
|---|
| New Year's Day (observed)<br>MLK Day<br>Memorial Day<br>4th of July<br>Labor Day<br>Thanksgiving Day<br>Day After Thanksgiving<br>Christmas Eve (observed)<br>Christmas Day (observed)<br>New Year's Day (observed) |
|---|

If a Legal Holiday falls on Saturday, it will be observed on the preceding Friday. If a Legal Holiday falls on Sunday, it will be observed on the following Monday. Normal hours of operation shall be between 8:00 am and 4:00 pm, Monday through Friday, excluding City of Denton Holidays. Any scheduled deliveries or work performance not within the normal hours of operation **must be approved** by the City Manager of Denton, Texas or his authorized designee.

53. **SURVIVABILITY OF OBLIGATIONS:** All provisions of the Contract that impose continuing obligations on the parties, including but not limited to the warranty, indemnity, and confidentiality obligations of the parties, shall survive the expiration or termination of the Contract.

54. **NON-SUSPENSION OR DEBARMENT CERTIFICATION:**

The City of Denton is prohibited from contracting with or making prime or sub-awards to parties that are suspended or debarred or whose principals are suspended or debarred from Federal, State, or City of Denton Contracts. By accepting a Contract with the City, the Vendor certifies that its firm and its principals are not currently suspended or debarred from doing business with the Federal Government, as indicated by the General Services Administration List of Parties Excluded from Federal Procurement and Non-Procurement Programs, the State of Texas, or the City of Denton.

55. **EQUAL OPPORTUNITY**

A. **Equal Employment Opportunity:** No Offeror, or Offeror's agent, shall engage in any discriminatory employment practice. No person shall, on the grounds of race, sex, sexual orientation, age, disability, creed, color, genetic testing, or national origin, be refused the benefits of, or be otherwise subjected to discrimination under any activities resulting from this RFQ.

B. **Americans with Disabilities Act (ADA) Compliance:** No Offeror, or Offeror's agent, shall engage in any discriminatory employment practice against individuals with disabilities as defined in the ADA.

56. **BUY AMERICAN ACT-SUPPLIES (Applicable to certain federally funded requirements)**

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The following federally funded requirements are applicable. A. Definitions. As used in this paragraph –

i. "Component" means an article, material, or supply incorporated directly into an end product.

ii. "Cost of components" means -

(1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(2) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

iii. "Domestic end product" means-

(1) An unmanufactured end product mined or produced in the United States; or

(2) An end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic.

iv. "End product" means those articles, materials, and supplies to be acquired under the contract for public use.

v. "Foreign end product" means an end product other than a domestic end product.

vi. "United States" means the 50 States, the District of Columbia, and outlying areas.

B. The Buy American Act (41 U.S.C. 10a - 10d) provides a preference for domestic end products for supplies acquired for use in the United States.

C. The City does not maintain a list of foreign articles that will be treated as domestic for this Contract; but will consider for approval foreign articles as domestic for this product if the articles are on a list approved by another Governmental Agency. The Offeror shall submit documentation with their Offer demonstrating that the article is on an approved Governmental list.

D. The Contractor shall deliver only domestic end products except to the extent that it specified delivery of foreign end products in the provision of the Solicitation entitled "Buy American Act Certificate".

**57. RIGHT TO INFORMATION:** The City of Denton reserves the right to use any and all information presented in any response to this contract, whether amended or not, except as prohibited by law. Selection or rejection of the submittal does not affect this right.

**58. LICENSE FEES OR TAXES:** Provided the solicitation requires an awarded contractor or supplier to be licensed by the State of Texas, any and all fees and taxes are the responsibility of the respondent.

**59. PREVAILING WAGE RATES:** The contractor shall comply with prevailing wage rates as defined by the United States Department of Labor Davis-Bacon Wage Determination at <http://www.dol.gov/whd/contracts/dbra.htm> and at the Wage Determinations website [www.wdol.gov](http://www.wdol.gov) for Denton County, Texas (WD-2509).

**60. COMPLIANCE WITH ALL STATE, FEDERAL, AND LOCAL LAWS:** The contractor or supplier shall comply with all State, Federal, and Local laws and requirements. The Respondent

must comply with all applicable laws at all times, including, without limitation, the following: (i) §36.02 of the Texas Penal Code, which prohibits bribery; (ii) §36.09 of the Texas Penal Code, which prohibits the offering or conferring of benefits to public servants. The Respondent shall give all notices and comply with all laws and regulations applicable to furnishing and performance of the Contract.

**61. FEDERAL, STATE, AND LOCAL REQUIREMENTS:** Respondent shall demonstrate on-site compliance with the Federal Tax Reform Act of 1986, Section 1706, amending Section 530 of the Revenue Act of 1978, dealing with issuance of Form W-2's to common law employees. Respondent is responsible for both federal and State unemployment insurance coverage and standard Workers' Compensation insurance coverage. Respondent shall ensure compliance with all federal and State tax laws and withholding requirements. The City of Denton shall not be liable to Respondent or its employees for any Unemployment or Workers' Compensation coverage, or federal or State withholding requirements. Contractor shall indemnify the City of Denton and shall pay all costs, penalties, or losses resulting from Respondent's omission or breach of this Section.

**62. DRUG FREE WORKPLACE:** The contractor shall comply with the applicable provisions of the Drug-Free Work Place Act of 1988 (Public Law 100-690, Title V, Subtitle D; 41 U.S.C. 701 ET SEQ.) and maintain a drug-free work environment; and the final rule, government-wide requirements for drug-free work place (grants), issued by the Office of Management and Budget and the Department of Defense (32 CFR Part 280, Subpart F) to implement the provisions of the Drug-Free Work Place Act of 1988 is incorporated by reference and the contractor shall comply with the relevant provisions thereof, including any amendments to the final rule that may hereafter be issued.

**63. RESPONDENT LIABILITY FOR DAMAGE TO GOVERNMENT PROPERTY:** The Respondent shall be liable for all damages to government-owned, leased, or occupied property and equipment caused by the Respondent and its employees, agents, subcontractors, and suppliers, including any delivery or cartage company, in connection with any performance pursuant to the Contract. The Respondent shall notify the City of Denton Procurement Manager in writing of any such damage within one (1) calendar day.

**64. FORCE MAJEURE:** The City of Denton, any Customer, and the Respondent shall not be responsible for performance under the Contract should it be prevented from performance by an act of war, order of legal authority, act of God, or other unavoidable cause not attributable to the fault or negligence of the City of Denton. In the event of an occurrence under this Section, the Respondent will be excused from any further performance or observance of the requirements so affected for as long as such circumstances prevail and the Respondent continues to use commercially reasonable efforts to recommence performance or observance whenever and to whatever extent possible without delay. The Respondent shall immediately notify the City of Denton Procurement Manager by telephone (to be confirmed in writing within five (5) calendar days of the inception of such occurrence) and describe at a reasonable level of detail the circumstances causing the non-performance or delay in performance.

**65. NON-WAIVER OF RIGHTS:** Failure of a Party to require performance by another Party under the Contract will not affect the right of such Party to require performance in the future. No delay, failure, or waiver of either Party's exercise or partial exercise of any right or remedy under the Contract shall operate to limit, impair, preclude, cancel, waive or otherwise affect such right

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or remedy. A waiver by a Party of any breach of any term of the Contract will not be construed as a waiver of any continuing or succeeding breach.

**66. NO WAIVER OF SOVEREIGN IMMUNITY:** The Parties expressly agree that no provision of the Contract is in any way intended to constitute a waiver by the City of Denton of any immunities from suit or from liability that the City of Denton may have by operation of law.

**67. RECORDS RETENTION:** The Respondent shall retain all financial records, supporting documents, statistical records, and any other records or books relating to the performances called for in the Contract. The Respondent shall retain all such records for a period of four (4) years after the expiration of the Contract, or until the CPA or State Auditor's Office is satisfied that all audit and litigation matters are resolved, whichever period is longer. The Respondent shall grant access to all books, records and documents pertinent to the Contract to the CPA, the State Auditor of Texas, and any federal governmental entity that has authority to review records due to federal funds being spent under the Contract.

**Should a conflict arise between any of the contract documents, it shall be resolved with the following order of precedence (if applicable). In any event, the final negotiated contract shall take precedence over any and all contract documents to the extent of such conflict.**

- 1. Final negotiated contract**
- 2. Contract/file documents**
- 3. City's standard terms and conditions**
- 4. Purchase order**
- 5. Supplier terms and conditions**



## MASTER SERVICES AGREEMENT

This **Master Services Agreement** (this “**Agreement**”), is entered into and made effective as of November, 2018 (the “**Effective Date**”), by and between Open Counter Enterprises, Inc. (“**OpenCounter**”) and the City of Denton, Texas with principal offices at 215 E McKinney St, Denton, TX 76201 (“**City**”).

### RECITALS

**WHEREAS**, City is an agency or division of state or local government, and wishes to license OpenCounter’s Hosted Services and to purchase the related Professional Services for its own use and that of persons and/or businesses applying for one or more permits or licenses, the issuance of which is within the jurisdiction of City; and

**WHEREAS**, OpenCounter is willing to provide to City the Hosted Services and related Professional Services, subject to the terms and conditions of this Agreement;

**NOW, THEREFORE**, in consideration of the representations, warranties, covenants and obligations set forth in this Agreement, and intending to be legally bound, OpenCounter and City hereby agree as follows:

### AGREEMENT

**1. Definitions.** The following capitalized terms shall have the meanings set forth below (and the following provisions are hereby agreed to by the parties):

**1.1. “Application”** means an application for a permit or license submitted by a Permit Applicant through the Hosted Services.

**1.2. “Application Data”** means the information, data and files, including any personally identifiable data, inputted, entered into or otherwise transmitted into the Hosted Services by either the City or Permit Applicants, or generated by the Hosted Services, in connection with Applications submitted by Permit Applicants.

**1.3. “Authorized Users”** means employees, contractors and agents of City who are authorized by City to access and use the Hosted Services on behalf of City under this Agreement. The maximum number of Authorized Users is set forth in the Project Schedule. City agrees that it will not grant “Authorized User” access to the Hosted Services to any party who is an employee, contractor or agent of a competitor of OpenCounter.

**1.4. “City Content”** means the content and materials provided by City to OpenCounter, including without limitation regulations, statutes, ordinances and summaries thereof, fee tables and other tables.

**1.5. “Documentation”** means the applicable training, support, and other documentation relating to the use of and access to the Hosted Services provided by OpenCounter to City and any Updates thereto provided by OpenCounter.

**1.6. “Hosted Services”** means OpenCounter’s hosted platform identified on the Project Schedule and licensed by City under this Agreement during the Subscription Term.

**1.7. “Intellectual Property Rights”** means all patent rights, copyright rights, utility models rights, trade secret rights, trademark rights (including all goodwill associated therewith), rights of publicity, authors’ rights, mask work rights, industrial rights, and all other intellectual property, proprietary or other rights, as may exist now and/or hereafter come into existence, including without limitation, (a) all rights, whether existing now or in the future, whether statutory or common law, whether subject to protection under statute, regulation or common law, in any jurisdiction in the world, together with all national, foreign and all applications therefor and state registrations, applications for registration and all renewals and extensions thereof (including, without limitation, any continuations, continuations-in-part, divisionals, reissues, re-examinations, renewals and extensions thereof); (b) all benefits, privileges, causes of action and remedies relating to any of the foregoing, whether before or hereafter accrued (including, without limitation, the exclusive rights to apply for and maintain all such registrations, renewals and extensions); and (c) all rights to sue for all past, present and future infringements or other violations of any of the foregoing rights, and the right to settle and retain proceeds from any such actions.

**1.8. “Launch Date”** means the mutually agreed date on which the Hosted Services for the City will be launched and made publicly available.

**1.9. “Liability”** means any and all damages (including punitive damages), losses, expenses (including reasonable attorneys’ fees and litigation costs), claims, demands, suits, causes of action, settlements, payments, awards, judgments, liens, fines, fees, penalties, interest and other liability.





**1.10. “Subscription Term”** means the term of the subscription for the Hosted Services, beginning on the Effective Date, and continuing for the period of time set forth on **Schedule A**.

**1.11. “Permit Applicants”** means individuals and businesses applying, through the Hosted Services, for one or more permits or licenses issued by City.

**1.12. “Professional Services”** means implementation services, training services or any other professional services to be provided by OpenCounter to City under this Agreement under the Project Schedule.

**1.13. “Project Schedule”** means the project schedule attached hereto as **Schedule B**.

**1.14. “Term”** has the meaning set forth in Section 10.1.

**1.15. “Territory”** means the territory where the City is located.

**1.16. “Updates”** means error corrections, bug fixes, enhancements, improvements, new releases, maintenance releases and updates provided by OpenCounter to City at no additional charge.

## **2. Implementation; License Grant.**

**2.1. Features. Schedule A** describes the features of the Hosted Services which are purchased by City as of the Effective Date. OpenCounter may provide, from time to time, enhancements to the Services which are added to the Hosted Services under this Agreement by City at no additional cost (“**Enhancements**”). OpenCounter may also provide, from time to time, additional features to the Services which may, but are not required to, be added to the Hosted Services under this Agreement by City at an additional cost (“**Optional Features**”). The parties understand and agree that access to and use of such Optional Features will be subject to both payment of the applicable fees therefor as well as additional or different terms and conditions applicable to such Optional Features. The parties may amend **Schedule A** to add, remove and/or modify the features (including Optional Features) purchased by City and **Schedule B** to add any required additional Professional Services required to implement such features, via a signed written amendment to this Agreement. Unless otherwise stated in such amendment, any changes made to the features of the Hosted Services will be effective as of the effective date of such amendment.

**2.2. Implementation.** OpenCounter will use commercially reasonable efforts to implement the Hosted Services by the Launch Date in accordance with the Project Schedule. City acknowledges that City’s timely provision of (and OpenCounter’s access to) City’s assistance, cooperation, and complete and accurate feedback, approvals, information and data from City’s officers, agents and employees as is reasonably requested by OpenCounter (collectively, “**Cooperation**”) is essential to the implementation of the Hosted Services, and that OpenCounter shall not be liable for any deficiency, delay or failure in implementing the Hosted Services if such deficiency, delay or failure results from City’s failure to provide full Cooperation as required hereunder. Cooperation includes, but is not limited to, designating a project manager to interface with OpenCounter during the course of OpenCounter’s implementation of the Hosted Services (as described in Section 2.3), and providing all necessary review and feedback as requested by OpenCounter.

**2.3. Project Manager.** OpenCounter and City shall each designate a project manager who shall be the principal point of contact for such party for all communications and actions taken by each party under this Agreement. Each project manager shall have the authority to represent its respective party under this Agreement and to take action and make binding decisions on behalf of such party. Each party may replace its project manager with a new project manager by providing written notice of such change to the other party. City’s project manager shall have the right to designate and replace Authorized Users and designated support contacts of City from time to time by providing written notice thereof to OpenCounter.

**2.4. Grant of Licenses.** Subject to the terms and conditions of this Agreement, OpenCounter grants to City a personal, non-exclusive, non-transferable (except as permitted under Section 12.2), non-sublicenseable license in the Territory, during the Subscription Term, to: (a) permit its Authorized Users to access and use the Hosted Services, and (b) use and reproduce a reasonable number of copies of the Documentation in support of the foregoing license and for purposes of testing, support and training in connection with the Hosted Services.

**2.5. Restrictions and Obligations.** City agrees (on behalf of itself and its Authorized Users), except as expressly permitted in Section 2.3 of this Agreement, not to: (a) access or use the Hosted Services or Documentation (or any portion thereof) in any way not expressly permitted under Section 2.3 hereof; (b) sell, rent, lease, sublicense, pledge, assign (except as permitted under Section 12.2) or otherwise transfer City’s rights, in whole or in part, to access and use Hosted Services or Documentation (or any portion thereof) to any third party or otherwise make the functionality of the Hosted Services available to third parties; (c) modify, adapt, translate or create derivative works based on the Hosted Services or Documentation (or any other portions thereof) in any way not expressly permitted under Section 2.3 hereof; (d) remove or alter any copyright, trademark, or other proprietary notices, legends, symbols, or labels appearing on or in the Hosted Services or Documentation (or any portion thereof), and City agrees to reproduce all such notices, legends, symbols and labels on copies of the Documentation; (e) use the Hosted Services or Documentation to create a product or service which is similar to or competitive with any portion of the Hosted Services or other offerings of OpenCounter; (f)



disclose to any third party the performance measures of the Hosted Services (or portion thereof) or benchmark tests or other comparisons of the Hosted Services (or portion thereof) with other services or software without OpenCounter's prior written consent; or (g) permit any party who is an employee, contractor or agent of a competitor of OpenCounter to access the Hosted Services, whether as an Authorized User or in any manner. City will not permit or encourage any third party to do any of the foregoing.

**2.6. Access by Authorized Users.** During the Subscription Term of the Agreement, City shall have the right to permit its Authorized Users to access and use the Hosted Services on behalf of City through the administrative portal of the Hosted Services. City agrees (on behalf of itself and its Authorized Users) that: (a) in registering to access the Hosted Services, City and Authorized Users will provide true, accurate and complete information; (b) City and Authorized Users will maintain the confidentiality and security of the login credentials used to access the Hosted Services ("**Login Credentials**"); (c) City and Authorized Users will not transfer, share, disclose or resell such Login Credentials or otherwise share or transfer access to the Hosted Services to any third party; (d) City and Authorized Users will promptly notify OpenCounter of any unauthorized use of such Login Credentials or City's account with OpenCounter; and (e) after accessing the Hosted Services, City and Authorized Users will "log off" and exit from their session at the end of each session. OpenCounter will not be liable for any Liability arising from City's failure to comply with the foregoing, and City is entirely responsible for all activities taking place through City's Login Credentials and actions taken by its Authorized Users.

**2.7. Feedback.** With respect to comments, suggestions, enhancement requests, recommendations or other feedback relating to the Hosted Services provided by City, its employees, agents, project manager and/or Authorized Users ("**Feedback**"), City hereby grants (on behalf of itself, and its employees, agents, project manager and Authorized Users) to OpenCounter a non-exclusive, perpetual, irrevocable, world-wide, royalty-free, fully paid up, sublicenseable, transferable, right and license, with full rights to grant sublicenses, to use, make, have made, offer for sale, sell, license, import, copy, create derivative works of, distribute, perform, transmit, and display and otherwise exploit such Feedback for any and all purposes whatsoever, without restriction.

**2.8. Use of Application Data and City Content.** City hereby grants to OpenCounter a worldwide, non-exclusive, royalty-free, fully paid up, non-transferable (except as permitted under Section 12.2) right and license: (a) during the Subscription Term, to use, store, process, modify, reproduce, distribute and display the Application Data and City Content, and to grant sublicenses to third parties, each for the sole purposes of providing the Hosted Services and Professional Services, performing its obligations under this Agreement, and complying with applicable law or legal requirements; and (b) during and after the Subscription Term, to use, store, process, modify, reproduce and display the Application Data for OpenCounter's internal business purposes, including development, diagnostic, forecasting, planning, analysis and corrective purposes in connection with the Hosted Services, and for otherwise improving and enhancing the Hosted Services.

**2.9. Right to Use Permit Program Data.** "**Permit Program Data**" means data about the City's program pertaining to the process of applying for and obtaining permits through the Hosted Services, which may be derived from Application Data, and which in all instances does not, and cannot be used to, identify any individual. City hereby grants to OpenCounter a worldwide, non-exclusive, royalty-free, perpetual, fully paid up, non-transferable (except as permitted under Section 12.2) right and license, during and after the Subscription Term, to use, store, process, reproduce and display the Permit Program Data.

**2.10. Right to Use Aggregated Data.** "**Aggregated Data**" means any data obtained by OpenCounter, including data pertaining to the Hosted Services, OpenCounter's systems and software, and the use of any of the foregoing, and data which may be derived from Application Data, which in all instances: (i) does not, and cannot be used to, identify any individual, and (ii) is not attributed to City. Aggregated Data includes data that has been combined into databases which include third party data. Notwithstanding anything else in this Agreement, during and after the Subscription Term, OpenCounter shall have the right to distribute, disclose and otherwise freely exploit in any manner Aggregated Data for OpenCounter's business purposes, including disclosure within its public statements and marketing materials describing and/or promoting OpenCounter and/or the Hosted Services.

**2.11. Consents from Permit Applicants.** City represents, warrants and agrees that: (a) it will comply with applicable law, including the laws of the territories from which any Application Data is obtained, in transmitting and in soliciting the transmission of, Application Data into the Hosted Services as contemplated under this Agreement; and (b) OpenCounter represents, warrants and agrees that prior to authorizing an Application and Application Data to be provided through the Hosted Services, OpenCounter shall have required each Permit Applicant to provide all applicable consents and approvals required for the transmission of such Application Data to OpenCounter and for the grant of the licenses to OpenCounter in Section 2.8..

**2.12. Prohibited Information.** Notwithstanding anything else in this Agreement, the parties acknowledge and agree that (a) Applicants and City have sole control over any and all Application Data that is provided and/or transmitted into the Hosted Services; (b) OpenCounter does not require receipt of or access to any specific type or amount of information to be transmitted to OpenCounter; (c) City shall not transmit, disclose or otherwise provide (or cause or allow to be transmitted or provided to OpenCounter) (i) social security numbers, passport numbers, driver's license numbers or other government issued state or national identification numbers, (ii) health insurance card or policy identification numbers, (iii) medical or health information, (iv) financial account numbers, credit card or other payment account information, and/or (v) security code passwords (collectively, "**Prohibited**



**Information**”); and (d) if City transmits or provides to OpenCounter any Prohibited Information, to the extent authorized by law, City shall indemnify, and hold OpenCounter harmless from and against, any Liability arising from the transmission to OpenCounter of any Prohibited Information, and OpenCounter shall have no liability or obligation whatsoever with respect to such Prohibited Information.

**2.13. Additional Terms and Conditions.** The parties agree to the additional terms and conditions set forth in **Schedule C** (the “**City Terms**”). In the event that any terms or conditions of this Agreement contradicts any terms or conditions of the City Terms, the terms or conditions of this Agreement will prevail and control, unless the City Terms make specific reference to the Section of this Agreement that is to be amended. Notwithstanding the foregoing, no City Term will be effective to: (a) decrease any limitation of liability, reduce the scope of recoverable damages, or restrict or eliminate exceptions to the limitation of liability; (b) expand, eliminate or restrict the scope of any indemnity obligations set forth in this Agreement.

### **3. Fees.**

**3.1. Fees.** City will pay the fees payable under this Agreement as described in the Project Schedule. Unless other payment terms are set forth in the Project Schedule, all fees payable by City to OpenCounter will be invoiced by OpenCounter and will be due and payable by City within thirty (30) days after the invoice date. City agrees that unless otherwise set forth in this Agreement, all fees paid and payable to OpenCounter under this Agreement shall be non-refundable. Any amounts not paid by the due date thereof will bear interest at the rate of one percent (1.0%) per month or the highest rate permitted by law, whichever is lower, and OpenCounter reserves the right to suspend the Hosted Services if payment for amounts due under this Agreement is not made within thirty (30) days after the due date thereof.

**3.2. Taxes.** The fees payable by City to OpenCounter under this Agreement are exclusive of any and all taxes, levies or duties imposed by any local, state, federal or international taxing authority, including any applicable, sales, VAT, use, excise, and withholding taxes based on the transactions or payments made by City to OpenCounter under this Agreement (other than taxes based on OpenCounter’s net income and taxes which are measured by wages, salaries, or other remuneration paid to persons employed or contracted by OpenCounter for work performed under this Agreement) (collectively, “**Taxes**”). City is governmental entity exempt from the payment of Taxes.

### **4. Support Services; Support Obligations of the Parties.**

**4.1. Support Services.** Commencing on the Launch Date and continuing throughout the term of the Agreement, OpenCounter will provide technical support services and maintenance for the Hosted Services (“**Support Services**”) in accordance with OpenCounter’s support policy located at [[www.opencounter.com/support](http://www.opencounter.com/support)] (the “**Support Services Policy**”). The Support Services Policy is hereby incorporated into this Agreement by this reference. OpenCounter reserves the right to modify the Support Services Policy from time to time effective immediately by posting an updated Support Services Policy, provided that OpenCounter will not materially degrade the level of Support Services during the Subscription Term. OpenCounter’s support obligations extend solely to City’s designated support contacts, the number of which is set forth on **Exhibit A**. City acknowledges and agrees that, as between City and OpenCounter, City shall be solely responsible to provide any and all support to Permit Applicants and other third parties. For purposes of clarity, OpenCounter shall not have any obligation to provide Support Services to Permits Applicants or any third parties.

### **5. Confidentiality.**

**5.1. Confidential Information.** Each party to this Agreement acknowledges that, in the course of performing under this Agreement, each party (as a receiving party) may obtain or otherwise learn the Confidential Information of the other party (as the disclosing party). “**Confidential Information**” means any information relating to a disclosing party, its business, technology, suppliers, licensors, resellers, distributors, customers, and third parties to whom the disclosing party has an obligation of confidentiality, whether in tangible or intangible form, which is either marked or designated as “confidential” or “proprietary,” or disclosed under circumstances indicating its confidential or proprietary nature, or otherwise would be known to be confidential or proprietary by a reasonable person. The Confidential Information of a disclosing party shall be owned exclusively by the disclosing party. The parties acknowledge and agree that the Documentation, and any performance measures of the Hosted Services are OpenCounter’s Confidential Information.

**5.2. Obligations.** The receiving party agrees: (a) to protect the Confidential Information from unauthorized dissemination and use; (b) to use the Confidential Information solely for performing its obligations and exercising its rights hereunder; (c) not to disclose any Confidential Information, or any part or parts thereof, except to the receiving party’s employees and contractors who are aware of the confidentiality obligations imposed by this Section 5.2 and have agreed to comply with the requirements of this Section 5.2; and (d) not to disclose or otherwise provide to any other third party, without the prior written consent of the disclosing party, any Confidential Information or any portion thereof. The receiving party shall remain liable for any non-compliance of such employee or contractor with the terms of this Section 5.2. The receiving party shall take the same degree of care that it uses to protect its own highly sensitive confidential and proprietary information of similar nature and importance (but in no event less than reasonable



care) to protect the confidentiality and avoid the unauthorized dissemination, disclosure or use of the Confidential Information.

**5.3. Exclusions.** The foregoing restrictions pertaining to the Confidential Information shall not apply to any Confidential Information that: (a) was or becomes publicly known through no fault of or breach of this Agreement by the receiving party; (b) was known by the receiving party before receipt from the disclosing party; (c) becomes known to the receiving party without confidential or proprietary restriction from a source that does not owe a duty of confidentiality to the disclosing party with respect to such Confidential Information; or (d) is independently developed by the receiving party without the use of the Confidential Information of the disclosing party. In addition, the receiving party may disclose the Confidential Information if the receiving party is legally compelled to do so, including in accordance with the Texas Public Information Act, Tex. Loc. Gov't Code Section 552 et al., provided that prior to any such compelled disclosure, the receiving party shall (if legally permitted to) notify the disclosing party of such compelled disclosure, shall cooperate fully with the disclosing party in protecting against any such disclosure and/or obtaining a protective order narrowing the scope of such disclosure and/or use of the Confidential Information, and shall solely disclose the portion of the Confidential Information compelled to be disclosed solely to the party entitled to receive it.

**5.4. Injunctive Relief.** Each receiving party agrees that, due to the unique nature of the Confidential Information, the unauthorized disclosure or use of the Confidential Information will cause irreparable harm and significant injury to the disclosing party, the extent of which will be difficult to ascertain and for which there will be no adequate remedy at law. Accordingly, each receiving party agrees that the disclosing party, in addition to any other available remedies, shall have the right to seek an immediate injunction and other equitable relief enjoining any breach or threatened breach of the obligations under this Section 5, without the necessity of posting any bond or other security. The receiving party shall promptly notify the disclosing party in writing upon becoming aware of any such breach or threatened breach.

**5.5. Terms of Agreement.** The parties may disclose the general nature of the relationship between the parties, but a party may not disclose the terms and conditions of this Agreement without the prior written consent of the other party, except: (a) as required by the applicable laws, including without limitation, requirements to file a copy of this Agreement (redacted to the extent reasonably permitted by applicable law) or to disclose information regarding the provisions hereof or performance hereunder to applicable regulatory authorities; (b) in confidence, to legal counsel; (c) in confidence, to accountants, banks, and financing sources and their advisors; (d) in connection with the enforcement of this Agreement or any rights hereunder; (e) in confidence, in connection with an actual or proposed merger, acquisition, or similar transaction; and (f) to the City's governing body in a public agenda.

**5.6. Press Release.** On the Launch Date or close to such date, the parties may issue a joint press release announcing the launch of the Hosted Services. Such press releases shall be subject to City's written approval, which shall not be unreasonably withheld.

## 6. Application Data.

**6.1. Information Security Programs.** Each party will maintain a written information security program that contains administrative, technical and physical safeguards to protect against anticipated threats or hazards to the security, confidentiality or integrity of, the unauthorized or accidental destruction, loss, alteration or use of, and the unauthorized access to or acquisition of, Application Data to which such party has access. Each such information security program will be consistent with the requirements of applicable laws and regulations.

**6.2. Export of Data.** To the extent that Application Data is contained within the Hosted Services: (a) City shall have the right and ability during the Term to export the Application Data through the administrative portal of the Hosted Services; and (b) such Application Data may not be available more than thirty (30) days following the expiration or termination of this Agreement. Unless the Application Data has been deleted from the Hosted Services earlier, City may request export of such Application Data within thirty (30) days after the expiration or termination of this Agreement, provided that OpenCounter shall have the right to charge reasonable hourly rates for the export of such Application Data.

## 7. Warranty; Representations and Warranties; Disclaimers.

**7.1. Performance.** OpenCounter warrants that, during the Subscription Term, the Hosted Services will conform in all material respects to the applicable specifications contained in the Project Schedule ("**Specifications**"). In the event that the Hosted Services do not meet the foregoing warranty, OpenCounter's sole obligation and City's exclusive remedy shall be for OpenCounter to replace the Hosted Services with corrected Hosted Services within thirty (30) days after receipt of notice of such breach(es) from City.

**7.2. Mutual Representations and Warranties.** Each party hereby represents and warrants that: (a) it has the full corporate right, power and authority to enter into this Agreement and to perform the acts required hereunder; and (b) the execution of this Agreement by such party, and the performance by such party of its obligations and duties hereunder, do not and will not violate any agreement to which such party is bound or any obligation of such party.

**7.3. Disclaimers.** EXCEPT FOR THE EXPRESS WARRANTIES CONTAINED IN THIS AGREEMENT, EACH PARTY HEREBY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS, IMPLIED, STATUTORY OR OTHERWISE,



INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF TITLE, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, SATISFACTORY QUALITY, ACCURACY, AND ANY WARRANTIES THAT MAY ARISE OUT OF COURSE OF PERFORMANCE, DEALING, USAGE OR TRADE. OPENCOUNTER DOES NOT WARRANT THAT THE HOSTED SERVICES WILL MEET CITY'S REQUIREMENTS, WILL BE ERROR-FREE OR SECURE, OR THAT THE HOSTED SERVICES WILL BE UNINTERRUPTED. OPENCOUNTER DOES NOT WARRANT THAT ANY APPLICATION DATA INPUT INTO THE HOSTED SERVICES WILL BE ACCURATE OR FREE OF ERRORS, THE OPERATION OF THE HOSTED SERVICES WILL BE COMPLETELY SECURE, ERROR FREE OR UNINTERRUPTED, OR ALL ERRORS WILL BE CORRECTED. CITY ASSUMES ALL RISK OF DELAYS OR INTERRUPTIONS IN ACCESS TO OR USE OF THE HOSTED SERVICE RESULTING FROM USE OF THE INTERNET AND/OR TELECOMMUNICATIONS TO ACCESS THE HOSTED SERVICE, AND OPENCOUNTER SHALL HAVE NO LIABILITY FOR ANY SUCH DELAYS OR INTERRUPTION.

## **8. Indemnification.**

**8.1. By OpenCounter.** SUBJECT TO CITY'S COMPLIANCE WITH SECTION 8.3, OPENCOUNTER SHALL INDEMNIFY CITY FROM ANY LIABILITIES ARISING FROM OPENCOUNTER'S BREACH OF SECTIONS 2.5 AND 2.11. SUBJECT TO CITY'S COMPLIANCE WITH SECTION 8.3, OPENCOUNTER SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS (AND AT OPENCOUNTER'S OPTION SETTLE) THE CITY FROM ANY CLAIM BROUGHT AGAINST CITY BY AN UNAFFILIATED THIRD PARTY ALLEGING THAT CITY'S AUTHORIZED USE AND ACCESS OF THE HOSTED SERVICES (EXCEPT FOR ANY CITY CONTENT INCORPORATED THEREIN) UNDER THIS AGREEMENT INFRINGES OR MISAPPROPRIATES SUCH THIRD PARTY'S U.S. PATENTS, TRADE SECRETS, COPYRIGHTS OR TRADEMARKS IN THE TERRITORY (EACH, AN "INFRINGEMENT CLAIM") AND WILL PAY ANY SETTLEMENT OF SUCH INFRINGEMENT CLAIM CONSENTED TO BY OPENCOUNTER OR ANY DAMAGES FINALLY AWARDED TO SUCH THIRD PARTY BY A COURT OF COMPETENT JURISDICTION AS THE RESULT OF SUCH INFRINGEMENT CLAIM. If an Infringement Claim occurs, or in OpenCounter's opinion is reasonably likely to occur, OpenCounter may, at its expense and at its sole discretion, in addition to its indemnification obligations under this Section 8.1: (a) procure the right to allow City to continue to use the Hosted Services (or infringing portions thereof), or (b) modify or replace the Hosted Services (or infringing portions thereof) to become non-infringing, or (c) if none of the two (2) foregoing options is commercially feasible, terminate City's right to access and use the Hosted Services (or affected portion thereof) and refund, on a pro-rata basis, any unused portion of the subscription fees paid by City for the Hosted Services (or affected portion thereof). Notwithstanding the foregoing, OpenCounter shall have no obligations under this Section 8.1 or otherwise with respect to any Infringement Claim to the extent any Infringement Claim is based upon or arises out of: (i) any modification or alteration of the Hosted Services (or portion thereof) not made by OpenCounter that results in the alleged infringement; (ii) any unauthorized access or use of the Hosted Services (or any portion thereof) or any breach of this Agreement by City and/or its Authorized Users; (iii) any combination or use of the Hosted Services (or any portion thereof) with other software, products, equipment, methods or services not provided by OpenCounter that results in such infringement; (iv) City's failure within a reasonable time to use or implement corrected or replacement Hosted Services (or portions thereof) that would have avoided or mitigated the alleged infringement; (v) City's continuance of allegedly infringing activity beyond a reasonable period after being notified thereof; and/or (vi) any specifications or requirements supplied by City or any City Content.

**8.2. By City.** Subject to OpenCounter's compliance with Section 8.3, and to the extent permitted by law, City shall indemnify OpenCounter from any Liabilities arising from City's breach of Sections 2.5 and 2.11.

**8.3. Procedure.** The party seeking indemnification under this Section 8 will: (a) provide notice of the applicable indemnified claim to the indemnifying party within a reasonable time after becoming aware of such claim; (b) provide reasonable assistance to indemnifying party in the defense of the indemnified claim and the indemnifying party will promptly assume and conduct (at its own expense) the full defense and/or settlement of any indemnified claim. The indemnifying party shall not have the right to settle any indemnified claim, without the prior written consent of the indemnified party, which contains an admission of liability or wrongdoing on the part of indemnified party or imposes a material obligation (including payment obligation) on indemnified party that is not wholly discharged by the indemnifying party. The indemnified party may participate in the defense and settlement of any claim for which it is entitled to indemnification at its sole expense.

**8.4. Remedies.** The remedies set forth in this Section constitute each indemnified party's sole and exclusive remedies, and each indemnifying party's entire liability, with respect to infringement, violation or misappropriation of third party Intellectual Property Rights.

## **9. Ownership.**

**9.1. By City.** As between the parties, City owns and shall retain all right, title and interest (including without limitation all Intellectual Property Rights) in and to the Applications submitted via the Hosted Services, City Content, and City's systems and



networks. City reserves all rights not expressly granted to OpenCounter under this Agreement.

**9.2. By OpenCounter.** As between the parties, OpenCounter owns and shall retain all right, title and interest (including without limitation all Intellectual Property Rights) in and to the Hosted Services (except for any City Content incorporated therein), and any modifications, improvements, derivative works of, and enhancements to all or portions of the Hosted Services (or any portion thereof) or Documentation performed by any party, and OpenCounter's systems and networks. OpenCounter reserves all rights not expressly granted to City under this Agreement.

## **10. Term and Termination.**

**10.1. Term.** The initial term of this Agreement (the "**Initial Term**") is set forth on **Schedule A**. Thereafter, at the sole option of the City, the Term may be further extended, not to exceed a total of six (6) months (each, a "**Renewal Term**"). The Initial Term, plus any Renewal Terms shall be the "**Term**" of this Agreement.

**10.2. Termination for Breach.** In addition to any other termination rights due to breach under this Agreement, if either party materially breaches this Agreement, the non-breaching party, at its option, shall have the right to terminate this Agreement by written notice to the breaching party unless, within thirty (30) calendar days (or ten (10) days for payment breaches) after the breaching party's receipt of written notice specifying such breach in reasonable detail from the other party, the breaching party cures such breach. Additionally, OpenCounter shall have the right to suspend the Services in the event of a material breach of this Agreement by City which has not been cured within thirty (30) days (or ten (10) days for payment breaches) after notice thereof to City.

**10.3. Effect of Termination.** Upon the expiration or any termination of this Agreement: (a) the licenses granted by OpenCounter to City in Sections 2.4 and 2.6 shall terminate, and OpenCounter shall have the right to immediately terminate the Hosted Services and any other services under this Agreement; (b) each party will promptly and permanently destroy and delete all Confidential Information of the other party in its possession or control, other than an archival copy for compliance, enforcement, and defense purposes, provided that any such retained copies shall remain subject to Section 5 of this Agreement for so long as they are retained; (c) all fees accrued through the date of termination will be immediately due and payable; and (d) Sections 1, 2.8, 2.9, 2.10, 3, 5, 6, 8, 9, 10.3, 11 and 12 shall survive. Upon request from the other party, each party will provide the other party with a written certification, signed by one of its officers certifying the destruction of all such Confidential Information. Termination of this Agreement by either party shall not act as a waiver of any breach of this Agreement, shall not act as a release of either party from any liability for breach of such party's representations, warranties or obligations under this Agreement, and shall be without prejudice to any other right or remedy that a party may have at law or in equity. Neither party shall be liable to the other party due to termination of this Agreement in accordance with Section 10 or any other express termination rights under this Agreement, whether for compensation, reimbursement or damages on account of the loss of prospective profits or anticipated sales or on account of expenditures, inventory, investments, leases or commitments in connection with the business or goodwill of either party

**11. Limitation of Liability.** NEITHER PARTY WILL BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES OF ANY KIND, INCLUDING DAMAGES FOR LOST PROFITS, REVENUE, BUSINESS, SAVINGS, DATA OR USE, OR THE COST OF SUBSTITUTE PROCUREMENT, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. NOTWITHSTANDING ANYTHING ELSE IN THIS AGREEMENT, OPENCOUNTER'S AGGREGATE LIABILITY TO CITY UNDER THIS AGREEMENT, WHETHER BASED ON NEGLIGENCE, CONTRACT, TORT, INDEMNIFICATION, STRICT LIABILITY OR ANY OTHER THEORY, WILL NOT EXCEED THE AMOUNTS PAID BY CITY TO OPENCOUNTER UNDER THIS AGREEMENT. UNDER NO CIRCUMSTANCES SHALL OPENCOUNTER HAVE ANY LIABILITY OR RESPONSIBILITY FOR THE ACCURACY OF ANY APPLICATION DATA THAT IS INPUTTED INTO THE HOSTED SERVICES OR CITY CONTENT INCORPORATED INTO THE HOSTED SERVICES, INCLUDING, WITHOUT LIMITATION, INACCURACIES IN CITY CONTENT INTRODUCED DURING THE INPUT BY OPENCOUNTER OF SUCH CITY CONTENT INTO THE HOSTED SERVICE. THE PARTIES ACKNOWLEDGE THAT BUT FOR THE LIMITATIONS CONTAINED IN THIS AGREEMENT, THEY WOULD NOT HAVE ENTERED INTO THIS AGREEMENT. THE LIMITATIONS SET FORTH ABOVE SHALL BE DEEMED TO APPLY TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW AND NOTWITHSTANDING THE FAILURE OF THE ESSENTIAL PURPOSE OF ANY LIMITED REMEDIES SET FORTH IN THIS AGREEMENT. NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY, THE LIMITATIONS ON AMOUNT AND/OR TYPES OF DAMAGES SHALL NOT APPLY TO CAUSES OF ACTION OR DAMAGES CAUSED OR CREATED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF OPENCOUNTER.

## **12. General.**

**12.1. Relationship of Parties.** Both parties are, and shall remain at all times, independent contractors, and nothing in this Agreement will be construed to create an agency, employment, fiduciary, representative or any other relationship between the parties.



**12.2. Assignment.** Neither party shall assign, sell, transfer, delegate or otherwise dispose of, whether voluntarily or involuntarily, by operation of law or otherwise, this Agreement or any of its rights or obligations under this Agreement without the prior written consent of the other party. Notwithstanding the foregoing, a party may assign this Agreement without the prior written consent of the other party solely in connection with a merger, consolidation, corporate reorganization, sale of all or substantially all of such party's assets, sale of stock, change of name or like event, provided that the assigning party provides reasonable notice of such assignment to the other party. Any attempted assignment other than in accordance with this Section 12.2 shall be null and void. Subject to the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and permitted assigns.

**12.3. Governing Law, Jurisdiction, and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, without reference to its conflicts of law provisions. The parties disclaim the application of the United Nations Convention on the International Sale of Goods or the Uniform Computer Information Transactions Act to this Agreement. Any dispute regarding this Agreement shall be subject to the exclusive jurisdiction of the state and federal courts located in Denton County, in the State of Texas, and the parties hereby irrevocably agree to submit to the personal and exclusive jurisdiction and venue of such courts, provided that either party may seek injunctive relief in any court of competent jurisdiction.

**12.4. Compliance with Law.** In performing its obligations and exercising its rights and licenses under this Agreement, each party will comply with all applicable laws, rules and regulations as may be applicable to such party.

**12.5. Export Control.** In performing under this Agreement, City agrees to comply fully with all applicable laws, including export laws and regulations of the United States, including, without limitation, the U.S. Export Administration Regulations and the export laws of international countries to which City is subject (collectively "**Export Controls**"). Without limiting the generality of the foregoing, City will not, and will require its agents and representatives not to, export, direct or transfer the Services, Software, Documentation, technical information or other portions of the Services provided by OpenCounter hereunder, or any direct product thereof, to any destination, person or entity restricted or prohibited by the Export Controls.

**12.6. Government Use.** The Software, Documentation and other portions of the Services are "commercial items" as that term is defined in FAR 2.101, consisting of "commercial computer software" and "commercial computer software documentation," respectively, as such terms are used in FAR 12.212 and DFARS 227.7202. If the Software, Documentation or other portions of the Services are being acquired by or on behalf of the U.S. Government, then, as provided in FAR 12.212 and DFARS 227.7202-1 through 227.7202-4, as applicable, the U.S. Government's rights in the foregoing will be only those specified in this Agreement. City's rights in the Software, Documentation and other portions of the Services are limited to those expressly granted in Sections 2.1 and 2.6. OpenCounter and its licensors reserve all rights and licenses in and to the Software, Documentation and other portions of the Services not expressly granted to City under this Agreement.

**12.7. No Third Party Beneficiary.** This Agreement is made and entered into for the sole protection and benefit of the parties hereto and is not intended to convey any rights or benefits to any third party, nor will this Agreement be interpreted to convey any rights or benefits to any person except the parties hereto.

**12.8. Force Majeure.** Neither party shall be liable for any loss, damage or penalty resulting from delays or failures in performance resulting from Force Majeure Events. The party affected by the Force Majeure Event will promptly notify the other party and will resume performance when the Force Majeure Event is no longer effective. "**Force Majeure Events**" means events beyond a party's reasonable control, including without limitation acts of nature, labor disputes, the stability or availability of the Internet or a portion thereof, actions by a governmental authority (such as a moratorium on any activities related to this Agreement or changes in government codes, ordinances, laws, rules, regulations, or restrictions), telecommunication or Internet network failures or brown-outs, failures or unavailability of third party systems, networks or software, flood, earthquake, fire, lightning, epidemics, war, acts of terrorism, riots, civil disturbances, sabotage, power grid failures, and denial of service attacks and other hacking attacks.

**12.9. Waiver.** The waiver by either party of a breach of or a default under any provision of this Agreement shall be in writing to be effective and shall not be construed as a waiver of any subsequent breach of or default under the same or any other provision of this Agreement, nor shall any delay or omission on the part of either party to exercise or avail itself of any right or remedy that it has or may have hereunder operate as a waiver of any right or remedy.

**12.10. Severability.** Any determination that any provision of this Agreement or any application thereof is invalid, illegal or unenforceable in any respect in any instance shall not affect the validity, legality and enforceability of such provision in any other instance, or the validity, legality, or enforceability of any other provision of this Agreement.

**12.11. Captions and Section Headings.** The captions and Section and paragraph headings used in this Agreement are inserted for convenience only and shall not affect the meaning or interpretation of this Agreement.

**12.12. Notices.** Any notice required to be given under this Agreement shall be in writing and delivered personally, by email transmission, or by express overnight mail to the other designated party at the postal address or email address set forth after each party's



signature (or such other postal address or email address provided by each party in accordance with this Section). Notices shall be deemed effective: (a) on the date of delivery if delivered personally; (b) on the date of email transmission, if sent by email and a read receipt or other confirmation by the recipient of the receipt of such email; or (c) one (1) business day after deposit, if sent by express overnight courier, with written confirmation of receipt.

**12.13. Entire Agreement; Amendment.** This Agreement contains the complete understanding between OpenCounter and City with respect to the subject matter hereof and supersedes and cancels all previous written and oral agreements, communications and other understandings relating to the subject matter of this Agreement. No changes, amendments, or alterations to this Agreement shall be effective unless signed by duly authorized representatives of both parties, except as expressly provided herein. No amendment or modification shall adversely affect vested rights or causes of action that have accrued prior to the effective date of such amendment or modification. No terms on purchase orders, invoices or like documents exchanged between the parties shall modify or supplement the terms of this Agreement and shall be deemed void and shall have no effect.

**12.14. Counterparts.** This Agreement may be executed and delivered in one or more counterparts (including facsimile, PDF or other electronic counterparts), with the same effect as if the parties had signed the same document. Each counterpart so executed shall be deemed to be an original, and all such counterparts shall be construed together and shall constitute one Agreement.

[Signatures on Next Page]





IN WITNESS WHEREOF, the parties hereto have duly executed this Master Services Agreement as of the Effective Date.

**OPENCOUNTER ENTERPRISES, INC.**

DocuSigned by:  
By: Peter Koht  
210B8375A83D486...

Name: Peter Koht

Title: Co-founder and Chief Operating Officer

**Address/ Email for Notices:**

Address: 25 Taylor Street  
San Francisco, CA 94102  
Attention: Contracts  
Email: [contracts@opencounter.com](mailto:contracts@opencounter.com)

**CITY OF DENTON, TEXAS**

DocuSigned by:  
By: Todd Hileman  
B776C711BA0B454...

Name: Todd Hileman

Title: City Manager

**Address/Email for Notices:**

Address: 215 E McKinney St, Denton, TX 76201  
Attention: Christina Davis  
Email: [Christina.Davis@cityofdenton.com](mailto:Christina.Davis@cityofdenton.com)



## Schedule A

**Term:** The Term commences on the Effective Date and shall continue for a period Five (5) year(s) after the Effective Date. Thereafter, at the sole option of the City, the Term may be further extended, not to exceed a total of six (6) months.

### **Hosted Service Features:**

#### **OpenCounter Zoning Portal**

The OpenCounter Zoning Portal renders complex land use regulations in the browser and makes regulations responsive to citizen inquiries.

Specifically, OpenCounter Zoning Portal helps applicants to navigate the site selection process by answering the seemingly simple question: "Where is my project permitted?" It does so by analyzing and importing the logical structure of the municipal code, factoring in the kind of project citizen end users want to pursue and secondary issues that may have huge implications for like use, such as whether a restaurant will serve alcohol, or have live entertainment.

Powered by a patent-pending geospatial rules engine, the OpenCounter Zoning Portal brings a new level of service to applicants, freeing them from parsing through dense code publishing sites and normalizing the process to an intuitive mapping interface while putting applicants in touch with City Subject Matter Experts to facilitate formal zoning and land use applications.

#### **OpenCounter Business Portal**

The OpenCounter Business Portal helps entrepreneurs understand the costs and complexity of establishing or growing a business. The OpenCounter Business Portal guides applicants through an intuitive permit discovery process, and estimates the time and cost associated with the specifics of their project. Once applicants are ready to proceed, it also allows them to submit their data.

**Number of City's Designated Support Contacts:** One (1)

**Target Launch Date (Zoning Portal):** November 31, 2018

**Target Launch Date (Business Portal):** November 31, 2018



## Schedule B

### Project Schedule & Scope of Services

#### 1. Scope of Services

OpenCounter has configured and launched the OpenCounter Zoning Portal and OpenCounter Business Portal for the City. The installations include use codes, permissions and clearances and has been reviewed and approved by staff. This Phase has been completed, accepted and launched, but OpenCounter will use the opportunity afforded by this extension to review and augment returns in the Portals based on staff feedback. All professional services are included in the licensing prices outlined below and services are subject to the service levels outlined at: [https://opencounter.com/terms\\_of\\_service](https://opencounter.com/terms_of_service)

#### 2. Acceptance Testing

When an implementation milestone is ready for use and testing, OpenCounter will notify City and City will commence acceptance testing of the implementation milestone, with such reasonable assistance and support as necessary from OpenCounter personnel. The acceptance test (“**Acceptance Test**”) will be conducted solely for the purpose of demonstrating that the deliverable or functionality (“**Milestone**”) performs in accordance with its specifications set forth in the applicable documentation (“**Acceptance Criteria**”). The Acceptance Test will be in a form mutually agreed upon between the parties, and will be completed within five (5) business days of the date upon which OpenCounter informs City that the Milestone is ready for testing (“**Acceptance Period**”).

If the Milestone passes the Acceptance Test, City will promptly so notify OpenCounter in writing (“**Notice of Acceptance**”). If the Milestone does not pass the Acceptance Test, City will notify OpenCounter, in writing, prior to the expiration of the Acceptance Period, specifying in reasonable detail in what respects the Milestone has failed to meet the Acceptance Criteria (“**Notice of Rejection**”).

OpenCounter will promptly correct any deficiencies set forth in the Notice of Rejection, and City will have an additional Acceptance Period to repeat the Acceptance Test for the corrected Milestone. A Milestone will be deemed accepted by City upon the earlier of (i) the issuance by City of a Notice of Acceptance, (ii) the use by City of the Milestone on a production basis, or (iii) the expiration of the applicable Acceptance Period prior to the receipt by OpenCounter of a Notice of Rejection.

#### 3. City Responsibilities and Level of Effort

Commercial Development is a complex project involving multiple departments across the City.

It is critical to the project schedule that City staff are engaged throughout the project in order to ensure successful outcomes. It is also important that stakeholder roles are defined so that decisions can be made effectively and efficiently during the execution of the project.

**Economic Development (Econ. Dev.)** will serve as the project sponsor (“**Project Sponsor**”). The Project Sponsor will appoint a project owner (“**Project Owner**”) as the key executive for the project, and a project manager (“**Project Manager**”) to facilitate ongoing project administration.

The Project Owner will be responsible for testing and accepting Milestones in accordance with the applicable Acceptance Criteria defined above as well as providing strategic oversight for the development of the Instance.

The Project Manager will provide access to required data and resources, facilitate calls and meetings with City staff, and provide assistance and support during on-site visits and training sessions. OpenCounter will provide bi-weekly updates during the timeframe outlined in the Implementation Plan set forth in Table 1.

The Project Manager will also facilitate calls and meetings with City subject matter experts (“**Subject Matter Experts**”) in specific permitting verticals and provide assistance and support with communications with Subject Matter Experts.

Subject Matter Experts time commitments will be limited to project status calls on an as-needed basis and during the verification of City Content during defined Acceptance Testing periods defined in the Implementation Plan.



#### **4. Training**

The goal of the project is to build a site that will be easy for citizens to use, and for City staff to administer. To that end, OpenCounter will offer training sessions to educate Department staff on the tools, technologies, and best practices of the various components of the Hosted Services.

**Three (3)** training sessions (each 60 minutes) are included within the fees detailed in 6.1 below. Additional training may be provided, upon request by City, at OpenCounter's standard fees for such training. All training will be provided remotely via online video conference at such dates and times mutually agreed by the parties.

The schedule for the training sessions will be determined by OpenCounter and City project staff and defined during the Project Management Phase of the Implementation Plan outlined above.

OpenCounter maintains online documentation to explain the functionality of the Hosted Services. Documentation will be updated to reflect new features. The documentation will be accessible through the following links:

- <https://help.opencounter.com>

#### **5. Publicity and Post-Launch Promotion**

OpenCounter will link to the Instance on OpenCounter's website at [www.opencounter.com](http://www.opencounter.com). OpenCounter will also tweet new customer announcements on its Twitter account @opencounter. The City will link to the Instance from its homepage, departmental landing pages and in its outbound marketing and promotional materials in order to ensure that the service is easily accessible to small business owners and entrepreneurs.

OpenCounter and the City will collaborate on a launch press release as well as a mid-year press release featuring case studies of end users who utilize the tool. These case studies may be leveraged for existing City marketing / program materials.



**6. Fees and Invoice Schedule.** City will pay the fees described below within thirty (30) days after the date of the applicable invoice therefor. City agrees that, except as set forth in the Agreement, all fees are non-refundable and its obligation to pay fees under this Agreement is an irrevocable and binding obligation of City. Invoices will be addressed to City to the attention of the Econ. Dev.

**6.1 Fees by Category**

<b>Line Item</b>	<b>Amount</b>
Professional Services: Configuration of OpenCounter Hosted Services (Zoning & Business Portals)	\$ N/A
Annual Subscription (commencing on the Effective Date)	\$25,000

**6.3 Invoice Schedule**

<b>Invoices</b>	<b>Date</b>	<b>Amount</b>
Configuration / Translation Costs	N/A	N/A
Year 1 Subscription – May be invoiced on or prior on the Effective Date	November 31, 2018 to October 31, 2019	\$25,000
Year 2 Subscription –First Anniversary of the Effective Date	November 1, 2019 to October 31, 2020	\$25,000
Year 3 Subscription –Second Anniversary of the Effective Date	November 1, 2020 to October 31, 2021	\$25,000
Year 4 Subscription –Third Anniversary of the Effective Date	November 1, 2021 to October 31, 2022	\$25,000
Year 5 Subscription –Fourth Anniversary of the Effective Date	November 1, 2022 to October 31, 2023	\$25,000



**Schedule C**

**Additional Terms and Conditions**

No Excess Obligations. In the event this Agreement spans multiple fiscal years, City's continuing performance under this Agreement is contingent upon the appropriation of funds to fulfill the requirements of the contract by the City's governing body. If the City's governing body fails to appropriate or allot the necessary funds, City shall issue written notice to OpenCounter that City may terminate the Agreement without further duty or obligation.

**Limitations. City is subject to constitutional and statutory limitations on its ability to enter into certain terms and conditions of the Agreement, which may include those terms and conditions relating to: disclaimers and limitations of warranties; disclaimers and limitations of liability for damages; waivers, disclaimers, and limitations on legal rights, remedies, requirements, and processes; limitations of time in which to bring legal action; granting control of litigation or settlement to another party; liability for acts or omissions of third parties; payment of attorney's fees; dispute resolution; and indemnities. Terms and conditions relating to these limitations will not be binding on City, except to the extent not prohibited by the Constitution and the laws of the State of Texas.**

**Exhibit D**

**House Bill 89 - Government Code 2270**

**VERIFICATION**

I, Peter Koht, the undersigned representative of Open Counter Enterprises Inc. Company or Business name (hereafter referred to as company), being **an adult over the age of eighteen (18) years of age, verify that the company named-above, under the provisions of Subtitle F, Title 10, Government Code Chapter 2270:**

- 1. Does not boycott Israel currently; and**
- 2. Will not boycott Israel during the term of the contract the above-named Company, business or individual with City of Denton.**

*Pursuant to Section 2270.001, Texas Government Code:*

- 1. "Boycott Israel" means refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory, but does not include an action made for ordinary business purposes; and*
- 2. "Company" means a for-profit sole proprietorship, organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, or any limited liability company, including a wholly owned subsidiary, majority-owned subsidiary, parent company or affiliate of those entities or business associations that exist to make a profit.*

Peter Koht

Name of Company Representative (Print)

DocuSigned by:  
*Peter Koht*

Signature of Company Representative

11/9/2018

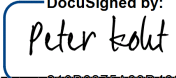
Date

**Exhibit E**  
**Senate Bill 252 -Government Code 2252**  
**CERTIFICATION**

I, Peter Koht, the undersigned representative of Open Counter Enterprises Inc. (Company or business name) being an adult over the age of eighteen (18) years of age, pursuant to Texas Government Code, Chapter 2252, Section 2252.152 and Section 2252.153, certify that the company named above is not listed on the website of the Comptroller of the State of Texas concerning the listing of companies that are identified under Section 806.051, Section 807.051 or Section 2253.153. I further certify that should the above-named company enter into a contract that is on said listing of companies on the website of the Comptroller of the State of Texas which do business with Iran, Sudan or any Foreign Terrorist Organization, I will immediately notify the City of Denton's Materials Management Department.

Peter Koht

\_\_\_\_\_  
Name of Company Representative (Print)

DocuSigned by:  
  
210B8375A83D486...


\_\_\_\_\_  
Signature of Company Representative

11/9/2018

\_\_\_\_\_  
Date



## Exhibit F

	<b>CONFLICT OF INTEREST QUESTIONNAIRE -</b>		<b>FORM CIQ</b>
<b>For vendor or other person doing business with local governmental entity</b>			
<b>This questionnaire reflects changes made to the law by H.B. 23, 84th Leg., Regular Session.</b>			
<p>This questionnaire is being filed in accordance with Chapter 176, Local Government Code, by a vendor who has a business relationship as defined by Section 176.001(1-a) with a local governmental entity and the vendor meets requirements under Section 176.006(a).</p> <p>By law this questionnaire must be filed with the records administrator of the local government entity not later than the 7th business day after the date the vendor becomes aware of facts that require the statement to be filed. See Section 176.006(a-1), Local Government Code.</p> <p>A vendor commits an offense if the vendor knowingly violates Section 176.006, Local Government Code. An offense under this section is a misdemeanor.</p>			
<b>1</b>	<b>Name of vendor who has a business relationship with local governmental entity.</b> Open Counter Enterprises Inc		
<b>2</b>	<input type="checkbox"/> <b>Check this box if you are filing an update to a previously filed questionnaire.</b>  (The law requires that you file an updated completed questionnaire with the appropriate filing authority not later than the 7 <sup>th</sup> business day after the date on which you became aware that the originally filed questionnaire was incomplete or inaccurate.)		
<b>3</b>	<b>Name of local government officer about whom the information in this section is being disclosed.</b>  <div style="text-align: center;">N/A</div> <hr style="width: 30%; margin: auto;"/> <div style="text-align: center;">Name of Officer</div> <p>This section, (item 3 including subparts A, B, C &amp; D), must be completed for each officer with whom the vendor has an employment or other business relationship as defined by Section 176.001(1-a), Local Government Code. Attach additional pages to this Form CIQ as necessary.</p> <p>A. Is the local government officer named in this section receiving or likely to receive taxable income, other than investment income, from the vendor?  <input type="checkbox"/> Yes      <input checked="" type="checkbox"/> No</p> <p>B. Is the vendor receiving or likely to receive taxable income, other than investment income, from or at the direction of the local government officer named in this section AND the taxable income is not received from the local governmental entity?  <input type="checkbox"/> Yes      <input checked="" type="checkbox"/> No</p> <p>C. Is the filer of this questionnaire employed by a corporation or other business entity with respect to which the local government officer serves as an officer or director, or holds an ownership of one percent or more?  <input type="checkbox"/> Yes      <input checked="" type="checkbox"/> No</p> <p>D. Describe each employment or business and family relationship with the local government officer named in this section.            No relationships either business or familial         </p>		
<b>4</b>	<input checked="" type="checkbox"/> <b>I have no Conflict of Interest to disclose.</b>		
<b>5</b>	DocuSigned by:  Signature of Vendor		11/9/2018 Date

## Certificate Of Completion

Envelope Id: 5C72B01DA66F4E869762992FC1A091E7	Status: Completed
Subject: Please DocuSign: 6918 - Open Counter Software	
Source Envelope:	
Document Pages: 41	Signatures: 10
Certificate Pages: 6	Initials: 0
AutoNav: Enabled	Envelope Originator:
Envelopeld Stamping: Enabled	Adrian Brown
Time Zone: (UTC-06:00) Central Time (US & Canada)	901B Texas Street
	Denton, TX 76209
	adrian.brown@cityofdenton.com
	IP Address: 129.120.6.150

## Record Tracking

Status: Original	Holder: Adrian Brown	Location: DocuSign
11/6/2018 2:09:52 PM	adrian.brown@cityofdenton.com	

## Signer Events

Signer Events	Signature	Timestamp
Adrian Brown adrian.brown@cityofdenton.com Buyer City of Denton Security Level: Email, Account Authentication (None)	<b>Completed</b>  Using IP Address: 129.120.6.150	Sent: 11/6/2018 3:34:04 PM Viewed: 11/6/2018 3:34:23 PM Signed: 11/6/2018 3:34:36 PM
<b>Electronic Record and Signature Disclosure:</b> Not Offered via DocuSign		

Mack Reinwand mack.reinwand@cityofdenton.com City of Denton Security Level: Email, Account Authentication (None)	<p>DocuSigned by: <i>Mack Reinwand</i> 7F9D328BF0204E5...</p> <p>Signature Adoption: Pre-selected Style Using IP Address: 129.120.6.150</p>	Sent: 11/6/2018 3:34:38 PM Viewed: 11/9/2018 2:42:10 PM Signed: 11/9/2018 2:58:52 PM
<b>Electronic Record and Signature Disclosure:</b> Not Offered via DocuSign		

Peter Koht peter@opencounter.com COO Open Counter Enterprises Inc. Security Level: Email, Account Authentication (None)	<p>DocuSigned by: <i>Peter Koht</i> 210B8375A83D486...</p> <p>Signature Adoption: Pre-selected Style Using IP Address: 67.180.95.75</p>	Sent: 11/9/2018 2:58:54 PM Viewed: 11/9/2018 3:01:15 PM Signed: 11/9/2018 3:04:33 PM
<b>Electronic Record and Signature Disclosure:</b> Accepted: 11/9/2018 3:01:15 PM ID: c3d3dd62-4000-46c2-9c8a-743ce1c534ac		

Caroline Booth Caroline.Booth@cityofdenton.com Director of Economic Development Security Level: Email, Account Authentication (None)	<p>DocuSigned by: <i>Caroline Booth</i> 8EE4BC71C00B4B2...</p> <p>Signature Adoption: Pre-selected Style Using IP Address: 129.120.6.150</p>	Sent: 11/9/2018 3:04:36 PM Viewed: 11/12/2018 10:35:29 AM Signed: 11/12/2018 10:36:16 AM
<b>Electronic Record and Signature Disclosure:</b> Accepted: 11/12/2018 10:35:29 AM ID: 50bf8c84-94a8-41ba-9c47-39c4f3488ecc		

Signer Events	Signature	Timestamp
<p>Tabitha Millsop tabitha.millsop@cityofdenton.com City of Denton Security Level: Email, Account Authentication (None)</p> <p><b>Electronic Record and Signature Disclosure:</b> Not Offered via DocuSign</p>	<p><b>Completed</b></p> <p>Using IP Address: 129.120.6.150</p>	<p>Sent: 11/12/2018 10:36:20 AM Viewed: 12/5/2018 2:45:05 PM Signed: 12/5/2018 2:46:00 PM</p>
<p>Todd Hileman Todd.Hileman@cityofdenton.com City Manager City of Denton Security Level: Email, Account Authentication (None)</p> <p><b>Electronic Record and Signature Disclosure:</b> Accepted: 7/25/2017 11:02:14 AM ID: 57619fbf-2aec-4b1f-805d-6bd7d9966f21</p>	<p>DocuSigned by: <i>Todd Hileman</i> B776C711BA0D454...</p> <p>Signature Adoption: Pre-selected Style Using IP Address: 47.190.47.120</p>	<p>Sent: 12/5/2018 2:46:06 PM Viewed: 12/5/2018 2:48:05 PM Signed: 12/5/2018 2:48:14 PM</p>
<p>Jane Richardson jane.richardson@cityofdenton.com Assistant City Secretary City of Denton Security Level: Email, Account Authentication (None)</p> <p><b>Electronic Record and Signature Disclosure:</b> Not Offered via DocuSign</p>	<p>DocuSigned by: <i>Jane Richardson</i> F96137F96F3D4D3...</p> <p>Signature Adoption: Pre-selected Style Using IP Address: 129.120.6.150</p>	<p>Sent: 12/5/2018 2:48:19 PM Resent: 12/7/2018 10:39:09 AM Resent: 12/7/2018 10:40:29 AM Resent: 12/7/2018 10:44:44 AM Viewed: 12/7/2018 12:08:25 PM Signed: 12/7/2018 12:08:46 PM</p>

In Person Signer Events	Signature	Timestamp
<b>Editor Delivery Events</b>	<b>Status</b>	<b>Timestamp</b>
<b>Agent Delivery Events</b>	<b>Status</b>	<b>Timestamp</b>
<b>Intermediary Delivery Events</b>	<b>Status</b>	<b>Timestamp</b>
<b>Certified Delivery Events</b>	<b>Status</b>	<b>Timestamp</b>

Carbon Copy Events	Status	Timestamp
<p>Sherrri Thurman sherrri.thurman@cityofdenton.com City of Denton Security Level: Email, Account Authentication (None)</p> <p><b>Electronic Record and Signature Disclosure:</b> Not Offered via DocuSign</p>	<div style="border: 2px solid blue; padding: 5px; width: fit-content; margin: 0 auto;"><b>COPIED</b></div>	<p>Sent: 11/6/2018 3:34:38 PM</p>
<p>Jane Richardson jane.richardson@cityofdenton.com Assistant City Secretary City of Denton Security Level: Email, Account Authentication (None)</p> <p><b>Electronic Record and Signature Disclosure:</b> Not Offered via DocuSign</p>	<div style="border: 2px solid blue; padding: 5px; width: fit-content; margin: 0 auto;"><b>COPIED</b></div>	<p>Sent: 12/5/2018 2:46:04 PM Viewed: 12/7/2018 9:35:23 AM</p>

Carbon Copy Events	Status	Timestamp
<p>Jennifer Bridges jennifer.bridges@cityofdenton.com Procurement Assistant City of Denton Security Level: Email, Account Authentication (None)</p> <p><b>Electronic Record and Signature Disclosure:</b> Not Offered via DocuSign</p>	COPIED	<p>Sent: 12/7/2018 12:08:49 PM Viewed: 12/10/2018 4:40:34 PM</p>
<p>Jane Richardson jane.richardson@cityofdenton.com Assistant City Secretary City of Denton Security Level: Email, Account Authentication (None)</p> <p><b>Electronic Record and Signature Disclosure:</b> Not Offered via DocuSign</p>	COPIED	<p>Sent: 12/7/2018 12:08:50 PM Viewed: 12/7/2018 12:10:19 PM</p>
<p>Christina Davis Christina.Davis@cityofdenton.com Security Level: Email, Account Authentication (None)</p> <p><b>Electronic Record and Signature Disclosure:</b> Not Offered via DocuSign</p>	COPIED	<p>Sent: 12/7/2018 12:08:51 PM Viewed: 12/7/2018 2:05:05 PM</p>

Notary Events	Signature	Timestamp
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Envelope Summary Events	Status	Timestamps
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Certified Delivered	Security Checked	12/7/2018 12:08:51 PM
Signing Complete	Security Checked	12/7/2018 12:08:51 PM
Completed	Security Checked	12/7/2018 12:08:51 PM

Payment Events	Status	Timestamps
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Electronic Record and Signature Disclosure
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## **ELECTRONIC RECORD AND SIGNATURE DISCLOSURE**

From time to time, City of Denton (we, us or Company) may be required by law to provide to you certain written notices or disclosures. Described below are the terms and conditions for providing to you such notices and disclosures electronically through your DocuSign, Inc. (DocuSign) Express user account. Please read the information below carefully and thoroughly, and if you can access this information electronically to your satisfaction and agree to these terms and conditions, please confirm your agreement by clicking the 'I agree' button at the bottom of this document.

### **Getting paper copies**

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You may contact us to let us know of your changes as to how we may contact you electronically, to request paper copies of certain information from us, and to withdraw your prior consent to receive notices and disclosures electronically as follows:

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To let us know of a change in your e-mail address where we should send notices and disclosures electronically to you, you must send an email message to us at [melissa.kraft@cityofdenton.com](mailto:melissa.kraft@cityofdenton.com) and in the body of such request you must state: your previous e-mail address, your new e-mail address. We do not require any other information from you to change your email address..

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- i. decline to sign a document from within your DocuSign account, and on the subsequent page, select the check-box indicating you wish to withdraw your consent, or you may;
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**Required hardware and software**

Operating Systems:	Windows2000? or WindowsXP?
Browsers (for SENDERS):	Internet Explorer 6.0? or above
Browsers (for SIGNERS):	Internet Explorer 6.0?, Mozilla FireFox 1.0, NetScape 7.2 (or above)
Email:	Access to a valid email account
Screen Resolution:	800 x 600 minimum
Enabled Security Settings:	<ul style="list-style-type: none"> <li>•Allow per session cookies</li> <li>•Users accessing the internet behind a Proxy Server must enable HTTP 1.1 settings via proxy connection</li> </ul>

\*\* These minimum requirements are subject to change. If these requirements change, we will provide you with an email message at the email address we have on file for you at that time providing you with the revised hardware and software requirements, at which time you will have the right to withdraw your consent.

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