



**CITY OF LODI  
COUNCIL COMMUNICATION**

**AGENDA TITLE:** Adopt Resolution Authorizing the City Manager to Execute Professional Services Agreements with Apogee Interactive and Blue Earth Energy (\$63,800)

**MEETING DATE:** July 17, 2013

**PREPARED BY:** Electric Utility Director

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**RECOMMENDED ACTION:** Adopt a resolution authorizing the City Manager to execute professional services agreements with Apogee Interactive and Blue Earth Energy for an amount not to exceed \$63,800.

**BACKGROUND INFORMATION:** The professional services agreements with Apogee Interactive and Blue Earth Energy for the City Council's consideration are two of many Public Benefit programs and services provided to residential and commercial/industrial customers in the community.

Fiscal Year 2013/2014 marks the 10<sup>th</sup> anniversary of the Lodi Energy Audit Program (LEAP) which provides free on-line energy audits for residential and small commercial customers. On a typical month, over 50 customers access the on-line service and perform energy audits. The audit identifies how the customer is consuming energy and then offers specific energy conservation measures to assist the customer in reducing monthly energy use. For FY 2013/2014, staff is recommending the addition of several new special purpose calculators that will be accessible to all customers performing on-line energy audits. These new calculators are Lodi-specific and include the following: water, plug-load, appliance, lighting, space heating, pool and spa, television, electric vehicle, commercial lighting and lawn-irrigation calculators. The on-line energy audit tools, as well as the special purpose calculators, are provided by Apogee Interactive. The total cost of the FY 2013/2014 agreement with Apogee Interactive is \$38,800. This fee does include one-time set-up costs for the eight new special purpose calculators. Note: There will be no charge to the customer to access and experiment with the ten calculators.

The Lodi Keep Your Cool Program, now entering its fifth year, is administered by Blue Earth Energy. This firm provides turn-key, direct install refrigeration and cooler box energy efficiency improvements to designated small and medium-sized commercial customers. The focus of the FY 2013/2014 program will be restaurants. The total cost of this agreement is \$25,000, and Blue Earth Energy provides for all customer contact, as well as full installation of agreed upon/recommended efficiency measures. The total number of customers eligible for this program will be ten to fifteen commercial customers assigned to the G1 or G2 rate tariff.

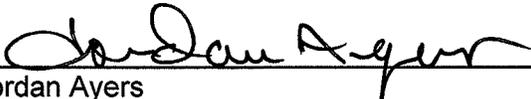
**FISCAL IMPACT:** The exact fiscal impact cannot be determined at this time; it will depend upon the total number of customer participants in both programs. An estimate of the total energy savings between the two programs is roughly 340,000 kilowatt hours of electricity saved, resulting in revenue reductions of approximately \$62,000.

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APPROVED:

  
Konradt Bartlam, City Manager

**FUNDING:** Included in FY 2013/14 Budget Account No. 164605.7323.

  
\_\_\_\_\_  
Jordan Ayers  
Deputy City Manager/Internal Services Director

  
\_\_\_\_\_  
Elizabeth A. Kirkley  
Electric Utility Director

**PREPARED BY:** Rob Lechner, Business Development Manager

EAK/RSL/lst

## AGREEMENT FOR PROFESSIONAL SERVICES

### ARTICLE 1 PARTIES AND PURPOSE

#### **Section 1.1 Parties**

THIS AGREEMENT is entered into on \_\_\_\_\_, 2013, by and between the CITY OF LODI, a municipal corporation (hereinafter "CITY"), and Apogee Interactive, Inc. (hereinafter "CONTRACTOR").

#### **Section 1.2 Purpose**

CITY selected the CONTRACTOR to provide the services required in accordance with attached Scope of Services, Exhibit A, attached and incorporated by this reference.

CITY wishes to enter into an agreement with CONTRACTOR for Online applications for customer energy audits (hereinafter "Project") as set forth in the Scope of Services attached here as Exhibit A. CONTRACTOR acknowledges that it is qualified to provide such services to CITY.

### ARTICLE 2 SCOPE OF SERVICES

#### **Section 2.1 Scope of Services**

CONTRACTOR, for the benefit and at the direction of CITY, shall perform the Scope of Services as set forth in Exhibit A.

#### **Section 2.2 Time For Commencement and Completion of Work**

CONTRACTOR shall commence work pursuant to this Agreement, upon receipt of a written notice to proceed from CITY or on the date set forth in Section 2.6, whichever occurs first, and shall perform all services diligently and complete work under this Agreement based on a mutually agreed upon timeline or as otherwise designated in the Scope of Services.

CONTRACTOR shall submit to CITY such reports, diagrams, drawings and other work products as may be designated in the Scope of Services.

CONTRACTOR shall not be responsible for delays caused by the failure of CITY staff to provide required data or review documents within the appropriate time frames. The review time by CITY and any other agencies involved in the project shall not be

counted against CONTRACTOR's contract performance period. Also, any delays due to weather, vandalism, acts of God, etc., shall not be counted. CONTRACTOR shall remain in contact with reviewing agencies and make all efforts to review and return all comments.

**Section 2.3 Meetings**

CONTRACTOR shall attend meetings as may be set forth in the Scope of Services.

**Section 2.4 Staffing**

CONTRACTOR acknowledges that CITY has relied on CONTRACTOR's capabilities and on the qualifications of CONTRACTOR's principals and staff as identified in its proposal to CITY. The Scope of Services shall be performed by CONTRACTOR, unless agreed to otherwise by CITY in writing. CITY shall be notified by CONTRACTOR of any change of Project Manager and CITY is granted the right of approval of all original, additional and replacement personnel at CITY's sole discretion and shall be notified by CONTRACTOR of any changes of CONTRACTOR's project staff prior to any change.

CONTRACTOR represents it is prepared to and can perform all services within the Scope of Services (Exhibit A) and is prepared to and can perform all services specified therein. CONTRACTOR represents that it has, or will have at the time this Agreement is executed, all licenses, permits, qualifications, insurance and approvals of whatsoever nature are legally required for CONTRACTOR to practice its profession, and that CONTRACTOR shall, at its own cost and expense, keep in effect during the life of this Agreement all such licenses, permits, qualifications, insurance and approvals, and shall indemnify, defend and hold harmless CITY against any costs associated with such licenses, permits, qualifications, insurance and approvals which may be imposed against CITY under this Agreement.

**Section 2.5 Subcontracts**

Unless prior written approval of CITY is obtained, CONTRACTOR shall not enter into any subcontract with any other party for purposes of providing any work or services covered by this Agreement.

**Section 2.6 Term**

The term of this Agreement commences on August 1, 2013 and terminates upon the completion of the Scope of Services or on June 30, 2014, whichever occurs first.

**ARTICLE 3**  
**COMPENSATION**

**Section 3.1 Compensation**

CONTRACTOR's compensation for all work under this Agreement shall conform to the provisions of the Fee Proposal, attached hereto as Exhibit B and incorporated by this reference.

CONTRACTOR shall not undertake any work beyond the scope of this Agreement unless such additional work is approved in advance and in writing by CITY.

**Section 3.2 Method of Payment**

CONTRACTOR shall submit invoices for completed work on a monthly basis, or as otherwise agreed, providing, without limitation, details as to amount of hours, individual performing said work, hourly rate, and indicating to what aspect of the Scope of Services said work is attributable. CONTRACTOR's compensation for all work under this Agreement shall not exceed the amount of the Fee Proposal.

**Section 3.3 Costs**

The Fee Proposal shall include all reimbursable costs required for the performance of the Scope of Services. Payment of additional reimbursable costs considered to be over and above those inherent in the original Scope of Services shall be approved in advanced and in writing, by CITY.

**Section 3.4 Auditing**

CITY reserves the right to periodically audit all charges made by CONTRACTOR to CITY for services under this Agreement. Upon request, CONTRACTOR agrees to furnish CITY, or a designated representative, with necessary information and assistance needed to conduct such an audit.

CONTRACTOR agrees that CITY or its delegate will have the right to review, obtain and copy all records pertaining to performance of this Agreement. CONTRACTOR agrees to provide CITY or its delegate with any relevant information requested and shall permit CITY or its delegate access to its premises, upon reasonable notice, during normal business hours for the purpose of interviewing employees and inspecting and copying such books, records, accounts, and other material that may be relevant to a matter under investigation for the purpose of determining compliance with this requirement. CONTRACTOR further agrees to maintain such records for a period of three (3) years after final payment under this Agreement.

**ARTICLE 4**  
**MISCELLANEOUS PROVISIONS**

**Section 4.1 Nondiscrimination**

In performing services under this Agreement, CONTRACTOR shall not discriminate in the employment of its employees or in the engagement of any sub CONTRACTOR on the basis of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, age, or any other criteria prohibited by law.

**Section 4.2 ADA Compliance**

In performing services under this Agreement, CONTRACTOR shall comply with the Americans with Disabilities Act (ADA) of 1990, and all amendments thereto, as well as all applicable regulations and guidelines issued pursuant to the ADA.

**Section 4.3 Indemnification and Responsibility for Damage**

CONTRACTOR to the fullest extent permitted by law, shall indemnify and hold harmless CITY, its elected and appointed officials, directors, officers, employees and volunteers from and against any claims, damages, losses, and expenses (including reasonable attorney's fees), arising out of performance of the services to be performed under this Agreement, provided that any such claim, damage, loss, or expense is caused by the negligent acts, errors or omissions of CONTRACTOR, any subcontractor employed directly by CONTRACTOR, anyone directly or indirectly employed by any of them, or anyone for whose acts they may be liable, except those injuries or damages arising out of the active negligence of the City of Lodi or its officers or agents.

**Section 4.4 No Personal Liability**

Neither the City Council, nor any other officer or authorized assistant or agent or City employee shall be personally responsible for any liability arising under this Agreement.

**Section 4.5 Responsibility of CITY**

CITY shall not be held responsible for the care or protection of any material or parts of the work described in the Scope of Services prior to final acceptance by CITY, except as expressly provided herein.

**Section 4.6 Insurance Requirements for CONTRACTOR**

CONTRACTOR shall take out and maintain during the life of this Agreement, insurance coverage as set forth in Exhibit C attached hereto and incorporated by this reference.

**Section 4.7 Successors and Assigns**

CITY and CONTRACTOR each bind themselves, their partners, successors, assigns, and legal representatives to this Agreement without the written consent of the others. CONTRACTOR shall not assign or transfer any interest in this Agreement without the prior written consent of CITY. Consent to any such transfer shall be at the sole discretion of CITY.

**Section 4.8 Notices**

Any notice required to be given by the terms of this Agreement shall be in writing signed by an authorized representative of the sender and shall be deemed to have been given when the same is personally served or upon receipt by express or overnight delivery, postage prepaid, or three (3) days from the time of mailing if sent by first class or certified mail, postage prepaid, addressed to the respective parties as follows:

To CITY:                      City of Lodi  
   221 West Pine Street  
   P.O. Box 3006  
   Lodi, CA 95241-1910  
   Attn: Rob Lechner, Business Development Manager

To CONTRACTOR: Apogee Interactive, Inc.  
   100 Crescent Center Parkway, #450  
   Tucker, GA 30084  
   Attn: James Malcolm

**Section 4.9 Cooperation of CITY**

CITY shall cooperate fully and in a timely manner in providing relevant information it has at its disposal relevant to the Scope of Services.

**Section 4.10 CONTRACTOR is Not an Employee of CITY**

CONTRACTOR agrees that in undertaking the duties to be performed under this Agreement, it shall act as an independent contractor for and on behalf of CITY and not an employee of CITY. CITY shall not direct the work and means for accomplishment of the services and work to be performed hereunder. CITY, however, retains the right to require that work performed by CONTRACTOR meet specific standards without regard to the manner and means of accomplishment thereof.

**Section 4.11 Termination**

CITY may terminate this Agreement, with or without cause, by giving CONTRACTOR at least ten (10) days written notice. Where phases are anticipated within the Scope of Services, at which an intermediate decision is required concerning whether to proceed further, CITY may terminate at the conclusion of any such phase.

Upon termination, CONTRACTOR shall be entitled to payment as set forth in the attached Exhibit B to the extent that the work has been performed. Upon termination, CONTRACTOR shall immediately suspend all work on the Project and deliver any documents or work in progress to CITY. However, CITY shall assume no liability for costs, expenses or lost profits resulting from services not completed or for contracts entered into by CONTRACTOR with third parties in reliance upon this Agreement.

**Section 4.12 Confidentiality**

CONTRACTOR agrees to maintain confidentiality of all work and work products produced under this Agreement, except to the extent otherwise required by law or permitted in writing by CITY. CITY agrees to maintain confidentiality of any documents owned by CONTRACTOR and clearly marked by CONTRACTOR as “Confidential” or “Proprietary”, except to the extent otherwise required by law or permitted in writing by CONTRACTOR. CONTRACTOR acknowledges that CITY is subject to the California Public Records Act.

**Section 4.13 Applicable Law, Jurisdiction, Severability, and Attorney’s Fees**

This Agreement shall be governed by the laws of the State of California. Jurisdiction of litigation arising from this Agreement shall be venued with the San Joaquin County Superior Court. If any part of this Agreement is found to conflict with applicable laws, such part shall be inoperative, null, and void insofar as it is in conflict with said laws, but the remainder of this Agreement shall be in force and effect. In the event any dispute between the parties arises under or regarding this Agreement, the prevailing party in any litigation of the dispute shall be entitled to reasonable attorney’s fees from the party who does not prevail as determined by the San Joaquin County Superior Court.

**Section 4.14 City Business License Requirement**

CONTRACTOR acknowledges that Lodi Municipal Code Section 3.01.020 requires CONTRACTOR to have a city business license and CONTRACTOR agrees to secure such license and pay the appropriate fees prior to performing any work hereunder.

**Section 4.15 Captions**

The captions of the sections and subsections of this Agreement are for convenience only and shall not be deemed to be relevant in resolving any question or interpretation or intent hereunder.

**Section 4.16 Integration and Modification**

This Agreement represents the entire understanding of CITY and CONTRACTOR as to those matters contained herein. No prior oral or written understanding shall be of any force or effect with respect to those matters covered hereunder. This Agreement may not be modified or altered except in writing, signed by both parties.

**Section 4.17 Contract Terms Prevail**

All exhibits and this Agreement are intended to be construed as a single document. Should any inconsistency occur between the specific terms of this Agreement and the attached exhibits, the terms of this Agreement shall prevail.

**Section 4.18 Severability**

The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision of this Agreement.

**Section 4.19 Ownership of Documents**

All documents, photographs, reports, analyses, audits, computer media, or other material documents or data, and working papers, whether or not in final form, which have been obtained or prepared under this Agreement, shall be deemed the property of CITY. Upon CITY's request, CONTRACTOR shall allow CITY to inspect all such documents during CONTRACTOR's regular business hours. Upon termination or completion of services under this Agreement, all information collected, work product and documents shall be delivered by CONTRACTOR to CITY within ten (10) calendar days.

CITY agrees to indemnify, defend and hold CONTRACTOR harmless from any liability resulting from CITY's use of such documents for any purpose other than the purpose for which they were intended.

**Section 4.20 Authority**

The undersigned hereby represent and warrant that they are authorized by the parties to execute this Agreement.

**Section 4.21 Federal Transit Funding Conditions**

If the box at left is checked, the Federal Transit Funding conditions attached as Exhibit apply to this contract. In the event of a conflict between the terms of this contract or any of its other exhibits, and the Federal Transit Funding Conditions, the Federal Transit Funding Conditions will control.

IN WITNESS WHEREOF, CITY and CONTRACTOR have executed this Agreement as of the date first above written.

CITY OF LODI, a municipal corporation

ATTEST:

\_\_\_\_\_  
RANDI JOHL  
City Clerk

\_\_\_\_\_  
KONRADT BARTLAM, City Manager

APPROVED AS TO FORM:  
D. STEPHEN SCHWABAUER, City Attorney  
JANICE D. MAGDICH, Deputy City Attorney

CONTRACTOR: Apogee Interactive, Inc

By: \_\_\_\_\_



By: \_\_\_\_\_

Name: James Malcolm  
Title: CFO & EVP

- Attachments:**  
Exhibit A – Scope of Services  
Exhibit B – Fee Proposal  
Exhibit C – Insurance Requirements

Funding Source: 164605.7323  
(Business Unit & Account No.)

Doc ID:

CA:rev.01.2012

**APPENDIX A**  
**Scope of Services**

APOGEE agrees to administer the *HomeEnergySuite (HES)*, *CommercialEnergyCalculator (CEC)* and *Special Purpose Calculators (SPCs)* for the City of Lodi, in strict conformity with the terms and conditions of this contract. APOGEE will provide all necessary implementation services to deliver the online applications, including all maintenance, under this agreement.

Implementation Services will be provided by APOGEE, continuing the services provided last year. These services include:

- HomeEnergyCalculator online audit tool
- Kid's Korner educational content
- Residential Energy Systems reference library content
- Lighting and Appliance calculators
- InteractiveEnergyHome educational application
- CommercialEnergyCalculator online audit tool\*
- 8 additional Special Purpose Calculators
  - Residential Irrigation
  - Pool & Spa
  - Vampire Losses
  - TV Calculator
  - Commercial Lighting
  - Electric Vehicle
  - Space Heater
  - Water Drip Calculator



**APPENDIX B**  
**Fee Proposal**

There is no change for the fees for the existing subscription elements, Home Energy Suite and Commercial Energy Calculator. That annual subscription totals for the Home Energy Suite and the Commercial Energy Calculator is \$12,700.

However, there is an additional fee for the 8 Special Purpose Calculators (SPCs). The annual subscription for the SPC's is \$11,600 with a one-time setup fee of \$14,500.

That annual subscription totals for the Home Energy Suite, Commercial Energy Calculator, and the 8 Special Purpose Calculators for 2013 is \$38,800 (due to the set-up fees for the SPC's). The annual subscription for the Home Energy Suite, Commercial Energy Calculator, and the 8 Special Purpose Calculators in 2014 and on is \$24,300.

A handwritten signature or mark, possibly a stylized 'B' or a similar character, located in the lower right quadrant of the page.

**APOGEE Interactive, Inc.**  
**BillingInsights™**  
**TERMS AND CONDITIONS**

**1. General**

The following terms and conditions ("Terms and Conditions") provide for terms that are common to this Agreement, including all Schedules. In the event of a conflict between these Terms and Conditions and any Schedule, the Schedule will control, unless expressly stated to the contrary in these Terms and Conditions.

**2. Definitions**

As used in this Agreement, and in addition to any other terms defined in this Agreement, the capitalized terms used herein will have the meanings set forth in the Glossary at the end of these Terms and Conditions.

**3. Services**

**3.1 Network Services.**

Licensor will provide Company and the Users with access to the applicable System residing on the Licensor Server ("Network Services") provided that Company and each User must provide its own equipment and services necessary to access the Internet.

**3.2 Maintenance Services.**

Licensor will provide maintenance services for Company as described on Schedule B ("Maintenance Services").

**4. RIGHTS RESERVED**

As between Licensor and Company, title, ownership rights, and Intellectual Property Rights in and to the BillingInsights™ Billing Question Resolution System (BI) and the related Marks (and all Derivative Works thereto and copies thereof, but excluding Company Materials) will remain with Licensor and its suppliers or licensors. Company agrees to abide by the patent and copyright laws and all other applicable laws of the United States including, but not limited to, export control laws. Company acknowledges that the System and all related Source Code remains Proprietary Information of Licensor and/or its suppliers, that the Source Code is not licensed to Company by this Agreement or any Schedule, and Licensor will not deliver a copy of the Source Code or any applications comprising the System to Company. Except as set forth in the Schedules, no right or implied license or right of any kind is granted to Company regarding the System or Deliverables, including, but not limited to, any right to use, reproduce, market, sell, translate, distribute, transfer, adopt, disassemble, decompile, reverse engineer the System or the Documentation thereof, or any portions thereof, or obtain possession of any Source Code or other technical material relating to the System. Company further agrees not to lease, license, sell, sublicense or otherwise transfer the System or Network Services except as expressly authorized by this Agreement. In addition, Company agrees not to modify the System, create Derivative Works or attempt to decipher, decompile, disassemble or reverse engineer the System. The System and Services provided hereunder are "commercial items" as that term is defined at 48 CFR 2.101 consisting of "commercial computer software" and "commercial computer software documentation" as such terms are used in 48 CFR 12.212 and other applicable acquisition regulations and are provided to Company (and the Users, including the U.S. Government, if applicable) only as a commercial item. Consistent with 48 CFR 12.212, 48 CFR 227.7102, and 48 CFR 227.7202, all U.S. Government Users, if any, acquire the Software and its associated documentation with only those rights and subject to the restrictions set forth in this Agreement. Notwithstanding the foregoing, the Software may not be acquired by the U.S. Government pursuant to a contract incorporating clauses prescribed by 48 CFR 27.4, 48 CFR 227.71 or 48 CFR 227.72.

**5. Fees and Payment Terms**

**5.1 Services**

For the Services provided under this Agreement, Company will pay Licensor the fees in the amount and manner set forth in the Letter Agreement for Company's use of BI.

**5.2 Expenses**

Company will pay or reimburse Licensor for, any out-of-pocket expenses, including, without limitation, travel and travel-related expenses, incurred by Licensor at the written request of or with the written approval of Company in connection with the performance of this Agreement. Reasonable and customary expenses incurred by Licensor, including without limitation expenses incurred for travel, including local transportation, lodging and meals, will be billed to Company at Licensor's actual cost.

**5.3 Taxes**

The fees and expenses due to Licensor as set forth in this Agreement are net amounts to be received by Licensor, exclusive of all sales, use, withholding, excise, value added, ad valorem taxes or duties incurred by Company or imposed on Licensor in the performance of this Agreement or otherwise due as a result of this Agreement. This Section will not apply to taxes based solely on Licensor's net income. Company will be solely responsible for and will pay any and all amounts required in the foreign location to be withheld, charged, deducted, or assessed against such payment amounts, and will promptly furnish Licensor with certificates evidencing payment of such amounts.

**5.4 Offset**

Fees and expenses due from Company under this Agreement may not be withheld or offset by Company against other amounts for any reason.

**6. Technical Requirements**

Company must have equipment, software, and Internet access meeting the requirements set forth on Schedule D to be able to use the System and the Network Services. Acquiring, installing, maintaining and operating equipment, Company Materials, and Internet access is solely Company's responsibility, except as otherwise expressly provided in Schedule D. Licensor neither represents nor warrants that the System will be accessible through any web browser release other than those web browser releases indicated in Schedule D.

**7. Nondisclosure and Confidentiality**

**7.1 Obligations**

The Receiving Party will hold in confidence and, without the consent of the Disclosing Party, will not use, reproduce, distribute, transmit, transfer, or disclose, directly or indirectly, in any form, by any means, or for any purpose, the Disclosing Party's Proprietary Information. The Receiving Party may only disclose the Proprietary Information to its employees and independent contractors who (i) have a need to know such information in connection with performing under this Agreement; and (ii) are obligated in writing not to disclose the Disclosing Party's Proprietary Information. Without limiting the foregoing, the Receiving Party will exercise at least the same standard of care in protecting the Disclosing Party's Proprietary Information as the Receiving Party does with its own Proprietary Information.

**7.2 Identification**

All Proprietary Information, except as provided below, will be marked as confidential if in writing or identified as confidential at the time of disclosure if conveyed orally. Notwithstanding the foregoing, Company agrees that any Proprietary Information in whatever form relating to the design, functionality, operational methods or coding of or relating to the System, will be deemed the Proprietary Information of Licensor.

**7.3 Exceptions**

Each party's obligations under this Section 7 will not apply to information which is shown by written evidence to have: (i) become a matter of public knowledge through no fault of or action by the Receiving Party; (ii) been rightfully in the Receiving Party's possession prior to disclosure by the Disclosing Party; (iii) been rightfully obtained by the Receiving Party subsequent to disclosure to the Receiving Party from a third party who is lawfully in possession of such proprietary information without restriction; (iv) been independently developed by the Receiving Party without resort to the Disclosing Party's Proprietary Information; or (v) required by law or judicial order to be disclosed, provided that prior written notice of such required disclosure is furnished to the Disclosing Party as soon as practicable in order to afford the Disclosing Party an opportunity to seek a protective order.

#### 7.4 Return of Information

Whenever requested by the Disclosing Party, the Receiving Party will immediately return the Proprietary Information to the Disclosing Party or destroy all manifestations of the Proprietary Information and provide the Disclosing Party written certification of such destruction.

#### 7.5 Right to Use Company Information

Company grants to Licensor the non-exclusive right to use Company's Proprietary Information (including any data) obtained under this Agreement for Licensor's internal purposes in order to perform the Services and as otherwise set forth in this Agreement. Nothing in this paragraph will limit Licensor's obligations under this Section 7 in any way.

#### 7.6 Term of Obligations

The Receiving Party's obligations with regard to the Disclosing Party's Trade Secrets remain in effect for as long as such information remains a trade secret under applicable law. The Receiving Party's obligations with regard to the Disclosing Party's Confidential Information shall remain in effect during the Term of this Agreement and for five (5) years after the expiration or termination of this Agreement for any reason. Notwithstanding the foregoing, any previously executed nondisclosure agreement between Company and Licensor having nondisclosure provisions shall continue in full force and effect. To the extent of any inconsistency or ambiguity between the non-disclosure obligations in such existing agreement and the non-disclosure obligations in this Agreement, the non-disclosure obligations of this Agreement shall govern and control to the extent of such conflict.

#### 7.7 No Restrictions on Deliverables

In the course of Licensor performing Services, Licensor may use enhancements, discoveries, processes, methods, designs and know-how, whether or not copyrightable or patentable, which Licensor may develop during the Term of this Agreement and Company acknowledges that Licensor may use such enhancements, processes, methods, designs and know-how in its business operations with its other customers.

### 8. Grant Of Rights

#### 8.1 Company Name and Marks

Any use by Licensor of Company's name, or any Company Marks, whether on the Services Website, as part of the Services, in press releases, marketing, advertising or other materials shall be subject to Company's express prior review and written approval, the granting of such approval to be in Company's sole discretion. Subject to the foregoing, Company shall provide Licensor with the Company Marks in the format, resolution, and size and via the method agreed upon by the parties, including updates as necessary, to enable Licensor to perform its obligations under this Agreement. During the Term, Company hereby grants to Licensor a non-exclusive, royalty free, and worldwide license to use the Company Marks (a) on the Services Website and as part of the Services, (b) on agreed upon press releases, marketing, advertising, or other materials, and (c) as otherwise agreed, solely to perform its obligations under this Agreement. Licensor understands and agrees that its use of the Company Marks in connection with this Agreement shall not create any right, title or interest in or to such Company Marks and that all such use and goodwill associated with the Company Marks will inure to the benefit of Company and its licensors. Licensor shall not make use of the Company Marks except as specifically provided for in this Agreement or as expressly authorized in writing by Company prior to such use.

#### 8.2 Company Materials

Subject to the terms and conditions of this Agreement, Company hereby grants to Licensor, during the Term, a non-exclusive, non-transferable, and non-assignable license to use and display the Company Materials: (i) in providing the Services; (ii) on mutually agreed upon press releases, marketing, advertising or other materials; and (iii) as otherwise expressly agreed in writing. Any use of the Company Materials, whether in performance of the Services or on marketing, advertising, or other materials shall be subject to this Section 8.3. Licensor shall not use the Company Materials other than as set forth in this Agreement. Notwithstanding the foregoing, Licensor may reformat Company Materials to fit the format necessary for performance of the Services.

#### 8.3 Reservation of Rights

Company owns and will retain all right, title and interest in its Marks and Materials including without limitation, those Marks and Materials currently used or any which may be developed in the future. Licensor will not copy, distribute, reproduce or use Company's Marks or Materials except as expressly permitted under this Agreement.

#### 8.4 User Data

The Company will own all right, title and interest in and to any information arising out of, or related to, its Users, including all information created as a result of the provision of Services for use by such Users (collectively, "User Data"). As between Licensor and Company, Company will own all User Data that is created, collected, or otherwise generated by Company or Licensor in connection with the Services.

### 9. Protective Legends

Company will not alter, distort, or remove any confidential, proprietary, copyright, trademark, trade secret, or patent legends that appear on or in the System or Documentation, or attempt to do so.

### 10. Limited Warranties

#### 10.1 Software Warranty

Licensor warrants that for a period of sixty (60) days after the Access Date (the "Software Warranty Period"), the System will substantially conform to the Documentation delivered by Licensor to Company or available on the Services Website. If Licensor receives written notice during the Software Warranty Period that the System does not perform as warranted, Licensor will undertake to correct the Software free of charge. **THE FORGOING IS COMPANY'S SOLE AND EXCLUSIVE REMEDY FOR BREACH OF THE WARRANTY.** Licensor warrants that (i) it owns or has sufficient rights to the System to grant all licenses granted on Schedule A and (ii) it has the right to enter into the Agreement. The warranty set forth above is made to and for the benefit of Company only. The warranty will not apply if the System has been used outside the scope of the license, modified other than by Licensor, altered or operated in an unauthorized manner. If Licensor investigates an "error" pursuant to Company's request and such "error" is found to be caused by operator error or erroneous system configuration (such as improper hardware, Company Materials, peripheral equipment, cabling, operating environment, improper data supplied by Company, misuse, or any other cause not inherent in the System Software), Licensor reserves the right to charge and Company shall pay Licensor's then current rates for such investigation.

#### 10.2 Company Warranties

Company warrants to Licensor that (a) during the Term of this Agreement, Company will use the Services, exercise its rights, and perform any obligations under this Agreement in compliance with all applicable laws and regulations and in accordance with this Agreement, and (b) Company holds all rights necessary to any third party intellectual property provided by Company to Licensor for Licensor's use pursuant to this Agreement.

**11. Warranty Disclaimer**

OTHER THAN AS EXPRESSLY SET FORTH IN SECTION 10 HEREIN OR IN A SCHEDULE, NEITHER LICENSOR, ITS AFFILIATES, LICENSORS OR SUPPLIERS, NOR THEIR OFFICERS, DIRECTORS, EMPLOYEES, SHAREHOLDERS, AGENTS OR REPRESENTATIVES MAKES ANY EXPRESS OR IMPLIED WARRANTIES, CONDITIONS, OR REPRESENTATIONS TO COMPANY, OR ANY OTHER PERSON OR ENTITY WITH RESPECT TO THE DELIVERABLES PROVIDED HEREUNDER OR OTHERWISE REGARDING THIS AGREEMENT, WHETHER ORAL OR WRITTEN, EXPRESS, IMPLIED OR STATUTORY. WITHOUT LIMITING THE FOREGOING, ANY IMPLIED WARRANTY OR CONDITION OF MERCHANTABILITY, THE IMPLIED WARRANTY OF NON-INFRINGEMENT, THE IMPLIED WARRANTY OR CONDITION OF FITNESS FOR A PARTICULAR PURPOSE, AND THOSE ARISING FROM A COURSE OF DEALING OR USAGE OF TRADE ARE EXPRESSLY EXCLUDED AND DISCLAIMED. NO WARRANTY IS MADE THAT USE OF THE SYSTEM, NETWORK SERVICES OR DELIVERABLES WILL BE ERROR FREE OR UNINTERRUPTED, THAT ANY ERRORS OR DEFECTS IN THE DELIVERABLES WILL BE CORRECTED, OR THAT THE DELIVERABLES FUNCTIONALITY WILL MEET COMPANY'S REQUIREMENTS.

**12. Limitation of Liability**

**12.1 LIMITATION OF REMEDY**

IN NO EVENT WILL LICENSOR, ITS AFFILIATES, LICENSORS OR SUPPLIERS, OR ANY OF THEIR OFFICERS, DIRECTORS, EMPLOYEES, SHAREHOLDERS, AGENTS OR REPRESENTATIVES BE LIABLE TO COMPANY, OR ANY OTHER PERSON OR ENTITY FOR ANY INDIRECT, SPECIAL, INCIDENTAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES OR LOSS OF GOODWILL IN ANY WAY RELATING TO THIS AGREEMENT OR RESULTING FROM THE USE OF OR INABILITY TO USE THE SYSTEM OR DELIVERABLES OR THE PERFORMANCE OR NON-PERFORMANCE OF ANY SERVICES, INCLUDING THE FAILURE OF ESSENTIAL PURPOSE, EVEN IF LICENSOR HAS BEEN NOTIFIED OF THE POSSIBILITY OR LIKELIHOOD OF SUCH DAMAGES OCCURRING, AND WHETHER SUCH LIABILITY IS BASED ON CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY, PRODUCTS LIABILITY OR OTHERWISE.

**12.2 MAXIMUM LIABILITY**

IN NO EVENT WILL LICENSOR'S LIABILITY FOR ANY DAMAGES TO COMPANY OR TO ANY OTHER PERSON OR ENTITY REGARDLESS OF THE FORM OF ACTION, WHETHER BASED ON CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY, PRODUCTS LIABILITY OR OTHERWISE, EVER EXCEED THE FEES RECEIVED BY LICENSOR UNDER THIS AGREEMENT IN CONNECTION WITH THE AFFECTED SERVICES DURING THE TWELVE (12) MONTHS IMMEDIATELY PRECEDING THE EVENTS GIVING RISE TO SUCH CLAIM.

**13. Indemnification**

**13.1 Licensor**

Licensor will indemnify, defend, and hold harmless Company against all claims, actions or proceedings, arising out of any claim that the System provided by Licensor, Licensor Marks, or the permitted use of the same by Company infringes or violates any third party patent, copyright or trade secret right enforceable in the United States. If it is, or, in the reasonable opinion of Licensor, there is a high probability that it will be, determined by a court of competent jurisdiction that the System or the use thereof infringes any patent, copyright, trade secret or trademark of a third party or if Company is enjoined from using such software or any part of the System, then Licensor, at its sole option and expense, may (i) procure for Company under any applicable patent, copyright, trade secret or trademark the same rights and to the same extent as those granted under this Agreement; (ii) replace such software or any part of the System with other software, which complies with the Documentation; (iii) modify the System, to avoid infringement without material functionality impairment; or (iv) terminate Company's license to the allegedly infringing software or System if (i), (ii) and (iii) are not reasonably practicable, as determined by Licensor. Upon termination under (iv), Licensor shall refund to Company the license fee paid for the allegedly infringing software or System, less a pro-rated amount based on Company's prior use of the allegedly infringing Software. Fulfilling its obligation under this Section 13 will be Licensor's sole obligation to Company and will be Company's sole and exclusive remedy pursuant to this Agreement.

**13.2 Company**

Company will indemnify, defend, and hold harmless Licensor against all claims, actions or proceedings, arising out of: (a) any claim that the Company Materials or any other content, data, logos, marks or other information provided by Company or its employees or inputted into the System, or the permitted use of the same by Licensor, infringes or violates any third party patent, copyright or trade secret right; (b) use by any Company, or any other person or entity, including without limitation Users not including use by Licensor; and (c) any statements, claims, representations or warranties made by Company or its officers, agents, employees, or representatives relating to the Services, other than as authorized by Licensor in writing or made in Licensor's own writings.

**13.3 Obligations**

The indemnifying party ("Indemnitor") will pay all damages, settlements, expenses, costs and reasonable attorneys' fees, incurred by the party to be indemnified ("Indemnitee"), arising out of the matters set forth in this Section 13, provided that such payment will be contingent on: (i) prompt notice by the Indemnitee to the Indemnitor in writing of such claim to enable the Indemnitor to defend or mitigate the same; (ii) cooperation by the Indemnitee with the Indemnitor in the defense and/or settlement thereof, at Indemnitor's expense; and, (iii) the Indemnitee allows the Indemnitor to control the defense and all related settlement negotiations, although the Indemnitor will consult with the Indemnitee.

**13.4 Exceptions**

Licensor will have no indemnity obligation for claims of infringement resulting or alleged to result from any combination, operation, or use of any software or services provided by Licensor with any programs or equipment not supplied by Licensor or not specified in the Agreement for such purpose if such infringement would have been avoided absent such combination, operation. Licensor will have no indemnity obligation for claims resulting or alleged to result from compliance with, or other implementation of, Company specifications. In addition, Licensor will have no indemnity obligation for claims of infringement resulting or alleged to result from any modification of software provided by Licensor by a party other than Licensor if such infringement would have been avoided in the absence of such modifications.

**14. Term and Termination**

**14. Generally**

This Agreement will commence on the Effective Date, and will remain in effect for twelve (12) months thereafter ("Term"). This agreement will automatically renew for an additional twelve (12) months ("Renewal Term") unless notice of Termination is received by either party thirty (30) days prior to renewal. In the event of a termination of the Agreement for any reason, all Schedules will also automatically terminate.

**14.2 Termination**

In the event that either party materially defaults in the performance of any of its duties or obligations under this Agreement or a particular Schedule and does not substantially cure such default, or commence a cure, within thirty (30) days after being given written notice specifying the default, the non-defaulting party may, by giving written notice thereof to the defaulting party, terminate this Agreement. Without prejudice to any other remedies, Licensor may terminate this Agreement immediately if Company makes an assignment for the benefit of creditors, or commences or has commenced against it any proceeding in bankruptcy, insolvency, or reorganization pursuant to bankruptcy laws, laws of debtor's moratorium or similar laws.

#### 14.3 Effect of Termination

Within thirty (30) days (or earlier upon Licensor's reasonable written request) after the effective date of a termination of this Agreement for any reason, Company will (i) pay Licensor for all Services performed by Licensor pursuant to the Schedules up to the effective date of such termination and all other amounts owed by Company to Licensor under this Agreement including, but not limited to, all license fees owed by Company after the effective date of termination; and (ii) return to Licensor all Licensor property, including, but not limited to, the Documentation, and all copies thereof, and the Proprietary Information of Licensor. Upon the return of such materials, Company will provide Licensor with a signed written statement certifying that it has returned all Licensor property to Licensor. Upon termination of this Agreement for any reason, all rights and licenses granted by Licensor hereunder to Company will immediately cease.

#### 14.4 Survival

Termination of this Agreement will not affect the provisions regarding Licensor's or Company's treatment of Proprietary Information, provisions relating to the payments of amounts due, indemnification obligations, or provisions limiting or disclaiming Licensor's liability, which provisions will survive such termination.

### 15. General

#### 15.1 Force Majeure

Neither Licensor nor Company will be liable for failure to perform any of their respective obligations under this Agreement, other than the payment of fees, if such failure is caused by an event outside its reasonable control, including but not limited to, an act of nature, war, or natural disaster.

#### 15.2 Subcontractors

Licensor may, as it deems appropriate, use subcontractors for all or any portion of the Maintenance Services. Licensor may at any time remove and replace any such subcontractors.

#### 15.3 Miscellaneous

This Agreement, including the Schedules and any addenda hereto signed by the parties, constitutes the entire agreement between the parties regarding the subject matter hereof and supersedes all prior or contemporaneous agreements, negotiations, representations and proposals, written or oral. This Agreement does not operate as an acceptance of any conflicting or additional terms and conditions and will prevail over any conflicting or additional provision of any purchase order or any other instrument of Company, it being understood that any purchase order issued by Company will be for Company's convenience only. This Agreement will not be construed to create any employment relationship, partnership, joint venture or agency relationship or to authorize any party to enter into any commitment or agreement binding on the other party. This Agreement will be binding upon and inure to the benefit of the parties, their legal representatives, permitted transferees, successors, and assigns as permitted by this Agreement. Except as otherwise set forth in this Agreement, this Agreement and all rights and obligations may not be assigned (by operation of law or otherwise) in whole or in part by Company, and any such attempted assignment will be void and of no effect. No delay or failure in exercising any right hereunder and no partial or single exercise thereof will be deemed to constitute a waiver of such right or any other rights hereunder. If any provision hereof is declared invalid by a court of competent jurisdiction, such provision will be ineffective only to the extent of such invalidity, so that the remainder of that provision and all remaining provisions of this Agreement will be valid and enforceable to the fullest extent permitted by applicable law. All notices required to be given hereunder will be given in writing and will be deemed delivered when delivered either by hand, or by facsimile (with confirmation copy available upon request) or upon two (2) days after mailed by certified mail with proper postage affixed thereto, or by a nationally recognized overnight delivery service addressed to the signatory at the address set forth on the signature page, or such other person and address as may be designated from time to time in writing. All such communications will be deemed received by the other party upon actual delivery. This Agreement will be exclusively construed, governed and enforced in all respects in accordance with the internal laws (excluding all conflict of law rules) of the State of Georgia and any applicable federal laws of the United States of America, as from time to time amended and in effect. Each party agrees that any claim or cause of action whether in law or equity, arising under or relating to this Agreement may be brought in a court of appropriate jurisdiction in the State of Georgia and each party hereby submits to such jurisdiction. The parties agree that the United Nations Convention on Contracts for the International Sale of Goods will not apply in any respect to this Agreement or the parties hereto. No modifications, additions, or amendments to this Agreement will be effective unless made in writing and signed by duly authorized representatives of the parties. This Agreement may be executed in any number of counterparts, each of which will be deemed an original but all of which together will be deemed for all purposes to constitute one and the same instrument. Signatures transmitted and received via facsimile or other electronic means will be treated as original signatures for all purposes of this Agreement.

### Glossary

"Access Date" means, with respect to the Network Services, the date that Licensor first grants Company access to the System as indicated on Schedule E.

"Account IDs" mean the login passwords and identification names issued for access and utilized by Company and their Users to access and utilize the Network Services as provided herein.

"Company Materials" means the software, data, algorithms content, data information and/or any other materials provided by Company, reasonably required for Licensor to provide the Services hereunder or under a Schedule, and includes those items required to be provided by Company in accordance with Section 6 herein.

"Company Website" means collectively, the points of presence maintained by or on behalf of Company on the Internet.

"Confidential Information" means a Disclosing Party's information (in tangible or intangible form) that is disclosed under this Agreement that is valuable to the disclosing party and not generally known by the public, but which does not rise to the level of a trade secret under applicable law.

"Licensor Server" means the hardware platform or network system owned or operated by, or on behalf of, Licensor where the System resides and is accessed by Company and Users via an Internet connection to the server using an approved Web browser.

"Derivative Works" means any suggestions, contributions, enhancements, improvements, additions, modifications, or derivative works to the referenced software or other materials.

"Disclosing Party" means the party disclosing or otherwise making available Confidential Information or Trade Secrets under this Agreement.

"Documentation" means the user documentation and any other operating, training, and reference manuals relating to the use of the System, as supplied by Licensor to Company, as well as any Derivative Works thereof.

"Intellectual Property Rights" means any and all rights existing from time to time in any jurisdiction under patent law, copyright law, moral rights law, trade-secret law, semiconductor chip protection law, trademark law, unfair competition law, or other similar rights.

"Link" means a URL hidden behind a formatting option that may take the form of a colored item of text (such as a URL description), logo or image, and which allows a user to automatically move to or between WWW pages, WWW sites or within a WWW document when a user clicks his/her mouse on that formatting option.

"Maintenance Services" means Customization Services, Account Services, Maintenance Services and Additional Services.

"Marks" means service marks, trademarks, trade names, logos, and any modifications to the foregoing that may be created during the Term.

"Materials" means the data, materials, pictures, documentation, audio, video, animations, artistic works, writings, and other works of authorship.

"Services Website" means the uniform resource locators which may be used to access the System via the Internet.

"System Pages" means the web site page(s) located on the Licensor Server as part of the Network Services.

"Proprietary Information" means individually and collectively Trade Secrets and Confidential Information.

"Receiving Party" means the party receiving or otherwise having access to Proprietary Information under this Agreement.

"Return Links" means a navigational feature included on a Web or Intranet page accessed through a Link from another Web or Intranet page that allows a Visitor to return to the Web page from which the Visitor originated.

"Trade Secrets" mean information (in tangible or intangible form) which is a trade secret under applicable law.

"Users" mean the individuals authorized by Company to access and use the System, including Company employees, representatives and agents.

## SCHEDULES

### SCHEDULE A

This Schedule A — System License ("Schedule A") is between Licensor and the Company identified on the cover page of the Agreement identified above.

1. **DEFINITIONS.** As used in this Schedule A, and in addition to any other terms defined herein, the capitalized terms used herein will have the meanings set forth in the Glossary at the end of the Terms and Conditions.

2. **GRANT OF LICENSE**

2.1 Grant. Subject to the Terms and Conditions and this Schedule, including, but not limited to, payment by Company of the applicable fees set forth in the Letter Agreement, during the Term and any renewal terms, Licensor grants to Company a limited, non-exclusive, nontransferable license to:

- (i) remotely access and use the System via a Web browser over an Internet connection to the Licensor Server solely for Company's and its customers and their Users' internal purposes; and
- (ii) make a reasonable number of copies of the Documentation provided in connection with the System for use internally by Company in connection with the Company's exercise of the foregoing rights.

2.2 Weather Data. All weather data may only be used in the United States of America and may have conditions placed on its international commercial use. Weather data provided in connection with the Services can be used within the U.S. or for non-commercial international activities without restriction. The non-U.S. weather data cannot be redistributed for commercial purposes.

2.3 Access. As soon as practicable after Licensor's receipt of the fully executed Agreement, Licensor shall provide the applicable System Services to Company according to the time-table set forth on Schedule E.

2.4 Account IDs. Licensor or Company shall assign each User an Account ID. Each Account ID may be used only by a single individual. No Account ID may be used by a single individual on more than one workstation at any one time. Company acknowledges that the use of a single Account ID by more than one User shall be grounds for immediate termination by Licensor and forfeiture of any unearned fees or deposits.

3. **COMPANY OBLIGATIONS**

In addition to other obligations under this Agreement Company (i) may not impose any liabilities upon Licensor, (ii) may not grant any warranty to the User on behalf of Licensor, and (iii) must be consistent with Licensor's Intellectual Property Rights in the System and Services.

4. **UPTIME COMMITMENT**

4.1 Availability. The Network Services will be provided to Company and its Users twenty-four hours a day, seven days a week less the period during which the Network Services are not available due to one or more of the following events (collectively, the "Excusable Downtime"):

- 4.1.1 Scheduled network, hardware or service maintenance;
- 4.1.2 The acts or omissions of Company or Company's employees, agents, contractors, vendors, Users or anyone gaining access to the Network Services by means of Company's Account or User Accounts;
- 4.1.3 A failure of the Internet and/or the public switched telephone network;
- 4.1.4 The occurrence of any event that is beyond Licensor's reasonable Control, or
- 4.1.5 At Company's direction, Licensor restricting Company and Users' access to the Network Services.

4.2 Commitment. Subject to Company satisfying its obligation herein, Licensor guarantees that the Network Services will be available to Company and Users at least 98.5% of the time during each calendar month, excluding Excusable Downtime ("Uptime Commitment"). If Licensor fails to satisfy the Uptime Commitment during a month then Licensor will credit to the Company a pro-rated portion of the System License Fee (as defined below) in the first month of the next succeeding calendar quarter following the failure. For purpose of this Section 3.2 "pro-rated portion of the System License Fee" means the product obtained by multiplying 1/12th of the applicable System License Fee by a fraction, the numerator of which will be the number of hours that the Network Services did not satisfy the Uptime Commitment, and the denominator of which will be the total number of hours during the month that such failure occurred less excusable Downtime. The foregoing refund will be Company sole and exclusive remedy for Licensor's failure to comply with the Uptime Commitment.

5. **License Fees.** In consideration of the license granted herein with respect to the System Services, Company agrees to pay Licensor the fees set forth in the Letter Agreement upon execution of the Agreement and thereafter for Company's use of BI.

## SCHEDULE B

This Schedule B — Maintenance Services ("Schedule B") is between Licensor and the Company identified on the cover page of this Agreement identified above.

1. **Definitions.** As used in this Schedule B, and in addition to any other terms defined herein, the capitalized terms used herein will have the meanings set forth in the Glossary at the end of the Agreement Terms and Conditions.

### 2. Maintenance Services

2.1 Licensor's General Responsibilities. During the Term of this Agreement and with respect to the System, Licensor will provide the following Maintenance Services:

2.1.1 Respond to any defect report it receives in accordance with the schedule set forth in Section 2.2 below;

2.1.2 Maintain a telephone number and technician to receive calls on a seven (7) days a week, twenty-four (24) hours a day basis, nationally recognized holidays and specific Licensor holidays, excepted, which include New Year's Day, Martin Luther King, Jr. Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and day after Thanksgiving, Christmas Eve and Christmas Day, concerning emergency problems and questions;

2.1.3 Clarify functions and features of the System during Licensor's normal business hours;

2.1.4 Provide technical support and guidance in the operation of the System to Company's Systems administrator during Licensor's normal business hours;

2.1.5 Provide System error analysis and correction as set forth in the schedule in Section 1.2 below;

2.1.6 Provide prompt notification and assistance, at Licensor's reasonable discretion, in the event Licensor determines a problem that is covered by this Section 2 exists; and

2.1.7 Provide a designated, knowledgeable support contact for providing technical support, who may be changed by written notice.

2.2 Response Times. Licensor will use commercially reasonable efforts to provide Maintenance Services in accordance with the following response times:

Error Level	Error Classification	Initial Response Time	Resolution Response Time
1	Critical	6 hours	48 hours
2	Severe	14 hours	3 business days
3	Medium	26 hours	10 business days
4	Low	26 hours	Next Release

"Initial Response Time" is the time for a return call from Licensor to Company to acknowledge the defect and to estimate the time for providing the resolution.

"Resolution Response Time" is the time to provide a documented fix or repair (which may be a workaround) that restores full functionality. Any such fix will be deemed an "Update".

#### "Error Classifications":

**Critical:** Company experiences real or perceived data loss or corruption or an essential part of the system is unusable. Unusable means that the Company is not able to use an essential part of the system because of its design or a defect. Essential parts of the system are those that Company needs to use the system effectively.

**Severe:** Company's effectiveness is severely compromised for a particular, essential part of the system, although all other essential parts of the system can be used. This can be measured by comparison to Company's expectations, previous products, previous releases of the same product or quality objectives established for the product or system. Effectiveness refers to the Company's productivity and satisfaction with the work process provided by the system. Satisfaction with the work process includes concerns such as frustrating processes that affect the system's fitness for use.

**Medium:** Company's effectiveness is compromised some, though not severely. All essential parts of the system can be used. This classification is appropriate for all parts of the system, essential or otherwise.

**Low:** Any other material deviation from Documentation or Specification.

2.3 Additional Charges. If a problem reported (or if Company otherwise requests assistance) is outside the scope of this Section 2, Licensor will notify Company to that effect and reserves the right to charge Company at Licensor's then current standard hourly rates, for which Company agrees to pay Licensor promptly upon receiving an invoice.

2.4 Company's General Responsibilities. Company will be responsible for:

2.4.1 Reporting errors promptly.

2.4.2 Promptly paying all fees and other amounts payable hereunder in accordance with the Agreement.

2.4.3 Providing sufficient information for Licensor to duplicate the circumstances of a reported System defect or duplicate the error, as described in the Documentation, so Licensor can duplicate the error, assess the situation, and/or undertake any needed or appropriate corrective action hereunder.

2.4.4 Otherwise following instructions or suggestions from Licensor regarding use, maintenance, upgrades, repairs, workarounds, or other related matters.

2.4.5 Designating two (2) members of its technical staff to serve as Company's System Administrators to contact Licensor with support issues.

2.4.6 Company understands and agrees that Licensor's successful response and provision of Training Services to Company is subject to Company's assistance and compliance regarding (i) at Licensor's reasonable request, Company will provide Licensor with reasonable access to Company's personnel and equipment during normal business hours to discuss and assess any problems and/or requests for assistance;

and (ii) Company will document and promptly report to Licensor all errors or malfunctions of the System. It is Company's responsibility to carry out procedures necessary at Company's facilities for the rectification of errors or malfunctions within a reasonable time after such procedures have been received from Licensor.

### 3. Performance

3.1 Project Control. Licensor has the sole right and obligation to supervise, manage, contract, direct, procure, perform, or cause to be performed the Maintenance Services to be performed by Licensor hereunder unless otherwise provided herein.

3.2 Subcontractors. Licensor may, as it deems appropriate, use subcontractors for all or any portion of the Maintenance Services. Licensor may at any time remove and replace any such subcontractors.

3. Ownership and Licenses.. Company acknowledges that Licensor or its third party suppliers own all rights, title and interest in the Deliverables provided and any and all enhancements, suggestions, contributions, modifications or additions that are contributed or added thereto by Licensor, the Company or others, excluding any third party Proprietary Information provided by Company and any Company Proprietary Information (collectively, the "Deliverables Provided"), including but not limited to all Intellectual Property Rights therein. Company also acknowledges that the Deliverables provided contain Proprietary Information belonging to Licensor and its third party suppliers, and that nothing herein gives Company any right, title or interest in such Deliverables except as otherwise expressly set forth in this Schedule B.

4. Maintenance and Service Fees. Company will pay to Licensor the fees for the applicable Maintenance Services as set forth in the Letter Agreement.

5. Company Representations and Warranties. During the term of this Agreement, Company may provide or make available to Licensor certain Company Materials in connection with Licensor performing Customization or Training Services. Company represents and warrants that Company is authorized to provide Licensor such Company Materials and that Licensor is authorized to use such Company Materials solely for the purpose of providing the Services. In addition to any other indemnification obligations it may have under the Agreement, Company will indemnify, defend and hold harmless Licensor from and against any and all claims (including, but not limited to, claims of infringement of Intellectual Property Rights), liabilities, losses, damages, causes of action or injuries, together with costs and expenses, including reasonable attorneys' fees, arising out of or resulting from Company's failure to comply with the foregoing representations and warranties.

## SCHEDULE C

This Schedule C— System Description & Network Services Description ("Schedule C") is between Licensor and the Company identified on the cover page of the Agreement identified above.

### 1. System. The System consists of

1.1 A local weather data feed to enable the provision of weather normalized usage information through the System

1.2 An interface to the billing cycle data feed Company's billing system as it exists on the Effective Date. Any modifications or technical development required to maintain the Interface with future versions or upgrades to such Company billing system will be provided by Licensor on a time and materials basis.

1.3 The Billing *Insights* Call Center Support System to utilize the billing cycle data to provide sophisticated analysis and reporting

1.4 A user interface for Company's call center representative high bill call resolution support function, which includes Licensor's standard CSR call scripting.

2. Network Services. The Network Services consists of hosting facilities and servers, enhanced by power conditioners, uninterruptible power systems and emergency standby power generators, consistent with the delivery of the service using full bandwidth T-1 access over fiber-optic lines to high-speed multiprocessor servers, including security for the system and its links consistent with their placement behind a firewall system. In addition, separate embedded security systems are provided through the use of Windows 2003 operating system security functions and Microsoft SQL Server database security systems.

## SCHEDULE D

This Schedule D— Technical Requirements ("Schedule D") is between Licensor and the Company identified on the cover page of the Agreement identified above.

Requirements for Access to Network Services include, but may not be limited to:

### 1. Access to the Internet via an Internet service provider (ISP)

#### 2. Internet Browser:

2.1 Internet Explorer 4.0 or higher with temporary session cookies allowed

2.2 Netscape Navigator 4.0 or higher with temporary session cookies allowed

2.3 Browser compatible with (a) or (b) with temporary session cookies allowed

## Schedule E

### Terms of Use

BY ACCESSING THE WEB SITE LOCATED AT WWW.LODIELECTRIC.APOGEE.NET, USING THIS SITE OR ANY RELATED WEB PAGES INCLUDING WITHOUT LIMITATION ANY CONTENT, TOOLS OR APPLICATIONS ACCESSIBLE ON SUCH WEB PAGES (COLLECTIVELY REFERRED TO AS "SITE") IN ANY MANNER, YOU ("YOU", "YOUR" OR "USER") AGREE THAT YOU HAVE READ AND AGREE TO THESE TERMS OF USE THAT ARE POSTED ON THE SITE. THE SITE IS PROVIDED BY CITY OF LODI AND/OR ITS SUPPLIERS AND LICENSORS (COLLECTIVELY REFERRED TO AS "WE", "US" OR "COMPANY").

### USE OF SITE AND THE TOOLS

This Site provides access to certain content, calculators and other applications related to energy and energy use and related matters ("Content"). The tools use calculations based on various factors, including information that You provide. The accuracy of any output from

such tools will reflect the information You submit. Since information changes from time to time, we cannot guarantee that the Content is up-to-date or accurate. In an effort to continue to provide you with as complete and accurate information as possible, information may be changed or updated from time to time without notice. The applications and tools made available on the Site are proprietary and may not be reverse engineered, decompiled, disassembled, copied, distributed or modified by You. You agree not to modify, publish, transmit, transfer or sell, reproduce, create derivative works from, distribute, perform, display, or in any way exploit, any of the Content, in whole or in part, except as expressly permitted in this Agreement. We may terminate your access to the Site if you fail to comply with any of the terms or conditions of these Terms of Use.

#### Your responsibilities

If You are provided with login information to access the Site, You are responsible to maintain the privacy and security of your login information, including user names and passwords, and not allow others to use the login information. You will notify us of any breach in secrecy of your login information. You agree to immediately notify Company by e-mail to [insert email address] of any potential breaches of secrecy of the login information and of the departure of any employee with access to the login information. You agree not to link, "frame" or "mirror" any Content or information contained on or accessible from the Site without the prior written approval of the Company or its licensors, as may be appropriate.

#### USE OF THE SITE.

You agree not to use the Site for any unlawful purpose or in anyway that might harm, damage, or disparage any other party. Without limiting the proceeding sentence and by way of example, You agree that You will not:

- Threaten, harass, abuse, slander, defame or otherwise violate the legal rights (such as rights of privacy and publicity) of others;
- Publish, distribute or disseminate any inappropriate, profane, vulgar, defamatory, infringing, obscene, tortious, indecent, unlawful, immoral or otherwise objectionable material or information;
- Create a false identity or impersonate another for the purpose of misleading others as to the identity of the sender or the origin of a message, including, but not limited to, providing misleading information to any feedback system employed through the Site;
- Transmit or upload any material that contains viruses, Trojan horses, worms, time bombs, cancelbots, or any other harmful or deleterious software programs;
- Interfere with or disrupt the Site, networks or servers connected to the Site or violate the regulations, policies or procedures of such networks or servers;
- Attempt to gain unauthorized access to the Site, logins and passwords of others, or computer systems and networks connected to the Site;
- Permit anyone other than Your authorized users to gain access to or use the Site, or logins and passwords of You;
- Upload or otherwise transmit any information or content that infringes any patent, trademark, trade secret, copyright or other proprietary rights of any party;
- Upload, post or otherwise transmit any unsolicited or unauthorized advertising, promotional materials, "junk mail," "spam," "chain letters," "pyramid schemes," or any other form of solicitation (commercial or otherwise); or
- Use the Site in any manner whatsoever that could lead to a violation of any federal, state or local laws, rules or regulations.

#### You agree to:

- Comply with all notices, instructions and rules posted on the Site; and
- Implement all Internet access and all security procedures required to use the Site at the sole expense of You.

#### THIRD PARTY CONTENT AND LINKS

From time to time, the Site may contain references or links to third-party materials (including without limitation web sites) not controlled by the Company or its suppliers or licensors. The Company provides such information and links as a convenience to you and should not be considered endorsements of such sites or any content, products or information offered on such sites. You acknowledge and agree that the Company is not responsible for any aspect of the information or content contained in any third party materials or on any third party sites accessible or linked to the Site.

#### INDEMNITY

You agree to indemnify and hold harmless the Company and its licensors and suppliers, and their respective directors, officers, employees, agents and contractors, from all damages, injuries, liabilities, costs, fees and expenses (including, but not limited to, legal and accounting fees) arising from or in any way related to your violation of these Terms of Use or misuse of the Site by you or any of your employees, contractors or agents.

#### LIMITATIONS

IN NO EVENT WILL THE COMPANY OR ITS LICENSORS OR SUPPLIERS BE LIABLE TO ANY PARTY FOR ANY DIRECT, INDIRECT, SPECIAL OR OTHER CONSEQUENTIAL DAMAGES FOR ANY USE OF THIS SITE, OR ANY OTHER LINKED WEB SITE, INCLUDING, WITHOUT LIMITATION, ANY LOST PROFITS, BUSINESS INTERRUPTION, OR OTHERWISE, EVEN IF THE COMPANY OR ITS LICENSORS OR SUPPLIERS IS EXPRESSLY ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN NO EVENT WILL THE COMPANY OR ITS LICENSORS OR SUPPLIERS BE LIABLE FOR ANY DIRECT DAMAGES INCURRED BY YOU IN EXCESS OF FIFTY DOLLARS.

#### DISCLAIMERS

THE COMPANY AND ITS LICENSORS AND SUPPLIERS HEREBY DISCLAIM ALL IMPLIED WARRANTIES INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT.

#### MISCELLANEOUS

The Company may amend, modify or otherwise change these Terms of Use by posting such modifications on the Site. In the event any of the provisions of the Terms of Use are held unenforceable or invalid by a court of competent jurisdiction, such provisions shall be deemed severed from the applicable agreement, and the remaining provisions thereof shall remain in full force and effect. Failure of any party to enforce, in any one or more instances, any of the provisions herein shall not be construed as a waiver of the future performance of any such terms or conditions. No consent to a breach of any express or implied term of the Terms of Use or any other notice, directive, or rule otherwise posted

on the Site shall constitute a consent to any prior or subsequent breach. These Terms of Use will be governed by the laws of the State of Georgia, United States of America



EXHIBIT C

**Insurance Requirements for Contractor** The Contractor shall take out and maintain during the life of this contract, insurance coverage as listed below. These insurance policies shall protect the Contractor and any subcontractor performing work covered by this contract from claims for damages for personal injury, including accidental death, as well as from claims for property damages, which may arise from Contractor's operations under this contract, whether such operations be by Contractor or by any subcontractor or by anyone directly or indirectly employed by either of them, and the amount of such insurance shall be as follows:

1. **COMPREHENSIVE GENERAL LIABILITY**

\$1,000,000 Ea. Occurrence

\$2,000,000 Aggregate

NOTE: Contractor agrees and stipulates that any insurance coverage provided to the City of Lodi shall provide for a claims period following termination of coverage which is at least consistent with the claims period or statutes of limitations found in the California Tort Claims Act (California Government Code Section 810 et seq.).

NOTE: (1) The street address of the **CITY OF LODI** must be shown along with (a) and (b) above: 221 West Pine Street, Lodi, California, 95241-1910; (2) The insurance certificate must state, on its face or as an endorsement, a description of the project that it is insuring.

A copy of the certificate of insurance with the following endorsements shall be furnished to the City:

(a) **Additional Named Insured Endorsement**

Such insurance as is afforded by this policy shall also apply to the City of Lodi, its elected and appointed Boards, Commissions, Officers, Agents, Employees, and Volunteers as additional named insureds. (This endorsement shall be on a form furnished to the City and shall be included with Contractor's policies.)

(b) **Primary Insurance Endorsement**

Such insurance as is afforded by the endorsement for the Additional Insureds shall apply as primary insurance. Any other insurance maintained by the City of Lodi or its officers and employees shall be excess only and not contributing with the insurance afforded by this endorsement.

(c) **Completed Operations Endorsement**

For three years after completion of project, a certificate of insurance with a Completed Operations Endorsement, CG 20 37 07 04, will be provided to the City of Lodi.

(d) **Severability of Interest Clause**

The term "insured" is used severally and not collectively, but the inclusion herein of more than one insured shall not operate to increase the limit of the company's liability.

(e) **Notice of Cancellation or Change in Coverage Endorsement**

This policy may not be canceled nor the coverage reduced by the company without 30 days' prior written notice of such cancellation or reduction in coverage to the Risk Manager, City of Lodi, 221 W. Pine St., Lodi, CA 95240.

NOTE: No contract agreement will be signed nor will any work begin on a project until the proper insurance certificate is received by the City.



# Liability Insurance

## Endorsement

*Policy Period* January 1, 2013 - January 1, 2014  
*Effective Date* January 1, 2013  
*Policy Number* 3536-48-28 EUC  
*Insured* APOGEE INTERACTIVE INC  
  
*Name of Company* FEDERAL INSURANCE COMPANY  
  
*Date Issued*

---

This Endorsement applies to the following forms:

GENERAL LIABILITY

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Under Who Is An Insured, the following provision is added:

### Who Is An Insured

#### Scheduled Person Or Organization

Subject to all of the terms and conditions of this insurance, any person or organization shown in the Schedule, acting pursuant to a written contract or agreement between you and such person or organization, is an **insured**; but they are **insureds** only with respect to liability arising out of your operations, or your premises, if you are obligated, pursuant to such contract or agreement, to provide them with such insurance as is afforded by this policy.

However, no such person or organization is an **insured** with respect to any:

assumption of liability by them in a contract or agreement. This limitation does not apply to the liability for damages for injury or damage, to which this insurance applies, that the person or organization would have in the absence of such contract or agreement.

damages arising out of their sole negligence.

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### Schedule

AS REQUIRED BY WRITTEN CONTRACT.

**AGREEMENT FOR PROFESSIONAL SERVICES**

**ARTICLE 1  
PARTIES AND PURPOSE**

**Section 1.1 Parties**

THIS AGREEMENT is entered into on \_\_\_\_\_, 2013, by and between the CITY OF LODI, a municipal corporation (hereinafter "CITY"), and Blue Earth Energy Management Services (hereinafter "CONTRACTOR").

**Section 1.2 Purpose**

CITY selected the CONTRACTOR to provide the services required in accordance with attached Scope of Services, Exhibit A, attached and incorporated by this reference.

CITY wishes to enter into an agreement with CONTRACTOR for the Lodi Keep Your Cool Program (hereinafter "Project") as set forth in the Scope of Services attached here as Exhibit A. CONTRACTOR acknowledges that it is qualified to provide such services to CITY.

**ARTICLE 2  
SCOPE OF SERVICES**

**Section 2.1 Scope of Services**

CONTRACTOR, for the benefit and at the direction of CITY, shall perform the Scope of Services as set forth in Exhibit A.

**Section 2.2 Time For Commencement and Completion of Work**

CONTRACTOR shall commence work pursuant to this Agreement, upon receipt of a written notice to proceed from CITY or on the date set forth in Section 2.6, whichever occurs first, and shall perform all services diligently and complete work under this Agreement based on a mutually agreed upon timeline or as otherwise designated in the Scope of Services.

CONTRACTOR shall submit to CITY such reports, diagrams, drawings and other work products as may be designated in the Scope of Services.

CONTRACTOR shall not be responsible for delays caused by the failure of CITY staff to provide required data or review documents within the appropriate time frames. The review time by CITY and any other agencies involved in the project shall not be

counted against CONTRACTOR's contract performance period. Also, any delays due to weather, vandalism, acts of God, etc., shall not be counted. CONTRACTOR shall remain in contact with reviewing agencies and make all efforts to review and return all comments.

**Section 2.3 Meetings**

CONTRACTOR shall attend meetings as may be set forth in the Scope of Services.

**Section 2.4 Staffing**

CONTRACTOR acknowledges that CITY has relied on CONTRACTOR's capabilities and on the qualifications of CONTRACTOR's principals and staff as identified in its proposal to CITY. The Scope of Services shall be performed by CONTRACTOR, unless agreed to otherwise by CITY in writing. CITY shall be notified by CONTRACTOR of any change of Project Manager and CITY is granted the right of approval of all original, additional and replacement personnel at CITY's sole discretion and shall be notified by CONTRACTOR of any changes of CONTRACTOR's project staff prior to any change.

CONTRACTOR represents it is prepared to and can perform all services within the Scope of Services (Exhibit A) and is prepared to and can perform all services specified therein. CONTRACTOR represents that it has, or will have at the time this Agreement is executed, all licenses, permits, qualifications, insurance and approvals of whatsoever nature are legally required for CONTRACTOR to practice its profession, and that CONTRACTOR shall, at its own cost and expense, keep in effect during the life of this Agreement all such licenses, permits, qualifications, insurance and approvals, and shall indemnify, defend and hold harmless CITY against any costs associated with such licenses, permits, qualifications, insurance and approvals which may be imposed against CITY under this Agreement.

**Section 2.5 Subcontracts**

Unless prior written approval of CITY is obtained, CONTRACTOR shall not enter into any subcontract with any other party for purposes of providing any work or services covered by this Agreement.

**Section 2.6 Term**

The term of this Agreement commences on August 1, 2013 and terminates upon the completion of the Scope of Services or on June 30, 2014, whichever occurs first.

## **ARTICLE 3 COMPENSATION**

### **Section 3.1 Compensation**

CONTRACTOR's compensation for all work under this Agreement shall conform to the provisions of the Fee Proposal, attached hereto as Exhibit B and incorporated by this reference.

CONTRACTOR shall not undertake any work beyond the scope of this Agreement unless such additional work is approved in advance and in writing by CITY.

### **Section 3.2 Method of Payment**

CONTRACTOR shall submit invoices for completed work on a monthly basis, or as otherwise agreed, providing, without limitation, details as to amount of hours, individual performing said work, hourly rate, and indicating to what aspect of the Scope of Services said work is attributable. CONTRACTOR's compensation for all work under this Agreement shall not exceed the amount of the Fee Proposal.

### **Section 3.3 Costs**

The Fee Proposal shall include all reimbursable costs required for the performance of the Scope of Services. Payment of additional reimbursable costs considered to be over and above those inherent in the original Scope of Services shall be approved in advanced and in writing, by CITY.

### **Section 3.4 Auditing**

CITY reserves the right to periodically audit all charges made by CONTRACTOR to CITY for services under this Agreement. Upon request, CONTRACTOR agrees to furnish CITY, or a designated representative, with necessary information and assistance needed to conduct such an audit.

CONTRACTOR agrees that CITY or its delegate will have the right to review, obtain and copy all records pertaining to performance of this Agreement. CONTRACTOR agrees to provide CITY or its delegate with any relevant information requested and shall permit CITY or its delegate access to its premises, upon reasonable notice, during normal business hours for the purpose of interviewing employees and inspecting and copying such books, records, accounts, and other material that may be relevant to a matter under investigation for the purpose of determining compliance with this requirement. CONTRACTOR further agrees to maintain such records for a period of three (3) years after final payment under this Agreement.

**ARTICLE 4**  
**MISCELLANEOUS PROVISIONS**

**Section 4.1 Nondiscrimination**

In performing services under this Agreement, CONTRACTOR shall not discriminate in the employment of its employees or in the engagement of any sub CONTRACTOR on the basis of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, age, or any other criteria prohibited by law.

**Section 4.2 ADA Compliance**

In performing services under this Agreement, CONTRACTOR shall comply with the Americans with Disabilities Act (ADA) of 1990, and all amendments thereto, as well as all applicable regulations and guidelines issued pursuant to the ADA.

**Section 4.3 Indemnification and Responsibility for Damage**

CONTRACTOR to the fullest extent permitted by law, shall indemnify and hold harmless CITY, its elected and appointed officials, directors, officers, employees and volunteers from and against any claims, damages, losses, and expenses (including reasonable attorney's fees), arising out of performance of the services to be performed under this Agreement, provided that any such claim, damage, loss, or expense is caused by the negligent acts, errors or omissions of CONTRACTOR, any subcontractor employed directly by CONTRACTOR, anyone directly or indirectly employed by any of them, or anyone for whose acts they may be liable, except those injuries or damages arising out of the active negligence of the City of Lodi or its officers or agents.

**Section 4.4 No Personal Liability**

Neither the City Council, nor any other officer or authorized assistant or agent or City employee shall be personally responsible for any liability arising under this Agreement.

**Section 4.5 Responsibility of CITY**

CITY shall not be held responsible for the care or protection of any material or parts of the work described in the Scope of Services prior to final acceptance by CITY, except as expressly provided herein.

**Section 4.6 Insurance Requirements for CONTRACTOR**

CONTRACTOR shall take out and maintain during the life of this Agreement, insurance coverage as set forth in Exhibit C attached hereto and incorporated by this reference.

**Section 4.7 Successors and Assigns**

CITY and CONTRACTOR each bind themselves, their partners, successors, assigns, and legal representatives to this Agreement without the written consent of the others. CONTRACTOR shall not assign or transfer any interest in this Agreement without the prior written consent of CITY. Consent to any such transfer shall be at the sole discretion of CITY.

**Section 4.8 Notices**

Any notice required to be given by the terms of this Agreement shall be in writing signed by an authorized representative of the sender and shall be deemed to have been given when the same is personally served or upon receipt by express or overnight delivery, postage prepaid, or three (3) days from the time of mailing if sent by first class or certified mail, postage prepaid, addressed to the respective parties as follows:

To CITY:                      City of Lodi  
   221 West Pine Street  
   P.O. Box 3006  
   Lodi, CA 95241-1910  
   Attn: Rob Lechner, Business Development Manager

To CONTRACTOR:      Blue Earth Energy Management Services  
   253 Polaris Avenue  
   Mountain View, CA 94043  
   Attn: John Pink

**Section 4.9 Cooperation of CITY**

CITY shall cooperate fully and in a timely manner in providing relevant information it has at its disposal relevant to the Scope of Services.

**Section 4.10 CONTRACTOR is Not an Employee of CITY**

CONTRACTOR agrees that in undertaking the duties to be performed under this Agreement, it shall act as an independent contractor for and on behalf of CITY and not an employee of CITY. CITY shall not direct the work and means for accomplishment of the services and work to be performed hereunder. CITY, however, retains the right to require that work performed by CONTRACTOR meet specific standards without regard to the manner and means of accomplishment thereof.

**Section 4.11 Termination**

CITY may terminate this Agreement, with or without cause, by giving CONTRACTOR at least ten (10) days written notice. Where phases are anticipated within the Scope of Services, at which an intermediate decision is required concerning whether to proceed further, CITY may terminate at the conclusion of any such phase.

Upon termination, CONTRACTOR shall be entitled to payment as set forth in the attached Exhibit B to the extent that the work has been performed. Upon termination, CONTRACTOR shall immediately suspend all work on the Project and deliver any documents or work in progress to CITY. However, CITY shall assume no liability for costs, expenses or lost profits resulting from services not completed or for contracts entered into by CONTRACTOR with third parties in reliance upon this Agreement.

**Section 4.12 Confidentiality**

CONTRACTOR agrees to maintain confidentiality of all work and work products produced under this Agreement, except to the extent otherwise required by law or permitted in writing by CITY. CITY agrees to maintain confidentiality of any documents owned by CONTRACTOR and clearly marked by CONTRACTOR as “Confidential” or “Proprietary”, except to the extent otherwise required by law or permitted in writing by CONTRACTOR. CONTRACTOR acknowledges that CITY is subject to the California Public Records Act.

**Section 4.13 Applicable Law, Jurisdiction, Severability, and Attorney’s Fees**

This Agreement shall be governed by the laws of the State of California. Jurisdiction of litigation arising from this Agreement shall be venued with the San Joaquin County Superior Court. If any part of this Agreement is found to conflict with applicable laws, such part shall be inoperative, null, and void insofar as it is in conflict with said laws, but the remainder of this Agreement shall be in force and effect. In the event any dispute between the parties arises under or regarding this Agreement, the prevailing party in any litigation of the dispute shall be entitled to reasonable attorney’s fees from the party who does not prevail as determined by the San Joaquin County Superior Court.

**Section 4.14 City Business License Requirement**

CONTRACTOR acknowledges that Lodi Municipal Code Section 3.01.020 requires CONTRACTOR to have a city business license and CONTRACTOR agrees to secure such license and pay the appropriate fees prior to performing any work hereunder.

**Section 4.15 Captions**

The captions of the sections and subsections of this Agreement are for convenience only and shall not be deemed to be relevant in resolving any question or interpretation or intent hereunder.

**Section 4.16 Integration and Modification**

This Agreement represents the entire understanding of CITY and CONTRACTOR as to those matters contained herein. No prior oral or written understanding shall be of any force or effect with respect to those matters covered hereunder. This Agreement may not be modified or altered except in writing, signed by both parties.

**Section 4.17 Contract Terms Prevail**

All exhibits and this Agreement are intended to be construed as a single document. Should any inconsistency occur between the specific terms of this Agreement and the attached exhibits, the terms of this Agreement shall prevail.

**Section 4.18 Severability**

The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision of this Agreement.

**Section 4.19 Ownership of Documents**

All documents, photographs, reports, analyses, audits, computer media, or other material documents or data, and working papers, whether or not in final form, which have been obtained or prepared under this Agreement, shall be deemed the property of CITY. Upon CITY's request, CONTRACTOR shall allow CITY to inspect all such documents during CONTRACTOR's regular business hours. Upon termination or completion of services under this Agreement, all information collected, work product and documents shall be delivered by CONTRACTOR to CITY within ten (10) calendar days.

CITY agrees to indemnify, defend and hold CONTRACTOR harmless from any liability resulting from CITY's use of such documents for any purpose other than the purpose for which they were intended.

**Section 4.20 Authority**

The undersigned hereby represent and warrant that they are authorized by the parties to execute this Agreement.

**Section 4.21 Federal Transit Funding Conditions**

If the box at left is checked, the Federal Transit Funding conditions attached as Exhibit \_\_\_\_\_ apply to this contract. In the event of a conflict between the terms of this contract or any of its other exhibits, and the Federal Transit Funding Conditions, the Federal Transit Funding Conditions will control.

**IN WITNESS WHEREOF, CITY and CONTRACTOR have executed this Agreement as of the date first above written.**

CITY OF LODI, a municipal corporation

ATTEST:

\_\_\_\_\_  
RANDI JOHL  
City Clerk

\_\_\_\_\_  
KONRADT BARTLAM, City Manager

APPROVED AS TO FORM:  
D. STEPHEN SCHWABAUER, City Attorney  
JANICE D. MAGDICH, Deputy City Attorney

CONTRACTOR: Blue Earth E.M.S.

By: \_\_\_\_\_  


By: \_\_\_\_\_  
Name: John Pink  
Title: President

**Attachments:**  
**Exhibit A – Scope of Services**  
**Exhibit B – Fee Proposal**  
**Exhibit C – Insurance Requirements**

**Funding Source:** 164605.7323  
**(Business Unit & Account No.)**

Doc ID:

CA:rev.01.2012

# **Lodi Electric Keep Your Cool Phase IV**

## **Attachment A**

### **SCOPE OF WORK**

The goal of the *Keep Your Cool* (KYC) program is to help commercial business owners save a significant amount of energy through the installation of targeted, best practice measures that are low-risk and high return. This describes the scope of work and compensation to implement a KYC's fourth cycle of implementation for Lodi Electric.

#### **Task 1: Program Delivery**

##### **Subtask 1.1: Customer Recruitment**

The purpose of this task is to market the program to potential customers in Lodi Electric service territory. The ultimate goal of this task is to enlist customers and schedule their retrofit installations. KYC's recruitment strategy will be built upon prior momentum and customer base, and include systematic cold-calls by KYC Auditors. Making sure that every customer has multiple interactions with the program is the key to avoiding lost opportunities.

##### **Subtask 1.2: Site Audit Report**

Customers who express interest in the program will receive a site audit by a KYC Auditor. The auditor will check existing refrigeration equipment at their facility for retrofit opportunities.

The KYC Auditor will record their findings and prepare an audit report for the customer. The audit report will detail all recommended energy efficient measures, the energy and monetary savings calculations, what incentives are available and what co-pays, if any, would be required. The KYC Auditor will submit the audit report and documentation to KYC administration via the online scheduling system.

KYC Auditors will follow up with customers who require extra time to make a decision, have additional questions or must meet requirements specific to their business (e.g. corporate approval) at a minimum of weekly intervals until the customer accepts or declines participation.

##### **Subtask 1.3: Retrofit Installations**

The project installation work will be scheduled and completed within 30-days unless unforeseen circumstances are encountered (such as manufacturer/supplier delays). Measures will, on average, be installed within two weeks of the customer's acceptance of the project proposal. Installers will arrive at the scheduled time, greet the customer or their employee, and identify themselves as a representative of Lodi and the *Keep Your Cool* program.

#### **Task 2: Program Metrics**

The measures installed, date of installation, and estimated energy savings and demand reduction will be tracked on an ongoing basis during the course of Lodi Electric's KYC program.

**Lodi Electric  
Keep Your Cool Phase IV**

**Attachment B**

**COMPENSATION**

1. The reimbursement level from Lodi Electric to Blue Earth Energy Management Services for providing the services specified in Exhibit A of this Work Order shall not exceed \$25,000.
2. The reimbursement levels per measure unit are shown in

Measure	Cost Unit	Price/Cost Unit
ASH Controller, coolers	door	\$156.88
ASH Controller, freezers	door	\$244.48
Auto Door Closer: Reach-In	closer	\$121.41
Auto Door Closer: Walk-In	closer	\$159.74
LED Case Lights	door	\$324.94
ECM Motor Controller	controller	\$951.88
Programmable EC Motor (3/4 HP, 5.6A)	motor	\$515.01
Programmable EC Motor (1/2 HP, 4.0A)	motor	\$493.11
Programmable EC Motor (1/3 HP, 2.6A)	motor	\$424.12
Programmable EC Motor (1/15 HP, 1.8A)	motor	\$235.06
Programmable EC Motor (1/47 HP, 1.1A)	motor	\$191.26
Programmable EC Motor (1/5 HP, 3.2A)	motor	\$416.45
Strip Curtain, walk-in	square feet	\$9.87
Strip Curtain, warehouse	square feet	\$20.00
T12 to T8 Electronic Ballast	fixture	\$94.20

3. *Table 1 – Lodi Electric Keep Your Cool Pricing.*

Measure	Cost Unit	Price/Cost Unit
ASH Controller, coolers	door	\$156.88
ASH Controller, freezers	door	\$244.48
Auto Door Closer: Reach-In	closer	\$121.41
Auto Door Closer: Walk-In	closer	\$159.74
LED Case Lights	door	\$324.94
ECM Motor Controller	controller	\$951.88
Programmable EC Motor (3/4 HP, 5.6A)	motor	\$515.01
Programmable EC Motor (1/2 HP, 4.0A)	motor	\$493.11
Programmable EC Motor (1/3 HP, 2.6A)	motor	\$424.12

<b>Programmable EC Motor (1/15 HP, 1.8A)</b>	motor	\$235.06
<b>Programmable EC Motor (1/47 HP, 1.1A)</b>	motor	\$191.26
<b>Programmable EC Motor (1/5 HP, 3.2A)</b>	motor	\$416.45
<b>Strip Curtain, walk-in</b>	square feet	\$9.87
<b>Strip Curtain, warehouse</b>	square feet	\$20.00
<b>T12 to T8 Electronic Ballast</b>	fixture	\$94.20

*Table 1 – Lodi Electric Keep Your Cool Pricing*



**Insurance Requirements for Contractor** The Contractor shall take out and maintain during the life of this contract, insurance coverage as listed below. These insurance policies shall protect the Contractor and any subcontractor performing work covered by this contract from claims for damages for personal injury, including accidental death, as well as from claims for property damages, which may arise from Contractor's operations under this contract, whether such operations be by Contractor or by any subcontractor or by anyone directly or indirectly employed by either of them, and the amount of such insurance shall be as follows:

- |  |  |
|--|--|
| 1. <u>COMPREHENSIVE GENERAL LIABILITY</u><br>\$1,000,000 Ea. Occurrence<br>\$2,000,000 Aggregate | 2. <u>COMPREHENSIVE AUTOMOBILE LIABILITY</u><br>\$1,000,000 - Ea. Occurrence |
|--|--|

NOTE: Contractor agrees and stipulates that any insurance coverage provided to the City of Lodi shall provide for a claims period following termination of coverage which is at least consistent with the claims period or statutes of limitations found in the California Tort Claims Act (California Government Code Section 810 et seq.).

NOTE: (1) The street address of the **CITY OF LODI** must be shown along with (a) and (b) above: 221 West Pine Street, Lodi, California, 95241-1910; (2) The insurance certificate must state, on its face or as an endorsement, a description of the project that it is insuring.

A copy of the certificate of insurance with the following endorsements, which may be blanket endorsements, shall be furnished to the City:

- (a) Additional Insured Endorsement  
Such insurance as is afforded by this policy shall also apply to the City of Lodi, its elected and appointed Boards, Commissions, Officers, Agents, Employees, and Volunteers as additional insureds.  
(This endorsement shall be on a form furnished to the City and shall be included with Contractor's policies.)
- (b) Primary Insurance Endorsement  
Such insurance as is afforded by the endorsement for the Additional Insureds shall apply as primary insurance. Any other insurance maintained by the City of Lodi or its officers and employees shall be excess only and not contributing with the insurance afforded by this endorsement.
- (c) Completed Operations Endorsement  
A certificate of insurance with a Completed Operations Endorsement, CG 20 37 07 04, will be provided to the City of Lodi during construction and for three years after acceptance.
- (d) Severability of Interest Clause  
The term "insured" is used severally and not collectively, but the inclusion herein of more than one insured shall not operate to increase the limit of the company's liability.
- (e) Notice of Cancellation or Change in Coverage Endorsement  
This policy may not be canceled nor the coverage reduced by the company without 30 days' prior written notice of such cancellation or reduction in coverage to the Risk Manager, City of Lodi, 221 W. Pine St., Lodi, CA 95240.

**Compensation Insurance** The Contractor shall take out and maintain during the life of this contract, Worker's Compensation Insurance for all of Contractor's employees employed at the site of the project and, if any work is sublet, Contractor shall require the subcontractor similarly to provide Worker's Compensation Insurance for all of the latter's employees unless such employees are covered by the protection afforded by the Contractor. In case any class of employees engaged in hazardous work under this contract at the site of the project is not protected under the Worker's Compensation Statute, the Contractor shall provide and shall cause each subcontractor to provide insurance for the protection of said employees. A waiver of subrogation is required for workers compensation insurance. This policy may not be canceled nor the coverage reduced by the company without 30 days' prior written notice of such cancellation or reduction in coverage to the Risk Manager, City of Lodi, 221 W. Pine St., Lodi, CA 95240.

NOTE: No contract agreement will be signed nor will **any** work begin on a project until the proper insurance certificate is received by the City.

RESOLUTION NO. 2013-134

A RESOLUTION OF THE LODI CITY COUNCIL  
AUTHORIZING THE CITY MANAGER TO EXECUTE  
PROFESSIONAL SERVICES AGREEMENTS WITH  
APOGEE INTERACTIVE AND BLUE EARTH ENERGY

=====

WHEREAS, City of Lodi staff offers numerous programs designed to encourage energy efficiency and conservation for residential and non-residential customers; and

WHEREAS, two of these programs include the Lodi Energy Audit Program (LEAP) and the Lodi Keep Your Cool Program; and

WHEREAS, the LEAP provides residential and small commercial customers with free, on-line energy audits, as well as special purpose calculators designed to assist in determining energy use on specific devices that consume electricity and water; and

WHEREAS, the Lodi Keep Your Cool Program will provide for up to fifteen small commercial customers with direct-installed energy efficiency measures, targeting refrigeration and cooler-box improvements; and

WHEREAS, both programs, funded via the City of Lodi Public Benefits Program (a State-mandated program), will cost a combined \$63,800 and will generate 340,000 or more kilowatt hours of electricity savings per year.

NOW, THEREFORE, BE IT RESOLVED that the Lodi City Council hereby authorizes the City Manager to execute Professional Services Agreements with Apogee Interactive (\$38,800) and Blue Earth Energy (\$25,000) in an amount not to exceed \$63,800.

Dated: July 17, 2013

=====

I hereby certify that Resolution No. 2013-134 was passed and adopted by the City Council of the City of Lodi in a regular meeting held July 17, 2013, by the following vote:

AYES: COUNCIL MEMBERS – Johnson, Katzakian, Mounce, and  
Mayor Nakanishi

NOES: COUNCIL MEMBERS – None

ABSENT: COUNCIL MEMBERS – Hansen

ABSTAIN: COUNCIL MEMBERS – None



RANDI JOHL-OLSON  
City Clerk