

**Meeting Date:** 4/28/2015

**Report Type:** Consent

**Report ID:** 2015-00366

**Title: Agreement: Software Support and Maintenance Services for Fire Department Records Management System (Two-Thirds Vote Required)**

**Location:** Citywide

**Recommendation:** Pass a Resolution 1) suspending competitive bidding in the best interests of the City for the procurement of software support and maintenance services to the Fire Department Records Management system; 2) awarding a Software Support and Maintenance Agreement to FDM Software, Ltd. for the Fire Department Records Management system for a total not-to-exceed amount of \$300,000 for a two year term and 3) authorizing the City Manager, or his designee, to execute an agreement with FDM Software Ltd. for software support and maintenance services for a total not-to-exceed amount of \$300,000 for the two year term.

**Contact:** Jon McFarland, Principal Systems Engineer, (916) 808-0408, Fire Department

**Presenter:** None

**Department:** Fire

**Division:** Data Management

**Dept ID:** 12001041

**Attachments:**

1-Description/Analysis

2-Resolution

3-Software Support and Maintenance Agreement with FDM Software Ltd.

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**City Attorney Review**

Approved as to Form

Lan Wang

4/15/2015 11:59:22 AM

**Approvals/Acknowledgements**

Department Director or Designee: Walt W. White - 4/9/2015 1:36:17 PM

## Description/Analysis

**Issue Detail:** In January of 2012, Council approved City Contract No. 2012-0179 for the software support and maintenance services for the Fire Department Records Management system from FDM Software, Ltd. This previous agreement with FDM Software Ltd. has expired.

The Fire Department has the need for continued support and maintenance of the Fire Department Records Management system to assure the department can provide the data and reports required by both state and federal regulation, while maintaining the accuracy and stability of its records system. FDM Software, Ltd. is the sole provider of maintenance and support for its proprietary database.

**Policy Considerations:** The recommendations in this report are in accordance with provisions of the City Code Section 3.56.230(C), which requires a two-thirds vote by Council to suspend competitive bidding, and City Code section 3.56.090, which requires Council approval of agreements involving an expenditure of \$100,000 or more.

**Economic Impacts:** None.

**Environmental Considerations:** This recommendation does not constitute a “project” and therefore is exempt from the California Environmental Quality Act (CEQA) according to Section 15061 (b)(3) and 15378(b)(2) of the CEQA guidelines.

**Sustainability:** There are no sustainability considerations as listed in the Sustainability Master Plan applicable to approving the agreement between the City and FDM Software Ltd.

**Commission/Committee Action:** None.

**Rationale for Recommendation:** This action requests that an agreement for continued support and maintenance for the Fire Department Records Management system be executed. The costs and services are reasonable and consistent with industry practices.

**Financial Considerations:** Sufficient funding is available for this agreement in the Fire Department’s FY2014/15 budget. Funding for the following two years is subject to sufficient funding available in the approved budget for the applicable fiscal year.

The Sacramento Fire Department will utilize this agreement for a not-to-exceed amount of \$300,000 to cover the annual fees as shown below, and to cover the costs for any additional features or functionalities that are added to the system that fall outside of FDM’s policy of upgrading the software.

- FY14/15 - \$68,423.53
- FY15/16 - \$69,792.00

- FY16/17 - \$71,187.84

**Local Business Enterprise (LBE):** A waiver of the LBE participation requirement was approved based on the fact that this is a sole-source procurement and the vendor is not a LBE.

## RESOLUTION NO.

Adopted by the Sacramento City Council

### **AGREEMENT: SOFTWARE SUPPORT AND MAINTENANCE SERVICES FOR FIRE DEPARTMENT RECORDS MANAGEMENT SYSTEM**

#### **BACKGROUND**

- A. In January of 2012, Council approved City Contract No. 2012-0179 for the software support and maintenance services for the Fire Department Records Management system from FDM Software, Ltd. This previous agreement with FDM Software, Ltd. has expired.
- B. The Fire Department has the need for continued support and maintenance of the Fire Department Records Management system to assure the department can provide the data and reports required by both state and federal regulation, while maintaining the accuracy and stability of its records system.
- C. FDM Software, Ltd. is the sole provider of maintenance and support for its proprietary database.

#### **BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE CITY COUNCIL RESOLVES AS FOLLOWS:**

- Section 1. In the best interest of the City, competitive bidding is hereby suspended for the procurement of software support and maintenance services for the Fire Department Records Management system.
- Section 2. FDM Software, Ltd. is awarded a Software Support and Maintenance Agreement for the Fire Department Records Management system for a total not-to-exceed amount of \$300,000 with a two year term.
- Section 3. The City Manager, or his designee, is authorized to execute the agreement with FDM Software Ltd. for software support and maintenance services for a total not-to-exceed amount of \$300,000 for the two year term.



# **SOFTWARE SUPPORT AND MAINTENANCE AGREEMENT**

**FDM SOFTWARE LTD.**

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# **SUPPORT AND MAINTENANCE AGREEMENT**

**between**

**CITY OF SACRAMENTO**

**and**

**FDM SOFTWARE LTD.**

THIS AGREEMENT for the support and maintenance of a Fire Department Records Management System (RMS) ("Agreement") is dated for reference this \_\_\_\_\_ day of \_\_\_\_\_ 2015 between

CITY OF SACRAMENTO, a municipal corporation under the laws of the State of California ("Customer") and

FDM SOFTWARE LTD. an existing British Columbia corporation, whose address is 949 West 3rd Street, Suite 113, North Vancouver, B.C., V7P 3P7 ("FDM").

## **RECITALS:**

A. FDM has licensed to the Customer the use of certain modules of the Fire Department Records Management Software system ("Software"), which modules are listed in Schedule B, and the Customer wishes to retain FDM to provide Support and Maintenance Services for the Software.

## **1 DEFINITIONS**

The following terms have the following meanings for the purposes of this Agreement (including all Schedules):

- a) **CURRENT RELEASE.** The term "Current Release" means the latest version of the Software offered for general commercial distribution at a given point in time and includes all Updates and Upgrades.
- b) **CUSTOMER SUPPORT.** The term "Customer Support" means a person employed by or contracted by FDM to work on behalf of FDM to provide support services to the Customer.
- c) **CUSTOMIZATIONS.** The term "Customizations" means all newly-developed software relating to the Software created for a separate fee by FDM or its subcontractors for the Customer, including but not limited to all interfaces between different components of the Software and Third Party Software.
- d) **DOCUMENTATION.** The term "Documentation" means, without limitation, all written, electronic, or recorded works, that describe the use, functions, features, or purpose of the Software or any component thereof, and which are published or provided to the Customer by FDM or its subcontractors, including without limitation all end user manuals, training manuals, guides, program listings, data models, flow charts, logic diagrams, and other materials related to or for use with the Software.
- e) **INTELLECTUAL PROPERTY.** The term "Intellectual Property" means all right, title, interest and benefit of a party in and to any registered or unregistered worldwide trade-marks, trade or brand names, service marks, copyrights, copyright applications, designs, logos, symbols, patents, patent applications, industrial design rights, circuit topographies or similar rights, rights in and to licenses and sub-licenses

from third parties in any of the foregoing, confidential information, trade secrets, processes, know-how, technology and other intellectual or industrial property.

- f) **GO-LIVE DATE.** The term "Go-Live Date" means the date when a module of the Software with respect to which support is being requested was put in production.
- g) **SOFTWARE.** The term "Software" means all modules of the software described in Schedule B and all Updates, Upgrades and Customizations to the Software.
- h) **SOFTWARE ADMINISTRATOR.** The term "Software Administrator" means the Customer's designated staff person who must have taken the training prescribed by FDM for the implementation and use of the Software.
- i) **SUPPORT AND MAINTENANCE SERVICES.** The term "Support and Maintenance Services" means the support and maintenance services to be provided by FDM as described in this Agreement.
- j) **THIRD PARTY SOFTWARE.** The term "Third Party Software" means all software not owned by FDM but included within the Software or required by FDM to be used as part of the Software requirements specified by FDM. The use of Third Party Software is subject to all of the terms and conditions of the third party's software license or agreement provided with the Third Party Software.
- k) **UPDATES.** The term "Updates" means minor modifications to the Software to fix bugs and to minimally change current functionality.
- l) **UPGRADES.** The term "Upgrades" means program changes to the Software made to add significant new functionality to the Software, most commonly given a new version number, that are made generally available without charge to FDM's licensees who have contracted for support and maintenance. For greater certainty, the "Upgrades" do not include separate modules that are separately licensed and priced and supported, or any replacement product that is developed and marketed and sold as a separate product by FDM.

## **2 SUPPORT AND MAINTENANCE SERVICES**

During the term of this Agreement, FDM shall provide to the Customer the Support and Maintenance Services for the Software in accordance with the terms of this Agreement and the attached Schedules.

### **2.1 Scope of Support and Maintenance**

Support and Maintenance means access to pre-defined Customer Support representative who may assist the Customer with:

- Access to website/FTP site
- Access to Documentation
- Access to the FDM online help desk
- Assisting with changes to the database
- Assisting with reports building
- Troubleshooting errors
- Assisting with configuration and testing problems
- Assisting with problems related to queries, advanced queries, calculated columns

- Supporting the Customer with issues that may arise from database upgrades to the latest FDM release
- Access to 24/7/365 Support for Software critical issues
- Assisting with up to three (3) upgrades per year

Support and Maintenance also includes the provision of Updates and Upgrades. Schedule B shall be deemed to have been amended without further action of the parties in the event that the Customer purchases the right to use additional modules of the Software that include the right Support and Maintenance pursuant to this Agreement.

## **2.2 NFIRS**

Support and Maintenance includes annual NFIRS reporting updates as issued by the US Fire Administration.

## **2.3 Billable Support Services**

The following support services are not included in Support and Maintenance during the term of this Agreement and may be billed by FDM at its then current rates:

- Creating reports
- Creating new tables and/or columns
- Creating calculated columns
- Creating interfaces between FDM and other data sources or CAD systems
- Creating scripts to fix issues that were not caused by FDM
- Database customization review
- Database clean up
- Converting current database to another database software system
- Upgrading the client database on client's behalf to latest FDM release, either at the Customer's site or at the FDM's location
- Additional training
- Custom programming or software development
- Services required because the Administrator is not available or is not trained on FDM products
- Services required due to failure of software or hardware not supplied by FDM and not covered in this Agreement
- Services required due to the Customer's use of hardware or software that does not meet FDM specifications or failure of the Customer to maintain or perform industry standard maintenance on the Customer's hardware or software
- Services required due to software or portions thereof that were incorrectly configured by the Customer
- Services required due to cases of force majeure, especially lightning strikes, fire or flood or other events not caused through FDM's fault
- Services required due to the Customer's failure to fulfill the Customer's Obligations set forth in Section 4
- On-site services

## **2.4 Hours of Support**

FDM shall provide Support Services during the hours as described in Schedule A.

## **2.5 New Releases**

FDM shall, from time-to-time issue new releases of the Software (Schedule B), and when it does, it will immediately make available to the Customer a copy of the release documentation, and updated user or Software documentation. FDM will assist and provide guidance for integrating pre-existing custom code into the new release. Any custom code and/or modules created outside the core functionality of the product is the responsibility of the Customer. FDM can offer professional services to integrate custom changes with new functionality. Such services will be billed at FDM's then current rates.

## **2.6 FDM Exceptions**

For greater certainty, FDM is responsible only for maintaining the Software as contemplated by this Agreement. Without limiting the generality of the foregoing, FDM is not responsible for (1) any hardware required to run the Software or to permit it to function, (2) any software required to run the hardware, including without limitation the operating Software and data base software, (3) maintaining unauthorized Customer modified portions of the Software, Customer data files or for maintaining portions of the Software affected by unauthorized Customer modified portions of the Software. The Customer shall cause the hardware on which the Software operates to be operating properly at all times and to be and continue to be properly maintained by the manufacturer of the equipment or a properly qualified service organization. Without limiting the generality of the foregoing, Customer will cause the hardware and underlying software to meet the minimum specifications for running the Software as declared by FDM from time to time. Corrections for difficulties or defects traceable to the Customer's errors or unauthorized changes, Customer's hardware, or conflicts with other software not identified by FDM as compatible or part of the recommended operating environment may be subject to billing at FDM's current rates. For greater certainty, FDM does not provide support for the Customer's database software application.

## **3 COST, PAYMENT AND TAXES**

### **3.1 Annual Fee**

The Customer shall pay the annual fee to FDM for Support and Maintenance Services as shown in Schedule C. All requests by the Customer for additional features or functionality that fall outside of FDM's ongoing policy of upgrading the Software will be quoted on separately.

If the Customer ceases to keep in force an annual Support and Maintenance Agreement and wants to reinstate it, the Customer shall pay an additional amount equivalent to all Support and Maintenance fees that would have been payable had Customer not terminated its annual Support and Maintenance Agreement, in addition to the fee for the current support year. The Customer acknowledges and agrees that the preceding clause is reasonable in light of the fact that expenses incurred and resources devoted by FDM to further development, enhancement and support of the FDM Software must be spread over FDM's client base and fairly shared by all FDM Software users.

Software version Updates and Upgrades are included in this Support and Maintenance Agreement and Customers are encouraged to keep their system up to date. A surcharge on the annual Support and Maintenance fee will be charged for systems that are two or more versions behind the current release version.

### **3.2 Additions to Support and Maintenance Agreement**

In the event the Customer purchases additional licenses or additional modules from FDM during the term of this Agreement, FDM will provide a written quote that reflects the additional licenses or module, and the support and maintenance fee. The support and maintenance fees for additional licenses are due immediately, while the support and maintenance fees for additional modules are due upon the go live date of the module.

### **3.3 Travel Expenses**

The Customer shall reimburse FDM for any out-of-pocket expenses incurred at the Customer's request and authorization, including travel to and from the Customer site, lodgings, meals, telephone and shipping, as may be necessary in connection with the duties performed by FDM under this Agreement.

### **3.4 Payment**

Support and Maintenance fees will be invoiced annually in advance on December 31st. Payment is due thirty (30) calendar days after invoice.

### **3.5 Taxes**

Customer shall pay all federal, state or local sales, or use taxes, or import duties and taxes that may be imposed upon the amount invoiced to Customer under this Agreement, unless Customer has furnished FDM with a certificate of exemption. Customer shall pay all such amounts directly to the taxing authority unless the taxing authority requires that FDM collect and remit payment, in which event Customer shall pay said amounts to FDM and FDM shall remit such amounts to the authority. Customer and FDM shall cooperate in taking all reasonable actions necessary to minimize, or to qualify for exemptions from, any such taxes, duties or liabilities, including the furnishing of certifications that purchases by Customer are for purposes of resale. Customer and FDM shall each have the right to protest or appeal any tax or charge assessed against it by any taxing authority.

## **4 CUSTOMER OBLIGATIONS**

### **4.1 Customer's Responsibility**

The Customer is responsible for the installation and maintenance, and regular replacement of all hardware (network cabling, switches, hubs, servers and workstations, backup power supplies and all other matters commonly the responsibility of the Customer) and for ensuring that all major operating software and database service packs are kept current after FDM has recommended their installation.

The Customer is responsible for ensuring that all workstations and servers are kept free of viruses, worms or other non FDM approved software which may affect the operation of the supplied software.

If the Customer purchases FDM CAD, the Customer is responsible for all the equipment and cabling necessary to get the incoming Telco 911 feed from the phone company's termination point to the server or workstation where the ANI/ALI interpreter resides.

The Customer is responsible for ensuring the accuracy and integrity and privacy of the data which supports the functioning of the Software. This data includes, but is not limited to:

- a. Accurate and correct department information.

- b. Accurate and correct resource information (departmental vehicles and station locations)
- c. Accurate and valid GIS data (where available).
- d. Accurate and correct location (property) information.

The Customer is responsible for performing and testing the integrity of regular database backups and redundancy process. The Customer is responsible for database administration functions and for ensuring the proper maintenance of the database (as per the database supplier's instructions).

The Customer is responsible for properly testing and applying routine virus updates and security patches without the need for additional FDM notification and for testing those updates before applying them to the Customer's production environment. Except for emergency replacement of a failing server, the Customer shall communicate with FDM prior to replacing a server on which Software is being used. For workstations running Software, the Customer acknowledges responsibility to test new workstation configurations, software service packs, new releases or versions of software, and new software products prior to implementation. FDM recommends that the Customer doesn't install other software on the server running the FDM Software. Support and Maintenance activities for systems configured outside of FDM's recommendations may be subject to additional fees.

Customer represents and agrees that it shall ensure that all persons operating the Software during times when life or property are at risk are properly qualified, supervised, trained, and have demonstrated effectively that the operator is proficient in the use of the hardware and software and the Software. Customer warrants that its operators will not rely solely upon recommendations presented by the Software when making decisions in situations where life or property could be at risk. Customer acknowledges that the Software may not operate totally without interruption and warrants that it shall maintain a manual or mechanical software adequate to back up the equipment and software should they become unavailable for use, either planned or unplanned.

#### **4.2 Access to Data and Software**

The Customer shall provide FDM with access to the Software, and with sufficient test time on the Customer's hardware and software to duplicate the problem, to certify that the problem is with the Software, and to certify that the problem has been corrected.

The Customer shall make reasonable efforts to upgrade the Software in its entirety to a release version that is not more than one (1) release version older than the most recent version of the Software, but will not exceed two (2) release versions older than the most recent version of the Software. FDM is not obligated to provide Updates and Upgrades for release versions that are more than two (2) release versions older.

The Customer will upgrade the computer operating software, hardware and underlying database engines of the Software as necessary to meet the changing requirements of the Software as specified by FDM as part of a current release of the Software, or as the parties mutually agree. The parties agree that FDM is not obligated to ensure that its new release of the Software is compatible with outdated (namely, exceeding three (3) years from date of initial release) hardware, computer operating software or database engines nor is FDM responsible to maintain the Software if Customer has failed to comply with the requirements of this paragraph.

#### **4.3 Software Administrator**

The Customer shall appoint a minimum one contact person who is authorized to make use of the Support and Maintenance Services provided ("Software Administrator"). The Customer must ensure that the Software Administrator has adequate expertise and experience to make accurate description of the malfunctions and make it possible for FDM to handle them efficiently. The Software Administrator must have successfully

completed FDM product training and must have knowledge of the Customer's operating software, network, hardware and other system software. The Customer agrees to promptly notify FDM of any replacement of a Software Administrator.

#### **4.4 Remote Access**

The Customer will permit FDM to electronically access the Customer's hardware and software via the remote tools used by FDM or the tool provided by the Customer. The Customer shall pay for the installation and maintenance of their remote tools. The tool will provide secure, auditable remote access to the Customer's Software, in order for FDM Customer Support personnel to effectively troubleshoot critical or complex problems and to expedite resolution of such issues. The Software Administrator should be available to assist FDM Customer Support personnel as needed during the entire process. Customer Support will only access the Customer's Software with the knowledge and consent of the Customer.

#### **4.5 Transferring Database**

From time to time, FDM may require a copy of the Customer database. In order to protect sensitive data, FDM provides a tool to remove, scramble, and/or make unreadable such sensitive data. It is the Customer's responsibility to ensure that all database sent to FDM have been created using this tool and to ensure that the tool is properly configured to eliminate any data the Customer considers sensitive.

### **5 CONFIDENTIALITY**

#### **5.1 Defined**

Confidential information includes, without limitation, any tangible and intangible material such as written or printed documents specifically identified to be confidential, samples, data structures, links, architecture, implementations of the Software, software, information obtained through access to an electronic database, and any oral disclosures. All confidential information submitted by either party to the other is subject to the terms of this Agreement, provided that the confidential nature of the information has been clearly marked, or when disclosed orally has been identified as confidential information at the time. The receiving party has no obligation or restriction with respect to confidential information which is in the public domain through no wrongful act or omission of the receiving party, has been lawfully received from a third party without obligations of confidentiality, or is independently developed in good faith by the receiving party (with the burden of proof being on the receiving party).

#### **5.2 Recipient's Responsibilities**

All information disclosed to a receiving party shall be protected and kept in confidence forever by the receiving party, who agrees to use the degree of care and employ safeguards as are reasonable for such information. The receiving party can disclose the confidential information only to persons within the receiving party's organization on a need-to-know basis. Such persons shall be informed of the confidential nature of the information, and if necessary shall be required to sign a similar agreement of non-disclosure. The receiving party shall segregate all confidential information from other material in order to prevent comingling, and the receiving party shall not use the confidential information in whole or in part for any purpose other than the purposes of this Agreement. The receiving party shall not reverse engineer, decompile, translate, modify or disassemble any Software disclosed to it. All confidential information shall be returned to the disclosing party upon the termination or expiration of this Agreement, unless it is reasonably required with respect to the ongoing use by Customer of the Software.

### **5.3 Rights to Confidential Information**

It is expressly understood and agreed by the parties that the disclosure of confidential information under this Agreement will not be construed as granting to the receiving party any rights or interest whether express or implied by license or otherwise to the matters or inventions to which such confidential information pertains or to any patent, industrial design, copyright, trade-mark or trade secret rights beyond the rights expressly granted by this Agreement. The receiving party may only use confidential information disclosed under this Agreement in furtherance of this Agreement.

### **5.4 Freedom of Information**

FDM acknowledges and agrees that the Customer may be subject to laws providing for free access to government information, commonly referred to as Freedom of Information statutes, with respect to information under its custody and control. Accordingly all documents and information provided by FDM to the Customer under and pursuant to this Agreement may potentially be available to the public by operation of law. Customer acknowledges that FDM has requested that all confidential information not be disclosed to the public and that Customer will use its best efforts and work with FDM to allow FDM to take advantage of all statutory exemptions from involuntary disclosure. Customer agrees to use reasonable efforts to notify FDM of any request to access confidential information.

### **5.5 Privacy**

Notwithstanding that any personally identifiable information collected by Customer may end up in the joint custody of FDM on account of this support agreement, Customer agrees that it remains liable for all compliance (including the cost of compliance) with all relevant privacy legislation, rules and regulations.

## **6 INTELLECTUAL PROPERTY RIGHTS**

### **6.1 FDM**

Customer acknowledges and agrees that FDM retains legal ownership of the Intellectual Property, including without limitation the Software and Documentation, including without limitation all copyrights and other Intellectual Property rights that may exist now or in the future. Without limiting the generality of the foregoing, the data structures and architecture of the Software, and any application code provided by FDM and contained within any database, are owned by FDM. Customizations are the sole property of FDM and will be deemed to be part of the Software for the purpose of this Agreement.

### **6.2 Customer**

FDM acknowledges and agrees that: (a) the data contained within the database provided by the Customer is and will remain the exclusive property of the Customer; and (b) the Customer retains full and complete rights to use such data. FDM shall not disclose, transfer or sell any data contained in the Database to any person and shall comply with the confidentiality requirements set forth in this Agreement.

### **6.3 Trade-marks**

Nothing contained in this Agreement shall be construed as licensing either party to use any trade-mark or trade name owned or used by the other party without its prior written consent.

## **7 LIMITATION OF LIABILITY**

Neither party will be liable to the other party for (i) any indirect, incidental, special, consequential or exemplary damages, including but not limited to, damages for loss or revenues, profits, goodwill, use, data, failure to realize expected savings, or (ii) other losses resulting from error, omission, or negligence of the other party with respect to the use of the Software, including but not limited to, in the case of the Customer, the data entered by the Customer and/or dispatched by the Customer pursuant to the data entered by the Customer. FDM disclaims all warranties not expressly provided in this Agreement including without limitation warranties of merchantability and fitness for a particular purpose.

To the extent permitted by law, neither party's liability to the other party in connection with any cause of action (excluding copyright infringement by either party or non-payment by Customer), whether in contract, tort, or under statute, relating to this Agreement shall in no event exceed the greater of the total price paid for Support and Maintenance in the twelve month period preceding the event giving rise to the claim or the amount payable pursuant to amount of coverage for such loss in effect pursuant to the policy of insurance in effect under this Agreement.

The limitations of Customer's liability contained in this section do not apply to any claims that FDM may have against Customer with respect to intellectual property infringement, amounts owing to FDM, or to Customer's obligation to indemnify FDM for claims made against FDM as a result of Customer breaching its obligations pursuant to this Agreement.

## **8 TERM AND TERMINATION**

### **8.1 Term**

The term of this Agreement commences on January 1st 2015 and ends December 31st 2017. At the end of the term, the parties may negotiate additional Support and Maintenance periods.

### **8.2 Limitations**

FDM may at its sole discretion limit or suspend Customer's access to Support, pursuant to this Agreement, where (1) Customer is in material default under the terms of this Agreement or the license from FDM authorizing Customer to use the Software (non-payment is deemed to be a material default), or (2) it appears that the need for Support is based upon the failure of Customer to provide a knowledgeable and FDM trained Software Administrator to administer the Software.

### **8.3 Termination for Convenience**

The Customer may terminate this Agreement at any time and for any reason upon thirty (30) calendar days prior written notice to FDM. Customer is not entitled to a refund of monies billed or paid for support for the period cancelled.

### **8.4 For Breach**

If either party fails to fulfill one or more of its material obligations under this Agreement (non-payment is deemed to be a material default), the other party may, upon its election and in addition to any other remedies that it may have, at any time terminate all the rights granted by it hereunder by providing not less than one (1) month's written notice specifying any such breach, unless within the period of such notice all breaches specified have been remedied or that all reasonable steps are being taken to remedy such breaches. For

greater certainty, if Customer is in material default under the terms of the license from FDM authorizing Customer to use the Software then Customer will be deemed to be in material default under this agreement.

## **8.5 Survival**

Expiration or termination of this Agreement for any reason will not affect any obligations which, within the context of this Agreement, are intended to survive expiration or the sooner termination of this Agreement, including but not limited to Sections 1 (Definitions), 3 (Cost, Payment and Taxes), 5 (Confidentiality), 7 (Limitations of Liability), and 11.7 (Disputes).

## **9 INSURANCE**

### **9.1 Limits**

FDM shall comply with the following conditions and procure and keep in force during the term of this Agreement, at its own cost and expense.

- a) **Workers' Compensation Insurance** or such insurance of a similar type as required by British Columbia law. If the Customer authorizes work by any subcontractors, FDM will require each subcontractor to provide **Workers' Compensation Insurance** or such insurance of a similar type for its employees, unless FDM covers such employees.
- b) **Commercial General Liability Insurance** on an occurrence basis in an amount not less than \$1,000,000 per occurrence and at least \$1,000,000 in the annual aggregate, including but not limited to: premises/operations (including off-site operations), blanket contractual liability and broad form property damage.
- c) **Business Automobile Liability Insurance** in an amount not less than \$1,000,000 per occurrence, extending to any automobile. A statement certifying that no vehicle will be used in accomplishing this Agreement may be substituted for this insurance requirement.

The Customer shall be named as an additional insured under the FDM's Commercial General Liability Insurance coverage. FDM shall provide certificates of insurance to the Customer indicating compliance with this paragraph.

The above liability policies shall contain a provision that the policy will not be cancelled or materially changed without thirty (30) calendar days prior written notice to the Customer. No cancellation provision in any insurance policy will be construed in derogation of the continuous duty of FDM to furnish the required insurance during the term of this Agreement.

In case of the breach of any provision of this section, the Customer may, at its option and with no obligation to do so, provide and maintain at the expense of FDM, such types of insurance in the name of FDM, and with such insurers, as the Customer may deem proper, and may deduct the cost of providing and maintaining such insurance from any sums which may be found or become due to FDM under this Agreement or may demand FDM to promptly reimburse the Customer for such cost.

## **10 RELATIONSHIP**

### **10.1 Independent Contractor**

The Agreement shall not be construed as creating an agency, employer/employee relationship, a partnership, or a joint venture. FDM's services are those of an independent contractor.

### **10.2 FDM Employees**

Any and all employees of and contractors to FDM, while engaged in the performance of any services hereunder, will be considered employees of FDM only and not of the Customer. FDM's employees are not entitled to any of the employment benefits of the Customer as a result of their performance of any obligations under this Agreement. Any and all claims that may or might arise under the worker's compensation legislation on behalf of said employees or FDM, while so engaged, and any and all claims made by a third party as a consequence of any negligent act or omission on the part of FDM's employees, while so engaged, will be the sole obligation and responsibility of FDM.

### **10.3 Personnel**

The Customer, acting reasonably, may review, approve, or request a change of FDM's employees or subcontractors who provide services under this Agreement.

A party must not directly or indirectly induce an employee or contractor of the other party to terminate her contract with the other party, nor will Customer hire any of FDM's employees or contractors.

This section remains in force for six (6) months after the end of the expiration or termination of this Agreement.

### **10.4 FDM Standards of Employment**

FDM warrants that it has not employed or retained any company or person, other than a bona fide employee, agent or contractor working for FDM, to solicit or secure this Agreement and that it has not paid or agreed to pay any company or person, other than a bona fide employee working solely for FDM, any fee, commission, percentage, brokerage fee, gifts, or any other consideration, contingent upon or resulting from the award or making of this Agreement. For breach or violation of this warranty, the Customer may terminate this Agreement without liability or, in its discretion, may deduct from the project price or otherwise recover the full amount of such fee, commission, percentage, brokerage fee, gift, or contingent fee.

FDM, with regard to the Support and Maintenance Services performed by it, will not discriminate on the grounds of race, religion, colour, national origin, or sex in the selection and retention of employees or independent contractors, including procurements of materials and leases of hardware.

## **11 MISCELLANEOUS**

### **11.1 Addresses**

Any statement, notice, request or other communication hereunder will be deemed to be sufficiently given to the addressee and any delivery hereunder deemed made three (3) calendar day after delivery or fax (with receipt confirmation) to the following addresses:

To the Customer:

Jon McFarland, Principal Systems Engineer  
City of Sacramento Fire Department  
5770 Freeport Bl., Suite 200  
Sacramento, CA 95822  
Fax number: 916-808-1629

To FDM:

Edward Colin, President and CEO  
FDM Software, Ltd.  
949 West 3rd Street, Ste. 113  
North Vancouver, BC, Canada V7P 3P7  
Fax number: 604-986-7130

or to such other address as the party may specify from time to time by notice given in accordance with this section.

**11.2 Construction**

Each party acknowledges that it has read this Agreement, understands it and agrees to be bound by its terms. Each party acknowledges that the Agreement should not be strictly construed against one party or the other, including the party that drafted it, but interpreted reasonably and fairly so as to give effect to the manifest intentions of the parties.

**11.3 Modification**

This Agreement may not be modified except by a written instrument duly executed by the parties hereto. The Customer may, from time to time, require changes in the scope of this Agreement. Such changes, including any increase or decrease in the amount of FDM's compensation, or services, will: (a) be made only in writing and signed by an authorized representative of the Customer, (b) be explicitly identified as a change to this Agreement, (c) be approved by FDM in writing and (d) become a part of this Agreement.

**11.4 Force Majeure**

Each party shall be excused from delays in performing or from its failure to perform hereunder to the extent that such delays or failures result from causes beyond the reasonable control of such party; provided that, in order to be excused from delay or failure to perform, such party must act diligently to remedy the cause or effect of such delay or failure to the extent the party is able. In the event of such delays, the timetables shall be extended by as many calendar days as the delay caused by forces outside the reasonable control of the parties.

**11.5 Required Approvals**

Unless otherwise specified herein, where agreement, approval, acceptance, or consent by either party is required by any provision of this Agreement, such action will not be unreasonably delayed or withheld.

## 11.6 Applicable Law and Choice of Forum

This Agreement and the parties' obligations hereunder is governed, construed, and enforced in accordance with the laws of the Province of British Columbia and the laws of Canada applicable therein. The parties agree that all disputes, subject to the dispute resolution set out below, will be submitted to a court of competent jurisdiction in the Province of British Columbia.

## 11.7 Disputes

With the exception of any claim relating to Intellectual Property rights or a breach of the confidentiality provisions set forth in this Agreement, if a dispute arises between the parties involving this Agreement or any provision thereof, then the parties shall conduct good faith negotiations to resolve such dispute or disagreement, failing which, after seven (7) calendar days, either party may request by written notice to the other that the dispute be escalated to senior management as specified below ("Senior Management"). If such a request is made, then each party will make available its Senior Management who will meet or discuss within fifteen (15) business days after such request is made to attempt to resolve the dispute. Either party may change its Senior Management appointee upon prior written notice to the other.

FDM                                      Edward Colin, President and CEO

Customer                                Walt W. White, Fire Chief

If Senior Management does not settle such dispute within an additional fifteen (15) calendar days, then either party may refer the dispute or disagreement to a single arbitrator to affect a binding resolution of the matter under the Rules of the British Columbia International Commercial Arbitration Centre. The appointing authority shall be the British Columbia International Commercial Arbitration Centre (B.C.I.C.A.C.). The case shall be administered under the BCICAC in accordance with its "Procedures for Cases Under the B.C.I.C.A.C. Rules". The place for arbitration shall be Vancouver, British Columbia, Canada.

The arbitrator shall have knowledge of and experience in commercial law and the software industry. The arbitration hearing shall commence within thirty (30) days after appointment of the arbitrator and shall be completed and a binding award rendered in writing within sixty (60) days after commencement of the hearing, unless exceptional circumstances warrant delay. Each party shall bear the cost of preparing its own case. The arbitrator shall have the right to include in the award the prevailing party's costs of arbitration and reasonable fees of lawyers, accountants, engineers and other professionals incurred by it in connection with the arbitration.

The arbitrator will give his decision in writing within three weeks of his being appointed and the decision, both on the dispute and on the costs of the arbitration will be final and binding upon the parties.

The arbitrator will have full authority to rule on any question of law in the same manner as any Judge in any Court of the Province of British Columbia and the ruling of the arbitrator on any question of law will be final and binding upon the parties. The decision of the arbitrator may be entered in any court of competent jurisdiction and execution entered thereupon forthwith.

The failure of any party to abide by the decision of the arbitrator will be considered an act of default under this Agreement.

Unless otherwise instructed by the Customer in writing, FDM will continue to perform its obligations pursuant to this Agreement during any mediation or litigation, unless the dispute is for material non-payment.

## **11.8 Severability of Agreement**

In the event that any provision of this Agreement is held invalid, void, illegal or unenforceable, the remainder of this Agreement will not be impaired or affected thereby, and each term, provision, and part will continue in full force and effect and will be interpreted in a manner consistent with the intent of the parties.

## **11.9 Headings for Convenience.**

The section and subsection headings used herein are for referral and convenience only, and will not enter into interpretation hereof. The exhibits referred to herein and attached, and to be attached hereto, are incorporated herein to the same extent as if set forth in full herein.

## **11.10 Assignment Barred**

Neither party may assign its rights or duties under this Agreement without the prior written consent of the other party, which consent may be unreasonably withheld. This provision does not prevent FDM from engaging appropriate independent contractors to complete its work provided that Customer approves of such independent contractors, and such approval will not be unreasonably withheld or delayed. In such event, FDM will remain fully liable and responsible for such independent contractors and will not be relieved of any of its obligations hereunder.

## **11.11 Order of Precedence**

In the event of any conflict between the clauses of this Agreement, its exhibits, and any of the documents incorporated by reference, the following order of precedence applies: (a) this Agreement; (b) exhibits to this Agreement; (c) the respective license for the Software which may be part of a master services agreement entered into with respect to Customer's license of the Software, (d) FDM's proposal and any changes thereto in reverse chronological order, (i.e., most recent modifies the earliest); and (e) any other documents incorporated by reference. Notwithstanding the foregoing, a specific reference in a clause takes precedence over a general reference, regardless of the order of precedence of the Agreement, exhibit or document that the clause is contained in.

## **11.12 Waiver of Rights**

The waiver by either party of any term or condition of this Agreement will not be deemed to constitute a continuing waiver thereof nor of any further or additional right that such party may hold under this Agreement.

## **11.13 Successors and Assigns**

This Agreement is binding on the parties, their successors and permitted assigns.

## **11.14 Entire Agreement**

Except as expressly provided otherwise herein, this Agreement constitutes the entire agreement between the parties with respect to the subject matter herein and cancels and supersedes any prior understandings and agreements between the parties hereto with respect thereto. There are no representations, warranties, terms, conditions, undertakings or collateral agreements, express, implied or statutory, between the parties other than as expressly set forth in this Agreement.

**11.15 Time of the Essence**

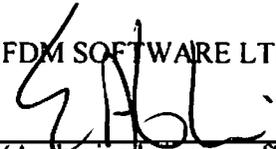
Time is of the essence of this Agreement and of every part hereof, and no extension or variation of this Agreement will operate as a waiver of this provision.

**11.16 Contra Proferentum**

The parties understand, agree, and acknowledge that: (a) this Agreement has been freely negotiated by both parties; and (b) in any controversy, dispute, or contest over the meaning, interpretation, validity, or enforceability of this Agreement or any of its terms or conditions, there will be no inference, presumption, or conclusion drawn whatsoever against either party by virtue of that party having drafted this Agreement or any portion thereof.

IN WITNESS to this Agreement the parties have caused this Agreement to be executed and delivered without condition by their duly authorized representatives.

FDM SOFTWARE LTD.

  
\_\_\_\_\_  
(Authorized signing officer)

Name and Title:

Edward Colin, President and CEO

Date:

CITY OF SACRAMENTO

\_\_\_\_\_  
(Authorized signing officer)

Name and Title:

Walt W. White, Fire Chief

Date:

## SCHEDULE "A"

Hours of Support and Maintenance Service are as follows:

Regular Hours of Service (Pacific Time)	After Hours of Service (Pacific Time)
6:00am to 4:30 pm Monday to Friday	4:30 pm to 6:00 am Monday to Friday  Saturdays & Sunday  Federal and Provincial Statutory holidays in BC, currently New Year's Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day, Boxing Day.

### Incident/Request for Service Priority

All Support and Maintenance incidents/ requests for service will be prioritized on the following basis:

Priority A (High)	Priority B (Medium)	Priority C (Low)
<b>Work Outage</b>		
The Software has failed and causes the users to be unable to work or perform some significant portion of their job. Examples could include such things as the Software is down and cannot be restarted, File Software Corruption.	Priority B issues are software faults where normal Software operation is affected to some degree and a workaround is not available, but users are still able to complete most other tasks. Examples could include such things as a user cannot extract data using a report, calculated column is not functioning as expected.	Priority C issues are for software faults where a fault was detected, but normal operation is not affected. Priority C calls also include enhancement requests for potential modification to Software. Examples could include "how to" reset passwords, changing default colours, etc.
<b>Response Time During Regular Hours of Service</b>		
Within 30 minutes after receiving call from Client Administrator or designate.	Within three business days of FDM's receipt of verbal, written or electronic notice from Client Administrator or designate. FDM will work with the Client to come to a mutually agreed upon resolution date. .	For software related issues, this priority allows for work to be scheduled as part of a planned maintenance update.
<b>Response Time During After Hours of Service</b>		
Within 2 hours after receiving call from answering service	Not Available	Not Available

All Response Times are conditional upon Software Administrator being available without limitation during the promised Response Time.

## **Incident/Request for Service Reporting Procedure**

All problems, queries or requests for assistance must be made to the FDM Client Service Department by phone at 1-877-986-9927 or by electronic mail at [clientservices@fdmsoft.com](mailto:clientservices@fdmsoft.com).

When reporting an issue, be prepared to provide your name, phone number, workstations affected, where you can be reached, a description of the problem/service, and the impact of the problem. FDM will deal with problem/incident according to the priority assigned. In the case that a problem cannot be readily resolved, FDM will attempt to identify a work around. As soon as FDM corrects an Issue, FDM will notify the Customer that the Issue has been corrected by sending an electronic mail.

### **For all Priority A calls:**

FDM will provide an update to the Customer regarding the status of the problem incident along with the action plan and anticipated resolution time within 2 hours after responding to the call and every 2 hours thereafter until the Software has been made operational or the issue is downgraded to a Priority B or Priority C call. FDM will provide resolution to the problem if the hardware, operating Software, network connectivity, SQL server software is functional and software and database backups are available. FDM is not responsible for hardware, operating Software, SQL server or network connectivity related problems.

### **Escalation Process**

- a) If problem incident remains unresolved within 6 hours the Manager of Support or their designate at FDM will contact the Customer's Administrator to provide a verbal update and action plan.
- b) If problem incident remains unresolved within 12 hours after responding to the call the President or CTO of FDM will contact the Fire Chief or the Director of ITS of the Customer to provide a verbal update and action plan. This process will continue every 12 hours thereafter.
- c) If the problem incident remains unresolved within 48 hours after responding to the call then FDM agrees to provide an on-site staff resource until the problem is resolved or downgraded to a Priority B or Priority C call. All travel meal and lodging costs will be at the expense of FDM. If the Priority A issue is the result of a condition that is in the Customer's control (hardware, OS / database software, network connectivity or unauthorized changes to the database) FDM will be entitled for reimbursement of all expenses.
- d) Upon resolution of the problem incident, a debriefing meeting will be held to discuss process for resolution, proposed improvements, and follow-up actions required.

Where temporary solutions are provided, FDM will provide a permanent fix within 30 calendar days or as mutually agreed but the application of the permanent fix will not exceed 6 months.

### **For Priority B and Priority C calls:**

FDM shall provide, at the Customer's request, a report of call history and the status of any active Priority B and C calls including the anticipated resolution date.

**PRIVACY NOTE: BEFORE SENDING ANY DATABASES TO FDM FOR SUPPORT PURPOSES, CUSTOMER MUST USE THE DATABASE ANONYMIZING TOOL PROVIDED BY FDM TO ENSURE THAT NO PERSONALLY IDENTIFIABLE DATA IS DISCLOSED TO FDM.**

## **SCHEDULE "B"**

### **FDM Licensed Modules:**

- **RMS Modules:**
  - Properties
  - Personnel
  - Incident Reporting (Fire & EMS)
  - Training
  - Inspection
  - Permits
  - GIS Analyst

## SCHEDULE "C"

### Annual Support and Maintenance Pricing

<b>Modules: (70 Concurrent Users)</b>	<b>Annual Fee</b>
Incident (Fire & EMS) Module	25,697.60
Training Module	13,525.00
Inspection Module	16,230.00
Permit Module	4,057.60
PRC Interface	2,000.00
Telestaff Interface	3,000.00
GIS Analyst (4)	12,400.00
<b>Subtotal</b>	<b>76,910.20</b>
<b>Discount</b>	<b>(8,486.67)</b>
<b>Total</b>	<b>68,423.53</b>

<b>Payment Plan by Year</b>	<b>Annual Fee Payable</b>
January 1 <sup>st</sup> 2015	68,423.53
January 1 <sup>st</sup> 2016	69,792.00
January 1 <sup>st</sup> 2017	71,187.84

#### **Notes:**

Sales taxes are extra. Travel expenses are extra.

The Support and Maintenance fees for modules purchased after the date of this Agreement or for increases in licenses will be added to the amount payable, pro-rated for the year in which the module goes live. The discount is a fixed amount.