

AGREEMENT

THIS AGREEMENT ("Agreement") is made and entered into this 20th day of August, 2019 ("Effective Date"), by and between the COUNTY OF FRESNO, a Political Subdivision of the State of California ("COUNTY"), and IBM Security, a cybersecurity enterprise, a wholly owned subsidiary of International Business Machines Corporation, a New York corporation, whose address is New Orchard Rd., Armonk, NY 10504. ("CONTRACTOR").

WITNESSETH:

WHEREAS, COUNTY desires to purchase software license, installation, training, data conversion, and software maintenance of Guardium from CONTRACTOR, which is database auditing software to allow for protection of COUNTY's data, compliance with various regulations, and identification of weaknesses, threats, and security holes within COUNTY databases as set forth in the COUNTY's Request for Proposal (RFP) Number 19-050, dated February 5, 2019;

WHEREAS, CONTRACTOR represented, via its Response to COUNTY's RFP No. 19-050, dated March 12, 2019, that the software license, installation, training, data conversion, and software maintenance of Guardium from CONTRACTOR, along with professional services from CONTRACTOR, would meet the stated needs of the COUNTY;

WHEREAS, COUNTY desires to purchase from CONTRACTOR continuous maintenance and support for Guardium;

WHEREAS, COUNTY and CONTRACTOR desire to execute this Agreement for the purchase of the right to use the software license, and maintenance and support of the Guardium software.

NOW, THEREFORE, in consideration of the mutual covenants, terms and conditions herein contained, the parties hereto agree as follows:

1. DEFINITIONS:

The following terms used throughout this Agreement shall be defined as follows:

Acceptance Criteria:

The performance and operating specifications which the System must meet at a minimum, as set out or referred to in this Agreement.

1 Acceptance Test:

2 The process of testing a specific function or functions to determine if the operation or operations
3 are as stated in this Agreement.

4 Change Control Process:

5 Process used by the Information Services Division of COUNTY's Internal Services Department
6 (ISD) to inform staff of new or updated production use systems.

7 County System Hardware:

8 The central processing units owned or leased by COUNTY, which are described in this
9 Agreement on which COUNTY is licensed to use the System Software, any back-up equipment
10 for such central processing units, and any peripheral hardware such as terminals, printers, and
11 Personal Computers as described in this Agreement.

12 COUNTY System Software:

13 The operating system and database software installed on the COUNTY System Hardware.

14 Final System Acceptance:

15 When it is determined by COUNTY that all necessary deliverables have been delivered, the data
16 has been converted, the base Guardium software has been successfully installed and tested,
17 and Guardium performs all functions in accordance with its specifications.

18 First Production Use:

19 Date of first use of the system in a production environment.

20 License:

21 The meaning assigned to the term 'License,' as defined in Section 2(A) of this Agreement, and
22 the rights and obligations which it creates under the laws of the United States of America and the
23 State of California, including without limitation, copyright and intellectual property law.

24 Monies:

25 The terms "Monies", "Charges", "Price", and "Fees" will be considered to be equivalent.

26 Public Records:

27 Public Records includes any writing containing information relating to the conduct of the public's
28 business that is prepared, owned, used, or retained by any state or local agency, regardless of

physical form or characteristics.

Supplier:

The terms "Supplier", "Vendor", and "IBM" all refer to CONTRACTOR and are considered to be equivalent throughout this Agreement.

System:

The System Software and System Documentation, collectively. Reference to the "System" shall include any component thereof. All modifications and enhancements to the System shall be deemed to be part of the System as defined herein and shall be subject to all terms and conditions set forth herein. The System consists of Guardium, which supports the Fresno County Department of Internal Services, all interfaces, and third-party software required for the system to function.

System Documentation:

The documentation relating to the System Software, and all manuals, reports, brochures, sample runs, specifications and other materials comprising such documentation provided by CONTRACTOR in connection with the System Software pursuant to this Agreement.

System Operation:

The general operation of COUNTY's hardware and all software including, but not limited to, system restarts, configuration and operation of system peripherals (such as printers, modems, and terminals), installation of new software releases, and other related activities.

System Installation:

All software has been delivered, has been physically loaded on a Computer, and COUNTY has successfully executed program sessions.

System Software:

Guardium, that certain computer software described in this Agreement provided by CONTRACTOR, and all interfaces, coding, tapes, disks, modules and similar materials comprising such software or on which it is stored. System Software shall not include operating system software, or any other Third-Party Software.

User:

1 The terms "User", "Customer" and "Licensee" all refer to COUNTY and are considered to be
2 equivalent throughout this Agreement.

3 2. **OBLIGATIONS OF THE CONTRACTOR**

4 A. **SOFTWARE LICENSE**

5 I. **GRANT OF LICENSE**

6 CONTRACTOR grants to COUNTY, and COUNTY accepts, a non-exclusive, non-transferable,
7 perpetual license to use Guardium, which is subject to the terms and conditions set forth in this
8 Agreement.

9 II. **SCOPE OF LICENSE**

10 The license granted herein shall consist solely of the non-exclusive, non-transferable right of
11 COUNTY to operate the System Software in support of various COUNTY departments, including
12 COUNTY's Department of Internal Services.

13 III. **OWNERSHIP**

14 The parties acknowledge and agree that, as between CONTRACTOR and COUNTY, title and
15 full ownership of all rights in and to the System Software, System Documentation, and all other materials
16 provided to COUNTY by CONTRACTOR under the terms of this Agreement shall remain with
17 CONTRACTOR. COUNTY will take reasonable steps to protect trade secrets of the System Software
18 and System Documentation. Ownership of all copies is retained by CONTRACTOR. COUNTY may not
19 disclose or make available to third parties the System Software or System Documentation or any portion
20 thereof. CONTRACTOR shall own all right, title and interest in and to all corrections, modifications,
21 enhancements, programs, and work product conceived, created or developed, alone or with COUNTY
22 or others, as a result of or related to the performance of this Agreement, including all proprietary rights
23 therein and based thereon. Except and to the extent expressly provided herein, CONTRACTOR does
24 not grant to COUNTY any right or license, express or implied, in or to the System Software and System
25 Documentation or any of the foregoing. The parties acknowledge and agree that, as between
26 CONTRACTOR and COUNTY, full ownership of all rights in and to all COUNTY data, whether in
27 magnetic or paper form, including without limitation printed output from the System, are the exclusive
28 property of COUNTY.

1 IV. POSSESSION, USE, AND UPDATE OF SOFTWARE

2 COUNTY agrees that only COUNTY will use the System Software for its own internal purposes.
3 CONTRACTOR may, at reasonable times, inspect COUNTY's premises and equipment to verify that all
4 of the terms and conditions of this license are being observed. CONTRACTOR may create, from time to
5 time, updated versions of the System Software and System Documentation and CONTRACTOR shall
6 make such System Updates available to COUNTY. All System Updates shall be licensed under the
7 terms of this Agreement. COUNTY agrees to follow the prescribed instructions for updating System
8 Software and System Documentation provided to COUNTY by CONTRACTOR. COUNTY must
9 authorize all System Updates in writing.

10 V. TRANSFER OF SOFTWARE

11 COUNTY shall not rent, lease, license, distribute, sell, transfer, or assign this license, the System
12 Software, or the System Documentation, or any of the information contained therein other than
13 COUNTY data, to any other person or entity, whether on a permanent or temporary basis, and any
14 attempt to do so will constitute a breach of this Agreement. No right or license is granted under this
15 Agreement for the use or other utilization of the licensed programs, directly or indirectly, for the benefit
16 of any other person or entity, except as provided in this Agreement.

17 VI. POSSESSION AND USE OF SOURCE CODE

18 Source code and other material that results from custom programming by CONTRACTOR
19 released to COUNTY under this license shall be deemed CONTRACTOR software subject to all of the
20 terms and conditions of the software license set forth in this Agreement. The scope of COUNTY's
21 permitted use of the custom source code under this license shall be limited to maintenance and support
22 of the System Software. For purposes of this Section, the term "maintenance and support" means
23 correction of System Software errors and preparation of System Software modifications and
24 enhancements. If COUNTY creates computer code in the process of enhancing the System Software,
25 that specific new code shall be owned by COUNTY and may be used by COUNTY's employees,
26 officers, or agents for COUNTY's own internal business operations. However, if COUNTY's
27 enhancement results in the creation of a derivative work from the System Software, the copyright to
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1 such derivative work shall be owned by CONTRACTOR and COUNTY's rights to use such derivative
2 work shall be limited to those granted with respect to the System Software in this Agreement.

3 VII. RESTRICTIONS ON USE

4 COUNTY shall not (i) license, sublicense, sell, resell, transfer, assign, distribute or otherwise
5 commercially exploit or make available to any third party the System Software or the System
6 Documentation in any way; (ii) modify or make derivative works based upon the System Software or the
7 System Documentation; (iii) create Internet "links" to the System Software or "frame" or "mirror" any
8 System Documentation on any other server or wireless or Internet-based device; (iv) send spam or
9 otherwise duplicative or unsolicited messages in violation of applicable law; (v) send or store infringing,
10 obscene, threatening, libelous, or otherwise unlawful or tortious material, including material harmful to
11 children or violative of third party privacy rights; (iv) send or store material containing software viruses,
12 worms, Trojan horses or other harmful computer code, files, scripts, agents or programs; (vii) interfere
13 with or disrupt the integrity or performance of the System Software or the data contained therein,
14 including but not limited to COUNTY Data; (viii) attempt to gain unauthorized access to the System
15 Software or its related systems or networks; (ix) reverse engineer or access the System Software in
16 order to (a) build a competitive product or service, (b) build a product using similar ideas, features,
17 functions or graphics of the System Software, or (c) copy any ideas, features, functions or graphics of
18 the System Software.

19 VIII. INTELLECTUAL PROPERTY, TRADEMARK, AND COPYRIGHT

20 CONTRACTOR retains ownership of the System Software, any portions or copies thereof, and
21 all rights therein. CONTRACTOR reserves all rights not expressly granted to COUNTY. This License
22 does not grant COUNTY any rights in connection with any trademarks or service marks of
23 CONTRACTOR, its suppliers or licensors. All right, title, interest and copyrights in and to the System
24 Software and the accompanying System Software Documentation and any copies of the System
25 Software are owned by CONTRACTOR, its suppliers or licensors. All title and intellectual property rights
26 in and to the content which may be accessed through use of the System Software are the property of
27 the respective content owner and may be protected by applicable copyright or other intellectual property
28 laws and treaties. This License grants COUNTY no rights to use such content.

1 B. SERVICES TO BE PROVIDED BY CONTRACTOR TO COUNTY

2 I. SYSTEM INSTALLATION

3 CONTRACTOR shall supply and install Guardium in accordance with this Agreement. Such
4 software installation shall include hardware/network review and recommendations, consultation,
5 software installation and remote technical support.

6 II. TRAINING

7 CONTRACTOR will conduct "train-the-trainer" training of COUNTY staff at a COUNTY-
8 designated location and at a time approved in writing by COUNTY, as specified in CONTRACTOR's
9 Response to RFP No. 19-050.

10 III. DOCUMENTATION

11 CONTRACTOR shall provide to COUNTY Guardium System Documentation, which shall consist
12 of electronic media files. The electronic media files must be printable using PC software normally
13 available at COUNTY. CONTRACTOR shall provide new System Documentation corresponding to all
14 new Software Upgrades. COUNTY may print additional copies of all documentation. All System
15 Documentation is to be used by COUNTY only for the purposes identified within this Agreement.

16 C. SYSTEM MAINTENANCE AND SUPPORT BY CONTRACTOR

17 System maintenance and support includes System Updates as they are released by
18 CONTRACTOR, including updates as required as a result of Federal Regulatory Changes. The first day
19 of production use will be identified by COUNTY and communicated to CONTRACTOR. CONTRACTOR
20 will support day-to-day operation of the System as follows:

21 I. SUPPORT HOURS/SCOPE:

22 Provide unlimited technical assistance by phone during normal coverage hours
23 (7:30 a.m. to 5:00 p.m. Pacific Standard Time (PST), Monday through Friday, except
24 CONTRACTOR and COUNTY holidays), toll-free telephone assistance to keep the
25 System in, or restored to, normal operating condition. The object of this support will be to
26 answer specific questions related to the System Software and the application thereof.
27 Support provided under this Agreement does not include training of new personnel (after
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initial staff is trained), operation of hardware, or solving other hardware/software problems unrelated to the System Software.

II. SUPPORT RESPONSE:

During the term of this Agreement, CONTRACTOR will (a) correct any error or malfunctions in the System as supplied by CONTRACTOR which prevents it from operating in conformance with the specifications set forth in this Agreement or (b) provide a commercially reasonable alternative that will conform to the specifications set forth in this Agreement.

If analysis by CONTRACTOR indicates a reported problem is caused by a reproducible error or malfunction in the then-current release of the System Software as supplied and maintained by CONTRACTOR that significantly impacts effective use of the System by COUNTY, CONTRACTOR will, if the System is inoperable, as reported by COUNTY, provide continuous effort to correct the error or to resolve the problem by providing a circumvention.

In such cases, CONTRACTOR will provide COUNTY with corrective information, such as corrective documentation and/or program code. CONTRACTOR will endeavor to respond to COUNTY's service request no later than four (4) business hours from the time a call has been received by CONTRACTOR. In the event that a person with the necessary expertise is not available when the call is received, CONTRACTOR will endeavor to respond to the service request no later than within one (1) business day.

III. REMOTE VIRTUAL PRIVATE NETWORK (VPN) DIAGNOSTICS

Remote VPN Diagnostics Support includes:

- a. Diagnostic or corrective actions necessary to restore proper Guardium operation;
- b. Diagnostic actions which attempt to identify the cause of system problem;
- c. Correction of data file problem; and
- d. Guardium modifications

CONTRACTOR product specialists will provide diagnostics via VPN on Guardium.
COUNTY will provide any required hardware and equipment necessary at COUNTY for
CONTRACTOR VPN support.

IV. ERROR CORRECTION PROCESS

If during the term of this Agreement COUNTY determines that software error(s) exist, COUNTY will first follow the error procedures specified in the System Documentation. If following the error procedures does not correct the software error, COUNTY shall immediately notify CONTRACTOR, setting forth the defects noted with specificity. Upon notification of a reported software error, CONTRACTOR shall have five (5) days to determine if any actual software error exist and, if so, endeavor to correct such software errors. At CONTRACTOR's request, additional time to solve difficult problems will not be unreasonably withheld. Within fifteen (15) days of correction, COUNTY shall retest the System Software and report any other software errors.

V. TECHNICAL INFORMATION

CONTRACTOR will provide technical information to COUNTY from time to time. Such information may cover areas such as Guardium usage, third party software, and other matters considered relevant to COUNTY by CONTRACTOR. Technical information will be provided at the discretion of CONTRACTOR but will not be unreasonably withheld.

D. ADDITIONAL SYSTEM MAINTENANCE SERVICES BY CONTRACTOR

CONTRACTOR may provide additional maintenance services ("Additional Maintenance and Support Services" or "Additional Maintenance Services") at an additional charge. Charges will be as identified in Section 6 of this Agreement; or, if not included in this Agreement, charges will be at current prices in effect at the time goods or services are provided. Any Additional Maintenance and Support Services requested by COUNTY and determined by CONTRACTOR to be billable by CONTRACTOR must be identified as a chargeable service prior to the service being performed and must be approved in writing in advance by COUNTY's Contract Administrator. Additional Maintenance Services include, but are not limited to, the following:

I. ADDITIONAL TRAINING

1 A specific amount of training is specified in this agreement. Additional training at a
2 County facility is available upon request by COUNTY at an additional charge under the
3 terms of this Agreement. Requests for additional training will be reviewed by
4 CONTRACTOR and must be requested in writing in advance by COUNTY's Contract
5 Administrator. Charges will be at rates identified in this Agreement.

6 II. DATA AND SYSTEM CORRECTIONS

7 Data and System Corrections include any corrective actions accomplished by
8 CONTRACTOR on-site or via VPN which are necessary due to COUNTY errors or
9 unauthorized source code or data access by COUNTY. Unauthorized access to the data
10 is defined as any COUNTY editing of data through other than normal system usage as
11 defined in System Documentation. Unauthorized access to source code is defined as any
12 COUNTY access whatsoever to system source code. Services provided by
13 CONTRACTOR are not billable when they result from errors caused by Guardium or
14 instruction provided by CONTRACTOR.

15 III. CUSTOMER SITE VISITS

16 Site visits to COUNTY sites, as may be requested in writing by COUNTY and that
17 are within the scope of the project services, are available for reasons such as, but not
18 limited to, (1) additional system training on hardware or software usage; (2) resolution of
19 system difficulties not resulting from actions by, or otherwise the responsibility of
20 CONTRACTOR (as determined by mutual agreement between CONTRACTOR and
21 COUNTY); (3) installation of Software Releases; and (4) assistance in equipment
22 maintenance, movement or diagnosis. Site visits outside of the scope of project services
23 will be reviewed by the CONTRACTOR and must be requested in writing in advance by
24 COUNTY's Contract Administrator. Charges will be at rates identified in this Agreement.

25 IV. CUSTOM PROGRAMMING

26 Requests for supplemental programming or customization of system features not
27 covered under this Agreement are available to COUNTY. Such requests will be reviewed
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1 by CONTRACTOR and must be requested in writing in advance by the COUNTY's
2 Contract Administrator. Charges will be at rates identified in this Agreement.

3 E. CONTRACTOR PROJECT COORDINATOR

4 Upon execution of this Agreement, CONTRACTOR shall appoint a Project Coordinator who will
5 act as the primary contact person to interface with COUNTY for implementation, maintenance and
6 support of Guardium.

7 F. SYSTEM UPDATES AND NEW PRODUCTS

8 I. SYSTEM UPDATES

9 From time to time CONTRACTOR will develop and provide System Updates to
10 COUNTY for the COUNTY'S licensed CONTRACTOR software. System Updates shall
11 be subject to the terms and conditions of this Agreement and shall be deemed licensed
12 System Software hereunder and will be made available to COUNTY at no additional
13 charge to COUNTY. System Updates will be made available to COUNTY at the discretion
14 of CONTRACTOR but will not be unreasonably withheld.

15 II. NEW PRODUCTS

16 CONTRACTOR may from time to time release new software with capabilities
17 substantially different from or greater than the System Software ("New Products") and
18 which therefore do not constitute System Updates. These New Products will be made
19 available to COUNTY at a cost not to exceed CONTRACTOR's then standard rates for
20 customers similarly situated.

21 G. OPERATING SYSTEM UPDATES

22 The application must run on an operating system (O/S) that is consistently and currently
23 supported by the operating system vendor. Applications under maintenance are expected to always be
24 within 1 year of current in regards to the O/S. Outdated or unsupported O/S will not be implemented on
25 the production network.

26 COUNTY will notify CONTRACTOR when a critical security patch is released. CONTRACTOR
27 will have thirty (30) days to ensure application can perform in the updated environment. With approval
28 from CONTRACTOR, COUNTY will apply patches to both the operating system, and non-critical

1 security subsystems as releases are available from operating system vendors. The application is
2 expected to perform in this environment. CONTRACTOR is expected to keep their software within one
3 (1) year of current in order to operate in this environment. These patches include critical O/S updates
4 and security patches.

5 H. ANTI-VIRUS MANAGEMENT

6 COUNTY will actively run anti-virus management, where appropriate, on all application servers
7 and PCs. The application is expected to perform adequately while anti-virus management is active.

8 I. ADHERE TO CHANGE CONTROL PROCESS

9 CONTRACTOR must adhere to COUNTY's Change Control Process, which shall be provided to
10 CONTRACTOR in writing. COUNTY employs a procedure to implement updates, upgrades, and version
11 releases to a system that is in production use. This forum allows ISD to inform staff (Help Desk,
12 Network, Server, Database, Security, and Analysts) of upcoming changes to a production system.
13 CONTRACTOR must inform ISD a minimum of 1 week prior to any planned, non-emergency changes
14 so that the Change Control Process may be followed.

15 J. OTHER

16 Unless otherwise specified, for third-party software, CONTRACTOR shall provide standard
17 documentation in electronic form (via the Internet or File Transfer Protocol (FTP)).

18 The system being provided runs in a Local Area Network and Web environment. As such, the
19 performance of the system is directly related to, among other things: available network bandwidth, and
20 the performance of other applications. For this reason, CONTRACTOR makes no guarantees as to
21 system response time.

22 3. OBLIGATIONS OF THE COUNTY

23 A. COUNTY CONTRACT ADMINISTRATOR

24 COUNTY appoints its Chief Information Officer (CIO) or his designee, as COUNTY's Contract
25 Administrator with full authority to deal with CONTRACTOR in all matters concerning this Agreement.

26 B. CONTRACTOR RESPONSE COMMITMENT
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COUNTY will follow its present practices to safeguard System Software delivered to COUNTY by CONTRACTOR. A copy of COUNTY'S "Information Technology (IT) Standards and Preferences" will be made available upon request.

C. SAFEGUARDING SYSTEM SOFTWARE

COUNTY will follow its present practices to safeguard System Software delivered to COUNTY by CONTRACTOR. A copy of COUNTY'S "Information Technology (IT) Standards and Preferences" will be made available upon request.

- 1) COUNTY utilizes a backup and recovery system written and maintained by Commvault Systems. This application requires a backup agent to run on the server.
- 2) COUNTY will provide the vendor with an account with appropriate administrative rights to administer the application. The account password is expected to periodically expire.
- 3) In order for the application to run on COUNTY supported servers, the application must not require the users to have administrative rights on the servers.
- 4) COUNTY, at all times, during and after the performance of the installation of the System Software, is responsible for maintaining adequate data backups to protect against loss of data.

D. BACKUP AND RECOVERY MANAGEMENT

- 1) COUNTY utilizes a backup and recovery system written and maintained by Commvault Systems. This application requires a backup agent to run on the server.
- 2) COUNTY will provide the vendor with an account with appropriate administrative rights to administer the application. The account password is expected to periodically expire.
- 3) In order for the application to run on COUNTY supported servers, the application must not require the users to have administrative rights on the servers.

1 4) COUNTY, at all times, during and after the performance of the installation of
2 the System Software, is responsible for maintaining adequate data backups to protect
3 against loss of data.

4 E. ACCEPTANCE TESTING

5 COUNTY shall approve Final System Acceptance when Guardium has been successfully tested
6 and satisfactorily performs all functions necessary pursuant to this Agreement, and all deliverables
7 identified in this Agreement as required for acceptance have been received by COUNTY.

8 F. ACCEPTANCE TESTING PROCESS

9 Following delivery and installation, CONTRACTOR shall test Guardium along with COUNTY
10 personnel.

11 G. FACILITIES AND PREPARATION

12 COUNTY will at its own expense provide all necessary labor and materials for site preparation,
13 electrical services, and cabling required for System Installation. COUNTY shall receive the System
14 Software and will follow instructions provided by CONTRACTOR to load it on COUNTY's System
15 Hardware to prepare the System for processing.

16 H. SYSTEM HARDWARE AND SYSTEM SOFTWARE

17 COUNTY will at its own expense provide and properly maintain and update on an on-going basis
18 all necessary COUNTY System Software and County System Hardware required to operate Guardium.
19 Said COUNTY System Software and County System Hardware shall meet or exceed CONTRACTOR's
20 recommendations.

21 As part of COUNTY's responsibility for computer infrastructure, COUNTY is responsible for
22 ensuring that data is secure and protected at all times. CONTRACTOR is not responsible for and cannot
23 be held liable for inadvertent data disclosure or theft from COUNTY facilities.

24 I. COUNTY PROJECT MANAGER

25 Upon execution of this Agreement, COUNTY's Contract Administrator shall designate one
26 individual from ISD who will function as Project Manager with responsibility for day-to-day management
27 of the project for implementation of Guardium. The Project Manager and COUNTY personnel shall have
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the necessary and appropriate training and experience to implement the terms of this Agreement.
COUNTY acknowledges CONTRACTOR'S reliance on same.

J. OTHER COUNTY OBLIGATIONS

1) Technical assistance from COUNTY's ISD staff will be provided during the performance of the installation of the System Software. In particular, COUNTY will provide:

- a. Network connectivity and troubleshooting assistance.
- b. Ability to monitor network traffic and isolate bottlenecks.
- c. Technical assistance concerning the integration with existing COUNTY systems (if applicable).
- d. Expertise to handle issues with PCs, printers, and cabling before, during, and after rollout.

4. TERM

The term of this Agreement shall be for a period of three (3) years, commencing on Effective Date, through and including August 19, 2022. This Agreement may be extended for two (2) additional consecutive twelve (12) month periods upon written approval of both parties no later than thirty (30) days prior to the first day of the next twelve (12) month extension period. The Director of Internal Services/Chief Information Officer (CIO) or his or her designee is authorized to execute such written approval on behalf of COUNTY based on CONTRACTOR'S satisfactory performance.

5. TERMINATION

A. Non-Allocation of Funds - The terms of this Agreement, and the services to be provided hereunder, are contingent on the approval of funds by the appropriating government agency. Should sufficient funds not be allocated, the services provided may be modified, or this Agreement terminated, at any time without penalty by giving the CONTRACTOR thirty (30) days advance written notice.

B. Breach of Contract - The COUNTY may immediately suspend or terminate this Agreement in whole or in part, where in the determination of the COUNTY there is:

- 1) An illegal or improper use of funds;

- 2) A failure to comply with any term of this Agreement;
- 3) A substantially incorrect or incomplete report submitted to the COUNTY;
- 4) Improperly performed service.

In no event shall any payment by the COUNTY constitute a waiver by the COUNTY of any breach of this Agreement or any default which may then exist on the part of the CONTRACTOR. Neither shall such payment impair or prejudice any remedy available to the COUNTY with respect to the breach or default. The COUNTY shall have the right to demand of the CONTRACTOR the repayment to the COUNTY of any funds disbursed to the CONTRACTOR under this Agreement, which in the judgment of the COUNTY were not expended in accordance with the terms of this Agreement. The CONTRACTOR shall promptly refund any such funds upon demand.

C. Without Cause - Under circumstances other than those set forth above, this Agreement may be terminated by COUNTY upon the giving of thirty (30) days advance written notice of an intention to terminate to CONTRACTOR.

6. **COMPENSATION/INVOICING:** COUNTY agrees to pay CONTRACTOR, and CONTRACTOR agrees to receive compensation as follows: \$500,000.00 annually. CONTRACTOR shall submit monthly invoices referencing the provided contract number, either electronically or via mail, in triplicate to the County of Fresno, Internal Services Department, Attention: Business Office, 333 W. Pontiac Way, Clovis, CA 93612, (isdbusinessoffice@fresnocountyca.gov).

In no event shall services performed under this Agreement exceed \$1,500,000.00 during the initial three-year term of this Agreement. If this Agreement is extended for an additional Year 4, in no event shall compensation for the four-year term exceed \$2,000,000.00. If this Agreement is extended for an additional Year 5, in no event shall compensation for the total possible five-year term exceed \$2,500,000.00. It is understood that all expenses incidental to CONTRACTOR'S performance of services under this Agreement shall be borne by CONTRACTOR. COUNTY shall pay CONTRACTOR within forty-five (45) days of receipt of an approved invoice.

7. **INDEPENDENT CONTRACTOR:** In performance of the work, duties and obligations assumed by CONTRACTOR under this Agreement, it is mutually understood and agreed that CONTRACTOR, including any and all of the CONTRACTOR'S officers, agents, and employees will at all

1 times be acting and performing as an independent contractor, and shall act in an independent capacity and
2 not as an officer, agent, servant, employee, joint venturer, partner, or associate of the COUNTY.
3 Furthermore, COUNTY shall have no right to control or supervise or direct the manner or method by which
4 CONTRACTOR shall perform its work and function. However, COUNTY shall retain the right to administer
5 this Agreement so as to verify that CONTRACTOR is performing its obligations in accordance with the
6 terms and conditions thereof.

7 CONTRACTOR and COUNTY shall comply with all applicable provisions of law and the rules and
8 regulations, if any, of governmental authorities having jurisdiction over matters the subject thereof.

9 Because of its status as an independent contractor, CONTRACTOR shall have absolutely no right
10 to employment rights and benefits available to COUNTY employees. CONTRACTOR shall be solely liable
11 and responsible for providing to, or on behalf of, its employees all legally-required employee benefits. In
12 addition, CONTRACTOR shall be solely responsible and save COUNTY harmless from all matters relating
13 to payment of CONTRACTOR'S employees, including compliance with Social Security withholding and all
14 other regulations governing such matters. It is acknowledged that during the term of this Agreement,
15 CONTRACTOR may be providing services to others unrelated to the COUNTY or to this Agreement.

16 8. **MODIFICATION:** Any matters of this Agreement may be modified from time to time by the
17 written consent of all the parties without, in any way, affecting the remainder.

18 9. **NON-ASSIGNMENT:** Neither party shall assign, transfer or sub-contract this Agreement
19 nor their rights or duties under this Agreement without the prior written consent of the other party.
20 Assignment of IBM rights to receive payments, and by IBM in conjunction with the sale of the portion of
21 IBM's business that includes the product or service is not restricted.

22 10. **EUROPEAN GENERAL DATA PROTECTION REGULATIONS**
23 The COUNTY agrees that no COUNTY personal data that is subject to European General Data Protection
24 Regulations (GDPR) requirements will be provided to CONTRACTOR under this Agreement. In the event
25 of a change, the COUNTY will notify CONTRACTOR in writing, and CONTRACTOR's Data Processing
26 Addendum (DPA) at <http://ibm.com/dpa> will apply, and supplements the Agreement. Additionally, IBM and
27 the COUNTY will agree on a DPA Exhibit (as described in the DPA). The DPA Exhibit and, if applicable, a
28 custom services DPA amendment, will be added as an Appendix to this transaction.

11. **HOLD HARMLESS and LIMITATION OF CONTRACTOR'S LIABILITY:**

11.1 CONTRACTOR agrees to indemnify, save, hold harmless, and at COUNTY'S request, defend the COUNTY, its officers, agents, and employees from any and all costs and expenses (including attorney's fees and costs), damages, liabilities, claims, and losses, and any and all claims, damages, costs, fees, regulatory fines and penalties, , occurring or resulting to COUNTY in connection with claims for injury or damages on account of bodily injuries (including death) or damages to real property or tangible personal property for which CONTRACTOR is legally liable to that third party, and pay all costs, damages and attorney's fees that a court finally awards or that are included in a settlement approved by CONTRACTOR , provided that the COUNTY shall promptly notify CONTRACTOR in writing of the claim, and allow CONTRACTOR to control, and will cooperate with the CONTRACTOR in the defense and any related settlement negotiations that are caused by or result from the performance, or failure to perform, by CONTRACTOR, its officers, agents, or employees under this Agreement

In the event of a third party claim of a CONTRACTOR product acquired under this Agreement for an alleged infringement of patent rights, copyright, or misappropriation of trade secrets, to the fullest extent permitted by law, CONTRACTOR agrees to and shall indemnify, save, hold harmless, and at COUNTY's request, defend COUNTY, including its officers, officials, agents, and employees against that claim and pay amounts finally awarded by a court against COUNTY or included in a settlement approved by CONTRACTOR, provided that COUNTY promptly: i) notifies CONTRACTOR in writing of the claim; ii) supplies information requested by CONTRACTOR; and iii) allows CONTRACTOR to control, and reasonably cooperates in, the defense and settlement, including mitigation efforts. If, in any suit, action, proceeding or claim relating to the foregoing, a temporary restraining order or preliminary injunction is granted, CONTRACTOR shall make every reasonable effort to secure the suspension of the injunction or restraining order. If, in any such suit, action, proceeding or claim, the services, software or any Equipment provided by CONTRACTOR or any part, combination or process thereof, is held to constitute an infringement and its use is enjoined, CONTRACTOR shall immediately (a) pay the reasonable direct out-of-pocket costs and expenses to secure a license to use such infringing work, replace the infringing work or modify the same so that it becomes non-infringing, and (b) make every reasonable effort to secure for the COUNTY a license, at no cost to COUNTY, authorizing COUNTY's continued use of the infringing work. If

1 CONTRACTOR is unable to secure such license within a reasonable time, CONTRACTOR, at its own
2 expense and without impairing performance requirements of the services, software, or any Equipment
3 provided by CONTRACTOR as part of this Agreement, shall either replace the affected services, software,
4 or any Equipment provided by CONTRACTOR as part of this Agreement, combination or process thereof,
5 with non-infringing services, software, or other equipment, or modify the same so that they become non-
6 infringing.

7 11.2 CONTRACTOR'S LIMITATION OF LIABILITY

8 a. CONTRACTOR's entire liability for all claims related to the Agreement will not exceed the
9 amount of any actual direct damages incurred by COUNTY up to the amounts paid (if recurring charges, up
10 to 12 months' charges apply) for the product or service that is the subject of the claim, regardless of the
11 basis of the claim. CONTRACTOR will not be liable for special, incidental, exemplary, indirect, or economic
12 consequential damages, or lost profits, business, value, revenue, goodwill, or anticipated savings. These
13 limitations apply collectively to CONTRACTOR, its affiliates, contractors, and suppliers.

14 b. The following amounts are not subject to the above cap: i) third party payments referred to in the
15 paragraph below; ii) damages that cannot be limited under applicable law; and iii) amounts paid in
16 accordance with Section 11.1 herein.

17 c. If a third party asserts a claim against COUNTY that a CONTRACTOR product acquired under
18 the Agreement infringes a patent or copyright, CONTRACTOR will defend COUNTY in accordance with
19 Section 11.1, herein.

20 d. CONTRACTOR has no responsibility for claims based on Non-CONTRACTOR products, items
21 not provided by CONTRACTOR, or any violation of law or third party rights caused by Content, or any
22 COUNTY materials, designs, specifications, or use of a non-current version or release of a
23 CONTRACTOR, product when an infringement claim could have been avoided by using a current version
24 or release.

25 The provisions of this Section 11 shall survive the termination of this Agreement.

26 12. INSURANCE

27 Without limiting the COUNTY's right to obtain indemnification from CONTRACTOR or any third
28 parties, CONTRACTOR, at its sole expense, shall maintain in full force and effect, the following insurance

1 policies or a program of self-insurance, including but not limited to, an insurance pooling arrangement or
2 Joint Powers Agreement (JPA) throughout the term of the Agreement:

3 A. Commercial General Liability

4 Commercial General Liability Insurance with limits of not less than Two Million Dollars
5 (\$2,000,000.00) per occurrence and an annual aggregate of Four Million Dollars (\$4,000,000.00). This
6 policy shall be issued on a per occurrence basis. COUNTY may require specific coverages including
7 completed operations, products liability, or contractual liability as insurance deemed necessary because of
8 the nature of this contract.

9 B. Commercial Automobile Liability

10 Commercial Automobile Liability Insurance with limits of not less than One Million Dollars
11 (\$1,000,000.00) per accident for bodily injury and for property damages. Coverage should include any auto
12 used in connection with this Agreement.

13 C. Technology Professional Liability (Errors and Omissions)

14 Technology Professional Liability (Errors and Omissions) Insurance appropriate to
15 CONTRACTOR's profession, with limits not less than Two Million Dollars (\$2,000,000) per occurrence
16 or claim, Two Million Dollars (\$2,000,000) aggregate. Coverage shall be sufficiently broad to respond to
17 the duties and obligations as is undertaken by CONTRACTOR in this Agreement and may include, but
18 not be limited to infringement of copyright, trademark, trade dress, negligent acts, errors, or omissions
19 arising from professional services provided under this Agreement.

20 D. Cyber Liability

21 CONTRACTOR shall provide the following cyber liability insurance with limits not less than Two
22 Million Dollars (\$2,000,000) per occurrence. Coverage shall include, but not be limited to, claims
23 involving Cyber Risks. The cyber liability policy shall be endorsed to cover the full replacement value of
24 damage to, alteration of, loss of, or destruction of intangible property (including but not limited to
25 information or data) that is in the care, custody, or control of the CONTRACTOR.

26 For purposes of the technology professional liability insurance and the cyber liability insurance
27 required under this Agreement, cyber liability insurance shall provide protection against liability for (1)
28 privacy breaches [liability arising from the loss or disclosure of confidential information no matter how it

occurs], (2) system breach, (3) denial or loss of service, (4) introduction, implantation, or spread of malicious software code, (5) unauthorized access to or use of computer systems, and (6) infringement of patents and copyright..

E. Worker's Compensation

A policy of Worker's Compensation insurance as may be required by the California Labor Code.

Additional Requirements Relating to Insurance

CONTRACTOR shall provide the following endorsements to the Commercial General Liability insurance naming the County of Fresno, its officers, agents, and employees, individually and collectively, as additional insured, but only insofar as the operations under this Agreement are concerned. Such coverage for additional insured shall apply as primary insurance, and any other insurance, or self-insurance, maintained by COUNTY, its officers, agents and employees shall be excess only and not contributing with insurance provided under CONTRACTOR's policies herein. This insurance shall not be cancelled or changed without written notice given to COUNTY in accordance with the terms of the policy.

CONTRACTOR hereby waives its right to recover from COUNTY, its officers, agents, and employees any amounts paid by the policy of worker's compensation insurance required by this Agreement. CONTRACTOR is solely responsible to obtain any endorsement to such policy that may be necessary to accomplish such waiver of subrogation, but CONTRACTOR's waiver of subrogation under this paragraph is effective whether or not CONTRACTOR obtains such an endorsement (however, waiver of subrogation does not apply in instances of gross negligence on the part of the customer, where gross negligence is defined to mean carelessness that is reckless disregard for the safety of others and/or a failure to use the slightest degree of care).

Within Thirty (30) days from the date CONTRACTOR signs and executes this Agreement, CONTRACTOR shall provide certificates of insurance and endorsement as stated above for all of the foregoing policies, as required herein, to the County of Fresno, Internal Services Department, Attention: Director of Internal Services/Chief Information Officer, 333 W. Pontiac Way, Clovis, CA 93612, stating that such insurance coverage have been obtained and are in full force; that the County of Fresno, its officers, agents and employees will not be responsible for any premiums on the policies; that for such worker's

1 compensation insurance the CONTRACTOR has waived its right to recover from the COUNTY, its officers,
2 agents, and employees any amounts paid under the insurance policy and that waiver does not invalidate
3 the insurance policy; that such Commercial General Liability insurance names the County of Fresno, its
4 officers, agents and employees, individually and collectively, as additional insured, but only insofar as the
5 operations under this Agreement are concerned; that such coverage for additional insured shall apply as
6 primary insurance and any other insurance, or self-insurance, maintained by COUNTY, its officers, agents
7 and employees, shall be excess only and not contributing with insurance provided under CONTRACTOR's
8 policies herein; and that this insurance shall not be cancelled or changed without a minimum of thirty (30)
9 days advance, written notice given to COUNTY.

10 In the event CONTRACTOR fails to keep in effect at all times insurance coverage as herein
11 provided, the COUNTY may, in addition to other remedies it may have, suspend or terminate this
12 Agreement upon the occurrence of such event.

13 All policies shall be issued by admitted insurers licensed to do business in the State of California,
14 and such insurance shall be purchased from companies possessing a current A.M. Best, Inc. rating of A
15 FSC VII or better.

16 13. **AUDITS AND INSPECTIONS:** The CONTRACTOR shall at any time during business
17 hours, and as often as the COUNTY may deem necessary, make available to the COUNTY for examination
18 all of its records and data with respect to the matters covered by this Agreement. The CONTRACTOR
19 shall, upon request by the COUNTY, permit the COUNTY to audit and inspect all of such records and data
20 necessary to ensure CONTRACTOR'S compliance with the terms of this Agreement.

21 If this Agreement exceeds ten thousand dollars (\$10,000.00), CONTRACTOR shall be subject to
22 the examination and audit of the California State Auditor for a period of three (3) years after final payment
23 under contract (Government Code Section 8546.7).

24 14. **NOTICES:** The persons and their addresses having authority to give and receive notices
25 under this Agreement include the following:

26 COUNTY
27 COUNTY OF FRESNO

28 Director of Internal Services/CIO
333 W. Pontiac Way

International Business Machines
Corporation
Attn: IBM Counsel
425 Market Street, 21st Floor

Clovis, CA 93612

San Francisco, CA 94105

All notices between the COUNTY and CONTRACTOR provided for or permitted under this Agreement must be in writing and delivered either by personal service, by first-class United States mail, by an overnight commercial courier service, or by telephonic facsimile transmission. A notice delivered by personal service is effective upon service to the recipient. A notice delivered by first-class United States mail is effective three COUNTY business days after deposit in the United States mail, postage prepaid, addressed to the recipient. A notice delivered by an overnight commercial courier service is effective one COUNTY business day after deposit with the overnight commercial courier service, delivery fees prepaid, with delivery instructions given for next day delivery, addressed to the recipient. A notice delivered by telephonic facsimile is effective when transmission to the recipient is completed (but, if such transmission is completed outside of COUNTY business hours, then such delivery shall be deemed to be effective at the next beginning of a COUNTY business day), provided that the sender maintains a machine record of the completed transmission. For all claims arising out of or related to this Agreement, nothing in this section establishes, waives, or modifies any claims presentation requirements or procedures provided by law, including but not limited to the Government Claims Act (Division 3.6 of Title 1 of the Government Code, beginning with section 810).

15. **GOVERNING LAW:** Venue for any action arising out of or related to this Agreement shall only be in Fresno County, California.

The rights and obligations of the parties and all interpretation and performance of this Agreement shall be governed in all respects by the laws of the State of California.

16. **DISCLOSURE OF SELF-DEALING TRANSACTIONS**

This provision is only applicable if the CONTRACTOR is operating as a corporation (a for-profit or non-profit corporation) or if during the term of the agreement, the CONTRACTOR changes its status to operate as a corporation.

Members of the CONTRACTOR's Board of Directors shall disclose any self-dealing transactions that they are a party to while CONTRACTOR is providing goods or performing services under this agreement. A self-dealing transaction shall mean a transaction to which the CONTRACTOR is a party and in which one or more of its directors has a material financial interest. Members of the Board of

1 Directors shall disclose any self-dealing transactions that they are a party to by completing and signing a
2 Self-Dealing Transaction Disclosure Form, attached hereto as Exhibit A and incorporated herein by
3 reference, and submitting it to the COUNTY prior to commencing with the self-dealing transaction or
4 immediately thereafter.

5 17. **ENTIRE AGREEMENT:** This Agreement constitutes the entire agreement between the
6 CONTRACTOR and COUNTY with respect to the subject matter hereof and supersedes all previous
7 Agreement negotiations, proposals, commitments, writings, advertisements, publications, and
8 understanding of any nature whatsoever unless expressly included in this Agreement. *In the event of any*
9 *inconsistency in interpreting the documents which constitute this Agreement, the inconsistency shall be*
10 *resolved by giving precedence in the following order of priority: (1) the text of this Agreement (excluding*
11 *Attachment "A", the COUNTY'S Request for Proposal No. 19-050 and the CONTRACTOR'S*
12 *Quote/Proposal in response thereto); (2) Attachment "A"; (3) the COUNTY'S Request for Proposal No. 19-*
13 *050; and (4) the CONTRACTOR'S quotation/proposal made in response to COUNTY'S Request for*
14 *Proposal No. 19-050.*

15 ///

16 ///

17 ///

18 ///

1 IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first
2 hereinabove written.

3
4 **CONTRACTOR**

5
6 (Authorized Signature)

7 Wesley Young - Security Representative
8 Print Name & Title

9 600 Anton Blvd
10 Costa Mesa, CA 92626
11 Mailing Address

COUNTY OF FRESNO

Nathan Magsig
Nathan Magsig, Chairman of the Board of
Supervisors of the County of Fresno

ATTEST:

Bernice E. Seidel
Clerk of the Board of Supervisors
County of Fresno, State of California

12
13
14
15 By: Susan Bishop
Deputy

16 **FOR ACCOUNTING USE ONLY:**

17 Fund: 1020

18 Subclass: 10000

19 ORG: 8905

20 Account: 7309
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SELF-DEALING TRANSACTION DISCLOSURE FORM

In order to conduct business with the County of Fresno (hereinafter referred to as "County"), members of a contractor's board of directors (hereinafter referred to as "County Contractor"), must disclose any self-dealing transactions that they are a party to while providing goods, performing services, or both for the County. A self-dealing transaction is defined below:

"A self-dealing transaction means a transaction to which the corporation is a party and in which one or more of its directors has a material financial interest"

The definition above will be utilized for purposes of completing this disclosure form.

INSTRUCTIONS

- (1) Enter board member's name, job title (if applicable), and date this disclosure is being made.
- (2) Enter the board member's company/agency name and address.
- (3) Describe in detail the nature of the self-dealing transaction that is being disclosed to the County. At a minimum, include a description of the following:
 - a. The name of the agency/company with which the corporation has the transaction; and
 - b. The nature of the material financial interest in the Corporation's transaction that the board member has.
- (4) Describe in detail why the self-dealing transaction is appropriate based on applicable provisions of the Corporations Code.
- (5) Form must be signed by the board member that is involved in the self-dealing transaction described in Sections (3) and (4).

Exhibit A

(1) Company Board Member Information:			
Name:		Date:	
Job Title:			
(2) Company/Agency Name and Address:			
(3) Disclosure (Please describe the nature of the self-dealing transaction you are a party to):			
(4) Explain why this self-dealing transaction is consistent with the requirements of Corporations Code 5233 (a):			
(5) Authorized Signature			
Signature:		Date:	