

PROFESSIONAL SERVICES CONTRACT

August 21, 2006

Project: Utility System Master Plan – Phase II
 Water and Wastewater Modeling Software
 City of Rapid City Project No. PW05-1447

Owner:	Supplier:
City of Rapid City 300 Sixth Street Rapid City, SD 57701-2724 Contact: Mr. Dan Coon, P.E. Phone: (605) 394-4154 Fax: (605) 394-6636	MWH Soft, Inc. 300 North Lake Avenue, Suite 1200 Pasadena, CA 91101 Contact: Paul Hsiung Phone: (913) 383-2086 Fax: (913) 383-2526

MWH Soft, Inc. (Supplier) will provide the City of Rapid City (Owner) water and sewer modeling software in accordance with the following:

<u>ITEM</u>	<u>QUANTITY</u>	<u>UNIT PRICE</u>	<u>AMOUNT</u>
InfoWater Suite 3.0 Floating (4,000 Links) Includes first year Platinum Annual Subscription Program. Future years are \$1,800/lic/year	1	\$9,000.00	\$9,000.00
InfoSewer Suite 4.0 Floating (4,000 Links) Includes first year Platinum Annual Subscription Program. Future years are \$1,500/lic/year	1	\$9,000.00	\$9,000.00
Shipping	1	\$40.00	<u>\$40.00</u>
Total Contract Price			\$18,040.00

Additional licenses for the current version, existing at the time of the request, of the above listed software will be provided for 50% of the Fixed Seat website price. This discount only applies to additional licenses obtained by the Owner for use in conjunction with the original license.

Shipping to be FedEx 2nd Day Air.

All Prices are in US Dollars.

Supplier to invoice Owner upon shipment.

Terms are net 30 days.

Additional Terms and Conditions are as provided in Attachment A for both InfoWater Suite and InfoSewer Suite.

ACCEPTED:

SUPPLIER:

J. Erick Heath
Erick Heath, Vice President
Supplier

Date: August 3, 2006

OWNER:

Jim Shaw, Mayor

Date: _____

ATTEST:

Jim Preston, Finance Officer

Date: _____

APPROVED AS TO FORM
CITY ATTORNEY'S OFFICE

Kavita 8/15/06
Attorney Date

ATTACHMENT A

SOFTWARE MAINTENANCE AGREEMENT INFOWATER SUITE – PLATINUM MAINTENANCE

IMPORTANT – READ THE FOLLOWING SOFTWARE MAINTENANCE AGREEMENT BEFORE USING THE ENCLOSED SOFTWARE.

This is a legal agreement between **you CITY OF RAPID CITY, SD** (either an individual or an entity) and **MWH Soft, Inc. (“MWH Soft”)**. By using the enclosed software, **you** are accepting and agreeing to be bound by all of the following terms and conditions of this Agreement. If **you** do not agree with these terms and conditions, promptly return the unused software and accompanying written materials and packaging to **MWH Soft** and **you** will receive a full refund.

This Agreement, dated **August 21, 2006**, relates to the provision of software maintenance services for the **1 INFOWATER SUITE** license(s) issued to **you**, bearing the following serial number(s): [**SERIAL NUMBER – TO BE DETERMINED**] (the “Licensed Software”).

1. Software Updates and Maintenance. **MWH Soft** will support, maintain, update, and upgrade the Licensed Software for the maintenance period. During that period, **MWH Soft** will correct any functions in the Licensed Software which fail to perform as specified in the supporting documentation and any malfunctions in the Licensed Software caused by incorrect coding or programming. Software updates/upgrades to the Licensed Software issued by **MWH Soft** also may include enhancements or new features. These services will apply only to the unmodified Licensed Software and to updates/upgrades distributed by **MWH Soft**.
2. Software Support. **You** may call **MWH Soft** user support at (626) 568-6869 weekdays during the business hours of 8:00 a.m. to 5:00 p.m. Pacific Time. **MWH Soft** support staff will be available to assist in answering your questions regarding the operations of the Licensed Software within a reasonable time.
3. Term. This Agreement shall begin on the date noted above and will continue for an initial twelve (12) month term, provided that the term of this Agreement shall automatically renew for successive periods of twelve (12) calendar months each until terminated in accordance with the provisions of this Agreement.
4. Cancellation. Either party may elect not to automatically renew this Agreement by providing the other party a written notification of cancellation at least sixty (60) days prior to the end of the term.
5. Service Fees. **MWH Soft** provides Annual Maintenance for twelve (12) calendar months from the date of this agreement at no additional charge to **you**. Thereafter, **you** agree to pay **MWH Soft** in full the Annual Maintenance Fee of One thousand eight hundred US dollars (\$1,800.00) each year on the anniversary date of this Agreement. **MWH Soft** reserves the

right to change the Annual Maintenance Fee, provided that: (i) any such change in the fee shall not take effect until the commencement of the next 12-month renewal term, and (ii) there will be no more than one change in the Annual Maintenance Fee in any 12-month period.

6. Late Payment. If **you** fail to pay the Annual Maintenance Fee when due, **this Agreement will automatically terminate within** seven (7) days without written notice. Failure to make payment will also result in you receiving no maintenance and support services as described herein, including but not limited to, the activation or reactivation of the software in connection with its transfer to another computer or server.
7. Training. No software training is provided under this Agreement.
8. Rights in Software. **You** acknowledge that **MWH Soft** owns all proprietary rights, including patent, copyright, trademark, trade secret and other proprietary rights, in and to the Licensed Software and in and to any corrections, bug fixes, enhancements, updates or other modifications, including custom modifications, to the Licensed Software. The provision of any corrections, bug fixes, enhancements, updates or other modifications, including custom modifications, to the Licensed Software shall be subject to all of the terms and conditions of the Software License Agreement relating to the Licensed Software.
9. Proprietary Information. **You** agree that the Licensed Software, and all **MWH Soft** information associated with the Licensed Software, is proprietary to **MWH Soft** and is and shall remain at all times the property of **MWH Soft**. **You** agree that **you** shall keep confidential the Licensed Software and all associated information, and shall prevent its disclosure to any unauthorized person, institution, government agency, firm or enterprise. **You** further agree that your obligations of confidentiality described in this section are binding in perpetuity and survive the termination of this Agreement. At **your** request, **MWH Soft** will agree to keep confidential any data files **you** send to **MWH Soft**.
10. Limitation of Liability. Under no circumstances shall **MWH Soft** be liable for any, incidental, special, or consequential damages of any kind (including, but not limited to, damages for loss of business profits, business interruption, loss of business information, or other pecuniary loss) arising out of the use or inability to use the Licensed Software, even if **MWH Soft** has been advised of the possibility of such damages.
11. Governing Law. The laws of the State of South Dakota and rules and regulations issued pursuant thereto shall be applied in the interpretation, execution, and enforcement of this Agreement.
12. U.S. Government Restricted Rights. The Licensed Software (including any updates) and accompanying written materials are provided with Restricted Rights. Use, duplication, or disclosure by the United States Government is subject to restrictions as set forth in subparagraph (c) (1) (ii) of the Rights on Technical Data and Computer Software clause at DFARS 252.227-7013 or subparagraphs (c) (1) and (2) of the Commercial Computer

Software - Restricted Rights clause at 48 CFR 52.227-19, as applicable. Manufacturer is MWH Soft, Inc. at 300 North Lake Avenue, Suite 1200, Pasadena, California 91101.

Complete Agreement. This Agreement constitutes the entire agreement between **you** and **MWH Soft** concerning maintenance of the Licensed Software and supersedes all prior or contemporaneous understandings or agreements, written or oral, concerning that subject matter. This Agreement may not be amended except by a writing signed by an authorized representative of **MWH Soft**.

ATTACHMENT A

SOFTWARE MAINTENANCE AGREEMENT INFOSEWER SUITE – PLATINUM MAINTENANCE

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9. **Proprietary Information.** **You** agree that the Licensed Software, and all **MWH Soft** information associated with the Licensed Software, is proprietary to **MWH Soft** and is and shall remain at all times the property of **MWH Soft**. **You** agree that **you** shall keep confidential the Licensed Software and all associated information, and shall prevent its disclosure to any unauthorized person, institution, government agency, firm or enterprise. **You** further agree that your obligations of confidentiality described in this section are binding in perpetuity and survive the termination of this Agreement. At **your** request, **MWH Soft** will agree to keep confidential any data files **you** send to **MWH Soft**.
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11. **Governing Law.** The laws of the State of South Dakota and rules and regulations issued pursuant thereto shall be applied in the interpretation, execution, and enforcement of this Agreement.
12. **U.S. Government Restricted Rights.** The Licensed Software (including any updates) and accompanying written materials are provided with Restricted Rights. Use, duplication, or disclosure by the United States Government is subject to restrictions as set forth in subparagraph (c) (1) (ii) of the Rights on Technical Data and Computer Software clause at DFARS 252.227-7013 or subparagraphs (c) (1) and (2) of the Commercial Computer

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ATTACHMENT A - SOFTWARE LICENSE AGREEMENT

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1. Grant of Nonexclusive License. MWH Soft Software Products are available in two installation configurations; Fixed Seat and Floating Seat. These license configurations are non-exchangeable.

1.a. Fixed Seat. A Fixed Seat license configuration permits the installation and use the enclosed software (“Software”) on a single computer at any one time. The Software may be uninstalled and reinstalled on a different computer at the same site as long as no more than one installation per Software license exists at any time.

1.b. Floating Seat A Floating Seat license configuration is installed on a centrally accessible computer or server (LAN or WAN) and consists of the numbers and combinations (sizes and types) of Floating Seat Software licenses purchased. The number of authorized concurrent Floating Seat licenses permitted may not be exceeded. Licenses may be checked out to a specific computer for the purpose of operating remotely (not connected to the network) or for other purposes and that checked out license will not be available to any other computer until returned. A Floating Seat license, once issued, may not be divided into multiple Floating Seat licenses with smaller numbers of users. The total number of users in a Floating Seat license may not be reduced.

2. Restrictions. Except as otherwise expressly allowed by this agreement, you may not: (a) use any Floating Seat Software outside the geographical boundaries of the country in which the centrally accessible computer or server is located (b) copy the Software (including any of the images and text incorporated into the Software) or any of the written materials accompanying the Software; (c) change, modify, merge, or adapt the Software in any way; (d) disassemble, decompile, or otherwise reverse engineer the Software; or (e) rent, lease, loan, or otherwise temporarily or permanently transfer or sublicense the software to another person or entity, including your affiliates or subsidiaries. However, you either may make one copy of the Software solely for backup or archival purposes or may instead copy the Software to a single hard disk and then keep the original disks as your single backup or archival copy of the software.

3. Ownership. The Software is and remains the property of MWH Soft and is protected by the copyright laws of the United States, other national and state laws, and international treaty provisions. This agreement provides you with no rights in the Software other than the limited nonexclusive rights to use the specific version of the Software licensed above.

4. Limited Warranty. MWH Soft warrants that (a) the Software will perform substantially in accordance with the accompanying written materials for a period of ninety (90) days from the date you receive it; and (b) the media on which the Software is distributed shall be free from defects in materials and workmanship for a period of ninety (90) days from the date that you receive it. MWH Soft’s entire liability and your exclusive remedy under this limited warranty will be, at MWH Soft’s option, either (a) the return of the price paid for the Software or (b) repair or replacement of the Software or the media that is returned to MWH Soft with a copy of your receipt. This limited warranty is void if the failure of the Software or media is due to accident, abuse, or misapplication. Any replacement Software or media will be warranted for the remainder of the original warranty period of thirty (30) days, whichever is longer. ANY IMPLIED WARRANTIES ON THE SOFTWARE OR MEDIA, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ARE LIMITED IN DURATION TO NINETY (90) DAYS FROM YOUR DATE OF RECEIPT. SOME STATE/JURISDICTIONS DO NOT ALLOW LIMITATIONS ON THE DURATION OF AN IMPLIED WARRANTY, SO THE ABOVE LIMITATION MAY NOT APPLY TO YOU. THIS WARRANTY GIVES YOU SPECIFIC LEGAL RIGHTS. YOU MAY ALSO HAVE OTHER RIGHTS THAT VARY FROM JURISDICTION TO JURISDICTION.

5. Disclaimer of All Other Warranties. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, MWH SOFT, INC. DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO SOFTWARE AND ACCOMPANYING WRITTEN MATERIALS. MWH SOFT, INC. DOES NOT WARRANT THAT THE SOFTWARE WILL MEET

YOUR REQUIREMENTS, THAT THE OPERATION OF THE SOFTWARE WILL BE UNINTERRUPTED OR ERROR-FREE, THAT THE SOFTWARE WILL OPERATE IN COMBINATION WITH ANY OTHER SOFTWARE THAT YOU MAY SELECT FOR ITS USE, OR THAT DEFECTS OR ERRORS IN THE SOFTWARE WILL BE CORRECTED. MWH SOFT, INC. FURTHER DOES NOT WARRANT OR MAKE ANY REPRESENTATIONS REGARDING THE USE OR THE RESULTS OF USE OF THE SOFTWARE OR ACCOMPANYING WRITTEN MATERIALS WITH RESPECT TO THEIR CORRECTNESS, ACCURACY, RELIABILITY, OR OTHERWISE. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY MWH SOFT, INC. SHALL CREATE A WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF THE LIMITED WARRANTY. SOME STATES/JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES, SO THE ABOVE EXCLUSION MAY NOT APPLY TO YOU.

6. Limitation of Liability. UNDER NO CIRCUMSTANCES, INCLUDING FOR NEGLIGENCE, SHALL MWH SOFT, INC. BE LIABLE FOR ANY INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES OF ANY KIND (INCLUDING, BUT NOT LIMITED TO, DAMAGES FOR LOSS OF BUSINESS PROFITS, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION, OR OTHER PECUNIARY LOSS) ARISING OUT OF THE USE OR INABILITY TO USE THE SOFTWARE OR ACCOMPANYING WRITTEN MATERIALS, EVEN IF MWH SOFT, INC. HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. SOME STATES/JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR LIMITATION OF LIABILITY FOR INCIDENTAL OR CONSEQUENTIAL DAMAGE, SO THE ABOVE EXCLUSION MAY NOT APPLY TO YOU. IN NO EVENT SHALL MWH SOFT, INC.'S LIABILITY TO YOU EVER EXCEED THE AMOUNT PAID BY YOU TO LICENSE THE SOFTWARE.

7. U.S. Government Restricted Rights. The Software and accompanying written materials are provided with Restricted Rights. Use, duplication, or disclosure by the United States Government is subject to restrictions set forth in subparagraph (c) (1) (ii) of the Rights of Technical Data and Computer Software clause at DFARS 252.227-7013 or subparagraphs (c) (1) (2) of the Commercial Computer Software – Restricted Rights clause at 48 CFR 52.227-19, as applicable. Manufacturer is MWH Soft, Inc. at 300 North Lake Avenue, Suite 1200, Pasadena, California 91101.

8. Controlling Law and Severability. This agreement shall be governed and construed exclusively in accordance with the laws of the State of California without regard to its choice of law provisions. If a court of competent jurisdiction finds any provision of this agreement void or unenforceable, that provision of the agreement shall be enforced to the maximum extent permissible to effect the intent of the parties, and the remainder of this agreement shall continue in full force and effect.

9. Complete Agreement. This agreement constitutes the entire agreement between you and MWH Soft concerning your use of the Software and accompanying written materials and supersedes all prior or contemporaneous understandings or agreements written or oral, concerning that subject matter. This agreement may not be amended except by a writing signed by an authorized representative of MWH Soft.

10. Termination. If you fail to comply with any of the restrictions under this agreement, your license of the Software will terminate without notice from MWH Soft. In the event of termination, you must destroy the Software (including any backup copy) and the accompanying written materials.

11. Rights of Others. ESRI, MapObjects, ArcInfo, ArcFM, and ArcView are trademarks of Environmental Systems Research Institute, Inc., registered in the United States and certain other countries; registration is pending in the European Community. The ESRI globe logo and GIS by ESRI are trademarks of Environmental Systems Research Institute, Inc. Portions of this computer program are owned by LizardTech, Inc., and are copyright (1995-1998, LizardTech, Inc., and/or the University of California. US Patent No.5,710,835). All Right Reserved. MapObjects components may not be separated from use of the base executable application. You shall not reverse engineer by any method, except and only to the extent such activity is expressly permitted by applicable law, copy for commercial use, transfer, or assign its rights under the license grant. ESRI or its suppliers may enforce their intellectual property rights through injunctive relief as well as all other remedies available at law or equity.