**INSTRUCTIONS March 2022**

**This rider template designed for use with certain licensed software and related maintenance that is to be hosted on-premises** (COTS software)**. It does not take the place of the System Acquisition Template-- it is for use with vendor terms, and may not include suitable contract language.**

This template addresses the more common issues found in a vendor’s software license and support terms. This template is the *starting point* for addressing both security and legal risks. The rider for a specific transaction should be edited to reflect what is deemed appropriate for the software and services before it is shared with the contractor.

This template does not address insurance, configuration, custom coding, or other professional services. **This rider may not be used for hosted services agreements, or software as a service.**

**This rider is not a substitute for an information security review.** On-premises software and maintenance services may present heightened risks for sensitive or confidential information that may be exchanged or created during use, or permissions the vendor may expect- yes, even for on premises software! Confer with your security office if the agency or the vendor’s license and support terms anticipate that data exchange, access, or systems communications will be a part of the solution or maintenance/support. Requests for EIS advice may be sent via email to: [ESO.info@oregon.gov​](mailto:ESO.info@oregon.gov).

**This rider is not a substitute for legal advice.** Requests for DOJ advice and drafting assistance may be sent via email to: [CRV.mail@doj.state.or.us](mailto:CRV.mail@doj.state.or.us?subject=Request%20for%20BTS%20Attorney%20Assignment-%20XaaS%20Agreement%20Drafting).

**DELETE THIS PAGE AND ALL COMMENTS BEFORE THIS DOCUMENT IS SHARED EXTERNALLY.**

**Rider to Software License and Maintenance Plan**

**And Agreement**

This rider (Rider) is between [name], a [state] Corporation (Licensor) and the State of Oregon, acting through its [Agency] (Licensee), and amends and supersedes any provision to the contrary in the Software License (License) or the Maintenance and Support Plan (Maintenance Plan). This Rider and its attachments constitute the agreement (Agreement) between the parties.

Notwithstanding any language in the License or Maintenance Plan to the contrary, Licensor and Licensee agree:

1. **Applicability**. This Agreement pertains to the [include any necessary specificity or limitation] Software, including related intellectual property (such as documentation) licensed by Licensor to Licensee under this Agreement, and related maintenance and support services. No Licensor-hosted software or software as a service is available under this Agreement.
2. **Complete Agreement.** This Agreement consists of this Rider, the License, in the form attached as Exhibit A, and the Maintenance Plan, in the form attached as Exhibit B. These exhibits are hereby incorporated into this Agreement by this reference. This Agreement merges all prior and contemporaneous communications with respect to the matters described in this Agreement.
3. **Order of Precedence**. In the event of any conflict between the Rider, the License, the Maintenance Plan, any terms and conditions published by Licensor on or after the Effective Date of this Agreement (including updates to any policy referenced in the License or Maintenance Plan), and any terms presented to an end user in a ‘click wrap’ or similar end user agreement, the conflict will be resolved in that order.
4. **Effective Date and Term**. This Agreement is effective on [date] or when it is fully executed and approved according to applicable laws, rules and regulations, whichever date is later (Effective Date). This Agreement continues in effect unless terminated by either party by providing notice in the manner [specified in the License, or] [specified the Maintenance Plan, or] specified in this Rider.
   1. There is no automatic renewal for the term of the [License or the ]maintenance and support services. Subsequent terms of either the License or the Maintenance Plan may be renewed as of the anniversary date.
      1. Licensor may terminate or suspend the [License,] maintenance and support services[, or both] if Licensee fails to pay a past-due invoice for a renewal term within 30 calendar days of receipt of written notice of such failure.
      2. If Licensee wishes to reinstate the [License and the] maintenance and support services, Licensee will pay the fee(s) due for the current term at then-current prices [available to State of Oregon agencies under an Oregon software reseller agreement]. Licensee will not pay a penalty, or be obligated to pay for additional terms.
5. **Payment.**
   1. [Software and services are payable through Licensor’s authorized reseller.]
   2. Licensee’s obligation to pay late charges is subject to ORS 293.462.
   3. No payment will be made for services or other charges that exceed fees paid for the current term unless the maximum additional amount payable is agreed upon in advance and authorized by Licensee in writing.
   4. Any Licensee obligation to pay travel expenses, including transportation, lodging, or meals, is subject to the rates and limitations of the Statewide Travel Policy, currently found online at: http://www.oregon.gov/das/Financial/Acctng/Documents/40.10.00.pdf.
6. **Confidentiality.** 
   1. Any obligation of Licensee to maintain the confidentiality of Licensor’s proprietary information provided to Licensee is conditioned by and subject to Licensee’s obligations under the Oregon Public Records Law, Oregon Revised Statutes (ORS) 192.311 to 192.478 which may require disclosure of proprietary information as a “public record” unless exempt under ORS 192.345 or ORS 192.355.
   2. Any information Licensor or its employees or agents receives or creates relating to Licensee or Licensee’s clients (Licensee Data) is owned by Licensee. Licensee hereby grants Licensor a license to use Licensee Data to fulfill the purposes of this Agreement, and otherwise only as specifically described in this Agreement.
   3. Licensor shall comply with the Oregon Consumer Information Protection Act (OCIPA), ORS 646A.600 through 646A.628, to the extent applicable.
   4. Licensor acknowledges that, it and its employees, subcontractors or agents in the course of this Agreement may be exposed to or acquire information that is confidential to Licensee or Licensee’s clients. Licensee Data is confidential information. Licensor shall maintain the confidentiality of Licensee’s confidential information, with the exception of:
      1. Information that becomes part of the public domain through lawful means and without breach of any confidentiality obligation by Licensor;
      2. Information subsequently and rightfully received from third parties who have the necessary rights to transfer the information without any obligation of confidentiality;
      3. Information that was known to Licensor prior to the Effective Date of the Agreement without obligation of confidentiality;
      4. Information that is independently developed by Licensor and documented in writing without use of, or reference to, any confidential information of Licensee; and
      5. Information required to be disclosed by compulsory judicial or administrative process or by law or regulation.
      6. If Licensor is required to disclose confidential information under section 6.4.5, Licensor shall first give Licensee notice and provide such information as may reasonably be necessary to enable Licensee to take action to protect its interests.
   5. Licensee Data will not be accessed from, transmitted, or stored outside of the United States or its territories. Licensee networks and systems will not be accessed from outside of the United States or its territories, including for maintenance and support services.
7. **Licensee Liabilities and Indemnification.** Licensee’s liabilities under this Agreement and any Licensee obligation under the License or Maintenance Plan to indemnify or hold Licensor harmless against claims brought by third parties against Licensor are subject to the limitations of Article XI, section 7 of the Oregon Constitution and the Oregon Tort Claims Act, ORS 30.260 through 30.300. Licensee has no obligation to defend Licensor.
8. **Licensor Indemnification.** Licensor shall indemnify, defend, and hold Licensee, the State of Oregon, and its agents, officials and employees harmless from all third party claims, demands, suits, actions, proceedings, losses, liabilities, damages, awards, and costs (including reasonable attorneys’ fees and expenses), which may be brought or made against Licensee, the State of Oregon, or their agents, officials, or employees and arising out of or related to any of the following (each an indemnifiable loss):
   1. Personal injury, death or tangible property damage caused by any alleged act, omission, error, fault, mistake or negligence of Licensor, its employees, agents, or representatives in connection with Licensor’s performance under or related to the Agreement.
   2. Any willful or grossly negligent act or omission by Licensor that constitutes a material breach of the Agreement, including any breach of warranty.
   3. [Claims that the Software or its use infringes or violates any patent, copyright, trademark, trade secret, or other proprietary right of a third party.]
   4. [Licensor’s obligations under this Section 8 (Licensor Indemnification) are exempt from any limitation of liability under this Agreement.]
   5. Licensee will timely notify Licensor in writing of any action, claim or demand of which Licensee becomes aware and which Licensee reasonably expects to result in an indemnifiable loss. Licensor’s indemnification obligations are not subject to any limitation of liability in the TOS. Licensor’s obligation under this section does not extend to any indemnifiable loss to the extent caused by: (i) the negligence or willful misconduct of Licensee, the State of Oregon, or their agents, officials or employees; or (ii) Licensee’s modification of Licensor’s software where the unmodified version of the software would not cause an indemnifiable loss.
9. **Defense of Claims**. To the extent Licensor is required under this Agreement to defend Licensee against claims asserted by third parties, [including under Section ## of the License,] Licensee shall reasonably cooperate in good faith, at Licensor’s reasonable expense, in the defense of the claim, Licensor shall select counsel reasonably acceptable to the Oregon Attorney General to defend the claim, and Licensor shall bear all costs of counsel. The Oregon Attorney General’s acceptance of counsel may not be unreasonably withheld. Counsel must accept appointment as a Special Assistant Attorney General under ORS Chapter 180 before counsel may act in the name of, or represent the interests of, the State of Oregon, Licensee, its officers, employees or agents. Licensee may elect to assume its own defense with an attorney of its own choice and at its own expense any time Licensee determines important governmental interests are at stake. Licensee will promptly provide notice to Licensor of any claim that may result in an obligation on the part of Licensor to defend. Subject to these limitations, Licensor may defend a claim with counsel of its own choosing, on the condition that no settlement or compromise of any claim may occur without the consent of Licensee, which consent must not be unreasonably withheld.
10. **Governing Law; Jurisdiction; Venue**. This Agreement is governed by, construed, and enforced in accordance with the laws of the State of Oregon, without giving effect to its conflict of law principles, and applicable federal law. Any action or suit brought by the parties relating to this Agreement must be brought and conducted exclusively in the Circuit Court of Marion County for the State of Oregon in Salem, Oregon; provided, however, if a claim must be brought in a federal forum, then it must be brought and conducted solely and exclusively within the United States District Court for the District of Oregon. LICENSOR HEREBY CONSENTS TO THE PERSONAL JURISDICTION OF THESE COURTS, WAIVES ANY OBJECTION TO VENUE IN THESE COURTS, AND WAIVES ANY CLAIM THAT THESE COURTS ARE INCONVENIENT FORUMS. In no way may this section or any other term of this Agreement be construed as (i) a waiver by the State of Oregon of any form of defense or immunity, whether it is sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the Constitution of the United States, or otherwise, or (ii) consent by the State of Oregon to the jurisdiction of any court.
11. **Attorneys’ Fees.** Neither party to this Agreement is entitled to obtain judgment from the other party for attorneys’ fees incurred in any litigation between the parties. Except as allowable under Section 7 (Licensee Liabilities and Indemnification) and Section 8 (Licensor Indemnification) of this Rider, neither party may obtain judgment from the other party for attorneys’ fees incurred in the defense of any claim asserted by a third party.
12. **Access and Audit rights**. Licensor’s audit rights in Section [##] of the License are modified to provide:
    1. Any audit will take place no more than once every 12 months, upon not fewer than 30 calendar days’ written notice, during normal business hours and in a manner that does not interfere unreasonably with Licensee’s operations. Licensee will provide Licensor or the independent auditor with information reasonably requested in furtherance of the verification; however, Licensor has no right of access to any locations, servers, computers, records, data, accounts, or other information protected by law from disclosure. As an alternative, Licensor can request Licensee complete a self-audit questionnaire.
    2. If the agreed-upon final audit report reveals that Licensee does not have sufficient licenses to meet its actual use, Licensee will order sufficient license(s) at then-current prices available to State of Oregon agencies under an Oregon software reseller price agreement. Licensee will not pay a penalty. Licensee may at its option purchase maintenance and support.
    3. Each party will bear its own costs of any activity conducted pursuant to Section ## of the License.
13. **Dispute Resolution.** Any dispute between the parties under this Agreement that is not resolved through informal discussions may be submitted to mediation upon the consent of both parties. If informal discussions or mediation are unsuccessful, either party may initiate litigation to resolve the dispute. The parties specifically disclaim any right to arbitration of disputes. Neither party waives its right to a jury trial or right to participate in class, collective, or representative claims.
14. **Incorporation of Oregon Statutes.** ORS 279B.220, 279B.230 and 279B.235 are incorporated into this Agreement by reference.
15. **Termination for Lack of Funding.** Nothing in this Agreement may be construed to permit any violation of Article XI, Section 7 of the Oregon Constitution or any other law regulating liabilities or monetary obligations of the State of Oregon. Licensee’s payment for license fees due after the last calendar day of the current State of Oregon biennium is contingent upon Licensee receiving funding, appropriations, limitations, allotments or other expenditure authority from the Oregon Legislative Assembly (including its Emergency Board) sufficient to allow Licensee, in the exercise of its reasonable administrative discretion, to continue to compensate Licensor. Licensee may immediately terminate this Agreement upon written notice if Licensee fails to receive funding, appropriations, limitations, allotments, or other expenditure authority as contemplated by Licensee’s budget or spending plan and Licensee determines, in its assessment and ranking of the policy objectives explicit or implicit in its budget or spending plan, that it is necessary to terminate this Agreement.
16. **Independent Contractor.** Licensor is at all times an independent contractor and not as an agent, employee, or representative of Licensee. Licensor has no right or authority to incur or create any obligation for or legally bind Licensee in any way. Licensor is not an "officer," "employee" or "agent" of Licensee or any other agency, office, or department of the State of Oregon, as those terms are used in ORS 30.265, and Licensor shall make no representations to third parties to the contrary. Neither party shall make any statements, representations, or commitments of any kind or to take any action binding on the other except as provided for in the Agreement or authorized in writing by the party to be bound.
17. **Publicity.** Licensor may disclose the form and existence of this Agreement in advertising, press releases or other materials distributed to prospective customers, but shall not otherwise attempt to obtain publicity from its association with Licensee or the State of Oregon, whether or not such disclosure, publicity or association implies an endorsement by Licensee or the State of Oregon of Licensor’s products and services, without the prior written consent of Licensee.
18. **Counterparts.** This Rider may be executed in two or more counterparts, by facsimile or otherwise, each of which is an original, and all of which together constitute one and the same instrument, notwithstanding that all parties are not signatories to the same counterpart.
19. **Amendments.** This Agreement may be amended, modified, or supplemented only by a written amendment that, if required by applicable law, has been approved according to applicable laws, rules and regulations, and for legal sufficiency by DOJ. No amendment will be effective until all requisite signatures and approvals are obtained from both parties.
20. **Statewide Price Agreement**. The software and maintenance and support services are available through a price agreement with a Licensor-authorized reseller. Such price agreement is held by the Oregon Department of Administrative Services under applicable Oregon law. Licensee will order software and services via a purchase order issued to the reseller. [The Department of Administrative Services is not a party to the purchase or this Agreement.]
21. **No Third Party Beneficiaries.** Licensee and Licensor are the only parties to this Agreement and are the only parties entitled to enforce its terms.
22. **Survival.** The provisions of this Rider that by their nature survive termination do so survive.
23. **Severability**. The parties agree that if any term or provision of this Agreement is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions will not be affected, and the rights and obligations of the parties will be construed and enforced as if this Agreement did not contain the particular term or provision held to be invalid.
24. **Non-Discrimination.** If the anticipated total value of the Software and services to be provided under this Agreement is $150,000 or more, Licensor certifies that it has a written policy and practice that meets the requirements described in ORS 279A.212 for preventing sexual harassment, sexual assault, and discrimination against employees who are members of a protected class. Licensor agrees, as a material condition, to maintain such policy and practice in force during the term of this Agreement. Licensor’s failure to maintain such policy and practice constitutes a breach entitling Licensee to terminate this Agreement for cause.
25. **Pay Equity.** As required by ORS 279B.235, Licensor shall comply with ORS 652.220 and not unlawfully discriminate against any of its employees in the payment of wages or other compensation for work of comparable character on the basis of an employee’s membership in a protected class. “Protected class” means a group of persons distinguished by race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, or age. Licensor’s compliance with this section is a material term of this Agreement, and Licensor’s failure to comply constitutes a breach entitling Licensee to terminate this Agreement for cause.
    1. As required by ORS 279B.235, Licensor may not prohibit any of its employees from discussing the employee’s rate of wage, salary, benefits, or other compensation with another employee or another person. Licensor shall not retaliate against an employee who discusses the employee’s rate of wage, salary, benefits, or other compensation with another employee or another person.
26. **Tax Compliance.** By executing this Rider, the undersigned certifies under penalty of perjury that Licensor has complied with the tax laws of the State of Oregon and the applicable tax laws of any political subdivision of this state, and that Licensor has no undisclosed liquidated and delinquent debt owed to this state or any political subdivision. Licensor shall, for the duration of this Agreement and any extensions, comply with all tax laws of this state and all applicable tax laws of any political subdivision of this state. For the purposes of this section, “tax laws” includes: (i) All tax laws of this state, including but not limited to ORS 320.005 to 320.150 and 403.200 to 403.250 and ORS chapters 118, 314, 316, 317, 318, 321 and 323 and local taxes administered by the Department of Revenue; (ii) Any tax provisions imposed by a political subdivision of this state that apply to Licensor, to Licensor’s property, operations, receipts, or income, or to Licensor’s performance of or compensation for any work performed by Licensor; (iii) Any tax provisions imposed by a political subdivision of this state that apply to Licensor, or to goods, services, or property, whether tangible or intangible, provided by Licensor; and (iv) Any rules, regulations, charter provisions, or ordinances that implemented or enforced any of the foregoing tax laws or provisions.
    1. This Agreement will be reported to the Oregon Department of Revenue. The Department of Revenue may take any and all actions permitted by law relative to the collection of taxes and debt due to the State of Oregon or a political subdivision, including (i) garnishing Licensor’s compensation under this Agreement, or (ii) exercising a right of setoff against Licensor’s compensation relating to this Agreement for any amounts that may be due and unpaid to the State of Oregon or its political subdivisions for which the Department of Revenue collects debts.
27. **LICENSOR, BY EXECUTION OF THIS AGREEMENT, HEREBY ACKNOWLEDGES THAT IT HAS READ THIS AGREEMENT, UNDERSTANDS IT, AND AGREES TO BE BOUND BY ITS TERMS AND CONDITIONS.**

**Licensor:**

|  |  |
| --- | --- |
| Signature & Date |  |
| Printed Name and Title of  Authorized Representative |  |

**Services Manager or Other Point of Contact:**

|  |  |  |  |
| --- | --- | --- | --- |
| Printed Name and Title |  | | |
| Mailing Address |  | | |
| Physical Address |  | | |
| Telephone |  | Fax |  |
| Email |  | | |

**Agency: State of Oregon acting by and through its [Licensee]**

|  |  |
| --- | --- |
| Signature & Date |  |
| Printed Name and Title of  Authorized Representative |  |

**Licensee Point of Contact:**

|  |  |  |  |
| --- | --- | --- | --- |
| Printed Name and Title |  | | |
| Mailing Address |  | | |
| Physical Address |  | | |
| Telephone |  | Fax |  |
| Email |  | | |

**APPROVED BY DEPARTMENT OF ADMINISTRATIVE SERVICES, PROCUREMENT SERVICES:**

**APPROVED BY THE STATE CHIEF INFORMATION OFFICER ACTING AS ENTERPRISE INFORMATION SERVICES:**

**APPROVED FOR LEGAL SUFFICIENCY BY THE DEPARTMENT OF JUSTICE:**

**EXHIBIT A**

**Software License**

**EXHIBIT B**

**Maintenance and Support Terms**