Master AGREEMENT

SOFTWARE AS A SERVICE

This agreement (“Agreement“) is entered into and is effective as of [Effective Date] (“Effective Date”), by and between the East Bay Community Energy Authority, a joint powers authority formed under the laws of the State of California (“EBCE”) and [SERVICE PROVIDER NAME], a [Service Provider’s legal status] located at [Service Provider Address] (“Service Provider”).

Recitals

WHEREAS, EBCE requires third-party hosted “software as a service” services, as further described herein, with respect to certain of its information technology needs;

WHEREAS, EBCE requested a proposal from Service Provider for such services;

WHEREAS, Service Provider has experience and expertise in the business of providing the required services;

WHEREAS, Service Provider submitted a proposal to EBCE to provide such services to EBCE;

WHEREAS, based on Service Provider’s superior knowledge and experience relating to the required services, EBCE has selected Service Provider to provide and manage the services;

WHEREAS, Service Provider wishes to perform the required services and acknowledges that the successful performance of the services and the security and availability of EBCE’s data are critical to the operation of EBCE’s business; and,

WHEREAS, Service Provider has agreed to provide the required services to EBCE, all on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants and representations set forth in this Agreement, the parties hereby agree as follows:

1. The Services. This Agreement sets forth the terms and conditions under which Service Provider agrees to license to EBCE certain hosted software and provide all other services necessary for productive use of such software including **[**customization / integration, user identification and password change management, data import / export, monitoring, technical support, maintenance, **offsite or onsite** training, backup and recovery, and change management- **MODIFY AS NEEDED]** (collectively, the “Services“) as further set forth in Exhibit “A” attached hereto.
   1. Authorized Users. Unless otherwise limited herein, Service Provider grants EBCE a renewable, irrevocable, nonexclusive, royalty-free, and worldwide right and license for any EBCE employee, contractor, or agent, or any other individual or entity authorized by EBCE, (each, an “Authorized User”) to access and use the Services. Other than any limitations otherwise described herein, Authorized Users will have no other limitations on their access to or use of the Services.
   2. Acknowledgement of License Grant. For the purposes of 11 U.S.C. § 365(n), the parties acknowledge and agree that this Agreement constitutes a grant of a license to EBCE to use intellectual property in software form, by Service Provider.
   3. Changes in Number of Authorized Users. EBCE is entitled to increase or decrease the initial number of Authorized Users (“Minimum Commitment”), on an as-requested basis; provided, however, that EBCE shall maintain the Minimum Commitment unless the parties otherwise agree to adjust the Minimum Commitment. Should EBCE elect to change the number of Authorized Users, Service Provider shall reduce or increase Authorized Users specified in Exhibit A and adjust the prospective Services Fees accordingly no later than five (5) business days from EBCE’s written request.
   4. Control and Location of Services. The method and means of providing the Services shall be under the exclusive control, management, and supervision of Service Provider, giving due consideration to the requests of EBCE. Cloud based storage shall not be utilized without the EBCE’s prior, written consent. Any and all permitted cloud storage shall be in compliance with ISO/IEC 27001 - 27018, as applicable, or successor standards thereto. Except as otherwise expressly set forth in Exhibit A, the Services (including all data storage), shall be provided solely from within the continental United States and on computing and data storage devices residing therein, and all such locations shall be disclosed to EBCE annually and within thirty (30) days of the effective date of this Agreement.
      1. Subcontractors. Service Provider shall not enter into any subcontracts for the performance of the Services, or assign or transfer any of its rights or obligations under this Agreement, without EBCE’s prior written consent and any attempt to do so shall be void and without further effect and shall be a material breach of this Agreement. Service Provider’s use of subcontractors shall not relieve Service Provider of any of its duties or obligations under this Agreement.
      2. Offensive or Disparaging Content. Where the Services or any web services affiliated with the Services contain offensive content or portray EBCE in a disparaging way, either as solely determined by EBCE, Service Provider shall immediately remove the offensive or disparaging content and EBCE shall have the right, at EBCE’s sole election, to: (a) immediately terminate this Agreement or any portion thereof corresponding to the offending or disparaging content, and be entitled to a return of any prepaid fees, as liquidated damages and not as a penalty; or, (b) obtain or retain, as the case may be, all fees paid or payable for the entire period of the then-current term, as liquidated damages and not as a penalty, associated with that portion of this Agreement corresponding to the offending or disparaging content.
   5. Storage. The Services shall include the applicable allocation of base data storage as described in Exhibit A, if any. Service Provider shall immediately notify EBCE when EBCE has reached eighty percent (80%) of EBCE’s then-current data storage maximum. Within five (5) calendar days of EBCE’s request, Service Provider shall make additional data storage available to EBCE at the rates described in Exhibit A.
   6. Development and Test Environments. In addition to production use of the Services, EBCE is entitled to one development and one test environment for use by Authorized Users at no additional charge. Such non-production environments shall have the same data storage and processing capacities as the production environment. Service Provider shall cooperate with EBCE’s requests in managing the non-production environments such as refreshing EBCE Data upon request.
   7. Documentation. The documentation for the Services (“Documentation”) will accurately and completely describe the functions and features of the Services, including all subsequent revisions thereto. The Documentation shall be understandable by a typical end user and shall provide Authorized Users with sufficient instruction such that an Authorized User can become self-reliant with respect to access and use of the Services. EBCE shall have the right to make any number of additional copies of the Documentation at no additional charge.
   8. Changes in Functionality. During the term of this Agreement, Service Provider shall not reduce or eliminate functionality in the Services. Where Service Provider has reduced or eliminated functionality in the Services, EBCE, at EBCE’s sole election and in EBCE’s sole determination, shall: (a) have, in addition to any other rights and remedies under this Agreement or at law, the right to immediately terminate this Agreement and be entitled to a return of any prepaid fees; or, (b) determine the value of the reduced or eliminated functionality and Service Provider will immediately adjust the Services Fees accordingly on a prospective basis. Where Service Provider has introduced like functionality in other services, EBCE shall have an additional license and subscription right to use and access the new services, at no additional charge, with the same rights, obligations, and limitations as for the Services. Where Service Provider increases functionality in the Services, such functionality shall be provided to EBCE without any increase in the Services Fees.
   9. No Effect of Click-Through Terms and Conditions. Where an Authorized User is required to “click through” or otherwise accept or be made subject to any online terms and conditions in accessing or using the Services, such terms and conditions are not binding and shall have no force or effect as to the Services or this Agreement.
   10. Modification of the Services. The EBCE’s Director of Information Technology, or designee, shall be authorized to waive, in writing, any of the Service Provider’s obligations with respect to the Services, where deemed to be in the EBCE’s best interest, provided that no such modification shall result in any increase in the amount of the Services Fees.
   11. Compliance with All Laws. In providing the Services, the Service Provider shall comply with any and all applicable local, State and federal laws, statutes, standards, policies, and regulations including, but not limited to, the Health Insurance Portability and Accountability Act of 1996, the Americans with Disabilities Act, the Stored Communications Act, 18 U.S.C. Section 2701, et seq., California Civil Code Sections 1798.80 through 1798.84, and the California Consumer Privacy Act, Civil Code Section 1798.100, et seq.
2. Service Levels.
   1. Service Levels; Time is of the Essence. For the term of this Agreement, Service Provider shall provide the Services, force majeure events excepted, during the applicable Service periods and in accordance with the applicable Service Level Standards, each as described in Exhibit A hereto. Time is of the essence in the performance of the Services.
   2. **[OPTIONAL]** Service Level Reporting. On a monthly basis, in arrears and no later than the fifteenth (15th) calendar day of the subsequent month following the reporting month, Service Provider shall provide reports to EBCE describing the performance of the Services and of Service Provider as compared to the Service Level Standards; provided, however, that a EBCE Satisfaction Service Level Survey shall be conducted by Service Provider each year on the anniversary of the Effective Date and the results shall be reported to EBCE by Service Provider no later than the fifteenth (15th) calendar day of the subsequent month following such anniversary date. The reports shall be in a form agreed-to by EBCE, and, in no case, shall contain less than the following information: (a) actual performance compared to the Service Level Standard; (b) the cause or basis for not meeting the Service Level Standard; (c) the specific remedial actions Service Provider has undertaken or will undertake to ensure that the Service Level Standard will be subsequently achieved; and, (d) any Performance Credit due to EBCE. Service Provider and EBCE will meet as often as shall be reasonably requested by EBCE, but no less than monthly, to review the performance of Service Provider as it relates to the Service Levels. Where Service Provider fails to provide a report for a Service Level in the applicable timeframe, the Service Level shall be deemed to have not been met for the purposes of calculating a Performance Credit. Service Provider shall, without charge, make EBCE’s historical Service Level reports available to EBCE upon request.
   3. Failure to Meet Service Level Standards. In the event Service Provider does not meet a Service Level Standard, Service Provider shall: (a) owe to EBCE any applicable Performance Credit, as liquidated damages and not as a penalty; and, (b) use its best efforts to ensure that any unmet Service Level Standard is subsequently met. Notwithstanding the foregoing, Service Provider will use its best efforts to minimize the impact or duration of any outage, interruption, or degradation of Service. In no case shall EBCE be required to notify Service Provider that a Performance Credit is due as a condition of payment of the same.
      1. Termination for Material and Repeated Failures. EBCE shall have, in addition to any other rights and remedies under this Agreement or at law, the right to immediately terminate this Agreement, and be entitled to a return of any prepaid fees where Service Provider fails to meet any Service Level Standard: (a) to such an extent that the EBCE’s ability, as solely determined by EBCE, to use the Services is materially disrupted, force majeure events excepted; or, (b) for four (4) months out of any twelve (12) month period.
   4. Audit of Service Levels. No more than quarterly, EBCE or EBCE’s agent shall have the right to audit Service Provider’s books, records, and measurement and auditing tools to verify Service Level Standard achievement and to determine correct payment of any Performance Credit. Where it is determined that any Performance Credit was due to EBCE but not paid, Service Provider shall immediately owe to EBCE the applicable Performance Credit.
3. Support; Maintenance; Additional Services.
   1. Technical Support. Service Provider shall provide the Technical Support as described in Exhibit A. The Services Fees shall be inclusive of the fees for all Technical Support.
   2. Maintenance. Service Provider shall provide bug fixes, corrections, modifications, enhancements, upgrades, and new releases to the Services to ensure: (a) the functionality of the Services, as described in the Documentation, is available to Authorized Users; (b) the functionality of the Services in accordance with the representations and warranties set forth herein, including but not limited to, the Services conforming in all material respects to the specifications, functions, descriptions, standards, and criteria set forth in Exhibit A and the Documentation; (c) the Service Level Standards can be achieved; and, (d) the Services work with the then-current version and the three prior versions of Internet Explorer, Edge, Mozilla Firefox, and Google Chrome Internet browsers. The Services Fees shall be inclusive of the fees for maintenance.
      1. Required Notice of Maintenance. Unless as otherwise agreed to by EBCE on a case-by-case basis, Service Provider shall provide no less than thirty (30) calendar day’s prior written notice to EBCE of all non-emergency maintenance to be performed on the Services, such written notice including a detailed description of all maintenance to be performed. For emergency maintenance, Service Provider shall provide as much prior notice as commercially practicable to EBCE and shall provide a detailed description of all maintenance performed no greater than one (1) calendar day following the implementation of the emergency maintenance.
      2. Acceptance of Non-Emergency Maintenance. Unless as otherwise agreed to by EBCE on a case-by-case basis, for non-emergency maintenance, EBCE shall have a ten (10) business day period to test any maintenance changes prior to Service Provider introducing such maintenance changes into production (the “Maintenance Acceptance Period”). In the event that EBCE rejects, for good cause, any maintenance changes during the Maintenance Acceptance Period, Service Provider shall not introduce such rejected maintenance changes into production. At the end of the Maintenance Acceptance Period, if EBCE has not rejected the maintenance changes, the maintenance changes shall be deemed to be accepted by EBCE and Service Provider shall be entitled to introduce the maintenance changes into production.
   3. **[OPTIONAL]** Customization / Integration Services. Service Provider shall provide the Customization / Integration Services, if any, described in Exhibit A. The Services Fees shall be inclusive of the fees for the Customization / Integration Services.
   4. **[OPTIONAL]** Training Services. Service Provider shall provide the Training Services, if any, described in Exhibit A. The Services Fees shall be inclusive of the fees for the Training Services.
4. Escrow Agreement. **[OPTIONAL]** At no additional cost to EBCE and upon EBCE’s request, Service Provider agrees to place in escrow with an escrow agent copies of the most current version of the source and object code for the applicable software that is included as a part of the Services as well as all necessary components to ensure proper function of such software including but not limited to any application program interfaces, configuration files, schematics of software components, build instructions, procedural instructions, and other documentation (collectively, the “Software“). The Software shall also include all updates, improvements, and enhancements thereof from time to time developed by Service Provider and which are necessary to internally support the Services for the benefit of EBCE. Service Provider agrees that upon the occurrence of any event or circumstance which demonstrates with reasonable certainty the inability or unwillingness of Service Provider to fulfill its obligations to EBCE in providing the Services, as determined solely by EBCE, EBCE shall be entitled to obtain the then-current Software from the escrow agent. At the sole election of EBCE, EBCE shall have the right to: (a) perform, at EBCE’s cost and no more than annually, via a third-party escrow verification service that is independent of Service Provider and the escrow agent, a verification of Service Provider’s compliance with its escrow obligations hereunder including but not limited to a full usability test of the Software; (b) obtain, at no additional cost to EBCE and no more than annually, the full usability test results of the Software, such test as performed by a third-party contracted by Service Provider; and, (c) contract with, at EBCE’s cost, a third-party that is independent of Service Provider to perform services relating to the backup and recovery of the Services and / or EBCE Data. Service Provider agrees to reasonably cooperate with all third-parties contracted by EBCE for purposes of this provision. Where EBCE determines, in EBCE’s sole determination, that Service Provider has failed to fulfill its escrow obligations, EBCE shall, at EBCE’s sole election: (a) have, in addition to any other rights and remedies under this Agreement or at law, the right to immediately terminate this Agreement and be entitled to a return of any prepaid fees; or, (b) be due from Service Provider twenty-five percent (25%) of the annualized Services Fees for the then-current contract year as liquidated damages and not as a penalty.
5. Audit Rights of Service Provider. Service Provider shall have no right to conduct an on-premises audit of EBCE’s compliance with the use of the Services. No more than once annually, Service Provider shall have the right to request from EBCE its certification of compliance with the permitted number of Authorized Users. Where the actual number of users exceeds the permitted number of Authorized Users, EBCE, at EBCE’s sole election shall, within thirty (30) business days: (a) reduce the actual number of users so as to be in compliance with the permitted number of Authorized Users in which case no additional Services Fees shall be due to Service Provider; or, (b) acquire the appropriate number of Authorized Users’ licenses at the rate specified in Exhibit A so as to be in compliance with the permitted number of Authorized Users.
6. Change Control Procedure. EBCE may, upon written notice, request changes to the scope of the Services under Exhibit A. If EBCE requests an increase in the scope, EBCE shall notify Service Provider, and, not more than five (5) business days (or other agreed upon period) after receiving the request, Service Provider shall notify EBCE whether or not the change has an associated cost impact. If EBCE approves, EBCE shall issue a change order, which will be executed by the Service Provider. EBCE shall have the right to decrease the scope, and the associated fees will be reduced accordingly.
7. Term and Termination; Renewals.
   1. Term. This Agreement is legally binding as of the Effective Date and shall continue for three (3) years (“Initial Term”) unless extended, or sooner terminated, as provided for herein. Following the Initial Term and unless otherwise terminated as provided for in this Agreement, this Agreement may be renewed for up to three (3), successive one (1) year terms (each, a “Renewal Term“) unless sooner terminated by a party providing the other party with written notice of termination.
   2. Termination for Convenience. Without limiting the right of a party to terminate this Agreement as provided for in this Agreement, a party may terminate this Agreement for convenience upon not less than \_\_\_\_\_\_\_\_\_\_\_\_ (\_\_) days prior written notice to the other party.
   3. Termination for Cause. Without limiting the right of a party to immediately terminate this Agreement for cause as provided for in this Agreement, if either party materially breaches any of its duties or obligations hereunder and such breach is not cured, or the breaching party is not diligently pursuing a cure to the non‑breaching party’s sole satisfaction, within thirty (30) calendar days after written notice of the breach, the non‑breaching party may terminate this Agreement for cause as of a date specified in such notice.
   4. Payments upon Termination for Convenience. Upon the termination of this Agreement, EBCE shall pay to Service Provider all undisputed amounts due and payable hereunder, if any, and Service Provider shall pay to EBCE all amounts due and payable hereunder, such as Performance Credits and prepaid fees, if any. As compensation for any administrative costs incurred by Service Provider due to EBCE’s termination for convenience, and unless otherwise agreed upon by the parties, EBCE shall pay, or Service Provider shall retain if fees were prepaid, \_\_\_\_ (\_) month’s worth of additional fees calculated prorata. Any remaining prepaid funds shall be refunded to EBCE.
   5. Return of EBCE Data. Upon the termination of this Agreement, Service Provider shall, within two (2) business day following the termination of this Agreement, provide EBCE, without charge and without any conditions or contingencies whatsoever (including but not limited to the payment of any fees due to Service Provider), with a final extract of the EBCE Data in the format specified by EBCE. Further, Service Provider shall certify to EBCE the destruction of any EBCE Data within the possession or control of Service Provider, in accordance with Section 12.5, but such destruction shall occur only after the EBCE Data has been returned to EBCE. This Section shall survive the termination of this Agreement.
   6. Renewals. Should the Services continue beyond the Initial Term, the Services Fees for the Renewal Term may be increased no more than three percent (3%) on an annualized per-user basis.
8. Transition Services. **[OPTIONAL]** Provided that this Agreement has not been terminated by Service Provider due to EBCE’s failure to pay any undisputed amount due Service Provider, Service Provider will provide to EBCE and/or to the service provider selected by EBCE (“Successor Service Provider“) assistance reasonably requested by EBCE to effect the orderly transition of the Services, in whole or in part, to EBCE or to Successor Service Provider (“Transition Services”) following the termination of this Agreement, in whole or in part. The Transition Services shall be provided on a time and materials basis and may include: (a) developing a plan for the orderly transition of the terminated Services from Service Provider to EBCE or Successor Service Provider; (b) if required, transferring the EBCE Data to Successor Service Provider; (c) using commercially reasonable efforts to assist EBCE in acquiring any necessary rights to legally and physically access and use any third-party technologies and documentation then being used by Service Provider in connection with the Services; (d) using commercially reasonable efforts to make available to EBCE, pursuant to mutually agreeable terms and conditions, any third-party services then being used by Service Provider in connection with the Services; and, (e) such other activities upon which the parties may agree. Notwithstanding the foregoing, should EBCE terminate this Agreement due to Service Provider’s material breach, EBCE may elect to use the Services for a period of no greater than six (6) months from the date of termination at a reduced rate of twenty (20%) percent off of the then-current Services Fees for the terminated Services. All applicable terms and conditions of this Agreement shall apply to the Transition Services. This Section shall survive the termination of this Agreement.
9. Fees; Billing. EBCE shall be responsible for and shall pay to Service Provider the fees as further described in Exhibit A, subject to the terms and conditions contained in this Agreement. Any sum due Service Provider for the Services for which payment is not otherwise specified shall be due and payable thirty (30) business days after receipt by EBCE of an invoice from Service Provider.
   1. Billing Procedures. Service Provider shall bill to EBCE the sums due pursuant to Exhibit A by Service Provider’s invoice, which shall contain: (a) EBCE’s purchase order number, if any, and Service Provider’s invoice number; (b) description of Services for which an amount is due; (c) the fees or portion thereof that are due; (d); taxes, if any; (e); any Performance Credits or other credits; and, (f) total amount due. Service Provider shall forward invoices in digital format to **AP@ebce.org.**
   2. Taxes. Service Provider represents and warrants that it is an independent contractor for purposes of federal, state, and local taxes. Service Provider agrees that EBCE is not responsible to collect or withhold any such taxes, including income tax withholding and social security contributions, for Service Provider. Any and all taxes, interest, or penalties, including any federal, state, or local withholding or employment taxes, imposed, assessed, or levied as a result of this Agreement shall be paid or withheld by Service Provider.
   3. Credits. Any amounts due to EBCE, such as a Performance Credit if applicable, from Service Provider may be applied by EBCE, at the sole election of EBCE, against any current or future fees due to Service Provider. Any such amounts that are not so applied by EBCE shall be paid to EBCE by Service Provider within thirty (30) calendar days following EBCE’s request. This Section shall survive the termination of this Agreement.
   4. Non-binding Terms. Any terms and conditions included in a Service Provider invoice shall be deemed to be solely for the convenience of the Service Provider, and no such term or condition shall be binding upon the EBCE.
   5. Auditable Records. Service Provider shall maintain accurate records of all fees billable to, and payments made by, EBCE in a format that will permit audit by EBCE for a period of no less than four (4) years from when a fee was incurred or a payment was made. The foregoing obligation of Service Provider shall survive the termination of this Agreement. For the term of this Agreement, upon EBCE’s written request, Service Provider shall provide EBCE with a copy of its annual American Institute of Certified Public Accountants Service Organization Control (SOC) 1 type 2 report and SOC 2 type 2 report (for all Trust Services Principles), or successor form of SOC reports.
   6. Billing Reviews by Third-Parties. For purposes of determining the competitiveness and appropriateness of fees charged to EBCE by Service Provider, EBCE is entitled to disclose to a third-party this Agreement, and any other data pertaining to fees paid or payable by EBCE to Service Provider.
   7. No Suspension of Services. Service Provider shall not suspend any part of the Services where: (a) EBCE is reasonably disputing any amount due to Service Provider; or, (b) any unpaid but undisputed amount due to Service Provider is less than ninety (90) business days in arrears.
10. Representations and Warranties.
    1. Mutual. EBCE and Service Provider each represent and warrant that:
       1. EBCE is a public entity, and Service Provider is a business, duly incorporated or established, validly existing, and in good standing under the laws of its state of incorporation;
       2. it has all requisite corporate power, financial capacity, and authority to execute, deliver, and perform its obligations under this Agreement;
       3. the execution, delivery, and performance of this Agreement has been duly authorized by it and this Agreement constitutes the legal, valid, and binding agreement of it and is enforceable against it in accordance with its terms, except as the enforceability thereof may be limited by bankruptcy, insolvency, reorganizations, moratoriums, and similar laws affecting creditors’ rights generally and by general equitable principles;
       4. it shall comply with all applicable federal, state, local, or other laws and regulations applicable to the performance by it of its obligations under this Agreement and shall obtain all applicable permits and licenses required of it in connection with its obligations under this Agreement; and,
       5. there is no outstanding litigation, arbitrated matter or other dispute to which it is a party which, if decided unfavorably to it, would reasonably be expected to have a potential or actual material adverse effect on its ability to fulfill its obligations under this Agreement.
    2. By Service Provider. Service Provider represents and warrants that:
       1. it is in the business of providing the Services;
       2. the Services are fit for the ordinary purposes for which they will be used;
       3. it is possessed of superior knowledge with respect to the Services;
       4. it acknowledges that EBCE is relying on its representation of its experience and expert knowledge, and that any substantial misrepresentation may result in damage to EBCE;
       5. it knows the particular purpose for which the Services are required by EBCE;
       6. it is the lawful licensee or owner of the Services (excluding any EBCE Data therein) and has all the necessary rights in the Services to provide the Services to EBCE;
       7. the Services and any other work performed by Service Provider hereunder shall not infringe upon any United States or foreign copyright, patent, trade secret, or other intellectual proprietary right, or misappropriate any trade secret, of any third-party, and that it has neither assigned nor otherwise entered into an agreement by which it purports to assign or transfer any right, title, or interest to any technology or intellectual property right that would conflict with its obligations under this Agreement;
       8. it shall disclose any third-party (which shall, for purposes of this Agreement, be deemed a subcontractor) whose intellectual property is incorporated into the Services or who is necessary for the performance of the Services and it shall maintain in-force written agreements with such third-party, if any, for the term of this Agreement;
       9. it has the expertise to perform the Services in a competent, workmanlike, and professional manner and in accordance with the highest professional standards;
       10. it will use its best efforts, but not less than commercially reasonable efforts, to ensure that no computer viruses, worms, malware, or similar items (collectively, a “Virus”) are introduced into EBCE’s computing and network environment by the Services, and that, where it transfers a Virus to EBCE through the Services, it shall reimburse EBCE the actual, documented cost incurred by EBCE to remove and/or recover from the Virus, including the costs of persons employed by EBCE to perform such services;
       11. the Services are free of any mechanism which may disable the Services and Service Provider warrants that no loss of EBCE Data will result from such items if present in the Services;
       12. in the case of EBCE’s reasonable dispute of any Service Provider invoice, it shall not withhold the performance of Services, including, without limitation, access and use of the Services, Technical Support, Maintenance, and extract of EBCE Data; and,
       13. the Services will conform in all material respects to the specifications, functions, descriptions, standards, and criteria set forth in Exhibit A and the Documentation.
11. EBCE Data.
    1. Ownership. EBCE’s data (“EBCE Data,” which shall also be known and treated by Service Provider as Confidential Information) shall include EBCE’s and/or EBCE employees’ data, including personally identifiable information (“PII“) if any, collected, accessed, used, processed, stored, generated, or otherwise made accessible to Service Provider, as the result of or in connection with the EBCE’s use of the Services. PII includes, without limitation, any information that identifies an individual, such as an individual’s social security number or other government-issued identification number, date of birth, address, telephone number, biometric data, mother’s maiden name, email address, credit card information, or an individual’s name in combination with any other of the elements listed herein. Except where subject to a third party’s intellectual property rights, all EBCE Data is and shall remain the sole and exclusive property of EBCE and all right, title, and interest in the same belongs to EBCE. This Section shall survive the termination of this Agreement.
    2. Service Provider Use of EBCE Data. Service Provider is provided a limited license to access EBCE Data for the sole and exclusive purpose of providing the Services, including a license to collect, process, store, generate, and display EBCE Data only to the extent necessary in the providing of the Services. Service Provider shall: (a) keep and maintain EBCE Data in strict confidence, using such degree of care as is appropriate and consistent with its obligations as further described in this Agreement and applicable law to avoid unauthorized access, use, disclosure, or loss; (b) use and disclose EBCE Data solely and exclusively for the purpose of providing the Services, such use and disclosure being in accordance with this Agreement, and applicable law; (c) allow access to EBCE Data only to those employees of Service Provider who are directly involved with and responsible for providing the Services; and, (d) not use, sell, rent, transfer, distribute, or otherwise disclose or make available EBCE Data for Service Provider’s own purposes or for the benefit of anyone other than EBCE without EBCE’s prior written consent. This Section shall survive the termination of this Agreement.
    3. Access to, and Extraction of EBCE Data. EBCE shall have full and complete access to, and ability to download, its EBCE Data 24 hours per day, 7 days per week, except during authorized periods of maintenance by Service Provider. Further, Service Provider shall, within one (1) business day of EBCE’s request, provide EBCE, without charge and without any conditions or contingencies whatsoever (including, but not limited to, the payment of any fees due to Service Provider), an extract of the EBCE Data in the format specified by EBCE. In the event EBCE gives Service Provider written notice of a “litigation hold”, then as to all data identified in such notice, Service Provider shall, at no additional cost to EBCE, isolate and preserve all such data pending receipt of further direction from the EBCE.
    4. Backup and Recovery of EBCE Data. As a part of the Services, Service Provider is responsible for maintaining a backup of EBCE Data and for an orderly and timely recovery of such data in the event that the Services may be interrupted. Unless otherwise described in Exhibit A, Service Provider shall maintain a contemporaneous backup of EBCE Data that can be recovered within two (2) hours at any point in time. Additionally, Service Provider shall store a backup of EBCE Data in an off-site (but within the continental United States) “hardened” facility no less than daily, maintaining the security of EBCE Data, the security requirements of which are further described herein. Any backups of EBCE Data shall not be considered in calculating storage used by EBCE.
    5. Loss or Unauthorized Access to Data. In the event of any act, error or omission, negligence, misconduct, or breach that permits any unauthorized access to, or that compromises or is suspected to compromise the security, confidentiality, or integrity of EBCE Data or the physical, technical, administrative, or organizational safeguards put in place by Service Provider that relate to the protection of the security, confidentiality, or integrity of EBCE Data, Service Provider shall, as applicable: (a) notify EBCE as soon as practicable but no later than twenty-four (24) hours of becoming aware of such occurrence; (b) cooperate with EBCE in investigating the occurrence, including making available all relevant records, logs, files, data reporting, and other materials required to comply with applicable law or as otherwise required by EBCE; (c) in the case of PII, at EBCE’s sole election, (i) notify the affected individuals who comprise the PII as soon as practicable but no later than is required to comply with applicable law including, but not limited to, the provisions of California Civil Code Section 1798.82, or, in the absence of any legally required notification period, within five (5) calendar days of the occurrence; or, (ii) reimburse EBCE for any costs in notifying the affected individuals; (d) in the case of PII, provide third-party credit and identity monitoring services to each of the affected individuals who comprise the PII for the period required to comply with applicable law, or, in the absence of any legally required monitoring services, for no less than twelve (12) months following the date of notification to such individuals; (e) perform or take any other actions required to comply with applicable law as a result of the occurrence; (f) without limiting EBCE’s obligations of indemnification as further described in this Agreement, indemnify, defend, and hold harmless EBCE with respect to any and all claims and liabilities, including reasonable attorneys’ fees, costs, and expenses incidental thereto, for damages which may be suffered by, accrued against, charged to, or recoverable from EBCE in connection with the occurrence up to the limits of Service Provider’s Cyber Liability policy required herein; (g) be responsible for recreating lost EBCE Data in the manner and on the schedule set by EBCE without charge to EBCE; and, (h) provide to EBCE a detailed plan within ten (10) calendar days of the occurrence describing the measures Service Provider will undertake to prevent a future occurrence. Notification to affected individuals, as described above, shall comply with applicable law, be written in plain language, and contain, at a minimum: name and contact information of Service Provider’s representative; a description of the nature of the loss; a list of the types of data involved; the known or approximate date of the loss; how such loss may affect the affected individual; what steps Service Provider has taken to protect the affected individual; what steps the affected individual can take to protect himself or herself; contact information for major credit card reporting agencies; and, information regarding the credit and identity monitoring services to be provided by Service Provider. This Section shall survive the termination of this Agreement.
12. Non-Disclosure of Confidential Information. The parties acknowledge that each party may be exposed to or acquire communication or data of the other party that is confidential and/or privileged communication not intended to be disclosed to third parties. The provisions of this Section shall survive the termination of this Agreement.
    1. Meaning of Confidential Information. For the purposes of this Agreement, the term “Confidential Information” shall mean all information and documentation of a party that: (a) has been marked “confidential” or with words of similar meaning, at the time of disclosure by such party; (b) if disclosed orally or not marked “confidential” or with words of similar meaning, was subsequently summarized in writing by the disclosing party and marked “confidential” or with words of similar meaning; and, (c) should reasonably be recognized as confidential information of the disclosing party. The term “Confidential Information” does not include any information or documentation that was: (a) already in the possession of the receiving party without an obligation of confidentiality; (b) developed independently by the receiving party, as demonstrated by the receiving party, without violating the disclosing party’s proprietary rights; (c) obtained from a source other than the disclosing party without an obligation of confidentiality; or, (d) publicly available when received, or thereafter became publicly available (other than through any unauthorized disclosure by, through, or on behalf of, the receiving party). For purposes of this Agreement, in all cases and for all matters, EBCE Data shall be deemed to be Confidential Information.
    2. Obligation of Confidentiality. The parties agree to hold all Confidential Information in strict confidence and not to copy, reproduce, sell, transfer, or otherwise dispose of, give or disclose such Confidential Information to third parties other than employees, agents, or subcontractors of a party who have a need to know in connection with this Agreement or to use such Confidential Information for any purposes whatsoever other than the performance of this Agreement, or as required by law including the California Public Records Act, subpoena, or court order. The parties agree to advise and require their respective employees, agents, and subcontractors of their obligations to keep all Confidential Information confidential.
    3. Cooperation to Prevent Disclosure of Confidential Information. Each party shall use its best efforts to assist the other party in identifying and preventing any unauthorized use or disclosure of any Confidential Information. Without limiting the foregoing, each party shall advise the other party immediately in the event either party learns or has reason to believe that any person who has had access to Confidential Information has violated or intends to violate the terms of this Agreement and each party will cooperate with the other party in seeking injunctive or other equitable relief against any such person.
    4. Remedies for Breach of Obligation of Confidentiality. Each party acknowledges that breach of its obligation of confidentiality may give rise to irreparable injury to the other party, which damage may be inadequately compensable in the form of monetary damages. Accordingly, a party may seek and obtain injunctive relief against the breach or threatened breach of the foregoing undertakings, in addition to any other legal remedies which may be available, to include, in the case of EBCE, at the sole election of EBCE, the immediate termination, without liability to EBCE, of this Agreement.
    5. Surrender of Confidential Information upon Termination. Upon termination or expiration of this Agreement, in whole or in part, each party shall, within five (5) calendar days from the date of termination, return to the other party any and all Confidential Information received from the other party, or created or received by a party on behalf of the other party, which is in such party’s possession, custody, or control; provided, however, that Service Provider shall return EBCE Data to EBCE following the timeframe and procedure described further in this Agreement. Should Service Provider or EBCE determine that the return of any EBCE Data or non-EBCE Data Confidential Information is not feasible, Service Provider shall destroy the data comprising such Confidential Information in compliance with the most current version of NIST standard SP800-88, or other standard acceptable to the EBCE, and shall certify the same to EBCE in writing within five (5) calendar days from the date of termination.
13. Data Privacy and Information Security.
    1. Undertaking by Service Provider.  Without limiting Service Provider’s obligation of confidentiality as further described herein, Service Provider shall be responsible for establishing, maintaining, and providing a written description to EBCE of, a data privacy and information security program, including physical, technical, administrative, and organizational safeguards,  that comply with or are substantial similar to the security controls identified in the current version of NIST SP800-53, and that is designed to: (a) ensure the security and confidentiality of the EBCE Data; (b) protect against any anticipated threats or hazards to the security or integrity of the EBCE Data; (c) protect against unauthorized disclosure, access to, or use of the EBCE Data; (d) ensure the proper disposal of EBCE Data; and, (e) ensure that all employees, agents, and subcontractors of Service Provider, if any, comply with all of the foregoing.  In no case shall the safeguards of Service Provider’s data privacy and information security program used to protect EBCE Data be less stringent than the safeguards used by Service Provider for its own data.  
         
       If the Services include handling credit card information, then the Service Provider shall comply at all times with all applicable Payment Card Industry Data Security Standards (PCI-DSS). Service Provider agrees and warrants that it is responsible for the security of “cardholder data” that Service Provider possesses, stores, processes or transmits on behalf of the EBCE, and for any impact on the security of EBCE’s cardholder data environment adversely affected by any failure of Company to maintain compliance with provisions of the PCI-DSS applicable to the Services.
    2. Audit by Service Provider. No less than annually, Service Provider shall conduct a comprehensive independent third-party audit of its data privacy and information security program and provide such audit findings to EBCE.  
         
       **[OPTIONAL**: The required audit shall be a SAS-70 (or successor standard) compliant audit, and Service Provider shall provide the audit findings in the form of an SAS-70 Type II report.]
    3. Right of Audit by EBCE. Without limiting any other audit rights of EBCE, EBCE shall have the right to review Service Provider’s data privacy and information security program prior to the commencement of Services and from time to time during the term of this Agreement. During the providing of the Services, on an ongoing basis from time to time and without notice, EBCE, at its own expense, shall be entitled to perform, or to have performed, an on-site audit of Service Provider’s data privacy and information security program. In lieu of an on-site audit, upon request by EBCE, Service Provider agrees to complete, within forty-five (45 days) of receipt, an audit questionnaire provided by EBCE regarding Service Provider’s data privacy and information security program.
    4. Audit Findings. Service Provider shall implement any required safeguards as identified by EBCE or by any audit of Service Provider’s data privacy and information security program.
    5. EBCE’s Right to Terminate for Deficiencies. EBCE reserves the right, at its sole election, to immediately terminate this Agreement without limitation and without liability if EBCE reasonably determines that Service Provider fails or has failed to meet its obligations under this Section.
14. Proprietary Rights.
    1. Pre-existing Materials. EBCE acknowledges that, in the course of performing the Services, Service Provider may use software and related processes, instructions, methods, and techniques that have been previously developed by Service Provider (collectively, the “Pre-existing Materials,” which shall include the Services) and that the same shall remain the sole and exclusive property of Service Provider.
    2. No License. Except as expressly set forth herein, no license is granted by either party to the other with respect to the Confidential Information or Pre-existing Materials. Nothing in this Agreement shall be construed to grant to either party any ownership or other interest, in the Confidential Information or Pre-existing Materials, except as may be provided under a license specifically applicable to such Confidential Information or Pre-existing Materials.
    3. The provisions of this Section shall survive the termination of this Agreement.
15. Indemnification; Limitation of Liability; Insurance.
    1. General Indemnification. To the maximum extent permitted by law, Service Provider agrees to indemnify, defend, and hold harmless EBCE and its elected officials, officers, directors, agents, attorneys and employees (each, an “Indemnitee“) from and against any and all liabilities, damages, losses, expenses, claims, demands, suits, fines, or judgments (each, a “Claim,” and collectively, the “Claims“), including reasonable attorneys’ fees, costs, and expenses incidental thereto, which may be suffered by, incurred by, accrued against, charged to, or recoverable from any Indemnitee, by reason of any Claim arising out of or relating to any act, error or omission, negligence, or misconduct of Service Provider, its officers, directors, agents, employees, and/or subcontractors, during the performance of this Agreement, including, without limitation, Claims arising out of or relating to: (a) bodily injury (including death) and/or damage to tangible personal or real property; (b) any payment required to be paid to subcontractors, if any, of Service Provider; (c) any material misrepresentation or breach of warranty set forth in this Agreement; (d) Service Provider’s professional services`; and/or (e) any material breach of any covenant set forth in this Agreement; provided, however, that the foregoing indemnity shall not apply to the extent the applicable Claim resulted from the negligent acts or omissions, or willful misconduct, of an Indemnitee.  
         
       To the maximum extent permitted by law, Service Provider shall indemnify, defend and hold each of the Indemnitees free and harmless, and pay reasonable attorneys’ fees and costs, with respect to any and all Claims to the extent arising out of, related to, or incurred in connection with any destruction, or unauthorized access to, use, or theft of EBCE Data (collectively, “cyber theft”) provided, however, that Service Provider’s liability for cyber theft shall be limited to the cyber liability insurance policy limits set forth in this Agreement.
    2. Proprietary Rights Indemnification. Service Provider agrees to indemnify, defend, and hold harmless Indemnitees from and against any and all Claims, including reasonable attorneys’ fees, costs, and expenses incidental thereto, which may be suffered by, incurred by, accrued against, charged to, or recoverable from any Indemnitee, by reason of any Claim arising out of or relating to the Services allegedly or actually infringing or misappropriating any United States or foreign patent, copyright, trade secret, trademark, or other proprietary right. In the event that Service Provider is enjoined from providing the Services and such injunction is not dissolved within thirty (30) calendar days, or in the event that EBCE is adjudged, in any final order of a court of competent jurisdiction from which no appeal is taken, to have infringed upon or misappropriated any patent, copyright, trade secret, trademark, or other proprietary right in the access or use of the Services, then Service Provider shall, at its expense: (a) obtain for EBCE the right to continue using such Services; (b) replace or modify such Services so that they do not infringe upon or misappropriate such proprietary right and is free to be used by EBCE; or, (c) in the event that Service Provider is unable or determines, in its reasonable judgment, that it is commercially unreasonable to do either of the aforementioned, Service Provider shall reimburse to EBCE any prepaid fees and the full cost associated with any Transition Services.
    3. Indemnification Procedures. Promptly after receipt by EBCE of a threat, notice, or filing of any Claim against an Indemnitee, EBCE shall give notice thereof to Service Provider, provided that failure to give or delay in giving such notice shall not relieve Service Provider of any liability it may have to the Indemnitee except to the extent that Service Provider demonstrates that the defense of the Claim is prejudiced thereby. Service Provider shall have sole control of the defense and of all negotiations for settlement of a Claim and EBCE shall not independently defend or respond to a Claim; provided, however, that: (a) EBCE may defend or respond to a Claim, at Service Provider’s expense, if EBCE’s counsel determines, in its sole discretion, that such defense or response is necessary to preclude a default judgment from being entered against an Indemnitee; and, (b) EBCE shall have the right, at its own expense, to monitor Service Provider’s defense of a Claim. At Service Provider’s request, EBCE shall reasonably cooperate with Service Provider in defending against or settling a Claim; provided, however, that Service Provider shall reimburse EBCE for all reasonable out-of-pocket costs incurred by EBCE (including, without limitation, reasonable attorneys’ fees and expenses) in providing such cooperation.
    4. Third-Party Beneficiaries. Nothing, express or implied, in this Agreement is intended to benefit, or to create or be construed to create any rights of enforcement in any persons or entities who are neither signatories to this Agreement nor Indemnitees.
    5. Limitation of Liability. NOTWITHSTANDING ANY OTHER PROVISION SET FORTH HEREIN, NEITHER PARTY SHALL BE LIABLE FOR ANY INDIRECT, SPECIAL, AND / OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT; PROVIDED, HOWEVER, THAT THE FOREGOING EXCULPATION OF LIABILITY SHALL NOT APPLY WITH RESPECT TO DAMAGES INCURRED AS A RESULT OF THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF A PARTY. A PARTY SHALL BE LIABLE TO THE OTHER FOR ANY DIRECT DAMAGES ARISING OUT OF OR RELATING TO ITS PERFORMANCE OR FAILURE TO PERFORM UNDER THIS AGREEMENT; PROVIDED, HOWEVER, THAT THE LIABILITY OF A PARTY, WHETHER BASED ON AN ACTION OR CLAIM IN CONTRACT, EQUITY, NEGLIGENCE, TORT, OR OTHERWISE FOR ALL EVENTS, ACTS, OR OMISSIONS UNDER THIS AGREEMENT SHALL NOT EXCEED THE FEES PAID OR PAYABLE UNDER THIS AGREEMENT FOR THE PREVIOUS TWO (2) YEARS, AND PROVIDED, FURTHER, THAT THE FOREGOING LIMITATIONS SHALL NOT APPLY TO**:** (A) A PARTY’S OBLIGATIONS OF INDEMNIFICATION, AS FURTHER DESCRIBED IN THIS AGREEMENT; (B) DAMAGES CAUSED BY A PARTY’S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT; OR, (C) A PARTY’S BREACH OF ITS OBLIGATIONS OF CONFIDENTIALITY, AS FURTHER DESCRIBED IN THIS AGREEMENT. This Section shall survive the termination of this Agreement.
    6. Insurance. Unless otherwise approved in writing by EBCE’s risk manager, Service Provider shall, at its own expense, procure and maintain in full force and effect during the term of this Agreement, policies of insurance, of the types and in the minimum amounts as follows, with responsible insurance carriers duly admitted and qualified in California covering the operations of Service Provider, pursuant to this Agreement: commercial general liability **[and auto liability if any of the Services will be performed on EBCE property]** ($1,000,000 per occurrence [and/or accident], $2,000,000 aggregate); excess liability ($2,000,000 per occurrence, $4,000,000 aggregate); workers’ compensation (statutory limits) and employers’ liability ($1,000,000 per accident); cyber liability ($2,000,000 per occurrence) providing protection against claims and liabilities arising from: (i) errors and omissions in connection with maintaining security of EBCE Data; (ii) data breach including theft, destruction, and/or unauthorized use of EBCE Data; (iii) identity theft including bank charges assessed; and (iv) violation of privacy rights due to a breach of EBCE Data; and, if required by EBCE’s risk manager, professional liability ($1,000,000 per occurrence, $2,000,000 aggregate). Any of the foregoing policy limits shall be subject to modification by the EBCE’s risk manager upon thirty (30) days prior, written notice to Service Provider, and at any time prior to commencement of the Services.  
         
       The Indemnitees shall be named as additional insureds in the commercial general, cyber, and excess liability policies which shall contain standard cross liability clauses, using forms of endorsements acceptable to EBCE’s risk manager. Service Provider shall cause the liability it assumed under this Agreement to be specifically insured under the contractual liability section of the liability insurance policies. The liability policies shall be primary without right of contribution from any Indemnitee, and Service Provider waives all rights of subrogation with respect to the CGL, workers compensation, and cyber liability policies. All policies shall require that EBCE be given no less than thirty (30) calendar days prior written notice of any cancellation thereof or material change therein. EBCE shall have the right to request an adjustment of the limits of liability for commercial general, cyber, and excess liability, and/or professional liability insurance if and as Service Provider’s exposure to EBCE increases. Service Provider shall provide EBCE with certificates of insurance and original endorsements, evidencing all of the above coverage, including all special requirements specifically noted above, and shall provide EBCE with certificates of insurance evidencing renewal or substitution of such insurance thirty (30) calendar days prior to the effective date of such renewal or substitution. Any “claims made” professional liability policy shall be endorsed to provide an extended reporting period of not less than three (3) years.
16. General.
    1. Relationship between EBCE and Service Provider. Service Provider represents and warrants that it is an independent contractor with no authority to contract for EBCE or in any way to bind or to commit EBCE to any agreement of any kind or to assume any liabilities of any nature in the name of or on behalf of EBCE. Under no circumstances shall Service Provider, or any of its staff, if any, hold itself out as or be considered an agent employee, jointventure,or partner of EBCE. In recognition of Service Provider’s status as an independent contractor, EBCE shall carry no Workers’ Compensation insurance or any health or accident insurance to cover Service Provider or Service Provider’s agents or staff, if any. EBCE shall not pay any contributions to Social Security, unemployment insurance, federal or state withholding taxes, any other applicable taxes whether federal, state, or local, nor provide any other contributions or benefits which might be expected in an employer-employee relationship. Neither Service Provider nor its staff, if any, shall be eligible for, participate in, or accrue any direct or indirect benefit under any other compensation, benefit, or pension plan of EBCE.
    2. Governing Law and Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of California and the federal laws of the United States of America. Service Provider hereby consents and submits to the jurisdiction and forum of the state and federal courts in the County of Alameda, State of California, in all questions and controversies arising out of this Agreement.
    3. Attorneys’ Fees and Costs. In any arbitration, litigation, or other proceeding, informal or formal, by which one party either seeks to enforce this Agreement or seeks a declaration of any rights or obligations under this Agreement, the non-prevailing party shall pay the prevailing party’s costs and expenses, including but not limited to, reasonable attorneys’ fees.
    4. Compliance with Laws, EBCE Policies and Procedures. Both parties agree to comply with all applicable federal, state, and local laws, executive orders and regulations issued, where applicable. Service Provider shall comply with EBCE policies and procedures where the same are posted, conveyed, or otherwise made available to Service Provider.
    5. Cooperation. Where agreement, approval, acceptance, consent or similar action by either party hereto is required by any provision of this Agreement, such action shall not be unreasonably delayed or withheld. Each party will cooperate with the other by, among other things, making available, as reasonably requested by the other, management decisions, information, approvals, and acceptances in order that each party may properly accomplish its obligations and responsibilities hereunder. Service Provider will cooperate with any EBCE supplier performing services, and all parties supplying hardware, software, communication services, and other services and products to EBCE, including, without limitation, the Successor Service Provider. Service Provider agrees to cooperate with such suppliers, and shall not commit or permit any act which may interfere with the performance of services by any such supplier.
    6. Force Majeure; Excused Performance. Neither party shall be liable for delays or any failure to perform the Services or this Agreement due to causes beyond its reasonable control. Such delays include, but are not limited to, fire, explosion, flood or other natural catastrophe, pandemic, governmental legislation, acts, orders, or regulation, strikes or labor difficulties, or failures in communication lines and routes not under a party’s control, to the extent not occasioned by the fault or negligence of the delayed party. Any such excuse for delay shall last only as long as the event remains beyond the reasonable control of the delayed party. However, the delayed party shall use its best efforts to minimize the delays caused by any such event beyond its reasonable control. Where Service Provider fails to use its best efforts to minimize such delays, the delays shall be included in the determination of Service Level achievement. The delayed party must notify the other party promptly upon the occurrence of any such event, or performance by the delayed party will not be considered excused pursuant to this Section, and inform the other party of its plans to resume performance. A force majeure event does not excuse Service Provider from providing Services and fulfilling its responsibilities relating to the requirements of backup and recovery of EBCE Data. In no event shall any of the following constitute a force majeure event: (a) failure, inadequate performance, or unavailability of Service Provider’s subcontractors, if any; or, (b) configuration changes, other changes, Viruses, or other errors or omissions introduced, or permitted to be introduced, by Service Provider that result in an outage or inability for EBCE to access or use the Services. Within thirty (30) calendar days following the Effective Date and on an annual basis thereafter until the termination of this Agreement, Service Provider shall provide its then-current business continuity plan (“Business Continuity Plan”) to EBCE upon EBCE’s request. The Business Continuity Plan shall include: (a) Services and EBCE Data backup and recovery procedures, including procedures and resources for disaster recovery; (b) fail-over procedures; and, (c) how Service Provider will interact with its business continuity suppliers, if any. Service Provider shall test its Business Continuity Plan on an annual basis until the termination of this Agreement and shall provide the test results to EBCE upon EBCE’s request.
    7. Advertising and Publicity. Service Provider shall not refer to EBCE directly or indirectly in any advertisement, news release, or publication, or use any EBCE logo, seal or mark, without prior written approval from EBCE.
    8. No Waiver. The failure of either party at any time to require performance by the other party of any provision of this Agreement shall in no way affect that party’s right to enforce such provisions, nor shall the waiver by either party of any breach of any provision of this Agreement be taken or held to be a waiver of any further breach of the same provision.
    9. Notices. Any notice given pursuant to this Agreement shall be in writing and shall be given by personal service or by United States certified mail, return receipt requested, postage prepaid to the addresses appearing at the end of this Agreement, or as changed through written notice to the other party. Notice given by personal service shall be deemed effective on the date it is delivered to the addressee, and notice mailed shall be deemed effective on the third day following its placement in the mail addressed to the addressee.
    10. Assignment of Agreement. This Agreement and the obligations of Service Provider hereunder are personal to Service Provider. Neither Service Provider nor any successor, receiver, or assignee of Service Provider shall directly or indirectly assign this Agreement or the rights or duties created by this Agreement, whether such assignment is effected in connection with a sale of Service Provider’s assets or stock or through merger, an insolvency proceeding or otherwise, without the prior written consent of EBCE. In the case of an assignment by Service Provider, Service Provider represents and warrants that it has all requisite rights and power to transfer any agreements or other rights with third-parties whose software is incorporated into the Services or who are necessary for the performance and use of the Services. Service Provider shall not subcontract performance of any of the Services without EBCE’s prior, written, consent.
    11. Time is of the Essence. Time is of the essence in every provision of this Agreement in which time for performance is a factor.
    12. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same Agreement. The parties agree that a facsimile signature may substitute for and have the same legal effect as the original signature.
    13. Entire Agreement. This Agreement and any and all attached exhibits, each of which is incorporated by reference herein, constitute the entire agreement between the parties and supersede any and all previous representations, understandings, or agreements between EBCE and Service Provider as to the subject matter hereof. No representation or promise not expressly set forth herein shall be binding. The provisions of this Agreement shall govern over any inconsistent or conflicting provisions contained in any exhibit hereto. This Agreement may only be amended by an instrument in writing signed by the parties. This Agreement shall be construed without regard to the party that drafted it. Any ambiguity shall not be interpreted against either party and shall, instead, be resolved in accordance with other applicable rules concerning the interpretation of contracts.

Cumulative Remedies. All rights and remedies of EBCE herein shall be in addition to all other rights and remedies available at law or in equity, including, without limitation, specific performance against Service Provider for the enforcement of this Agreement, and temporary and permanent injunctive relief.

1. Proper Countersignatures

|  |  |
| --- | --- |
| **Type of Entity** | **Authorized Signatories** |
| For a corporation: | Pursuant to California Corporations Code Section 313 proof of authority to execute  the Agreement is established if one of the corporate officers listed in Column A below and one  of the corporate officers listed in Column B below both sign the documents.     |  |  |  | | --- | --- | --- | | **Column A** | **AND** | **Column B** | | Chairman of the Board, or |  | Secretary, or | | President, or |  | Assistant Secretary, or | | Vice President |  | Chief Financial Officer, or | |  |  | Assistant Treasurer |   If the agreement is signed by any combination of persons other than those listed above or by  an individual, then the agreement must be accompanied by a copy of the Board minutes, resolution, Corporate Secretary’s certificate, or articles of incorporation stating that  the signatories have the authority to bind the corporation. |
| For a general partnership,  a limited partnership, or  a limited liability partnership: | All the general partners must sign the Agreement (a general partnership agreement is sufficient  to establish the names of all general partners) unless the person signing the Agreement  provides proof that he/she has authority to bind the partnership. |
| For a limited liability  company (LLC) | Copies of the following documents should be provided to establish who has authority to bind  the LLC: (1) State Forms LLC-1 and LLC-12 if the company was formed in California; and (2)  the operating agreement for the LLC – whether formed in California or another state. |
| For a sole proprietor, or  a sole proprietor  doing business  under another name: | Only the individual who owns the business can sign. Either a Fictitious Business Name  Statement or a EBCE Business Tax Certificate is sufficient to establish the authority of  an individual to bind a sole proprietorship. |

[*signatures on following page*]

Executed on the dates set forth below by the undersigned authorized representative of EBCE and Service Provider to be effective as of the Effective Date.

|  |  |
| --- | --- |
| East Bay Community Energy Authority,  A Joint Powers Authority  Name:  Title:  Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Approved as to form:  EBCE General Counsel | [Service Provider],  A [Legal form of entity]  [Name]  [Title]  Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  [Name]  [Title]  Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

**EXHIBIT A**

**STATEMENT OF SERVICES, SUPPORT, AND SERVICE LEVEL AGREEMENT [SELECT OPTIONS AS NEEDED]**

This Exhibit A - Statement of Services, Support, and Service Level Agreement shall be incorporated in and governed by the terms of that certain Master Software as a Service Agreement by and between **the EBCE of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** (“EBCE“) and **[SERVICE PROVIDER NAME]** (“Service Provider”) dated [Effective Date], (“Agreement”). In the event of a conflict between the provisions contained in the Agreement and those contained in this Exhibit A, the provisions contained in the Agreement shall prevail.

Services Description. [Enter a detailed description of the Services that will be provided. As appropriate, documents describing the Services can be “attached hereto and incorporated herein.”]

Start Date and End Date. These dates represent the Initial Term of this Agreement. [Indicate the Start Date and End Date of the Services. If the Services are not required until after Customization / Integration Services, Training Services, etc. are completed, be sure to indicate that the Start Date for the Services may be later than the Start Date for, for example, the Customization / Integration Services.]

Authorized Users and Services Fees. [Indicate the initial number of Authorized Users and rates. Additionally, describe “tiers” or numbers and corresponding rates to purchase additional user licenses. Be clear as to the type of pricing model; for example, scalable pricing, module pricing, per seat pricing, usage-based pricing. This Agreement assumes a scalable and elastic per-user pricing model. Also include the billing frequency, such as monthly, quarterly, or annually.]

Storage Threshold(s). [Describe the initial data storage provided by the Service Provider and any additional “tiers” of storage.]

Storage Fees. [Describe Storage Fees, if any, for the initial data storage provided by the Service Provider as well as for any additional “tiers” of storage.]

Technical Support Description. [Modify this section as necessary.] Service Provider will provide to EBCE telephone and email support (“Technical Support”) twenty-four (24) hours per day, seven (7) days per week, three-hundred-sixty-five (365) days per year. Technical Support will include any research and resolution activity performed by Service Provider.

a) Request for Technical Support. Authorized Users will make Technical Support requests by calling or emailing Service Provider’s Technical Support staff or by submitting a request via Service Provider’s customer service web portal. The Technical Support staff shall assign to the request the Problem Severity Level (as defined herein) indicated by the requestor.

b) Problem Severity Levels 1 and 2 Response and Resolution**.** For Technical Support requests not made by telephone, within the Request Response Time of such a request, Service Provider shall confirm to the requestor receipt of the request by Service Provider. If a Problem Severity Level 1 or 2 request cannot be corrected to the reasonable satisfaction of the requestor within the Request Resolution Time after the requestor makes the initial request for Technical Support, Service Provider will: (a) immediately escalate the request to Service Provider’s management; (b) take and continue to take the actions which will most expeditiously resolve the request; (c) provide a hourly report to the requestor of the steps taken and to be taken to resolve the request, the progress to correct, and the estimated time of correction until the request is resolved; and, (d) every [Time Duration], provide increasing levels of technical expertise and Service Provider management involvement in finding a solution to the request until it has been resolved.

c) Problem Severity Levels 3 and 4 Response and Resolution. For Technical Support requests not made by telephone, within the Request Response Time of such a request, Service Provider shall confirm to the requestor receipt of the request by Service Provider. If a Problem Severity Level 3 or 4 request cannot be corrected to the reasonable satisfaction of the requestor within the Request Resolution Time after the requestor makes the initial request for Technical Support, at the sole election of requestor: (a) Service Provider will work continuously to resolve the request; or, (b) requestor and Service Provider will mutually agree upon a schedule within which to resolve the request.

Technical Support Problem Severity Levels

a) Problem Severity Level 1.

1) Description. This Problem Severity Level is associated with: (a) Services, as a whole, are non-functional or are not accessible; (b) unauthorized exposure of all of part of EBCE Data; or, (c) loss or corruption of all or part of EBCE Data.

2) Request Response Time. 30 minutes.

3) Request Resolution Time. 2 hours.

b) Problem Severity Level 2.

1) Description. This Problem Severity Level is associated with significant and / or ongoing interruption of an Authorized User’s use of a critical function (as determined by the Authorized User) of the Services and for which no acceptable (as determined by the Authorized User) work-around is available.

2) Request Response Time. 1 hour.

3) Request Resolution Time. 4 hours.

c) Problem Severity Level 3.

1) Description. This Problem Severity Level is associated with: (a) minor and / or limited interruption of an Authorized User’s use of a non-critical function (as determined by the Authorized User) of the Services; or, (b) problems which are not included in Problem Severity Levels 1 or 2.

2) Request Response Time. 8 hours.

3) Request Resolution Time. 24 hours.

d) Problem Severity Level 4.

1) Description. This Problem Severity Level is associated with: (a) general questions pertaining to the Services; or, (b) problems which are not included in Problem Severity Levels 1, 2, or 3.

2) Request Response Time. 8 hours.

3) Request Resolution Time. 48 hours.

Customization / Integration Services. [**OPTIONAL]** Describe all Customization / Integration Services, if any, to be provided by the Service Provider to enable production use of the Services.]

Training Services. [**OPTIONAL]** Describe all Training Services, if any, to be provided by the Service Provider. Include any type of training or method of delivery, including documentation or other materials, web- or computer-based, instructor-led, train-the-trainer, etc.]

Service Levels.

a) Availability Service Level.

1) Definitions.

(a) “Actual Uptime” shall mean the total minutes in the reporting month that the Services were actually available to Authorized Users for normal use.

(b) “Maintenance Window” shall mean the total minutes in the reporting month represented by the following day(s) and time(s) during which Service Provider shall maintain the Services: [Day(s) and Time(s)].

(c) “Scheduled Downtime” shall mean the total minutes in the reporting month represented by the Maintenance Window.

(d) “Scheduled Uptime” shall mean the total minutes in the reporting month less the total minutes represented by the Scheduled Downtime.

2) Service Level Standard. Services will be available to Authorized Users for normal use 100% of the Scheduled Uptime.

3) Calculation. (Actual Uptime / Scheduled Uptime) x 100 = Percentage Uptime (as calculated by rounding to the second decimal point)

4) Performance Credit.

(a) Where Percentage Uptime is greater than 99.98%, no Performance Credit will be due to EBCE.

(b) Where Percentage Uptime is equal to or less than 99.98%, EBCE **[may treat such event as a breach of this Agreement] [or] [shall be due a Performance Credit in the amount of 10% of the Services Fees (as calculated on a monthly basis for the reporting month) for each full 1% reduction in Percentage Uptime.]**

5) Example Calculation.

(a) Assuming reporting month is March 2020 (44640 minutes).

(b) Assuming a Maintenance Window of Sundays from Midnight to 4:00 a.m. Eastern Standard Time (equals Scheduled Downtime of 960 minutes).

(c) Scheduled Uptime equals 43680 minutes (total minutes of 44640 less 960 minutes of Scheduled Downtime).

(d) Assuming Actual Uptime of 41,000 minutes. Percentage Uptime is calculated as follows: (43,000 / 43680) x 100 = 98.44%.

(e) The threshold of 99.99% less the Percentage Uptime of 98.44% = 1.55%.

(f) The difference is greater than a 1% reduction but is less than a 2% reduction; therefore, **[Service Provider is in default] [or] [EBCE is due 10% of the Services Fees as a Performance Credit.]**

b) Services Response Time Service Level. **[OPTIONAL]**

1) Definition(s).

(a) “Response Time” shall mean the interval of time from when an Authorized User requests, via the Services, a Transaction to when visual confirmation of Transaction completion is received by the Authorized User. For example, Response Time includes the period of time representing the point at which an Authorized User enters and submits data to the Services and the Services display a message to the Authorized User that the data has been saved.

(b) “Total Transactions” shall mean the total of Transactions occurring in the reporting month.

(c) “Transaction” or “Transactions” shall mean Services web page loads, Services web page displays, and Authorized User Services requests.

2) Service Level Standard. Transactions will have a Response Time of 1 second or less 100% of the time each reporting month during the periods for which the Services are available.

3) Calculation. ((Total Transactions – Total Transactions failing Standard) / Total Transactions) \* 100 = Percentage Response Time (as calculated by rounding to the second decimal point).

4) Performance Credit.

(a) Where Percentage Response Time is greater than 95.00%, no Performance Credit will be due to EBCE.

(b) Where Percentage Response Time is equal to or less than 95.00%, EBCE shall be due a Performance Credit in the amount of 1% of the Services Fees (as calculated on a monthly basis for the reporting month) for each full 1% reduction in Percentage Response Time.

5) Example Calculation.

(a) Total Transactions during the reporting month equal 42,078.

(b) Total Transactions failing the Standard of 100% equal 2,163.

(c) Percentage Response Time is calculated as follows: ((42,078 – 2,163) / 42,078) \* 100 = 94.86%

(d) The threshold of 95.01% less the Percentage Response Time of 94.86% = .15%. The difference is less than a 1% reduction; therefore, EBCE is not due a Performance Credit.

c) Technical Support Problem Response Service Level.

1) Definition. “Total Problems” shall mean the total of problems occurring in the reporting month.

2) Service Level Standard. Problems shall be confirmed as received by Service Provider 100% of the time each reporting month, in accordance with the Request Response Time associated with the Problem Severity Level.

3) Calculation. ((Total Problems – Total Problems failing Standard) / Total Problems) \* 100 = Percentage Problem Response (as calculated by rounding to the second decimal point). Note: This Calculation must be completed for each Problem Severity Level.

4) Performance Credit.

(a) Problem Severity Level 1 – 2.

(1) Where Percentage Problem Response is greater than 99.00%, no Performance Credit will be due to EBCE.

(2) Where Percentage Problem Response is equal to or less than 99.00%, EBCE shall be due a Performance Credit in the amount of 1% of the Services Fees (as calculated on a monthly basis for the reporting month) for each full 1% reduction in Percentage Problem Response.

(b) Problem Severity Level 3 – 4.

(1) Where Percentage Problem Response is greater than 90.00%, no Performance Credit will be due to EBCE.

(2) Where Percentage Problem Response is equal to or less than 90.00%, EBCE shall be due a Performance Credit in the amount of .5% of the Services Fees (as calculated on a monthly basis for the reporting month) for each full 1% reduction in Percentage Problem Response.

5) Example Calculation (Using Problem Severity Level 1 – 2).

(a) Total Problems during the reporting month equal 68.

(b) Total Problems failing the Standard of 100% equal 3.

(c) Percentage Problem Response is calculated as follows: ((68 – 3) / 68) \* 100 = 95.59%

(d) The threshold of 99.01% less the Percentage Problem Response of 95.59% = 3.42%. The difference is greater than a 3% reduction but is less than a 4% reduction; therefore, EBCE is due 3% of the Services Fees as a Performance Credit.

d) Technical Support Problem Resolution Service Level.

1) Definition. “Total Problems” shall mean the total of problems occurring in the reporting month.

2) Service Level Standard. Problems shall be resolved by Service Provider 100% of the time each reporting month, in accordance with the Request Resolution Time associated with the Problem Severity Level.

3) Calculation. ((Total Problems – Total Problems failing Standard) / Total Problems) \* 100 = Percentage Problem Resolution (as calculated by rounding to the second decimal point). Note: This Calculation must be completed for each Problem Severity Level.

4) Performance Credit.

(a) Problem Severity Level 1 – 2.

(1) Where Percentage Problem Resolution is greater than 99.00%, no Performance Credit will be due to EBCE.

(2) Where Percentage Problem Resolution is equal to or less than 99.00%, EBCE shall be due a Performance Credit in the amount of 5% of the Services Fees (as calculated on a monthly basis for the reporting month) for each full 1% reduction in Percentage Problem Resolution.

(b) Problem Severity Level 3 – 4.

(1) Where Percentage Problem Resolution is greater than 90.00%, no Performance Credit will be due to EBCE.

(2) Where Percentage Problem Resolution is equal to or less than 90.00%, EBCE shall be due a Performance Credit in the amount of 1% of the Services Fees (as calculated on a monthly basis for the reporting month) for each full 1% reduction in Percentage Problem Resolution.

5) Example Calculation (Using Problem Severity Level 3 – 4).

(a) Total Problems during the reporting month equal 17.

(b) Total Problems failing the Standard of 100% equal 2.

(c) Percentage Problem Resolution is calculated as follows: ((17 – 2) / 17) \* 100 = 88.24%

(d) The threshold of 90.01% less the Percentage Problem Resolution of 88.24% = 1.77%. The difference is greater than a 1% reduction but is less than a 2% reduction; therefore, EBCE is due 1% of the Services Fees as a Performance Credit.