

PIGGYBACK AGREEMENT FOR INFORMATION TECHNOLOGY EQUIPMENT SOFTWARE AND SERVICES

THIS AGREEMENT is made and entered into this _____ day of _____, 2019,
by and between:

CITY OF POMPANO BEACH, a Florida municipal corporation, having
its principal office at 100 W. Atlantic Blvd., Pompano Beach, Florida
33060, referred to as "City,"

and

e-BUILDER, INC., a Florida corporation, whose mailing address is
13450 W. Sunrise Blvd., Suite 600, Sunrise, Florida 33323, referred to as
"Contractor,"

collectively referred to as the "Parties."

W I T N E S S E T H:

WHEREAS, the City wishes to enter into this Agreement for Information Technology
Equipment, Software and Services ("Agreement") with Contractor; and

WHEREAS, the Parties wish to incorporate the terms and conditions of the solicitation
and contractual arrangement between U.S. General Services Administration (GSA) and Contractor
in accordance with GSA Contract Number GS-35F-408AA, which provides for goods and services
set forth in **Exhibit A**, attached and referenced to as the "GSA Contract"; and

WHEREAS, Section 32.41(C) of the Code of the City of Pompano Beach authorizes the
City to utilize joint bids, cooperative bids, state contract prices and prices obtained by other
governmental agencies through competitive bidding to satisfy the formal bidding requirements;
and

NOW THEREFORE, in consideration of the mutual covenants set forth in this Agreement
and other good and valuable consideration, the receipt and sufficiency of which is acknowledged,
the parties agree as follows:

1. **RECITALS.** The foregoing "WHEREAS" clauses are adopted and incorporated in
this Agreement.

2. **TERM.** The term of this Agreement shall commence on the date last signed by the
parties ("Effective Date") and shall expire at the conclusion of the twelfth month (12 month) unless
sooner terminated. This Agreement may be renewed for an additional one year terms, upon the

mutual consent of both parties and with at least sixty (60) days written notice prior to the date of expiration.

3. **SCOPE OF SERVICES.** Contractor agrees to provide the goods and services requested by City and as further described in **Exhibit B**, the Task Order dated August 5, 2019, as amended, and e-Builder Enterprise Project Management Software Tool Implementation Process & Next Steps, attached and incorporated in this Agreement. The GSA Contract is incorporated into this Agreement for all purposes. In the event of conflict between the GSA Contract and this Agreement, the order of priority shall be: (1) this Agreement; and (2) the GSA Contract. The City reserves the right, however, to terminate this Agreement and bid or negotiate a new Agreement, if the procurement by the City under this Agreement are significantly greater than the estimated amounts in the GSA Contract.

The following provisions are included as supplementary to and amending the GSA Contract:

A. City shall pay Contractor no more than the unit prices set forth in the GSA Contract and in accordance with the provisions of the GSA Contract in the total amount **Not To Exceed \$190,931.03** for Services described in Exhibit B, including travel expenses incurred as a result of providing such Services in the total amount not to exceed \$11,767.00 that is reimbursable to Contractor by City consistent with City's travel policy.

1. Annual Software Subscription (\$56,337.97) is due and payable upon the Effective Date. For any subsequent renewals, Contractor will invoice the Annual Software Subscription on the Effective Date of such renewal and shall be payable within thirty (30) days.

2. One-Time Implementation Services shall be provided as described in Exhibit "B," specifically the "Implementation Processes & Next Steps". Payment for One-Time Implementation Services (\$122,826.06) shall be invoiced and be due and payable, as follows: a) fifty (50%) percent on the Effective Date; b) twenty-five (25%) percent within sixty (60) days of the Effective Date; and c) twenty-five (25%) percent upon conclusion of training on use of the SaaS Service as described in Exhibit B.

B. City of Pompano Beach shall be deemed substituted for GSA, with regard to any provisions of the GSA Contract, including, for example and not limitation, with regard to insurance, indemnification, licensing, termination, default, and ownership of documents, including the additional provisions below. All recitals, representations and warranties of Contractor made in the GSA Contract are restated as if fully set forth, made for the benefit of City, and incorporated in this Agreement.

C. During a renewal period, the license fee for the proprietary software and other related costs shall continue to be consistent with the GSA Contract.

D. The City acknowledges that *e-Builder Enterprise* software may be modified or upgraded from time to time and that the Services and Customer Support described in Exhibit "B" shall only include the use of the most recent version of *e-Builder Enterprise*. The City's right to use the Services described in Exhibit B, without limitation, is limited to the restrictions contained in this Agreement including those related to the number of users, projects, annual capital program expenditures and period of use. The City acknowledges that title to and copyright in the software applications supplied by *e-Builder* are reserved by Contractor. City acquires no right in any software, copyrights, patents or any other intellectual property belonging to or licensed by *e-Builder*, other than the specific limited rights to the Services *e-Builder* is and shall remain the sole owner of all copyrights, trademarks, patents and other proprietary rights in and to all aspects of the Services including, without limitation, all software, code and designs used in providing the Services.

E. In the event that the GSA Contract is terminated for any reason, including GSA's failure to exercise any or all options granted, the City shall have the right to continue this Contract in full force and effect, despite such termination; and to exercise any and all options which GSA fails to exercise.

F. Either Party may terminate this Agreement for cause, upon written notice to the breaching party, for the following reasons: (1) a payment default that is not cured within sixty (60) days of the invoice payment date; or (2) a material, non-monetary default that is not cured within sixty (60) days following receipt of written notice of such default. If the City terminates this Agreement for cause, the City shall be entitled to a refund of any unused portion of the annual software subscription fee and fees for Professional Services and Implementation Services. In such instance, the City, after termination for cause, shall have no further obligations under this Agreement. If, however, the City terminates this Agreement for convenience, all fees paid and all previously paid subscription fees for the current contract year shall be non-refundable and forfeited. Furthermore, all fees for Professional Services and Implementation Services must be paid in full before the termination becomes effective. In all instances, neither party is prevented from pursuing any and all available remedies at law.

G. Public Records.

1. The City of Pompano Beach is a public agency subject to Chapter 119, Florida Statutes. The Contractor shall comply with Florida's Public Records Law, as amended. Specifically, the Contractor shall:

a) Keep and maintain public records required by the City in order to perform the service.

b) Upon request from the City's custodian of public records, provide the City with a copy of requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in Chapter 119, Florida Statutes or as otherwise provided by law.

c) Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of the contract term and following completion of the contract if the Contractor does not transfer the records to the City.

d) Upon completion of the contract, transfer, at no cost to the City, all public records in possession of the Contractor, or keep and maintain public records required by the City to perform the service. If the Contractor transfers all public records to the City upon completion of the contract, the Contractor shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If the Contractor keeps and maintains public records upon completion of the contract, the Contractor shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the City, upon request from the City's custodian of public records in a format that is compatible with the information technology systems of the City.

2. Failure of the Contractor to provide the above described public records to the City within a reasonable time may subject Contractor to penalties under 119.10, Florida Statutes, as amended.

PUBLIC RECORDS CUSTODIAN

IF THE CONTRACTOR HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO THE CONTRACTOR'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS CONTRACT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT:

CITY CLERK

100 W. Atlantic Blvd., Suite 253

Pompano Beach, Florida 33060

(954) 786-4611

RecordsCustodian@copbfl.com

H. **ASSIGNMENT.** Neither party may assign its rights or obligations under this Agreement without the consent of the other.

I. **NOTICE.** Notice shall be provided in writing by certified mail return receipt requested, or customarily used overnight transmission with proof of delivery, to the following parties, with mandatory copies, as provided below:

For City: City Manager
City of Pompano Beach
100 West Atlantic Avenue
Pompano Beach, Florida 33060

For Contractor: David Tabb, Senior Contracts Attorney
e-Builder, Inc.
13450 W. Sunrise Blvd., Suite 600
Sunrise, Florida 33323

J. Warranties; Limitation of Liability; Indemnification.

1. Contractor represents, warrants and covenants the following: a) Contractor currently possesses all necessary licenses, permits, insurance and approvals required validly to execute, deliver and perform its duties under this Agreement and is qualified to do business in all jurisdictions where such qualification is required for Contractor's performance of its duties under this Agreement, b) to the best of its knowledge and ability, Contractor will comply with, and will use its best efforts to cause each subcontractor it may engage to comply with all applicable federal and state laws and regulations in performing its and their respective responsibilities under this Agreement and any subcontracts, and c) No information provided to Contractor or disseminated through its software or systems shall infringe on or violate any trademark, copyright, trade secret, right of publicity or privacy (including but not limited to defamation), patent or other proprietary right of any third party.

2. **CONTRACTOR DOES NOT AND CANNOT CONTROL THE FLOW OF DATA TO OR FROM E-BUILDER'S NETWORK AND OTHER PORTIONS OF THE INTERNET. SUCH FLOW DEPENDS IN LARGE PART ON THE PERFORMANCE OF INTERNET SERVICES PROVIDED OR CONTROLLED BY THIRD PARTIES. AT TIMES, ACTIONS OR INACTIONS OF SUCH THIRD PARTIES CAN IMPAIR OR DISRUPT CITY'S CONNECTIONS TO THE INTERNET (OR RELATED PORTIONS). ALTHOUGH CONTRACTOR WILL USE COMMERCIALY REASONABLE EFFORTS TO TAKE ALL ACTIONS IT DEEMS APPROPRIATE TO REMEDY AND AVOID SUCH EVENTS, CONTRACTOR CANNOT GUARANTEE THAT SUCH EVENTS WILL NOT OCCUR. ACCORDINGLY, CONTRACTOR DISCLAIMS ANY AND ALL LIABILITY RESULTING FROM OR RELATED TO SUCH EVENTS THAT CONSTITUTE FORCE MAJEURE. NOTWITHSTANDING SUCH EVENTS, THE CONTRACTOR SHALL PROVIDE THE LEVEL OF SERVICE GUARANTEED IN EXHIBIT C, SERVICE LEVEL AGREEMENT.**

3. **FOR ANY ONE OR MORE BREACH OF THIS AGREEMENT OR DEFAULT, THE ENTIRE LIABILITY OF THE PARTY IN BREACH OR DEFAULT, AND THE EXCLUSIVE REMEDY OF THE OTHER PARTY, SHALL BE PAYMENT OF THE ACTUAL DAMAGES PROXIMATELY CAUSED BY SUCH BREACH OR DEFAULT, WHICH SHALL NOT EXCEED THE SUM OF ONE MONTH'S**

FEES PAID BY CITY UNDER THIS AGREEMENT. IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL, CONSEQUENTIAL OR EXEMPLARY DAMAGES, LOSSES, OR EXPENSES, INCLUDING, WITHOUT LIMITATION, LOST PROFITS, FAILURE TO REALIZE EXPECTED SAVINGS OR ANY OTHER COMMERCIAL OR ECONOMIC LOSS OF ANY KIND ARISING OUT OF OR RELATED TO THIS AGREEMENT. THESE LIMITATIONS ON THE LIABILITY OF EITHER PARTY SHALL APPLY TO ANY AND ALL CAUSES OF ACTION THAT EITHER PARTY MAY HAVE AGAINST THE OTHER, IRRESPECTIVE OF THE NATURE OF THE CAUSE OF ACTION UNDERLYING A CLAIM, DEMAND OR ACTION, INCLUDING, WITHOUT LIMITATION, WHETHER IT SOUNDS IN CONTRACT OR TORT, EXCEPT IN CASES WHERE CONTRACTOR'S EMPLOYEES, AGENTS OR SUBCONTRACTORS ARE ON CITY'S PROPERTY PERFORMING SERVICES. This clause shall not impair the City's right to recover for fraud or crimes arising out of or related to this Contract under any state or federal fraud statute, including the False Claims Act, 31 U.S.C. §§ 3729-3733. Furthermore, this clause shall not impair nor prejudice the City's right to express remedies provided in the GSA Schedule 70 contract (e.g., clause 552.238-75 – Price Reductions, clause 52.212-4(h) – Patent Indemnification, and GSAR 552.215-72 – Price Adjustment – Failure to Provide Accurate Information).

4. Nothing contained in this paragraph or elsewhere in this Agreement is in any way intended to be a waiver of the limitation placed upon City's liability as set forth in Chapter 768, Florida Statutes. Additionally, no claim or award against the City shall include attorney's fees, investigative costs or pre-judgment interest.

5. Contractor agrees to indemnify and hold harmless the City, its elected officials, officers, employees or agents from and against any claims, suits, actions, damages, causes of action or judgments made upon the City by any third party, arising out of information or software or Services provided by Contractor pursuant to this Agreement; and from and against all costs, attorney's fees, expenses and other liabilities incurred in the defense of any such claim, suit or action, and any investigation work. The Parties agree that one percent (1%) of the total compensation paid to Contractor for Services under this Agreement shall constitute specific consideration to Contractor for the indemnification to be provided under this Agreement.

6. **BY ENTERING INTO THIS AGREEMENT, THE PARTIES EXPRESSLY WAIVE ANY RIGHTS EITHER PARTY MAY HAVE TO A TRIAL BY JURY OF ANY CIVIL LITIGATION RELATED TO THIS AGREEMENT.**

K. **AUDIT RIGHTS.** Contractor will have the right, during normal business hours and upon at least five (5) days prior written notice, to have an independent audit firm, at Contractor's sole expense, audit City's records relating to City's activities pursuant to this Agreement, unless in contravention of Florida's public records law, in order to verify that City has complied with the terms of this Agreement. Such audits will be conducted no more than once in

any period of twelve (12) consecutive months, and Contractor and its auditing firm will adhere to any security measures or other actions or procedures required by Florida law.

L. CONFIDENTIALITY. The Parties agree that, except to the extent necessary to implement the terms and conditions of this Agreement, when authorized in writing by the other Party or when otherwise required by law or where such information is a public records and accessible pursuant to Florida law: (1) each Party will preserve and protect the confidentiality of the other Party's Confidential Information; (2) neither Party will disclose to any third party the existence, source, content or substance of the other Party's Confidential Information, or make copies of such Confidential Information except as required by this Agreement; (3) neither Party will deliver the other Party's Confidential Information to any third party, or permit such information to be removed from the premises of the Party receiving such information; and (4) each Party shall advise any of its employees or agents working on or having access to the other Party's Confidential Information of the confidentiality of such information.

M. ENTIRE AGREEMENT. This Agreement sets forth the entire agreement between Contractor and City with respect to the subject matter of this Agreement. This Agreement supersedes all prior and contemporaneous negotiations, understandings and agreements, written or oral, between the parties. This Agreement may not be modified except by the parties' mutual agreement set forth in writing and signed by the parties. Any modifications to the GSA Contract shall be applicable to the City only if so agreed to in writing by the City. In the event that such changes or modification adversely impacts the City, the City may terminate this Agreement.

N. SEVERABILITY. If any provision of this Agreement is held to be illegal, invalid or unenforceable under any present or future law, and if the rights or obligations of any Party under this Agreement will not be materially and adversely affected thereby, such provision will be fully severable, this Agreement will be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part hereof, the remaining provisions of this Agreement will remain in full force and effect and will not be affected by the illegal, invalid or unenforceable provision or by its severance here from and in lieu of such illegal, invalid or unenforceable provision, City and Contractor shall negotiate in good faith to restore insofar as practicable the benefits to each party that were affected by such ruling and to include as a part of this Agreement a legal, valid and enforceable provision as similar in terms to such illegal, invalid or unenforceable provision as may be possible.

O. FORCE MAJEURE

1. Neither party shall be obligated to perform any duty, requirement or obligation under this Agreement if such performance is prevented by fire, hurricane, earthquake, explosion, war, civil disorder, sabotage, accident, flood, acts of God or by any reason of any other matter or condition beyond the control of either party which cannot be overcome by reasonable diligence and without unusual expense ("Force Majeure"). In no event shall economic hardship or lack of funds be considered an event of force majeure.

2. If either Party is unable to perform, or are delayed in their performance of any obligations under this Agreement because of any event of force majeure, their inability to perform or delay shall be excused until such time as may be reasonably necessary for either party to correct the adverse effect of such event of force majeure.

3. In order to be entitled to the benefit of this Paragraph, a party claiming an event of force majeure shall be required to give prompt written notice to the other party specifying in detail the event of force majeure and also diligently proceed to correct the adverse effect of any force majeure. The parties agree that, as to this Article, time is of the essence.

P. MISCELLANEOUS

1. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. A photocopy, email or facsimile copy of this Agreement and any signatory to this Agreement shall be considered for all purposes as original.

2. A Party's failure to insist upon strict compliance with any terms, covenants or conditions of this Agreement shall not be deemed a waiver of such, nor shall any waiver or relinquishment of such right or power at any time be taken to be a waiver of any other breach.

3. The Parties may request changes to modify certain provisions of this Agreement; however, unless otherwise provided, such changes must be contained in a written amendment executed by both parties with the same formality of this Agreement.

4. Regardless of which party or party's counsel prepared the original draft and subsequent revisions of this Agreement, both City and Contractor and their respective counsel have had equal opportunity to contribute to and have contributed to its contents, and this Agreement shall not be deemed to be the product of, and therefore construed against, either party.

5. It is further agreed the omission of a term or provision contained in an earlier draft of this Agreement shall have no evidentiary significance regarding the contractual intent of the parties.

6. In the event of litigation between the parties, the prevailing party shall be entitled to recover all costs of collection, including a reasonable attorney's fees and court costs, at trial or on appeal. The provisions of this paragraph shall survive termination of this Agreement.

7. Authority. Each person signing this Agreement on behalf of either party individually warrants that he or she has full legal power to execute this Agreement on behalf of the party for whom he or she is signing, and to bind and obligate such party with respect to all provisions contained in this Agreement.

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IN WITNESS WHEREOF, the parties have accepted, made and executed this Agreement upon the terms and conditions above stated on the day and year entered below.

"CITY":

Witnesses:

CITY OF POMPAÑO BEACH

By: _____
Rex Hardin, Mayor

By: _____
Gregory P. Harrison, City Manager

Attest:

Asceleta Hammond, City Clerk

(SEAL)

Approved As To Form:

Mark E. Berman, City Attorney

STATE OF FLORIDA
COUNTY OF BROWARD

The foregoing instruments were acknowledged before me this _____ day of _____, 2019, by **REX HARDIN** as Mayor, **GREGORY P. HARRISON** as City Manager and **ASCELETA HAMMOND** as City Clerk of the City of Pompano Beach, Florida, a municipal corporation, on behalf of the municipal corporation, who are personally known to me.

NOTARY'S SEAL:

NOTARY PUBLIC, STATE OF FLORIDA

(Name of Acknowledger Typed, Printed or Stamped)

Commission Number

"CONTRACTOR":

Witnesses:

e-BUILDER, INC., a Florida corporation

[Signature]

Daniel Tabb

Print Name

[Signature]

Sandra Sierra

Print Name

By:

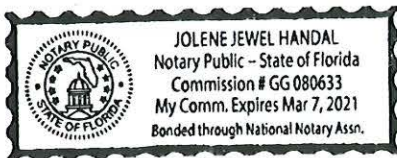
[Signature]
Jeanne Prayther, CFO

(SEAL)

STATE OF FLORIDA
COUNTY OF BROWARD

The foregoing instrument was acknowledged before me this 31st day of October, 2019, by Jeanne Prayther, as CFO of e-Builder, Inc., a Florida corporation, on behalf of the corporation. He is personally known to me or who has produced _____ (type of identification) as identification.

NOTARY'S SEAL:



[Signature]
NOTARY PUBLIC, STATE OF FLORIDA

Jolene Jewel Handal
(Name of Acknowledger Typed, Printed or Stamped)

GG 080633
Commission Number

JES/jrm
10/29/19
L:agr/engr/2019-1287