

## **OpenSFS Terms and Conditions**

### **July 22, 2011**

#### **CONTRACTOR ACCEPTANCE**

The Contractor's written acceptance of this Contract, or the performance of any portion of this Contract, shall constitute the Contractor's unqualified acceptance of this Contract and all of the Contract's terms and conditions. Any alterations made to the documents comprising this Contract or any conditions imposed by the Contractor upon its written acceptance of this Contract are not acceptable, shall constitute a proposal for modification of the Contract only, and shall have no effect on the validity or the Contractor's acceptance of this Contract and its terms and conditions, anything to the contrary notwithstanding.

#### **CHANGES**

OpenSFS may direct the Contractor to make changes within the general scope of this Contract to any services to be performed or their time and place of performance. If any such change causes an increase or decrease in the price of, or the time required for, performance of this Contract, the OpenSFS Contract Administrator shall make an equitable adjustment in the Contract price, completion date, or both, by a written modification to the Contract. The Contractor must submit any claim for an equitable adjustment within 30 days from receipt of a directed change, or by such other time as the OpenSFS Contract Administrator may permit. Changes to the terms and conditions of this Contract may be made only by the written agreement of the parties.

#### **FORCE MAJEURE**

The Contractor shall not be liable for default if non-performance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence, such as acts of God or the public enemy, acts of the Government in its sovereign capacity, fires, flood, epidemics quarantine, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify OpenSFS in writing as soon as reasonably possible after commencement of any excusable delay, setting forth the full particulars in connection therewith. The Contractor shall remedy such occurrence with all reasonable dispatch and shall promptly give OpenSFS written notice of the cessation of such occurrence.

#### **CONTRACT TERMINATION**

The Contract may be terminated by either party at any time, at will, with or without cause, with or without the giving of any reasons, and by giving notice to the other party at least 30 calendar days before the termination is to be effective.

In the event of a termination by OpenSFS, the Contractor shall be paid, subject to the terms and conditions of the Contract, a percentage of the Contract price reflecting the percentage of work performed prior to the notice of termination, plus any reasonable charges resulting from the termination that the Contractor can substantiate to the satisfaction of OpenSFS, using the Contractor's standard record keeping system. Provided, however, that the total thereof shall not exceed the Contract price. The Contractor shall not be paid for any work performed or costs incurred that reasonably could have been avoided after receipt of a notice of termination.

### **SUBPROJECT TERMINATION**

A Subproject may be terminated by either party at any time, at will, with or without cause, with or without the giving of any reasons, and by giving notice to the other party at least 30 calendar days before the termination is to be effective.

In the event of a termination by OpenSFS, the Contractor shall be paid, subject to the terms and conditions of the Contract, a percentage of the Subproject price reflecting the percentage of work performed prior to the notice of termination, plus any reasonable charges resulting from the termination that the Contractor can substantiate to the satisfaction of OpenSFS, using the Contractor's standard record keeping system. Provided, however, that the total thereof shall not exceed the Subproject price as detailed in the Milestone payments of the Subproject. The Contractor shall not be paid for any work performed or costs incurred that reasonably could have been avoided after receipt of a notice of termination.

### **PATENT, TRADEMARK, AND COPYRIGHT INFRINGEMENT**

The Contractor shall indemnify OpenSFS and its officers, employees, and agents against liability, including costs, for actual or alleged, direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark, or copyright, arising out of the performance of this Contract, provided (a) the Contractor is reasonably notified of such claims and proceedings, (b) the Contractor is given an opportunity to participate in the defense thereof, and (c) no settlement of an indemnified claim shall be made without the Contractor's consent, such consent not to be unreasonably withheld or delayed. The Contractor shall not be required to provide indemnification to the extent such claims or proceedings relate to or arise as a result of (i) subsequent modifications of the Contractor's work product by OpenSFS or a third party, (ii) software developed by third parties which is part of Contractor's work product, or (iii) liability arising solely due to the combination, operation, or use of the Contractor's work product with any product, data, tool or system that was not developed by Contractor. Contractor, at its discretion and expense, may (x) modify or replace the infringing portion of the software, or (y) obtain the necessary rights from the third party for OpenSFS to continue to exercise OpenSFS' rights under the OpenSFS Contribution Agreement. If Contractor concludes that neither of these alternatives is reasonably available, Contractor may terminate the rights under the OpenSFS Contribution Agreement and promptly repay to OpenSFS the amount received by Contractor over a thirty-six month period. These remedies are the sole and exclusive remedy under this provision.

### **LIMITATION OF LIABILITY**

To the maximum extent permitted by applicable law, neither party shall be liable, whether in contract, warranty, tort (including negligence, whether active, passive or imputed), product liability, strict liability or other legal theory for any indirect, incidental, special, punitive or consequential damages arising out of or relating to its performance or failure to perform pursuant to this Contract, even if informed of the possibility thereof in advance. Under no circumstances shall either party's aggregate liability to the other party, of whatever nature, exceed the amount actually paid by OpenSFS to Contractor under this Contract. These limitations shall apply notwithstanding any failure of essential purpose of any remedy.

**EXPORT CONTROL**

The Contractor shall comply with all applicable U.S. export control laws and regulations, if any, in the performance of this Contract and the distribution and use of resulting work products. Generally, U.S. export control laws and regulations apply to any shipment, transmission, transfer, or exposure to any foreign person, as defined in 22 CFR 120.16, of commodities (equipment, hardware, or material); technology (technical data, information, or assistance); and software (commercial or custom), regardless of where (inside or outside the United States) or how it may occur.

The Contractor shall be responsible for obtaining the appropriate licenses or other approvals for exports of commodities, technology, and software, unless an exemption or exception applies. The Contractor shall also be responsible for obtaining the appropriate licenses or other approvals before utilizing a foreign person or entity in the performance of this Contract, where the foreign person or entity will have access to any information, technology, or software subject to export control.

The Contractor shall be responsible for all regulatory record-keeping requirements associated with the use of licenses and license exemptions and exceptions.

The Contractor shall ensure that the provisions of this clause apply to its subcontractors at all tiers.

**RELEASE OF INFORMATION TO THE PUBLIC**

The Contractor shall coordinate any planned advertisements, news releases, or other public releases of information concerning this Contract, the undertaking, or any data developed hereunder with the OpenSFS Contract Administrator prior to release. The Contractor may acknowledge OpenSFS sponsorship as appropriate, provided the OpenSFS Contract Administrator is given written notice thereof.

**ASSIGNMENT**

This Contract may be assigned by OpenSFS. Except as to assignment of payment due hereunder, the Contractor shall have no right, power, or authority to sell, mortgage, transfer, or assign this Contract, any portion hereof, any interest herein, or any claim hereunder, nor to allow or permit any other party or parties to have any interest in or use any part of the rights or obligations granted hereunder for any purpose whatsoever without the prior written consent of OpenSFS.

**GOVERNING LAW AND DISPUTE RESOLUTION**

This Contract shall be governed by and construed in accordance with the laws of the State of California, without giving effect to its choice of law principles. All actions and disputes arising under this Contract shall be brought exclusively in the state and federal courts located in Alameda County, California, and such courts shall have the exclusive jurisdiction to determine the validity, construction and performance of this Contract, and the parties agree to submit to the jurisdiction of such courts.

**ENTIRE AGREEMENT**

This Contract shall consist of the Contract document (Signature Page and Schedule of Articles) and any documents incorporated therein, including these Terms and Conditions. This Contract is

the entire agreement between the parties concerning the subject matter hereof. This Contract supersedes all prior proposals, representations, negotiations, or agreements, whether written or oral.

**ORDER OF PRECEDENCE**

Any inconsistencies among the documents comprising the Contract shall be resolved by giving precedence in the following order: (a) the Contract document; (b) these Terms and Conditions; (c) other referenced documents, exhibits, and attachments; and (d) any incorporated statement of work.