



## **APPENDIX E**

# **AGREEMENT FOR SUPPORT OF CRAY INC. PRODUCTS**

**DIR-TSO-2721**

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This agreement is entered into this \_\_\_\_ day of \_\_\_\_\_, 20\_\_ (the "Effective Date"), by and between Cray Inc., with its principal office located at 901 Fifth Ave., Suite 1000, Seattle, WA 98164 ("Cray"), and **(Customer Name)**, with its principal office located at **(Customer Address)** ("Customer").

## 1. GENERAL

### 1.1 Transaction Description

Cray agrees to provide maintenance and support in accordance with DIR Contract No. DIR-TSO-2721 (the "Contract"), Appendix A to said Contract, and Article 2. Customer agrees to accept the maintenance and support according to the terms and conditions of the Contract, Appendix A to the Contract, this Agreement and, if applicable, the Accepted Proposal. The Contract; Appendix A, Standard Terms and Conditions For Products and Related Services Contracts; Appendix B, Vendor's Historically Underutilized Businesses Subcontracting Plan; Appendix C, Pricing Index; Appendix D, Cray Software License Agreement; Appendix E, Cray Support Agreement; Exhibit 1, Vendor's Response to RFO DIR-TSO-TMP-216, including all addenda; and Exhibit 2, RFO DIR-TSO-TMP-216, including all addenda; are incorporated by reference and constitute the entire agreement between DIR and Vendor. In the event of a conflict between the documents listed in this paragraph, the controlling document shall be the Contract, then Appendix A, then Appendix B, then Appendix C, then Appendix D, then Appendix E, then Exhibit 1, and finally Exhibit 2. In the event and to the extent any provisions contained in multiple documents address the same or substantially the same subject matter but do not actually conflict, the more recent provisions shall be deemed to have superseded earlier provisions.

### 1.2 Definitions

The following definitions apply to this Agreement:

- 1.2.1 **"Accepted Proposal"** means any relevant proposal submitted by Cray and accepted by the Customer.
- 1.2.2 **"Agreement"** means, collectively, this contract and all Exhibits.
- 1.2.3 **"Equipment"** means any Cray provided computer hardware and/or accessories accepted for Support by Cray and listed in Exhibit 2 or the Accepted Proposal.
- 1.2.4 **"GNU Public License Software"** means the software incorporated in the Software Products that is designated in the Software Products, or associated electronic or hard copy documentation, as governed by the GNU Public License.
- 1.2.5 **"Licensed Software"** means Cray operating system(s), software tools and applications software that are not GNU Public License Software or open source software licensed to the Customer hereunder.
- 1.2.6 **"Party"** means the Customer or Cray and "Parties" should be construed accordingly.
- 1.2.7 **"Products"** means Equipment and/or Software Products.
- 1.2.8 **"Software Products"** means the computer software products described in **Exhibit 2** to this Agreement or the Accepted Proposal.
- 1.2.9 **"Support"** means Cray support services provided under this Agreement as described in Article 4 of this Agreement.

### 1.3 Limitation of Warranty and Remedy; Limitation of Damages

**EXCEPT AS OTHERWISE EXPRESSLY STATED IN THIS AGREEMENT, ALL SUPPORT IS PROVIDED "AS IS" AND "WITHOUT WARRANTY" OF ANY KIND. CRAY HEREBY EXPRESSLY EXCLUDES AND DISCLAIMS ALL OTHER WARRANTIES, WHETHER EXPRESS, IMPLIED OR STATUTORY, REGARDING SUPPORT, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ANY WARRANTY OF NON-INFRINGEMENT, AND ANY**

**WARRANTY THAT MAY ARISE BY REASON OF CUSTOM, USAGE OF TRADE OR COURSE OF DEALING.** Cray will not be liable in any event for any special, incidental, consequential, or indirect damages, including, without limitation, loss of business or profits arising out of or in connection with any Support. In any case, the liability of Cray under this Agreement will be limited to the lesser of direct damages in the amount of the support charges paid by Customer to Cray under this Agreement during the twelve (12) month period preceding the event that created the liability, or \$200,000.00.

#### **1.4 Pricing**

The price for the Support for the Products is listed in either Exhibit 1 or the Accepted Proposal.

#### **1.5 Taxes**

All taxes (except income taxes and Washington Business and Occupation Tax) and other Governmental charges based on or measured by the charges set forth in this Agreement, or based on the sale or use of the Equipment, the license of software, or any Support provided hereunder, now or hereafter imposed by any government authority, including but not limited to sales, use, gross receipts, GST, import duties and personal property taxes will be paid by Customer or, if paid by Cray on Customer's behalf, will be repaid by Customer immediately upon receipt of an invoice from Cray specifying the charges to be reimbursed. If Customer claims exemption from any taxes resulting from this Agreement Customer will provide Cray with documentation required by the taxing authority to support the exemption being claimed.

#### **1.6 Invoices and Payment**

##### **1.6.1 Invoices**

Unless otherwise agreed (in writing), invoices for the Support will be issued in advance on a monthly basis. Other invoices will be issued as the charges are incurred. Payment shall be made by Customer to Cray no later than thirty (30) days after the date of Cray's invoice. Payment shall be via wire transfer in accordance with Cray's payment directions specified in Cray's invoice.

##### **1.6.2 Payment Receipt**

Payment is considered made when good funds are received in the account specified on the invoice. Customer will incur a delayed payment charge of one and one half percent (1 1/2%) percent per month on any overdue balance.

#### **1.7 Assignments**

Customer may not assign its rights or obligations under this Agreement without the advance written authorization of Cray.

#### **1.8 Applicable Law**

This Agreement is governed by the laws of the State of Texas, USA, excluding the UN Convention on International Sale of Goods. Any legal action in connection with this Agreement must be filed within the Statute of Limitations for such actions in the State of Texas after the cause for such action has accrued.

#### **1.9 Notices**

Notices will be effective when received in writing and shall be sent to the person and address designated on the signature page of this Agreement or such other person or address as may have been furnished to Customer or Cray by advance written notice.

#### **1.10 Confidential Information**

##### **1.10.1 Definition**

"Confidential Information" shall mean all communications, documents and other information, whether in written, electronic, oral or other form, which either Party through any of its Representatives (the "Discloser") furnishes, causes to be furnished or otherwise discloses to the other Party (the "Recipient), or which the Recipient obtains, has access to, or otherwise learns from the Discloser in connection with the discussions and interactions between the Parties. Confidential Information includes, but is not limited to, any written or tangible documentation created by Recipient or its Representatives to the extent such writing or tangible documentation directly derives

from Confidential Information. Confidential Information also includes, but is not limited to, the terms of this Agreement, computer software, methodologies, algorithms, services or product plans, designs, market research and analysis, costs, pricing, customer and supplier lists, customer and supplier information, employee lists, employee information, strategies, forecasts, and technical data and know-how.

#### **1.10.2 Non-disclosure**

Each Party agrees to hold the Confidential Information with respect to which it is the Recipient in trust and confidence, using its commercially reasonable, diligent efforts to keep secret and confidential that Confidential Information. Such efforts shall include refraining from discussions and review of Confidential Information in the presence of persons who are not authorized to receive such Confidential Information. Such efforts shall, in all events, be at least equivalent to the efforts the Recipient takes to preserve the confidential nature of its own similar information. Each Party agrees that it and its Representatives shall not attempt to gain or allow access to any data, files or programs or other information of the other Party which they are not entitled or authorized to receive under this Agreement. If such unauthorized access is obtained, that Party shall immediately return all materials in its possession or control containing such information to the other Party and shall safeguard the same as Confidential Information of that other Party.

Each Party agrees to use Confidential Information with respect to which it is the Recipient solely for the purposes of assessing whether to enter into a commercial arrangement with the Discloser and performing its responsibilities under this Agreement and any resulting agreement between the Parties. Each Party further agrees that it shall not copy, reproduce, or disclose Confidential Information with respect to which it is the Recipient to any third party, except that a Recipient may, subject to the following restrictions, disclose such Confidential Information or portions thereof to those of its Representatives who need to know such information for the purpose of performing under this Agreement or as required to comply with applicable legal or regulatory requirements. Prior to disclosing any Confidential Information to any Representative the Recipient shall inform such Representative of the proprietary nature of the Confidential Information and shall require such Representative to agree to be bound by this Agreement or an agreement with equivalent protections applicable to that Confidential Information.

#### **1.10.3 Exclusions**

Neither party will be obligated to maintain any information in confidence or to refrain from using it if:

(a) at the time of disclosure the information is in the public domain or is otherwise available to the Recipient other than on a confidential basis; (b) after disclosure, the information becomes a part of the public domain by publication or otherwise through no fault of the Recipient; (c) the information is disclosed to the Recipient by a third party not under an obligation of confidentiality to the party who owns the information; or (d) that the information is or has been developed by the Recipient (as evidenced by the Recipient's written records) independently of disclosures by the Discloser and without use of Confidential Information otherwise learned in connection with discussions and interactions with the Discloser.

#### **1.10.4 Court Order**

Notwithstanding any provision in this Agreement to the contrary, if the Recipient receives a subpoena or other validly issued administrative or judicial process requesting or demanding the disclosure of Confidential Information of the other Party, the Recipient shall, unless prohibited by law, provide prompt notice to the Discloser of such receipt. Unless the request or demand shall have been timely limited, quashed or extended, the Recipient shall thereafter be entitled to comply with such subpoena or other process, but only to the extent required thereby. If requested by the Discloser, the Recipient shall cooperate (at the expense of the Discloser) in the defense of the request or demand.

**1.11 Relocation of Equipment and Export Compliance**

Except for temporary, emergency relocation of the Equipment and/or Licensed Software to prevent its damage or destruction, any relocation of the Equipment, Licensed Software or other Cray intellectual property out of the United States (or the country where Cray initially installed the Equipment, Licensed Software or other Cray intellectual property) without Cray's prior written consent voids the warranty effective the date of relocation. Customer agrees (and agrees to cause any subsequent buyer of the Equipment and/or licensee or user of the Licensed Software to agree) to comply with the U.S. Export Administration Regulations and any other U.S. export requirements on export and re-export of any, Equipment, Licensed Software, or any other item delivered or transferred by Cray.

**1.12 Survival and Severability**

Notwithstanding the termination or completion of the Contract, Appendices, this Agreement, all agreements, covenants, indemnities, and warranties made in this Agreement will continue in full force and effect to the extent required for their full observance and performance. If any of the provisions of these terms and conditions are in conflict with any rule of law or statutory provision in a jurisdiction, such provision shall be stricken, but such provision shall not invalidate any other terms, which shall survive.

**1.13 Force Majeure**

"Force Majeure" shall be in accordance with Appendix A to the Contract.

**1.14 Dispute Resolution**

In the event of a dispute or alleged breach of this Agreement by either party, the parties will work together in good faith to resolve the matter by escalating it to higher levels of management prior to resorting to litigation, provided such escalation does not result in the loss of legal rights due to the expiration of the statute of limitations, waiver or similar effect. Nothing in this Article restricts the right of either party to apply for injunctive relief at any time.

**1.15 Complete Agreement**

The terms and conditions stated in the Contract, Appendices to the Contract, this Agreement and the Exhibits constitute the complete and exclusive statement of the agreement between Customer and Cray, and supersede all prior oral and written statements of any kind whatsoever made by either party or their representatives. Any order form used by Customer in connection with this Agreement will be considered to have its pre-printed clauses and statements deleted and such terms are expressly rejected by Cray. Any waivers or amendments, to be effective, must be in writing, signed by both parties.

**1.16 Manuals and Documentation**

Manuals and documentation for the Products will be provided online. A copy may be printed and duplicated for Customer's internal use only so long as all copies clearly include all proprietary notices included in the online manual and documentation.

**1.17 Subcontracts**

Cray may not subcontract any work or services to be performed hereunder without the prior written approval of Customer.

**1.18 Relationship of the Parties**

Cray is an independent contractor in all respects with regard to this Agreement. Nothing contained herein shall be deemed or construed to create a partnership, joint venture, agency, or other relationship other than that of contractor and customer.

**1.19 Waiver**

No failure by either Party to take any action or assert any right hereunder will be deemed to be a waiver of such right in the event of the continuation or repetition of the circumstances giving rise to such right.

## **1.20 Conflicting Provisions**

This Agreement and all of the Exhibits, including all documents incorporated by reference or web-link, are intended to be read and construed in harmony with each other, but if any provision in any attachment or incorporated document conflicts with any provision of this Agreement, then the controlling document shall be the Contract, then Appendix A, then Appendix B, then Appendix C, then Appendix D, then this Agreement (Appendix E), then Exhibit 1, and finally Exhibit 2., and such conflicting provision(s) shall be deemed removed and replaced with the governing provision herein.

## **1.21 Headings**

The headings used in this Agreement are solely for the convenience of the Parties, and shall not be used in the interpretation of the text of this Agreement. Each Party has read and agreed to the specific language of this Agreement; therefore no conflict, ambiguity, or doubtful interpretation shall be construed against the drafter.

## **1.22 Multiple Copies or Counterparts of the Agreement**

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

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# **2. MAINTENANCE AND SUPPORT**

## **2.1 General**

The description of the Support being provided, its price and payment schedule are set out in Exhibit 1 or the Accepted Proposal.

## **2.2 Support Description**

### **2.2.1 Specific Support Agreement**

The agreed level of Support is set out in Exhibit A or the Accepted Proposal and the various levels of Support are described therein.

### **2.2.2 Telephone Support**

Customer will have access to Cray's toll-free Support number during the agreed cover hours pursuant to Exhibit 1.

### **2.2.3 Remote Diagnosis**

Cray may require system administrator capabilities to perform command line functions when connected to customers' systems. Cray is able to provide remote diagnosis using common teleconferencing tools.

### **2.2.4 Software Support**

If, during the diagnosis and troubleshooting process, the Cray Support engineer working on the case concludes that the issue is related to third-party software, the Customer may be requested to consult with the software vendor directly.

## **2.3 Customer Obligations**

### **2.3.1 Facility Environment**

Customer will ensure that Products are installed at all times at a location meeting the environmental conditions specified in Cray's User's Guide. The User's Guide will be made available to Customer prior to the installation of any Equipment or Licensed Software. Cray reserves the right to

periodically modify, update or correct the User's Guide as the need to do so occurs, with prior notice to Customer.

### **2.3.2 Limit Access to Technical Information**

Customer will limit access to Cray's technical information and Licensed Software in Customer's possession solely to Customer's employees for purposes specifically related to Customer's use of the technical information or Licensed Software in accordance with this Agreement.

### **2.3.3 Notification of Failures**

Customer is required to promptly notify Cray of all Product interrupts, failures, alarms, or any other event indicative of non-standard operation, and grant Cray full and free access to the Equipment (subject to Customer's reasonable security rules), reasonable working and storage space, heat, cooling, light, electric power, and telephone services for business use.

### **2.3.4 User Maintenance Operations**

Customer will perform any user maintenance operations on Equipment authorized by Cray, including, but not limited to, cleaning Equipment, performing operating checks and diagnostics, and other tasks described in Cray's User's Guide or other Cray manuals provided with the Product and Customer will maintain at least one (1) current backup copy of all Licensed Software.

### **2.3.5 Notification of Problems**

Customer will promptly notify Cray of any failures or bugs in any of the Products, and give Cray any reasonable assistance requested by Cray in performing its obligations hereunder, including cooperation with Cray's support personnel in performing reasonable Product testing, and allowing access to the Products and information relating to any problem Customer reports to Cray.

## **2.4 Restriction on Relocation**

Customer will not move Products supported by Cray without providing prior written notice to Cray. All Product relocations must occur in accordance with Cray's written instructions. If there is an approved Product relocation, the Support prices for Products that have been relocated will be Cray's then-current DIR Contract prices for Support at the new location, including any applicable location surcharges. If Customer does not purchase Cray's de-installation/reinstallation services, Customer agrees that Cray will not be required to resume Support on the relocated Products until Cray has completed an inspection on such Products and any remedial or other work that Cray reasonably deems necessary to return such Products to operating condition, at Customer's expense.

## **2.5 Restriction on Modification**

Customer will not change the configuration of the Equipment without the prior written permission of Cray.

## **2.6 Term and Termination**

### **2.6.1 Term**

The initial term of Support is set out in Exhibit A. Support may be extended subject to written agreement between Parties at least one (1) month prior to the commencement of the new term.

### **2.6.2 Termination**

The Support agreement may be terminated upon written notice by either Party in the event that either Party is in material breach of this Agreement and will have failed to cure such breach within thirty (30) days of receipt of written notice thereof from the non-defaulting Party. In the event of termination Customer will be responsible for payment for any accepted services provided by Cray prior to the effective date of termination.

**2.7 Support Exclusions and Limitations**

**2.7.1 Products Not Supplied by Cray**

Except by separate, express written agreement, Cray will not provide Support for hardware or software not supplied by Cray and Cray will not be liable or responsible for the performance or nonperformance of such hardware or software, the support services provided by the suppliers thereof, or incompatibility between Cray Products and such hardware and software.

**2.7.2 Special Exceptions**

Unless otherwise agreed in writing, Cray will not: (i) change, modify or alter the Equipment other than as Cray reasonably determines is appropriate to keep the Equipment in operating condition under normal use; (ii) furnish accessories or supplies for or, paint or refinish, or provide any electrical work external to, the Equipment; or (iii) reinstall or deinstall Product.

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**CRAY INC.:**

**CUSTOMER:**

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

# EXHIBIT 1 PRICING, PAYMENT, TERM AND SUPPORT LEVEL

**Pricing and Invoice Schedule:**

**Support Start date:** Upon installation unless otherwise agreed

**Term of Support:**

The Support Level to be provided by Cray under this contract is denoted by the checked box (es) below.

- |                  |                          |  |                          |
|------------------|--------------------------|--|--------------------------|
| <b>Depot</b>     | <input type="checkbox"/> | <b>Includes Advance Replacement Option</b> | <input type="checkbox"/> |
| <b>Depot +</b>   | <input type="checkbox"/> | <b>Includes Advance Replacement Option</b> | <input type="checkbox"/> |
| <b>Premium</b>   | <input type="checkbox"/> | <b>(Advance Replacement is Included)</b>   |                          |
| <b>Premium +</b> | <input type="checkbox"/> | <b>(Advance Replacement is Included)</b>   |                          |

Further terms and conditions concerning the above Support Levels (Form 1003) are available at the following web-link:

[www.cray.com/Assets/PDF/about/legal/CCSSupportLevels1003.pdf](http://www.cray.com/Assets/PDF/about/legal/CCSSupportLevels1003.pdf)

- |                 |                          |
|-----------------|--------------------------|
| <b>Silver</b>   | <input type="checkbox"/> |
| <b>Gold</b>     | <input type="checkbox"/> |
| <b>Platinum</b> | <input type="checkbox"/> |
| <b>Diamond</b>  | <input type="checkbox"/> |

Further terms and conditions concerning the above Support Levels (Form 1004) are available at the following web-link:

[www.cray.com/Assets/PDF/about/legal/HPCSSupportLevels1004.pdf](http://www.cray.com/Assets/PDF/about/legal/HPCSSupportLevels1004.pdf)

**EXHIBIT 2**  
**EQUIPMENT AND SOFTWARE**

**EXHIBIT 3**  
**ADDITIONAL ATTACHMENTS AS APPLICABLE**