

**APPENDIX D to DIR-TSO-2571  
HOSTING AND SERVICES AGREEMENT**

This Hosting and Services Agreement (this "Agreement") is entered into by and between Early Morning Software, Inc., a Maryland corporation with offices located at 227-229 North Holliday Street, Baltimore, MD 21202 ("Vendor") and {INSERT CUSTOMERNAME}, a {INSERT CUSTOMERSTATE OF INCORPORATION} corporation with offices located at {INSERT CUSTOMERADDRESS} ("Customer").

**1. The System.**

1.1 Definitions. Terms not otherwise defined herein are defined in **Exhibit C**, attached and incorporated herein by reference.

1.2 Provision of System. Customer engages Vendor to provide the System for Customer to access and use under the terms and conditions set forth in **Exhibits A**, Statement of Work and under the terms and conditions set forth herein.

1.3 Data Center and Service Standards. The System shall be kept and maintained by Vendor at the Data Center. Vendor shall be solely responsible for the setup, configuration, operation and management of all computer systems, hardware, software and data at the Data Center used by Vendor to provide the System; if indicated on an Exhibit, Vendor may be purchasing Customer specific hardware to implement the System. Vendor shall maintain the Service Standards as described in **Exhibit B** (including but not limited to any safeguards required by applicable law). Vendor shall not be responsible for non-compliance with Service Standards to the extent that such non-compliance results from the actions or inactions, or criminal or reasonably unforeseeable intentional acts, of any Customer or third party. Scheduled Maintenance on the System shall not be considered Service Standards non-compliance.

1.4 Implementation and Logon Access.

(i) Implementation Schedule. If not already completed at execution hereof or in a previous pilot, Vendor and Customer shall promptly after the Effective Date schedule a meeting for a time and place convenient to both parties to develop a mutually agreeable Implementation Schedule. Vendor shall use its reasonable commercial efforts to complete Implementation in accordance with the Implementation Schedule; *provided however*, that Customer agrees to amend and/or extend the Implementation Schedule upon Vendor's reasonable request in the event Vendor encounters unforeseen circumstances during Implementation or in the event Customer requests material or untimely changes in the content, structure or configuration of the System.

(ii) Go Live Date. After Implementation is completed and Vendor has received payment of the Initial Hosting Fee and all Setup Fees, Vendor shall begin the provision of the System as set forth in Exhibit(s) A-D. Upon

Customer's request, Vendor shall also provide Customer a unique user name and preliminary password. Customer may then log on to the Website and select a unique Customer password. Customer shall incur Fees other than the Initial Hosting and Setup Fees (see Section 5) beginning on the Go Live Date, which date shall in no event be later than the date of any use of the System for business purposes other than to test for compliance with Implementation requirements. Vendor is not responsible for loss, misuse or other negligence concerning usernames and passwords in the possession, custody or control of Customer.

(iii) Terms of Use. All persons logging into the System shall agree to the Terms of Use of DIR Contract Number DIR-TSO-2571 and Terms of Use as posted on the Website; provided however that such Terms of Use shall not modify DIR Contract Number DIR-TSO-2571 and this Agreement and as between Customer and Vendor, DIR Contract Number DIR-TSO-2571 shall supersede and control over the Terms of Use.

1.5 Security. Vendor shall employ commercially reasonable technological or other security measures as required by applicable law to maintain the security and privacy of Proprietary Information and Personal Information. Additionally, the parties agree to enter into a mutually acceptable amendment to this Agreement to the extent necessary to timely comply with applicable federal laws and regulations.

1.6 Support. Vendor shall provide Customer with the services as set forth in **Exhibit A**. Vendor shall follow all support priority and escalation procedures and electronic support systems established by Vendor in the Documentation or on the Website. Customer shall designate a reasonable number of Customer's technical staff as Customer's sole contact with Vendor regarding technical support obligations including Implementation, data input, archival, critical form/report generation and database maintenance support.

1.7 Enhancements. Vendor may, on a schedule determined by Vendor, update or enhance the System. During the Term, such updates and enhancements shall be automatically made available to Customer through Scheduled Maintenance at no additional cost.

1.8 Additional Services. Customer may request and Vendor may provide, subject to Vendor's written consent, Additional Services, which shall be fully described in one or

more additional **Exhibit A**. All Additional Services, within scope of DIR Contract Number DIR-TSO-2571, are billed at Vendor's standard rates in accordance with DIR Contract Number DIR-TSO-2571, Appendix C Pricing Index.

## **2. Customer Obligations and Acknowledgements.**

Unless otherwise provided in a separate written agreement between the parties, Customer shall be solely responsible for: (i) providing data and information necessary for the provision of the System as necessary to make effective use of the System; (ii) providing accurate, timely and complete information to Vendor regarding the data used in the System; (iii) maintaining the confidentiality of all user names and passwords and secure access to all user names and passwords only to Authorized Persons; (iv) performing all acts and cooperation necessary to permit Vendor to meet the milestones and timely implement the System, including but not limited to performing those acts set forth in any applicable statement of work, schedule or other agreement between the parties, and (v) all actions taken by Vendor at Customer's direction or request provided, however, that Vendor otherwise materially complies with the DIR Contract Number DIR-TSO-2571 and the terms of this Agreement in taking such actions.

## **3. Subscription License; Proprietary Rights.**

3.1 Software and Documentation. During the Term, Vendor grants to Customer a nontransferable and nonexclusive license and right to: (i) access the System using authorized user names and passwords solely for the purpose of using the System for Customer's internal business operations in accordance with the number of access licenses and the Documentation as provided herein; and (ii) reproduce the Documentation solely for use as provided therein. No other rights are granted herein and all other rights are reserved.

3.2 Ownership Acknowledgment. All rights and property interests, including but not limited to patents, copyrights, Trade Secrets, trademarks and other proprietary rights recognized under applicable law in or relating to the System and all modifications, adaptation, derivative works and enhancements thereto, are owned exclusively by Vendor and/or its licensors, and all such rights not expressly granted herein are reserved to Vendor. Notwithstanding the above, Vendor shall not acquire through this Agreement any ownership interest in Personal Information or in any Customer provided data or software or Customer provided intellectual property rights.

3.3 Trademarks. No party will use in any manner the Marks of the other party without the express written permission of such other party, which consent may be withheld in the sole and absolute discretion of such other party. Notwithstanding the above, either party may publicly display, copy or reproduce the Marks of the other party solely in accordance with the purpose and intent of this Agreement;

provided however that neither party shall alter, modify or revise any Mark of the other party.

3.4 Account Information and Data. Vendor does not own any Customer Data. Customer, not Vendor, shall have sole responsibility for the accuracy, quality, integrity, legality, reliability, appropriateness, and intellectual property ownership or right to use of all Customer Data, and Vendor shall not be responsible or liable for Customer's acts or omissions resulting in the deletion, correction, destruction, damage, loss or failure to store any Customer Data. In the event this Agreement is terminated for any reason, Vendor will make available to Customer a file of the Customer Data within 30 days of Customer's so further, if applicable law specifically requires such retention or access, in which case Vendor shall comply with applicable retention and data access laws, rules and regulations.

3.5 Acceptable Uses. Customer may not use the system: (i) send unsolicited commercial email or otherwise duplicative or unsolicited messages in violation of applicable laws; or (ii) send or store infringing, obscene, threatening, libelous, or otherwise unlawful or tortious material, including material harmful to children or violative of third party privacy rights. Both parties will make commercially reasonable efforts and shall not intentionally: (iii) send or store material containing software viruses, worms, Trojan horses or other harmful computer code, files, scripts, agents or programs; (iv) interfere with or disrupt the integrity or performance of the System or the data contained therein; or (v) attempt to gain unauthorized access to the System or its related systems or networks.

## **4. Term; Termination.**

4.1 Term. Regardless of the Go Live Date but subject to Section 4.2, this Agreement shall be effective from the Effective Date through the Initial Term and any mutually agreed upon Renewal Terms as set forth in the DIR Contract Number DIR-TSO-2571, Section 2.

### 4.2 Termination

(i) Termination will be in accordance with the DIR Contract Number DIR-TSO-2571, Appendix A, Section 11.B. Termination. Each party shall immediately return to the other, or at such other party's written election, destroy copies of, all of the other party's Proprietary Information. The party returning or destroying copies of such materials shall provide to the other party a signed written statement under oath certifying that it has returned or destroyed all of the other party's Proprietary Information and that such party does not retain in its possession any copies of the other party's Proprietary Information in hardcopy or electronic format. Notwithstanding the above, each party shall be permitted to retain for its records one archival copy of all Proprietary Information solely for purposes of defense of such party in the event of subsequent litigation or third party claims arising out of or related to this Agreement, or compliance with applicable

law. Such archival copy shall be destroyed on the earlier of the execution of a written release between the parties, or after six years from the effective date of termination. The confidentiality and security obligations of this Agreement shall survive termination and continue in perpetuity as to all such retained Proprietary Information.

(ii) *Personal Information.* Vendor shall execute a data inspection of the electronic databases containing Personal Information provided by Customer, so that upon completion of a data scrub of such Personal Information, all such Personal Information in all live electronic databases owned or operated by Vendor will be rendered inaccessible by any user of the databases other than Vendor and its employees or agents, provided that, such agents are bound by non-disclosure obligations that are at least as restrictive as those in this Agreement. Additionally, if feasible, Vendor shall return or destroy all Personal Information that Vendor still maintains in any form and retain no copies of such information when no longer needed for the purpose for which disclosure was made, except that, if such return or destruction is not feasible or applicable law requires such information to be retained in Vendor's reasonable good faith determination, Vendor shall limit further uses and disclosures to those purposes that make the return or destruction of the information infeasible.

(iii) *License terminates.* Customer shall immediately cease all use of the System, and all rights and licenses granted by Vendor hereunder to Customer shall immediately cease. Customer shall promptly notify all Authorized Persons of the termination of this Agreement.

(iv) *No refunds.* Customer shall not be entitled to any refund of any Fees or Expenses and shall remain liable for all amounts due up to and including the termination date, including if applicable, the Termination Fees set forth in Exhibit A-1; provided however that if Vendor is finally determined to have been in material breach of this Agreement, Customer shall be entitled to a refund of any prepaid amounts at the time of the termination.

(v) *Survival of Terms.* The provisions of Sections 1.3 and 1.5 (only as necessary to protect the confidentiality of retained Proprietary Information and Personal Information), 3.2, 3.3, 3.4, 4.2, 5 (to the extent of any unpaid amounts), and Sections 6 through and including 13 shall continue and survive in full force and effect to the extent so provided therein.

## **5. Fees.**

5.1 Setup Fee. The Setup Fee shall be the amount due and payable at the time specified on Exhibit A and in accordance with the DIR Contract Number DIR-TSO-2571, Appendix C, Pricing Index. In the event Vendor encounters unforeseen difficulties or Customer requests material or untimely changes in the content, structure or configuration of the System during Implementation which results in increased costs of Implementation, Vendor may reasonably request that Customer submit an additional Setup Fee in an amount necessary to cover such increased costs. Such additional Setup Fee shall be in accordance with the DIR Contract Number DIR-TSO-2571, Appendix C, Pricing Index and are due and payable in accordance with the DIR Contract Number DIR-TSO-2571, Appendix A, 8.1, Payments.

5.2 Fees. As consideration for providing access to the System, Customer shall pay to Vendor the Fees, specified in the DIR Contract Number DIR-TSO-2571, Appendix C, Pricing Index. Should the scope of services change for any reason beyond the scope originally agreed upon, Customer and Vendor shall execute amendments to reflect the changes in the scope of services. Fees shall be in accordance with the DIR Contract Number DIR-TSO-2571, Appendix C, Pricing Index.

5.3 Payments. Payments shall be in accordance with the DIR Contract Number DIR-TSO-2571, Appendix A, Section 8.1, Payments.

5.4 Taxes. Taxes shall be in accordance with the DIR Contract Number DIR-TSO-2571, Appendix A, Section 8.D, Tax-Exempt.

## **6. Non-Disclosure and Confidentiality.**

6.1 Disclosure and Confidentiality shall be in accordance with DIR Contract Number DIR-TSO-2571, Section 8.E.

6.2 Exceptions. The above confidentiality obligations shall not apply if and to the extent that Recipient establishes that the information communicated: (i) was already known to Recipient, without obligation to keep such information confidential, at the time of Recipient's receipt from Discloser, as evidenced by documents in the possession of Recipient prepared or received prior to such communication; (ii) was received by Recipient in good faith from a third party lawfully in possession thereof and having no obligation to keep such information confidential; (iii) was publicly known at the time of Recipient's receipt from Discloser or has become publicly known other than by a breach of the Agreement; or (iv) prior to Recipient's disclosure of such information, such disclosure was consented to in writing by Discloser. Except as provided in any Public Access Law, unless otherwise designated and unless falling under this paragraph, all information transmitted between the parties (other than Personal

Information) shall be presumed to be Confidential Information.

6.3 Security Measures. Without limiting the obligations specified above, Recipient agrees to implement the following security steps in order to protect the confidentiality and security of Proprietary Information of Discloser: (i) implement internal procedures to limit, control and supervise the use of Discloser's Proprietary Information; (ii) make Discloser's Proprietary Information available only to Recipient's employees, agents and contractors who comply with the non-disclosure obligations set forth herein; (iii) notify Discloser in writing of any suspected or known breach of the obligations and/or restrictions set forth herein; and (iv) use those security procedures it uses for its own Proprietary Information which it protects against unauthorized disclosure, appropriation or use, but not less than reasonable security procedures.

## 7. Warranties and Covenants.

7.1 Both Parties. Each party warrants and/or covenants that: (i) it has the power and authority to execute and deliver this Agreement and has taken all necessary corporate action to authorize the execution and delivery of this Agreement; (ii) this Agreement is and shall be the legal, valid and binding obligation of such party, enforceable in accordance with the DIR Contract Number DIR-TSO-2571, Appendix A, Section 7.C.

7.2 Customer. Customer covenants that Customer shall: (i) timely and fully perform its obligations under this Agreement; (ii) use the System in compliance with all applicable federal and state laws, rules and regulations; (iii) not post on or provide for the System any material that infringes the trademarks, copyrights or other intellectual property rights of third parties or that violates a right of privacy or constitutes defamation; (iv) comply with all Documentation provided by Vendor; (v) not alter, recast, revise, modify, translate, reformat, reverse engineer, compile, disassemble or decompile the System or any portion thereof; (vi) make no representations to Authorized Persons or third parties regarding the System or Vendor's services that are not expressly authorized to be made in this Agreement; (vii) not use Vendor's Marks in any manner except as permitted under this Agreement; and (viii) cooperate with Vendor in its provision of the System including providing such technical assistance and information as reasonably requested by Vendor.

7.3 Vendor. Vendor warrants and/or covenants that Vendor: (i) owns or has acquired sufficient rights to all proprietary interests in the System necessary to grant the licenses set forth herein; (ii) shall maintain the System in compliance with all applicable federal and state laws, rules and regulations; (iii) shall promptly post on the System all information and materials provided by Customer for posting, including all updates and amendments to such information and materials; (iv) the System will operate in accordance with

the Service Standards; and (v) to the knowledge of Vendor, the software necessary to provide the System contains no virus, Trojan horse, worm, or other software routines designed either to permit unauthorized access by third parties or to disable, erase, or otherwise harm any data supplied by Customer.

7.4 Disclaimer. OTHER THAN AS EXPRESSLY SET FORTH ABOVE, NEITHER VENDOR NOR CUSTOMER MAKES ANY OTHER EXPRESS OR IMPLIED WARRANTIES OF ANY KIND WHETHER ORAL OR WRITTEN, AND VENDOR EXPRESSLY DISCLAIMS ANY AND ALL IMPLIED WARRANTIES, INCLUDING THE IMPLIED WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE AND MERCHANTABILITY, ANY IMPLIED WARRANTY AGAINST INFRINGEMENT AND ANY IMPLIED WARRANTIES ARISING UNDER ANY APPLICABLE UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT OR OTHER APPLICABLE LAW. THERE IS NO WARRANTY THAT THE SYSTEM OR ANY EFFORTS OR INFORMATION PROVIDED BY VENDOR WILL FULFILL ANY OF CUSTOMER'S PARTICULAR PURPOSES OR NEEDS. EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, VENDOR SHALL NOT BE LIABLE FOR THE QUALITY OR ACCURACY OF INFORMATION PROVIDED BY CUSTOMER OR THIRD PARTIES FOR OR VIA THE SYSTEM NOR FOR ANY INACCURATE RESULTS DUE TO VENDOR'S PROCESSING OF ANY SUCH DATA. EXCEPT FOR THE EXPRESS WARRANTIES HEREIN THAT THE SYSTEM WILL PERFORM IN ACCORDANCE WITH THE SERVICE STANDARDS, VENDOR MAKES NO GUARANTEE OR WARRANTY OF TIMELINESS OF DELIVERY OF THE SYSTEM TO, OR PROCESSING OF ANY INFORMATION OR DATA PROVIDED BY, CUSTOMER.

## 8. Indemnification.

8.1 Infringements Shall be in accordance with the DIR Contract Number DIR-TSO-2571, Appendix A, Section 10.A

## 9. LIMITATION OF LIABILITY.

9.1 Limitation of Liability shall be in accordance with the DIR Contract Number DIR-TSO-2571, Appendix A, Section 10.K.

10. **Additional Provisions.** Notwithstanding any provisions of Appendix A to the Contract (to which this Agreement is Appendix D):

10.1 Vendor's software is not licensed to Customers on a perpetual basis and shall be hosted for and accessible by Customer upon payment to Vendor an annual subscription or license fee. Customers hosting and access to the software service shall automatically terminate upon last day of term of annual subscription. All "Work Product" as defined in Appendix or other deliverable that shall be owned by State, DIR, or Customer shall be identified in a mutually agreed signed scope of services and clearly marked as "Customer Name Work Product." Any "Work Product" or deliverable without the "Customer Work Product" mark shall be solely owned by Vendor, and Customer shall have the right to use

the Work Product without any further payment for it. Vendor's software and service is proprietary and contains trade secrets, and in the event of a freedom of information act request or other similar demand for information regarding the method of operation or functionality of Vendor's software, the State, DIR or Customer shall provide written notice to Vendor.

10.2 Vendor is not responsible to administer or manage the content provided by the State, DIR or Customer; rather the data and content of the State, DIR or Customer in Vendor's software solution is managed by the State, DIR or Customer directly. Vendor is solely responsible to maintain the software and service as provided in this Appendix D.

10.3 Vendor expressly reserves the right to terminate an Authorized Person's misuse of the System without terminating this Agreement

10.4 Customer shall not allow sharing of access credentials or access rights but may reassign such rights from time to time to new Authorized Persons who are replacing former Authorized Persons who have terminated employment or otherwise changed job status or function and no longer use the System.

**11. No competition; Non-Solicitation; No Raid.** Each party represents and covenants that it shall not, directly or indirectly, during the Term and for a period of one (1) year thereafter hire, retain, induce, solicit, advise, interfere with, seek to interfere with or otherwise contact any employee or independent contractor of the other party with respect to terminating their engagement with such other party or entering into an engagement with such party or such party's subsidiaries or Affiliates. The parties agree, however, that nothing in this Section shall: (i) prohibit a party from considering for employment or hiring an individual who applies for employment in response to a general media advertisement seeking employment applicants or otherwise not as the result of such party's initiation of contact with, or directed contact towards, such individual regarding employment; or (ii) release a party from liability for violation of a restrictive covenant found in a written employment agreement between the other party and such individual.

**12. Dispute Resolution.** Dispute Resolution shall be in accordance with the DIR Contract Number DIR-TSO-2571, Appendix A, Section 11.A.

**13. Miscellaneous.**

13.1 Applicable Law. This Agreement has been made, executed and delivered in Texas. The parties mutually stipulate and agree that this Agreement is in all respects (including, but not limited to, all matters of interpretation, validity, performance and breach) to be exclusively construed, governed and enforced in accordance with the laws of Texas without regard to conflict of provisions therein and all applicable federal laws of the United States of America, as from time to time amended and in effect. The

parties agree that the Uniform Commercial Code - Article 2 Sales, the United Nations Convention on Contracts for the International Sale of Goods, and the Electronic Signatures in Global and National Commerce Act shall not apply in any respect to this Agreement or the parties.

13.2 Relationship of the Parties. Except as expressly provided herein, nothing in this Agreement shall be: (i) deemed to constitute a partnership or joint venture between the parties or be deemed to constitute one party as agent of the other, for any purpose whatever, and neither party shall have the authority or power to bind the other, or to contract in the name of or create a liability against the other, in any way or for any purpose; or (ii) construed as a limitation on the powers or rights of either party to carry on its separate businesses for its sole benefit, including and not limited to the ability to enter into similar agreements with third parties, and each party shall take no action, directly or indirectly, which may prevent or hinder the other party from fulfilling its obligations to third parties.

13.3 Assignment. Assignment shall be in accordance with the DIR Contract Number DIR-TSO-2571, Appendix A, Section 4.D.

13.4 Notice. Notice shall be in accordance with the DIR Contract Number DIR-TSO-2571, Appendix A, Section 12.A

13.5 Entire Agreement; Amendments. DIR Contract Number DIR-TSO-2571 and this Agreement may be signed in counterparts, each of which shall be deemed an original and which shall together constitute the entire Agreement. DIR Contract Number DIR-TSO-2571 and this Agreement, all documents referenced herein and the Exhibits attached hereto represent the entire understanding between the parties with respect to the subject matter hereof and supersede all other prior written or oral agreements between the parties with respect to the subject matter hereof. Any waiver or modification of this Agreement will not be effective unless made in writing and signed by the authorized representatives of the parties. In the event of any direct conflict between the terms and conditions of DIR Contract Number DIR-TSO-2571 and this Agreement and any document referenced herein or any Exhibit, the terms of this Agreement shall control.

13.6 Force Majeure. Force Majeure shall be in accordance with the DIR Contract Number DIR-TSO-2571, Appendix 1, Section 11.C.

13.7 Severability. If any provision hereof is declared invalid or unenforceable by a court of competent jurisdiction, then the meaning of that provision will be interpreted, to the extent feasible, in a way that renders it enforceable or valid. If no feasible interpretation is possible, the provision will be severed from DIR Contract Number DIR-TSO-2571 and this Agreement and the remainder of this Agreement will remain in full force and effect.

**IN WITNESS WHEREOF**, the parties, intending to create a document under seal, have caused DIR Contract Number DIR-TSO-2571 and this Agreement to be executed by their duly authorized representatives effective on the Effective Date.

**CUSTOMER**

\_\_\_\_\_  
Signature (Authorized Officer)

\_\_\_\_\_  
Name (Print)

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

**EARLY MORNING SOFTWARE, INC.**

\_\_\_\_\_  
Signature (Authorized Officer)

\_\_\_\_\_  
Name (Print)

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

**APPENDIX D to DIR-TSO-2571  
HOSTING AND SERVICES AGREEMENT**

**EXHIBIT A**

**STATEMENT OF WORK**

***Sample Contents***

**Phase 1: Project Management**

**Deliverable 1: Perform Project Initiation**

***Completion & Acceptance:***

**Deliverable 2: Perform Project Management**

***Completion & Acceptance Criteria:***

**Phase 2: PRISM Software Configuration**

**Deliverable 3: PRISM Configuration Workshop**

***Completion & Acceptance Criteria:***

**Phase 3: Certify PRISM Reports**

**Deliverable 4: Certify Standard Reports**

***Completion & Acceptance Criteria:***

**Phase 4: PRISM Training**

**Deliverable 5: End User Training**

***Completion & Acceptance Criteria:***

**Deliverable 6: Systems Administration Training**

***Completion & Acceptance Criteria: Administration Training.***

**Deliverable 7: System Acceptance and Production**

***Completion & Acceptance Criteria:***

**Phase 5: Data Transformation**

**Deliverable 8: Data Transformation Services**

***Completion & Acceptance Criteria:***

**Additional Services**

***Completion & Acceptance Criteria:***

**APPENDIX D to DIR-TSO-2571  
HOSTING AND SERVICES AGREEMENT**

**EXHIBIT B**

**SERVICE STANDARDS**

Vendor is committed to providing the highest quality services to Customers (and Authorized Persons). The following guarantees are part of such commitment and demonstrate Vendor's willingness to stand behind our internal processes, our network and the quality of our service, as described below.

- I Availability Guarantees.** Subject to Force Majeure as defined in the DIR Contract Number DIR-TSO-2571, Appendix A, Section 11.C. and this Agreement and Scheduled Maintenance:
- A. Hardware Availability. Vendor guarantees that all Vendor-owned or provided hardware operated and maintained ("Hardware") will be operational at least 99.9% of the time in each calendar month for standard services. Upon receiving a Request, Vendor will calculate the duration of any Hardware Unavailability to Customer.
  - B. Core Applications Availability. Vendor guarantees that the set of hosting applications and services that Customer has access to from Vendor and are being operated and maintained by Vendor on behalf of Customer ("Core Applications") will be operational at least 99.0% of the time in each calendar month for the Term. Core Applications Unavailability will be deemed to exist if one or more of the Core Applications purchased by Customer is Unavailable at Vendor's Internet boundary and does not respond to Vendor's Core Applications monitoring systems. Upon receiving a Request, Vendor will calculate the duration of any Core Applications Unavailability to Customer.
  - C. Power Availability. Vendor guarantees to supply redundant AC power ("Power") to its Hardware at least 99.0% of the time in each calendar month. Upon receiving a Request, Vendor will calculate the duration of any Power Unavailability to Customer.
  - D. Vendor Data Center Network Availability. Vendor guarantees to supply Customer with Vendor Data Center Connectivity at least 99.0% of the time in each calendar month. Upon receiving a Request, Vendor will calculate the duration of the Data Center Connectivity Unavailability to Customer.
  - E. Backbone Network Availability. Vendor guarantees at least 99.0% redundant Backbone Network uptime in each calendar month. Unavailability as a result of outages or other problems experienced by the backbone connectivity provider/manager will not apply against Vendor's Guarantee of Backbone Network Availability. Upon receiving a Request, Vendor will calculate the duration of the Backbone Network Unavailability to Customer.
- II Outage Notification Guarantee.** Vendor guarantees that it shall contact Customer's designated technical contact by email (unless the email is known to be down, and then by phone) to the email address or telephone number, provided in writing to Vendor, within one (1) hour after the occurrence of any Unavailability affecting any Availability Guarantee resulting in Customer's complete inability to access the System despite attempts to properly log onto the system that comes to the knowledge of Vendor. Not less than forty-eight (48) hours prior to a scheduled service interruption, Vendor will use its best efforts to notify Customer's technical contact by email of such scheduled interruption in service and the nature of such interruption. Such notice shall be effective for all purposes herein, despite any failure of Customer to receive such notice for any reason, including problems with or failures of Customer's e-mail system(s) or erroneous contact information provided by Customer or any other reason.
- III Internet Latency and Packet Loss Upstream Contribution.** Vendor has agreements with upstream internet Vendors, which may include service level guarantees from such providers concerning average monthly packet transmission rates and packet loss between the Backbone Network and the network owned or operated by the upstream provider from which the packets are received and sent (there are no guarantees on latency or packet loss past upstream providers with which Vendor has agreements). In the event of a substantial degradation in service due to substantial in-network latency or packet loss for which Vendor can make a claim against its upstream providers and receive credits, Vendor agrees to pass through the net credit, pro rata to all Fee-paying contract customers of Vendor affected by such degraded service. In this paragraph "net credit" refers to the total credit actually received from the upstream provider(s) resulting from the claim, less any direct costs incurred by Vendor resulting from diagnosis and resolution of such issue (predominantly employee overtime, but may include other direct costs associated with the specific event).

- IV **Call Center.** Through continual monitoring and evaluation, Vendor will ensure that it employs the resources to meet the following Guarantees as to its provision of Call Center Services: a monthly average of 45 seconds of "hold time" per caller and a "dropped call" rate not to exceed a monthly average of 5%.
- V **Requests for Information.** Requests for information received by Vendor's customer service department through electronic mail shall be responded to within two (2) business days of receipt. The response provided will set forth the amount of time estimated to resolve and/or further address the inquiry. Vendor shall make concerted efforts to remediate and resolve critical issues, where Customer's service is inoperable, within 48 – 72 hours.
- VI **Material Failure to Provide Services.** Vendor's failure to provide the Services shall be deemed a material failure if any of the following have occurred:
- A. **Unavailability:** Failure to meet the Availability Guarantees in Article I of this Exhibit B, vendor delivers software in its hosted environment and Vendor performs periodic maintenance for software, operating software, and infrastructure. Customer provides its end users software, operating software, and infrastructure and Customer has sole responsible for maintenance of end user computing environment. Unavailability, therefore, shall not include denial of access to software due to Scheduled Maintenance; packet loss; substantial in-network packet latency, scheduled equipment or software upgrades; unavailability arising from a Customer Party service request; any Customer Party equipment, circuit, application, software, code, hardware device failure or malfunction; acts or omissions of Customer Parties or other users of the System; planned or unplanned Vendor upstream provider outages Force Majeure. Vendor and Customer will negotiate times for Scheduled Maintenance and upgrades.
- B. **Outage Notice:** Failure to timely provide the guaranteed outage notice for three (3) or more outages in any given thirty (30) day period.
- VII **System Security.** Vendor shall employ reasonable, industry standard techniques to ensure the security and privacy of information provided by Customer Parties, including: (i) encryption for all transmissions between the browser of Customer Parties and Vendor's web server is dependent upon the user's browser - SSL 128-bit encryption will be used for browsers with such capabilities, SSL 40-bit encryption will be used for browsers with 40-bit capacity; (ii) automatic user session termination at the expiration of a time period establish by Vendor; (iii) the assignment and selection of unique user names and passwords for restricted access to the Services; (iv) protocol isolation of the database from the web servers; (v) redundant firewalls to ensure system network isolation from unauthorized requests; and (vi) industry standard disaster recovery procedures and file security procedures.
- A. The Data Center containing Vendor's servers is located in a secure building with two independent security perimeters, which each use a different locking mechanism, independently keyed. The Data Center shall be equipped with facilities to allow alternate sources of power and cooling in the event of a failure of the main systems. System backups are run at least once daily, are password protected and maintained in a separately locked cabinet.
- B. Each user is assigned a user name by Vendor, but is permitted to select its own unique password. Access to information contained on the database (including Personal Information) is restricted depending upon the identity of the user. The Services also permit each user to prepare printable reports of the information to which such user has access.
- C. **Guaranty:** If any person obtains unauthorized access to Customer's Proprietary Information or Personal Information referring or relating to any Employee of Customer or any dependent of such Employee on the System through a brute force attack, or by compromising a Core Applications security system (i.e., if such break in is accomplished other than by a person guessing username/password combinations, obtaining access to username/password combinations from a Customer Party or any third party, whether or not authorized to do so, or where the attack occurs as a result of the negligence or intentional action or inaction of a Customer Party or a third party), Vendor will: (i) report all such conduct to to all affected parties, all legal obligations incurred, and pursue the arrest and prosecution of such persons to extent reasonable under the circumstances; (ii) provide a detailed report to the Customer of the method of attack, what systems were compromised, the information that was accessed, and all other pertinent information; and (iii) take reasonable effort under the circumstances to retrieve all information that was compromised and maintain the security of the data.

**APPENDIX D to DIR-TSO-2571  
HOSTING AND SERVICES AGREEMENT**

**EXHIBIT C  
DEFINITIONS**

"**Additional Services**" shall mean services for DIR Contract Number DIR-TSO-2571 offered by Vendor and related to the System as more fully described on **Exhibit A**.

"**Affiliate(s)**" means an entity directly or indirectly controlling, controlled by or under common control with a party, where control means the ownership or control, directly or indirectly, of more than 50 percent of all of the voting shares; provided that an entity shall be considered an affiliate only for the time during which such control exists.

"**Authorized Persons**" shall mean an employee of the Customer (and, if specifically authorized in Exhibit A, a subcontractor of Customer) who accesses or use the System for Customer's business purposes within the restrictions and limitations of the rights granted in the Agreement.

"**Confidential Information**" means in respect of Vendor, the System, all software provided in connection with the System (including both source and object code) and discussions between the parties concerning such software, all user names and passwords for accessing the System, the Documentation, all amendments, enhancements and derivative works to such software and/or materials; and in respect of both parties, it also means the terms and conditions of this Agreement, and information, other than Trade Secrets, that is of value to the Discloser and is treated as confidential. Confidential Information specifically shall not include Personal Information, or any information established to be excluded from this definition under Section 6.2.

"**Content Creation Seat License**" means the right, on a concurrent basis, for one Authorized Person to access and use the portion of the System to generate electronic collateral materials (e.g. video presentations, tests, announcements, blog entries, email advertisements and all other type of electronic collateral materials that the System allows to be created).

"**Customer Data**" means (a) data that Customer or Authorized Persons have input into the System, excluding Supplier Information; (b) transactional data that identifies, documents or describes a transaction between Customer (or customers of Customer) and a supplier; and (c) information about Customer (or customers of Customer) that identifies the Customer or its customers. For the avoidance of doubt, "Customer Data" does include any De-Identified Information.

"**Data Center**" shall mean a secure testing and operating environment with connectivity and management sufficient to allow Vendor to comply with the Service Standards, as more fully described in **Exhibit B**.

"**De-Identified Information**" means meta-data about a transaction that does not identify the parties to the transaction or the details of the transaction, and/or aggregated de-identified information – i.e. information that cannot be used to identify Customer, a customer of Customer, or transaction details regarding Customer or a customer of Customer

"**Discloser**" refers to the party disclosing Proprietary Information under this Agreement, whether such party is Vendor or Customer and whether such disclosure is directly or through Discloser's employees or agents.

"**Documentation**" shall mean all information provided by Vendor describing the features, basic use and operation of the System.

"**Effective Date**" shall mean the date this Agreement is fully executed by both parties.

"**Expenses**" shall mean all reasonable out-of-pocket expenses incurred by Vendor that are directly related to Vendor's performance as set forth in DIR Contract Number DIR-TSO-2571, Appendix C Pricing Index.

"**Fees**" shall mean the fees charged by Vendor and incurred by Customer for provision of the System and Additional Services as more fully described in **Exhibit A**.

"**Force Majeure**" shall be in accordance with the DIR Contract Number DIR-TSO-2571, Appendix A, Section 11.C.

"**Go Live Date**" shall mean the date on which the System is first made available for log in by Customer's Employees or such earlier date as set forth in **Exhibit A**. provided however that the Go Live Date shall in no event be later than earlier of (a) the date a Customer Party first logs on to the Website for purposes of actual business use; (b) Project Initiation & Completion of Milestones has been completed by Vendor; or (c) ninety (90) calendar days after the Effective Date, regardless of whether Vendor has completed implementation and installation services, unless the failure of Vendor to complete implementation and installation services is primarily the result of Vendor's breach of its obligations (in which case the 90 day period in item (c) of this definition shall be extended for the number of days that Vendor is in breach of its obligations hereunder).

"**Implementation**" shall mean Vendor's services in establishing online access for the Customer to the Website and System and cooperating with Customer to establish such interfaces with Customer's current computer software and systems consistent with the transfer of data files in a format selected by Customer that is reviewed and approved by Vendor so as to allow Customer to make effective use of the System as contemplated by this Agreement.

"**Implementation Schedule**" shall mean the mutually agreeable timeline developed by the parties for Vendor's Implementation of the Website, as amended or modified by the parties under Section 1.4 of the Agreement.

"**Initial Term**" shall mean that length of time more fully described in **Exhibit A-1**.

"**Marks**" shall collectively mean the trademarks, tradenames, trade dress, servicemarks or other identifying symbols of a party, whether or not registered.

"**Personal Information**" shall mean all personally identifiable information referring or relating to a natural person or an entity.

"**Proprietary Information**" shall mean all of a given party's Trade Secrets and Confidential Information.

"**Recipient**" refers to the party receiving any Proprietary Information under this Agreement, whether such party is Vendor or Customer and whether such disclosure is received directly or through Recipient's employees or agents.

"**Renewal Term**" shall mean the succeeding consecutive one (1) year period following the Initial Term or a Renewal Term.

"**Scheduled Maintenance**" shall mean routine, scheduled maintenance on the System during non-peak usage periods.

"**Service Standards**" shall mean those service level standards as more fully set forth on **Exhibit B**.

"**Setup Fee**" shall mean the fee charged to Customer for Implementation as more fully described in **Exhibit A**.

"**Supplier Information**" means demographic and identifying information about suppliers that are available in the System.

"**System**" means the Data Center and the hardware and software components used to provide Customer access to the Vendor's software functions as described in Exhibit(s) A-(x).

**"Term"** shall mean the length of time from the Effective Date through the effective date of a termination or expiration of this Agreement in accordance with the terms of the DIR Contract Number DIR-TSO-2571.

**"Terms of Use"** shall mean the terms and conditions of use of the System as set forth in the online user agreements and privacy policy developed by Vendor.

**"Website"** shall mean the worldwide web page(s) Vendor permits Customer Parties to access and use in connection with the System.

**APPENDIX D to DIR-TSO-2571  
HOSTING AND SERVICES AGREEMENT**

**EXHIBIT D  
ASP Hosting Configuration**

PRISM Configuration will be Application Service Provide and hosted as:

- PRISM Hosted Facility; or
- Customer Hosted Facility.

