

Amendment Number 5
to
Contract Number DIR-SDD-2068
between
State of Texas, acting by and through the Department of Information Resources
and
APPLE INC.

This Amendment Number 5 to Contract Number DIR-SDD-2068 (“Contract”) is between the Department of Information Resources (“DIR”) and Apple Inc. (“Vendor”). DIR and Vendor agree to modify the terms and conditions of the Contract as follows:

1. **Contract, Section 2. Term of Contract**, is hereby amended as follows:

DIR and Vendor hereby agree to renew the term of the Contract for one (1) year through February 8, 2017, or until terminated pursuant to the termination clauses contained in the Contract, completing all three (3) additional one-year options. **No additional extension options remain.**

2. **Appendix A. Standard Terms and Conditions For Product and Related Services Contracts**, is hereby deleted in its entirety and replaced with Appendix A. Standard Terms and Conditions For Product and Related Services Contracts version 09/24/2015, as attached hereto.

3. **Appendix A. Standard Terms and Conditions For Product and Related Services Contracts, Section 3.A, Customer**, is hereby amended by adding the following:

Vendor has sole discretion in accepting or rejecting orders from Participating Entities or Purchasing Entities for customers other than State agencies as defined in Texas Government Code, Title 10, Subtitle D, Chapter 2151, Sec. 2151.002.

4. **Authorized Exceptions to Appendix A, Standard Terms and Conditions for Services Contracts, as listed below** are hereby added as follows:

A. Section 5. Intellectual Property, is hereby replaced in its entirety as follows:

Intellectual Property Matters

Absent a written amendment to this Contract, no customization services are included or contemplated or permitted under this Contract, and the Professional Services Agreement included in the Vendor’s proposal is expressly excluded from this Contract. Therefore, this Section concerning Intellectual Property Matters is unnecessary and is deleted.

Vendor and Customers may contract for installation of standard equipment and products, training, imaging and tagging of inventory without an amendment to this Contract. Additional terms and conditions that do not conflict with the Contract and are acceptable to Customer and Vendor may be added in a statement of work and given effect. No additional term or condition added in a statement of work issued by a Customer can conflict

with or diminish a term or condition of the Contract. In the event of a conflict between a statement of work and the Contract, the Contract term shall control.

B. Section 8. Pricing, Purchase Orders, Invoices, and Payments. Sub-Section A, Manufacturer's Suggested Retail Price (MSRP) or List Price, is hereby replaced in its entirety as follows:

Manufacturer's Suggested Retail Price (MSRP) or Apple List Price

MSRP is defined as the product sales price list published in some form by the manufacturer or publisher of a product and available to and recognized by the trade. A price list especially prepared for a given solicitation is not acceptable for establishing MSRP or Apple List Price.

C. Section 8. Pricing, Purchase Orders, Invoices, and Payments. Sub-Section C.1), Customer Price, is hereby replaced in its entirety as follows:

1) The price to the Customer shall be calculated as follows:

Customer Price = ((MSRP or Apple List Price) x (1 – Customer Discount % as set forth in Appendix C, Pricing Index or better)) x (1 + DIR Administrative Fee, as set forth in the Contract).

D. Section 8. Pricing, Purchase Orders, Invoices, and Payments. Sub-Section G, Changes to Prices, is hereby restated in its entirety as follows:

Changes to Prices

Vendor may change the price of any Vendor Product or Service at any time, based upon changes to the MSRP or Apple List Price, but, subject to the below, discount levels shall remain consistent with the discount levels specified in this Contract. In the event of an administrative fee change pursuant to Section 5(B) of this Contract, Vendor may change the discount level to reflect the change in administrative fee. Price decreases shall take effect automatically during the term of this Contract and shall be passed onto the Customer immediately for orders not yet accepted by Vendor. Vendor will report any change in price to DIR at time of update at www.Apple.com. If DIR does not agree to a price increase, it will notify Vendor, and Vendor will remove the Product or Service referenced in Appendix C.

E. Section 10.A. Indemnification, is deleted and hereby replaced as follows:

1) Vendor will indemnify and hold harmless DIR and Customers from any claim by a third party against Customer to the extent based on a claim that: (i) an Apple-Branded Product sold by Vendor to Customer infringes a U.S. patent, copyright, trademark or trade secret; or (ii) personal injury or economic loss suffered by such third party was caused by Vendor's negligence or misconduct. Notwithstanding anything to the contrary, Vendor is not liable to defend or be responsible for any claims or damages arising solely out of or solely related to: (a) modification of any Apple-Branded Product; (b) combination,

operation or use of any Apple-Branded Product with non Apple-Branded Vendor Products or other programs, data or documentation; (c) Customer's violation of any import or export control requirements, regulations and laws; (d) Customer's use or exportation of any Vendor Product into any countries identified on any U.S. Government embargoed countries list; (e) use of any Apple-Branded Product in a manner not authorized under the applicable license terms; (f) any other Vendor Products; or (g) Customer's, its agents, employees or contractors' negligent acts or omissions. TO THE EXTENT CONTRIBUTORY NEGLIGENCE ON THE PART OF DIR OR CUSTOMER IS FOUND, VENDORS OBLIGATIONS TO INDEMNIFY AND HOLD HARMLESS WILL NOT BE PRECLUDED, BUT THE AMOUNT OF VENDOR'S ULTIMATE FINANCIAL RESPONSIBILITY WILL BE REDUCED BY THE PROPORTION OF NEGLIGENCE ATTRIBUTED TO DIR OR CUSTOMER.

- 2) Notice and Defense Conditions. Customer shall promptly notify Vendor, in writing, of any claim, demand, proceeding or suit of which Customer becomes aware which may give rise to a right of defense under this Section 9(A) ("Claim"). Notice of any Claim that is a legal proceeding, by suit or otherwise, must be provided to Vendor within 30 business days of Customer's first learning of such proceeding. The defense shall be coordinated with the Office of the Attorney General and Vendor may not agree to any settlement as to claims against Texas state agencies without first obtaining concurrence from the Office of the Attorney General. If a Claim is settled and to the extent permitted by law, neither party will publicize the settlement and will make every effort to ensure the settlement agreement contains a non-disclosure provision.
- 3) Mitigation. In the event of any actual or potential Claim, Vendor will be entitled (but not obligated), at its sole option, to: (i) procure for Customer the right to continue use of the applicable Apple-Branded Product(s); (ii) replace the applicable Apple-Branded Product(s); (iii) modify the applicable Apple-Branded Product(s); or (iv) refund the amount paid by Customer to Vendor for the applicable Apple-Branded Product
- 4) **Independent Contractor. VENDOR AGREES AND ACKNOWLEDGES THAT DURING THE EXISTENCE OF THIS CONTRACT, IT IS FURNISHING SERVICES IN THE CAPACITY OF AN INDEPENDENT CONTRACTOR AND THAT VENDOR IS NOT AN EMPLOYEE OF THE CUSTOMER, DIR OR THE STATE OF TEXAS.**

F. Section 10.K. Limitation of Liability, is hereby restated in its entirety as follows:

Notwithstanding anything to the contrary, except to the extent prohibited by Texas or federal law, the maximum aggregate liability of Vendor for any and all claims and damages arising out of or related to this Contract, whether arising in contract, warranty, tort, strict liability, statute or otherwise, shall be limited to ten million dollars (\$10,000,000.00). IN NO EVENT SHALL VENDOR BE LIABLE FOR INCIDENTAL, CONSEQUENTIAL, SPECIAL, INDIRECT DAMAGES (INCLUDING, WITHOUT LIMITATION, CLAIMS FOR LOST BUSINESS PROFITS OR REVENUE, LOSS OF DATA, INTERRUPTION IN USE, UNAVAILABILITY OF DATA) OR FOR PUNITIVE OR EXEMPLARY DAMAGES, WHETHER AS A RESULT OR BREACH OF CONTRACT, WARRANTY,

TORT, STRICT LIABILITY, STATUTE OR OTHERWISE. The remedies set forth in this Contract shall be Customer's and DIR's sole and exclusive remedies for any and all claims against Vendor, its agents and subcontractors in connection with or related to this Contract. The parties further agree that the liability cap set forth herein shall not be applied cumulatively or on a per claim basis and nothing shall be construed so as to enlarge that aggregate limit. This limitation of Vendor's liability shall not apply to Vendor's intellectual property indemnification obligations in Section 10(A) of this Contract. THE PARTIES AGREE THAT THE ABOVE TERMS REPRESENT A FAIR ALLOCATION OF RISK BETWEEN THE PARTIES WITHOUT WHICH THEY WOULD NOT HAVE ENTERED INTO THE AGREEMENT.

5. All other terms and conditions of the Contract not specifically modified herein shall remain in full force and effect. In the event of a conflict among provisions, the order of precedence shall be Amendment Number 5, then Amendment Number 4, then Amendment Number 3, then Amendment Number 2, then Amendment Number 1 and then the Contract.

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IN WITNESS WHEREOF, the parties hereby execute this amendment to be effective as of the date of the last signature, but in all events, no later than February 8, 2016.

APPLE INC.

Authorized By: Signature on File

Name: Vanessa Boenig

Title: Bids & Direct Operation Contracts Manager

Date: 2-1-2016

The State of Texas, acting by and through the Department of Information Resources

Authorized By: Signature on File

Name: Dale Richardson

Title: Chief Operating Officer

Date: 2/3/16

General Counsel: DBrown 2-5-16