



# **Information Technology Hardware and Maintenance Contract**

between

The Virginia Information Technologies Agency

on behalf of

The Commonwealth of Virginia

and

Dell Marketing, L.P.

**INFORMATION TECHNOLOGY HARDWARE AND MAINTENANCE CONTRACT  
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## INFORMATION TECHNOLOGY HARDWARE AND MAINTENANCE CONTRACT

THIS INFORMATION TECHNOLOGY HARDWARE AND MAINTENANCE CONTRACT (“**Contract**”) is entered into by and between the Virginia Information Technologies Agency (“**VITA**”), pursuant to § 2.2-2012 of the *Code of Virginia* (“**Code**”) and on behalf of the Commonwealth of Virginia (“**Commonwealth**”), and Dell Marketing, L.P. (“**Supplier**”), a Texas limited partnership headquartered at One Dell Way, Round Rock, TX 78682 to be effective as of August 22, 2019 (“**Effective Date**”).

### 1. PURPOSE AND SCOPE

VITA, on behalf of the Commonwealth, seeks to provide Authorized Users and public bodies with a broad range of computer hardware device options to satisfy the immediate and future computer hardware needs of the Commonwealth. To achieve this goal, VITA is seeking services that will provide one or more contracts for the purchase of computer hardware – including personal computer devices, peripherals, and servers – and associated services for the Commonwealth. This Contract sets forth the terms and conditions under which Supplier will provide personal computers, servers, laptops, thin clients, all-in-one devices, rugged devices, tablets, peripherals and related services in accordance with the terms and conditions of the RFP, to the Authorized Users.

### 2. DEFINITIONS

#### A. Acceptance

Successful Delivery and performance by the Supplier of its contractual commitments at the location(s) designated in the applicable Statement of Work (“**SOW**”) or order.

#### B. Agent

Any third party independent agent of any Authorized User.

#### C. Application

Means computer programs that are designed to perform specialized data processing tasks for the user and any Software specifically designated by Supplier as Application. The software programs in object code and other related data, and Documentation contained and applicable to Licensed Services hosted and supported by Supplier under the Contract, as described in Exhibit A or as described in any SOW or order issued under the Contract, may include Updates, enhancements, and replacements to the Application.

#### D. Authorized Users

All public bodies, including VITA, as defined by Code § 2.2-4301 and referenced by Code §§ 2.2-4304 and 2.2-2012, authorized to participate in the procurement of information technology under this Contract. Authorized Users include private institutions of higher education chartered in Virginia and granted tax-exempt status under §501(c)(3) of the Internal Revenue Code that are listed at: <http://www.cicv.org/Our-Colleges/Profiles.aspx>.

#### E. Claim

Any and all losses, damages, claims, demands, proceedings, suits and actions, including any related liabilities, obligations, losses, damages, assessments, fines, penalties (whether criminal or civil), judgments, settlements, expenses (including attorneys’ and accountants’ fees and disbursements), and costs. Collectively, “Claims”.

#### F. Code

The Code of Virginia, as amended, and all laws in the titles, chapters, articles and sections contained therein.

#### G. Commonwealth

The Commonwealth of Virginia.

#### H. Commonwealth Indemnified Parties

Means, collectively and individually, the Commonwealth, VITA, any Authorized User, their officers, directors, agents, and employees.

**I. Computer Virus**

Any malicious code, program, or other internal component (e.g., computer virus, computer worm, computer time bomb, or similar component), which could damage, destroy, alter or disrupt any computer program, firmware, or hardware or which could, in any manner, reveal, damage, destroy, alter or disrupt any data or other information accessed through or processed by such software in any manner.

**J. Confidential Information**

Any confidential or proprietary information of a Party that is disclosed in any manner, including oral or written, graphic, machine readable or other tangible form, to any other Party in connection with or as a result of discussions related to this Contract or any order or SOW issued hereunder, and which at the time of disclosure either:

(i) is marked as being "Confidential" or "Proprietary";

(ii) is otherwise reasonably identifiable as the confidential or proprietary information of the disclosing Party; or

(iii) under the circumstances of disclosure should reasonably be considered as confidential or proprietary information of the disclosing Party.

**K. Consumables**

Toner, drums, fuser agent, developer, ink cartridges, maintenance kits, feeder rollers, transfer kits, waste toner boxes and cleaning kits, and other products which may be needed for the operation of the devices provided by the Supplier on behalf of the Authorized User in order to fulfill the services.

**L. Contract**

This agreement, including all exhibits, schedules, and attachments, including any modifications or amendments thereto, entered into by VITA and Supplier.

**M. Contractor**

The use of the term "Contractor" in any of the following terms, conditions, links, or IRS Publication 1075 means the same as the term "Supplier" as defined and used in this Contract.

**N. Deliverable**

The embodiment of the work performed by Supplier or any combination of Services, Maintenance Services, Licensed Services, Application, Solution, Solution Component, Software, System Software, reports, Product, Supplier Product, and Updates, including any and all components, provided or delivered by the Supplier in fulfilling its obligations under the Contract or as identified in the applicable SOW or order. "Deliverable" also means the development or creation of Work Product, if Work Product is agreed to be a deliverable via a SOW and is authorized under the Contract.

**O. Documentation**

Those materials means the then current, generally available (including user manuals, training materials, guides, product descriptions, technical manuals, product specifications, product notices and supporting materials) detailing the information and instructions needed in order to allow any Authorized User and its agents to make use of the Application, Software, Solution, Product, Service, Licensed Services or Deliverable,.

**P. Effective Date**

The date this Contract goes into full force and effect as set forth in the preamble of this Contract above.

**Q. Federal Tax Information ("FTI")**

FTI consists of federal tax returns and return information (and information derived from it) that is in the possession or control of any Authorized User, which is covered by the confidentiality protections of the Internal Revenue Code ("IRC") and subject to the IRC § 6103(p)(4)

safeguarding requirements including IRS oversight. FTI is categorized as "Sensitive" but "Unclassified" information and may contain personally identifiable information.

**R. Industrial Funding Adjustment ("IFA")**

The fee paid by Supplier to VITA to compensate VITA for the cost of procuring and managing the Contract.

**S. Inventory Record**

A record of all units of Product covered under warranty or maintenance by type, quantity, and location, including the end date for each unit's warranty period or maintenance term, as applicable.

**T. Maintenance Coverage Period ("MCP")**

The period of time during which Supplier is obligated to provide Maintenance Services for a unit of Software or Product.

**U. Maintenance Level**

The defined parameters of Maintenance Services, including the times during which, and time-frames in which, Supplier shall respond to a request for Maintenance Services. The available Maintenance Levels are defined in Exhibit B to this Contract or as defined in any Statement of Work or order issued pursuant to this Contract. The actual Maintenance Level for a unit of Software or Product will be set forth in the signed order or Statement of Work for Maintenance Services of that Software or Product referencing this Contract.

**V. Maintenance Services**

Those services, preventive and remedial, provided or performed by Supplier under the Contract, or for an Authorized User pursuant to an order or SOW, in order to ensure continued operation of the Product, hardware, or Software, including Software Updates. Maintenance Services include support services. Maintenance Services for Software may include the development of Work Product, if so authorized in the Contract.

**W. Multifunction Device ("MFD")**

A device which includes various capabilities, including by not limited to, copying, printing, faxing and scanning as determined by the applicable original equipment manufacturers specifications.

**X. Operating Condition**

The condition that allows the Software or Product to function in a normal, acceptable working manner, as designed by the Software or Product manufacturer, and, if applicable, in compliance with any service levels established in the Contract or any SOW or order issued under the Contract.

**Y. Party**

Any combination of Supplier, VITA, or the Commonwealth. In an SOW, any Authorized User is also a "Party". Collectively, "Parties".

**Z. Performance Changes**

Any engineering changes that affect the ability of the Product(s) provided by Supplier pursuant to this Contract to meet the published specifications.

**AA. Preventative Maintenance**

Maintenance that can be performed in advance of an actual problem or malfunction through the monitoring of internal diagnostic reports generated automatically by print output devices.

**BB. Product**

For the purposes of this Contract, "Product" includes personal computers, servers, laptops, thin clients, all-in-one devices, rugged devices, tablets, peripherals, and any other equipment, including the System Software, as well as all upgrades, and related accessories as set forth on Exhibit A or as specified in any Statement of Work or order provided pursuant to the Contract.

**CC. Prompt Payment Act**

The Virginia Prompt Payment Act, Code §§ 2.2-4347 *et seq.*, as amended.

**DD. Realized Sales**

Sales under this Contract for which Supplier has received full and complete payment from an Authorized User.

**EE. Receipt**

An Authorized User has physically received or has unfettered access to any Deliverable at the correct “ship-to” location.

**FF. Requirements**

The functional, performance, operational, compatibility, and other parameters and characteristics of the Product, Software, as set forth in Exhibit A or the applicable SOW or order, and such other parameters, characteristics, or performance standards that may be agreed upon in writing by the Parties.

**GG. Response Time**

The time between Supplier’s receipt of Authorized User’s request for Maintenance and the time Supplier has notified Authorized User that it has commenced repair and resolution of the reported problem.

**HH. Safety Changes**

Any engineering changes that affect the safety of the Product(s) provided pursuant to this Contract.

**II. Services**

Any work performed or service provided by Supplier in fulfilling its obligations under the Contract or, as applicable, any Statement of Work or order issued under the Contract, including design, and development of software and modifications, software updates, solution, products, implementation, installation, maintenance, support, testing, training, or other provision to the Authorized User of any Deliverable described in the applicable Statement of Work or order, as authorized by the Contract scope. As permitted by the scope of the Contract, may include the discovery, creation, or development of Work Product, if any. This definition does not include Licensed Services.

**JJ. Subcontractor**

Any group or person that furnishes supplies or services to the Commonwealth, VITA, or any Authorized User on behalf of Supplier or another Subcontractor in performance of this Contract.

**KK. Supplier**

The entity set forth in the preamble of this Contract.

**LL. Supplier Personnel**

Any and all of Supplier’s employees, agents, contractors, or subcontractors performing services under this Contract.

**MM. Supplier Product**

Supplier’s proprietary reports, information and data made available to Authorized User as part of the Licensed Services.

**NN. Supplier Reporting System (“SRS”)**

The VITA system used by Supplier to fulfill reporting obligations under this Contract. The SRS can be accessed at the following URL(s): <http://vita2.virginia.gov/procurement/srs/>, or any successor URL(s).

**OO. SWaM**

Any entity certified by the Commonwealth’s Department of Small Business and Supplier Diversity as a small, women-owned, minority-owned, or service disabled veteran-owned business, as



defined in Code §§ 2.2-2000.1 and 2.2-4310, or a certified micro business as defined in Executive Order Number 20 (2014).

**PP. System Software**

Software that provides basic hardware functionality and provides a platform for applications to run (e.g., firmware and BIOS software), and any Software specifically designated by Supplier as System Software the purpose of which is to operate and manage the Products in which it is embedded. The operating system code, including software, for each Product, may including any subsequent revisions, as well as any applicable documentation to be agreed to by the Parties.

**QQ. Term**

The period of time beginning with the Effective Date and lasting for the length of time, including any extension periods, set forth in the "Contract Term" section below during which this Contract will be in full force and effect.

**RR. Transition Out Plan**

The written plan developed by Supplier addressing the transition of Supplier's contractual obligations, in whole or in part, away from the Supplier and to Authorized User, or its designee, after the expiration or termination of the Contract.

**SS. Transition Period**

The period of time after the expiration or termination of the Contract that, Supplier is obligated to continue providing assistance to Authorized Users so as to transition the Supplier's contractual obligations, or any portion thereof, to any other supplier.

**TT. Update**

Any update, modification or new release of the COTS Software, System Software, Application, Documentation, or Supplier Product that Software Publisher or Supplier makes generally available to its customers at no additional cost. Software Updates may include patches, fixes, upgrades, enhancements, improvements, or access mode, including without limitation additional capabilities to or otherwise improve the functionality, increase the speed, efficiency, or base operation of the Software.

**UU. VITA**

The Virginia Information Technologies Agency, an agency of the Commonwealth of Virginia pursuant to Chapter 20.1 (§§ 2.2-2005 *et seq.*) of the Code, or any successor agency.

**VV. Warranty Period**

The period of time during which Supplier is obligated to provide maintenance for a unit of Software or Product.

**WW. Work Product**

Each party will retain all patents (including reissues, divisions, continuations and extensions thereof), utility models, and registered and unregistered designs including mask works, copyrights and any other form of protection afforded by law to inventions, models, designs or technical information, and applications therefore (collectively, "**Intellectual Property Rights**"), that it owned or controlled prior to the date of this Agreement, or Intellectual Property Rights that result from activities independent of the Services performed pursuant to this Agreement ("**Background IP**"). In addition, subject to payment in full for the applicable Services, for the portion of deliverables that consists of scripts and code, Dell shall grant to the Customer a perpetual, non-exclusive, non-transferable, full paid right and license to use the deliverables solely for the University to use the deliverables as specified by the terms of this Agreement.

Work Product: Subject to payment in full for the applicable Services, the University shall own all copyrights in the portion of any deliverables that consist solely of written reports, designs, charts, plans, specifications, data, documentation and information, analyses and other working papers unique to the University's environment, and specifically produced or created by Dell for the

University as a result of the Services which are provided to the University by Dell in connection with this Agreement and specifically identified in a Work Order ("**Work Product**").

Utilities; Residual IP: Notwithstanding the foregoing, the University acknowledges that Dell will retain all right, title and interest in and to all Intellectual Property Rights in or related to the Services, or tangible components thereof, including but not limited to (a) all know-how, intellectual property, methodologies, processes, technologies, algorithms, software or development tools used in performing the Services (collectively, the "**Utilities**"), and (b) ideas, concepts, know-how, processes and reusable reports, designs, charts, plans, specifications, documentation, forms, templates or output which are developed, created or otherwise used by or on behalf of Dell in the course of performing the Services or Creating the Work Product, which do not specifically incorporate proprietary or Confidential Information or data of the University (the "**Residual IP**"), whereby such Utilities and Residual IP shall be considered Dell Background IP even if embedded in the Work Product.

The foregoing warranty is predicated on Dell's reservation of all intellectual property rights in the Professional Services that it has not expressly granted to Customer pursuant to a statement of work, and any work product associated with the Professional Services shall not be a "work made for hire" under applicable law.

### **3. TERM AND TERMINATION**

#### **A. Contract Term**

This Contract is effective and legally binding as of the Effective Date and, unless terminated as provided for in this section, will be effective and legally binding for a period of two (2) years ("**Term**"). VITA, in its sole discretion, may extend this Contract for up to three (3) additional one (1) year periods after the expiration of the initial Term. VITA will issue a written notification to the Supplier stating VITA's intention to exercise the extension period no less than 30 calendar days prior to the expiration of any current term. In addition, performance of an order or SOW issued during the Term of this Contract may survive the expiration of the Term of this Contract, in which case all contractual terms and conditions required for the operation of such order or SOW will remain in full force and effect until all of Supplier's obligations pursuant to such order or SOW have met the final Acceptance criteria of the applicable Authorized User.

#### **B. Termination for Convenience**

VITA may terminate this Contract, in whole or in part, at any time and for any reason upon not less than 30 calendar days prior written notice to Supplier. An Authorized User may terminate an order or SOW, in whole or in part, at any time and for any reason upon not less than 30 calendar days prior written notice to Supplier. Any termination under this provision will not affect the rights and obligations attending any order or SOW outstanding at the termination date.

#### **C. Termination for Breach**

In the event of breach by the Supplier, VITA will have the right to terminate this Contract, in whole or in part, and an Authorized User may terminate an order or SOW issued hereunder, in whole or in part. Supplier will be deemed in breach in the event that Supplier fails to meet any material obligation set forth in this Contract or in any order or SOW issued hereunder. Any termination under the provisions of this section will be deemed a "Termination for Breach".

If VITA deems the Supplier to be in breach, VITA shall provide Supplier with notice of breach and allow Supplier 15 business days to cure the breach. If Supplier fails to take reasonable steps to cure the breach as noted, VITA may immediately terminate this Contract or any order or SOW issued pursuant to this Contract, in whole or in part. If an Authorized User deems the Supplier to be in breach of an order or SOW, that Authorized User shall provide Supplier with notice of breach and allow Supplier 15 business days to cure the breach. If Supplier fails to cure the breach as noted, the Authorized User may immediately terminate its order or SOW, in whole or in part. In addition, if Supplier is found by a court of competent jurisdiction to be in violation of or to have violated 31 U.S.C. § 1352, or if Supplier becomes a party excluded from Federal Procurement and Nonprocurement Programs, VITA may immediately terminate this Contract, in whole or in part, for breach, and VITA shall provide written notice to Supplier of such termination. Supplier shall provide prompt written notice to VITA if Supplier is charged with violation of 31 U.S.C. § 1352, or if federal debarment proceedings are instituted against Supplier.

**D. Termination for Non-Appropriation of Funds**

All payment obligations from public bodies under this Contract are subject to the availability of legislative appropriations at the federal, state, or local level for this purpose. In the event of non-appropriation of funds, irrespective of the source of funds, for the items under this Contract, VITA may terminate this Contract, in whole or in part, or any order or SOW, in whole or in part, or an Authorized User may terminate an order or SOW, in whole or in part, for those goods or services for which funds have not been appropriated. Written notice will be provided to the Supplier as soon as possible after legislative action is completed.

**E. Effect of Termination**

Upon termination, neither the Commonwealth, nor VITA, nor any Authorized User will have any future liability except for Deliverables accepted by an Authorized User or Services (including any applicable Maintenance Services) rendered by Supplier or Software publisher as applicable and accepted by the Authorized User prior to the termination date.

In the event of a Termination for Breach, Supplier shall accept return of any Deliverable that was not accepted by the Authorized User, and Supplier shall refund any monies paid by any Authorized User for the unaccepted Deliverable. Supplier will bear all costs of de-installation and return of Deliverables.

**F. Termination by Supplier**

In no instance will termination by Supplier be considered. Failure by an Authorized User to make timely payments owed to Supplier for its performance under this Contract will constitute a breach by that Authorized User. Supplier's remedy for a breach is limited to the remedies set forth in Code § 2.2-4363 and the "Remedies" section of this Contract below.

**G. Transition of Services**

At the request of an Authorized User prior to or upon expiration or termination of this Contract, Supplier shall provide reasonable assistance as the Authorized User may reasonably require to transition the Supplier's contractual obligations, or any portion thereof, to any other supplier with whom the Authorized User contracts for provision of same. This Transition Period obligation may extend beyond expiration or termination of the Contract for a reasonable period of time not to exceed. In the event of a Breach. Supplier shall provide all such reasonable transition assistance requested by the applicable Authorized User at no charge or fee to VITA or any Authorized User; otherwise Supplier shall provide such assistance at a reasonable hourly rate or a charge agreed upon by Supplier and VITA or Authorized User

**H. Contract Kick-Off Meeting**

Within 30 calendar days of the Effective Date, Supplier may be required to attend a contract orientation meeting, along with the VITA contract manager/administrator, Authorized User project manager(s) or authorized representative(s), and any other significant stakeholders who have a part in the successful performance of this Contract. The purpose of this meeting will be to review all contractual obligations for both parties, all administrative and reporting requirements, and to discuss any other relationship, responsibility, communication and performance criteria set forth in the Contract.

**I. Transition Out Plan**

If requested by VITA or Authorized User within three (3) months of the Effective Date of an order, Supplier will develop and distribute to the applicable Authorized User a Transition Out Plan. The Supplier will maintain the Transition Out Plan throughout the Term, and update the Transition Out Plan as needed and subject to Authorized User's approval.

**J. Contract Closeout**

Prior to the Contract's expiration date, Supplier may be provided contract closeout documentation by VITA. If contract closeout documentation is provided, then Supplier shall complete, sign, and return to VITA Supply Chain Management any required documentation within 30 calendar days of receipt to ensure completion of closeout administration and to maintain a positive performance reputation with the Commonwealth.

#### 4. SUPPLIER PERSONNEL

##### A. Selection and Management of Supplier Personnel

Supplier shall take such commercially reasonable steps as may be reasonably necessary to ensure that all Supplier Personnel performing services under this Contract are competent and knowledgeable of the contractual arrangements and the applicable order or SOW between Authorized User and Supplier. Supplier shall be solely responsible for the supervision and conduct of Supplier Personnel, including all acts and omissions. Additionally, Supplier shall ensure that Supplier Personnel comply with the appropriate Authorized User's site security, information security and personnel conduct rules, as well as applicable federal, state and local laws, including export regulations. Authorized User reserves the right to require the immediate removal from such Authorized User's premises of any Supplier Personnel whom such Authorized User believes in good faith has failed to comply with the above or whose conduct or behavior is unacceptable or unprofessional or results in a security or safety breach.

##### B. Subcontractors

Supplier may use Subcontractors to perform its contractual obligations or any order or SOW issued pursuant to the Contract unless specifically prohibited in writing to do so by the Authorized User. If an order or SOW issued pursuant to this Contract is supported in whole or in part with federal funds, Supplier may not subcontract to any Subcontractor that is a party excluded from Federal Procurement and Nonprocurement Programs. In no event may Supplier subcontract to any Subcontractor that is debarred by the Commonwealth or that owes back taxes to the Commonwealth and has not made arrangements with the Commonwealth for payment of such back taxes.

If Supplier subcontracts the provision of any performance obligation under this Contract to any other party, Supplier shall (i) act as prime contractor and will be the sole point of contact with regard to all obligations under this Contract; and (ii) Supplier shall remain responsible for the performance of its obligations under this contract.

#### 5. NEW TECHNOLOGY

##### A. Access to New Technology

Supplier will use commercially reasonable efforts to bring to VITA's attention any new products or services within the scope of the Contract that Supplier believes will be of interest to VITA and will work to develop proposals for the provision of any such products or services as VITA requests.

##### B. New Service Offerings Not Available from Supplier

If new or replacement product or service offerings become available and cannot be competitively provided by the Supplier under the scope of this Contract, VITA will have the right to purchase the new or replacement products or services from a third party. If VITA elects to use such new or replacement product or service offerings, Supplier will reasonably assist VITA to migrate to such products or services.

If VITA elects to acquire new products or services as described in the paragraph above and such services replace existing Supplier-provided services, discount tiers and any commitments (as applicable per the Contract) will be reduced to reflect reductions in purchases of the replaced products or services.

#### 6. GENERAL WARRANTY

THE OBLIGATIONS OF SUPPLIER UNDER THIS GENERAL WARRANTY SECTION ARE MATERIAL. SUPPLIER MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY CONCERNING MERCHANTABILITY OR FITNESS FOR ANY OTHER PARTICULAR PURPOSE.

Supplier warrants and represents to VITA the products as described in Exhibit A as follows:

##### A. Ownership

Supplier has to the best of its knowledge the right to perform and provide all contractual obligations and provide all needed services or products without violating or infringing any law,

rule, regulation, copyright, patent, trade secret, or other proprietary right of any third party. Supplier is the owner of the Product or otherwise has, to the best of its knowledge, the right to grant to the Commonwealth or any Authorized User title or the right to use the Product provided pursuant to this Contract. At the time of order placement, the Commonwealth or ordering Authorized User, as applicable, will obtain good and clear title to the Product, excluding the System Software, and free and clear of all liens, claims, security interests, and encumbrances, to the best of Supplier's knowledge and ability.

**B. Coverage Period**

Limited Warranty During the warranty period, Supplier shall provide assistance as required by an Authorized User in exercising its rights pursuant to Hardware Manufacturers Limited Warranty in accordance with Exhibit B.

**C. Documentation and Deliverables**

i. Any required Documentation Supplier is obligated to provide under this Contract will be sufficient in detail.

ii. All Deliverables provided or delivered pursuant to this Contract are at the current release level unless an Authorized User specifies an older version in its order or SOW.

iii. No Update, engineering change, or revision made to any Supplier-provided Deliverables will (a) degrade the performance of any Deliverable or its components to a level below that defined in the Requirements or the Product manufacturer's or Software Publisher's published specifications, as applicable; or (b) cause any other warranty to be breached.

**D. Malicious Code**

Supplier shall not knowingly provide any Software with known Computer Viruses or undocumented features in the Software at the time of delivery to an Authorized User.

**E. Supplier's Viability**

Supplier has the financial capacity to perform and continue to perform its obligations under this Contract. Supplier has no constructive or actual knowledge of a potential legal proceeding being brought against Supplier that could materially adversely affect performance of this Contract. Further, Supplier is not prohibited by any contract, or order by any court of competent jurisdiction from entering into this Contract.

**F. Supplier's Past Experience**

Supplier has met similar contractual obligations and fulfilled the Requirements as set forth in Exhibit A and in this Contract, in similar or greater complexity, to other customers without significant problems due to Supplier's performance and without causing a contractual breach or default claim by any customer

**7. SCOPE OF USE**

Any Authorized User may use the Product, and any Software licensed in connection with the Product, based off the operating license on a worldwide basis for the benefit of itself and its agents. Supplier may provide written consent for use of the Product by third parties who are under contract with an Authorized User to provide outsourcing services.

**8. DELIVERY AND INSTALLATION**

**A. Delivery Procedure**

Supplier shall deliver all Products F.O.B. destination, with the destination being the "ship to" address specified in the applicable order or SOW. Supplier shall select the vendor for shipment. Supplier will bear all risk of loss or damage to the Product until Receipt. In all cases, Supplier shall arrange and pay for all transportation and insurance sufficient to fully protect the Product while in transit. Each shipment must include a packing slip indicating this Contract number, the Authorized User's order number, the SOW number, if applicable, the part number, a description of the Product shipped and the quantity shipped. Each package in any shipment must (i) be numbered; (ii) have a description stenciled on the outside indicating the quantity of Product

contained by part number and description; and (iii) must conspicuously display the number of the package in that shipment which contains the packing slip. If required by the Authorized User, Supplier shall bar code all packages shipped. If any loss to, or damage of, the Product occurs prior to Acceptance by the Authorized User, Supplier shall immediately provide a replacement item. Title to Product, excluding software will pass upon Acceptance.

Supplier will make available all appropriate and required Documentation at the time of delivery of the first unit of each different Product type.

**B. Late Delivery**

Supplier acknowledges and agrees that failure to deliver the Product ordered in accordance with the agreed upon delivery schedule as set forth in the order or SOW may constitute a breach of this Contract. If the delay lasts longer than thirty (30) calendar days, the Authorized User may immediately cancel the order.

In addition, in the event the Supplier fails for any reason to deliver the Product within thirty (30) calendar days of the agreed upon delivery date set forth in the order/schedule, or if no date was specified, following the date the order or SOW was received by Supplier, then the ordering Authorized User, may give Supplier written notice of cancellation regarding the subject order or OW.

**C. Product Trade-in and Upgrade**

To be determined upon execution of contract.

**D. Product Installation**

Unless agreed and as reflected/written on the order or SOW, Supplier shall provide the initial installation of all Product at no additional charge. Installation will include: unpacking, removal of all shipping/packing materials, positioning, connecting to internal utility services, testing, and related necessary services to allow for Acceptance by the Authorized User.

All Product installations shall comply with building and facilities standards established by the ordering Authorized User. If Authorized User installs the Product, Supplier shall provide all reasonably necessary telephone assistance at no charge.

**9. ACCEPTANCE**

**A. Product Acceptance**

Products will be deemed accepted when the ordering Authorized User receives the Products at the time and location designated in the applicable order or SOW.

**B. Cure Period**

Customer may only return Products to the Supplier that are permitted to be returned pursuant to the return policy located at [www.Dell.com/returnspolicy](http://www.Dell.com/returnspolicy). All Equipment, and Operating Systems are deemed accepted by Customer upon Delivery, however, Customer retains all rights and remedies set forth in the applicable Product warranty. Supplier shall correct any non-conformities identified and re-submit the corrected Product within seven (7) calendar days or other period as mutually agreed upon of Supplier's receipt of a written notice of non-conformance, or as otherwise agreed between the Authorized User and Supplier in the applicable order or SOW. If Supplier fails to cure the non-conformity or deliver Product that meets the Requirements, the Authorized User may, in its sole discretion: (i) reject the Product in its entirety and recover amounts previously paid to Supplier; (ii) issue a "partial Acceptance" of the Product with an equitable adjustment in the price to account for such deficiency; or (iii) conditionally accept the applicable Product while reserving its right to revoke Acceptance if timely correction is not forthcoming. Failure of a Product to meet, in all material respects, the Requirements after the second set of acceptance tests may constitute a breach by Supplier. In the event of such breach, the Authorized User may, at its sole discretion, terminate its order or SOW, in whole or in part, for the Product and any Services to be provided by Supplier.

**10. PRODUCT SUPPORT AND ADDITIONAL SERVICES**

**A. Authorized User or Third Party Support**

1. Documentation and Support Availability

In the event that VITA terminates this Contract, Supplier shall provide reasonable necessary user and installation Documentation. Authorized User to maintain and repair the Product itself, or to obtain support and Maintenance Services from a third-party. Supplier shall also provide the reasonable Documentation and training necessary to allow any Authorized User to self-maintain to the subcomponent level.

2. Timeliness and Price

Supplier agrees to make the above-referenced Documentation, training, and spare parts and components available within 15 business days or other mutually agreed to period following receipt of a written request, and at a price set forth in Exhibit B.

**B. Engineering Changes and Product Modification**

Product processing or operating capability, they will be scheduled at the Authorized User's request with supplier agreement. The Authorized User will have the option with the supplier agreement to waive or pre-approve all other engineering changes planned by Supplier on the Product delivered or planned for delivery to the Authorized User.

**C. Inventory Record**

Supplier shall maintain the Inventory Record at no additional cost or reduction in the Warranty Period. Product quantities and types may vary as Product is added or deleted from coverage. Authorized User shall notify Supplier in writing of any Product relocated, added, or removed from service. Upon receipt of this notification, Supplier will amend the Inventory Record to reflect the addition, or deletion of the Product. Supplier shall provide, at no additional cost, a copy of the most current Inventory Record to any Authorized User upon request.

**D. Product Service Record**

Supplier shall maintain, at no additional cost, a Product Service Record for each unit of Product covered under warranty or maintenance. The Product Service Record must include the following records for each unit of Product: (i) installation/ relocation/ removal/ modifications; (ii) remedial actions; (iii) preventive actions; and (iv) any additional services not covered by warranty or maintenance. Upon request by the Authorized User, Supplier shall provide, at no additional cost, a copy of the Product Service Record.

**E. Additional Services**

Upon request of an Authorized User by means of an order or SOW issued in accordance with the ordering provisions of this Contract, Supplier will provide additional on-site services which may include: (i) relocation of previously installed hardware; (ii) assistance to Authorized User's communications department in mutually acceptable duties related to the warranty or Maintenance Services provided under this Contract; and (iii) cabling, if applicable. The Authorized User shall compensate Supplier for such additional on-site services in accordance with the prices identified in Exhibit B. These additional on-site services will be in addition to any existing on-site Warranty Services or Maintenance Services obligations of Supplier

Upon request of an Authorized User by means of a mutually agreed to order or SOW issued in accordance with the ordering provisions of this Contract, Supplier may also provide the following services beyond those identified as Warranty Services or Maintenance Services offerings: (i) service on equipment not covered by this Contract; (ii) repair of damage or replacement of parts of Hardware resulting from changes in the hardware environment, extraordinary use of the hardware, or interconnected devices; or (iii) service outside the applicable hours of service specified in an executed order or SOW referencing this Contract. The charge for such services will be at the hourly rate specified in Exhibit B and will be inclusive of all expenses.

**11. WARRANTY AND REMEDY OF PRODUCT**

**A. Product**

Supplier warrants the following with respect to the Product:

- i. The Product will be free of defects in material, design, and workmanship pursuant to Dell's Warranty;
- ii. Upon delivery, the Product will be new and in Operating Condition and will have all engineering changes released to date already installed;
- iii. Supplier shall not disable any Authorized User's use of System Software through remote access or otherwise. If the System Software contains authorization codes allowing access to a data base or other software, Supplier warrants that such codes will be perpetual and non-expiring.

**B. Warranty Services**

Supplier will provide the Warranty Services as specified in Exhibit B.

**12. MAINTENANCE SERVICES**

Supplier shall provide Maintenance Services (including unlimited telephonic support and all necessary travel and labor) during the MCP at the prices identified in Exhibit B without additional charge to maintain the Product in accordance with the Requirements.

Exhibit B attached to this Contract provides detailed descriptions of the Supplier's warranty and maintenance offerings and responsibilities, as well as remedies available to the Authorized User in the event Supplier fails to perform its warranty and maintenance obligations. Any remedies will be paid to the Authorized User on a quarterly basis. Exhibit B also defines coverage periods, response times, and restore times.

VITA acknowledges that Maintenance Services depend upon the Products offered and acquired, and the level of support purchased. Supplier agrees to work with Authorized User to ensure proper adequate product support but shall not be responsible for the performance of such Maintenance Services.

**A. Ordering**

See the "Fees, Ordering, and Payment Procedure" section of this Contract below.

**13. FEES, ORDERING, AND PAYMENT PROCEDURE**

**A. Fees and Charges**

In consideration for the Supplier's performance obligations under this Contract, an Authorized User shall pay Supplier the fee(s) owed pursuant to the schedule of fees and charges as set forth on Exhibit B attached to this Contract. Supplier will only be entitled to those fees owed for Supplier's performance obligations and any additional Products and Services provided to an Authorized User in accordance with the scope of this Contract and the Requirements, as authorized by Exhibit A, and per the Authorized User's order or SOW. The fees, and any associated discounts, will be applicable throughout the Term of this Contract unless modified pursuant to the terms and conditions below. In the event the fees or discounts apply for any period less than the entire Term, Supplier agrees that it will not increase the fees during the first twelve (12) month period following the Effective Date, and will not increase the fees more than once in any subsequent twelve (12) month period thereafter. No increase in fee amounts will exceed the lesser of three percent (3%) or the annual increase in the Consumer Price Index for All Urban Consumers (CPI-U), U.S. City Average, All Items, Not Seasonally Adjusted, as published by the Bureau of Labor Statistics of the Department of Labor (<http://www.bls.gov/cpi/home.htm>), for the date of the increase compared with the same index one (1) year prior. This applies to the discount percentage and is not applicable to the retail price list. Supplier must submit any change in price in writing to VITA and to the Authorized User if the change impacts any SOW or order and in accordance with the above and will not become effective for 60 calendar days thereafter.

**B. Reproduction Rights for Supplier-Provided Software**

For enterprise and other appropriate license types, Supplier shall provide the Authorized User with a reproducible media, at an Authorized User's request and where available. The Authorized User will be responsible for making copies and distributing the Software as required. Within 30



calendar days of the end of each calendar quarter, the Authorized User shall provide to Supplier a report of the net number of additional copies of the Software deployed during the quarter. Supplier will invoice such Authorized User for the net number of new licenses reported as deployed.

**C. Supplier Quote and Request for Quote**

Should an Authorized User determine that a competitive process is required to ensure it receives the best value for its needed Software and/or associated Services under this Contract, such Authorized User may, at its sole discretion, issue a Request for Quote (“**RFQ**”) to obtain products and services identical or similar to those provided pursuant to this Contract. Supplier shall respond to the RFQ by providing a written quote which shall include (a) a detailed description of each product or service proposed, including any applicable components, at the Exhibit B line item level; (b) the quantity of each line item; (c) the total contract price; (d) any additional percentage discount offered; (e) an extended price; (f) any optional or alternate pricing; and (g) any pricing assumptions. If requested by the Authorized User, Supplier’s quote must also include a detailed description of the approach Supplier plans to take in developing, implementing, and maintaining its offering pursuant to the RFQ for the Authorized User. If Supplier is unable to respond to the RFQ Supplier shall notify the Authorized User in writing of its inability to perform the work requested by the Authorized User, and provide the reasons for its inability to perform, prior to the due date for the submission of quotes in response to the RFQ.

**D. Ordering**

All Authorized Users have the right to license or purchase Supplier’s Products or Services under this Contract, but Authorized Users have no obligation to purchase or license from Supplier any of Supplier’s Products or Services. This Contract is optional use and non-exclusive, and all Authorized Users may, at their sole discretion, purchase, license, or otherwise receive benefits from third party suppliers of products and services similar to, or in competition with, the Products and Services provided by Supplier. Supplier shall accept any order or placed by an Authorized User through the Commonwealth’s electronic procurement website portal, eVA (<http://www.eva.virginia.gov/>). Agencies, as defined by Code § 2.2-2006, and legislative, judicial, and independent agencies of the Commonwealth, must order through eVA. All other Authorized Users are encouraged to order through eVA, but may order through the following means:

- i. Purchase Order (“**PO**”): An official PO form issued by an Authorized User. All orders are subject to acceptance by supplier to verify availability.
- ii. Any other order/payment charge or credit card process, such as AMEX, MASTERCARD, or VISA under contract for use by an Authorized User. This ordering authority is limited to issuing orders or SOWs for the contractual offerings and Requirements available under the scope of this Contract. No Authorized User have the authority to modify this Contract under any circumstances. An order or SOW from an Authorized User may contain additional terms and conditions. In the event that the terms and conditions of the Authorized User’s order or SOW are inconsistent with the terms and conditions of this Contract, the terms of this Contract will supersede.

An Authorized User upon mutual agreement may order Maintenance Services if available for any Product at any time during the Term of the Contract, irrespective of whether such Product is covered under warranty or maintenance at the time the order is issued to Supplier. Dell reserves the right to charge then applicable recertification fees, if applicable, for maintenance services on products that are not under warranty or support. Each order will identify:

- iii. Product and, if applicable, serial number, for which Maintenance Services will be provided,
- iv. Maintenance Level to be provided, and
- v. MCP for the Product Maintenance. Authorized User may elect, at any time, another Maintenance Level offered by Supplier. Such amendment will take effect within 30 calendar days following Supplier’s receipt of Authorized User’s written notice, in the form of a mutually agreed upon modification to an order or SOW.

Supplier shall not accept any order or SOW from an Authorized User if the order or SOW is to be funded, in whole or in part, by federal funds and if, at the time the order or SOW is placed,

Supplier is not eligible to be the recipient of federal funds as may be noted on any of the Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs.

ALL CONTRACTUAL OBLIGATIONS UNDER THIS CONTRACT IN CONNECTION WITH AN ORDER OR SOW PLACED BY ANY AUTHORIZED USER ARE THE SOLE OBLIGATION OF SUCH AUTHORIZED USER AND NOT THE RESPONSIBILITY OF VITA UNLESS THE AUTHORIZED USER IS VITA.

**E. Invoice Procedures**

Supplier shall remit each invoice to the “bill-to” address provided with the order promptly after all Supplier’s performance obligations have been accepted and in accordance with the milestone payment schedule, if any, in the applicable order or SOW. No invoice may include any costs other than those identified in the signed order or SOW, and those costs must be in accordance with the schedule of fees listed on Exhibit B. Without limiting the foregoing, all shipping costs are the Supplier’s responsibility except to the extent shipping charges are identified in Exhibit B and noted in any signed order or SOW referencing this Contract. Supplier shall issue invoices that identify, at a minimum:

- i. Dates/periods that invoice covers, including any service or subscription periods, as applicable.
- ii. Line item description of the Deliverable(s) applicable to this Contract, may include any components or service type, and, if applicable, the project milestone.
- iii. Quantity, charge and extended pricing for each line item
- iv. Applicable date of the order or SOW or both
- v. This Contract number and the applicable order number or SOW number or both
- vi. Supplier’s Federal Employer Identification Number (“**FEIN**”)

Any conflicting terms included on Supplier’s invoice will have no force or effect and will in no way bind the Authorized User.

**F. Purchase Payment Terms**

Supplier is responsible for the accuracy of its billing information. Supplier may not issue invoices prior to the shipment date from Supplier’s facility.

**G. Reimbursement of Expenses**

Authorized User shall pay, or reimburse Supplier, for all reasonable and actual travel-related expenses for greater than 30 miles from portal to portal incurred by Supplier during the relevant period. An Authorized User will only be liable to pay for Supplier’s travel-related expenses, including transportation, meals, lodging and incidental expenses, that have been authorized by the Authorized User in advance in the order or SOW. The travel-related expenses will be reimbursable at the then-current per diem amounts as published by the Virginia Department of Accounts (<http://www.doa.virginia.gov/>). Authorized Users who are not public bodies may have their own per diem amounts applicable to Supplier’s pre-approved travel expenses.

All reimbursed expenses will be billed to the Authorized User on a pass-through basis without any markup by Supplier. At Authorized User’s request, Supplier shall provide copies of receipts for all travel expenses over US\$30.00.

**H. Disputed Charges**

If, before payment of an invoice, an Authorized User notifies the Supplier in writing of a disputed charge, Authorized User will have the right to withhold payment of the disputed amount until the dispute is settled or finally resolved. Authorized User and Supplier must use good faith efforts to resolve any disputes. Supplier shall respond in writing to Authorized User’s notification of a disputed charge acknowledging Supplier’s receipt of the dispute within five (5) business days. Any charges disputed by Authorized User will be resolved (whether by credit or explanation of the charge to the Authorized User’s satisfaction) in the Authorized User’s required format within two (2) billing cycles (60 calendar days) following Authorized User’s written notification. In the absence of the Supplier’s written evidence identifying the merit of the disputed amounts, Authorized User will not be obligated to pay the disputed amounts and may consider the matter

concerning the specific identified amounts closed, unless merited documentation has been provided. Authorized User will not pay any disputed amounts that remain unresolved after 180 calendar days. If a disputed charge is reversed, Supplier shall reverse all associated surcharges, regulatory charges and taxes.

#### **14. SUPPLIER SPONSORED PROMOTIONS**

The Supplier, at its discretion, may sponsor Product and Service promotions during the Term or any extensions. In the event that Supplier chooses to sponsor such a promotion, Supplier may provide in writing to VITA, at least five (5) days prior to the promotion, the following information: (i) the dates of the promotion or the duration of the promotion to include the commencement date and the ending date; (ii) the exact Products or Services covered in the promotion; and (iii) the pricing or percentage discount offered during the promotion. VITA will communicate to Supplier in writing its agreement to the promotion.

Supplier may make all sponsored Product or Service promotions shall be available to all Authorized Users. Should the Supplier request a promotion that would be limiting, either through product configuration or quantities of Products and Services, VITA, at its sole discretion, may not provide a written agreement. VITA and Supplier agree that promotions will not target any one Authorized User, or a few Authorized Users.

VITA and Authorized Users may, at their discretion, assist in advertising the promotion. This assistance may consist of advertising space on Authorized User web sites, or other assistance at an Authorized User's discretion.

If Supplier fails to obtain the prior written agreement of VITA for the promotion, proposes prices different from those in the Contract without VITA's consent, or otherwise does not adhere to the provisions of this section, Supplier will be deemed to be in breach of this Contract. VITA will have all remedies for this breach available under the Contract as well as in law and in equity.

#### **15. REPORTING**

Supplier shall submit to VITA a monthly report containing data on:

- i. Amount of Realized Sales; and
- ii. Small Business Procurement and Subcontracting Spend

This report must be submitted in accordance with the instructions and further detailed requirements, and on the templates set forth on the "Supplier Reporting" webpage located at the following URL: <https://www.vita.virginia.gov/supply-chain/supplier-reporting/>, or any successor URL(s). Supplier is encouraged to review the site periodically for updates on Supplier reporting requirements and methods. Supplier's failure to comply with all reporting, payment, and other requirements in this section may be deemed by VITA, in its sole discretion, to be a breach of the Contract.

##### **A. Amount of Realized Sales**

Supplier shall submit to VITA a monthly report of all Realized Sales under this Contract.

In connection to the monthly report of Realized Sales, Supplier shall pay to VITA the following monthly fee in accordance with instructions described on the "Supplier Reporting" webpage located at: <https://www.vita.virginia.gov/supply-chain/supplier-reporting/>. The monthly report of Realized Sales must include these fees and percentages:

- IFA: 2% of monthly sales

##### **B. Small Business Procurement and Subcontracting Spend**

Supplier shall provide to VITA a report of monthly subcontracting spend data. This data must include Supplier's spend with all Subcontractors who provide direct performance for obligations under this Contract. Supplier's monthly subcontracting spend data must be submitted via the SRS webpage located at: <http://vita2.virginia.gov/procurement/srs/>.

In addition, every six (6) months following the Effective Date, Supplier shall submit to VITA a "SWaM Subcontracting Certification of Compliance" ("**SSCC**") certifying that Supplier has fully complied with the Contract's Supplier Procurement and Subcontracting Plan ("**Plan**"). A copy of

Supplier's Plan is attached to this Contract as Exhibit H, and is incorporated by reference. The SSCC must include a written explanation of any variances of greater than 20% between the Plan and the actual subcontractor spend by Supplier. Supplier's SSCC will be maintained by VITA in the Supplier's procurement file. Supplier must submit the SSCC to the following address: SCMInfo@vita.virginia.gov. In the event that Supplier fails to comply with its contractually obligated Plan spend or fails to report its contractually obligated Plan spend, VITA may, at its sole discretion, prohibit or delay any renewals or extensions of the Contract, withhold any final payments due, or both. Supplier's failure to comply will be considered in the prospective award of any future contracts with Supplier.

**16. STATUS MEETINGS**

Supplier will be prepared to conduct monthly stewardship meetings with VITA to provide a broad review of all services, projects and ongoing operations. Supplier should also be prepared to conduct semi-annual meetings/presentations to discuss new products and services and their potential benefit to VITA.

**17. POLICIES AND PROCEDURES GUIDE**

Within 30 calendar days of the Effective Date of the Contract, Supplier will provide VITA with a policy and procedures guide that describes how the Supplier and VITA will work together and how performance, including Deliverables and Services, is to be measured. The guide will provide process diagram details, working activities, and interface points with VITA and Supplier deliverables. Updated versions of the guide will be provided by Supplier to VITA and all Authorized Users every six (6) months during the Term, including any extensions, of the Contract.

**18. TRAINING AND DOCUMENTATION**

**A. Training**

In addition to any online tutorial training Supplier may make available, Supplier's may provide at an additional fee, unless expressly included all training as agreed upon for the training of one (1) Authorized User trainer per order or SOW. In order to allow Authorized User the full benefit of the applicable Deliverable, the training will cover the use and operation of the Deliverable provided to Authorized User including instruction in any necessary conversion, manipulation, or movement of such Authorized User's data. Supplier shall provide personnel sufficiently experienced and qualified to conduct such training at a time and location mutually agreeable to Supplier and Authorized User. Available additional and optional training, and applicable pricing and discounts, are described in Exhibit B.

**B. Documentation**

Supplier shall make available to Authorized User complete copies of any Documentation applicable to the Deliverable(s) provided to Authorized User, in a quantity and media format as agreed upon by the Parties under an order or SOW. This Documentation must include, but is not limited to, overview descriptions of all major functions, detailed step-by-step installation and operating procedures for each screen and activity, and technical reference manuals.

**19. AUTHORIZED USER SELF-SUFFICIENCY**

[RESERVED]

**20. COMPETITIVE PRICING**

[RESERVED]

**21. CONFIDENTIALITY**

**A. Treatment and Protection**

Each Party shall:

- i. hold in strict confidence all Confidential Information of any other Party;

- ii. use the Confidential Information solely to perform or to exercise its rights under this Contract; and
- iii. not transfer, display, convey or otherwise disclose or make available all or any part of the other Party's Confidential Information to any third-party.

A receiving party may, however, disclose the Confidential Information as delivered by the disclosing party to subcontractors, contractors, or agents of the receiving party that are bound by non-disclosure agreements. Each Party shall take the same measures to protect against the disclosure or misuse of the Confidential Information as it takes to protect its own proprietary or confidential information, but in no event will such measures be less than reasonable care.

#### **B. Exclusions**

The term "Confidential Information" does not include information that is:

- i. in the public domain through no fault of the receiving Party or of any other person or entity that is similarly contractually or otherwise obligated;
- ii. obtained independently from a third-party without an obligation of confidentiality to the disclosing Party and without breach of this Contract;
- iii. developed independently by the receiving Party without reference to the Confidential Information of the other Party; or
- iv. required to be disclosed under The Virginia Freedom of Information Act (Code §§ 2.2-3700 *et seq.*) or similar laws or pursuant to a court order.

#### **C. Return or Destruction**

Upon written request of the disclosing party the receiving party shall, at its own expense,

- i. promptly return all tangible Confidential Information (and all copies thereof except the record required by law) to the disclosing Party; or
- ii. upon written request, destroy any Confidential Information in its possession or control, and provide the disclosing party with written certification of the destruction.

Additionally, the receiving party shall cease all further use of the Confidential Information, whether in tangible or intangible form.

The Authorized User shall retain and dispose of Supplier's Confidential Information in accordance with the Commonwealth's records retention policies or, if Authorized User is not subject to the Commonwealth's policies, in accordance with the Authorized User's own records retention policies.

#### **D. Confidentiality Statement**

All Supplier Personnel performing Services pursuant to this Contract are required to sign a confidentiality statement or non-disclosure agreement. Any violation of the statement or agreement will be deemed a breach of this Contract and may result in termination of the Contract or any order or SOW issued hereunder.

#### **E. Freedom of Information Act Acknowledgement**

All Supplier documents now or later comprising the Contract may be released in their entirety under the Virginia Freedom of Information Act, and Supplier agrees that any confidentiality or similar stamps or legends that are attached to any future documents or information may be ignored to the extent they claim confidentiality beyond that permitted by the Virginia Freedom of Information Act.

## **22. INDEMNIFICATION AND LIABILITY**

### **A. Indemnification**

Supplier shall defend all Commonwealth Indemnified Parties against any third party claim that Supplier-branded products or support/maintenance services ("**Supplier Products**"), or use of Supplier Products alone and not in combination with any third party products, services, or items (provide such use is in accordance with this Contract), that infringes or misappropriates a third

party's intellectual property rights enforceable in the country where VITA purchased the Supplier Products from Supplier ("**IP Claim**"); and indemnify Commonwealth Indemnified Parties by paying:(1) the resulting costs and damages finally awarded against Commonwealth Indemnified Parties by a court of competent jurisdiction to the extent that such are the result of the third party IP Claim; or (2) the amounts stated in a written settlement negotiated and approved by Supplier for any IP Claim.

Selection and approval of counsel and approval of any settlement shall be accomplished in accordance with all applicable laws, rules and regulations. For state agencies the applicable laws include §§ 2.2-510 and 2.2-514 of the Code. In all cases, the selection and approval of counsel, and approval of any settlement, shall be satisfactory to the Commonwealth, such approval not to be unreasonably withheld provided Supplier shall have the right and ability to make any final decisions regarding the resolution of the IP Claim. In the event of a settlement between Supplier and a private institution of higher education listed at <http://www.cicv.org/Our-Colleges/Profiles.aspx> who is an Authorized User of this Contract only to the extent provided by the applicable laws, such settlement shall be reasonably satisfactory to that institution provided Supplier shall have the right and ability to make any final decisions regarding the resolution of the IP Claim..

In the event that an IP Claim is commenced against any of Commonwealth's Indemnified Parties alleging that the provision of support/maintenance services for Supplier-branded products under this Contract infringes any third party's Patent, copyright trade secret enforceable in the US and Supplier is of the opinion that the allegations in such Claim in whole or in part are not covered by this indemnification provision, Supplier shall immediately notify VITA in writing, via certified mail, specifying to what extent Supplier believes it is obligated to defend and indemnify under the terms and conditions of this Contract. Commonwealth Indemnified Parties may, at their own expense, participate in the defense of any IP Claim and represents their own interests and Supplier shall in such event make commercially reasonable efforts to provide reasonable cooperation to any Commonwealth Indemnified Parties to permit the Commonwealth Indemnified Parties to defend their interests.

In the event of a Claim pursuant to any actual or alleged infringement or misappropriation of any third party's intellectual property rights by any of the Services, and in addition to all other obligations of Supplier in this Section, Supplier shall at its expense, either (a) procure for VITA the right to continue use of such infringing Services, or any component thereof; or (b) replace or modify such infringing Services, or any component thereof, with non-infringing services reasonably satisfactory to VITA. And in addition, Supplier shall provide VITA with comparable temporary replacement services, or reimburse VITA for the reasonable costs incurred by VITA in obtaining alternative services in the event VITA cannot benefit from the affected Services. If Supplier cannot accomplish any of the foregoing within a reasonable time and at commercially reasonable rates, then Supplier shall accept the return of the infringing component of the Services, along with any other components rendered unusable by VITA as a result of the infringing component, and refund the price paid to Supplier for such components. Notwithstanding the foregoing, Supplier shall have no obligation under (a) if VITA or Authorized User is in material breach of this Contract or (b) for any IP Claim resulting or arising from (i) any modifications of the Suppliers Products that were not performed by or on behalf of Supplier; (ii) any combination, operation, or use of a Supplier Product with any other products, services, items or technology, including third party products and open source software, where the IP Claim would not have arisen but for such combination, operation, or use; (iii) use for a purpose or in a manner for which the Supplier Product was not designed, or use after Supplier notifies VITA or Authorized User to cease such use due to a possible or pending IP Claim; (iv) any modifications made by any person other than Supplier or its authorized representatives; or (v) Supplier's compliance with VITA or Authorized User's written specifications or directions, including the incorporation of any software or other materials or processes provided by or requested by VITA or Authorized User.

Supplier's duty to indemnify and defend under this Section is contingent upon: (i) Supplier receiving prompt written notice of the third-party claim or action for which Supplier is obligated to indemnify VITA or Authorized User under this section; (ii) to the greatest extent allowable under applicable state law, Supplier having the right to control the defense and resolution of such claim or action, provided that resolution does not require monetary payment by VITA or Authorized

User without its consent; and (iii) VITA or Authorized User's cooperation with Supplier in defending and resolving such claim or action.

This Section states VITA and/or Authorized User's exclusive remedies for any IP Claim or action, and nothing in this Contract or elsewhere will obligate Supplier to provide any greater indemnity to VITA or Authorized User.

With respect to any IP Claim that non-supplier branded product(s) provided by Supplier under this Agreement infringes upon that person's or entity's patent, copyright, trade secret or other intellectual property rights enforceable in the United States, Supplier agrees to extend to the appropriate Authorized User any indemnification protection provided by Supplier's suppliers, applicable to such non-supplier branded product(s), that may by its own terms be extended to such Authorized Users without additional payment or liability by Supplier.

## **B. Liability**

Except for liability with respect arising from:

- i. any intentional or willful misconduct, fraud, or recklessness of Supplier or any Supplier Personnel; or
- ii. any negligent act or omission of Supplier or any Supplier Personnel that results in Claims for bodily injury, including death, and damage to real property or tangible property resulting from the negligence of a Supplier or any Supplier Personnel, or
- iii. Supplier's indemnification obligations,

Supplier's liability will not exceed the greater of twice the aggregate value of the product or services giving rise to the claim provided under this Contract for the preceding twelve (12) months prior to the incident which gave cause for the liability or \$1,000,000.00. Supplier agrees that it is fully responsible for all acts and omissions of its employees, agents, and subcontractors, including their gross negligence or willful misconduct. This limitation shall apply on a per-incident basis, it being understood that multiple losses stemming from the same root cause constitute a single incident.

**FOR ALL OTHER CONTRACTUAL CLAIMS, IN NO EVENT WILL ANY PARTY BE LIABLE TO ANY OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES, INCLUDING (WITHOUT LIMITATION) LOSS OF PROFIT, INCOME OR SAVINGS, EVEN IF ADVISED OF THE POSSIBILITY THEREOF, EXCEPT WHEN SUCH DAMAGES ARE CAUSED BY THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF THE PARTY, ITS EMPLOYEES, AGENTS OR SUBCONTRACTORS.**

## **23. INSURANCE** [RESERVED]

## **24. SECURITY COMPLIANCE**

Supplier shall take all commercially reasonable steps to comply with all applicable provisions of the then-current Commonwealth security procedures, published by VITA and which may be found at: <https://www.vita.virginia.gov/it-governance/itrm-policies-standards/>, or any successor URL(s), as are pertinent to Supplier's performance of Services under this Contract . Further, Supplier shall comply with all applicable provisions of the relevant Authorized User's then-current security procedures as are pertinent to Supplier's performance of services under this contract and which have been provided to Supplier by the Authorized User. Supplier shall also comply with all applicable federal, state, and local laws and regulations.

Any unauthorized release of any Confidential Information, or Commonwealth proprietary or personal information, by the Supplier or Supplier Personnel constitutes a breach of Supplier's obligations under the Contract. VITA and Authorized Users acknowledge that additional security procedures may result in additional costs

Supplier does not require access to and will not create, maintain or store Personal Information during the performance of Services under the scope of this contract. Any access to Personal Information during the performance of Services will be incidental to the Services provided. VITA and Authorized

Users are solely responsible for encrypting or redacting Personal Information which Supplier may have access to during the course of performance of Services hereunder.

## **25. IMPORT/EXPORT**

Supplier shall comply with all data export laws and regulations. In addition, VITA policy requires that any data deemed “restricted” or “sensitive” by either federal or state authorities, may only be collected, developed, analyzed, or otherwise used or obtained by persons or entities working within the boundaries of the United States.

## **26. BANKRUPTCY**

If Supplier becomes insolvent, takes any step leading to its cessation as a going concern, fails to pay its debts as they become due, or ceases business operations continuously for longer than 15 business days, then VITA may immediately terminate this Contract, and an Authorized User may terminate an order or SOW, on notice to Supplier unless Supplier immediately gives VITA or such Authorized User adequate assurance of the future performance of this Contract or the applicable order or SOW. If this Contract has not been otherwise terminated and bankruptcy proceedings are commenced with respect to Supplier, then VITA may suspend all further performance of this Contract until Supplier assumes this Contract and provides adequate assurance of its performance of Supplier’s contractual obligations or rejects this Contract pursuant to Section 365 of the Bankruptcy Code or any similar or successor provision, it being agreed by VITA and Supplier that this is an executory contract. Any suspension of further performance by VITA or Authorized User pending Supplier’s assumption or rejection will not be a breach of this Contract, and will not affect the rights of VITA or any Authorized User to pursue or enforce any of its rights under this Contract or otherwise.

## **27. GENERAL PROVISIONS**

### **A. Relationship Between VITA and Authorized User and Supplier**

Supplier has no authority to contract for, bind or commit to any agreement of any kind, or to assume any liabilities of any nature in the name of or on behalf of VITA or any Authorized User. Under no circumstances will Supplier, or any Supplier Personnel, hold itself out as or be considered an agent or an employee of VITA or any Authorized User, and neither VITA nor any Authorized User will have any duty to provide or maintain any insurance or other employee benefits on behalf of Supplier or any Supplier Personnel. Supplier represents and warrants that it is an independent contractor for purposes of federal, state, and local employment taxes, and agrees that neither VITA nor any Authorized User is responsible to collect or withhold for Supplier any federal, state, or local employment taxes, including, but not limited to, income tax withholding and social security contributions. Supplier shall pay or withhold any and all taxes, interest or penalties (including, but not limited to, any federal, state, or local withholding or employment taxes, and any penalties related to health care or employee benefits laws) that are imposed, assessed, or levied as a result of this Contract or Services performed pursuant to this Contract. Supplier shall reimburse VITA or any Authorized User in the event that any taxes, interest or penalties are assessed against and paid by VITA or any Authorized User as a result of this Contract.

### **B. Licensing Within the Commonwealth**

Any and all licenses granted or provided pursuant to this Contract, whether to System Software, COTS Software, or any other Software will be held by:

- i. the Commonwealth, if the Authorized User is an agency as defined by Code § 2.2-2006 or a legislative, judicial and independent agency of the Commonwealth, board, commission, or other quasi-political entity of the Commonwealth of Virginia or other body referenced in Title 2.2 of the Code;
- ii. the applicable public body, if the Authorized User is a locality, municipality, school, school system, college, university, local board, local commission, or local quasi-political entity; or
- iii. the applicable private institution of higher education, if the Authorized User is a private institution of higher education listed at: <http://www.cicv.org/Our-Colleges/Profiles.aspx>.



**C. Incorporated Contractual Provisions**

In addition to the terms, conditions, and obligations of this Contract, Supplier agrees to the VITA “Mandatory Contract Terms” which consist of the VITA:

- “Core Contractual Terms”;
- “Required eVA Terms and Conditions” as set forth in Code §2.2-4463; and
- “Mandatory Internal Revenue Service (IRS) Publication 1075 (required for FTI data only)”

Each of these Mandatory Contract Terms are set forth at the following URL and incorporated into this Contract by reference: <https://www.vita.virginia.gov/supply-chain/scm-policies-forms/mandatory-contract-terms/>.

Supplier agrees that non-compliance with the above-referenced Mandatory Contract Terms and IRS Publication 1075 may be deemed to be a material breach of the applicable order or SOW or of the Contract. Supplier is responsible for verifying the correct and current version of this IRS publication and related safeguarding terms language and acknowledges that any Authorized User issuing the order or SOW will be held harmless.

The then current terms and conditions set forth in documents posted at the URL above, and any successor URL(s), are subject to change pursuant to action by the legislature of the Commonwealth, change in VITA policy, adoption of revised eVA business requirements, or change to IRS Publication 1075. If a change is made to any of the Mandatory Contract Terms documents, a new effective date will be noted in the applicable document title. Supplier is advised to check the URLs, or their successors, periodically.

**D. Compliance with the Federal Lobbying Act**

Supplier’s signed certification of compliance with 31 U.S.C. § 1352 (entitled "Limitation on use of appropriated funds to influence certain Federal Contracting and financial transactions") or by the regulations issued from time to time thereunder is incorporated as Exhibit G to this Contract.

**E. Ethics in Public Contracting**

By signing this Contract, Supplier warrants that its assent to this Contract is made without collusion or fraud, and that Supplier has not offered or received any kickbacks or inducements from any other bidder, supplier, manufacturer or subcontractor in connection with their proposal or the terms of this Contract. Further, Supplier warrants that it has not conferred any payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, on any public employee having official responsibility for this procurement transaction, unless consideration of substantially equal or greater value was exchanged. In addition, Supplier warrants that it will notify VITA if it becomes aware of a potential conflict of interest in the future.

**F. Governing Law**

This Contract is governed by and will be construed in accordance with the laws of the Commonwealth of Virginia without regard to that body of law controlling choice of law. Any and all litigation relating to this Contract must be brought in the circuit courts of the Commonwealth of Virginia. The English language version of this Contract prevails when interpreting this Contract. The United Nations Convention on Contracts for the International Sale of Goods and all other laws and international treaties or conventions relating to the sale of goods are expressly disclaimed. The Uniform Computer Information Transactions Act applies to this Contract only to the extent required by Code § 59.1-501.15.

**G. Dispute Resolution**

In accordance with Code § 2.2-4363, contractual claims, whether for money or other relief, must be submitted in writing to the public body from whom the relief is sought no later than 60 calendar days after final payment; however, written notice of the Supplier’s intention to file such claim must be given to such public body at the time of the occurrence or beginning of the work upon which the claim is based. Pendency of claims will not delay payment of amounts agreed due in the final payment. The relevant public body shall render a final decision in writing within 30 calendar days after its receipt of the Supplier’s written claim.

The Supplier may not invoke any available administrative procedure under the Code nor institute legal action prior to receipt of the decision of the relevant public body on the claim, unless that public body fails to render its decision within 30 calendar days. The decision of the relevant public body will be final and conclusive unless the Supplier, within six (6) months of the date of the final decision on the claim, invokes appropriate action under Code § 2.2-4364 or the administrative procedure authorized by Code § 2.2-4365.

Upon request from the public body from whom the relief is sought, Supplier shall submit any and all contractual disputes arising from this Contract to the public body's alternative dispute resolution ("ADR") procedures, if any. Supplier may invoke such public body's ADR procedures, if any, at any time and concurrently with any other statutory remedies prescribed by the Code.

In the event of any breach by a Commonwealth agency, Supplier's remedies will be limited to claims for damages and interest allowable under the Prompt Payment Act and, if available and warranted, equitable relief. All such claims to be processed pursuant to this Section as long as user has not taken any action that has voided warranty. In no event will Supplier's remedies include the right to terminate any license or support services hereunder.

#### **H. Assignment**

This Contract is binding upon and will inure to the benefit of the permitted successors and assigns of VITA and Supplier. Supplier may not assign, subcontract) except as indicated otherwise below), delegate or otherwise convey this Contract or any of its rights and obligations under this Contract, to any entity without the prior written consent of VITA which shall not be unreasonably withheld, and any attempted assignment or subcontracting without consent will be void. VITA may assign this Contract to any entity, so long as the assignee agrees in writing to be bound by the all the terms and conditions of this Contract. The provisions of this paragraph shall not apply to Supplier's back-office subcontracting (i.e. subcontracting within Supplier's administrative or manufacturing operations, including but not limited to imaging and etching) or to warranty or maintenance services, provided that Dell shall require each such subcontractor to agree to substantially similar confidentiality and insurance requirements as are required of Supplier in addition to all other applicable provisions of this Contract and further provided that Supplier shall remain primarily responsible for the provision of services in compliance with this Contract.

If any law limits the right of VITA or Supplier to prohibit assignment or nonconsensual assignments, the effective date of the assignment will be 30 calendar days after the Supplier gives VITA prompt written notice of the assignment, signed by authorized representatives of both the Supplier and the assignee. Any payments made prior to receipt of such notification will not be covered by this assignment.

#### **I. Severability**

Invalidity of any term of this Contract, in whole or in part, will not affect the validity of any other term. VITA and Supplier further agree that in the event such provision is an essential part of this Contract, they shall immediately begin negotiations for a suitable replacement provision.

#### **J. Survival**

Any provisions of this Contract regarding Software License, Rights To Work Product, Warranty, Escrow, Confidentiality, Content Privacy and Security, Liability, Indemnification, Transition of Services, the right to purchase Maintenance Services, and the General Provisions survive the expiration or termination of this Contract.

#### **K. Force Majeure**

No Party will be responsible for the delay or failure to meet its obligations under this Contract if the delay or failure arises from causes beyond the reasonable control and without the fault or negligence of the obligated Party. If any performance date under this Contract is postponed or extended pursuant to this Section for longer than 30 calendar days, VITA, by written notice given during the postponement or extension, may terminate Supplier's right to render further performance after the effective date of termination without liability for that termination, and in addition an Authorized User may terminate any order or SOW affected by such postponement or delay.

**L. No Waiver**

Any failure to enforce any terms of this Contract will not constitute a waiver.

**M. Remedies**

The remedies set forth in this Contract are intended to be cumulative. In addition to any specific remedy, the Parties reserve any and all other remedies that may be available at law or in equity.

**N. Right to Audit**

VITA reserves the right to audit those Supplier records that relate to the Contract or any SOWs or orders issued there under. VITA's right to audit is limited as follows:

- i. on an annual basis during the terms of the contact and annual basis for up to three (3) years from end date of the Contract;
- ii. at VITA's expense;
- iii. no more than once per every twelve (12) months;
- iv. performed at Supplier's premises, during normal business hours at mutually agreed upon times; and
- v. access to Supplier cost information is excluded.

In no event will Supplier have the right to audit, or require to have audited, VITA or any Authorized User.

**O. Taxes**

The Commonwealth is exempt from Federal excise and all State and Local taxes and any such taxes may not be included in Contract prices. Tax certificates of exemption, Form ST-12 can be obtained from Authorized Users upon request. Deliveries against this Contract shall be free of Federal excise and transportation taxes. The Commonwealth's excise tax exemption registration number is 54-73-0076K.

**P. Currency**

All prices, costs, or fees in this Contract and all exhibits, schedules, orders, or SOWs will be in United States dollars.

**Q. Advertising and Use of Proprietary Marks**

No Party may use the name of the other Party or refer to the other Party, directly or indirectly, in any press release or formal advertisement without receiving prior written consent of the other Party. In no event may any Party use a proprietary mark of the other Party without receiving the prior written consent of the other Party.

**R. Notices**

Any notice required or permitted to be given under this Contract must be in writing and will be deemed to have been sufficiently given if delivered in person, or if deposited in the U.S. mails, postage prepaid, for mailing by registered, certified mail, or overnight courier service addressed:

- i. To VITA and to Supplier, if Supplier is incorporated or formed pursuant to the laws of the Commonwealth, to the addresses shown on the signature page.
- ii. To Supplier, if Supplier is incorporated or formed outside the Commonwealth, to the address shown on the signature page and to the Registered Agent registered with the Virginia State Corporation Commission.

Pursuant to Title 13.1 of the Code, VITA or Supplier may change its address for notice purposes by giving the other Party notice of such change in accordance with this Section.

Administrative contract renewals, modifications or non-claim related notices are excluded from the above requirement. Such written, or signed, or both, contract administration actions may be processed by the assigned VITA and Supplier points of contact for this Contract and may be given in person, via U.S. mail, courier service or electronically.

**S. Offers of Employment**  
[RESERVED]

**T. Contract Administration**

Supplier agrees that at all times during the term of this Contract an account executive, at Supplier's senior management level, will be assigned and available to VITA. Supplier reserves the right to change such account executive upon reasonable advance written notice to VITA.

**U. Captions**

The captions of sections and subsections of this Contract are for convenience and in no way define, limit, or enlarge the scope of this Contract or any of its sections.

**V. Entire Contract**

The following exhibits, including all subparts thereof, are attached to this Contract and are made a part of this Contract for all purposes:

Exhibit A – Requirements

Exhibit B – Pricing

Exhibit C – Intentionally Omitted

Exhibit D – Intentionally Omitted

Exhibit E – Reserved

Exhibit F – Intentionally Omitted

Exhibit G – Certification Regarding Lobbying

Exhibit H – Supplier Procurement and Subcontracting Plan

Exhibit I – Service Level Agreement (SLA)

This Contract, its exhibits, and any prior non-disclosure agreement constitute the entire agreement between VITA and Supplier and supersede any and all previous representations, understandings, discussions or agreements between VITA and Supplier as to the subject matter of this Contract. Any and all terms and conditions contained in, incorporated into, or referenced by the Supplier's proposal are deemed invalid. The provisions of the Virginia Department of General Services, Division of Purchases and Supply Vendor's Manual will not apply to this Contract or any order issued pursuant to the Contract. This Contract may only be amended by an instrument in writing signed by VITA and Supplier.

An Authorized User and Supplier may enter into an ordering agreement pursuant to this Contract. To the extent that an ordering agreement, or any order or SOW issued pursuant to this Contract, includes any terms and conditions inconsistent with the terms and conditions of this Contract, the terms and conditions of the order or SOW will be of no force and effect.

**W. Order of Precedence**

In the event of a conflict, the following order of precedence shall apply: this Contract document, Exhibit A, any individual SOW, Exhibit B, then the any order of the remaining Contract exhibits. In the event of a conflict or inconsistency between the negotiated terms of this Contract and any provision incorporated by reference into the Contract (e.g., a section of a License Agreement), the negotiated terms of this Contract will take precedence. For purposes of this section, a "conflict" exists with respect to a subject that has been comprehensively addressed in the Contract when supplementary terms contained in a provision incorporated by reference would alter the rights and obligations of the Parties set forth in the Contract.

**X. Counterparts and Electronic Signatures**

This Contract may be executed in multiple counterparts, each of which, when assembled to include an original signature for each of Supplier and VITA, will constitute a complete and fully executed original. All fully executed original counterparts will collectively constitute a single agreement. Signatures transmitted by fax or electronic mail (in portable data format ("PDF")) are also permitted as binding signatures to this Contract.

**Y. Opportunity to Review**

VITA and Supplier each acknowledge that it has had the opportunity to review this Contract and to obtain appropriate legal review if it so chose.


[SIGNATURE PAGE(S) TO FOLLOW]

Signed by the undersigned authorized representatives of VITA and Supplier and effective as of the Effective Date set forth in the preamble of this Contract above.

DELL MARKETING, L.P.

VITA, on behalf of the  
COMMONWEALTH OF VIRGINIA

By:   
(Signature)

By:   
(Signature)

Name: Loretta Ortman \_\_\_\_\_  
(Print)

Name: Nelson Moe \_\_\_\_\_  
(Print)

Title: SLED Counsel \_\_\_\_\_

Title: Chief Information Officer \_\_\_\_\_

Date: 8/20/19 \_\_\_\_\_

Date: August 22, 2019 \_\_\_\_\_

Address for Notice:  
Dell Marketing L.P. ('Dell') \_\_\_\_\_  
One Dell Way \_\_\_\_\_  
Round Rock, TX 78682 \_\_\_\_\_

Address for Notice:  
11751 Meadowville Lane \_\_\_\_\_  
Chester, VA 23836 \_\_\_\_\_

Attention: Legal Notices: Dell Legal Notices@Dell.com

Attention: Contract Administrator