

**SOFTWARE LICENCE, IMPLEMENTATION AND SUPPORT AND
MAINTENANCE AGREEMENT**

BETWEEN

ADVANCED UTILITY SYSTEMS CORPORATION

- and -

CITY OF RAPID CITY, SOUTH DAKOTA

**2235 Sheppard Ave East, Suite 1400
Toronto, Ontario
M2J 5B5**

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**SOFTWARE LICENCE, IMPLEMENTATION AND SUPPORT AND MAINTENANCE
AGREEMENT**

THIS AGREEMENT made as of the 2nd day of October 2006.

BETWEEN:

ADVANCED UTILITY SYSTEMS CORPORATION
("Consultant")

- and -

City of Rapid City, South Dakota
("Organization")

RECITALS

1. The Consultant owns the Software (as defined below);
2. The Organization wishes to (a) acquire a license to utilize the Software, (b) retain the Consultant to perform the Services (as defined herein), and (c) enter into a support and maintenance contract (Schedule "D").
3. The Consultant wishes to (a) grant the Organization a license to utilize the Software, and (b) provide the Services to the Organization, all upon the terms and conditions set out in this Agreement.

NOW THEREFORE, in consideration of the mutual covenants set out in this Agreement and for other good and valuable consideration (the receipt and sufficiency of which is hereby acknowledged), the parties agree as follows:

ARTICLE I
INTERPRETATION

1.1 **Definitions**

Throughout this Agreement, except as otherwise expressly provided, the following words and expressions shall have the following meanings:

- (a) "Agreement", "this Agreement", "the Agreement", "hereof", "herein", "hereto", "hereby", "hereunder" and similar expressions mean this Software Licence, Implementation and Support and Maintenance Agreement, including all of its Schedules and all instruments supplementing, amending or confirming this Agreement. All references to "Articles" or "Sections" mean and refer to the specified Article or Section of this Agreement.

- (b) **“Change Order”** means any written documentation between the Organization and Consultant evidencing their agreement to change particular aspects of this Agreement.
- (c) **“Completion of Services”** means that the Software is fully operational and performing in conformity with the specifications set out herein. For purposes of this Agreement, Completion of Services will be deemed to have occurred on the date which the Organization commences using the Software as its predominate business system.
- (d) **“Designated Computer System”** shall mean the Organization’s platform and operating system environment which is operating the Software.
- (e) **“Project Scope of Work”** means the scope of work appended hereto as Schedule “E” delineating, among other things, the Services that will be provided by Consultant to Organization pursuant to this Agreement, as such schedule may be amended or modified by mutual specific written agreement of the parties’ respective representatives from time to time in accordance with the terms of this Agreement.
- (f) **“Required Programs”** has the meaning set out in Section 3.3(b) hereof.
- (g) **“Services”** has the meaning set out in Section 3.1 hereof.
- (h) **“License”** means the non-exclusive license granted to the Organization pursuant to Section 2.1 hereof, to configure and install the Software on the Organization’s server computers to enable users to access and use the Software.
- (i) **“Software”** means the program material in machine-readable or interpreted form, and may include, where appropriate, listings of either machine code or source code and related materials, including instructions and documentation provided by Consultant to Organization, including any such programs provided subsequent to this Agreement, and including all copies made by Organization. The Software to be provided by Consultant at the inception of this Agreement is identified on the attached Schedule A.
- (j) **“Support and Maintenance Agreement”** has the meaning set out in Section 3.4 hereof.
- (k) **“Warranty Period”** means a period of twelve months from the date of Completion of Services, during which time the Consultant shall correct any errors or malfunctions reported to the Consultant by the Organization in accordance with Section 6.3 of this Agreement.

1.2 Time of the Essence

Time shall be of the essence in and of this Agreement and every part hereof. Any extension, waiver or variation of any provision of this Agreement shall not be deemed to affect this provision and there shall be no implied waiver of this provision.

1.3 Currency

Unless otherwise specified, all references to amounts of money in this Agreement refer to U.S. currency.

1.4 Headings

The descriptive headings preceding Articles and Sections of this Agreement are inserted solely for convenience of reference and are not intended as complete or accurate descriptions of the content of such Articles or Sections. The division of this Agreement into Articles and Sections shall not affect the interpretation of this Agreement.

1.5 Plurals and Gender

The use of words in the singular or plural, or referring to a particular gender, shall not limit the scope or exclude the application of any provision of this Agreement to such persons or circumstances as the context otherwise permits.

1.6 Schedules

The Schedules described below and appended to this Agreement shall be deemed to be integral parts of this Agreement.

Schedule "A" -	Description of Software
Schedule "B" -	Implementation Process and Timetable
Schedule "C" -	Fee Structure and Payment Schedule
Schedule "D" -	Support and Maintenance Agreement
Schedule "E" -	Scope of Work – if applicable
Schedule "F" -	There is no Schedule "F"
Schedule "G" -	RFP – Consultant response to Organization
Schedule "H" -	System Software – if applicable
Schedule "I" -	Hardware – if applicable
Schedule "J" -	Software not selected – if applicable
Schedule "K" -	Addendum – if applicable

ARTICLE II SOFTWARE LICENCES

2.1 Grant of Licenses

Subject to the terms and conditions of this Agreement, the Consultant hereby grants to the Organization a personal, non-exclusive, non-transferable right and license to use the Software on the Designated Computer System (the "License").

Any Software furnished by Consultant in machine-readable form may be copied in whole or in part by Organization for use on the Designated Computer System. Organization agrees that the original copy of all Software furnished by Consultant and all copies thereof made by Organization are and at all times remain the sole property of Consultant.

2.2 Term of License

The License granted herein commence on the date of this Agreement and is of indefinite duration unless terminated pursuant to the terms hereof.

2.3 Restrictions on Use

Organization may not give away, rent, lease or otherwise sell, sublicense, distribute or transfer the License granted under this Agreement without the prior written consent of Consultant.

Consultant requires a separate License for each computer system or environment into which the Software or any portion thereof is read in machine-readable form for operation on such system or environment; provided, however, that the Software may be transferred and/or copied to a back-up or disaster recovery system.

Within thirty (30) days after discontinuance or termination of the License for any reason, including termination resulting from a breach by the Organization beyond the applicable notice and cure periods as provided in this Agreement, Organization shall deliver to Consultant the Software and all copies thereof in whichever form, including partial copies which may have been modified by Organization or Consultant. Alternatively, the Software and other related materials may be disposed in accordance with written instructions from Consultant. Upon prior written authorization from Consultant, Organization may be permitted for a specific period after the termination of the License to retain one copy of certain materials for record purposes.

The Software and related materials supplied by Consultant are protected by copyright and trademark laws. Title, ownership rights and intellectual property rights in the Software and related materials supplied by Consultant remain with Consultant. Use of the Software and related materials supplied by Consultant is subject to the applicable copyright laws and the express rights and restrictions of this Agreement. Any rights not expressly granted herein are reserved. Organization may not remove any copyright, trademark or other proprietary notices from the Software and related materials supplied by Consultant.

2.4 Derivation, Modification and Copyright

- (a) The Organization agrees that it will not attempt to derive, or permit or help others to derive the source code relating to the Software or attempt to otherwise convert or alter the Software into human readable code. The Organization further agrees that it will not attempt to duplicate, or permit or help others to duplicate, the source code relating to the Software.
- (b) The Organization shall have no right to modify any of the Software supplied by the Consultant for Organization's use under this Agreement without the prior written approval and direction of the Consultant.
- (c) The Organization agrees that it will not, except as otherwise expressly provided in this Agreement or except as dictated by Organization's standard computer system's backup procedures and/or test environments, make or allow others to make copies or reproductions of the Software or other proprietary information in any form. The Organization agrees that it will not copy or otherwise reproduce the Software and that any additional copies as are reasonably necessary for the use of the Software shall be provided to the Organization through the issuance of additional Licenses at the Consultant's then current charges.

2.5 Ownership of Software and Confidential Information

- (a) The Organization acknowledges that the Software contains proprietary and confidential information of the Consultant which shall, at all times, remain the property of the Consultant. Through the grant of licenses pursuant to Section 2.1, the Organization is only entitled to use of the Software in accordance with the terms of this Agreement.
- (b) The Organization will ensure that the Universal Copyright Convention symbol and other copyright and proprietary notices of the Consultant will remain on the Software in machine-readable form. The Organization will take the same care to safeguard the Software as it takes to safeguard its own confidential information and such care shall not be any less than would be taken by a reasonable person to safeguard its own confidential information.
- (c) No third party, other than duly authorized agents or employees of the Organization authorized pursuant to the Licenses issued hereunder, shall have access to or use of the Software.

- (d) In order to assist the Consultant with the protection of its proprietary rights with respect to the Software and to enable the Consultant to ensure that the Organization is complying with its obligations with respect to the proprietary nature and confidentiality of the Software, the Organization shall permit the Consultant to visit during normal business hours any premises at which the Software is used and shall provide the Consultant with access to such Software.

2.6 **Escrow**

- (a) The Consultant shall keep a copy of the source code for the Software (the “Source”) with a third-party escrow service provider selected by the Consultant from time to time (the “Escrow Agent”).
- (b) The Consultant hereby grants the Organization a contingent licence, subject to the conditions of Sections 2.6(c) and 2.6(d) herein, to use the copy of the Source maintained by the Escrow Agent for support purposes only.
- (c) The contingent licence referred to in Section 2.6(b) shall only be available to the Organization to the extent that the Organization has a Support and Maintenance Agreement in effect with the Consultant immediately prior to the occurrence of any event specified in Section 2.6(d). If no such Support and Maintenance Agreement is in effect, the Organization may retain the licences granted to it pursuant to Section 2.1, but will relinquish its rights to receive any updates or modification of the Software or continuing support from the Consultant. Furthermore, the Organization will relinquish its rights to access the Source upon the occurrence of any of the events specified in Section 2.6(d). To the extent that the Organization terminates its Support and Maintenance Agreement, the provisions in this Agreement respecting the use of the Software and the terms of the licences granted hereby, will continue to apply following any such termination.

- (d) The contingent licence granted pursuant to Section 2.6(b) shall, to the extent it remains available to the Organization, become exercisable if and when any of the following events occur:
- (i) the Consultant ceases to do business for any reason whatsoever;
 - (ii) the Consultant fails or refuses to perform its obligations under this Agreement or provide the Organization with support for the Software pursuant to the Support and Maintenance Agreement (except as a result of a failure by the Organization to comply with its obligations under this Agreement or the Support and Maintenance Agreement), the Organization has issued written notice to the Consultant in respect of such failure or refusal pursuant to Section 10.3(a), and the Consultant has not cured the failure or refusal indicated in such written notice or issued a written notice of its own to the Organization disputing the default alleged by the Organization;
 - (iii) the Consultant commits any act of bankruptcy within the meaning of the *Bankruptcy Act*, and fails to cure such act within 30 days of the commission of such act; and
 - (iv) the Consultant institutes or has instituted against it bankruptcy, receivership, insolvency, reorganization, dissolution, liquidation or other similar proceedings under any federal or provincial laws and, in the case of any proceedings instituted against the Consultant, it fails to stay such proceedings or vacate or dismiss any order resulting therefrom within 60 days of the initiation of such proceedings or the issuance of such order, as the case may be.
- (e) On the occurrence and during the continuance of any of the conditions listed in Section 2.6(d) , and at the Organization's request, validation of Source shall be performed as follows:
- (i) the Consultant or a duly qualified computer programmer selected by the Organization (the "Programmer") shall retrieve the Source from the Escrow Agent and shall perform the necessary Source verification and testing procedures at the premises of the Organization on the Organization's computer systems;
 - (ii) the Programmer shall proceed to carry out the steps necessary to correct any deficiencies in the existing Software utilizing the Source; and
 - (iii) following the completion of said verification and correction procedures, the Consultant or Programmer shall return the Source to the Escrow Agent.

- (f) The provisions of this Section 2.6, and the requirement of the Escrow Agent to perform its duties in accordance with this Section 2.6, shall be subject to:
 - (i) the Organization executing any standard form documentation containing reasonable terms required by the Escrow Agent in connection with the performance of its duties and obligations hereunder

2.7 Ownership and Disposition of Documents

The Organization shall be the exclusive owner of all materials and documents which were developed or prepared by the Consultant specifically for the Organization pursuant to this Agreement. All materials and documents which were developed or prepared by the Consultant for general use and which are not the copyright of any other party or publicly available, including educational materials, the Software and any other computer applications, shall continue to be the property of the Consultant.

ARTICLE III CONSULTING SERVICES

3.1 The Consultant's Services

In order to achieve the Completion of Services, the Consultant agrees, subject to the terms and conditions of this Agreement, to perform the following services (the "Services") for the Organization:

- (a) Oversee and implement the conversion from the Organization's existing software applications to the Consultant's Software substantially in accordance with the timetable attached hereto as Schedule "B".
- (b) Install the Software, perform necessary set up and configuration operations, perform initial testing and parallel testing in accordance with the timetable attached hereto as Schedule "B".
- (c) Provide the training substantially in accordance with the timetable attached hereto as Schedule "B".
 - (i) Consultant recommends a maximum of eight (8) people in each training class for optimal training. In any training class exceeding eight (8) people, Organization may be assessed an additional charge for additional instructors.

(ii) Organization is required to make copies of the training manuals required for the training classes either by photocopy or electronic duplication each of which is subject to the restrictions and obligations contained in this Agreement. The Organization can make as many copies of training manuals and documentation as required.

(iii) On-line reference documentation is delivered with each release. Organization may print this documentation solely for its internal use.

(iv) Cancellation of any on-site Services by Organization is allowed for any reason if done in writing more than fourteen (14) days in advance of such Services. Cancellation by Organization with fourteen (14) days or less of scheduled on-site Services will be billed at fifty percent (50%) of the on-site fee, plus any non-recoverable costs incurred by Consultant due to advance scheduling of travel. Additionally, Organization hereby acknowledges that cancellation of on-site Services means that such on-site Services will be rescheduled as Consultant's then current schedule permits. Consultant is not responsible for any delay in Organization's project resulting from Organization's cancellation of training. Consultant may also cancel any on-site Services within the fourteen (14) days in advance of the visit if Consultant determines the Organization is not adequately prepared or has not completed the assigned tasks for such visit.

In this event, Organization will pay Consultant on the same basis as if the Organization cancelled as noted above.

3.2 Performance by Consultant

- (a) Manner of Performance -- The Consultant shall perform the Services in an efficient, competent and timely manner and exercise reasonable care, skill and diligence in the performance thereof.
- (b) Consultant's Discretion -- The Consultant shall determine in its sole discretion the manner and means by which the Services shall be performed.
- (c) Conduct on Organization's Premises -- The Services shall be performed with the Organization's full co-operation, on the premises of the Organization or, if agreed to by both parties, at an alternative location. The Consultant agrees, while working on the Organization's premises, to observe the Organization's rules and policies relating to the security thereof, access to or use of all or part of the Organization's premises and any of the Organization's property, including proprietary or confidential information.
- (d) Inquiries by Organization -- The Consultant shall respond expeditiously to any inquiries pertaining to this Agreement from the Organization.

3.3 Performance by Organization

- (a) Co-operation by Organization -- The Organization acknowledges that the success and timeliness of the implementation process shall require the active participation and collaboration of the Organization and its staff and agrees to act reasonably and co-operate fully with the Consultant to achieve the Completion of Services.
- (b) Required Programs. The Organization acknowledges that the use of the Software requires that the Organization obtain and install additional required software programs (the "Required Programs"), as detailed in the attached Schedule "A", and the Organization agrees that the acquisition of the Required Programs shall be at its sole cost and that the cost thereof is not included in the fees herein. The Organization further acknowledges that the operation of the Software requires the Organization's hardware to be of sufficient quality, condition and repair, and the Organization agrees to maintain its hardware in the appropriate quality, condition and repair at its sole cost and expense, in order to facilitate the achievement of Completion of Services.
- (c) Project Manager -- The Organization shall appoint a project manager (the "Project Manager") who shall work closely with the Consultant to facilitate the successful completion of the implementation process and who shall be responsible for supervising the staff of the Organization and their co-operation with and participation in such process.
- (d) Additional Organization Obligations
 - (i) Organization shall install all corrections and maintenance releases within a reasonable period of time of Organization's notification of their availability. However, any fix or correction designated as "critical" by Consultant shall be implemented by Organization within thirty (30) days of notification to the Organization by Consultant of its availability.
 - (ii) Organization shall notify Consultant of suspected defects in any of the Software supplied by Consultant. Organization shall provide, upon Consultant request, additional data deemed necessary or desirable by Consultant to reproduce the environment in which such defect occurred.
 - (iii) Organization shall allow the use of online diagnostics on the Software supplied by Consultant to Organization, if required by Consultant during problem diagnosis. Organization shall provide to Consultant, at Organization's expense, access to the Designated Computer System via the Organization's firewall to communications software (e.g. PC Anywhere, WebEx, Web Demo).

(iv) Organization shall ensure that its personnel are, at all times, educated and trained in the proper use of the Software in accordance with applicable Consultant manuals and instructions. If Organization's personnel are not properly trained as mutually determined by Consultant and Organization, Organization agrees that such personnel will be trained by Consultant or Organization within fifteen (15) days of determination. If Organization desires Consultant to perform the required training then Consultant shall be compensated in accordance with this Agreement.

(v) Organization shall establish proper backup procedures necessary to replace critical Organizational data in the event of loss or damage to such data from any cause. Organization shall provide Consultant with access to qualified functional or technical personnel to aid in diagnosis and to assist in repair of the Software in the event of error, defect or malfunction.

(vi) Organization shall have the sole responsibility for:

(a) the performance of any tests it deems necessary prior to the use of the Software.

(b) assuring proper Designated Computer System installation, configuration, verification, audit controls and operating methods.

(c) implementing proper procedures to assure security and accuracy of input and output and restart and recovery in the event of malfunction.

(d) timely upgrade and keeping current all third party license releases and/or Software products to meet the requirements of the Consultant Software.

3.4 Support and Maintenance Agreement

Concurrently with the execution and delivery of this Agreement, the Consultant and the Organization have entered into a support and maintenance agreement (the "Support and Maintenance Agreement") in the form of and on the terms set out in the attached Schedule "D" which shall apply in respect of the ongoing services and support to be provided by the Consultant to the Organization following the Completion of Services. Notwithstanding the ongoing application of the Support and Maintenance Agreement, the terms and conditions of this Agreement, insofar as they relate to the Software and the Documentation and the rights and obligations of the parties with respect thereto, shall continue to apply and the Support and Maintenance Agreement is not intended to, nor will it, apply to the exclusion of this Agreement. Consultant shall have no obligation under this Agreement to render any maintenance services or related services with respect to non-Consultant software, except as contracted for in writing with the Organization.

3.5 Stages of Services

For descriptive purposes, this provision is intended to set out the two stages pertaining to the Services and the ongoing support and maintenance of the Software. They are as follows:

- (a) Start to Completion of Services – during this stage, all Services will be performed and the Software will be tested to the reasonable satisfaction of the Organization, until the Organization is prepared to commit to the Software as its predominant business system.
- (b) Support Phase – following the Completion of Services, for so long as a Support and Maintenance Agreement is in effect, the Consultant shall be required to correct any significant programming defects, errors and malfunctions, within Consultant’s standard business practices and provide the Organization with any updates of, or modifications to, the Software.

For greater certainty, during each of the above phases (subject only to the requirement that an effective Support and Maintenance Agreement is in place during the Support Phase), the Consultant will be required to correct any significant programming defects, errors and malfunctions, within Consultant’s standard business practices, which may occur in respect of the Software.

ARTICLE IV

HARDWARE

4.1 Hardware

This Article IV shall only be applicable in the event any hardware is listed on Schedule I.

(i) Organization agrees to purchase from Consultant and Consultant agrees to sell to Organization, the hardware listed on the attached Schedule I (collectively the “Hardware”), for the purchase prices listed in said Schedule. Consultant shall arrange for the delivery of the Hardware, and Organization shall pay for the transportation charges incurred by Consultant in connection with the delivery of the Hardware. Delivery of the Hardware shall be F.O.B. point of destination, provided that Organization shall pay for the shipping charges. All risk of loss and risk of damage to the Hardware will pass to Organization upon delivery to Organization’s specified location.

(ii) Upon delivery of the Hardware to Organization, Consultant shall invoice Organization for the Hardware, and Organization shall pay for the same within thirty (30) days. Consultant hereby reserves a purchase money security interest in all Hardware delivered to Organization in accordance with this Agreement until payment in full is received for all Hardware delivered to Organization, and for that purpose, this Agreement shall be a security agreement. Organization authorizes Consultant or its agent to file the necessary financing statements to perfect Consultant’s interest. Additionally, Consultant may file this Agreement or

a copy of this Agreement with such public filing offices as are necessary in Consultant's discretion.

(iii) Consultant and/or the Hardware manufacturer(s) will provide Organization with one copy of the then current user documentation for use with the Hardware ordered and the environmental specifications for the equipment, where applicable.

(iv) Except as otherwise provided in this Agreement, Organization shall be responsible for the installation of the Hardware at Organization's location. If Organization desires Consultant to perform any installation not described in this Agreement, Consultant and Organization shall follow the procedures set out in this Agreement.

(v) It is acknowledged by the parties hereto that the Hardware provided by Consultant to Organization pursuant to this Agreement was manufactured and delivered to Consultant by a third party manufacturer and Consultant is reselling it to Organization. As such, Consultant makes no warranties, express or implied, with respect to the Hardware, including, without limitation, their merchantability or fitness for a particular purpose. Any warranty Organization has with respect to the Hardware shall be solely provided by the manufacturer(s). Notwithstanding, except for manufacturer defects, Consultant warrants that the Hardware is capable of implementing the Software Licensed to Organization hereunder.

(vi) The parties agree that although this Agreement may contain estimated prices for the maintenance of the Hardware, Hardware maintenance shall be provided solely by the respective Hardware manufacturer(s) through separate agreements between Organization and the Hardware manufacturer(s). In no event shall Consultant be responsible for such Hardware maintenance.

ARTICLE V

SYSTEM SOFTWARE

5.1 System Software

This Article V shall only be applicable in the event any System Software is listed on Schedule H.

(i) Consultant shall distribute to Organization the System Software which is listed on Schedule H, and Organization shall pay Consultant for the System Software in the amount of the purchase price(s) listed on Schedule H. Upon delivery of the System Software to Organization, Consultant shall invoice Organization for the System Software, and Organization shall pay for the same within thirty (30) days. Delivery of the System Software shall be deemed to have occurred: (i) on the date for which Consultant delivers Hardware to Organization with the System Software installed thereon, F.O.B. point of destination, provided that Organization is shall pay the shipping charges, or (ii) the date on which Consultant installs the System Software on Organization's Hardware. Consultant and/or the System Software manufacturer(s) will provide Organization with one copy of the then current user documentation for use with the System Software.

(ii) Except as otherwise provided in this Agreement, Organization shall be responsible for the installation of the System Software at Organization's location. If Organization desires Consultant to perform any installation which is not described in this Agreement, Consultant and Organization shall follow the procedures set forth in this Agreement.

(iii) It is acknowledged by the parties hereto that the System Software provided by Consultant to Organization pursuant to this Agreement was developed and delivered to Consultant by one or more third party software companies and Consultant is distributing, sublicensing and/or reselling it to Organization. As such, Consultant makes no warranties, express or implied, with respect to the System Software, including, without limitation, their merchantability or fitness for a particular purpose. Any warranty Organization has with respect to the System Software shall be solely provided by the third party software companies. Additionally, Organization acknowledges that its interest in the System Software may be in the nature of a license or sublicense with one or more of the third party software companies which may: (i) require Organization to enter into one or more separate license agreements with such third party software companies, and/or (ii) place restrictions on Organization's use of the System Software. Notwithstanding, except for third party software companies defects, Consultant warrants that the System Software is capable of implementing the Software Licensed to Organization hereunder.

(iv) The parties agree that although this Agreement may contain estimated prices for the annual maintenance of the System Software, any maintenance of the System Software shall be provided solely by the third party software companies through separate agreements between Organization and such third party software companies. In no event shall Consultant be responsible for such System Software maintenance.

ARTICLE VI REPRESENTATIONS AND WARRANTIES

6.1 Warranty of Performance

Consultant warrants to Organization that the software, material and services to be provided and/or rendered will be of the kind and quality referred to in the Consultant manuals and other documentation provided. Organization's sole recourse in the event the Software does not conform to the applicable documentation is the repair and replacement of the Software. The Consultant warrants to the Organization that the Software will perform as described if the Software is properly used in accordance with the Consultant's instructions. This warranty is void if the Organization or any other third party changes or modifies the Software. Examples of such changes or modifications include, but are not limited to, data modifications from third party software, the de-compiling and modifying of the source code, and tampering with the base set-up of the system.

6.2

Intellectual Property Rights

The Consultant warrants:

- (a) that it has the full right, authority and power to enter into this Agreement and to grant to the Organization the Licenses and rights conveyed by this Agreement; and
- (b) that the Software is an original work of authorship and does not infringe the intellectual property rights of others.

6.3 Corrections

The Consultant covenants that it will make corrections of program malfunctions which are reported in writing to the Consultant during the Warranty Period and which are necessary for the Software to conform to this Agreement. The Organization agrees to allow the Consultant the opportunity to make repeated efforts within a reasonable time to correct programming errors or malfunctions as warranted in this Agreement.

6.4 No Other Warranties

The express warranties contained above are in lieu of all other representations, warranties and conditions, express or implied, whether arising by statute or otherwise in law or from a course of dealing, or usage of trade. Without limiting the generality of the foregoing, the Consultant does not represent or warrant and the Organization acknowledges that there are no further representations or warranties:

- (a) that the functions contained in the Software will operate in the combinations which may be selected for use by the Organization or will meet the Organization's requirements and satisfy its intended results; or
- (b) that the operation of the Software will be error free or that:
 - (i) any programming errors will be corrected after the Warranty Period, or
 - (ii) any updates of, or modifications to, the Software will be made available to the Organization after the Warranty Period,

in each case unless there is an effective Support Agreement in place after the Warranty Period in respect of the period of time during which any such programming errors require correction, or any updates of, or modifications to, the Software, are developed by the Consultant and made available to the other licensees of the Software.

**ARTICLE VII
FEES AND PAYMENTS**

7.1 Fees and Payments

- (a) The Organization agrees to pay the Consultant total fees of \$294,500.00 for the supply of software, implementation of software, and the initial support and maintenance fee and a maximum of direct expenses of \$28,000.00 for a total cost not to exceed amount of \$322 500.00 for the scope of work contained herein. The fee structure and payment schedule is outlined in the attached Schedule "C".
- (b) During the term of this Agreement, Consultant shall, from time to time, deliver invoices to Organization. Each invoice delivered to Organization by Consultant shall be due and payable upon receipt thereof by Organization.
- (c) The Organization shall reimburse the Consultant for its direct expenses, including, but not limited to courier services, photocopying, faxing and reproduction, all reasonable travel costs including a travel time rate of \$50.00 per hour, meal expenses of not more than the greater of \$40.00 or the amount prescribed by the State where services will be delivered or federally if higher on a per diem basis (no receipts provided) and a mileage charge based on the current Internal Revenue Service recommended rate per mile, long distance telephone calls, and all other reasonable expenses incurred in the performance of the Consultant's duties. Total expenses billed to the Organization will not exceed \$28,000.00. In the event of a change of scope, where additional expenses are required, the charge order will reflect expenses, if any, to be billed to the Organization.
- (d) In the event Organization fails to pay all or any portion of an invoice on or before forty-five (45) days after the date of invoice, the invoice payment shall be considered past due. Organization further agrees, at the request of Consultant, to pay a late payment charge to Consultant at the rate of two percent (2%) per month, or at the maximum late payment charge permitted by applicable law, whichever is less, on any unpaid amount for each calendar month (or fraction thereof) that such payment is past due; provided, however, that Consultant shall not assess the foregoing late payment charge if Organization has been late in paying Consultant on less than three (3) previous occasions within the last calendar year.
- (e) In the event Organization fails to pay all or any portion of an invoice on or before ninety (90) days after the date it becomes due, in addition to all other remedies Consultant has under this Agreement or otherwise, Consultant shall have the option to suspend or terminate all Services under this Agreement. Suspension or termination of any such Services shall not relieve the Organization of its obligation to pay its outstanding invoices, including any applicable late charges.

- (f) Consultant shall be responsible for paying all taxes, fees, assessments and premiums of any kind payable on its employees and operations. Any tax Consultant may be required to collect or pay upon the sale, use or delivery of the Software, Services or Support and Maintenance described in this Agreement shall be paid by Organization and such sums shall be due and payable to Consultant upon receipt of an invoice therefore. Any personal property taxes levied after delivery of the Software described in this Agreement shall be paid by Organization.

7.2 Change Orders

With respect to any proposed changes to the Services defined by this Agreement that do not materially impact the scope of either party's work effort required under this Agreement, the parties will cooperate in good faith to execute Change Orders in respect thereof, and will not unreasonably withhold approval of such proposed changes. If either party causes or requests a change that, in the reasonable opinion of the other party, materially impacts the scope of the parties' work effort required under this Agreement, such as, but not limited to, changes in the allocation of the resources of the Organization and of the Consultant applied to a task, changes in completion schedules for individual tasks or for overall implementation, and changes in staffing that require a party to provide additional work hours, the other party may propose a change to cover the additional work effort required of it. Approval of any such proposed changes will not be unreasonably withheld (it being acknowledged that any such material changes may require modifications to the consideration paid, and timelines governing, the Services), and any disputes regarding changes shall be handled initially by discussions between the parties which will be convened in good faith by the parties to resolve any such matters in dispute.

ARTICLE VIII REMEDIES AND LIABILITY

8.1 Remedies and Liability

- (a) Termination of this Agreement shall not affect any right of action of either party arising from anything which was done or not done, as the case may be, prior to the termination taking effect.
- (b) The Organization and the Consultant recognize that circumstances may arise entitling the Organization to damages for breach or other fault on the part of the Consultant arising from this Agreement. The parties agree that in all such circumstances the Organization's remedies and the Consultant's liabilities will be limited as set forth below and that these provisions will survive notwithstanding the termination or other discharge of the obligations of the parties under this Agreement.
- (i) FOR BREACH OR DEFAULT BY THE CONSULTANT OR OTHERWISE IN CONNECTION WITH THIS AGREEMENT, INCLUDING A BREACH OF DEFAULT ENTITLING THE

ORGANIZATION TO RESCIND OR BE DISCHARGED FROM THE PROVISIONS OF THIS AGREEMENT AND WHETHER IN THE NATURE OF A BREACH OF CONDITION OR A FUNDAMENTAL BREACH, THE ORGANIZATION'S EXCLUSIVE REMEDY, IN ADDITION TO ELECTING IF SO ENTITLED TO RESCIND OR BE DISCHARGED FROM THE PROVISIONS OF THIS AGREEMENT, SHALL BE PAYMENT BY THE CONSULTANT OF THE ORGANIZATION'S DIRECT DAMAGES TO A MAXIMUM AMOUNT of \$1,000,000.00

- (ii) IN NO EVENT SHALL ANY DAMAGES INCLUDE, NOR SHALL THE CONSULTANT BE LIABLE FOR, ANY SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES EVEN IF THE CONSULTANT HAS BEEN ADVISED OF THE POSSIBILITY THEREOF. WITHOUT LIMITING THE GENERERALITY OF THE FOREGOING, THE CONSULTANT SHALL NOT BE LIABLE FOR LOST PROFITS, LOST BUSINESS REVENUE, FAILURE TO REALIZE EXPECTED SAVINGS, OTHER COMMERCIAL OR ECONOMIC LOSS OF ANY KIND OR FOR ANY CLAIM WHATSOEVER AGAINST THE ORGANIZATION BY ANY OTHER PARTY.
- (iii) CLAUSES (i) AND (ii) SHALL APPLY IN RESPECT OF ANY CLAIM, DEMAND OR ACTION BY THE ORGANIZATION IRRESPECTIVE OF THE NATURE OF THE CAUSE OF ACTION UNDERLYING SUCH CLAIM, DEMAND OR ACTION, INCLUDING, BUT NOT LIMITED TO, BREACH OF CONTRACT OR TORT.

8.2 **Intent**

The parties hereby confirm that the waivers and disclaimers of liability, releases from liability, limitations and apportionments of liability, and exclusive remedy provisions expressed throughout this Agreement shall apply even in the event of default, negligence (in whole or in part), strict liability or breach of contract of the person released or whose liability is waived, disclaimed, limited, apportioned or fixed by such remedy provision, and shall extend to such person's affiliates and to its shareholders, directors, officers, employees and affiliates.

8.3 **Remedies**

Where remedies are expressly afforded by this Agreement, such remedies are intended by the parties to be the sole and exclusive remedies of the Organization for liabilities of the Consultant arising out of or in connection with this Agreement, notwithstanding any remedy otherwise available at law or in equity.

ARTICLE IX INDEMNITY

9.1 Indemnity

The Organization shall indemnify and save harmless the Consultant, its successors and assigns together with its officers, directors, employees, agents and those for whom it is in law responsible, only from and against any and all liabilities, damages, costs, expenses, causes of action, claims, suits, proceedings and judgments (collectively "Claims") which they may incur or suffer or be put to by reason of or in connection with or arising from any breach, violation or non-performance by the Organization of any obligation contained in this Agreement to be observed or performed by the Organization, or any wrongful act or negligence of the Organization or its agents or employees which relates to this Agreement, howsoever arising. The Organization acknowledges and agrees that this indemnity shall survive any termination of this Agreement.

The Consultant shall indemnify and save harmless the Organization, its successors and assigns together with its officers, directors, employees, agents and those for whom it is in law responsible, only from and against any and all liabilities, damages, costs, expenses, causes of action, claims, suits, proceedings and judgments (collectively "Claims") which they may incur or suffer or be put to by reason of or in connection with or arising from any breach, violation or non-performance by the Consultant of any obligation contained in this Agreement to be observed or performed by the Consultant, or any wrongful act or negligence of the Consultant or its agents or employees which relates to this Agreement, howsoever arising. The Consultant acknowledges and agrees that this indemnity shall survive any termination of this Agreement.

ARTICLE X GENERAL

10.1 Force Majeure

Neither party shall be liable for delay or failure in performance resulting from acts beyond the control of such party including, but not limited to, acts of God, acts of war or of the public enemy, riots, fire, flood, or other natural disaster, acts of government, strike, walkout, communication line or power failure, failure in operability or destruction of the Organization's computer (unless by reason of the negligence of a party to this Agreement) or failure or inoperability of any software other than the Software. Any applicable delivery schedule shall be extended by a period of time equal to the time lost because of any such delay.

10.2 Confidentiality

- (a) Duty Owed to the Organization -- The Consultant acknowledges that it may receive information from the Organization or otherwise in connection with this Agreement or the performance of the Services. Except for information in the

public domain, unless such information falls into the public domain by disclosure or other acts of the Consultant or through the fault of the Consultant, the Consultant agrees:

- (i) to maintain this information in confidence;
 - (ii) not to use this information other than in the course of this Agreement;
 - (iii) not to disclose or release such information except on a need-to-know only basis;
 - (iv) not to disclose or release such information to any third person without the prior written consent of the Organization, except for authorized employees or agents of the Consultant; and
 - (v) to take all appropriate action, whether by instruction, agreement or otherwise, to ensure that third persons with access to the information under the direction or control or in any contractual privity with the Consultant, do not disclose or use, directly or indirectly, for any purpose other than for performing the Services during or after the term of this Agreement, any material or information, including the information, without first obtaining the written consent of the Organization.
- (b) Duty Owed to the Consultant -- The parties agree that if the Organization shall breach any term of Section 2.5 of this Agreement entitled “Ownership of Software and Confidential Information”, then the Consultant shall have the right to terminate this Agreement and the grant of licences herein forthwith without giving notice as set forth in Section 10.3(b).

10.3

Termination

- (a) If the Consultant should neglect to perform the Services properly or otherwise fail to comply with the requirements of this Agreement, the Organization must notify the Consultant in writing of such default (a “Default Notice”). Upon receipt of a Default Notice, the Consultant must either correct the default at no additional cost to the Organization, or issue a written notice of its own disputing the alleged default, in either case within thirty (30) days immediately following receipt of a Default Notice. If the Consultant fails to correct the default, or issue a notice disputing the alleged default, in either case within thirty (30) days following receipt of the Default Notice, the Organization may terminate the part of this Agreement relating to the provision of Services and in such case will be responsible for payment to the Consultant of only that part of the fee earned by the Consultant for those Services performed up to the time of communication of such notice of termination to the Consultant.
- (b) If the Organization should fail to comply with its obligations under this Agreement, the Consultant must notify the Organization in writing of such default

(a “Default Notice”). Upon receipt of a Default Notice, the Organization must correct the default at no additional cost to the Consultant, or issue a written notice of its own disputing the alleged default, in either case within thirty (30) days immediately following receipt of a Default Notice. If the Organization fails to correct the default, or issue a notice disputing the alleged default, in either case within thirty (30) days following receipt of the Default Notice, the Consultant may terminate the whole of this Agreement including the grant of licence to the Software and in such case the Organization will be responsible for payment to the Consultant of only that part of the fee earned by the Consultant for that part of the Services performed in accordance with this Agreement up to the time of communication of such notice of termination to the Organization.

10.4 Procedure on Termination

If this Agreement is terminated prior to the Completion of Services, then within thirty (30) days following such termination, the Organization shall return the Software to the Consultant and shall certify, under the hand of a duly authorized officer of the Organization, that all copies of the Software or any part thereof, in any form, within the possession or control of the Organization have been returned to the Consultant. If this Agreement is terminated following the Completion of Services, then the Organization may retain the copy of the Software in its possession as of the Completion of Services but it shall not be entitled to any additional Licences, nor will it receive updates of, or modifications to, the Software made by the Consultant. Finally, it will not be entitled to access the Source through exercise of the licence granted pursuant to Section 2.6 of this Agreement. Notwithstanding the foregoing, the Organization will remain subject to the obligations imposed upon it pursuant to this Agreement with respect to the Software, including, but not limited to, such obligations relating to ownership of the Software and confidentiality.

10.5 Accounts and Records

The Consultant shall:

- (a) keep proper and detailed accounts in accordance with accepted accounting practices of all factors entering into the computation of the amounts payable pursuant to this Agreement; and

- (b) for a period of two years from the date of Completion of Services by the Consultant, preserve all accounts and other documentation relating to the Organization and keep them available for inspection by the Organization or its representative, at any time. The Consultant agrees that this obligation shall survive any termination of this Agreement.

10.6 Addresses for Notice

Any notice required or permitted to be given to any party to this Agreement shall be given in writing and shall be delivered personally, mailed by prepaid registered post or sent by facsimile to the appropriate address or facsimile number set out below. Any such notice shall be conclusively deemed to have been given and received on the day on which it is delivered or transmitted (or on the next succeeding business day if delivered or received by facsimile after 5:00 p.m. local time on the date of delivery or receipt, or if delivered or received by facsimile on a day other than a business day), if personally delivered or sent by facsimile or, if mailed, on the third business day following the date of mailing, and addressed, in the case of the Consultant, to:

ADVANCED UTILITY SYSTEMS CORPORATION
 2235 Sheppard Ave East, Suite 1400
 Toronto, Ontario M2J 5B5
 Attention: CEO
 Telephone: 613-226-5511, extension 2149

and in the case of the Organization, to:

City of Rapid City, SD
 300 Sixth Street
 Rapid City, SD
 57701
 Attention: Dan Coon

Telephone: (605) 394-4154
 Fax: (605)394-6636

Each party may change its particulars respecting notice, by issuing notice to the other party in the manner described in this Section 10.6.

10.7 Assignment

- (a) Consultant may assign this Agreement or its interest therein without Organization's consent or prior written notice to Organization. Any such assignment, however, will not change the obligations of Consultant to Organization.
- (b) This Agreement is not assignable by the Organization without the prior, express, written permission of the Consultant, which may not be unreasonably withheld. The licenses granted hereunder and the Software may not be sublicensed,

assigned or transferred. Any assignment by Organization without the prior written consent of Consultant shall be void.

10.8 Reorganizations

The Organization acknowledges that the License fee set out in this Agreement has been established on the basis of the structure of the Organization at the date of this Agreement. To the extent that the Organization amalgamates, consolidates or undergoes any similar form of corporate reorganization or transition (a “Reorganization”), and the resulting entity (whether or not the Organization is the resulting or continuing entity) requires additional Licenses to support the system, the Consultant shall be entitled to receive, and the Organization shall pay, an additional License fee based on the then prevailing License fee in effect. The provisions of this Section 10.9 shall apply *mutatis mutandis* to any subsequent Reorganizations occurring following the first Reorganization. The provisions of this Section 10.9 shall not apply where the Organization undergoes a Reorganization involving only other organizations that have already purchased a License from the Consultant. For purposes of this Agreement, any corporate changes undergone by the Organization will be characterized as either an assignment, in which case Section 10.8 will apply, or a Re-organization, in which case Section 10.9 will apply, but it is not intended that Sections 10.8 and 10.9 will apply to any single sequence of events, if such application would result in a duplication of the fees provided for in those provisions.

10.9 Binding Agreement and Enurement

This Agreement shall be binding upon the parties hereto and their respective successors and assigns. This Agreement shall enure to the benefit of the parties hereto and their respective successors and permitted assigns.

10.10 Entire Agreement

This Agreement shall constitute the entire agreement between the parties hereto with respect to the matters covered herein. No other agreements, representations, warranties or other matters, oral or written, purportedly agreed to or represented by or on behalf of Consultant by any of its employees or agents, or contained in any sales materials or brochures, shall be deemed to bind the parties hereto with respect to the subject matter hereof. Organization acknowledges that it is entering into this Agreement solely on the basis of the representations contained herein.

10.11 Section Headings

Section and other headings in this Agreement are for reference purposes only, and are in no way intended to describe, interpret, define or limit the scope or extent of any provision hereof.

10.12 Independent Contractor

Organization engages Consultant under this Agreement solely as an independent contractor to perform Consultant duties which are described in this Agreement. Organization and Consultant expressly acknowledge and agree that Consultant is the independent contractor of Organization and nothing contained in this Agreement or which otherwise exists shall be construed by Organization, Consultant or any third person or entity to create a relationship of joint venturers, partners, or employer and employee.

10.13 Governing Law

This Agreement shall be governed by the laws of the State in which Organization is located.

10.14 Invalidity

The invalidity or unenforceability of any provision or covenant contained in this Agreement shall not affect the validity or enforceability of any other provision or covenant herein contained and any such invalid provision or covenant shall be deemed to be severable.

10.15 Waiver

A term or condition of this Agreement may be waived or modified only by written consent of both parties. Forbearance or indulgence by either party in any regard shall not constitute a waiver of the term or condition to be performed, and either party may evoke any remedy available under the Agreement or by law despite such forbearance or notice.

10.16 Counterparts

This Agreement may be executed in counterparts (whether by facsimile signature or otherwise), each of which when so executed shall constitute an original and all of which together shall constitute one and the same instrument.

10.17 **RFP Response**

Consultant's response to Organization's RFP is attached hereto and incorporated herein as an exhibit. Organization acknowledges that Consultant, after it has been selected by Organization, re-evaluates its proposal relative to the Organization's RFP to determine if any updates or revisions are necessary. Any such updates and revisions are attached hereto as an exhibit and incorporated herein.

10.18 **Competitive Bid**

Organization has conducted a competitive evaluation and has concluded such efforts with this negotiated Agreement (including any addenda hereto); therefore, this Agreement may serve as the basis for similar agreements whereby other entities may contract separately with Consultant. Organization agrees that Consultant may disclose all or any portion of this Agreement to any of its current or prospective customers.

10.19 **Further Assurances**

The parties shall do all such things and provide all such reasonable assurances as may be required to consummate the transactions contemplated hereby, and each party shall provide such further documents or instruments required by any other party as may be reasonably necessary or desirable to effect the purposes of this Agreement and carry out its provisions.

IN WITNESS WHEREOF the parties hereto have duly executed this Agreement on the day and year first written above.

**ADVANCED UTILITY SYSTEMS
CORPORATION**

Per: _____
Name: Steven Hammond
Title: Vice-President

City of Rapid City

Per: _____
Name: Jim Shaw
Title: Mayor

Per: _____
Name: James Preston
Title: Finance Officer