



AGENDA REPORT

Meeting Date: May 24, 2011
Item Number: F-9
To: Honorable Mayor & City Council
From: David Schirmer, Chief Information Officer
Subject: AN AGREEMENT BETWEEN THE CITY OF BEVERLY HILLS AND AVAYA INC., CUSTOMER AGREEMENT GENERAL TERMS (MASTER AGREEMENT); AND

AUTHORIZE A PURCHASE ORDER IN AN AMOUNT NOT TO EXCEED \$335,905.23 FOR THE PURCHASE OF GOODS AND SERVICES

Attachments: 1. Agreement

RECOMMENDATION

Staff recommends that the City Council (i) approve the agreement between the City of Beverly Hills and Avaya Inc., entitled "Avaya State & Local Government/Education Customer Agreement General Terms;" and (ii) authorize a purchase order to Avaya Inc., in an amount not to exceed \$335,905.23 for the purchase of equipment and services as set forth in this agenda report.

INTRODUCTION

This item requests approval of a three-year master agreement with the City's telecommunications system provider to allow the City to purchase hardware, software, equipment and services. The purchase order is for the purchase of hardware, software, equipment and services related to the enhancement of the City's existing telephone communications system.

DISCUSSION

Master Agreement

The City's previous agreement with Avaya was for the installation of a new city-wide telephone system including the purchase of all hardware, software, equipment and related services. In order to facilitate the purchase of new equipment or new services (if requested by the City), Avaya requires that the City have in place an agreement for such purchases. In order to facilitate the City's potential need of equipment, services as well as maintenance of the existing telephone system, staff proposes that the City enter into a new three-year master agreement. The master agreement sets forth the terms and conditions for the purchase of products as well as the purchase of services. The master agreement also provides the terms and conditions for maintenance services of existing equipment as well as any new equipment the City purchases during the three-year term.

The master agreement does not itself include a scope of services for equipment or services. Rather, the master agreement provides a process for the City to purchase equipment or services. Under the master agreement, if the City desires to purchase equipment or services (such as an enhancement or other telephone module), the master agreement provides that both the City and Avaya must execute an "Order Form" if purchasing equipment or a "Statement of Work" if engaging in services. The Order Form will provide the details of the equipment to be purchased including the warranty and pricing. The Statement of Work will provide the detailed scope of services to be implemented by Avaya and include other terms such as acceptance of work, warranty provisions and pricing. Any purchase of equipment or engagement of services will be governed by the terms of the master agreement.

The master agreement also includes a provision to allow the City's Chief Information Officer or City Manager to execute the Order Form(s) and/or the Statement of Work(s) as long as a purchase order has been authorized and the amount of equipment and/or services do not exceed the amount in the purchase order. Section 13.7 of the agreement provides that purchase orders must be approved pursuant to the provisions of the Beverly Hills Municipal Code. In general, this means that any purchase order over \$50,000 must be reviewed and approved by the City Council.

Purchase Order

Staff is also requesting approval of a purchase order in the amount of \$335,905.23 for the purchase of equipment and services pursuant to the terms of the Master Agreement. The equipment to be purchased and the services to be implemented include the following:

- Modular messaging upgrade. This is the upgrade to the latest version of software for the modular messaging platform/voicemail and the services to implement that upgrade in the amount of \$17,165.38.
- Telephone System Upgrade. This is the upgrade to the telephone system to the latest supported release, which is to be implemented citywide and includes both hardware, software and services in the amount of \$161,878.30.

- Messaging Licenses. This is for the purchase of software and licenses including services to provide the City ability to do voicemail-to-text in the amount of \$23,963.25.
- Flare Special Bundle. This is for the purchase of hardware, software and services to implement Avaya video solutions to allow for video-conferencing in the amount of \$43,545.22.
- Equipment. This is for the purchase of equipment such as phones in the amount of \$27,754.62.

The expansion of utility and upgrade of the system to the latest supported release as detailed above are part of IT's work plan for this fiscal year.

As stated above, once the master agreement is signed, the City Chief Information Officer will implement the purchase of the goods and services detailed herein through the process set forth in the master agreement.

FISCAL IMPACT

The funding identified has been budgeted, and is located in the following accounts:

PROGRAM	ACCT	DESCRIPTION	AMOUNT
31410856	85050	Telephone System – CIP Equipment	\$335,905.23



Noel Marquis
Finance Approval



David Schirmer
Approved By

Attachment 1



STATE & LOCAL GOVERNMENT/EDUCATION
CUSTOMER AGREEMENT
GENERAL TERMS

This Customer Agreement (the "Agreement") is entered into by and between Avaya Inc., with an address of 211 Mt. Airy Road, Basking Ridge, New Jersey 07920 United States ("Avaya") and the undersigned Customer. The terms of this Agreement govern the undersigned Customer's purchase and/or license of hardware, software and associated Documentation (as defined in Section 6.1) ("Products") and related services as described in the relevant Attachment(s) ("Services") in the manner set forth herein. The "Effective Date" of this Agreement is May 17, 2011 once executed by the parties. For purposes of this Agreement, the Customer is an agency or department of a State or Municipal Government, or a publicly funded educational institution. This Agreement covers Products and Services for use only in the United States.

The Agreement also consists of the following:

- These **General Terms**
- Attachment 1** – Supply of Generally Available Products
- Attachment 2** – Implementation & Professional Services Terms
- Attachment 3** – Maintenance/Managed Services Terms

The parties agree that this Agreement shall serve as a Master Agreement, which creates a set of agreed-upon terms and conditions that govern Customer's subsequent purchase and/or license of Products and Services. Said purchase and/or license of Product and Services shall be effectuated by an "Order Form" or "Statement of Work," which said Order Form or Statement of Work is executed by both Avaya and Customer in order to be valid and binding on the parties. An Order Form is defined as the form customarily utilized by Avaya which provides the Product or Service description, the corresponding price and the warranty period, if any. A Statement of Work is a document customarily utilized by Avaya that provides a detailed scope of services, including deliverables, work assumptions, and other provisions for Services. Customer hereby authorizes the City's Chief Information Officer or City Manager to execute the Order Forms and/or Statement of Work as long as Customer complies with Section 13. 7.

1. ORDERS

Orders are subject to acceptance by Avaya. Avaya may accept an order by shipping Products or commencing to perform Services if such Order Form or Statement of Work is signed by both parties. Accepted orders will be deemed to incorporate and be subject to the Agreement. Orders will be governed by the terms of the Agreement even when they lack an express reference to the Agreement. All other terms and conditions contained in any Customer purchase order or other document not expressly referenced in the Agreement will have no effect, unless otherwise agreed to in writing by the parties.

2. INVOICING AND PAYMENT

2.1 Invoicing and Payment. Avaya will invoice Customer Product and Service fees as provided in the applicable Order Form and/or Statement of Work. Unless otherwise requested by customer in writing, Avaya will invoice to and process payments from Customer via Avaya's electronic bill application. Unless otherwise governed by State law, payments of undisputed portions of invoices are due within 30 days from the date of Avaya's invoice. Customer will pay all bank charges, taxes, duties, levies and other costs and commissions associated with other Customer required methods of invoicing and payment. Avaya may suspend licenses and performance of orders for which payment is overdue until the overdue amount is paid in full.

2.2 Taxes. Unless Customer provides Avaya with a current tax exemption certificate, Customer is solely responsible for paying all legally required taxes, including without limitation any sales, excise or other taxes and fees which may be levied upon the sale, transfer of ownership, license, installation or use of the Products, except for any income tax assessed upon Avaya. The preceding sentence shall be superseded to the extent the payment of taxes is governed by conflicting State law.

3. CUSTOMER RESPONSIBILITIES

Customer will cooperate with Avaya as reasonably necessary for Avaya's delivery of Products and performance of Services in a timely manner. Customer will provide Avaya with interface and other information regarding access to third party products in Customer's network and necessary third party consents and licenses to enable Avaya's performance under the Agreement. Customer is responsible for ensuring that its networks and systems are adequately secured against unauthorized intrusion or attack and regularly backing up its data and files in accordance with good computing practices. Customer will reasonably use, safeguard and return to Avaya any items that Avaya loans to Customer ("Avaya Tools") for the purpose of providing Services under this Agreement, such as, but not limited to, the Secure Intelligent Gateway. Customer will bear risk of loss and damage to Avaya Tools until returned to Avaya. Avaya Tools shall not be considered Products as that term is defined in these General Terms. If Customer will reasonably use, safeguard and return to Avaya any items that Avaya loans to Customer ("Avaya Tools") for the purpose of providing Services under this Agreement, such as, but not limited to, the Secure Intelligent Gateway. Customer will bear risk of loss and damage to Avaya Tools until returned to Avaya. Avaya Tools shall not be considered Products as that term is defined in these General Terms. If Customer fails to meet its cooperation obligations under this Section or as otherwise provided in the Agreement, Avaya may delay or suspend its delivery of Products or performance of Services relating to Customer's failure.

4. CONFIDENTIAL INFORMATION

4.1 "Confidential Information" means either party's business and/or technical information, pricing, discounts and other information or data, regardless of whether in tangible or other form if marked or otherwise expressly identified in writing as confidential. Information communicated verbally will qualify as Confidential Information if designated as confidential or proprietary at the time of disclosure and summarized in writing within 30 days after disclosure. Confidential Information excludes information that: (i) is publicly available other than by an act or omission of the receiving party; (ii) subsequent to its disclosure was lawfully received from a third party having the right to disseminate the information without restriction on its dissemination or disclosure; (iii) was known by the receiving party prior to its receipt and was not received from a third party in breach of that third party's confidentiality obligations; (iv) was independently developed by the receiving party without use of the disclosing party's Confidential Information; or (v) is required to be disclosed by court order or other lawful government action, but only to the extent so ordered, provided the receiving party provides prompt written notification to the disclosing party of the pending disclosure so the disclosing party may attempt to obtain a protective order. In the event of a potential disclosure in the case of subsection (v) above, the receiving party will provide reasonable assistance to the disclosing party should the disclosing party attempt to obtain a protective order.

4.2 Obligations. To the extent permitted by law and pursuant to the California Public Records Act, each party will protect the secrecy of all Confidential Information received from the other party with the same degree of care as it uses to protect its own Confidential Information, but in no event with less than a

of performing obligations under the Agreement. The confidentiality obligations of each party will survive expiration or termination of the Agreement. Upon termination of the Agreement, each party will cease all use of the other party's Confidential Information and will promptly return, or at the other party's request destroy, all Confidential Information, including any copies, in tangible form in that party's possession or under its control, including Confidential Information stored on any medium. Upon request, a party will certify in writing its compliance with this Section.

5. INTELLECTUAL PROPERTY RIGHTS

5.1 Customer Owns Customer IP. Customer reserves all rights, including, but not limited to, ownership, title, intellectual property rights and all other rights and interest in and to any computer programs (in object or source code format or any other form), know-how, inventions, processes, data bases, documentation, training materials and any other intellectual property and any tangible embodiments of it (collectively "Intellectual Property" or "IP") that Customer makes available to Avaya (collectively "Customer IP").

5.2 Avaya Owns Avaya IP. Avaya reserves all rights, including, but not limited to, ownership, title, and all other rights and interest in, and to, any Intellectual Property that Avaya owned prior to providing Services under the Agreement, any Intellectual Property that Avaya develops, creates, or otherwise acquires independently of this Agreement, and any Intellectual Property that Avaya develops, creates, or otherwise acquires (excluding Customer IP) while performing Services under the Agreement.

5.3 Customer Ownership of Delivered Software. Upon the effective date of this Agreement, neither party contemplates that the Customer will order customized deliverables from Avaya that will result in the transfer of any ownership rights of software or other proprietary data from Avaya to the Customer. Prior to any obligation of Avaya to transfer such rights, a written amendment to this Agreement shall be executed by authorized representatives of both parties expressly identifying the subject intellectual property and identifying the ownership rights that will be transferred.

6. SOFTWARE LICENSE TERMS AND RESTRICTIONS

6.1 License. Avaya grants Customer a personal, non-sublicenseable, non-exclusive, non-transferable, perpetual license to use software and Documentation provided under the Agreement and for which applicable fees have been paid at the indicated capacity and feature levels and within the scope of the applicable license types described in Attachment 1 (Supply of Generally Available Products) hereto for Customer's internal business purposes and at the locations in the United States. Except for the limited license rights expressly granted in the Agreement, Avaya reserves all rights, title and interest in and to the software and Documentation and any modifications to it. "Documentation" means Avaya information manuals containing operating instructions and performance specifications that Avaya generally makes available to users of its products and delivers to Customer with the Products. Documentation does not include marketing materials. For software that is delivered electronically to or downloaded by Customer via Avaya's secured website, the license terms contained in this Agreement will prevail over the license terms (including Avaya's standard End User License Agreement, if applicable) that Customer might have accepted concurrent with license activation or downloading of the Software from Avaya's secured website.

6.2 License Restrictions. To the extent permissible under applicable law, Customer agrees not to: (i) decompile, disassemble, or reverse engineer the software; (ii) alter, modify or create any derivative works based on the software or Documentation; (iii) merge the software with any other software other than as expressly set forth in the Documentation; (iv) use, copy, sell, sublicense, lease, rent, loan, assign, convey or otherwise transfer the software or Documentation except as expressly authorized by the Agreement; (v) distribute, disclose or allow use of the software or Documentation, in any format, through any timesharing service, service bureau, network or by any other means; (vi) allow any service provider or other third party, with the exception of Avaya's authorized channel resellers and their designated employees ("Authorized Providers") who are acting solely on behalf of and for the benefit of Customer, to use or execute any software commands that cause the software to perform functions that facilitate the maintenance or repair of any Product except that a service provider or other third party may execute those software commands that, as designed by Avaya, would operate if a user is logged into a Product using a customer level login and Maintenance Software Permissions ("MSPs") were not enabled or activated; (vii) gain access to or the use of any software or part thereof without authorization from Avaya; (viii) enable or activate, or cause, permit or allow others to enable or activate any logins reserved for use by Avaya or Authorized Providers; or (ix) permit or encourage any third party to do so. Authorized Providers shall be obligated to comply with the terms and provisions of this Agreement. Customer shall advise any third party, including any Authorized Provider, who accesses or uses any software of the terms and provisions of this Agreement. Customer shall be responsible for such third party's failure to comply and shall indemnify Avaya for any damages, loss, expenses or costs, including attorneys' fees and costs of suit, incurred by Avaya as a result of non-compliance with this section.

6.3 Backup Copies. Customer may create a reasonable number of archival and backup copies of the software and Documentation, provided all proprietary rights, notices, names and logos are duplicated on all copies.

6.4 Termination of License. If Customer has not cured all breaches of the license limitations or restrictions in this Agreement within ten business days of Customer's receipt of a reasonably detailed written notice to cure, Avaya may, with immediate effect, terminate the software licenses granted in the Agreement without prejudice to any available rights and remedies in contract or for infringement. Upon termination or expiration of the license for any reason, Customer shall immediately return the Product and any copies to Avaya or at Avaya's discretion and written notice to Customer, Customer shall permanently destroy all copies of the Product and any related materials in Customer's possession or control.

6.5 License Compliance. At Avaya's request and upon reasonable prior written notice, Avaya will have the right to inspect Customer's compliance with these Software License Terms.

7. WARRANTIES AND LIMITATIONS

Specific warranties for Products and Services are provided in the Attachments. THESE WARRANTIES ARE LIMITED AS PROVIDED IN EACH ATTACHMENT AND GENERALLY AS PROVIDED BELOW.

7.1 Exclusions and Disclaimers. The warranties do not extend to any damages, malfunctions, or non-conformities caused by: (i) Customer's use of Products in violation of the license granted under the Agreement or in a manner inconsistent with the Documentation; (ii) use of non-Avaya furnished equipment, software, or facilities with Products (except to the extent provided in the Documentation); (iii) Customer's failure to follow Avaya's installation, operation or maintenance instructions; (iv) Customer's failure to permit Avaya timely access, remote or otherwise, to Products; (v) failure to implement all new Updates (defined below) to software provided under the Agreement; (vi) Products that have had their original manufacturer's serial numbers altered, defaced or deleted; or (vii) Products that have been serviced or modified other than by Avaya or a third party specifically authorized by Avaya to provide the service or modification. An "Update" is a change in software that typically provides maintenance correction only and is designated as a change in the digit to the right of the second decimal point (e.g. n.y.[z]). EXCEPT AS REFERENCED AND LIMITED IN THIS SECTION, NEITHER AVAYA NOR ITS LICENSORS OR SUPPLIERS MAKES ANY EXPRESS REPRESENTATIONS OR WARRANTIES WITH REGARD TO ANY PRODUCTS OR SERVICES OR OTHERWISE RELATED TO THE AGREEMENT. AVAYA DOES NOT WARRANT UNINTERRUPTED OR ERROR FREE OPERATION OF PRODUCTS OR THAT THE PRODUCTS AND SERVICES WILL PREVENT TOLL FRAUD. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, AVAYA DISCLAIMS ALL IMPLIED OR STATUTORY WARRANTIES, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. THE WARRANTY REMEDIES EXPRESSLY PROVIDED IN THE AGREEMENT WILL BE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES.

8. INFRINGEMENT DEFENSE AND INDEMNIFICATION

8.1 Defense and Indemnity. Avaya will defend Customer, at Avaya's expense, against any Claim, as defined below, and will indemnify Customer as provided for in this Section for any judgments, settlements and court awarded attorney's fees resulting from a Claim. Avaya's obligations under this Section are conditioned on the following: (i) Customer promptly notifies Avaya of the Claim in writing upon Customer being made aware of the Claim; (ii) Customer gives Avaya sole authority and control of the defense and (if applicable) settlement of the Claim, provided that Customer's legal counsel may participate in

such defense and settlement, at Customer's expense, and (iii) Customer provides all information and assistance reasonably requested by Avaya to handle the defense or settlement of the Claim. For purposes of this Section, "Claim" means any cause of action in a third party action, suit or proceeding against Customer alleging that a Product as of its delivery date under this Agreement infringes a valid U.S. patent, copyright or trademark.

8.2 Remedial Measures. If a Product becomes, or Avaya reasonably believes use of a Product may become, the subject of a Claim, Avaya may, at its own expense and option: (i) procure for Customer the right to continue use of the Product; (ii) replace or modify the Product; or to the extent that neither (i) nor (ii) are deemed commercially practicable, (iii) refund to Customer a pro-rated portion of the applicable fees for the Product based on a linear depreciation monthly over a five (5) year useful life, in which case Customer will cease all use of the Product and return it to Avaya.

8.3 Exceptions. Avaya will have no defense or indemnity obligation for any Claim based on: (i) a Product that has been modified by someone other than Avaya; (ii) a Product that has been modified by Avaya in accordance with Customer-provided specifications or instructions; (iii) use or combination of a Product with Third Party Products; (iv) Customer Products or Third Party Products; (v) a Product that is used or located by Customer in a country other than the country in which or for which it was supplied by Avaya; or (vi) possession or use of the Product after Avaya has informed Customer of modifications or changes in the Product required to avoid such Claim and offered to implement those modifications or changes, if such Claim would have been avoided by implementation of Avaya's suggestions and to the extent Customer did not provide Avaya with a reasonable opportunity to implement Avaya's suggestions. "Third Party Products" means any products manufactured by a party other than Avaya, and may include, without limitation, products ordered by Customer from third parties pursuant to Avaya's recommendations. However, components of Avaya-branded Products are not Third Party Products if they are both: (i) embedded in Products (i.e., not recognizable as standalone items); and (ii) are not identified as separate items on Avaya's price list, quotes, order specifications forms or Documentation.

8.4 Sole Remedy. THE FOREGOING STATES AVAYA'S ENTIRE LIABILITY, AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDY, WITH RESPECT TO ANY INFRINGEMENT OR MISAPPROPRIATION OF ANY INTELLECTUAL PROPERTY RIGHTS OF ANY OTHER PARTY.

8.5 General Indemnification. Avaya shall indemnify and hold harmless Customer, Customer's agents, servants and employees against all claims, demands and judgments made or recovered against them by third parties for damages to real or tangible personal property or for bodily injury or death to any person arising out of, or in connection with this Agreement ("Claim"), to the extent such damage, injury or death was proximately caused by the negligence of Avaya, any subcontractor of Avaya or their employees, servants or agents while performing under this Agreement; provided, however, that such indemnification and save harmless obligation shall apply only to direct damages which are proven and shall not apply to the extent such damages, injury or death was caused by Customer's act or omission or the act or omission of Customer's agents, servants, employees or others; and, provided, further, that such indemnification and save harmless obligation is expressly conditioned on the following: (a) that Avaya shall be notified in writing promptly of any such Claim, (b) that Avaya shall have sole control of the defense of any action or such Claim and of all negotiations for its settlement or compromise provided that Customer's legal counsel may participate in such defense and settlement, at Customer's expense; and that (c) Customer shall cooperate with Avaya in a reasonable way to facilitate the settlement or defense of such Claim.

9. LIMITATION OF LIABILITY

IN NO EVENT WILL EITHER PARTY OR ITS RESPECTIVE LICENSORS OR SUPPLIERS HAVE ANY LIABILITY FOR ANY INCIDENTAL, SPECIAL, STATUTORY, INDIRECT OR CONSEQUENTIAL DAMAGES, LOSS OF PROFITS OR REVENUE, LOSS OR CORRUPTION OF DATA, OR TOLL FRAUD. THE TOTAL AGGREGATE LIABILITY OF EITHER PARTY FOR ALL CLAIMS ARISING OUT OF OR IN CONNECTION WITH THE AGREEMENT WILL NOT EXCEED AN AMOUNT EQUAL TO TWICE THE TOTAL CONTRACT PRICE (OR IN THE ABSENCE OF A CONTRACT PRICE, TWICE THE AMOUNT OF ALL FEES PAID OR PAYABLE UNDER THE AGREEMENT IN THE 24 MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO THE CLAIM), UP TO \$5,000,000. THE LIMITATIONS OF LIABILITY IN THIS SECTION WILL APPLY TO ANY DAMAGES, HOWEVER CAUSED, AND ON ANY THEORY OF LIABILITY, WHETHER FOR BREACH OF CONTRACT, TORT (INCLUDING, BUT NOT LIMITED TO, NEGLIGENCE), OR OTHERWISE, AND REGARDLESS OF WHETHER THE LIMITED REMEDIES AVAILABLE TO THE PARTIES FAIL OF THEIR ESSENTIAL PURPOSE. HOWEVER, THEY WILL NOT APPLY IN CASES OF WILLFUL MISCONDUCT, PERSONAL INJURY, OR BREACHES OF AVAYA'S LICENSE RESTRICTIONS. THE LIMITATIONS OF LIABILITY IN THIS SECTION ALSO WILL APPLY TO ANY LIABILITY OF DIRECTORS, OFFICERS, EMPLOYEES, AGENTS AND SUPPLIERS. THE LIMITATIONS OF AGGREGATE LIABILITY WILL NOT APPLY TO CONTRACTUAL INDEMNIFICATION OBLIGATIONS PROVIDED IN THE AGREEMENT.

10. GOVERNING LAW AND DISPUTE RESOLUTION

10.1 Governing Law. The Agreement and any disputes arising out of or relating to the Agreement ("Disputes") will be governed by the laws of the state where the Customer resides, excluding conflict of law principles.

11. Term and Termination

11.1 General Terms. The Agreement will be effective and continue in effect for three years from the Effective Date unless terminated earlier in accordance with this Section. Either party may terminate the Agreement by written notice to the other party effective immediately upon receipt, if the other party fails to cure any material breach of the Agreement within a 30 day period after having received a written notice from the non-breaching party detailing the breach and requesting the breach be cured. Customer may terminate the Agreement for convenience upon 30 days written notice and subject to termination or cancellation fees, if any. If Customer terminates this Agreement for convenience, Avaya shall submit to Customer a termination settlement claim containing any charges up to the date of termination and any applicable termination fees, in the form of an invoice, within ninety (90) days from the effective date of the termination. Notwithstanding the foregoing, except for Customer's termination for non-appropriation of funds as set forth in subsection 11.2 below, termination of Maintenance Services shall be as set forth in Attachment 3. The provisions concerning confidentiality, license grant to Customer, and indemnity (as well as any other terms which, by their nature, are intended to survive termination or expiration) of these General Terms will survive any termination or expiration of the Agreement and any order. Except as expressly provided otherwise in the Agreement and termination for uncured breach, any termination of the Agreement will not affect any rights or obligations of the parties under any order accepted before the termination of the Agreement became effective.

11. Availability of Funds. Customer warrants that it has funds available to pay all amounts due hereunder through the end of its current appropriation period and warrants further that it will request funds to make payments in each appropriation period from now until the end of the Agreement term. In the event that: (i) funds are not appropriated and are not otherwise available to Customer for any fiscal period following its current fiscal year ("subsequent fiscal period") for the acquisition of Services and functions which are the same as or similar to those for which the Products provided or installed under the Agreement was acquired, (ii) such non-appropriation has not resulted from Customer's act or failure to act, and (iii) Customer has exhausted all funds legally available for payment under the Agreement and no other legal procedure shall exist whereby payment thereunder can be made to Avaya, then Customer may terminate this Agreement as of the last day for which funds were appropriated or otherwise made available by giving sixty (60) days prior written notice of termination to Avaya. Notwithstanding the preceding paragraph, Customer shall remain responsible for payment to Avaya for all work completed and accepted, as well as for all Products delivered and accepted.

12. AUDIT

Customer may inspect Avaya's records and work-papers directly related to this Agreement to determine the validity of billings for work performed. Such inspections shall be conducted upon reasonable notice and during normal business hours. Adequate records to support these billings shall be maintained. Documentation must be retained for review for at least two (2) years subsequent to final payment.

13. MISCELLANEOUS

13.1 Compliance. The parties will observe all applicable laws and regulations, including export and re-export laws and regulations, when using the Products and work product of any Services.

13.2 Assignment & Subcontractors. Upon submission and approval of any statutorily required novation or assignment requests, Avaya may assign the Agreement and any order under the Agreement to any of its affiliated entities or to any entity to which Avaya may sell, transfer, convey, assign or lease all or substantially all of the assets or properties used in connection with its performance under the Agreement. Any other assignment of the Agreement or any rights or obligations under the Agreement without the express written consent of the other party will be invalid. Avaya may subcontract any or all of its obligations under the Agreement, but will retain responsibility for the work.

13.3 Force Majeure. Neither party will be liable for any delay or failure in performance to the extent the delay or failure is caused by events beyond the party's reasonable control, including without limitation, fire, flood, Act of God, explosion, war or the engagement of hostilities, strike, embargo, labor dispute, government requirement, civil disturbances, civil or military authority, and inability to secure materials or transportation facilities ("Force Majeure").

13.4 Entire Agreement. The Agreement constitutes the entire understanding of the parties with respect to the subject matter of the Agreement and will supersede all previous and contemporaneous communications, representations or understandings, either oral or written, between the parties relating to that subject matter and will not be contradicted or supplemented by any prior course of dealing between the parties. Any modifications or amendments to this Agreement must be in writing and signed by both parties, which in no event shall include any form of electronic communication (such as e-mail). If any provision of the Agreement is determined to be unenforceable or invalid by court decision, the Agreement will not be rendered unenforceable or invalid as a whole, and the provision will be changed and interpreted so as to best accomplish the objectives of the original provision within the limits of applicable law.

13.5 No Waiver. The failure of either party to assert any of its rights under the Agreement, including, but not limited to, the right to terminate the Agreement in the event of breach or default by the other party, will not be deemed to constitute a waiver by that party of its right to enforce each and every provision of the Agreement in accordance with their terms.

13.6 Notices. Any notice required or permitted under this Agreement shall be delivered to the facsimile numbers or the addresses of the relevant party set forth below. Such delivery shall be affected by facsimile, courier or by first-class mail, postage pre-paid.

FOR AVAYA:

ATTENTION: VICE PRESIDENT, LAW
AVAYA INC.
211 MT. AIRY ROAD,
BASKING RIDGE, NEW JERSEY 07920
UNITED STATES
FACSIMILE:

FOR CUSTOMER: THE CITY OF BEVERLY
HILLS

Contact Name: David Schirmer
Company Name: City of Beverly Hills
Street Address: 444 N Rexford Dr.
City, State, and Zip Code: Beverly Hills, CA
90210
United States
FASCIMILE: (310) 246-1567

13.7 Purchase Authority. Customer, through the Beverly Hills City Council, hereby delegates authority to the City of Beverly Hills' Chief Information Officer and/or the City Manager to purchase Products and/or Services pursuant to the terms of this Agreement with a City purchase order that has been approved pursuant to the provisions of the Beverly Hills Municipal Code. The cost for said Products and/or Services may not exceed the amount set forth in the City issued purchase order.

13.8 Avaya will maintain the following insurance coverage's during the term of this Agreement:

Worker's Compensation and Employer's Liability insurance, covering each employee engaged in the performance of work under this engagement, with limits of liability in accordance with applicable state law in the case of Workers' Compensation insurance, and with the following limits of liability in the case of Employers Liability insurance:

- Workers' Compensation – Coverage A – Statutory
- Employers Liability – Coverage B – Each Accident - \$2,500,000
- Policy Limit - \$2,500,000
- Each Employee by Disease - \$2,500,000

Commercial General Liability insurance, written on an occurrence basis including coverage for contractual liability, products and completed operations, personal injury, bodily injury and broad form property damage with liability limits in the amount of \$2,500,000 per occurrence and annual aggregate.

Automobile Liability insurance covering all owned, non-owned and hired vehicles used in connection with the performance of work under this engagement, with combined single limit of liability for bodily injury and property damage of \$5,000,000 per occurrence.

Professional Liability insurance with limits of \$5,000,000 per claim and annual aggregate

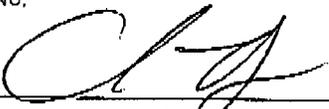
Insurance Companies providing coverage are rated by A.M. Best with at least an A rating.

Current Certificates of Insurance can be provided prior to the commencement of work and be maintained during the term of the engagement. Avaya will include the City of Beverly Hills as an additional insured under the commercial general liability and automobile liability policy

The parties have caused the Agreement to be executed by their duly authorized representatives with the intent to be legally bound, for good and valuable consideration, the receipt and adequacy of which is hereby acknowledged.

AVAYA INC.

COMPANY NAME: THE CITY OF BEVERLY HILLS

By: 
 Name: CHRISTOPHER HENRY
 Title: Region Sales Leader
 Date: 5/18/11

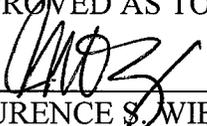
By: _____
 Name: _____
 Title: _____
 Date: _____

Signature page Avaya agreement

ATTEST:

BYRON POPE
City Clerk

APPROVED AS TO FORM:



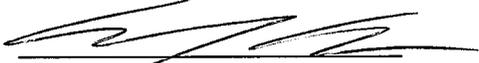
LAURENCE S. WIENER
City Attorney

APPROVED AS TO CONTENT:

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STATE & LOCAL GOVERNMENT/ /EDUCATION
CUSTOMER AGREEMENT

ATTACHMENT 1
SUPPLY OF GENERALLY AVAILABLE PRODUCTS

These terms for Supply of Generally Available Products set forth in this Attachment 1 are part of the Customer Agreement between Avaya and Customer, which incorporates this Attachment 1 by reference. They apply if and to the extent Customer purchases or receives licenses for Products under the Agreement that are generally available on Avaya's price lists.

Products acquired under the Agreement are for use in the ordinary course of Customer's business and are not for resale by Customer.

1. DELIVERY AND IN-SERVICE DATES

1.1 The "Delivery Date" means the date on which Avaya delivers: (i) Avaya-installed Products to Customer's premises; or (ii) other Products to a carrier for shipment. In the case of software features that can be enabled by Avaya remotely or delivered via electronic means, "Delivery Date" means the date the features are enabled or the software is downloaded to the target processor. Customer agrees that for Software that Avaya delivers electronically to its customers, the instructions posted on Avaya's website for downloading and installation of the Software may be provided in English only. The "In-Service Date" means the date on which Avaya notifies Customer that the Avaya-installed Products are installed in good working order in accordance with applicable Documentation. "Installation Start Date" means the date on which Avaya's personnel arrive at Customer's premises to install Products.

1.2 Acceptance. For Customer-installed products, acceptance shall occur no later than thirty (30) days following the Delivery Date. For Avaya-installed products, acceptance shall occur no later than thirty (30) days following the In-Service Date. In the event that Customer has not provided Avaya with either (a) written acceptance, or (b) a rejection of the order with reasonably detailed explanation of the basis for such rejection, within thirty days following the In-Service Date, formal acceptance of Avaya-installed products will be deemed complete by default. Acceptance shall not be deemed a waiver of any warranties, or any other rights under this Contract.

2. ORDER OF PRECEDENCE

In the event of conflict among the terms of this Attachment 1 and the General Terms, the order of precedence is: (i) the terms of this Attachment 1; and (ii) the General Terms. In the event of a conflict between the license terms contained in this Agreement and the license terms the Customer accepts prior to license activation, installation or downloading of the Software that Avaya delivers electronically to its customers, the license terms in this Agreement will prevail, except with respect to third party elements subject to a Shrinkwrap License, in which case the Shrinkwrap License will prevail.

3. PRODUCT CHANGES

Avaya may make changes to Products or modify the drawings and specifications relating to Products, or substitute Products of later design, provided that the changes do not adversely and materially impact Product form, fit or function.

4. ORDER CHANGES AND CANCELLATIONS

For purposes of this Section, "Configured Products" means made-to-order Products provided under this Attachment and "Non-configured Products" are all other Products provided under this Attachment. Customer may change or cancel orders as follows:

Configured Products:

- Changes within 72 hours of order placement – 5% of Product and related installation fees
- Changes after 72 hours of order placement or any cancellation prior to Delivery Date – 15% of Product and related installation fees

Non-Configured Products

- Change or cancellation prior to Delivery Date– No Charge
- Change or cancellation after Delivery Date, but prior to Installation Start Date AND Avaya is installing the Product – 15% of Product and related installation fees.

In the event of a permitted cancellation, all preliminary or advance Products that have been delivered to Customer will be returned promptly to Avaya in the original, unopened packaging and in the same condition as delivered. No other changes or cancellations are permitted.

5. SHIPPING; RISK OF LOSS; TITLE

Products will be shipped to the destination specified in the order. Shipping and handling costs will be reflected as a separate line item on the Avaya invoice. Risk of loss will pass to Customer on the Delivery Date. Title to all hardware will pass to Customer on the Acceptance date, provided Customer maintains all delivered hardware in a secure environment with controlled access. Title to software provided under the Agreement will remain solely with Avaya and its licensors.

6. INVOICING

Unless otherwise agreed, Avaya will invoice Customer for Products as follows: (i) non-Avaya-installed Products will be invoiced 100% on the Delivery Date; (ii) Avaya-installed Products will be invoiced 100% on the In-Service Date.

7. WARRANTY AND LIMITATION OF LIABILITY

7.1 Warranty. Avaya warrants to Customer that during the applicable warranty period, the Product will conform to and operate in accordance with the applicable Documentation in all material respects. The Products are not fault-tolerant and are not designed, manufactured or intended for any use requiring fail-safe performance in which the failure of a Product could lead to death, serious personal injury, severe physical or environmental damage ("High Risk Activities"). This includes the operation of aircraft or nuclear facilities. Customer agrees not to use, or license the use of, the Products in connection with any High Risk Activities.

7.2 Warranty Period. Unless a different period is specified in the applicable order, the warranty periods for Products are as follows: (i) hardware: 12 months, beginning on the In-Service Date for Avaya-installed hardware and on the Delivery Date for all other hardware; and/or (ii) software and software media: 90 days, beginning on the In-Service Date for Avaya-installed software and on the Delivery Date for all other software.

7.3 Remedies. If a Product is not in conformance with the warranty above and Avaya receives from Customer during the applicable warranty period a written notice describing in reasonable detail how the Product failed to be in conformance, Avaya at its option will: (i) repair or replace the Product to achieve conformance and return the Product to Customer; or (ii) refund to Customer the applicable fees upon return of the non-conforming Product to Avaya. For software warranty claims, Customer must provide Avaya with information in sufficient detail to enable Avaya to reproduce and analyze the failure and must provide remote access to the affected Products. Replacement hardware may be new, factory reconditioned, refurbished, re-manufactured or functionally equivalent and will be furnished only on an exchange basis. Returned hardware that has been replaced by Avaya will become Avaya's property. Replacement Products are warranted as above for the remainder of the original applicable Product warranty period.

7.4 Warranty Procedures. Products subject to a warranty claim must be returned to Avaya in accordance with Avaya's instructions accompanied by evidence satisfactory to Avaya that the Products remain entitled to warranty protection.

7.5 Costs. If a Product is returned within the applicable warranty period subject to a valid warranty claim, Avaya will not charge for any repair, replacement, error identification or correction, or return shipment of the non-conforming Product. If Avaya determines that the Product was operating in conformance with its applicable warranty, Avaya may charge Customer for error identification or correction efforts, repair, replacement and shipment costs at Avaya's then current rates.

8. SOFTWARE LICENSE TERMS

The following license terms and restrictions will apply to software licensed pursuant to this Attachment in addition to those in the General Terms.

8.1 License Types. Avaya grants Customer a license within the scope of one of the license types described below. The license type abbreviations below may be referenced in the order and/or Product Documentation. Where the order or Documentation does not expressly identify a license type, the applicable license will be a Designated System License. Where the order does not expressly indicate a specific number of licenses or units of capacity, the applicable number of licenses and units of capacity for which the license is granted will be one. For purposes of this list of license types: (i) "**Designated Processor**" means a single stand-alone computing device; and (ii) "**Server**" means a Designated Processor that hosts a software application to be accessed by multiple users.

8.1.1 Designated System(s) License (DS). Customer may install and use each copy of the software only on a number of Designated Processors up to the number indicated in the order. Avaya may require the Designated Processor(s) to be identified in the order by type, serial number, feature key, location or other specific designation, or to be provided by Customer to Avaya through electronic means established by Avaya specifically for this purpose.

8.1.2 Concurrent User License (CU). Customer may install and use the software on multiple Designated Processors or one or more Servers, so long as only the licensed number of Units are accessing and using the software at any given time. A "**Unit**" means the unit on which Avaya, at its sole discretion, bases the pricing of its licenses and can be, without limitation, an agent, port or user, an e-mail or voice mail account in the name of a person or corporate function (e.g., webmaster or helpdesk), or a directory entry in the administrative database utilized by the Product that permits one user to interface with the software. Units may be linked to a specific, identified Server.

8.1.3 Database License (DL). Customer may install and use each copy of the software on one Server or on multiple Servers provided that each of the Servers on which the software is installed communicates with no more than a single instance of the same database.

8.1.4 CPU License (CP). Customer may install and use each copy of the software on a number of Servers up to the number indicated in the order provided that the performance capacity of the Server(s) does not exceed the performance capacity specified for the software. Customer may not re-install or operate the software on Server(s) with a larger performance capacity without Avaya's prior consent and payment of an upgrade fee.

8.1.5 Named User License (NU). Customer may: (i) install and use the software on a single Designated Processor or Server per authorized Named User (defined below); or (ii) install and use the software on a Server so long as only authorized Named Users access and use the software. A "**Named User**" means a user or device that has been expressly authorized by Avaya to access and use the software. At Avaya's sole discretion, a Named User may be, without limitation, designated by name, corporate function (e.g., webmaster or helpdesk), an e-mail or voice mail account in the name of a person or corporate function, or a directory entry in the administrative database utilized by the Product that permits one user to interface with the Product.

8.1.6 Shrinkwrap License (SR). Customer may install and use the software in accordance with the terms and conditions of the applicable license agreements, such as "shrinkwrap" or "click-through" licenses, accompanying or applicable to the software ("**Shrinkwrap License**").



STATE & LOCAL GOVERNMENT/ EDUCATION
CUSTOMER AGREEMENT
ATTACHMENT 2

IMPLEMENTATION & PROFESSIONAL SERVICES TERMS

These Implementation & Professional Services Terms set forth in this Attachment 2 are part of the Customer Agreement between Avaya and Customer, which incorporates these Services terms in this Attachment 2 by reference. They apply if and to the extent Customer acquires Implementation & Professional Services

1. SCOPE; ORDER OF PRECEDENCE; CHANGES

1.1 Services Provided. Avaya will provide the services described in this paragraph ("Implementation & Professional Services") as specified in an Order Form (if applicable) and as may be further described in, a Statement of Work executed by both parties ("SOW"). Implementation & Professional Services can include installation and configuration of Products, consulting and other services where Avaya (i) creates and delivers customized software, hardware, documentation, or other work product ("Deliverables") and/or (ii) completes other defined objectives ("Milestone Objectives") on a milestone basis or on a time and material basis ("T&M Services"). T&M Services are Implementation & Professional Services provided on a time and materials basis in exchange for hourly, daily or monthly fees and expense reimbursements calculated on the basis of Avaya service records. Deliverables and work product of T&M Services do not include generally available hardware and software and are not Products. To the extent an SOW provides that Avaya will deliver Products, the terms for Supply of Generally Available Products will apply to those Products. Implementation & Professional Services do not include Maintenance Services or Managed services (as defined in Attachment 3).

1.2 Order of Precedence. Unless otherwise provided for in these Implementation & Professional Services Terms of this Attachment 2, in the event of conflict among the General Terms, these Implementation & Professional Services Terms/Attachment 2, an SOW and any ancillary attachments to or documents referenced in an SOW, the order of precedence is: (i) this Implementation & Professional Services Terms/Attachment 2; (ii) the General Terms; (iii) any SOW; and (iv) ancillary documents; except that in relation to limitations of liability, licensing provisions, intellectual property rights and indemnification, the provisions contained in the General Terms will always take priority.

1.3 Changes. Changes in Implementation & Professional Services will be made in accordance with Avaya's standard change control procedures or procedures agreed to in writing by both parties in the SOW.

2. ACCEPTANCE

2.1 T&M Services. T&M Services are deemed accepted upon performance.

2.2 SOW without Acceptance Procedures. Where the SOW does not contain specific acceptance criteria and procedures), Implementation & Professional Services are deemed accepted upon the earlier of either: (i) Avaya providing notice of completion to Customer; or (ii) production use of Deliverables or installed Products.

2.3 SOW with Acceptance Procedures. Where the SOW contains acceptance criteria and procedures ("Acceptance Procedures"), the Deliverable or Milestone Objective is deemed accepted upon the earlier of either: (i) the end of the acceptance period defined in the Acceptance Procedures, unless Avaya has received from Customer a rejection notice indicating in reasonable detail the material failure of the Deliverable or Milestone Objective to conform to the criteria in the Acceptance Procedures ("Rejection Notice"); or (ii) production use (except to the extent production use is included in the Acceptance Procedures). If the Deliverable or Milestone Objective fails to conform to the criteria in the Acceptance Procedures and Avaya has received a timely Rejection Notice, then Avaya will re-perform the respective Milestone Objective and re-submit the Deliverable or Milestone Objective for acceptance as described above. If, after resubmission, Customer provides another Rejection Notice, then Customer's remedies will be either to: (a) terminate the SOW, return all Deliverables and receive a refund of fees paid under the SOW; or (b) accept the Deliverable or Milestone Objective subject to the warranties and remedies described in Section 5.

3. TRANSFER OF RISK, TITLE; LICENSE TO DELIVERABLES

3.1 Transfer of Risk and Title. Title to hardware components of Deliverables will pass to Customer upon acceptance as described in Section 2. Risk of loss will pass to Customer when the carrier receives the Deliverable for shipment to Customer or when the Deliverable arrives on Customer's premises, whichever occurs earlier.

3.2 Customer's License to Deliverables. Subject to Customer's payment of fees for the Services, Avaya grants Customer a non-exclusive, non-transferable, perpetual, limited, non-sublicenseable license to use the Deliverables. Software contained in Deliverables will be licensed subject to the Software License Terms contained in the Agreement.

4. INVOICING AND PAYMENT

Fees will be invoiced as follows: (i) Implementation & Professional Services on completion of the Services other than T&M Services, unless otherwise provided in the SOW; and (ii) T&M Services monthly in arrears, unless otherwise provided in the SOW.

5. WARRANTY

5.1 Warranty Period. Unless a different period is specified on the Order Form or SOW, the warranty period for implementation & Professional Services and Deliverables will be 30 days beginning on the acceptance or deemed acceptance date of the Deliverables or the performance of the Service whichever is later (the "Warranty Period").

5.2 Warranty. During the Warranty Period Avaya warrants to Customer that (i) Implementation & Professional Services will be carried out in a professional and workmanlike manner by qualified personnel in conformance with generally accepted industry practices in the field for which the work is to be performed; and (ii) Deliverables will conform in all material respects to the specifications contained in the SOW. However, Avaya does not warrant that software contained in the Deliverables will perform uninterrupted or error-free.

5.3 Remedies.

5.3.1 Implementation & Professional Services. To the extent that Avaya has not performed Implementation & Professional Services in accordance with the above warranty ("Non Conformity") and Avaya receives written notice from the Customer within the Warranty Period that identifies the Non-Conformity in reasonable detail and requests Avaya cure the Non-Conformity, Avaya will re-perform the applicable Services or if Avaya determines that re-performance is not commercially reasonable, either (i) Avaya will refund to Customer the fees for the Non-Conforming Implementation & Professional Services; or in the case of T&M Services, (ii) Customer may cancel the affected T&M Services, subject to payment of fees for T&M Services already performed.

5.3.2 Deliverables If Avaya receives from Customer within the Warranty Period a written notice describing in reasonable detail how the Deliverables failed to be in conformance with the above warranty, Avaya will, at its option, repair or replace the non-conforming Deliverables, or refund to Customer the applicable fees upon return of the non-conforming Deliverables.

5.3.3 Exclusive Remedies. THE REMEDIES SET FORTH IN THIS SECTION 5.3 WILL BE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES AND WILL BE IN LIEU OF ANY OTHER RIGHTS OR REMEDIES CUSTOMER MAY HAVE AGAINST AVAYA WITH RESPECT TO THE NON-CONFORMANCE OF IMPLEMENTATION & PROFESSIONAL SERVICES AND DELIVERABLES.

5.4 (Closed)Disclaimer. Services provided to enhance network security are not a guaranty against malicious code, deleterious routines, and other techniques and tools employed by computer "hackers" and other third parties to create security exposures. Neither Avaya nor its suppliers make any warranty, express or implied, that all security threats and vulnerabilities will be detected or that the Services will render an end user's network or particular network elements safe from intrusions and other security breaches.

6. TERM AND TERMINATION

6.1 Term. The term of an SOW will begin on the date specified in the SOW or order if any, or on the date executed by the last party to sign the SOW or Order. The term of the SOW will continue until the work is completed or the SOW is terminated earlier in accordance with this Section.

6.2 Termination. Unless otherwise provided in the SOW, either party may terminate Implementation & Professional Services upon 45 days prior written notice, and Customer will pay for Services performed to the date of termination and all non-refundable or non-terminable out-of-pocket expenses Avaya incurred.



STATE & LOCAL GOVERNMENT/ EDUCATION
CUSTOMER AGREEMENT
ATTACHMENT 3
MAINTENANCE/MANAGED SERVICES TERMS

These Maintenance/Managed Services Terms are part of the Customer Agreement between Avaya and Customer, which incorporates these Services Terms by reference. They apply if and to the extent Customer acquires Maintenance/Managed Services.

1. ORDER, PROVISION AND SCOPE OF SERVICES

1.1 Order and Provision of Services. In return for the payment of the fees specified in the order, Avaya will provide the Maintenance/Managed Services options for Supported Products or Supported Systems at Supported Sites, as described further in this Attachment and the SAS (for purposes of this Attachment, "Services"). The "Service Agreement Supplement" or "SAS" is the applicable Avaya Service Agreement Supplement then current as of the date of Avaya's acceptance of an order for Services and available to Customer upon request. The parties may execute a statement of work describing specific Services to be provided by Avaya ("Statement of Work" or "SOW"). As used in this Attachment, "SAS" refers to the Service Agreement Supplement or Statement of Work, as applicable. "Supported Products" are: (i) hardware or software products identified in the order; and (ii) Added Products (defined in Section 1.9). Supported Products may include non-Avaya products to the extent they are specified in the order. "Supported Systems" are a group of products or networks specified in the order. "Supported Sites" are locations specified in the order.

1.2 Documents and Order of Precedence. Unless otherwise provided for in these Maintenance/Managed Services Terms, in the event of conflict among the General Terms, these Maintenance/Managed Services Terms; the SAS and any ancillary attachments to or documents referenced in the SAS, the order of precedence is: (i) these Maintenance/Managed Services Terms; (ii) the General Terms; (iii) SAS; and (iv) ancillary documents, except that in relation to limitations of liability, licensing provisions, intellectual property rights and indemnification, the provisions contained in the General Terms will always take priority.

1.3 Monitoring. Avaya may electronically monitor Supported Products and Supported Systems for the following purposes: (i) remote diagnostics and corrective actions; (ii) to determine system configuration and applicable charges; (iii) to verify compliance with applicable software license terms and restrictions; (iv) when providing managed Services, to assess Customer needs for additional products or Services; (v) as otherwise provided in the SAS.

1.4 Error Correction. Some Services options may include correction of Errors. An "Error" means a failure of a Supported Product to conform in all material respects to the manufacturer's specifications that were currently applicable when the Supported Product was purchased or licensed.

1.5 Help Line Support. Where the selected Services option includes help line support, Avaya will provide it in accordance with the coverage option (service hours, target response intervals, etc.) that Customer has selected.

1.6 Updates. Where the selected Services option includes the provision of Updates, Avaya will make Updates available to Customer if, and when, the manufacturer makes them generally available to its other customers. Avaya will provide Updates via a website, email or post mail, at Avaya's option. Updates may be remotely installed by Avaya or delivered to Customer for self-installation.

1.7 End of Support. Periodically, Avaya or a third party manufacturer may declare "end of life," "end of service," "end of support," "manufacture discontinue" or similar designation ("End of Support") for certain Supported Products. Customer may access Avaya's user support website (www.support.avaya.com) for End of Support notifications, and to register an e-mail address to receive e-mail notifications of the same, when published by Avaya. For Products subject to End of Support, Avaya will continue to provide the support described in the SAS except for the End of Support exceptions listed therein ("Extended Support"). If the support described in the SAS does not include Extended Support information, Avaya will make available the description of Extended Support (if available) for the Products concerned at the same time as its End of Support notification. For Products not subject to Extended Support, if Services are discontinued for a Supported Product, the Supported Product will be removed from the order and rates will be adjusted accordingly.

1.8 Replacement Hardware. Replacement hardware provided as part of Services may be new, factory reconditioned, refurbished, re-manufactured or functionally equivalent. It will be furnished only on an exchange basis. Returned hardware that has been replaced by Avaya will become Avaya's property.

1.9 Added Products. If Customer acquires additional products of the same type and manufacturer(s) as the existing Supported Products and locates them with existing Supported Products at a Supported Site, they will be considered "Added Products", and will be added to the order automatically for the remainder of the term. Added Products purchased from a party other than the manufacturer or an authorized reseller are subject to certification by Avaya at Avaya's then current Services rates. If Added Products fail certification, Avaya may choose not to add them to the Supported Products.

1.10 General Limitations. Unless the SAS provides otherwise, Avaya will provide software Services only for the unaltered current release of the software and the prior release. The following items are included in the Services only if the SAS specifically includes them: (i) support of user-defined applications; (ii) support of Supported Products that have been modified by a party other than Avaya (except for installation of standard, self-installed Updates provided by the manufacturer); (iii) making corrections to user-defined reports; (iv) data recovery services; (v) services associated with relocation of Supported Products; (vi) correction of Errors arising from causes external to the Supported Products (such as power failures or surges); and (vii) services for Supported Products that have been misused, used in breach of their license restrictions, improperly installed or configured, or that have had their serial numbers altered, defaced or deleted

2. INVOICING AND PAYMENT

2.1 Invoicing. Avaya will invoice Customer for Services in advance unless another payment option is specified in the order or SAS.

3. CUSTOMER RESPONSIBILITIES

3.1 General. Customer will cooperate with Avaya as reasonably necessary for Avaya's performance of its obligations, such as: (i) providing Avaya with full, free and safe access to its facilities; (ii) providing telephone numbers, network addresses and passwords necessary for remote access; and (iii) providing interface information for Supported Products and necessary third party consents and licenses to access them. All items will be provided by Customer at Customer's expense. If Avaya provides an Update or other new release of software as part of the Services, Customer will implement it promptly.

3.2 Provision of Supported Products and Systems. Except for Avaya hosted facilities identified in the SAS Customer will provide all Supported Products, Supported Systems and Supported Sites. Customer continuously represents and warrants that: (i) Customer is either the owner of, or is authorized to access and use, each of them; and (ii) Avaya, its suppliers, and subcontractors are authorized to do the same to the extent necessary to provide the Services in a timely manner.

3.3 Moves of Supported Products. Customer will notify Avaya in advance before moving Supported Products.

3.4 Vendor Management. Where Avaya is to instruct or request products or services on Customer's behalf from third party vendors under Customer's supply contracts with the third party vendors ("Vendor Management"), Customer will provide Avaya upon request a letter of agency or similar document, in a form reasonably satisfactory to Avaya, permitting Avaya to perform the Vendor Management. Where the third party vendor's consent is required for Avaya to be able to perform Vendor Management in a timely manner, Customer will obtain the written consent of the vendor and provide Avaya a copy of it upon request.

3.5 Third Party Hosting. In the event one or more network address(es) to be monitored by Avaya are associated with systems owned, managed, and/or hosted by a third party service provider ("Host"), Customer will: (i) notify Avaya of the Host prior to commencement of the Services; (ii) obtain the Host's

advance written consent for Avaya to perform the Services on the Host's computer systems and provide Avaya with a copy of the consent upon request; and (iii) facilitate necessary communications between Avaya and the Host in connection with the Services.

3.6 Access to Personal Data. From time to time, Customer may require Avaya to access a Supported Product or Supported System containing employee, customer or other individual's personal data (collectively, "Personal Data"). Where Customer instructs Avaya to access any Personal Data or a third party identified by Customer with access, Customer will (i) notify all relevant employees and other individuals of the fact that Avaya will have access to such Personal Data in accordance with Customer's instructions, and (ii) if permitted by law, indemnify Avaya and its officers, directors, employees, subcontractors and affiliates against, and hold each of them harmless from, any and all liabilities, costs, damages, judgments and expenses (including reasonable attorney's fees and costs) arising out of Avaya accessing or providing access in accordance with Customer's instructions.

4. TITLE AND RISK OF LOSS TO EQUIPMENT

Title to Avaya-installed replacement hardware provided as part of Services will pass to Customer when installed. Title to all other hardware provided as part of Services will pass to Customer when it arrives at the Supported Site.

5. SOFTWARE LICENSE

Where Services include provision of patches, Updates or feature upgrades for Supported Products ("New Software"), they will be provided subject to the license grant and restrictions contained in the original agreement under which Customer licensed the original software from Avaya. Where there is no existing license from Avaya, New Software will be provided subject to the manufacturer's then current license terms and restrictions for the New Software. New Software may include components provided by third party suppliers that are subject to their own end user license agreements. Customer may install and use these components in accordance with the terms and conditions of the "shrinkwrap" or "clickwrap" end user license agreement accompanying them.

6. WARRANTY AND LIMITATION OF LIABILITY

6.1 Warranty. Avaya warrants to Customer that Services will be carried out in a professional and workmanlike manner by qualified personnel.

6.2 Remedy. If Services are not in conformance with the above warranty and Avaya receives Customer's detailed request to cure a non-conformance within thirty (30) days of its occurrence, Avaya will re-perform those Services. This remedy will be Customer's sole and exclusive remedy and will be in lieu of any other rights or remedies Customer may have against Avaya with respect to the non-conformance of Services.

6.3 Disclaimer. Services provided to enhance network security are not a guaranty against malicious code, deleterious routines, and other techniques and tools employed by computer "hackers" and other third parties to create security exposures. Neither Avaya nor its suppliers make any warranty, express or implied, that all security threats and vulnerabilities will be detected or that the Services will render an end user's network or particular network elements safe from intrusions and other security breaches.

7. TERM AND TERMINATION

Term. Unless a different term is mandated in the applicable SAS, Avaya will provide Services for an initial term of one year. Unless otherwise specified in the SAS, Customer may terminate Services in whole or in part upon 30 days written notice subject to cancellation fees equal to maintenance Service fees for 12 months or the remaining term, whichever is less.