

# **Master Software and Services Contract**

**Between**

**Des Moines Public Schools and  
LMS Vendor**

**Month XX, 2016**

**DRAFT - FOR REVIEW AND DISCUSSION ONLY**

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# Master Software and Services Contract

This Master Software and Services Contract is entered into, on **Month xx, 2016** by and between the Des Moines Public Schools, governing body of the Public Schools of Des Moines, IA (“the District”), and **LMS Vendor**, a **Delaware** corporation having its principal place of business at **LMS Vendor address (“LMS vendor”)**, with reference to the following facts:

- A. The District is responsible for provision of all public educational services required to be provided by state and local law to children through 12<sup>th</sup> grade and certain adult education services for students in the Poke County, certain other incorporated municipalities within the Poke County, and certain unincorporated areas of the Poke County. It is governed by and acts by and through the authority of an elected Board of Education.
- B. LMS Vendor is engaged generally in the business of supplying technology and technology-related services to government agencies and instrumentalities throughout the United States of America. Among other things, LMS Vendor is engaged in the business of developing, licensing, installing and maintaining computer software for use in the management and operation of schools and educational service programs, with particular but not exclusive emphasis on K-12 education.
- C. Iowa and federal law require the District to maintain systems and procedures for collection, storage, retrieval, and processing of a wide variety of information relating to its students and programs.
- D. The District has heretofore promulgated a Request for Proposal to which several vendors responded including LMS Vendor, for the provision of software and services required to implement a LMS. After a selection process and subsequent School Board approval at the **Month xx, 2016** regular meeting, the District determined to conduct negotiations with LMS Vendor with respect to the terms and conditions under which LMS Vendor would provide the products and services listed in the LMS Vendor proposal. The parties have now reached an agreement and understanding as to the specific products and services to be provided by LMS Vendor to the District and the terms and conditions on which such products and services will be provided.

NOW, THEREFORE, in consideration of the mutual promises of the parties and other good and valuable consideration, receipt of which is hereby acknowledged, the parties agree as follows:

## 1. Definitions

- 1.1 **“Acceptance Test”** shall mean the conduct of the series of tests and protocols specified in the Project Documents for a particular Deliverable, the successful completion of which signify the successful delivery of such Deliverable. In the case of a documentary Deliverable, the Acceptance Test for such Deliverable shall mean the review by the District of such documentary Deliverable and certification that such Deliverable complies in all material respects with the requirements for such documentary Deliverable.
- 1.2 **“Additional School”** shall mean any separately functioning school unit (whether an additional physical plant or a separately identified school unit operating within the same

physical plant as another school unit) founded or created within the District after the date of execution of this Contract.

- 1.3 **“LMS Vendor”** shall mean the “Learning Management System”, the requirements for which are set forth in the RFP, Statement of Work, and Specifications.
- 1.4 **“LMS Vendor Software Title”** shall mean the suite of software (or individual components thereof) offered by **LMS Vendor**, among other things, for student and school information management, whether offered under the current trademark or another mark.
- 1.5 **“LMS Vendor Supported Software”** shall mean the **LMS Vendor** LMS Vendor Software Title as the same is commercially available as of the Commencement Date and owned or licensed by LMS Vendor, which computer programs will be licensed to the District as part of the LMS, as such programs shall be upgraded and enhanced by LMS Vendor from time to time hereafter.
- 1.6 **“Contract”** shall mean the text of this memorandum, together with all Exhibits and Schedules hereto and any amendments made in accordance with the terms hereof.
- 1.7 **“Board of Education”** shall mean the Board of Education of the District, as the same is constituted from time to time.
- 1.8 **“Business Day”** shall mean a day in which general business operations of the District are conducted, whether or not schools are open, but shall not include any day in which the general business offices of the District are closed. All other references to “days” refer to calendar days.
- 1.9 **“Change Order”** shall mean a modification or clarification of the Project Documents that is duly adopted by the Parties in accordance with the Scope Management Process as set forth in Appendix F.
- 1.10 **“Change Request”** shall mean a request by a Party for a Change Order made in accordance with the Scope Management Process.
- 1.11 **“Confidential Information”** shall mean and include (1) student records and reports that are confidential and exempt from disclosure under IA Statutes (2) District employee personnel files that are confidential and exempt from disclosure under IA Statutes, and (3) any other information, record, or document that is confidential or subject to privacy

protection as otherwise provided by law, including but not limited to District's and LMS Vendor Proprietary Information.

- 1.12 **"Commencement Date"** shall mean contract signing date.
- 1.13 **"Critical Deliverable"** shall mean a Deliverable, the acceptance of which is necessary for the release of any significant component of Software into Production, as more specifically identified in the Project Documents.
- 1.14 **"Defect"** shall mean a characteristic or condition of the Licensed Software which results in the failure of such software to operate in accordance with the Specifications and/or which results in the input, storage, computation, transfer or display of erroneous information. Defects shall be characterized by their severity as set forth in the Software Maintenance Services Agreement.
- 1.15 **"Deliverable"** shall mean any unit of work required to be delivered by LMS Vendor to the District as a Deliverable in the Statement of Work.
- 1.16 **"Deliverable Date"** shall be the deadline date for the delivery or completion of a Deliverable under this Contract.
- 1.17 **"Delivery"** of a Deliverable shall be deemed to have taken place (or the Deliverable shall have been deemed "Delivered") as follows:
- A. In the case of items to be delivered in tangible form, upon the transfer of possession of the item to the control of the respective District personnel designated to receive such possession at the designated time and place, or if no place is designated at such person's office.
  - B. In the case of items to be delivered by electronic transmission, upon the successful completion of such transmission to the designated District computer and verification of the accuracy of such transmission.
  - C. In the case of items for which payment is conditioned upon the completion of an acceptance test, upon the certification by the designated agent or employee of the District that such acceptance test has been completed to the reasonable satisfaction of such agent.
  - D. In all other cases, upon the completion of the Services encompassed by such Deliverable in all material respects as set forth in the applicable schedule to this Contract.
- 1.18 **"Dispute Statement"** shall mean a statement submitted by a Party under Section 9.2 below.
- 1.19 **"District"** shall mean the Des Moines Public Schools, each and every subdivision or unit thereof constituted now and in the future including schools and or territories within Poke County, IA and charter schools in Poke County, and each and every entity in the future to the responsibility of the Des Moines Public Schools to provide educational services to

students at any level of education. The district acknowledges the software is sold as a per student price structure.

- 1.20 **“Documentation”** shall mean all operator guides, operating procedures (including any special yearend procedures), user manuals, training aids, installation guides, functional and detailed specifications and other technical documents with respect to a System Deliverable or any portion or component thereof.
- 1.21 **“End User”** shall mean an individual who supplies, analyzes, and/or retrieves student, school, or related data by directly or indirectly invoking a computer program.
- 1.22 **“Enhanced Software”** shall mean those any and all future Releases of {LMS Vendor Product Title} that will be developed by LMS Vendor under this Contract, but which will be made available by LMS Vendor to other Persons in the future. Specifically, Enhanced Software shall include any Release of {LMS Vendor Product Title} first made available to any customer or licensee of LMS Vendor from and after **Month xx, 2016**.
- 1.23 **“Force Majeure Event”** shall mean fire, flood, earthquake, elements of nature or acts of God; acts of war, terrorism, riots, civil disorders, rebellions or revolutions; strikes, lockouts, or labor difficulties, equipment failures, computer viruses, malicious acts of third parties, interruption of telecommunications service; or any other similar cause beyond the reasonable control of the respective Party, that could not have been prevented by reasonable precautions of the kind ordinarily taken by well-managed firms engaged in software development and maintenance (such as, by way of illustration and not limitation, regular software backups and regular use of commercial anti-virus software, but not including duplicate or parallel computer systems or on or off-site backup or disaster recovery equipment).
- 1.24 **“Dispute Resolution Process”** shall mean the procedures for identifying and resolving issues related to the determination or interpretation of Project Documents, as set forth in Section 9 of this Contract.
- 1.25 **“Licensed Software”** shall mean any and all computer software required for the operation of the {LMS Vendor Product Title}, including without limitation software owned or licensed by LMS Vendor or Third Party Software, but excepting Third Party Software specifically identified in the Statement of Work as being the responsibility of the District.
- 1.26 **“License Fees”** shall mean any fees paid or to be paid by the District to LMS Vendor in respect of the right to copy, install, distribute use, or make derivative works from Licensed Software under this Contract.
- 1.27 **“Maintenance Materials”** shall mean the Object Code, Source Code and Documentation for error corrections, minor enhancements, updates, and Releases of the Licensed Software

supplied or to be supplied by LMS Vendor pursuant to its responsibilities under the warranty or maintenance service provisions of this Contract.

- 1.28 **“Software Maintenance Services Agreement”** shall mean the description of maintenance services as set forth in Appendix D.
- 1.29 **“FWISD Features”** shall mean those certain computer programs and program functions developed for delivery to and installation and use by the District.
- 1.30 **“FWISD Resource Plan”** shall mean the schedule of personnel and other resources that the District has committed to provide in support of its obligations during the Project.
- 1.31 **“FWISD Supplied Software”** shall mean and include any computer programs specified in the Statement of Work to be supplied by the District, either for use during development or during production.
- 1.32 **“Object Code”** shall mean the form of a computer program that may be loaded for execution without intervening process other than the use of a program loader, linkage editor, or similar computer program.
- 1.33 **“Party”** shall mean the District and/or LMS Vendor as the context requires.
- 1.34 **“Person”** shall mean any natural person or entity recognized by law.
- 1.35 **“Platform Software”** shall mean any computer program required for the operation, installation, debugging, or maintenance of another program, including without limitation,

operating systems, database management systems, compilers, interpreters, runtime or execution environments, development environments and the like.

- 1.36 **“Pricing Schedule”** shall mean the schedule of prices and payments as set forth in Appendix C.
- 1.37 **“Production”** shall mean the use of the {LMS Vendor Product Title} in the ordinary course of the operations of the District.
- 1.38 **“Product Plan”** shall mean the complete set of requirements and specifications for the {LMS Vendor Product Title} as finalized in accordance with this Contract.
- 1.39 **“Project”** shall mean and include all work to be performed under the terms of this Contract, including without limitation all Services and all intangible and tangible Deliverables.
- 1.40 **“Project Documents”** shall mean the Statement of Work, the Pricing Schedule, the Specifications, together with any supporting charts, schedules, or documents specified in those documents or any Change Order approved by the parties.
- 1.41 **“Project Manager”** shall mean the individual designated by the respective Party pursuant to Section 4.2.
- 1.42 **“Proposal”** shall mean LMS Vendor’s response to the RFP, together with all written clarifications exchanged by the Parties on or before the date hereof, including all text, graphics, summaries, and documents referred to in such Proposal.
- 1.43 **“Proprietary Information”** shall mean all information relating to finances as provided in IA Statute Section xxxx.xx and data, programs, or support information which is a trade secret as defined in IA Statute xxxxx, as provided in Section xxxxxx., IA Statutes. Proprietary Information shall not include information which the (provider) of the information can demonstrate:
- A. Is public knowledge or which becomes public knowledge through no breach of this Contract; or
  - B. Is required to be disclosed to the public by reason of a statute or by any public or regulatory authority.

Proprietary Information may be conveyed by written, graphic, electronic, oral, or physical financial condition, models, source code, object code, drawings, formulas, processes, ideas, inventions as provided above.

All Proprietary Information shall be marked as proprietary with an appropriate legend, marking, stamp, or other obvious written identification by the disclosing party prior to disclosure. In the event either Party discloses its Proprietary Information to the other Party other than in the manner provided for above, the disclosing party shall promptly inform the receiving party that such information is deemed proprietary by reference to IA or Federal statute, and shall provide the receiving party with a brief written description of such information within thirty (30) days of such disclosure, identifying therein the manner, place, and date of such disclosure and the names of the receiving party’s representative to whom such disclosure was made. Notwithstanding the foregoing, all information, the privacy, or disclosure of which is protected by applicable law or regulation shall be treated



as proprietary information of the person holding the interests so protected, whether or not such information is marked or otherwise identified as confidential or proprietary.

- 1.44 **“Release”** when referring to computer software, shall mean a modification or addition to existing computer software that requires substantial reconfiguration and/or re-installation of computer software in Production. Releases shall include any and all new releases of existing software products and/or replacement products made available by LMS Vendor that provide substantially all of the operational functions of the Licensed Software with paid Maintenance Agreement.
- 1.45 **“Resource”** shall mean the time or effort of a Party or its employees or contractors or a quantity of components, supplies, software, software rights, or material to be supplied by or on behalf of a Party under this Contract.
- 1.46 **“RFP”** shall mean the Request for Proposal promulgated by the District in **Month xx, 2016** to which LMS Vendor responded.
- 1.47 **“RFE”** shall mean the “Request for Enhancement”
- 1.48 **“Scope Management Process”** shall mean the provisions relating to processes for the modification or amendment of the Statement of Work and/or the pricing relating thereto, as the same are set forth in Appendix F attached hereto.
- 1.49 **“Services”** shall mean, collectively, the Department Services, Requirements Services, Support Services, and Training, including, but not limited to, accurate and complete data conversion from the existing system, report development, and generation of forms and invoices.
- 1.50 **“Source Code”** shall mean a human-readable form of computer programming code that can be modified, compiled, and executed, and all related Source Code Documentation.
- 1.51 **“Specifications”** shall mean the detailed set of specifications for the System as set in the specifications document as set forth in the RFP # 7370 Learning Management System.
- 1.52 **“Statement of Work”** shall mean the statement of work as set forth in Appendix D, as the same shall be modified or amended in accordance with the terms of this Contract and/or the Scope Management Process.
- 1.53 **“Test Environment”** shall mean a configuration of hardware and Platform Software owned by the District and provided on District premises for the purpose of configuring and testing Deliverables and managing release for use in Production.
- 1.54 **“Third Party Software”** shall mean any computer program supplied by a Person other than LMS Vendor, which is required for the operation of the LMS, including without limitation, any Platform Software and any applications software that will be dependent on the LMS

Vendor Supported Software, the Enhanced Software, or the FWISD Features for its operation.

- 1.55 **“Work Order”** shall mean a request for small or routine services issued by the District pursuant to procedures set forth for Work Orders in the Scope Management Process.

## 2. Products and Services to be provided by LMS Vendor

- 2.1 **General Scope.** LMS Vendor shall provide to the District, on the terms and conditions set forth in this Contract, all products and services required for the development, installation, and maintenance of the {LMS Vendor Product Title} as defined in the RFP # 7370 Learning Management System, other than the provision of hardware and Third Party Software expressly excluded under the terms of this Contract and the responsibilities expressly reserved to the District as set forth in the Statement of Work. Without limiting the generality of the foregoing, LMS Vendor shall provide all those Services and Deliverables as are set forth in the Statement of Work.
- 2.2 **Order of Precedence.** Any actual or asserted ambiguity in this Contract shall be resolved by reference first to to DMPS LMS RFP # 7370 , second to the Statement of Work, and third to the LMS Vendor’s Proposal Response to RFP # 7370.
- 2.3 **Software Maintenance Services.** During the term of this Contract, LMS Vendor shall provide all services required by the District to maintain and upgrade the {LMS Vendor Product Title} as set forth in the LMS Vendor Software Maintenance Agreement. The Maintenance Services Fee may be increased by LMS Vendor to LMS Vendor’s prevailing level for similar maintenance services to similar customers, but in no event increased each year by **no more than the CPI** over the annual fee in effect for the preceding one year period of maintenance services. Nothing herein shall be deemed to obligate the District to purchase maintenance services beyond the term of this Contract.
- 2.4 **Adoption of Updates, etc.** In creating and delivering the Maintenance Materials, LMS Vendor shall use its best efforts to avoid the need of the District to upgrade any Platform Software.
- 2.5 **Delivery of Source Code and Documentation.** In connection with the delivery of each component of Licensed Software for which LMS Vendor has granted or is obligated to grant rights to the District with respect to Source Code, LMS Vendor shall at the same time deliver Source Code in standard machine-readable formats sufficient to generate the Object Code of the Licensed Software or component thereof being delivered, together with all Documentation of such Source Code. Source code will be distributed at no cost via downloading from the secure LMS Vendor website.
- 2.6 **Electronic Delivery.** All Deliverables of Licensed Software and Documentation required or permitted under the terms of this Contract shall be delivered from a point of transmission outside of facilities owned or operated by the District by electronic transmission via common telecommunications carrier or the public Internet to and for storage within computing hardware and electronic storage devices owned or under the control of the

District. No tangible media Object Code, Source Code, or Documentation shall be delivered to the possession and/or ownership of the District.

2.7 **Standard of Care.** LMS Vendor shall perform all Services in accordance with best practices in the development of computer software.

2.8 **Acceptance of Deliverables; No Waiver.** Delivery of a Deliverable shall not be deemed complete unless and until the Deliverable shall have successfully completed the Acceptance Tests specified for such Deliverable. In the event that a Deliverable shall not satisfy the requirements of the applicable Acceptance Test, LMS Vendor shall promptly correct and/or revise the Deliverable such that the Deliverable shall satisfy the requirements of the specified Acceptance Test and shall continue to correct and/or revise the Deliverable until such time as the Acceptance Test for such Deliverable shall have been completed successfully. No failure to object or inaction on the part of the District shall be deemed an acceptance of any Deliverable under this Contract, nor to delay or waive the due date for any Critical Deliverable, except that the District's use of the Deliverable in Production shall be deemed its acceptance. In the event the District fails to meet its obligations for timely review of Deliverables, LMS Vendor may notify the District in writing and, if five business days pass without District acceptance or rejection, LMS Vendor may elect to invoke the Issue Resolution Process. Upon the invocation by LMS Vendor of the Issue Resolution Process, the due date for any subsequent Deliverable that is dependent on the Deliverable for which District review is not yet complete shall be extended by the amount of time by which such delay by the District reasonably delays LMS Vendor's ability to deliver such subsequent Deliverable.

2.9 **Third Party Software Procurement.** The District may elect to purchase licenses to one or more items of Third Party Software products itemized in the Pricing Schedule, by issuing a purchase order for the same to LMS Vendor. LMS Vendor shall thereafter arrange for the delivery of the same to the District, by electronic means to the maximum extent made possible by the licensor of such Third Party Software. In such event, the District shall pay the price for such items in accordance with the price, formula or method set forth in the Pricing Schedule. Provided that license rights for such Third Party Software shall run directly to the District from its respective licensor, the District's rights with respect to such Third Party Software shall be solely those rights (including rights to install, use and make derivative works) conveyed under the respective licensor's license agreements. In the event that LMS Vendor acts as a sub-licensor to the District of such Third Party Software, LMS Vendor shall assign to the District or otherwise assure to the District that the District has all rights to such software as it would have under the licensor's prevailing direct end user license agreements. LMS Vendor shall arrange for the District to contract with the licensor of such software for customary maintenance and update services.

2.10 **No Obligation of the District.** Nothing herein, however, shall require the District to purchase any Third Party Software other than Licensed Software from LMS Vendor and

the District shall be free in its sole discretion to select any vendor it so chooses for such purchases.

- 2.11 Documentation Standards.** In connection with the delivery to the District of each installment, component or version of the Licensed Software or Maintenance Materials, LMS Vendor shall provide all Documentation reasonably required for the configuration, installation, testing, maintenance, and operation of such installment, component, or version, as required by the Statement of Work. Technical Documentation shall be in most cases in the form of electronic tutorials and written in a manner sufficient to enable a software engineer or programmer ordinarily skilled in the art and in the use of the Platform Software to maintain such software with commercially reasonable effort, to make reasonable modifications and enhancements for maintenance of existing functionality, and to aid in isolating and correcting design or functional errors in the Licensed Software. Documentation of user instructions shall be in accordance with best industry practices for similar software. Acceptance testing shall include review of associated Documentation for compliance with these standards.

### 3. Intellectual Property Rights and Confidential Information

- 3.1 Object Code License.** LMS Vendor grants to the District a perpetual, non-exclusive, non-transferable, non-refundable royalty-free right and license to install and use the Object Code of all Licensed Software on any, some or all computing devices used by or for the benefit of the District in connection with the operation of the District, effective on delivery of each component or installment thereof, subject only to payment therefore as provided in this Contract and the Pricing Schedule. The right granted by this paragraph shall extend to the right of contractors to the District, other government agencies, students, parents, health care providers, and other End Users who have a reasonable need to avail themselves of the services provided by the {LMS Vendor Product Title} for the sole purpose of conducting District business, to use the Licensed Software by remote or local access, and to install and use any applets or plug-ins that are part of the Licensed Software and are provided for the purpose of using or facilitating the use of the Licensed Software or any portion thereof on a remote or client basis. The District shall not sublicense any rights granted to the District under this Contract.
- 3.2 Source Code License.** Effective upon each delivery to the District of Licensed Software to the District pursuant to this Contract and subject to payment in full by the District of the License Fees set forth in the Pricing Schedule, LMS Vendor grants to the District a perpetual, non-exclusive, non-transferable, non-refundable royalty-free right and license to copy, make derivative works, install and use such Licensed Software in Source Code form for the purpose of creating, modifying, testing, configuring, operating and maintaining the Licensed Software in Object Code form as permitted by Section 3.1 above. The rights to Source Code granted under this Section shall not include the right to deliver copies of such Source Code to independent contractors engaged by the District to perform activities for or on behalf of the District, except with LMS Vendor's written approval which should not be unreasonably withheld. And further provided that such contractors are bound by obligations of confidentiality at least as strict as the obligations of confidentiality of the

District to LMS Vendor with respect to the particular materials being delivered or proposed to be delivered to such contractor and that no such independent contractor shall receive any rights to use such Licensed Software except for the sole benefit of the District.

- 3.3 Documentation License.** Upon delivery to the District of Documentation other than documentation of Third Party Software, LMS Vendor grants to the District a non-exclusive, perpetual, royalty-free right and license to copy, make derivative works, distribute and display such Documentation to authorized users of the LMS. In the case of Documentation containing Proprietary Information of LMS Vendor, the distribution of copies of such Documentation shall be limited to Persons with a reasonable need to know such Proprietary Information in connection with their activities for the District who are bound by obligations of confidentiality at least as strict as the obligations of confidentiality of the District to LMS Vendor with respect to the particular materials being delivered or proposed to be delivered.
- 3.4 Software Acquired from Third Parties.** LMS Vendor does not hold any third party source code.
- 3.5 Protection of Proprietary Information.** The District agrees that it will not disclose LMS Vendor's Proprietary Information to any Person, except to (a) the District's employees with a need to know who are bound by agreements or employment policies restricting the right of such employees to use or disclose such Proprietary Information for any purpose other than the Project, and (b) authorized contractors, in accordance with Section 4.2 of this Contract. The District agrees to preserve the confidentiality of LMS Vendor's Proprietary Information with the same level of care it uses with respect to its own Confidential Information, but in no event less than a reasonable level of care. The foregoing obligation does not apply to Proprietary Information which is (a) already known to the District at the time of its receipt from LMS Vendor, (b) is disclosed to the District by a third party who had the right to make such disclosure without any confidentiality restrictions, (c) is, or through no fault of the District, has become generally available to the public, or (d) is independently developed by the District without access to, or use of, LMS Vendor's Proprietary Information. Notwithstanding the foregoing, the District may disclose Proprietary Information of LMS Vendor to the extent that such disclosure is (i) necessary for the District to enforce its rights under this Contract, or (ii) required by law or by the order of a court or similar judicial or administrative body. In the event the District receives a third party subpoena, notice to produce or other judicial or administrative request for disclosure, the District shall notify LMS Vendor as soon as is reasonably practicable after the receipt of such request in order to permit LMS Vendor to take such action as LMS Vendor sees fit to obtain protective orders or other relief from the compulsion of process against the District to compel such disclosure.
- 3.6 Protection of Confidential Information.** LMS Vendor agrees that it will not disclose the District's Confidential Information to any Person, except to LMS Vendor's employees with a need to know who are bound by agreements or employment policies restricting the right of such employees to use or disclose such Confidential Information for any purpose other than the Project. LMS Vendor agrees to preserve the confidentiality of the District's

Confidential Information with the same level of care it uses with respect to its own Proprietary Information, but in no event less than a reasonable level of care. LMS Vendor shall implement operating practices and procedures that will (i) maintain the confidentiality and assure the physical security of all student records accessed and used in the course of providing professional services under this Contract; (ii) prohibit the release or disclosure of such records to anyone except authorized Board personnel, (iii) prevent any unauthorized access to such records, and (iv) preclude the unauthorized use, release, or disclosure of the information contained in such records. The foregoing obligation does not apply to Confidential Information which is required by law or by the order of a court or similar judicial or administrative body. In the event LMS Vendor receives a third party subpoena, notice to produce or other judicial or administrative request for disclosure, LMS Vendor shall notify the District as soon as is reasonably practicable after the receipt of such request in order to permit the District to take such action as the District sees fit to obtain protective orders or other relief from the compulsion of process against LMS Vendor to compel such disclosure. The parties acknowledge that they are subject to the provisions of Iowa Government Code relating to the release of public records. District shall notify LMS Vendor as soon as is reasonably practicable after the receipt of a public records request that may include LMS Vendor's Proprietary Information in order to permit LMS Vendor to take such actions permitted under the law to protect its Proprietary Information. The LMS Vendor will abide by the laws of the The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law that protects the privacy of student education records.

- 3.7 **Rights in Data.** The District is and will remain the owner of all data provided to LMS Vendor by the District pursuant to this Contract. LMS Vendor will not use such data for any purpose other than providing Services and support to customer under this Contract, nor will any part of such data be sold, assigned, leased or otherwise disclosed to third parties (other than authorized subcontractors for purposes of performance of the Services) or commercially exploited by or on behalf of LMS Vendor. LMS Vendor will not possess or assert any lien or other right against such data. The District agrees not to provide or otherwise make the Licensed Software available in any form to any person, except in strict conformity with the licenses expressly granted under this Contract.
- 3.8 **LMS Vendor Intellectual Property; Residual Rights.** Except as otherwise provided in this Contract, LMS Vendor retains all right, title, and interest in and to any inventions (patentable or otherwise), discoveries, improvements or copyrightable works, and Licensed Software (whether the LMS Vendor Supported Software, Enhanced Software or FWISD Features) that LMS Vendor creates or licenses to the District in connection with its performance of Services hereunder (collectively "LMS Vendor Intellectual Property"). The District shall execute such truthful acknowledgments, affidavits or other documentation reasonably required by LMS Vendor, during and for a reasonable period after the Term, to assist in proving LMS Vendor creation and/or ownership of LMS Vendor Intellectual Property. Subject to any restrictions expressed elsewhere in this Contract, each Party and its respective subcontractors shall have the right to re-use any of their know-how, ideas, concepts, methods, processes, expressions, skill, experience or similar information, however characterized, whether in tangible or intangible form, and whether used by them

during the Project or not, at any time and without limitation, provided that such use shall not infringe the patents, copyrights, or trade secrets of the other Party. Each Party further retains ownership of any and all of its respective intellectual property rights that existed prior to the effective date of this Contract including, without limitation, all methods, concepts, designs, reports, programs, and templates, and any Third Party Software. Nothing in this Contract will prevent LMS Vendor or its authorized subcontractors from marketing, developing, using, and performing services similar to or competitive with the Services and products furnished under this Contract or will prevent the District from engaging other contractors to provide services of any sort to the District (provided that the intellectual property rights of LMS Vendor are not thereby infringed).

## 4. Warranties

4.1 **LMS Vendor Warranties.** LMS Vendor represents, warrants, and covenants to District as follows:

4.1.1 **General Warranties.** LMS Vendor hereby warrants that all items supplied to the Public Schools, including all hardware, software, and/or any Deliverable, meet the standards of merchantability and is fit for the particular purpose for which it was supplied.

4.1.2 **Software Limitations.** To the best of LMS Vendor's knowledge, no software comprising a Deliverable or licensed hereunder shall contain any virus, "Trojan horse," timer, clock, counter, or other limiting design, instruction, or routine that would erase data or programming or cause the software or any hardware or computer system to become inoperable or otherwise incapable of being used in the full manner for which it was designed and created (a "Software Limitation"). LMS Vendor shall not include any such Software Limitation in any Maintenance Materials provided to the District. LMS Vendor also shall use all reasonable practices and security procedures necessary to avoid insertion of Software Limitations prior to installation of any Deliverable. Any Deliverable shall operate compatibly with major commercially available virus protection programs that District may use. Further, no Software Limitation shall be triggered by: (i) any Deliverable being used or copied a certain number of times, or after the lapse of a certain period of time; (ii) any Deliverable being installed on or moved to a central processing unit or system that has a serial number, model number, or other identification different from the central processing unit or system on which such Deliverable or licensed software originally was installed; or (iii) the occurrence or lapse of any similar triggering factor or event.

4.1.3 **Accuracy of Documentation.** All Documentation shall be complete and describe the applicable Deliverable and components thereof accurately so as to enable a staff consisting of a reasonable number of information systems professionals with ordinary skills and experience to utilize the Deliverable for the purposes for which it is being acquired by or intended for use by District.

4.1.4 **Non-infringement.** No Deliverable shall violate or infringe upon the rights of any third party, including, without limitation, any patent rights, copyright rights, trademark rights, trade secret rights, or other proprietary rights of any kind. Lawful

use by the District Rights of the {LMS Vendor Product Title} Software in accordance with the Specifications does not require the District to secure rights to use Platform Software or other Third Party Software (whether acquired through LMS Vendor or through or from others) except for those specific items identified in the Statement of Work in the quantities and/or for the categories of users set forth in the Statement of Work.

- 4.15 Authority.** LMS Vendor has full power and authority to enter into this Contract and to perform hereunder.
- 4.16 No Claims.** There is no action, suit, proceeding, or material claim or investigation pending or threatened against it in any court, or by or before any federal, state, municipal, or other governmental department, commission, board, bureau, agency, or instrumentality, domestic or foreign, or before any arbitrator of any kind, that, if adversely determined, might adversely affect any Deliverable or restrict LMS Vendor's ability to complete the transactions contemplated by this Contract, or restrict District's right to use any Deliverable. LMS Vendor knows of no basis for any such action, suit, claim, investigation, or proceeding.
- 4.17 Third Party Warranties.** LMS Vendor has the right to assign and transfer to District all of LMS Vendor's rights under any and all warranties received from the supplier (other than LMS Vendor) of any component of any Deliverable, and has the right to assign or transfer to District such supplier's warranties.
- 4.18 Title.** LMS Vendor has full title and right to license and deliver to District, all Deliverables, including without limitation software owned by LMS Vendor and Third Party Software (other than FWISD Supplied Software).
- 4.19 Disclaimer.** The foregoing warranties, together with any other warranties set forth in this agreement, are in lieu of all other warranties, express or implied, including, but not limited to, implied warranties of merchantability and fitness for a particular purpose.
- 4.2 Assignment of Warranties.** If under this Contract, LMS Vendor procures goods or services for the District, LMS Vendor shall assign or otherwise transfer to District, or afford the District the benefits of, any manufacturer, licensor, or other provider's warranty for such goods and/or services.

## 5. Obligations of the District

- 5.1 Development Facilities.** During the term of this Contract, the District shall provide LMS Vendor's personnel with limited office space and certain other facilities as specifically described in the Statement of Work, subject to compliance by LMS Vendor, its employees and permitted subcontractors with all applicable rules of occupancy of such facilities imposed by the lessor to the District of such facilities and all applicable rules, policies and procedures of the District as applied to District employees and other contractors using such facilities. In no event may such facilities be used for any purpose other than performing Services pursuant to this Contract. Except as expressly provided in the Statement of Work and/or the Pricing Schedule, LMS Vendor shall be solely responsible for all other costs



associated with its personnel, contractors, software development, computing equipment and other facilities as a specified in the response to the RFP.

- 5.2 **Staffing.** The District shall provide those certain personnel identified in the FWISD Resource Plan to perform the functions therein stated, subject to reasonable coordination with their respective work schedules and responsibilities.
- 5.3 **Testing Platforms.** The District shall be responsible for supplying and operating at its expense, the Test Environment, including all hardware and Platform Software (other than software to be supplied by LMS Vendor) required for the conduct of preliminary and final acceptance testing as described in the Statement of Work.
- 5.4 **{LMS Vendor Product Title} Operation.** The District shall be responsible for the operation of the {LMS Vendor Product Title} in Production, including without limitation, the following:
  - A. Installing the Licensed Software and Platform Software in the computing and telecommunications environment required for Production (with the assistance of LMS Vendor during the initial release to Production, as well as any update or Upgrade involving a material change in hardware Platform Software that is required to be installed by the District under this Contract).
  - B. Implementing proper procedures to assure security and accuracy of input and output, and restart and recovery in the event of a malfunction.
  - C. Establishing proper backup procedures.
  - D. Using reasonable efforts in the event of system malfunction to establish temporary operating procedures or work-arounds.
- 5.5 **Installation of Releases.** The District shall determine in its sole discretion whether and when to install updates or Releases of the Licensed Software provided such action or inaction will have no impact on the Project schedule. LMS Vendor shall not be responsible for activities required for the actual installation of such updates or Releases unless so provided in the Statement of Work. The District shall be responsible for installing any Release from LMS Vendor that is reasonably required because of the withdrawal of support by a third party for any Platform Software, state requirements or when such update or Release is required to support LMS Vendor's commitment to the Project schedule.
- 5.6 **Proprietary Notices.** District agrees that any copies of the Licensed Software and Documentation that it makes pursuant to this Contract shall bear all copyright, trademark, and other proprietary notices included therein by LMS Vendor or the respective third party licensor. District may add its own copyright or other proprietary notice to any copy of the

Licensed Software or Documentation that contains modifications made by District in accordance with the terms of this Contract.

- 5.7 **Indemnity.** The District and its employees can neither agree to hold LMS Vendor harmless nor agree to indemnify it and any contracts or provisions to the contrary are void.
- 5.8 **Exception for Third Party Software.** Notwithstanding any other provision of this Contract to the contrary (including without limitation paragraph 5.7 above), neither the District nor any of its Board members, officers, employees, attorneys and representatives shall be liable to LMS Vendor in any fashion or to any extent for any claim brought against LMS Vendor by or in the name of any licensor or supplier of Platform Software, based on the District's failure to purchase or maintain licenses to such Platform Software unless a) LMS Vendor has identified clearly and unambiguously in the Statement of Work the requirement for such licenses and the specific basis of computation of any fees or other charges due such licensor or supplier, such that the amount of such charges is fully known as of the date of execution hereof.

## 6. Other Obligations of LMS Vendor; Insurance, Indemnities

- 6.1 **Compliance with Laws and Regulations.** The District has sole responsibility for compliance with applicable law in its operations and LMS Vendor will use commercially reasonable efforts, in conjunction with input and assistance from the District, to cause the Licensed Software, as modified for the District, in the course of implementation, to provide the functionality to enable the District to comply with its compliance obligations.
- 6.2 **Staffing and Management.** During the term of this Contract, LMS Vendor shall not reassign or modify the operational authority of the management personnel listed in the Scope Management Process without the consent of the District, except (a) upon request by the District, (b) as the result of the termination by LMS Vendor of the employment of the affected person, or (c) upon reasonable request initiated by such affected person. LMS Vendor shall furthermore refrain from reassigning or reallocating work on the Project if a reasonably foreseeable consequence of such reassignment or reallocation would be to require the repetition of work or delay in the completion of the delivery of any Deliverable. Notwithstanding the foregoing, upon request by the District for a change in such management personnel, LMS Vendor shall use commercially reasonable efforts to remove and replace such individual LMS Vendor personnel assigned to the Project in a timely fashion.
- 6.3 **Use of Contractors.** Prior to subcontracting any portion of the Services, LMS Vendor shall notify the District of the proposed subcontract and proposed subcontractor, including without limitation any legal entity and/or any individual not in the exclusive employ of LMS Vendor who would be involved in any manner in the Services, other than activities relating the development of the {LMS Vendor Product Title} Software product. The notice should provide background information with respect to the proposed subcontractor that is appropriate to the nature and scope of the subcontractor's activities. In the event the District objects to such subcontractor, LMS Vendor shall not use such subcontractor in connection

with such work. No subcontractors have yet been approved by the District as of the execution of this Contract. No subcontracting or other arrangement shall release LMS Vendor from its responsibility for its obligations under this Contract. No subcontractor may be engaged unless such subcontractor and each of its employees providing services on the relevant engagement certifies in writing such qualifications as are required by the District for contractors generally, and agrees in writing to guard the confidentiality of Proprietary Information of the District to the same standard of care as binds LMS Vendor under this Contract and agrees in writing, prior to commencing work, that all work is a "work for hire" under the Copyright Laws of the United States and that in the event that such work is not eligible for treatment as such a work for hire, such subcontractor presently, prospectively and irrevocably assigns any copyrights in such work to LMS Vendor. Use of such contractors shall also be conditioned on contractors' compliance with any insurance requirements otherwise applicable to LMS Vendor, except that the applicable limit shall be \$2,000,000, combined limit. The District may require delivery of reasonable evidence of compliance as a condition of consent.

- 6.4 Financial Reporting; Audit and Inspection of Records.** LMS Vendor shall, on an annual basis, provide District with compiled financial information if District requests them in writing. LMS Vendor agrees that until the expiration of three years after expenditure of funds under this Contract, the District and any of its duly authorized representatives shall have access to and the right to examine any and all directly pertinent books, documents, papers, and records of the LMS Vendor involving transactions related to this Contract. LMS Vendor agrees that payments made under this Contract shall be subject to reduction for amounts charged that are found on the basis of audit examination not to constitute allowable fees or costs. All required records shall be maintained until an audit is completed and all questions arising from such audit are resolved, or until five years after completion of all work under this Contract.
- 6.5 Indemnity.** LMS Vendor shall indemnify and hold harmless District, all members of the Board of Education, and their employees, agents, and attorneys from and against any losses suffered by District as a result of LMS Vendor's breach of its warranties set forth in this Contract, or arising out of or in connection with LMS Vendor's provision of the Services, the Deliverables, or any component or part thereof, or LMS Vendor's failure to provide the same. Provided, however, the foregoing indemnity and hold harmless is conditioned on such loss(es) being proximately caused in whole or in part by the negligent or willful act or omission of LMS Vendor, its employees, subcontractors, or anyone employed directly by LMS Vendor. This Indemnification shall not exceed the total amount of all payments made under the agreement by Customer to LMS Vendor in the proceeding 360 days of cause of action. LMS Vendor also shall defend, indemnify, and hold harmless District, all members of the Board of Education, employees, agents, and attorneys from and against any claim, demand, challenge, suit, loss, cost, damage, or liability based on any assertion that any Deliverable or any component or part thereof infringes, misappropriates, or violates any patent right, copyright right, trade secret, or other proprietary right of any third party. District shall notify LMS Vendor in writing of the initial claim or action brought against it. The selection of counsel, the conduct of the defense of any lawsuit, and any settlement shall be within LMS Vendor's control; provided that District shall have the right to participate in

the defense of any such infringement claim using counsel of its choice, at District's expense. No settlement shall be made without notice to the District.

- 6.6 Use Disruption.** If a third-party intellectual property claim causes the use of any Deliverable, any Documentation, or any component or part thereof to be seriously endangered or disrupted, LMS Vendor shall, at the option of District, (i) replace the same without additional charge, buy compatible, functionally equivalent and non-infringing product(s); (ii) modify such Deliverable, Documentation, or component or part, to avoid the claim or infringement and retain all functionality; (iii) obtain license(s) for District to continue use of such Deliverable, Documentation, or component or part, and pay any additional fee required for such licenses Nothing in this section shall relieve LMS Vendor from any obligation to deliver all material functions of the {LMS Vendor Product Title} as required by the Project Documents.
- 6.7 General Insurance Requirements.** LMS Vendor shall secure and maintain, as a minimum, insurance as set forth below with insurance companies reasonably acceptable to the District to protect LMS Vendor from claims which may arise from operations under the Contract, whether such operations be by LMS Vendor or anyone employed by LMS Vendor. LMS Vendor further shall furnish upon request of the District's Contract and Insurance Services Branch, certificates of such insurance, signed by an authorized representative of the insurance carrier, which shall include a minimum thirty-one (31) day cancellation clause. Failure to maintain the insurance and furnish the required certificates may be considered a breach of the contract by LMS Vendor and the District may exercise any, some, or all of its rights on breach by LMS Vendor.
- A. Workers' Compensation Insurance in accordance with provisions of the Iowa Labor Code, adequate to protect LMS Vendor from claims under Workers' Compensation Acts which may arise from operations under the contract, whether such operations be by the contractor or anyone directly employed by them. LMS Vendor, in submitting this proposal hereby certifies, pursuant to the Iowa Labor Code, Chapter xxx, Iowa Statutes, that it is aware of the provisions of Section xxx.xx of the Iowa Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and it will comply with such provisions before commencing the performance of the work of this contract.
- B. Comprehensive Bodily Injury and Property Damage Liability Insurance for Combined Single Limit Bodily Injury and/or Property Damage Liability of not less than \$1,000,000 each occurrence, \$2,000,000 aggregate. The policy so secured and maintained shall include coverage for Contractual Liability, Products Liability or Completed Operations, and Owned, Hired, and Non-owned Automobiles Insurance; and shall be endorsed to name the Des Moines Public Schools and Board of Education of the Poke County as additional insured's and to provide specifically that any insurance carried by the District which may be applicable to any claim or loss shall be deemed excess and the contractor's insurance primary despite any conflicting provisions in the contractor's policy to the contrary.

- 6.8 **Damage to Property.** LMS Vendor shall be responsible and liable for all damage to the property of the District which is caused by LMS Vendor sub-contractors, or their respective employees, during the term of this Contract and shall, at its own expense, repair, and/or replace all damaged property to its original condition.
- 6.9 **Errors and Omissions Insurance.** LMS Vendor shall maintain the following insurance coverage, at its sole expense, sufficient to cover any claims, damages, liabilities, costs and expenses (including counsel fees) arising out of or in connection with LMS Vendor's fulfillment of any of its obligations under this Contract or either party's use of any Deliverable or any component or part thereof: (i) comprehensive general liability coverage; (ii) errors and omissions insurance which covers professional errors and omissions of LMS Vendor and all professionals who are employees of LMS Vendor and are engaged to furnish professional services in connection with the services hereunder. Coverage under each policy will be a minimum of One Million Dollars (\$1,000,000) for each instance and four Million Dollars (\$4,000,000) in the aggregate. Each policy shall be issued by a reputable insurance company qualified to do business in IA. Upon District's request, LMS Vendor shall ensure that the general liability policy shall name District, any agency or instrumentality for which the District provides or manages educational services, the members of the Board of Education, and its officers, employees, agents and attorneys, as additional insured's. LMS Vendor shall provide District with evidence of compliance with LMS Vendor's obligations under this Section. In the case of failure to furnish such evidence or upon cancellation of any required insurance, District may declare a breach of this Contract or may withhold all future payments until LMS Vendor complies with this requirement or may purchase such coverage and offset the cost against any amounts otherwise due to LMS Vendor. LMS Vendor shall provide thirty (30) days prior written notice to District of any impending cancellation or termination of such insurance.
- 6.10 **Performance Bond.** In the event of a significant problem in system performance prior to final acceptance that affects the day-to-day system operational effectiveness or delivery of function to the agreed upon schedule, DMPS will document the issue to LMS Vendor. LMS Vendor will have 30 days to deliver a fix. If the fix is unacceptable, DMPS will have the right to demand some financial contingency. This could take the form of an escrow amount or a performance bond. If a performance bond is requested, the amount will be based on the cumulative payment percentages at the current acceptance date as shown on the payment schedule. LMS Vendor will pay for this performance bond.

## 7. Financial Matters

- 7.1 **Fixed Fee Contract.** LMS Vendor will provide all Services, as defined in the RFP. All travel and related expenses are included in the fixed fee portion of the contract as defined in Appendix B, Cost Forms of the DMPS RFP # 7370.
- 7.2 **Payment on Deliverables.** For all software and Documentation deliverables, DMPS shall pay to LMS Vendor the fees and costs set forth beside the respective Deliverables on the Pricing Schedule.
- 7.3 **Conditions to Payment.** Payment to LMS Vendor of the amounts due on account of each software Deliverable and Documentation Deliverable or group thereof under this Contract shall be conditioned strictly upon satisfaction of the conditions for such payment set forth in the Pricing Schedule and specifically upon the successful and timely completion of the Acceptance Tests specified for the particular Deliverable.
- 7.4 **Maintenance Services.** After the Warranty period of XX days, Maintenance will start. The District shall pay to LMS Vendor the annual maintenance fee set forth in the Pricing Schedule. This fee shall cover all Maintenance Services, updates and Releases to the Licensed Software during the period to which such annual maintenance fee shall apply. These are for all purchase products and/or modules.
- 7.5 **Time and Manner of Payment.** The District shall pay each amount set forth in the Pricing Schedule on or before forty-five (45) days after its receipt of an invoice for the amount, which invoice shall have been rendered no earlier than the successful completion of the acceptance tests or criteria set forth as a condition of such payment. Except in the case of suspension of payments for failure to Deliver Critical Deliverables as provided in this Contract, in the event the District disputes any amount due under an invoice, it shall nonetheless pay the amount with which it has not dispute and shall use the dispute resolution procedures provided by this Contract to resolve any such dispute. The District reserves the right to provide payment via virtual, Pcard, or electronic funds transfer.
- 7.6 **Work Orders.** In the event that an authorized representative of the District shall issue a Work Order for Services, Third Party Software and/or equipment under this Contract, the District shall pay to LMS Vendor an amount determined by the time and materials fee schedules under the Pricing Schedule, not to exceed the maximum cumulative amount for Work Orders under this Contract, as set forth in the Scope Management Process and the Pricing Schedule. Amounts due under this paragraph shall be paid within forty five (45) days after receipt by the District of LMS Vendor's statement for the respective Services,

itemizing the time and materials expended on the particular Work Order for the month preceding and cumulatively for that Work Order and the aggregate of Work Orders to date.

- 7.7 **Form of Invoicing.** Invoices shall itemize services, dates, and deliverables consistent with the terms of this agreement. Additional documentation shall be furnished by LMS Vendor to the District's Accounts Payable Section upon request. Invoices shall be mailed to:

Des Moines Public Schools  
Purchasing Department  
2323 Grand Ave.  
Des Moines, IA 50312  
Attn: Judith Martens  
Business & Finance Manager

- 7.8 **Change Orders.** When quoting a price for a Change Order under this Contract, LMS Vendor shall determine the fee by the process and formula set forth in the Scope Management Process and Pricing Schedule.
- 7.9 **Reduction of Scope.** The District may determine to eliminate certain of the Services or Deliverables from the scope of the Project. In such event, the parties shall negotiate in good faith as to an equitable reduction in the applicable prices set forth in the Pricing Schedule.
- 7.10 **Most Favorable Customer.** LMS Vendor agrees to treat District as its most favored customer. LMS Vendor represents that all of the fees and prices, warranties, benefits, and other terms being provided to District under this Contract are equivalent to or better than the fees and prices, warranties, benefits, and other terms being offered by LMS Vendor to any other customer for similar services under similar circumstances of similar size in student Full Time Equivalency.
- 7.11 **Suspension of Payments.** In the event that any Critical Deliverable shall not be delivered or accepted on or before the applicable dates specified for such Critical Deliverable, all payment for Deliverables to be delivered subsequent to such delayed deliverable shall be suspended until the acceptance of all Critical Deliverables which have not been timely delivered or accepted. In no event shall the suspension of a payment under this paragraph relieve LMS Vendor from any other date for delivery or acceptance.
- 7.12 **Taxes.** LMS Vendor acknowledges that the District is exempt from sales and use taxes imposed under Iowa law. Except as expressly provided in the Statement of Work, all software Deliverables are presumed to be deliverable solely by electronic transmission and not on tangible media.
- 7.13 **Allowance for Suspension or Delay Caused by District.** In the event that the District shall suspend the Project, delay any Deliverable Date, fail to provide resources on a timely basis

in accordance with the DMPS Resource Plan, or fail to respond to a request for review and approval, the following provisions shall apply:

- A. The due date for any Deliverable set forth in the Statement of Work that is dependent on such performance by the District shall be deemed adjusted equitably to allow for the effect of such suspension or delay on LMS Vendor's ability to supply or perform such Deliverable, taking into account a reasonable adjustment in assignment by LMS Vendor of its resources to provide Deliverables under this Contract; and,
- B. LMS Vendor shall be entitled to reimbursement for any such costs that cannot reasonably be mitigated by temporary reassignments of personnel or other resources, including without limitation the hourly charges for any LMS Vendor personnel necessarily idled by such delays but whose capacity is required to be maintained for timely future performance by LMS Vendor, priced as set forth in the Pricing Schedule.

## 8. Formalities; Term and Termination

- 8.1 **Approval by the District.** This Contract shall be effective upon its signature by the Superintendent of Schools in accordance with applicable law and District policies and procedures, with a budget encumbrance intended to fund performance through June 30, 2017. Each fiscal year of the District thereafter, it is expected that the Board of Education will consider for allocation the amount set forth in the Pricing Schedule for the respective year of the term of this Contract ("Fiscal Allocation"). Nothing herein, however, shall be construed so as to require the District to allocate any sums on this Contract beyond the Initial Allocation.
- 8.2 **Initial Term.** The term of this Contract shall commence on the date of its approval by the Parties and shall continue thereafter for a period of Sixty (60) months, unless sooner terminated in accordance with this Contract. Notwithstanding the foregoing, the terms and conditions applicable to maintenance services shall continue thereafter until the expiration of the year on account of which maintenance services shall have been paid.
- 8.3 **Termination for Funding Restriction.** If, in connection with the determination of the budget for the District for each successive year of the term of this Contract, the Board of Education determines to allocate a smaller amount to the Project than the Fiscal Allocation for the year in question, the parties shall negotiate in good faith for a reasonable time, not to exceed sixty (60) days as to the reduction in Scope of Services reasonably required to accommodate the reduction in such allocation. If the District makes a determination that the reduction in scope to which LMS Vendor has agreed is too large to be practicable, the District may either: (a) terminate this Contract in full without further charge beyond amounts incurred in accordance with this Contract or encumbered by District, (b) suspend the Contract until such time that the Board of Education does encumber sufficient funds to continue, or (c) provided that the budget allocation by the Board of Education is sufficient, may terminate all remaining Services other than maintenance services related to software for which the District has already paid or incurred the obligation to pay the license fee. Such notice shall be given promptly following the expiration of the 60 day negotiation period specified in this Section. In no event shall the District be liable for any amounts beyond the



Initial Allocation, unless the same shall have been duly appropriated by action of the Board of Education. All source code and documentation will be returned promptly to LMS Vendor.

- 8.4 **Termination for Convenience.** The District may terminate this Contract at any time without cause upon a minimum 90 days' notice to LMS Vendor, in which case the following provisions shall apply:
- A. The notice may be effective as of a date certain or may apply only after the delivery of certain enumerated Deliverables.
  - B. The District shall pay to LMS Vendor upon receipt of an invoice from LMS Vendor otherwise complying with this Contract, for any Services in respect of a Deliverable not yet Delivered which have actually been performed by LMS Vendor, pro-rated on a percentage completion basis based on LMS Vendor's reconciliation of labor actually expended compared to labor originally estimated by LMS Vendor in constructing its bid.
  - C. The District shall pay to LMS Vendor upon receipt of an invoice from LMS Vendor otherwise complying with this Contract, upon Delivery of any Deliverable specified to be delivered under the notice.
  - D. No other payments shall be due to LMS Vendor.
  - E. All documentation must be returned within 30 days if the termination date. If it is returned, LMS Vendor will return a prorated amount based on the payment percentages.
- 8.5 **Failure to Progress.** The Statement of Work provides certain Deliverable Dates for the delivery of certain Critical Deliverables identified therein. If Delivery of any Critical Deliverable shall not have been completed by the Deliverable Date for such Critical Deliverable, and such delay is not materially caused by any fault of District or a third party over which LMS Vendor does not have the right to control, the District shall give LMS Vendor notice providing a period of not less than thirty (30) days to complete Delivery of such Critical Deliverable. In the event that LMS Vendor shall fail to complete Delivery of the Critical Deliverable identified in such notice within the stated cure period, the District may, in its sole discretion, thereafter either (a) extend the time for cure, or (b) declare an immediate termination of this Contract (or Services related to such Critical Deliverable) for Failure to Progress without further payment obligation on the part of the District with respect to the portion so terminated (other than charges already due and owing). In the event of a termination for Failure to Progress in accordance with this section, the District shall have no further liability to LMS Vendor with respect to any payments not yet due and owing that are related to the portion so terminated.
- 8.6 **Termination for Breach.** In the event that LMS Vendor a) commits a material breach of this Contract, that, if capable of being cured within thirty (30) calendar days, is not cured within thirty (30) calendar days after notice of breach from the District to LMS Vendor; b) commits a material breach of this Contract which is not capable of being cured within thirty (30) calendar days and fails to (A) proceed promptly and diligently to correct the breach, and (B) cure the breach to the District's reasonable satisfaction within ninety (90) calendar days

after receiving notice; or c) commits a material breach of this Contract which, by its nature, cannot be cured, then the District may (without limitation on other remedies that may be available to it under this Contract, at law or in equity), by giving written notice to LMS Vendor, terminate this Contract, in whole or as to selected Deliverables or Services, as of a date specified in the notice of termination.

- 8.7 **Material Breach.** For the purposes of the foregoing provision “material breach” shall mean the failure of LMS Vendor to perform any material obligation, including without limitation, the following:
- A. Failure to Deliver a Critical Deliverable within the notice period specified for a notice of Failure to Progress.
  - B. Chronic failures to deliver Deliverables on a timely basis, without such failures being materially caused by fault of the District, a third party over which LMS Vendor does not have the legal right to control, or an event of Force Majeure.
  - C. Breach of any warranty given pursuant to 4.1, which breach materially affects the ability of the District to deploy and/or use the {LMS Vendor Product Title}.
- 8.8 **Termination for Nonpayment.** If the District fails to pay LMS Vendor when due any charges under the Contract within ninety (90) days after presentation of an invoice and fails to make such payment within forty five (45) days of notice from LMS Vendor of the failure to make such payment, then LMS Vendor may terminate this Contract without further notice, provided, however, that such termination shall not relieve the District of its payment obligations to LMS Vendor for services rendered and reimbursable expenses incurred through the effective date of the termination. Documentation must be returned in 30 days.
- 8.9 **Termination for Bankruptcy.** This Contract may be terminated by either party, without notice, in the event that either Party shall have ceased business, become the subject of an order for relief or insolvent under applicable bankruptcy laws or made an assignment for the benefit of creditors. (Source Code and Documentation will be transferred to the District for complete ownership)
- 8.10 **Payment on Termination.** In the event that the District terminates this Contract or any portion thereof prior to its expiration on any basis other than for LMS Vendor’s material breach or Failure to Progress, the District shall pay LMS Vendor for all Deliverables Delivered prior to the effective date of termination and for partially completed Deliverables on a percentage completion basis. In the case of a termination for Failure to Progress, the District shall continue to be liable for Services not terminated, but shall not be liable for any amounts related to partial completion of Deliverables associated with the Critical Deliverable in question. In the case of a termination for material breach by LMS Vendor, the District shall not be liable for any payments on account of Deliverables not delivered as of the effective date of such termination. In no event shall the District be liable for any future payments, lost profits, costs, or expenses of LMS Vendor, incurred with respect to Services not actually performed.
- 8.11 **Transition on Termination.** In the event of a termination of this Contract, except as otherwise provided, the District shall nonetheless continue to have all rights to use and

maintain for its own benefit any and all Deliverables already in Production or completed and delivered as if no termination had taken place, subject to payment for such Deliverables. The right to use the {LMS Vendor Product Title} Software nonetheless shall be subject to full payment of license fees as set forth in the Pricing Schedule. In the case of termination by the District for breach by LMS Vendor or for Failure to Progress, LMS Vendor shall provide those certain transition services identified in the Statement of Work, subject to payment at the time and materials rates set forth in the Pricing Schedule, and shall promptly assign to the District all of LMS Vendor's rights to use Platform Software, which rights were acquired by LMS Vendor primarily for the ability to provide the Services to the District under this Contract, upon payment by the District of any amounts set forth in the Pricing Schedule on account of such Platform Software. In the event of a termination for material breach or for Failure to Progress, the District may thereafter engage such contractor or contractors as it determines in its sole discretion to provide any of the Services not yet provided by LMS Vendor to the District or any other services the District determines in its sole discretion to be necessary or convenient to the development, maintenance and operation of the LMS, subject to compliance with provisions of this Contract relating to the use of contractors to service the Licensed Software.

- 8.12 Force Majeure.** Neither party shall be liable for any delay or failure to perform, to the extent caused by a Force Majeure Event. Upon occurrence of a Force Majeure Event, the non-performing Party shall be excused from any further performance or observance of the affected obligation(s) for as long as, and to the extent that the Force Majeure Event continues and the non-performing Party (i) continues to perform to the extent practicable; (ii) takes commercially reasonable measures to mitigate the effects of the Force Majeure Event; and (iii) uses commercially reasonable efforts to recommence performance or observance whenever and to whatever extent possible without delay. Any Party whose performance is affected by a Force Majeure Event will immediately notify the other Party by telephone (to be confirmed in writing within two (2) business days of the inception of such delay) and describe in reasonable detail the circumstances causing such delay.

## 9. Dispute Resolution and Remedies

- 9.1 Project Managers.** All disputes, claims or controversies arising out of or relating to the validity, interpretation, performance, termination, breach, threatened breach of this Contract, or any Failure to Progress ("Dispute(s)") shall initially be referred by the Party raising the Dispute to the Project Managers designated by the Parties.. If the Project Managers are unable through good faith discussions to resolve the Dispute within ten (10) Business Days after receiving written notice of the Dispute, the Dispute shall be submitted to the Senior Executives.
- 9.2 Senior Executives Resolution.** If the Project Managers are unable to resolve the Dispute within 10 Business Days after submission by either or both Project Managers, the Dispute shall be referred to the Senior Executives. Each Project Manager will, within ten (10) business days after referral, provide to both of the Senior Executives a Dispute Statement describing in detail the substance of the Dispute and the Parties' respective positions, and supported by such documentation as may be appropriate to acquaint the Senior Executives

with the issues. The Dispute Statements will not limit either Party's right to identify additional relevant issues at any time, or waive, prejudice or limit either Party's rights or remedies with respect to any issues. Dispute Statements will be provided without prejudice to the providing Party for settlement purposes, and shall not be admitted in evidence or otherwise used or referred to in litigation. For the purpose of this provision, the Senior Executives shall be the Executive Sponsor for the District and the President for LMS Vendor. Either party may re-designate its Senior Executive from time to time during the term of this Contract by thirty (30) days' notice to the other party, provided that once a dispute resolution procedure shall be commenced under this section, neither party may re-designate its Senior Executive without the consent of the other party as long as such Senior Executive remains in the employ of the respective party.

- 9.3 **Mediation.** Within ten (10) business days after delivery of the Dispute Statements, the Senior Executives of both parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All reasonable requests for information made by one party to the other will be honored. If the Senior Executives are unable to resolve the Dispute within twenty (20) business days of receipt of the Dispute Statements, the parties may pursue all claims based upon such Dispute as otherwise provided by law.
- 9.4 **Continued Access.** The parties agree as follows with respect to any dispute or disagreement concerning the Licensed Software or component thereof or any of the transactions arising out of or contemplated by this Contract: during such dispute or disagreement under this Contract or any proceeding to resolve such dispute, pending final resolution of such dispute or disagreement, LMS Vendor shall not interfere with the access or use by the District of the Licensed Software. In addition, the Parties expressly agree that if any dispute or disagreement arises with respect to the performance of any of either Party's obligations which would otherwise delay the schedule for either Party's performance of any of its subsequent obligations, to the extent technically and operationally feasible, each Party shall proceed to the performance of such subsequent obligations according to the existing schedule as if such dispute or disagreement were non-existent, but shall be entitled to reimbursement or relief for delay as set forth in this Contract.
- 9.5 **Applicable Law.** This Contract shall be construed in accordance with and governed by the substantive law of the State of IA.
- 9.6 **Jurisdiction.** The parties consent to the exclusive personal jurisdiction of the Court of the Poke County or the United States District Court for the Polk County, Iowa for the purpose of any and all judicial proceedings authorized under the terms of this Contract.
- 9.7 **No Consequential Damages.** Neither party shall be liable for any indirect, exemplary, special, or consequential damages arising out of this agreement.
- 9.8 **Limitation on Liability.** The liability of LMS Vendor to the District from all causes shall not exceed the previous 365 days of payments. LMS Vendor shall have no liability for any claim of copyright or patent infringement based upon the use of other than a current unaltered Release of the alleged infringing item or items if such infringement would have

been avoided by the use of the current unaltered release of such item or items, or upon combination of the item with programs or data not supplied or specified by LMS Vendor if such infringement would have been avoided by the use or combination of the unaltered item with any other programs or data in order to perform the specified functions.

- 9.9 **Waiver of Trial by Jury.** The Parties waive their right to trial by jury of any matter arising out of or relating to this Agreement.

## 10. Miscellaneous Provisions

- 10.1 **Publicity.** Neither party shall make, issue or distribute a public statement announcing the existence of this Contract or the Services except with the consent of the other party, which consent shall not be unreasonably withheld or delayed. Upon the execution of this Contract, the parties shall confer and agree as to the information to be disclosed in press releases announcing the Contract. Notwithstanding the foregoing, the Parties shall be entitled to discuss the Project publicly at any time after its submission for approval by the Board of Education in connection with obtaining such approval, any hearings thereon, of any requests by members of the public or media and LMS Vendor shall be entitled to discuss the Project with potential customers and to disclose its existence in customer proposals. Either party shall be entitled to make such reasonable disclosures as are required by law, including without limitation any disclosures required for compliance with the Securities Laws of the United States or any state, of any licensing entity, and the like.
- 10.2 **Solicitation of Employees.** During the term of this Contract and for a period of one (1) year thereafter, neither Party shall solicit any employee of the other to work for such Party, provided that nothing herein shall preclude a Party from hiring an employee of the other Party who has responded to general advertising or general employment programs solicitation of such Party.
- 10.3 **Entire Contract.** This Contract, including its Exhibits and Schedules and the documents incorporated by reference herein, constitutes the sole and entire understanding and agreement of the parties with respect to its subject matter, and supersedes and replaces all prior agreements, representations and understanding of the parties.
- 10.4 **Amendment.** This Contract may not be amended or modified, except by a Contract signed by duly authorized officers of the respective parties and, in the event applicable law requires the action of the Board of Education to amend the subject provisions hereof, the due approval of such amendment by the Board of Education.
- 10.5 **Severability.** In the event that any portion of this Contract shall be deemed unenforceable by any dispute resolution tribunal, the remainder of the Contract shall remain in full force and effect.
- 10.6 **Assignment.** This Contract may not be assigned by LMS Vendor without the written consent of the District, except in connection with the sale of substantially all of the assets of

the operating unit of LMS Vendor responsible for the {LMS Vendor Product Title} Software and may not be assigned by the District without the consent of LMS Vendor. An assignment of rights to receive monies due and becoming due given as security for payment of a LMS Vendor institutional debt shall be permissible upon thirty (30) days prior notice to the District. Any assignment in contravention of this provision shall be void and no assignment shall relieve the assignor of any obligations under this Contract. This Contract shall be binding upon the Parties hereto their respective successors and assigns.

**10.7 Headings and Captions.** The captions and headings used in this document are for convenience of reading only and are not to be used in the interpretation or construction of this Contract.

**10.8 Reasonable Behavior.** The parties shall deal with one another in good faith. Whenever this agreement requires or contemplates any action, decision, consent or approval, the parties shall act reasonably and in good faith and (unless the parties have expressly agreed in writing to some other discretionary standard) and may not unreasonably withhold or delay any such action, decision, consent or approval.

**10.9 No Third Party Beneficiaries.** Nothing herein contained is intended to constitute any person a third party beneficiary under this agreement, nor to create any obligation on the part of either party to any person who is not a party to this Contract.

**10.10 No Partnership or Agency.** Nothing in this Contract shall be deemed to constitute either party the agent, joint venture, or partner of the other for any purpose and neither party shall be authorized to bind the other legally in any form.

**10.11 Survival. Articles 3, 4, 9 and 10 and Sections 2.3, 5.6, 5.7, 6.5, 7.4, 8.10 and 8.11** of this Contract shall survive the expiration or termination of this Contract.

**10.12 Notices.** Any notices required or permitted under the terms of this Contract shall be in writing and shall be effective upon receipt, or five (5) days after mailing, postage prepaid, certified, and returns receipt requested, addressed to the parties as follows:

**TO THE DISTRICT:**

To Be Determined  
Title  
Des Moines Public Schools  
1915 Prospect Ave  
Suite 1200  
Des Moines, IA 50310  
Attn: TBD

**With a copy to:**

**TO LMS Vendor, LLC:**

Name  
Chief Executive Officer  
  
LMS Vendor  
Address line 1  
City, State ZIP

**With a copy to:**

Attorney, Esq.  
General Counsel  
LMS Vendor

Either party may from time to time substitute a new address or addresses for notices by delivery to the other party of a notice complying with this paragraph. This notice procedure relates to provisions of this memorandum and is not intended to override or replace provisions of the Statement of Work or Scope Process related to operational communications during the term of this Contract.

**10.13 Non-Waiver of Timely Performance.** Each party hereto may specifically waive any item(s) of performance under this Contract by the other party, provided that no such waiver shall be binding or effective unless in writing and no such waiver shall constitute a continuing waiver of similar or other items of performance. A waiving party, at any time, and upon notice given in writing to the party whose performance has been waived, may direct future compliance with the waived term or terms.

**10.14 Counterparts.** This agreement may be executed in duplicates and counterparts, each of which shall be effective as an original for all purposes.

**10.15 Related Projects.** LMS Vendor and the district may agree to put an additional line item into the contract. Notwithstanding any other provisions of this Contract, DMPS agrees that if LMS Vendor is acting as a pass through on this line item, LMS Vendor shall not be liable for any damages that DMPS may incur relating to the services to be provided by a contracted Project Manager. The funding will be part of the total contract and paid by DMPS.

IN WITNESS WHEREOF, the parties have executed this Contract, effective as of the date first above written.

**LMS Vendor:**

LMS Vendor  
Address line 1  
Address line 2  
City, State ZIP

**THE DISTRICT:**

Des Moines Public Schools  
1915 Prospect Ave  
Suite 1200  
Des Moines, IA 50310

By \_\_\_\_\_  
Name  
Chief Executive Officer

By \_\_\_\_\_  
Name  
Superintendent of Schools

Appendices:

- A. LMS Vendor Master License Agreement
- B. LMS Vendor Annual Software Support Agreement
- C. Pricing/Payment Schedule (dynamic file in process)
- D. Statement of Work
- E. Scope Management Process
- F. DMPS RFP 7370 (separate file)
- G. LMS Vendor RFP #7370 LMS Proposal Response (separate file)
- H. LMS Vendor Escrow Agreement (separate file)
- I. Service Level Agreement



**Appendix A:  
LMS Vendor Master License Agreement  
For the  
Learning Management System  
For the  
Des Moines Public Schools**

**Month XX, 2016**

**DRAFT - FOR REVIEW AND DISCUSSION ONLY**

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## Appendix A: LMS Vendor Master License Agreement

The following Master Terms and Conditions contained in this Agreement (“T&C’s” or “Agreement”) supplement and govern each Product Order Form Software End User Agreement (“Product Order Form”) entered into at any time between LMS Vendor, LLC. (“LMS Vendor”) and Des Moines Public Schools (“DMPS”). LMS Vendor and DMPS are individually referred to herein as a “Party” or collectively as the “Parties.”

### 1. Definitions

Unless the context otherwise requires, the following definitions shall apply and are in addition to the definitions contained in other parts of this Agreement and in each Product Order Form:

- A. “Agreement” means these T&C’s and each Product Order Form referring to these T&C’s and entered into by the Parties.
- B. “LMS Vendor Supported Products” or “Products” means the products specified by LMS Vendor in a Product Order Form for as long as those products are eligible for Support by LMS Vendor under Section 4 of this Agreement during the Support Period.
- C. “Escrow Agreement” means the agreement attached to the Master Software and Services Agreement as Exhibit I, governing the placement and release of Source Code by an escrow agent under certain release conditions.
- D. “Intellectual Property Rights” means all copyrights, patent rights, confidentiality rights, trade secret rights and trademark rights.
- E. “License Fee” means the amount to be paid by DMPS for the components of the System as identified in the Schedule.
- F. “License Term” is perpetual, unless a shorter term is specified in a Product Order Form or the License is terminated pursuant to the Agreement.
- G. “Major Release” means the version of a LMS Vendor Supported Product denominated by the number before the decimal point in the release designation (e.g., 4.0 and 5.0 are each different Major Releases).
- H. “Operating System” shall mean the third party foundation software required to communicate with DMPS’s computer hardware.
- I. “Price” means the total amount of License and Service Fees for the System as specified in the DMPS Product Order Form.
- J. “Schedule” means the Product Order Form or Forms initially attached hereto, and/or subsequently added by consent of the Parties, which identify the elements of the System to be provided and the Services to be performed by LMS Vendor or a third party under this Agreement.
- K. “Services” means each of the types of services identified in a Product Order Form and rendered by LMS Vendor during the period identified in that Product Order Form which may include training, maintenance, implementation services, and conversions.

- L. "Services Fees" means the particular fees for specific services identified in the Product Order Form.
- M. "Software" shall mean the LMS Vendor Supported Products or Products (including modifications and enhancements [and source or object code if DMPS's Product Order Form calls for an in-house standalone installation of the Software]) that comprise the proprietary application software and its accompanying documentation as identified in the Schedule.
- N. "Software Maintenance Agreement" means an annual software support and maintenance contract between LMS Vendor and DMPS in consideration for such percentage of the then current License Fees of the LMS Vendor Supported Products identified in the Product Order Form.
- O. "Subscription Services" means each of the types of services identified in a Product Order Form and rendered by LMS Vendor during the subscription period identified in that Product Order Form. (Support is not a Subscription Service.)
- P. "Support Period" means the initial period of Support specified in a Product Order Form (60 days unless otherwise specified) and commencing on the initial delivery of the LMS Vendor Supported Products ("Initial Support Period").
- Q. "System" shall mean the Software and Operating System.

## 2. License

In accordance with the terms herein, LMS Vendor grants to DMPS and DMPS accepts from LMS Vendor a personal, nonexclusive and nontransferable license to use the Software (including all object, source or executable codes related thereto and specified in DMPS's Product Order Form if DMPS's Product Order Form calls for an in-house standalone installation of the Software) or provide DMPS with a functional Application Service Provider license with respect to the Software (if DMPS's Product Order Form calls for an "Application Service Provider" license) and/or System, as the case may be, within the {District Name}, subject to the conditions and restrictions contained herein, with only up to the maximum concurrent users and maximum seats - per Subscription agreement as shown in the Product Order Form applicable, unless and until terminated hereunder. DMPS shall be entitled to license additional concurrent users at LMS Vendor's then prevailing rates by written agreement of the parties. Except as otherwise provided in this Agreement, the Software and/or System shall be used only for DMPS's internal business needs. Except as otherwise provided in this Agreement, DMPS shall not permit any third party, to use the Software and/or System nor shall DMPS grant any sublicense for the use of the Software and/or System. All modifications, enhancements, and updates to the Software provided by LMS Vendor shall become part of the Software and be subject to the terms and conditions herein (the "License"):

### 2.1 Installation and Use

DMPS may: i) install, access, or support the Software upon computer hardware equipment owned or leased by DMPS (if DMPS's Product Order Form calls for an in-house standalone installation of the Software) or ii) provide DMPS with a functional Application Service

Provider license with respect to the Software (if DMPS's Product Order Form calls for an "Application Service Provider" license (defined as a centrally-hosted implementation of LMS Vendor's Software which is shared by multiple end-user accounts) of the Software, in each case with DMPS's use of the Software being only for the internal business needs of DMPS. DMPS acknowledges that its use of the Software may be subject to additional licensing terms from the relevant Third Party, and that DMPS is authorized to use the Software subject to the terms of this Agreement and such additional licensing terms.

## **2.2 Software Licenses**

All copies of the Software (whether made by DMPS or provided by LMS Vendor) are subject to the provisions of this Agreement. DMPS must maintain an accurate record of the locations of all licenses of the Software, which record may be inspected by LMS Vendor at any time.

## **2.3 Documentation Copies**

DMPS may make a reasonable number of copies of the LMS Vendor Documentation.

## **2.4 Software Modifications**

DMPS may use the LMS Vendor Products to develop and use (for only the internal business needs of DMPS) interfaces, Software modifications, or enhancements. LMS Vendor will continue to own all Intellectual Property Rights to any object code, executable code or source code developed by LMS Vendor. This Agreement and DMPS will not restrict LMS Vendor's independent development, use or licensing of any type of software. DMPS developed software which enhances, supports, or modifies the LMS Vendor Products ("DMPS Modifications") shall be owned by LMS Vendor. Each such DMPS Modifications may be used by LMS Vendor for its own use and for use by LMS Vendor's other customers as a perpetual, irrevocable, nonexclusive right and license; provided, however, if LMS Vendor, in its sole discretion, decides to incorporate such DMPS Modifications into LMS Vendor's standard product offerings or LMS Vendor's Supported Products which LMS Vendor makes available to its other customers, then DMPS may continue to use such DMPS Modifications pursuant to the License granted in this Agreement. Notwithstanding the foregoing, should LMS Vendor incorporate such DMPS Modifications into its standard product offerings or its Supported Products then DMPS, by its execution of this Agreement, irrevocably assigns to LMS Vendor all right, title and legal interests (including all rights of copyright, patent, and other intellectual property rights) in and to DMPS Modifications, absolutely and in fee simple, including, but not limited to the right of perpetual, irrevocable, nonexclusive use and license and sublicense rights with respect to DMPS Modifications, for its and its future customers' benefit, in each and all manner and circumstance, without any compensation due or payable to DMPS for such ownership rights with respect to all DMPS Modifications.

## 2.5 Restrictions

DMPS may not rent, lease or re-license the Software or use the Software to provide data processing, outsourcing, service bureau, hosting services or training to third parties. DMPS will retain and include on each copy of the Software, all titles, trademarks, and copyright and restricted rights notices. DMPS will not disassemble, decompile, decode or reverse engineer the Software, except as expressly permitted by applicable law or contract for the LMS Vendor Products. The restrictions in the Agreement concerning the use and confidentiality of the Software extend to any updates, upgrades, enhancements, new releases or support materials related to the Software and provided by LMS Vendor. DMPS is responsible for compliance with the Agreement by each member and employee of DMPS and each user.

## 2.6 U.S. Government restricted rights

If Licensee is acting on behalf of any unit or agency of the United States Government (“Government”), the following provisions apply: (1) the software and documentation are provided to the Government with Restricted Rights, (2) use, duplication or disclosure by the Government is subject to restrictions as set forth in subparagraph (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at DFARS 252.227-7013 and subparagraph (c)(2) of the Commercial Computer Software – Restricted Rights clause at FAR 52.227-19.

## 2.7 Price and Payment

DMPS shall pay LMS Vendor for the Software License granted herein, in the manner and as specified to in the initial and/or any subsequent Product Order Forms executed by DMPS pursuant to this Agreement (collectively the “Product Order Price”).

All payments hereunder shall be made in United States dollars. Unless otherwise stated herein, or specified on DMPS’s Product Order Form, all invoices shall be due and payable within forty-five (45) days of date of invoice.

If DMPS fails to pay the Product Order Price and/or License Fees (but not with respect to any failure of DMPS to pay any maintenance fees) and persists in such failure to pay the Product Order Price and/or License Fees for forty five (45) days after receiving written notice thereof from LMS Vendor, LMS Vendor may terminate this Agreement and declare any unpaid amounts owed hereunder immediately due and payable. DMPS Modifications made to the Software by DMPS shall be LMS Vendor’s property, pursuant to the terms described in Section 2(f) of this Agreement. Any modifications, enhancements, or changes made to the Software by LMS Vendor, whether under agreement with DMPS or otherwise, shall be LMS Vendor’s property. DMPS Modifications made to the Software shall be subject to LMS Vendor’s warranty only if and when such changes are incorporated into the Software, LMS Vendor’s standard product offerings or LMS Vendor’s Supported Products, as generally distributed to LMS Vendor’s other customers. Upon any termination of this Agreement pursuant to this paragraph, DMPS shall discontinue its use of, and shall return within 10 days, all copies of the Software and Documentation then in its possession. DMPS’s obligation to pay accrued charges and fees and to protect the confidentiality of the

Software and Documentation shall survive termination. Cancellation of the license granted hereunder shall be in addition to and not in lieu of any other remedies available to LMS Vendor. Any such termination shall also terminate LMS Vendor's warranty and indemnity obligations and liabilities.

### 3. Deliveries and Installation

Promptly after receipt of the payment(s) as specified in the Product Order Price, LMS Vendor will deliver to DMPS one copy of the Software (if DMPS's Product Order Form calls for an in-house stand-alone installation of the Software) and one copy of the Documentation. Except to the extent otherwise agreed to separately in writing by the Parties, DMPS is responsible, at its expense, for installation of the Software (if DMPS's Product Order Form calls for an in-house stand-alone installation of the Software), user training, data conversion, and other services.

### 4. Support by LMS Vendor

During the Support Period, LMS Vendor will provide DMPS the following support ("Support"):

- A. Repair, replace, or provide DMPS with an upgrade of the LMS Vendor-Supported Products to comply with the Product Warranty under Section 7.
- B. Make LMS Vendor's standard telephone support available to persons authorized by DMPS, including general technical information and assistance with problem determination, isolation, verification, and resolution during the hours of 8 a.m. to 5 p.m. **CST** (excluding weekends and LMS Vendor designated holidays, or as specified on DMPS's Product Order Form).
- C. Provide DMPS updates, enhancements, and new releases of the LMS Vendor Supported Products when generally made available by LMS Vendor for installation and use by DMPS. (1) LMS Vendor will provide support for the immediate prior Major Release for a period of 12 months after general availability of the then current Major Release. (2) LMS Vendor will alert DMPS at least 6 months before the scheduled termination of Support and the Product Warranty for any Major Release. LMS Vendor may immediately terminate Maintenance and the Product Warranty for all LMS Vendor Supported Products if DMPS does not renew Support for the LMS Vendor Supported Products designated on a Product Order Form. LMS Vendor will have no obligation to provide support for any DMPS Modifications until such time as such DMPS Modifications have been incorporated into the LMS Vendor Supported Products which have been made available to other LMS Vendor customers.
- D. LMS Vendor shall exercise reasonable skill and care in the provision and performance of support. Dates given for performance of Services are good faith estimates only.

### 5. DMPS Responsibilities

LMS Vendor Support and the Product Warranty require that:

- A. DMPS shall ensure its hardware is kept in good working order in accordance with the manufacturer's recommendations and requirements.
- B. DMPS shall identify and provide "key" individual contacts to serve as DMPS's first line of support on routine System issues for DMPS's authorized users and to serve as a liaison between DMPS and LMS Vendor on the issues which need to be communicated to LMS Vendor.
- C. DMPS shall provide LMS Vendor access to DMPS's system 24 hours/ day-365 days/year via a mutually agreed upon method. Such access shall allow LMS Vendor to conduct an audit of the Software as required by LMS Vendor, from time to time, and to support, monitor, and test DMPS's system.
- D. DMPS shall take all reasonable steps to ensure that no virus is loaded on the System. Virus diagnosis and removal services are not covered by Support and are billable at LMS Vendor's then prevailing rates.
- E. DMPS shall install all new releases of the Software within 12 months after being provided by LMS Vendor. If the installation of a new release of Software also requires a new release of the Operating System, DMPS shall also install such new release(s) at the same time that it installs any such new release of the Software, so that the newly supported LMS Vendor release will be functional.
- F. DMPS shall be responsible, to the extent DMPS deems necessary, for the following, unless otherwise set forth in the Schedule: adherence to specified electrical requirements; running all cable and phone connections for the System; all data conversion, media, and other charges related to the transfer of DMPS's data; all networking design and administration charges relating to the set-up and support of DMPS's network.
- G. DMPS shall use the Software only in accordance with the terms and conditions set forth in this Agreement. LMS Vendor Software may only be used within {District Name} or on portable hardware owned by DMPS and utilized by its employees.
- H. DMPS shall provide LMS Vendor reasonably available information and technical assistance.
- I. DMPS's installation of all or any part of the Software shall be in accordance with the Documentation.
- J. If LMS Vendor reasonably determines that a DMPS reported problem is due to DMPS's modification of the Products or noncompliance with the Documentation, and LMS Vendor is reasonably able to correct the problem at DMPS's request, then DMPS will reimburse LMS Vendor for that requested correction at LMS Vendor's then current hourly rates. (LMS Vendor will notify DMPS before incurring those expenses).

## 6. Service Fees, Renewal and Reinstatement

[This Section 6 pertains only to LMS Vendor Supported Products having a perpetual License Term. Service fees for LMS Vendor Supported Products that have a shorter, stated License Term, are payable in the amounts and on the periodic payment dates described in the Product Order Form for those Products.] There is no Service Fee for the LMS Vendor Supported Products during the Initial Support Period. While LMS Vendor provides Support



to other Clients, DMPS may renew Support for the LMS Vendor Supported Products for one-year renewal periods by paying LMS Vendor the applicable amounts under this Section 6 and the Product Order Form. LMS Vendor will invoice DMPS approximately 90 days before the end of the then current Support Period and notify DMPS of non-payment approximately 10 days before the Support renewal date. LMS Vendor may terminate Support if all past due, undisputed invoices are not paid by the Support renewal date. The Product Order Form states the initial fee after the Initial Support Period and relevant dates for annual Support of the LMS Vendor Supported Products. DMPS will reimburse LMS Vendor for reasonable travel and out-of-pocket expenses incurred when rendering on-site Support or Product Warranty services, if such onsite support or warrantee service is required due to errors of DMPS which cannot be corrected remotely, (LMS Vendor will notify and obtain DMPS approval before incurring those expenses). If Support has terminated because of non-renewal or non-payment, and DMPS desires to reinstate Support, LMS Vendor will reinstate available Support within 18 months after termination of Support if DMPS pays LMS Vendor: (a) all undisputed invoices, (b) the annual Support fee for the next one year Support Period, and (c) if support has been terminated for more than 90 days, a “reinstatement fee” as specified by LMS Vendor. (d) prorated prior year’s Maintenance for all the days Support was terminated.

## 7. Product Warranty

During the Support Period LMS Vendor warrants that (the “Product Warranty”):

**7.1 General Warranties.** LMS Vendor hereby warrants that all items supplied to the Public Schools, including all hardware, software, and/or any Deliverable, meet the standards of merchantability and is fit for the particular purpose for which it was supplied.

### 7.2 Media

The Product media as provided by LMS Vendor will be free of material defects.

### 7.3 Viruses

Before Product delivery by LMS Vendor, LMS Vendor will use up-to-date, commercially available virus scanning and cleaning products, and will not, based on the results of that scanning and cleaning, deliver to DMPS Products containing any computer viruses, time bombs, harmful and malicious data, or other undocumented programs which inhibit Product use and operation. When properly installed, the unmodified Software provided by LMS Vendor for the LMS Vendor Supported Products will operate materially and substantially as described in the Documentation for that Software.

## 8. Title

- A. LMS Vendor warrants that it owns all rights, titles, and interests in the LMS Vendor Supported Products and the software used by LMS Vendor for the Subscription Services, or has the authority by license, sufficient to grant DMPS the License and fulfill LMS

Vendor's obligations under the Agreement. DMPS's exclusive remedies for the breach of this Section 8 by LMS Vendor are described in Sections 9 and 11.

- B. The Software, Operating System, all programs developed by LMS Vendor for DMPS hereunder, and all copies thereof are proprietary to LMS Vendor and title thereto remains with LMS Vendor. All applicable rights to patents, copyrights, trademarks and trade secrets in the Software, Operating System or any programs developed by or at DMPS's request are and shall remain in LMS Vendor. DMPS shall not modify, reverse engineer, assemble or decompile, in whole or in part, or Operating System. DMPS shall not sell, license, transfer, publish, disclose, display or otherwise make available the Software, or Operating System or copies thereof to any other party, individual or entity. DMPS agrees to secure and protect the Software and Operating System and copies thereof in a manner consistent with the maintenance of LMS Vendor's rights therein and to take appropriate action by instruction or agreement with its employees or consultants who are permitted access to the Software or Operating System to satisfy its obligations hereunder. Violation of any provision of this paragraph shall entitle LMS Vendor to terminate this Agreement and the Software and Operating System licenses granted hereunder.

## 9. Product Warranty or Support Remedies

DMPS's exclusive remedies for breach of the Product Warranty or Support are:

- A. LMS Vendor will provide Support to repair or replace the Products to enable the Products to comply with the Product Warranty.
- B. If LMS Vendor does not comply with Section 9(a) within the Cure Period (as defined below), DMPS may recover direct damages for the LMS Vendor Supported Products subject to the damage claim, including up to a refund of the License Fees or Service Fees paid by DMPS to LMS Vendor, subject to the time periods and limitations described in Section 14. DMPS may also elect to terminate Support, the Subscription Services, the License, or the Agreement if LMS Vendor's breach is not cured within the Cure Period. LMS Vendor may terminate the License and the Agreement if the undisputed License Fees are not paid by DMPS within 45 days after notice of late payment or if DMPS does not cure any other material breach of the Agreement within 90 days after notice of breach. LMS Vendor may terminate Support and any Subscription Services if LMS Vendor's undisputed invoices are not paid within 45 days after notice of late payment. Upon termination of the License by LMS Vendor for non-payment of the Product Order Price, the License Fees or Service Fees, then DMPS shall promptly destroy or return the Products to LMS Vendor. If the License and the Agreement terminate as described in this Section 9 other than for non-payment of the Product Order Price, the License Fees or Service Fees, then DMPS shall (if DMPS's Product Order Form calls for an in-house standalone installation of the Software) be permitted to retain and continue its right to use, for its use only, the source, object and executable Software codes, pursuant to the term, restrictions and conditions contained in this Agreement. "Cure Period" means the period of time reasonably required after notice from DMPS for LMS Vendor to cure a breach in accordance with LMS Vendor's standard and solely defined Support practices. Sections 1, 2, 5, 8b, and 10 through 22 shall survive any termination of the Agreement.

## 10. Confidential Information

DMPS acknowledges that the System is a confidential and proprietary trade secret of LMS Vendor. DMPS, including DMPS's agents and employees, shall keep the Software and all related confidential materials in strictest confidence. "Confidential Information" means object code, source code and benchmark tests for the Products, DMPS data and all other information reasonably believed to be confidential, but excludes:

- A. Information made available to the general public without restriction by the disclosing Party ;
- B. Information known to the receiving Party independent of disclosures by the disclosing Party;
- C. Information independently developed by the receiving Party without access to or use of the disclosing Party's Confidential Information; and
- D. Information that the receiving Party may be required to disclose pursuant to subpoena or other lawful process, provided that the receiving Party notifies the disclosing Party in a timely manner to allow the disclosing Party to appear and protect its interests, and such disclosure complies with applicable law.

DMPS's Confidential Information also excludes any new features or functionality suggested by DMPS for the Products or Subscription Services. The Parties will use reasonable efforts to keep each other's Confidential Information secret and will use that information only to fulfill the rights and obligations under the Agreement. Either Party may disclose in confidence the other Party's Confidential Information on a need-to-know basis to other persons within the control of the disclosing party, and the Party making that disclosure will be responsible for that person's compliance with these restrictions on disclosure and use.

## 11. Infringement Indemnity and Remedies

LMS Vendor will, at its expense, retain counsel and defend any suit or claim brought against DMPS or software used by LMS Vendor for the Subscription Services infringe upon any third party's Intellectual Property Rights enforceable under Canadian, United States or state law or international copyright treaty, if DMPS: (a) promptly notifies LMS Vendor after DMPS learns of the suit or claim, and no delay by DMPS in providing that notice materially prejudices the rights of LMS Vendor; (b) gives LMS Vendor authority to defend or settle the suit or claim (provided that LMS Vendor does not agree to any settlement that materially prejudices DMPS); (c) gives LMS Vendor all available non-privileged information reasonably requested by LMS Vendor concerning the suit or claim; and (d) complies with this Section 11 and reasonably cooperates with LMS Vendor in the defense (LMS Vendor will reimburse DMPS's reasonable out-of-pocket costs of that requested cooperation). DMPS may also retain counsel to participate in the defense ("DMPS's Counsel"). LMS Vendor will reimburse DMPS for the reasonable fees and expenses of DMPS's Counsel only if LMS Vendor fails to continue to retain legal counsel as required by this Section 11. LMS Vendor shall have the right to control the defense of all such claims, lawsuit and other proceedings. In no event shall DMPS make any prejudicial statement in relation thereto, or settle any such claim, lawsuit or proceeding without LMS Vendor's prior written approval.

DMPS shall, if and when requested by LMS Vendor, and at LMS Vendor's expense, promptly provide all needed assistance in the defense of such claims. If as a result of any claims of infringement by the Software against any patent, copyright, license or the property right of a third party, LMS Vendor or DMPS is enjoined from using the Software, or if LMS Vendor believes that the Software is likely to result in a judgment of infringement, LMS Vendor at its option and expense may: (i) procure the right for DMPS to continue to use the Software; (ii) replace or modify the Software so as to make it non-infringing with similar functionality; or (iii) discontinue the License granted herein and refund to DMPS 50% of the respective License Fees paid hereunder with respect only to the software component of the System deemed likely in a judgment of infringement and which has been paid during a three year period prior to LMS Vendor making this election under Section 11. LMS Vendor will have no obligations or liability for any suit or claim of infringement based on DMPS's use of a superseded or DMPS-altered release of the LMS Vendor Supported Products to the extent that the obligation or liability will be voided by the use of a then current release of the LMS Vendor Supported Products which LMS Vendor provides to DMPS. DMPS will reasonably cooperate with LMS Vendor to mitigate infringement damages. The foregoing states the entire, sole, and exclusive liability of LMS Vendor with respect to infringement on any third party property rights by the Software or any parts thereof. This indemnity shall not apply if the infringement is caused in whole or in part by modifications to the System made by DMPS or other non-LMS Vendor personnel; use of the Software in a manner other than in accordance with the Agreement or use of the Software in combination with software not supplied by LMS Vendor under the Agreement.

## 12. Excusable Delay

Neither Party will be in default of its obligations under the Agreement or liable to the other for any noncompliance arising from causes beyond the reasonable control of the Party, including without limitation, fires, floods, natural disasters. Each Party will use reasonable efforts to resolve promptly any type of excusable delay.

## 13. Limitations of Liability

In no event will LMS Vendor, LMS Vendor's Third Parties or DMPS be liable for indirect, incidental, punitive, exemplary, special or consequential damages, or damages for loss of profits, revenue, data or use, incurred by either Party, whether in contract or tort, even if the other Party has been advised of the possibility of such damages. Party will neither seek nor apply for such damages. LMS Vendor's and its Third Parties' aggregate liability for damages to DMPS for the Agreement, the Products, the Product Warranty, Support or the Subscription Services, whether in contract or tort, shall be limited to actual direct money damages in an amount not to exceed: (a) the License Fees paid by DMPS to LMS Vendor for the Products subject to the damage claim if the claim arose within one year after the date of the earliest Product Order Form for those Products, (b) the most recent annual Service Fees paid by DMPS to LMS Vendor for the Products subject to the damage claim if the claim arose more than one year after the date of the earliest Product Order Form for those Products or (c) the most recent annual Subscription Services Fees paid by DMPS to LMS Vendor for the Subscription Services subject to the damage claim. The Parties will each use reasonable

efforts to mitigate their damages. These limitations represent the agreed allocation of risk. THE FOREGOING LIMITATION OF LIABILITY SHALL REMAIN IN FULL FORCE AND EFFECT REGARDLESS OF WHETHER CLIENT'S REMEDIES HEREUNDER HAVE FAILED THEIR ESSENTIAL PURPOSE.

#### **14. Assignment**

DMPS may not assign the License or the Agreement or transfer any rights or obligations under the Agreement without LMS Vendor's consent under an assignment or leasing addendum. Any assignment or transfer in violation of this Section 14 is void. Any valid assignment of DMPS's rights and obligations in relation to the Software will require an additional Software License Fee paid to LMS Vendor at LMS Vendor's then prevailing rates unless otherwise specified. Assignments of this Agreement by LMS Vendor shall not be made without prior notification to DMPS.

#### **15. Publicity**

Either Party may (in any presentations, press releases, advertising or publicly-disseminated materials) refer to the other Party, to the Products licensed by DMPS, or to background information, including for example: LMS Vendor competitors and competing products considered by DMPS, and DMPS business needs and reasons for selecting LMS Vendor and its Products. Before disseminating that information publicly, the disclosing Party will review the factual content of the disclosures with the other Party.

#### **16. Remedies**

If DMPS has a good faith complaint concerning the Products, Support Subscription Services, the Agreement or LMS Vendor's invoices, DMPS shall send LMS Vendor a specific and complete written description of the complaint within 90 days of discovering the basis for the complaint. LMS Vendor reserves the right, in its sole discretion, to determine if a Software breach exists, and to implement a plan and resolution time frame to resolve the issue, as defined by LMS Vendor and to retain subject matter experts to determine whether the complaint has a reasonable basis. If DMPS fails to specify a particular complaint with the Products, Support, Subscription Services, the Agreement or LMS Vendor's invoices, DMPS understands and agrees that this failure will result in a waiver of DMPS's right to raise that complaint in any litigation. Promptly after receiving the specific and complete written description of the complaint, each of the Parties will appoint a designated representative to meet, within a reasonable time, in person or by telephone to attempt to resolve in good faith any dispute concerning the Products, Support, Subscription Services, LMS Vendor's invoices, or the Agreement. If the designated representatives do not resolve the dispute, then either Party may request that an officer of LMS Vendor and an officer of DMPS meet, within a reasonable time, in person or by telephone to review and attempt to resolve the dispute in good faith. No litigation, arbitration or other action relating to the Products, Support, Subscription Services, LMS Vendor's invoice or the Agreement may be brought: (a) if DMPS has not participated or agreed to participate in the above meetings or (b) if the cause of action has been known by DMPS more than 90 days. DMPS agrees that failure to

comply with this provision will entitle LMS Vendor to seek dismissal of any litigation without prejudice and DMPS agrees not to oppose any motion to dismiss the litigation without prejudice. DMPS agrees not to initiate or re-initiate any litigation until this section is satisfied. Each Party will pay (without reimbursement) its own legal fees and expenses incurred in any dispute.

The Parties must comply with this section for any dispute, controversy, or claim arising out of or relating to the rights and obligation of a party under this Agreement or the validity, interpretation, breach or termination thereof, including claims seeking redress or asserting rights under applicable law.

## 17. Notices

All notices required under the Agreement must be in writing and delivered electronically or by other method providing for proof of delivery, to the attention of the CEO or President, as to LMS Vendor and to the Superintendent, as to DMPS, at the address on the applicable Product Order Form (unless a different address has been designated by notice to the other Party).

## 18. Escrow

The Software is mission critical to the Public Schools and its ability to access its data, even following a major default or any interruption in the business of the LMS Vendor or interruption in the delivery of its service, is of crucial importance to the Public Schools. The Public Schools requires protection and assurance against the LMS Vendor failure to maintain or support the application properly and/or failure to maintain or support the application indefinitely, Escrow of the Software and source code shall be subject to the Software Escrow and Penalty for Early Vendor Termination Agreement attached as Exhibit I of the Master Software and Services Contract.

## 19. General

- A. Unless otherwise specifically agreed in writing by an authorized representative of DMPS and a Vice President or higher-ranking officer of LMS Vendor, this Agreement will solely govern any present or future purchases/licenses by DMPS from LMS Vendor. Any additional Schedules shall be attached and incorporated into this Agreement by reference.
- B. Each party acknowledges that it has read this Agreement, understands it, and agrees to be bound by its terms. This Agreement, along with the respective Product Order Forms and attachments, is the complete and exclusive statement of the Agreement between the parties with respect to the System and shall supersede all prior proposals, understandings, and all other agreements, oral and written. The terms and conditions in this Agreement shall take precedence over the terms and conditions included in all purchase orders and other documentation submitted by DMPS pursuant to this Agreement. This Agreement may not be modified or altered except by a written instrument duly executed by both parties.

- C. Neither party hereto shall be liable or deemed in default for any delay or failure in performance hereunder resulting from any cause beyond its reasonable control.
- D. This Agreement, and any action arising out of or related to it, shall be governed by and construed in accordance with the laws of the State of Iowa; however, except as otherwise expressly stated herein, the parties specifically waive and disclaim the applicability of the Uniform Commercial Code; Unfair Trade Practices Act, Uniform Electronic Transactions Act, and Uniform Computer Information Transactions Act to this Agreement. Except for DMPS and LMS Vendor, no other party may sue or be sued under this Agreement.
- E. If any provision of this Agreement is held to be ineffective, unenforceable or illegal for any reason, such decision shall not affect the effectiveness, validity or enforceability of any or all of the remaining provisions hereof, and if any provision of this agreement is held to be ineffective, unenforceable or illegal with respect to particular circumstances, such provision shall remain in full force and effect in all other circumstances.
- F. This Agreement shall be binding upon and inure to the benefit of only the parties hereto and their respective successors and permitted assigns.
- G. The waiver or failure of either party to exercise any right provided for in this Agreement shall not be deemed a waiver of any further right hereunder.
- H. All communications or notices permitted or required to be given or served under this Agreement shall be in writing, shall be addressed to the other Parties at the appropriate Party's address or as set forth below, and shall be deemed to have been duly given or served if delivered in person or deposited in the United States mail, certified mail, return receipt requested.
- I. This Agreement shall become effective upon the signature hereof by an authorized representative of DMPS and LMS Vendor and receipt by LMS Vendor of the initial payment specified herein.
- J. All services provided by LMS Vendor will be provided as an independent contractor, and neither Party will be, or represent itself to be, the franchiser, franchisee, agent, or legal representative of the other Party.
- K. The Agreement may be amended only in writing signed by the Parties, except that LMS Vendor may, upon notice to DMPS and without DMPS's signature, amend a Product Order Form to correct errors without increasing the License Fees. All purchase orders, prior agreements, representations, statements, requests for proposal, proposals, negotiations, understandings, and undertakings concerning the Products, Support or Subscription Services are superseded by the Agreement.

## 20. Jurisdiction, Service of Process

Any proceeding arising out of or relating to this Agreement may be brought in the courts of the State of IA, Poke County, or, if it has or can acquire jurisdiction, in the United States Southern District Court serving Des Moines, IA, and each of the Parties irrevocably submits to the exclusive jurisdiction of each such court in any such proceeding, waives any objection it may now or hereafter have to venue or to convenience of forum, agrees that all claims in respect of the proceeding shall be heard and determined only in any such court and agrees

not to bring any proceeding arising out of or relating to this Agreement in any other court. The Parties agree that either or both of them may file a copy of this paragraph with any court as written evidence of the knowing, voluntary and bargained agreement between the Parties irrevocably to waive any objections to venue or to convenience of forum. Process in any proceeding referred to in the first sentence of this section may be served on any Party anywhere in the world.

**21. Taxes and Duties**

The charges covered by the License are exclusive of any tariffs, duties or taxes imposed or levied by any government or governmental agency in connection with this agreement. With the exception of taxes imposed upon LMS Vendor which are based upon net income, DMPS as licensee shall, unless otherwise exempt from the payment of the following described taxes, be liable for payment of all such taxes, however designated, levied or based on the Software, its charges or its use or on this agreement, including without limitation state or local sales, use, FLT, and personal property taxes.

**22. Maintenance Services**

The annual charges to DMPS for LMS Vendor’s routine software maintenance and product support will be as specified on the most recent Product Order Form, or invoice.

**23. Governing Law**

This Agreement will be governed by and construed under the laws of the State of IA without regard to conflicts-of-laws principles that would require the application of any other law.

**LMS Vendor**

**Des Moines Public Schools**

\_\_\_\_\_  
(Authorized Signature)

\_\_\_\_\_  
(Authorized Signature)

\_\_\_\_\_  
Name  
(Printed Name)

\_\_\_\_\_  
(Printed Name)

\_\_\_\_\_  
Chief Executive Officer  
(Title)

\_\_\_\_\_  
(Title)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
Address line 1  
(Street Address Line #1)

\_\_\_\_\_  
(Street Address Line #1)



Address line 2

\_\_\_\_\_  
(Street Address Line #2)

\_\_\_\_\_  
(Street Address Line #2)

City, State ZIP

\_\_\_\_\_  
(City, State, Postal Code)

\_\_\_\_\_  
(City, State, Postal Code)

**Appendix B:  
LMS Vendor  
Annual Software Agreement  
For the  
Learning Management System  
For the  
Des Moines Public Schools**

**Month XX, 2016**

**DRAFT - FOR REVIEW AND DISCUSSION ONLY**

**Appendix B:**

(To be supplied by LMS Vendor)

**Appendix C:  
Pricing/Payment Schedule  
For the  
Learning Management System  
For the  
Des Moines Public Schools**

**Month XX, 2016**

**DRAFT - FOR REVIEW AND DISCUSSION ONLY**

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### Appendix C: Pricing/Payment Schedule

This is the Pricing Schedule referred to in Paragraph 1.34 of the Software Services and License Agreement between The Des Moines Public Schools (“the District”) and LMS Vendor Corp. (“ LMS Vendor”) dated as of Month \_\_, 2016 (“the Contract”). Its purpose is to set forth the agreement and understanding of the Parties with respect to all determinations of the amounts to be paid by the District to LMS Vendor for Services and Deliverables under the Agreement. All terms herein shall have the meanings set forth in the Agreement.

## 1. LMS Vendor Pricing Structure

### 1.1 LMS Vendor Pricing Structure

The Initial License, Annual Maintenance and Hosting Services Fee with Implementation Costs are listed on the chart below:

Item No.	Application	District-wide License	Total Price
<b>Learning Management System License</b>			
1	LMS Vendor Software Product name	\$ -	\$ -
2	LMS Vendor Software Product name	\$ -	\$ -
3	LMS Vendor Software Product name	\$ -	\$ -
4	LMS Vendor Software Product name	\$ -	\$ -
5		\$ -	\$ -
6		\$ -	\$ -
<b>Other Applications or Costs (enter name below)</b>			
7		\$ -	\$ -
8		\$ -	\$ -
<b>LMS Installation Services</b>			
9	On-site Vendor Implementation Project Management		\$ -
10	Learning Management System Installation		\$ -
11	Configure/Customize LMS to DMPS requirements		\$ -
12	Appendix A - LMS Functional Requirements customization		\$ -
13	Report Development Assistance		\$ -
14	LMS Operational Process Redesign Assistance		\$ -
15	LMS Data Conversion and Import		\$ -
<b>LMS Data Interfaces</b>			
16	By-Directional integration with Infinite Campus SIS		\$ -
17	By-directional integration with the Sungard H/R System		\$ -

18	Import of State Standards		\$	-
19	Import of Local Curriculum Standards		\$	-
20			\$	-
<b>LMS Training Services</b>				
21	LMS Training for Entire DMPS Staff Total		\$	-
22	LMS 6-month refresher training		\$	-
23	LMS 1-year refresher training		\$	-
<b>Infrastructure Costs</b>				
24	Required Operating System Software	\$	-	\$
25	Required System Server Hardware	\$	-	\$
	<b>Total Price (Sum 1 thru 25)</b>	<b>\$0.00</b>	<b>\$</b>	<b>-</b>

The price to the Des Moines Public Schools for the first year license and implementation costs shall be [to be determined]

## 1.2 Payment Schedule

Payments on account of the Licensed Fees shall be due and payable as follows, upon presentation to the District of invoices complying with the terms and conditions of the Agreement. DMPS will pay LMS Vendor a pro-rated amount of the License Fee based upon the successful installation and operation of the {LMS Vendor Product Title} and signed acceptance of the **DMPS Project** Manager. Such pro-rated amount will be based upon the percentage of LMS product installed for each month. An installation schedule is contained below: [to be determined]

## 2. Fixed Price Deliverable

### 2.1 Learning Management System Installation Services

The following table set forth the amounts payable for each Deliverable associated with the Learning Management System Installation Services. The following table will contain a list of Milestones and Deliverables mutually agreed to by DMPS and the LMS Vendor. Services will be invoiced upon completion.

Description of Milestone	Acceptance Test	Amount Due
Appendix A - LMS Functional Requirements customization	Approved by District, according to LMS Vendor response and subsequent mutually-agreed charges.	\$
Report Development Assistance	Approved by District, according to LMS Vendor response and subsequent mutually-agreed charges.	\$
LMS Operational Process Redesign Assistance	Approved by District, according to LMS Vendor response and subsequent mutually-agreed charges.	\$
Learning Management System Data Conversion and Import	Approved by District, according to LMS Vendor response and subsequent mutually-agreed charges.	\$
Infinite Campus Student Information System Data Interface	Approved by District, according to LMS Vendor response and subsequent mutually-agreed charges.	\$
MUNIS Finance System Data Interface	Approved by District, according to LMS Vendor response and subsequent mutually-agreed charges.	\$
LMS Training for Entire Staff	Approved by District, according to LMS Vendor response and subsequent mutually-agreed charges.	\$
LMS 6-month refresher training	Approved by District, according to LMS Vendor response and subsequent mutually-agreed charges.	\$



LMS 1-year refresher training	Approved by District, according to LMS Vendor response and subsequent mutually-agreed charges.	\$
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### 3. Maintenance Service Charges

#### 3.1 Annual Maintenance Charges during Term

The fee for all Licensed Software Maintenance Services as described in the Maintenance Services Schedule shall be [\$ To be Determined ] per year payable on the first of each July each of the four years commencing **Month, dd, 2016**.

#### 3.2 Post Term Maintenance Charges

In the event that the District elects to purchase annual Maintenance Services for periods after **June, 30, 20xx**, the following prices shall apply:

Provided that the District shall have continuously acquired Maintenance Services for prior years, for each of the ten years commencing **Month, dd, 20xx**, the annual fee for all Maintenance Services shall not be increased each year by more than **the CPI** over the annual Maintenance Services Fee charge to the District for the immediately preceding year of Maintenance Services, but in no event more than the rate charged to other licensees of Licensed Software receiving comparable maintenance services.

### 4. Option Work Orders

#### 4.1 Work Orders

Work orders shall be priced according to the price schedule agreed upon by the Parties in Work Orders will be placed on a “not to exceed” basis.

#### 4.2 Option to Authorize End-User Training Services

LMS Vendor will conduct {LMS Vendor Product Title} End-User Training on-site for a number of End-user training classes agreed upon, in writing, by the Parties, but not to exceed xxxx dollars (\$xx,xxx). {LMS Vendor Product Title} End-User Training will proceed on the basis of District-issued Work Orders.

The End-User Training will follow Section 4.11, Training Approach, as outlined in LMS Vendor RFP proposal. {LMS Vendor Product Title} training materials will be tailored to DMPS terminology and implementation guidelines.

Not to Exceed Price Deliverable:

**4.3 Option to Authorize {LMS Vendor Product Title} Custom Report Development**

LMS Vendor will develop District defined custom reports as required by the District to satisfy its District and/or State reporting requirements. Custom report development will proceed on the basis of a District-issued Work Order.

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<b>Description of Milestone</b>	<b>Acceptance Test</b>	<b>Not to Exceed Amount Due</b>
Custom {LMS Vendor Product Title} Report Development	Approval by District Determined	Amount to be determined

**Appendix D:  
Statement of Work  
For the  
Configuration, Installation and Deployment  
Of the  
Learning Management System  
For the  
Des Moines Public Schools**

**Month xx, 2016**

**DRAFT - FOR REVIEW AND DISCUSSION ONLY**

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## Appendix E:

### Statement of Work for the Configuration, Installation, and Deployment

THIS STATEMENT OF WORK describes the work and Deliverables to be provided by LMS Vendor, Inc. (“LMS Vendor”) to the Des Moines Public Schools (“DMPS”) under that certain Master Software and Services Contract between the Parties dated **Month xx, 2016** (“Contract”). The capitalized terms used in this Statement of Work shall have the meanings set forth in the Contract.

## A. Project Overview and Introduction

### 1. Introduction

#### 1.1 Scope

DMPS has selected LMS Vendor’s software to be implemented as the basis for its Learning Management System (LMS) package. DMPS has engaged LMS Vendor as the prime vendor to implement the software. The LMS Project will implement the LMS Vendor’s software package in a cooperative effort between DMPS and LMS Vendor and will be carried out in five (5) major Phases, as follows:

- Project Initiation
- Project Planning (including Fit/Gap Analysis)
- Project Managing
- Readiness and Deployment for DMPS schools
- Project Closeout

LMS Vendor shall build and expand upon the functionality that is already incorporated in the existing LMS Vendor’s {LMS Vendor Product Title} Software application as needed to meet the Specifications for the new DMPS Learning Management System as defined in the RFP # 7370 Learning Management System Section 4.5.1 Approach to Meeting Learning Management System Requirements and Appendix A - Learning Management System Functional Requirements.

DMPS and LMS Vendor will approach this project as a cooperative implementation, rather than custom development effort, in order to minimize the software change and development efforts required for the project. In this regard, both parties agree that the primary design objective for this project is to use the functionality that already exists in the LMS Vendor’s {LMS Vendor Product Title} application rather than to substantially modify this functionality. In turn, the existing application will be expanded to include the additional functionality specified in the RFP and addressed in the LMS Vendor proposal for this project. Nonetheless, LMS Vendor is solely responsible for the design and implementation of DMPS {LMS Vendor Product Title} in a manner such that DMPS {LMS Vendor Product Title} functions in accordance with the Specifications in all material respects. This understanding serves as the basis for the work plan and budget that has been proposed and accepted for this project.

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LMS Vendor shall provide all Services and Deliverables required under this Statement of Work with respect to the installation, customization, configuration, testing, training and maintenance of DMPS LMS, as defined in the RFP except for those responsibilities allocated to DMPS under this Statement of Work, all for the fixed price set forth in the Contract and the Pricing Schedule (to be determined during Contract Negotiations.).

## 1.2 DMPS {LMS Vendor Product Title} Objectives

The DMPS LMS Project has been initiated by DMPS and with LMS Vendor as its primary Contractor for the Project, will develop and implement a comprehensive, “state of the art,” learning management system. The parties acknowledge that the key objectives for the DMPS {LMS Vendor Product Title} are as follows:

- Meet the requirements of the RFP as responded to as affirmative by LMS Vendor.
- Provide the framework to address additional requirements beyond the scope of this contract through an effective scope management process.

These goals provide a starting point for defining the objectives set for this Project. It is understood that additional objectives may be identified during the initial phase of the project as DMPS and LMS Vendor work together to refine the vision for an integrated learning management system.

## 1.3 Definitions

The following additional definitions shall apply throughout this Statement of Work:

- “Baseline LMS Vendor’s {LMS Vendor Product Title} Software” – the then current release of the LMS Vendor’s {LMS Vendor Product Title} Software at the time of Project Initiation, based on the regular LMS Vendor product development schedule.
- “Consultation and Assistance” – advice and examples provided by one party to another to help the responsible party complete its assigned activities, tasks, and deliverables.
- “FTP Site” – the site maintained by LMS Vendor from which DMPS may download software and Documentation deliverables to machines under the control of DMPS.
- “Health Check” – a process for evaluating and assessing the status of a project that includes project planning, monitoring and control, communication, customer issues, and people management.
- “Integration Testing” – the testing of the relationships of the individual DMPS {LMS Vendor Product Title} modules, components, services, or deliverables to one another, including the relationships of the DMPS LMS to the DMPS technology infrastructure.
- “Project Work Plan” – a schedule of the individual tasks to be performed by the respective Parties during the Project, including fixed and dependent times, personnel and resources required from the respective Parties.

- 
- “System of Record” – a system which is the authoritative source for reporting of DMPS’s official information regarding student records for all facilities/schools.
  - “System Testing” shall mean the testing of multiple components.
  - “Technical Platform” – the combination of hardware and Platform Software within the DMPS architected framework, reasonably required for the proper operation of the DMPS LMS.
  - “Test Environment” – the configuration of hardware and software as set forth in Section 5.1 and operated by DMPS for the purpose of conducting Integration and Acceptance Testing of software deliverables and protocols under this Statement of Work.
  - “Unit Testing” – the testing of an individual DMPS LMS module, component, service, or deliverable.

#### 1.4 LMS Vendor Responsibilities

LMS Vendor shall provide the following Services:

- Building, revising as necessary, and maintaining a single, comprehensive Project Work Plan in collaboration with the DMPS Project Management Office (PMO).
- Providing functional and technical knowledge of LMS Vendor’s {LMS Vendor Product Title} Software.
- Assist DMPS in conducting business process re-engineering around major {LMS Vendor Product Title} data entry, management, and reporting procedures.
- Providing a DMPS LMS Vendor {LMS Vendor Product Title} software and assisting DMPS in implementing DMPS functionality.
- Providing Consultation and Assistance on the development of site-specific business rules and providing DMPS specific templates for consideration by DMPS.
- Providing Consultation and Assistance on business processes and “best practices” in the use of LMS Vendor’s {LMS Vendor Product Title} Software.
- Configuring LMS Vendor’s {LMS Vendor Product Title} Software in accordance with the approved Product Plan and associated Configuration/Specification Documents.
- Documenting application configuration selections and providing training to District application administrators on the methods and consequences of making application configuration changes related to site-specific business rules.
- Designing, building, testing, and verifying new modules, functions, and capabilities for LMS Vendor’s {LMS Vendor Product Title} Software.
- Designing, building, testing, and verifying the interfaces from LMS Vendor’s {LMS Vendor Product Title} Software and any DMPS Third Party Software packages and services.
- Supplying and deploying a web-based compliant release of the LMS Vendor’s {LMS Vendor Product Title} Software system on a DMPS District-wide basis, with



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the features required herein in connection with the deployment of the implementation phase of the Project.

- Utilizing Microsoft Project as its electronic project management system for management and communication during the Project that is acquired by DMPS.
- Developing the data conversion programs to load the data provided by DMPS into LMS Vendor's {LMS Vendor Product Title} Software.
- Assisting in defining and testing of conversion programs to and from existing legacy systems.
- Leading and collaborating with DMPS on data conversion activities and assisting DMPS in verifying the accuracy of data following conversion.
- Transferring technical knowledge of the LMS Vendor's {LMS Vendor Product Title} Software to the DMPS project team members.
- Designing and developing DMPS training programs, including course materials tailored to DMPS processes.
- Delivering training, as specified for DMPS technical staff and facility/school personnel as set forth in the approved Training Plan
- Providing Consultation and Assistance to DMPS, within the DMPS hardware architecture environment, in the evaluation of alternative technical platforms, including hardware, systems and operating software, database management software, and application support software.
- Developing specifications for the technical platform selected by DMPS, within the architected framework, including hardware, systems and operating software, database management software, and application support software.
- Testing of interfaces during unit and integration testing. Time and Materials apply for non LMS Vendor applications.
- Defining and overseeing systems integration and performance tests for each release of LMS Vendor's {LMS Vendor Product Title} Software as part of the operational integration and deployment process.
- Facilitating DMPS's systems integration and performance tests by collaborating with DMPS in its review.
- Assisting in developing production support processes for problem management
- Assisting in developing systems operations procedures and processes, including tuning and capacity planning.
- Providing Consultation and Assistance in planning for the deployment of each new release of the LMS Vendor's {LMS Vendor Product Title} Software in the DMPS operating environment.
- Providing Level 3 assistance, as defined in Appendix D: Software Maintenance Services Agreement, during post Production support.
- Providing Level 2 assistance, as defined in Appendix D: Software Maintenance Services Agreement, during each deployment phase.

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- Providing project leadership and responsibility, with DMPS, for managing the Project.
  - Conducting quarterly Project Status Reviews to assure the Project is making adequate progress towards meeting contract requirements.
  - Providing non-District contact information (LMS Vendor email address, LMS Vendor telephone number, pager numbers, and mobile phone numbers).

## 1.5 DMPS Responsibilities

DMPS shall provide the following support, services, and facilities during the term of the Project as further set forth in this Statement of Work:

- Coordinating with LMS Vendor in building, revising as necessary, and maintaining a single, comprehensive Project Work Plan.
- Ensuring executive sponsorship, knowledge of existing systems, knowledge of DMPS's functional requirements, and – with LMS Vendor – project management.
- Collaborating and cooperating with LMS Vendor to accomplish the objectives of the Project through providing the resources set forth in the DMPS Resource Plan (to be determined during Contract Negotiations).
- Providing timely review and approval of project Deliverables and timely resolution of project issues.
- Describing the processes and procedures DMPS uses to manage student and school information.
- Testing, and verifying interfaces from the DMPS legacy systems or any third party packages licensed directly by DMPS and not provided under this Contract.
- Administering the LMS Vendor's security and authorization functionality in Production.
- Assisting in developing end user training material.
- Assisting in delivery of training for facility/school personnel.
- Planning and conducting organizational change management activities, such as modifying business processes, where appropriate and practicable; building and delivering project communications to interested stakeholders; negotiating with collective bargaining units for changes in collective bargaining agreements where appropriate and practicable; and developing process improvement and efficiency measures and metrics.
- Determining, installing, and maintaining site-specific business rules.
- Providing assistance in system development and System Testing.
- Reviewing and approving the design and execution of integration and performance tests specifically tailored to address technical issues in the DMPS environment.
- Ensuring that the telecommunications network is appropriately configured, sized, and functioning properly.

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- Acquiring, implementing, and maintaining all components of the Technical Platform as specified by LMS Vendor in the Specifications and subsequently the Product Plan.
  - Maintaining all systems software (e.g., operating systems, DBMS, etc.) as well as application development software at supported release levels.
  - Providing facilities and required infrastructure for training DMPS staff.
  - Providing facilities and Test Environment infrastructure for testing of releases of the software provided by LMS Vendor.
  - Completing final acceptance testing for each release of the software and Deliverables.
  - Cleansing and extracting relevant existing data from legacy systems and providing it for conversion.
  - Working with LMS Vendor to verify data accuracy following conversion.
  - Operating the DMPS LMS in the Production environment.
  - Providing a LMS Vendor trained production help desk for both Level 1 and Level 2 support as defined in the Maintenance Service Schedule.

## 1.6 Scope Management

Neither the functional requirements of the Licensed Software nor the specifications, manner of delivery, or schedule of activities set forth in the Statement of Work, nor shall the charges therefore be modified, except in accordance with the procedures set forth in the Scope Management Process (Appendix F). In particular, LMS Vendor's response to a Change Request from the District (or LMS Vendor offer of a Change Request) shall constitute its firm offer to perform the additional or modified Services and/or provide the additional or modified Deliverables as set forth in the Scope Management Process. Notwithstanding the foregoing, no provision set forth in this Contract shall be deemed amended, except in strict compliance with the terms outlined in this Contract.

## 1.7 {LMS Vendor Product Title} Vendor's LMS Software Modules

The Project Implementation will include the following LMS Vendor's {LMS Vendor Product Title} software modules.

### 1.7.1 LMS Vendor {LMS Vendor Product Title} software Learning Management System and Supplemental modules:

- Standards, Curriculum and Resources
- Instructional Design and Delivery
- Student Assessment
- Staff Proficiencies and Professional Development
- Student Profiles and Work Samples
- LMS Data Analysis and Reporting

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## 1.8 System of Record

LMS Vendor {LMS Vendor Product Title} software will become DMPS's System of Record when the following are true:

- 100% of district's schools have been fully deployed in the LMS Vendor's {LMS Vendor Product Title} software;
- Interface are constructed between LMS Vendor's {LMS Vendor Product Title} software and the systems that will be retained as listed in the RFP.

## 1.9 Electronic Delivery Protocols

All deliveries of LMS Vendor's {LMS Vendor Product Title} Software and Documentation required under the Contract shall be transmitted electronically and not by the delivery of any printed or tangible medium, in accordance with the following protocols:

- LMS Vendor shall establish on a computer under its direct control not owned or otherwise controlled by DMPS, an "FTP Site," in which all of such Deliverables are stored in digital formats.
- The FTP Site shall contain, at the minimum, a repository of the LMS Vendor's {LMS Vendor Product Title} Software, including error corrections, Updates and Releases to be delivered under this Contract, indexed with release dates and other descriptive information about each Release.
- Delivery shall be accomplished by causing the Test Environment computing hardware to access the FTP Site over the public Internet, and request the transmission of all applicable modules for storage in the Test /Production Environment, so as to create a duplicate of the repository in the Test/Production Environment.
- Release to Production shall take place as described in this Statement of Work.

## 2. Specific Resources to Be Supplied by DMPS

### 2.1 Personnel

DMPS shall provide, at District expense, those certain staff and employees identified in the DMPS Resource Plan [to be defined at contract negotiations] attached hereto during the times indicated for the purpose of managing the Project and performing the activities required of DMPS.

### 2.2 Facilities

DMPS shall provide and operate (to the extent required) the following physical resources at District expense in support of the Project:

- Facilities and infrastructure for personnel assigned pursuant to Section 2.1 above.
- A Test Environment, consisting of the hardware and software described in LMS Vendor's RFP response.

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- A host computer (which may be the test computer), if necessary, or a third-party hosting arrangement for the operation of the Electronic Project Management Office software selected by the Parties.
  - Data telecommunications means suitable to the development of the DMPS LMS, by which deliverables may be received electronically by DMPS.
  - Limited space to be temporarily used by LMS Vendor employees when their presence is required in connection with testing and configuration of the Deliverables.
  - Facilities for the co-location of the LMS Vendor Project Management Office with DMPS Project Management Office.
  - All facilities, equipment, Platform Software, telecommunications services and other items required for the operation of the DMPS LMS in Production.
  - All facilities and infrastructure to accommodate training.

Except as expressly set forth above, LMS Vendor shall be responsible for leasing or otherwise acquiring all office space, computing equipment, telecommunications equipment and services, supplies and other facilities required by LMS Vendor in order to perform the Services.

### **3. Third Party Software**

#### **3.1 Software Supplied by LMS Vendor as quoted in RFP**

Third party software may be utilized as part of the total LMS Vendor's LMS Software DMPS Learning Management System solution. Unless specified in this Statement of Work to be supplied by DMPS at District expense, LMS Vendor shall be responsible for supplying the SIF agent.

### **4. Project Management**

#### **4.1 Project Management Generally**

The Project will be managed through active cooperation and communication between the Parties and the formation of working teams consisting of District Personnel and LMS Vendor staff designated under this Statement of Work to support the Project.

#### **4.2 Project Managers**

At the time of execution of this Contract, each Party shall designate in writing and communicate to the other, an individual as its Project Manager, who shall serve as a single authoritative point of contact for the other Party during the course of its activities pursuant to this Contract. Neither Party shall change its Project Manager for a period of at least three (3) months after designation, except (i) in the event such Project Manager ceases all employment with the Party, (ii) the other Party reasonably requests a change in such Project Manager, or (iii) the other Party consents to such change on notice which is reasonable in

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light of the circumstances. Thereafter, changes in LMS Vendor's Project Managers shall be subject to the same provisions of Section 6.2 of the Contract as are applicable to any others of LMS Vendor's designated management personnel. Project Managers shall have authority to negotiate all Change Orders in accordance with the Scope Management Process (Appendix F), other than those requiring approval by the Board of Education or LMS Vendor or District Executive Sponsors, and shall be authorized by their respective Party to make reasonable staff re-assignments (subject to the provisions of Section 6.2 of the Contract) and to make all communications to the other Party and its designated Project Manager as are required or convenient to the efficient progress of the Project. Nothing herein, however, shall be construed as precluding communication between subordinate persons for the purpose of consultation and cooperation, provided that no such subordinate shall have actual or ostensible authority to authorize Change Orders, except as expressly provided in the Scope Management Process.

#### **4.3 DMPS Project Management Personnel**

DMPS will establish a Project Management Office ("DMPS PMO"), comprised of representatives reasonably representative of various constituencies within DMPS. Participation at the local facility/school level will be managed and controlled by the DMPS PMO. Other staffing shall be in accordance with the DMPS Resource Plan and Project Work Plan developed by the Parties.

#### **4.4 LMS Vendor Project Management Personnel**

LMS Vendor shall designate a Project Manager, who shall be available to manage the Project. Such person may alternate physical presence between facilities of DMPS and LMS Vendor's offices at which LMS Vendor is doing the work required under this Contract. Other staffing shall be consistent with the Project Work Plan developed by the parties. LMS Vendor will also designate additional staff to support the PMO that will be co-located with the PMO to provide leadership in the various technical areas of the Project. Such individual(s) shall be highly expert and have demonstrable experience in logistic coordination of highly complex software development and deployment projects.

#### **4.5 Steering Committee**

DMPS and LMS Vendor will appoint and convene a Steering Committee consisting of senior level executives. The Steering Committee shall meet at intervals set forth in the Project Work Plan to review the project and coordinate the activities of the Parties.

#### **4.6 Dispute Resolution Process**

In the event that there are differences of opinion or delays in responses by either Party in connection with Project Management activities, the Issue Resolution process will be guided by Section 10 of the Contract.

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#### 4.7 Electronic Project Management

LMS Vendor in collaboration with DMPS will develop an overall Project Work Plan utilizing Microsoft Project 2007. The Project Work Plan shall, when approved by both Parties, state the final Specifications for the Project. The project plan shall be modeled after the Project Management Institute's (PMI) standards. If the Parties cannot reach agreement as to such Project Work Plan within 90 days after the Commencement Date, the matter shall be escalated in accordance with the dispute resolution process set forth in Section 9 of the Contract. Notwithstanding the foregoing, nothing herein shall constitute the District's waiver of or agreement to waive any requirements from LMS Vendor for the LMS as set forth in the RFP. The Project Management Plan shall, at the least provide the following features:

- Information about all personnel and other resources required for the Project at each stage of the Project.
- Assignment of Resources to each task and Deliverable.
- Identification of task dependencies.
- Monitoring of progress on each task.
- Identification of personnel and resources that are current pacing items.
- Tracking of actual and budgeted expenditures
- Identification of each version of LMS Vendor's {LMS Vendor Product Title} Software and the status of development, testing, and deployment.
- Identification of all reported faults or defects in software and the status of efforts to correct such faults or defects.
- A common repository of all Change Requests and Change Orders and a list of sections affected.

#### 4.8 Reporting

During the entire term of the Project, LMS Vendor shall provide the district a secured web site where personnel can review all outstanding issues, updated programs, releases, and documentation. In addition, LMS Vendor shall provide periodic status and performance reports on a bi-weekly basis to include accounting of payments to date and remaining deliverable schedule.

#### 4.9 Management Meetings

{LMS Vendor Product Title} Vendor's managers and their District counterparts shall meet via video conference, phone or at the DMPS district office if requested by either party. It is expected that weekly project status meetings and monthly executive steering committee meetings will be held.

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## 5. Establishment of Testing Environment and Testing Protocols

### 5.1 District Facilities

DMPS is responsible for the testing environment.

### 5.2 Pre-Delivery Test Requirements

Prior to Delivery to DMPS of any subsequent software release, LMS Vendor shall conduct tests of the respective Deliverable to assure its compliance with requirements for such Deliverable, including unit testing and System Testing.

### 5.3 Minimum Test Criteria

Unless otherwise expressly agreed in this Statement of Work no Software Deliverable need be accepted by DMPS in connection with any deployment phase unless it passes the tests outlined in the LMS Vendor RFP response.

- **Unit Testing.** LMS Vendor shall provide reports of satisfactory pre-delivery unit testing. That is, LMS Vendor shall test all system components, customizations, interfaces, etc. that are coded or modified, as individual units, prior to incorporating these components into the Test Environment. These tests shall be done by LMS Vendor's unit test standards and processes, and shall be consistent with industry best practices.
- **Functional Compliance.** The Deliverable shall perform all functions strictly in accordance with the Product Plan and Configuration/Specification Deliverables.
- **Integration Testing.** The Deliverable shall work properly in connection with all other DMPS LMS and DMPS technical infrastructure components as specified in the Product Plan. District must notify in writing of any and all changes to the network, 3rd party application software, operating systems or any other software or hardware that may have a negative impact on the Deliverable.
- **Regression.** No modification shall adversely affect the accuracy of any previously operational feature of the system.

### 5.4 Testing Configuration

LMS Vendor will provide Consultation and Assistance to the DMPS in the installation and configuration of the Test Environment so as to (a) permit the realistic simulation of the Production Environment for the purpose of testing any, some, or all of the software Deliverables, and (b) permit identification and correction of errors and inefficiencies determined during testing, and (c) permit the pre-assembly of an operational system to support migration of new releases, patches and other modifications and enhancements to the Production Environment once they have passed acceptance tests.



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## 5.5 Test Database

During each phase of the Project, DMPS shall extract a set of student and school/facility information of its choosing (“Test Database”) from its existing records of the requisite types for the phase in process, in the format specified by LMS Vendor for data conversion and make it available for import into the Testing Environment. Such Test Database shall not be copied or removed from facilities under the direct control of DMPS and may only be exposed to LMS Vendor employees and LMS Vendors who are subject to the confidentiality obligations and security protocols otherwise imposed by the Contract and this Statement of Work.

## 5.6 Test Scripts

At least 15 Business Days prior to the due date for each software Deliverable, LMS Vendor shall deliver a proposed sequence of data and operational procedures (“Test Script”) to be used to verify the accuracy and reliability of the Deliverable. DMPS shall review such proposed Test Script and make such additions and changes as it reasonably deems appropriate. The Test Script as edited and agreed to by the Parties shall be used to conduct the applicable acceptance tests for such Deliverable.

## 5.7 Software Acceptance Testing

All acceptance testing protocols shall at the minimum verify that the modules being tested with the RFP responses. Upon the Delivery of each software Deliverable and the approval of applicable Test Scripts, DMPS shall conduct tests within 10 Business Days of receipt of the applicable Deliverable in the Test Environment with requested Consultation and Assistance from LMS Vendor. DMPS shall determine in accordance with the provisions of the Contract if the results of such acceptance tests are satisfactory to indicate conformity with the Product Plan and Configuration/ Specification Deliverables in all material respects. Payment will be made for LMS Vendor application software by module for successful completion of acceptance testing.

## 5.8 Faults or Defects

In the event that the software Deliverable fails to meet the standards set for Acceptance Testing, DMPS shall itemize the Faults or Defects, and LMS Vendor shall perform such root cause analysis and other procedures to isolate the problem, develop corrections as soon as practicable, and rerun the applicable portions of the tests and such of the other tests as DMPS determines to repeat to ensure the faults have been corrected. The process of fault detection, analysis, correction, and retest shall continue until the applicable Deliverable has successfully passed the acceptance test.

## 5.9 Release to Production

Deliverables that have passed the designated acceptance tests shall be migrated to the Production Environment in accordance with the mutually agreed upon migration procedures, provided that DMPS’s Project Manager has given written approval.

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## 6. Data Conversion/Data Conversion Services

### 6.1 Data Conversion Generally

LMS Vendor shall provide the mechanisms for converting or importing data and formats specified by LMS Vendor responses in the RFP. To the extent practicable, DMPS will use the same tools and processes for data conversion as are used for interfaces and data integration employed by the DMPS LMS.

### 6.2 Responsibilities of DMPS

Cleansing and extracting relevant existing data from legacy systems and providing it for conversion.

### 6.3 Testing of Conversion Databases

For the purpose of accomplishing the conversion required to migrate systems to Production, at least 15 days prior to the scheduled migration, LMS Vendor shall cause a test of the conversion in the Test Environment, verifying that the conversion programs are reliable and accurate and will not interfere with the necessary operation of the Production Environment. The Parties will work cooperatively to confirm the accuracy of the data and to perform manual corrections in the Test Environment.

## 7. Training

### 7.1 Development of Training Program

In accordance with the Project Work Plan, LMS Vendor shall design and develop the Training Plan, comprised of training curriculum and training materials for each phase of the DMPS LMS implementations.

### 7.2 Training of DMPS Technical Staff

LMS Vendor will provide training for DMPS Technical Staff identified in the DMPS Staffing Plan to facilitate the transfer of knowledge for operation, technical support, help desk support (Levels 1 and 2 as specified in the Maintenance Service Schedule), and software maintenance (installation, testing, and deployment of new LMS Vendor's {LMS Vendor Product Title} Software Releases). Once LMS Vendor has delivered the initial technical training as specified in the Training Plan approved by DMPS and within the constraints of the Level of Effort set forth in the approved Project Work Plan and LMS Vendor's RFP Proposal, DMPS will be responsible for ongoing training of technical staff.

### 7.3 Training District End Users

LMS Vendor will provide training for DMPS End Users in accordance with the Training Plan approved by DMPS and within the constraints of the Level of Effort set forth in the approved Project Work Plan and the RFP. After the LMS Vendor completes the "go-live"

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training, DMPS will assist LMS Vendor to provide retraining, additional training, supplemental training, and training for new school staff in the event of employee turnover, changing job assignments, and the like.

#### **7.4 Responsibilities of DMPS**

DMPS is responsible for providing qualified staff that will become DMPS {LMS Vendor Product Title} trainers in accordance with the DMPS Staffing Plan, the approved Project Work Plan, and the Training Plan accepted by DMPS. DMPS will assume the primary training responsibility for the new {LMS Vendor Product Title} after initial deployment in accordance with the DMPS Staffing Plan, the approved Project Work Plan, and the Training Plan accepted by DMPS, with LMS Vendor providing Consultation and Assistance. DMPS shall also audit classes to assure consistent quality of training delivery across DMPS. DMPS will be responsible for providing retraining, additional training, supplemental training, and training for new school staff for all schools in the event of employee turnover, changing job assignments, and the like.

#### **7.5 Adjustment of Plan**

The Training Plan will be based on the accepted Project Plan and will focus on the changes to DMPS's student records administration business processes within the context of the DMPS LMS implementation. The Training Plan will be adjusted based on the detailed Configuration/Specification deliverables developed for each LMS Vendor's LMS Software release as well as the "lessons learned" during the rollout of the LMS.

### **8. Organizational Change Management**

#### **8.1 Organizational Change Management Requirements**

In addition to determining the functional and technical requirements that will best meet the needs of DMPS in this project, it will also be important for DMPS to consider the organizational change management requirements for the new system. These include the extent to which changes need to be made in existing operating practices and procedures to accommodate and support the new learning management system. It also includes any staff issues or concerns that have to be included in the training for this project, in order to help staff accept and use the new system.

#### **8.2 District Responsibility**

DMPS has the responsibility for organizational change management with Consulting and Assistance from LMS Vendor. The change management needs for the project will be addressed in at least two key ways, as highlighted below.

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### 8.3 Initial Organizational Change Management Readiness Review

As a first step, DMPS will conduct a formal change management readiness review and complete the same by the conclusion of the planning phase of the Project, focusing on such issues as:

- The extent to which staff currently use automation and are ready to work with and accept the level of technical functionality planned for the new DMPS LMS systems.
- The extent to which adequate data input processes and procedures are in place to support the data input requirements for the new system.
- The extent to which current work methods, practices, and procedures, such as the way that teachers record their daily attendance or prepare and enter grades, support the way the new system is designed to work in the classroom and in the administrative setting.
- The extent to which teachers and administrative staff will have to change their current operating practices to best use the new system.
- The extent to which any teacher or staff resistance can be expected as the new system is implemented, and the best ways to address this potential resistance in the training planned for the new system
- The extent to which current hardware may hinder acceptability of the new system

This information will be useful for finalizing the training requirements and curriculum for the new system. It will also be useful for determining the extent to which changes need to be made in existing work methods, practices, and procedures. The DMPS staff assigned to this project will be responsible for completing all change management reviews and interviews. DMPS is responsible for the collection of the information. LMS Vendor will provide Assistance to DMPS in interpreting the results of this review effort.

### 8.4 Continuing Organizational Change Management Perspective

LMS Vendor will consider DMPS organizational change management needs for this project as a formal review element at key decision points in the project. During the Fit/Gap Analysis, LMS Vendor will bring to the attention of the DMPS PMO any requirements issues that the LMS Vendor's {LMS Vendor Product Title} Software may have change management impact. The team will follow this same approach in planning all system training and implementation steps.

## B. Project Phases and Steps

### 9. Project Initiation

#### 9.1 Project Charter and Kick-off

Promptly after the Commencement Date, the Parties shall work together to establish a Project Charter, including, but not limited to, the following activities:

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- Conduct a visioning session to establish project “branding” and logo.
  - Establish the Project Management infrastructure described in Section 4, above.
  - Complete comprehensive, integrated Project Work Plan to manage all activities related to the Project.
  - Refine and confirm Project Charter and other project management documents.
  - Plan and conduct Project Kick-Off.

## 9.2 Services

LMS Vendor shall provide the following Services during the Project Initiation Phase:

- Make the Baseline LMS Vendor’s {LMS Vendor Product Title} Software available to DMPS on the LMS Vendor FTP Site.
- Permit DMPS to conduct Beta Testing activities by individuals designated by DMPS through unrestricted access to the Host Environment for the purpose of examining all completed features of the Baseline Software.

## 9.3 Project Work Plan

No later than 30 days after the Commencement Date, LMS Vendor will develop and recommend an overall Project Work Plan, subject to the approval of DMPS, which approval will not be unreasonably withheld or delayed. The Project Work Plan will include all tasks and activities with appropriate staffing assignments as agreed upon by DMPS and LMS Vendor. The Project Work Plan take into account all the project phases, tasks and activities outlined in LMS Vendor’s RFP response Section 4.3 Project Management Approach Requirements, 4.4 Proposed Technical Environment, 4.5 Proposed Solution Approach, 4.6 Proposed Approach to Enhancements and Customizations, 4.7 Testing Strategy, 4.8 {LMS Vendor Product Title} Data Conversion Strategy, and 4.11 Training Strategy.

## 9.4 Responsibilities of DMPS

DMPS shall provide the following during the Project Initiation Phase:

- Define Key Project Success Factors in collaboration with LMS Vendor
- Respond with comments, approvals, and rejections on a timely basis.
- Review and approve or reject Product Plan and Work Plan on a timely basis

# 10. LMS Vendor {LMS Vendor Product Title} Software Enhancements

## 10.1 Enhancements

LMS Vendor will develop, test, and make available for testing and installation enhancements, improvements, and new modules for the LMS Vendor’s {LMS Vendor Product Title} Software as defined in the Product Plan and the agreed upon Software Enhancements.

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The purpose of LMS Vendor's {LMS Vendor Product Title} Software Enhancements to design, code, and test LMS Vendor's {LMS Vendor Product Title} Software modifications and enhancements as specified in the Product Plan and the RFP. In all cases, as appropriate, every attempt will be made by LMS Vendor to include all enhancements in the national release so as to avoid multiple product paths; and DMPS-unique patches or add-ons.

## **10.2 Specific Features**

The following features were either marked as under development or planned for future release.

To be Determined.

The following items were marked as "no cost" customizations which will be addressed by LMS Vendor in accordance with the Product Plan prior to the "go-live" deployment:

To be Determined.

## **10.3 Proposed Project Timeline**

To be Determined.

## **10.4 Required LMS Report Development List**

To be Determined.

## **10.5 Proposed LMS Implementation Roll-out Schedule**

To be Determined.

**Appendix E:**  
**Scope Management Process**  
**For the**  
**Learning Management System**  
**For the**  
**Des Moines Public Schools**

**Month xx, 2016**

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## Appendix F: Scope Management Process

The purpose of this document is to define a series of processes by which changes may be made to any aspect of the work being performed or Deliverable being delivered by LMS Vendor. ("LMS Vendor") to Des Moines Public Schools ("DMPS") pursuant to that certain Contract dated **Month xx, 2016** by and between LMS Vendor and DMPS ("the Contract"). All capitalized terms used in this document shall have the meanings specified in the Contract, or if no meanings are defined in the Contract, such meanings as may be specified in this document.

### 1. Definitions

- 1.1 **"Change Order"** shall mean a modification or clarification of the Project Documents that is duly adopted by the Parties in accordance with the Scope Management Process.
- 1.2 **"Change Request"** shall mean a request by a Party for a Change Order made in accordance with the Scope Management Process.
- 1.3 **"Emergency Change Order"** shall mean a Change Order resulting from a Change Request which DMPS has designated as having an emergency status.
- 1.4 **"Initial Specification"** shall mean the description or specification of a computer program, process, method, or other item which is called for under the terms of the Statement of Work, but which has not yet been specified in full as of the Execution Date of the Agreement.
- 1.5 **"Priced Resource"** shall mean a component of labor, materials, or other expense in providing a service under the Agreement, including without limitation, hours or other units of work of individuals, units of supplies, license fees, travel and lodging expenses, and other items.
- 1.6 **"Scope Process"** shall mean, as the context requires, either this Scope Management Process document, or the applicable procedures set forth in this Scope Management Process document.
- 1.7 **"Work Order"** shall mean a request for specific words of a relatively routine nature that does not affect any Specification and that is priced on a time and materials basis.

### 2. The Change Request Process

#### 2.1 Change Requests Logging and Numbering

All change requests will be entered into LMS Vendor's customer portion of the website. The LMS Vendor RFE (Request For Enhancement) process will be used.

## **2.2 Initial Specification Process**

Each RFE initiated will contain a thorough description of the business problem to be solved, an impact statement, and the system components, if applicable. Additional documentation shall be provided, such as screen shots, reports samples, etc. if necessary.

## **2.3 RFE from DMPS**

RFEs initiated by DMPS shall have a completed RFE, be in a Tutorial and shall be signed by the designated DMPS Project Manager. Duly executed Change Requests shall be delivered to the LMS Vendor Project Manager.

# **3. Responses to RFEs**

## **3.1 Initial Specifications**

In the event that additional clarifications are necessary to the specifications submitted, LMS Vendor shall assign a representative to meet with the person(s) initiating their request and acquire additional documentation or other forms of clarification necessary to proceed.

## **3.2 Time to Respond**

The Party receiving a Change Request shall respond in writing to such change request with the materials required by this Article within ten (10) Business Days of its receipt of the Change Request.

## **3.3 Contents of LMS Vendor Response**

LMS Vendor's response to a Change Request received from DMPS shall include the following items:

- A. A binding price of the work requested computed in accordance with the procedures set forth in this Scope Process.
- B. A complete Technical Assessment of the Change Request, as described herein.
- C. The amount of time required to complete the work requested.
- D. Any Additional acceptance criteria.

## **3.4 Technical Assessment**

A technical assessment of a Change Request shall contain a technical evaluation of the proposed change and an estimate of the effect of the Change Request on all material aspects of the Project or any Deliverable, including without limitation (a) any anticipated changes in time to complete any and all affected milestones, (b) the estimated effects of the changes on the accuracy, speed, reliability, or other characteristics of any and all functions of LMS Vendor's {LMS Vendor Product Title} software and (c) the risk analysis associated with preceding with this Change Request.

### **3.5 Effect on Acceptance Criteria**

Unless otherwise approved in a Change Order, no acceptance process, test, or criteria and shall be modified as the result of the adoption of a Change Order, except to the narrow and limited extent made necessary by the approved technical changes.

## **4. Pricing of Change Orders**

### **4.1 Fixed Prices on All Change Orders**

Except in the case of Work Orders, all price quotes for Change Orders will be the agreed upon price of the specific RFE.

### **4.2 Relief for Unforeseeable Circumstances**

Notwithstanding the foregoing, in the event that LMS Vendor can demonstrate that its quotation for a Change Order proposed by and subsequently accepted by DMPS was based on information collected by LMS Vendor which was substantially inaccurate and which LMS Vendor should not have known at the time was materially inaccurate, the parties shall negotiate in good faith as to the revision of the quoted price. LMS Vendor understands and acknowledges that this procedure is only to be used under extraordinary circumstances. DMPS is expecting that LMS Vendor will use its best efforts in all cases to collect accurate information upon which to base a response to a Change Request. In no event shall LMS Vendor be entitled to price relief on any Change Request initiated by LMS Vendor.

### **4.3 Work Orders**

DMPS may from time to time request in writing for LMS Vendor to perform services related to the LMS Vendor {LMS Vendor Product Title}, not exceeding the maximum aggregate amount set forth in the Contract, to provide additional minor functionality or to provide services not otherwise required by the Statement of Work. Such requests shall take the form of Work Orders, shall be priced on a Time and Materials basis, not to exceed the amount set forth in the Work Order, and shall be directed to the LMS Vendor Project Manager.

### **4.4 Resource Estimation**

Each price quotation by LMS Vendor in response to a Change Requests initiated by DMPS shall be based on a reasonable estimate of a quantity of each Resource required to be supplied or expended in connection with the Services to be performed in the event that the Change Requests is accepted and implemented. In addition, LMS Vendor shall notify DMPS of Resources that will not be required (or will be replaced) in the event that the Change Request is accepted and implemented. The Resource estimate shall be accompanied by a Gantt Chart or Work Breakdown Schedule identifying when Resources affected by the Change Request are to be deployed, such as to identify increases or decreases in staffing or other components which would affect LMS Vendor's costs.

#### **4.5 Resource Prices**

The price for a District Change Request shall be equal to the sum of the prices for all Resources to be supplied or expended under the Change Request, applying the rates set forth in the Pricing Schedule attached to the Contract, plus the cost of any resources which will not be required or will be replaced as a result of the acceptance and implementation of the Change Request. In the event that a Resource is required that is not listed in the Pricing Schedule, the price shall be quoted prior to the start of the Change Order.

### **5. Request for Enhancements**

#### **5.1 Effect of Response**

LMS Vendor's response to a DMPS RFE (or its own Change Request) shall constitute LMS Vendor's offer to provide for services and Deliverables specified in the Change Request on the terms set forth in such response or LMS Vendor RFE, which offer shall be irrevocable for a period of 90 days from its submission to DMPS, subject to modification only in the event of the discovery of unforeseeable circumstances as described in Section 4.2.

#### **5.2 Acceptance of RFE**

DMPS's PMO team will conduct a review of each LMS Vendor RFE and each response by LMS Vendor to a DMPS Change Request prior to making a recommendation for acceptance or rejection of such response or LMS Vendor RFE. DMPS may accept LMS Vendor's offer made pursuant to Section 5.1 above by delivering an acceptance, executed by DMPS's Executive Sponsor, to LMS Vendor at any time prior to the effective revocation of such offer by LMS Vendor. Upon acceptance by DMPS, the terms and conditions of the RFE shall become a Change Order and be deemed to amend the Statement of Work in all applicable respects, as well as to amend the provisions of any Specification, the Pricing Schedule, or any other applicable Project Documents specified by the parties in the Change Request and/or response thereto.

#### **5.3 Effect of Non-acceptance**

In the event that DMPS either rejects an offer from LMS Vendor pursuant to Section 5.1 above or fails to accept such offer prior to its revocation, all provisions of the Statement of Work, Pricing Schedule and other Project documents shall remain unchanged as if no Change Request had been submitted.

#### **5.4 Form of RFE**

Upon DMPS's acceptance of LMS Vendor response to a RFE (or of a LMS Vendor RFE), LMS Vendor shall promptly prepare a Change Order for the approval by DMPS, which shall contain the following items:

- A. An itemization of all Deliverables under the Change Order
- B. A description of all acceptance criteria for all new Deliverables

- C. The prices and terms and conditions for payment for all Deliverables under the Change Order
- D. A list of all sections of a Project Documents affected by the Change Order
- E. A signature line for approval by appropriate DMPS and LMS Vendor personnel