

## AGREEMENT TERMS AND CONDITIONS

### STATE OF NEW MEXICO SANTA FE COUNTY

#### CONTRACT TERMS AND CONDITIONS CONTRACT NO. 29-0171-MGR

THIS AGREEMENT is made and entered into on this 15<sup>th</sup> day of June, 2009, between Town Square Software, (Licensor), with its principle place of business located at 1415 Parkside Drive North, Reading, Pennsylvania, 19610 and the County of Santa Fe ("Licensee"), located at 102 Grant Ave., Santa Fe, New Mexico 87501-2161.

IT IS MUTUALLY AGREED BETWEEN THE PARTIES:

#### 1. DEFINITIONS:

"Acceptance" means approval, after a test period, of software, communications, card products, systems production facility, or any other component of this project by the County.

"Agreement" means this agreement for the procurement of the software and services specified herein.

"Compliance Update" means a change made to the Software to reflect a mandated change in an applicable State Law.

"Commercial Off-the shelf" Software ("COTS") means the current, generally available releases of Licensor's software products.

"Database Software" means Relational Database Management Systems (RDMS) such as Microsoft SQL Server, Oracle or similar third-party Software that is utilized by the Software to store Licensee data on a disk subsystem as part of the operation of the Software.

"Designated Processor" means the computer processing device that provides the primary control for the interpretation and execution of the Software on which the Software is initially installed or, if a software activator device is required, the computer processing device within which the software activator is properly installed.

"Documentation" means any standard operator and user manuals, product specifications, glossary, index, training materials, and other similar materials generally made available and provided by Licensor for use with the Software.

"End User" means the Licensee, or any employee(s), affiliate(s), agent(s), representative(s) or any other person under the direction or control of the Licensee that uses the Software to perform certain functions or tasks as required by the Licensee.

"Enhancement" means any modification or addition that, when made or added to the Software, changes its utility, efficiency, functional capability or application. Licensor may, in its sole discretion, designate an Enhancement as minor or major.

“Error” means any failure of the Software to conform in any material respect to the functional specifications contained in the Documentation, as published from time to time by Licensor.

“Error Corrections” means a modification or an addition that, when made or added to the Software, establishes material conformity of the Software to the Documentation, or a procedure or routine that, when implemented in the regular operation of the Software, eliminates the practical adverse effect on the Licensee of such nonconformity.

“Hardware” means the Computer System components and equipment, other than the Database Software, Software, and Third-Party Software.

“Interface” means the transmission of data that will allow for efficient and logical interaction with other applicable systems.

“Integrate” means components of the system shall function efficiently and logically with all applicable existing systems.

“Licensed Software” is the computer software in all representations, along with documentation and manuals that are owned by the Licensor.

“Maintenance” means both preventive and remedial maintenance.

“Products” refers to software, Commercial Off-the-shelf Software, or services purchased by Licensee or provided by Licensor.

“Services” refers to support services, educational services, services to customize software, application design and analysis, or other professional services to be performed within the scope of the Agreement.

“Site” means a single physical location and single database for which the Software is licensed. The number of Sites for which Licensee is licensed to use the Software shall be determined by Licensee.

“Software” applies to programs; procedures, rules, and any associated documentation pertaining to the operation of a system or applications system and include Error Corrections, Compliance Updates and new Versions and Releases of such program(s) that may be provided under this Agreement. The term "Software" excludes any Third-Party Software.

“Software Modification” has the same meaning as "Customization" if made at the request of the County under the terms of this Agreement and "Enhancement" when made by Ma as part of the development or enhancement of the Software or Third-Party Software.

“Technical Support” means Licensor-supplied software, customized software, hardware, and COTS maintenance, trouble shooting and correction, telephone support, and other software/hardware.

“ Test Period” means the period following (a) the County’s receipt of the Notice of Completion or (b) in the case here the County request or causes a material delay in the performance of implementation services, the date set forth in the Statement of Work for commencement of acceptance testing.



“Third-Party Software” means any third-party software program(s) provided by Licensor to the Licensee under this Agreement.

“Version” means a new version of the Software that includes minor Enhancements, Error Corrections and/or Compliance Updates.

2. **GRANT OF LICENSE:** Subject to the term sand conditions herein, Licensor hereby grants Licensee a nonexclusive license to (i) access and execute eCIVICALL (the Software) on Licensor’s application server over the Internet, and (ii) transmit data related to Licensee’s use of the Software over the internet.

3. **USE AND ACCESS:**

3.1 Subject to the restrictions on use as set forth herein, Licensee will have access to the Software and Licensor’s application server for the purpose of using the software for its intended purpose and in accordance with the specifications set forth in any documentation relating to the Software provided by Licensor. Such use and access will be continuous on a 24/7 basis except for interruptions by reason of maintenance or downtime beyond Licensor’s reasonable control.

3.2 Licensee will use the Software only for its internal business operations and will not permit the Software to be used by or for the benefit of anyone other than Licensee. Licensee will not have the right to re-license or sell rights to access and /or use the Licensed Software or to transfer or assign rights to access or use the Software, except as expressly provided herein. Licensee may not modify, translate, reverse engineer, decompile or create derivative works based upon the Software. Licensee agrees to use the Software in a manner that complies with all applicable laws including intellectual property and copyright laws. Licensor expressly reserves all rights not expressly granted to licensee herein.

3.3 Licensee will not: (i) transmit or share identification or password codes to persons other than authorized users, (ii) permit the identification or password codes to be cached in proxy servers and accessed by individuals who are not authorized users, or (iii) permit access to the software through a single identification or password code being made available to multiple users on a network.

4. **ACCEPTANCE:** The Licensee reserves the right to perform acceptance testing, for a period of 30 days, of system installation and implementation at the Licensee site.

4.1 During any acceptance test period, the Licensee may test the Software to verify that it conforms in all material respects to the Documentation. If the Software does not so conform, the Licensee shall promptly notify Licensor in writing and Licensor shall work diligently to correct all nonconformities free of cost to the Licensee.

4.2 The Software shall be considered accepted for all purposes upon the earlier of: (a) notification by Licensee that the Software is in compliance; (b) expiration of the Test Period if Licensee fails to notify Licensor of any material nonconformity within thirty (30) days following installation of Software.



4.3 At any time before the end of the acceptance testing period, if the Licensee, in its sole discretion, determines that the system has failed to meet the specifications or requirements of this Agreement, or that features or functions said to be present in Licensor's proposal are absent or do not function properly, and Licensor is unable to correct any non-conformity in the Software within fifteen (15) days of notice of the non-conformity, the Licensee may take any or all of the following actions:

4.3.1 Have Licensor modify the installed system to eliminate the deficiency to the Licensee's satisfaction.

4.3.2 Have Licensor re-install a new copy of the system product(s).

4.3.3 Allow Licensor an additional fifteen (15) days to cure any defect or implement a plan to cure any defect within a time period acceptable to the Licensee.

5. **SUPPORT SERVICES:** Licensor will supply telephone support regarding the Software to Licensee on a reasonable and necessary basis during normal weekday business hours of 8:30am to 5:00 pm Eastern Time excluding legal holidays. Additionally, Licensor will, if necessary, provide reasonable support to Licensee through email and/or written correspondence.

6. **OWNERSHIP OF INTELLECTUAL PROPERTY:** Title to any proprietary rights in the Software or Licensor's web site will remain in and be the sole and exclusive property of Licensor. Licensee will be the owner of all content created and posed by Licensee. For Licensee, this includes but is not limited to Licensee's resident information, employee information and departmental names associated with the Township.

7. **INDEMNITY:**

7.1 Licensor shall defend, indemnify, and hold harmless Licensee and its Elected Officials, agents, and employees from any losses, liabilities, damages, demands, suites, causes of action, judgments, costs or expenses (including but not limited to attorney's fees) resulting from or directly or indirectly arising out of Licensor's negligent performance or non-performance of its obligations under this Agreement and shall be limited to the amount of the Licensor's error's and omissions insurance policy required under paragraph 25, *in year one and limited to the total fee paid for this contract in years two through four (\$32,000)*

7.2 Licensor agrees (i) that the Licensee shall have the right to control and participate in the defense of any such demand, suit, or cause of action concerning matters that relate to the County and (ii) that such suit will not be settled without the County's consent, such consent not to be unreasonably withheld. If a conflict exists between the interests of the County and Licensor in such demand, suit, or cause of action counsel shall be retained to represent the Licensee's interest.

8. **TERM:** This Agreement shall become effective upon execution by both parties. The term of the Agreement shall be for four (4) years with a termination date of ~~January 31, 2013.~~ *June 30, OK*

9. **TERMINATION:**

9.1 Termination of Agreement for Cause. Either party may terminate the Agreement based upon any material breach of this Agreement by the other party. The non-breaching party shall give the breaching party written notice of termination specifying the grounds for the termination. The termination shall be effective **thirty (30)** days from the breaching party's receipt of the

*-GL OK  
General Liability*

*NO*

*JOH*

*[Signature]*

notice of termination, during which time the breaching party shall have the right to cure the breach. If, however, the breach cannot with due diligence be cured within **thirty (30)** days, the breaching party shall have a reasonable time to cure the breach, provided that, within seven (7) days of its receipt of the written notice of termination, the breaching party (i) began to cure the breach and (ii) advised the non-breaching party in writing that it intended to cure.

9.2 Termination for Convenience of Licensee. The Licensee may, in its discretion, terminate this Agreement at any time for any reason by giving the Licensor written notice of termination. The notice shall specify the effective date of termination, which shall not be less than seven (7) days from the Licensor's receipt of the notice. The Licensee shall pay the Licensor for acceptable work/product, determined in accordance with the specifications and standards set forth in the Agreement, performed before the effective date of termination but shall not be liable for any work performed after the effective date of termination.

9.3 If Licensor ceases conducting business in the normal course, admits its insolvency or makes an assignment for the benefit of creditors or becomes the subject of any judicial or administrative proceedings in bankruptcy, receivership or reorganization and such proceeding is not dismissed within ninety (90) days after it is commenced, the Licensee may terminate this Agreement immediately upon written notice to Licensor.

**10. APPROPRIATIONS AND AUTHORIZATIONS:**

10.1 This Agreement is contingent upon sufficient appropriations and authorizations being made for performance of this Agreement by the Board of County Commissioners of the County and/or, if state funds are involved, the Legislature of the State of New Mexico. If sufficient appropriations and authorizations are not made in this or future fiscal years, this Agreement shall terminate upon written notice by the Licensee to Licensor. Such termination shall be without penalty to the Licensee, and the Licensee shall have no duty to reimburse Licensor for expenditures made in the performance of this Agreement. The Licensee is expressly not committed to expenditure of any funds until such time as they are programmed, budgeted, encumbered and approved for expenditure by the Licensee. The Licensee's decision as to whether sufficient appropriations and authorizations have been made for the fulfillment of this Agreement shall be final and not subject to challenge by Licensor in any way or forum, including a lawsuit.

**11. COMPENSATION**

11.1 Fee: The total amount to be paid to Licensor under this Agreement shall not exceed **\$32,000.00** exclusive of New Mexico Gross Receipts Tax.

11.2 Cost Schedule:

<u>Item Description/QTY</u>	<u>Rate</u>
eCIVICALL enterprise license 1x License Fee	\$24,000
eCIV Set/C, ECIVICALL Setup and Configuration 1x Fee	\$2,500
eCIV DB Pop DB Citizen table population full addressing 1xFee	\$2,500
Training Implementation and Training Package 2 Days (1,500 per day)	\$3,000
eCIVICALL Annual Maintenance & Hosting Year One Gratis	-\$3,600
<b>TOTAL</b>	<b>\$32,000.00</b>

11.3 Licensor shall submit a written request for payment to Licensee as provided above. Within fifteen (15) days of the Licensee's receipt of the written request, the Licensee shall issue a

*in Addendum A, here to attach and incorporate in its entirety.*



written certification of complete or partial acceptance or rejection of the contractual items or services for which payment is sought. Licensor acknowledges and agrees that the County may not make any payment hereunder unless and until it has issued a written certification accepting the contractual items or services. Within thirty (30) days of the issuance of a written certification accepting the contractual items or services, the County shall tender payment for the accepted items or services. In the event the County fails to tender payment within thirty (30) days of the written certification accepting the items or services, the County shall pay late payment charges of one and one-half percent (1.5%) per month, until the amount due is paid in full.

11.4 In the event Licensor breaches this Agreement, the Licensee may, without penalty, withhold any payments due Licensor for the purpose of set-off until such time as the Licensee determines the exact amount of damages it suffered as a result of the breach.

11.5 Payment under this Agreement shall not foreclose the right of the Licensee to recover excessive or illegal payment.

**12. CONFIDENTIAL INFORMATION:**

12.1 Both the Licensee and Licensor acknowledge that the Software, including the database architecture and sequence and Documentation, the Third Party Software, any information, except for information that is public information under law, provided to or developed by Licensor in the performance of this Agreement, and any information that is exchanged by the parties that is clearly marked with a confidential, private or proprietary legend, is Confidential Information.

12.2 The parties shall not to use or make each other's Confidential Information available to any third party for any purpose other than as necessary to perform under this Agreement.

12.3 Exceptions. A party's Confidential Information shall not include information that: (a) is or becomes publicly available through no act or omission of the recipient; (b) was in the recipient's lawful possession prior to the disclosure and was not obtained by the recipient either directly or indirectly from the disclosing party; (c) is lawfully disclosed to the recipient by a third party without restriction on recipient's disclosure, and where recipient was not aware that the information was the confidential information of discloser; (d) is independently developed by the recipient without violation of this Agreement; or (e) is required to be disclosed by law.

**13. ASSIGNMENT:** Licensor shall not assign nor transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without prior, written approval from the Licensee. No such assignment or transfer shall relieve Licensee from its obligations and liabilities under this Agreement.

**14. SUBCONTRACTING:** Licensor may not subcontract portions of the services to be performed under this Agreement without prior, written approval of Licensee. No such subcontracting shall relieve Licensor from its obligations and liabilities under this Agreement.

**15. STATUS OF CONTRACTOR:** Notwithstanding any other provisions of this Agreement, Licensor, and its agents and employees, are independent Contractors performing professional services for Licensee and are not employees of Licensee. Licensor, including its agents and employees, shall not, by virtue of this Agreement, accrue leave, retirement, insurance, bonding, use of Licensee's vehicles, or any other benefits afforded to employees of Licensee. Licensor acknowledges that all sums received under the terms of the Agreement are reportable by it for income tax purposes as self-employment or business income.

16. **CONFLICT OF INTEREST:** Licensor warrants that it presently has no interest and shall not acquire any interest, direct or indirect, that would conflict in any manner or degree with the performance of services required under this Agreement.

17. **AMENDMENTS:** This Agreement shall not be altered, changed, or amended except by an instrument in writing executed by the parties hereto.

18. **EQUAL OPPORTUNITY COMPLIANCE:**

18.1 Licensor agrees to abide by all Federal, State, and local laws, ordinances, and rules and regulations pertaining to equal opportunity and unlawful discrimination. Without in any way limiting the foregoing general obligation, Licensor specifically agrees not to discriminate against any person with regard to employment with Licensor or participation in any program or activity offered pursuant to this Agreement on the grounds of race, age, religion, color, national origin, ancestry, sex, physical or mental handicap, serious medical condition, spousal affiliation, sexual orientation, or gender identity.

18.2 Licensor acknowledges and agrees that failure to comply with this Section shall constitute a material breach of this Agreement.

19. **APPLICABLE LAW:** This Agreement shall be governed by the laws of the State of New Mexico. Notwithstanding any other provision of this Agreement, in the event of a lawsuit involving this Agreement, venue shall be proper only in a New Mexico court of competent jurisdiction. By execution of this Agreement, Licensor acknowledges and agrees to the jurisdiction of the courts of the State of New Mexico over such lawsuits.

20. **RECORDS AND AUDITS:**

20.1 To the extent their books and records relate to (i) their performance of this Agreement or any subcontract entered into pursuant to it or (ii) cost or pricing data (if any) set forth in this Agreement or that was required to be submitted to Licensee as part of the procurement process, Licensor agrees to (i) maintain such books and records during the term of this Agreement and for a period of six (6) years from the date of final payment under this Agreement; (ii) allow the Licensee or its designee to audit such books and records at reasonable times and upon reasonable notice; and (iii) to keep such books and records in accordance with generally accepted accounting principles ("GAAP").

20.2 To the extent their books and records relate to (i) their performance of this Agreement or any subcontract entered into pursuant to it or (ii) cost or pricing data (if any) set forth in this Agreement or that was required to be submitted to the County as part of the procurement process, Licensor also agrees to require any subcontractor it may hire to perform its obligations under this Agreement to (i) maintain such books and records during the term of this Agreement and for a period of six (6) years from the date of final payment under the subcontract; (ii) to allow Licensee or its designee to audit such books and records at reasonable times and upon reasonable notice; and (iii) to keep such books and records in accordance with GAAP.

21. **ENFORCEMENT OF AGREEMENT/WAIVER:** the waiver by any party of any breach of covenant will not be construed to be a waiver of any succeeding breach or any other covenant. All waivers must be in writing, and signed by the party waiving its rights.



22. **NOTICE OF PENALTIES:** The New Mexico Procurement Code, NMSA 1978, Sections 13-1-28 through 13-1-199, as amended, imposes civil and criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for bribes, gratuities and kick-backs.

23. **NOTICES:** All deliveries, notices, requests, demands or other communications provided for or required by this Agreement shall be in writing and shall be deemed to have been given when sent by registered or certified mail, return receipt requested; when sent by overnight carrier; or upon telephone confirmation to sender of receipt of a facsimile communication which is followed by a mailed hard copy from sender. Notices shall be addressed to:

SANTA FE COUNTY (LICENSEE):

Legal Department  
102 Grant Ave.  
P.O. Box 276  
Santa Fe, NM 87504-0276

TOWN SQUARE SOFTWARE, LLC (LICENSOR):

1415 Parkside Drive North  
Reading, PA 19610

~~269-567-2900~~

(610) 374-7900 -ok

*jan@csvtell.com*

24. **MERGER; SCOPE OF AGREEMENT:**

24.1 The provisions of this Agreement are severable, and if for any reason, a clause, sentence or paragraph of this Agreement is determined to be invalid by a court of competent jurisdiction, such invalidity shall not affect other provisions of this Agreement, which can be given effect without the invalid provision.

24.2 This Agreement incorporates all the agreements, covenants and understandings between the parties concerning the subject matter hereof, and all such agreements, covenants and understandings have been merged into this Agreement. No prior agreement or understanding, verbal or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

25. **INSURANCE:**

25.1 General Conditions. Licensor shall submit evidence of insurance as required herein. Policies of insurance shall be written by companies authorized to write such insurance in New Mexico.

25.2 General Liability Insurance, Including Automobile. Licensor shall procure and maintain ~~during the life~~ of this Agreement a comprehensive general liability and automobile insurance policy with liability limits in amounts not less than \$1,050,000 combined single limits of liability for bodily injury, including death, and property damage for any one occurrence. Said policies of insurance shall include coverage for all operations performed for the Licensee by Licensor; coverage for the use of all owned, non-owned, hired automobiles, vehicles and other equipment,

*-no*

*for the 1st year of the agreement*

both on and off work; and contractual liability coverage under which this Agreement is an insured contract. County of Santa Fe shall be a named additional insured on the policy.

25.3 Workers' Compensation Insurance. Licensor agrees to comply with the state laws and rules pertaining to workers' compensation insurance coverage for its employees. If Licensor fails to comply with the New Mexico Workers' Compensation Act and applicable rules when required to do so, the Agreement may be canceled effective immediately.

25.4 Increased Limits. If, during the life of this Agreement, the Legislature of the State of New Mexico increases the maximum limits of liability under the Tort Claims Act, NMSA 1978, Sections 41-4-1 through 41-4-29, as amended, Licensor shall increase the maximum limits of any insurance required herein.

26. **LIMITATION OF LIABILITY:** The Licensee's liability to Licensor for any breach of this Agreement by the Licensee shall be limited to direct damages and shall not exceed the maximum amount of potential compensation specified in Section 18, "COMPENSATION," of this Agreement. In no event shall the Licensee be liable to Licensor for special or consequential damages, even if the Licensee was advised of the possibility of such damages prior to entering into this Agreement. OK  
SIF  
[Signature]

27. **NO THIRD-PARTY BENEFICIARIES:** This Agreement was not intended to and does not create any rights in any persons not a party hereto.

28. **SURVIVAL OF OBLIGATIONS:** The Sections in this Agreement entitled Software License, Intellectual Property Indemnification, Insurance, and Confidential Information shall survive the expiration or termination of this Agreement.

**IN WITNESS WHEREOF**, the parties hereto have executed this Agreement as of the date of the last signatory.

**SANTA FE COUNTY:**

By: [Signature]  
Roman Abeyta, County Manager



**APPROVED AS TO FORM:**

By: [Signature]  
Stephen C. Ross, County Attorney

**FINANCE DEPARTEMENT APPROVAL:**

By: [Signature]  
Teresa Martinez, Santa Fe County Finance Director

[Signature]

**TOWN SQUARE SOFTWARE, LLC:**

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



Print Name and Title: \_\_\_\_\_

JAN B. ORCUTT

Tax I.D. No.: \_\_\_\_\_

37-1575415



**ADDENDUM A  
AGREEMENT TERMS AND CONDITIONS**

STATE OF NEW MEXICO  
SANTA FE COUNTY

CONTRACT no. 29-0171 MGR dated June 15, 2009

*please review*

**1. PAYMENT TERMS**

Licensee agrees to pay Licensor for the eCIVICAL product as demonstrated with the enhancement of the Search capability by District and the inclusion of the district field within the Citizen Address Table within the product according to the following schedule:

Within fifteen days from contract signing: The sum of: One half of the License fee (\$12,000) plus the total setup and configuration fees (\$8,000) for a total of \$20,000.

Upon completion of onsite Training: \$6,000.

Upon Final Acceptance of Product: \$6,000.

**2. MAINTENANCE AND HOSTING FEE PAYMENTS**

The Annual Maintenance and Hosting Fees according to the following schedule:

Year One (\$3,600): July 1 for the period: July 1, 09 through June 30, 2010: WAIVED

Year Two \$3,780: July 1, 2010 for the period July 1, 2010 through June 30, 2011

Year Three \$4,000: July 1, 2011 for the period July 1, 2011 through June 30, 2012

Year Four \$4,200: July 1, 2012 for the period July 1, 2012 through June 30, 2013

At the end of the Term of this Agreement, Licensee may renew for a fee of 15% of the original License fee (\$24,000) which is equal to \$3,600 plus the annual maintenance and hosting fee of \$4,410 in year 5.

**Note on Section 25. INSURANCE:**

Year One is the only year in which any employees of Licensor will have need to travel on Santa Fe County's behalf, and strictly for the purpose of Training the County's employees on the use of the product.

*licensed for forty (40) users*



**ADDENDUM B**

**SANTA FE COUNTY and TOWN SQUARE SOFTWARE**

THIS ADDENDUM B is hereby made and entered into on this 14<sup>th</sup> day of July, 2009 between the County of Santa Fe (hereinafter "Licensee") and Town Square Software, LLC (hereinafter "Licensor").

1. This Addendum B clarifies and modifies the Agreement Terms & Conditions of Contract No. 29-0171-MGR, dated June 15, 2009, including the interlineations thereto and Addendum A attached thereto.
2. Paragraphs 7 and 25.2, dealing with insurance requirements, are modified to the extent that because of the nature of the underlying contract (including Addendums A and B) and the type of service to be performed, after the first year, there is no travel or other on-site visitation(s) required and all work is performed over the internet and, therefore, liability under a general liability, including automobile, would be non-existent.
3. Paragraph 11.3 is restored to the original requirement of allowing thirty (30) days after issuance of a written certification accepting said services.
4. All other terms and conditions of the Contract, including interlineations and Addendum A, are hereby ratified and are to be given full force and effect.

**SANTA FE COUNTY**



ROMAN ABEYTA, COUNTY MANAGER



**TOWN SQUARE SOFTWARE, LLC.**



JAN R. ORCUTT, PRESIDENT

Approved as to Form:

  
STEPHEN C. ROSS, COUNTY ATTORNEY

Dated:

7-14-09