

**Council Meeting: March 18, 2008****SUBJECT: Award of Contract for the Maintenance of the City's Telephone System (F0702-70)****REPORT IN BRIEF**

Approval is requested for the award of a three-year contract in the amount of \$244,841 to Avaya Communication of Highlands Ranch, Colorado, for the maintenance of the City's telephone system, including voice mail, for the Information Technology Department.

BACKGROUND

The City's telephone system consists of the Lucent Technologies DEFINITY Enterprise Communications Server (ECS), the INTUITY voice mail system and miscellaneous telephone sets, small recorders and other desktop accessories. In February 2005, Council awarded the current maintenance agreement to Avaya for a three-year period (RTC 05-052). This contract expired on February 25, 2008.

DISCUSSION

The requested contract will cover the maintenance of the City's telephone equipment. Service on the telephone switch and sets will be available 24 hours per day, seven days per week.

Section 2.08.070 (b) of the Sunnyvale Municipal Code exempts from competitive bidding those situations where the solicitation of bids would be impractical, unavailing or impossible. Soliciting bids for the maintenance of the Lucent Technologies equipment would be impossible since the DEFINITY and INTUITY systems are proprietary. Boards and cards are available only from Avaya or an Avaya authorized business partner. Software upgrades and enhancements are available only from the factory through Avaya Communication.

FISCAL IMPACT

Cost to the City for the three-year contract will not exceed \$244,841. This represents an increase of \$5,323 over the three-year contract that expired at the end of February. Funds are available in Information Technology operating budget for Activities 773300 – Maintain Telephone and Voicemail Systems and 773330 – Maintain Sets, Headsets and Other.

PUBLIC CONTACT

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, in the Council Chambers lobby, in the Office of the City Clerk, at the Library, Senior Center, Community Center and Department of Public Safety; posting the agenda and report on the City's Web site; and making the report available at the Library and the Office of the City Clerk.

RECOMMENDATION

It is recommended that Council award a three-year contract in an amount not to exceed \$244,841 to Avaya Communication for the maintenance of the City's telephone system, including voice mail.

Reviewed by:

Mary J. Bradley, Director, Finance
Prepared by: Dreama Howard, Senior Buyer

Reviewed by:

Cuong Nguyen
Director, Information Technology

Approved by:

Amy Chan
City Manager

Attachment

- A. Avaya Customer Agreement



STATE & LOCAL GOVERNMENT CUSTOMER AGREEMENT
GENERAL TERMS

This Customer Agreement (the “Agreement”) governs the undersigned Customer’s purchase and/or license of hardware, software and associated Documentation (“Products”) and related services as described in the relevant Attachment(s) (“Services”) from Avaya Inc., with an address of 211 Mount Airy Road, Basking Ridge, NJ 07920 (“Avaya”). The “Effective Date” of the Agreement is the date Avaya countersigns it. For purposes of this Agreement, the Customer is an agency or department of a State or Municipal Government, or a publicly funded educational institution. This Agreement covers Products and Services for use only in the United States. If applicable, the Agreement also consists of one or more of the following Attachments:

- Attachment 1 – Supply of Generally Available Products
- Attachment 2 – Implementation Services Terms
- Attachment 3 – Maintenance/Managed Services Terms

1. ORDERS

Orders are subject to acceptance by Avaya. Avaya may accept an order by shipping Products or commencing to perform Services. Accepted orders will be deemed to incorporate and be subject to the Agreement. Orders will be governed by the terms of the Agreement even when they lack an express reference to the Agreement. All other terms and conditions contained in any Customer purchase order or other document not expressly referenced in the Agreement will have no effect.

2. INVOICING AND PAYMENT

2.1 Invoicing and Payment. Avaya will invoice customer product and service fees as provided in the applicable attachment. Unless otherwise requested by customer in writing, Avaya will invoice to and process payments from Customer via Avaya’s electronic bill application. Unless otherwise governed by State law, payment of undisputed invoices is due within 30 days from the date of Avaya’s invoice. Customer will pay all bank charges, taxes, duties, levies and other costs and commissions associated with other methods of invoicing and payment. Avaya may suspend licenses and performance of orders for which payment is overdue until the overdue amount is paid in full.

2.2 Taxes. Unless Customer provides Avaya with a tax exemption certificate, Customer is solely responsible for paying all legally required taxes, including without limitation any sales, excise or other taxes and fees which may be levied upon the sale, transfer of ownership, license, installation or use of the Products, except for any income tax assessed upon Avaya. The preceding sentence shall be superseded to the extent the payment of taxes is governed by conflicting State law.

3. CUSTOMER RESPONSIBILITIES

Customer will cooperate with Avaya as reasonably necessary for Avaya’s delivery of Products and performance of Services in a timely manner. Customer will provide Avaya with interface and other information regarding access to third party products in Customer’s network and necessary third party consents and licenses to enable Avaya’s performance under the Agreement. Customer is responsible for ensuring that its networks and systems are adequately secured against unauthorized intrusion or attack and regularly backing up its data and files in accordance with good computing practices. If Customer fails to meet its cooperation obligations under this Section or as otherwise provided in the Agreement, Avaya may delay or suspend its delivery of Products or performance of Services relating to Customer’s failure.

4. CONFIDENTIAL INFORMATION

4.1 “Confidential Information” means either party’s business and/or technical information, pricing, discounts and other information or data, regardless of whether in tangible or other form if marked or otherwise expressly identified in writing as confidential. Information communicated verbally will qualify as Confidential Information if designated as confidential or proprietary at the time of disclosure and summarized in writing within 30 days after disclosure. Confidential Information excludes information that: (i) is publicly available other than by an act or omission of the receiving party; (ii) subsequent to its disclosure was lawfully received from a third party having the right to disseminate the information without restriction on its dissemination or disclosure; (iii) was known by the receiving party prior to its receipt and was not received from a third party in breach of that third party’s confidentiality obligations; (iv) was independently developed by the receiving party without use of the disclosing party’s Confidential Information; or (v) is required to be disclosed by court order or other lawful government action, but only to the extent so ordered, provided the receiving party provides prompt written notification to the disclosing party of the pending disclosure so the disclosing party may attempt to obtain a protective order. In the event of a potential disclosure in the case of subsection (v) above, the receiving party will provide reasonable assistance to the disclosing party should the disclosing party attempt to obtain a protective order.

4.2 Obligations. To the extent permitted by law, each party will protect the secrecy of all Confidential Information received from the other party with the same degree of care as it uses to protect its own Confidential Information, but in no event with less than a reasonable degree of care. Neither party will use or disclose the other party’s Confidential Information except as permitted in this Section or for the purpose of performing obligations under the Agreement. The confidentiality obligations of each party will survive expiration or termination of the Agreement. Upon termination of the Agreement, each party will cease all use of the other party’s Confidential Information and will promptly return, or at the other party’s request destroy, all Confidential Information, including any copies, in tangible form in that party’s possession or under its control,

including Confidential Information stored on any medium. Upon request, a party will certify in writing its compliance with this Section.

5. INTELLECTUAL PROPERTY RIGHTS

5.1 Customer Owns Customer IP. Customer reserves all rights, including, but not limited to, ownership, title, intellectual property rights and all other rights and interest in and to any computer programs (in object or source code format or any other form), know-how, inventions, processes, data bases, documentation, training materials and any other intellectual property and any tangible embodiments of it (collectively “Intellectual Property” or “IP”) that Customer makes available to Avaya (collectively “Customer IP”).

5.2 Avaya Owns Avaya IP. Avaya reserves all rights, including, but not limited to, ownership, title, and all other rights and interest in, and to, any Intellectual Property that Avaya develops, creates, or otherwise acquires independently of this Agreement, and any Intellectual Property that Avaya develops, creates, or otherwise acquires (excluding Customer IP) while performing Services under the Agreement.

5.3 Customer Ownership of Delivered Software. Upon the effective date of this Agreement, neither party contemplates that the Customer will order customized deliverables from Avaya that will result in the transfer of any ownership rights of software or other proprietary data from Avaya to the Customer. Prior to any obligation of Avaya to transfer such rights, a written amendment to this Agreement shall be executed by authorized representatives of both parties expressly identifying the subject intellectual property and identifying the ownership rights that will be transferred.

6. SOFTWARE LICENSE TERMS AND RESTRICTIONS

6.1 License. Avaya grants Customer a non-sublicensable, non-exclusive, non-transferable, perpetual license to use software and Documentation provided under the Agreement and for which applicable fees have been paid at the indicated capacity and feature levels and within the scope of the applicable license types described below for Customer’s internal business purposes and at locations in the United States. Except for the limited license rights expressly granted in the Agreement, Avaya reserves all rights, title and interest in and to the software and Documentation and any modifications to it. “Documentation” means Avaya information manuals containing operating instructions and performance specifications that Avaya generally makes available to users of its products and delivers to Customer with the Products. Documentation does not include marketing materials.

6.2 License Restrictions. To the extent permissible under applicable law, Customer agrees not to: (i) decompile, disassemble, or reverse engineer the software; (ii) alter, modify or create any derivative works based on the software or Documentation; (iii) merge the software with any other software other than as expressly set forth in the Documentation; (iv) use, copy, sell, sublicense, lease, rent, loan, assign, convey or otherwise transfer the software or Documentation except as expressly authorized by the Agreement; (v) distribute, disclose or allow use of the software or Documentation, in any format, through any timesharing service, service bureau, network or by any other means; or (vi) permit or encourage any third party to do so.

6.3 Backup Copies. Customer may create a reasonable number of archival and backup copies of the software and Documentation, provided all proprietary rights, notices, names and logos are duplicated on all copies.

6.4 Termination of License. Avaya may, with immediate effect, terminate the software licenses granted in the Agreement and exercise all available rights and remedies if, within ten business days of Customer’s receipt of a reasonably detailed written notice, Customer has not cured all breaches of license limitations or restrictions.

6.5 License Compliance. At Avaya’s request and upon reasonable prior written notice, Avaya will have the right to inspect Customer’s compliance with these Software License Terms.

7. WARRANTIES AND LIMITATIONS

Specific warranties for Products and Services are provided in the Attachments. THESE WARRANTIES ARE LIMITED AS PROVIDED IN EACH ATTACHMENT AND GENERALLY AS PROVIDED BELOW.

7.1 Exclusions and Disclaimers. The warranties do not extend to any damages, malfunctions, or non-conformities caused by: (i) Customer’s use of Products in violation of the license granted under the Agreement or in a manner inconsistent with the Documentation; (ii) use of non-Avaya furnished equipment, software, or facilities with Products (except to the extent provided in the Documentation); (iii) Customer’s failure to follow Avaya’s installation, operation or maintenance instructions; (iv) Customer’s failure to permit Avaya timely access, remote or otherwise, to Products; (v) failure to implement all new updates to software provided under the Agreement; (vi) Products that have had their original manufacturer’s serial numbers altered, defaced or deleted; or (vii) Products that have been serviced or modified other than by Avaya or a third party specifically authorized by Avaya to provide the service or modification. EXCEPT AS REFERENCED AND LIMITED IN THIS SECTION, NEITHER AVAYA NOR ITS LICENSORS OR SUPPLIERS MAKES ANY EXPRESS REPRESENTATIONS OR WARRANTIES WITH REGARD TO ANY PRODUCTS OR SERVICES OR OTHERWISE RELATED TO THE AGREEMENT. AVAYA DOES NOT WARRANT UNINTERRUPTED OR ERROR FREE OPERATION OF PRODUCTS OR THAT THE PRODUCTS AND SERVICES WILL PREVENT TOLL FRAUD. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, AVAYA DISCLAIMS ALL IMPLIED OR STATUTORY WARRANTIES, INCLUDING, BUT NOT LIMITED TO,

ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. THE WARRANTY REMEDIES EXPRESSLY PROVIDED IN THE AGREEMENT WILL BE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES.

8. INFRINGEMENT DEFENSE AND INDEMNIFICATION

8.1 Defense and Indemnity. Avaya will defend Customer, at Avaya's expense, against any Claim, as defined below, and will indemnify Customer as provided in this Section for any judgments, settlements and court awarded attorney's fees resulting from a Claim. Avaya's obligations under this Section are conditioned on the following: (i) Customer promptly notifies Avaya of the Claim in writing upon Customer being made aware of the Claim; (ii) Customer gives Avaya sole authority and control of the defense and (if applicable) settlement of the Claim, provided that Customer's legal counsel may participate in such defense and settlement, at Customer's expense; and (iii) Customer provides all information and assistance reasonably requested by Avaya to handle the defense or settlement of the Claim. For purposes of this Section, "Claim" means any cause of action in a third party action, suit or proceeding against Customer based upon an allegation that a Product as of its delivery date under the Agreement infringes a valid U.S. patent or copyright.

8.2 Remedial Measures. If a Product becomes, or Avaya reasonably believes use of a Product may become, the subject of a Claim, Avaya may, at its own expense and option: (i) procure for Customer the right to continue use of the Product; (ii) replace or modify the Product; or to the extent that neither (i) nor (ii) are deemed commercially practicable, (iii) refund to Customer a pro-rated portion of the applicable fees for the Product based on a linear depreciation monthly over a five year useful life, in which case Customer will cease all use of the Product and return it to Avaya.

8.3 Exceptions. Avaya will have no defense or indemnity obligation for any Claim based on: (i) a Product that has been modified by someone other than Avaya; (ii) a Product that has been modified by Avaya in accordance with Customer-provided specifications or instructions; (iii) use or combination of a Product with Third Party Products; or (iv) Customer products or third party products. "Third Party Products" means any products manufactured by a party other than Avaya, and may include, without limitation, products ordered by Customer from third parties pursuant to Avaya's recommendations. However, components of Avaya-branded Products are not third party products if they are both: (i) embedded in Products (i.e., not recognizable as standalone items); and (ii) are not identified as separate items on Avaya's price list, quotes, order specifications forms or Documentation.

8.4 Sole Remedy. THE FOREGOING STATES AVAYA'S ENTIRE LIABILITY, AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDY, WITH RESPECT TO ANY INFRINGEMENT OR MISAPPROPRIATION OF ANY INTELLECTUAL PROPERTY RIGHTS OF ANY OTHER PARTY.

8.5 General Indemnification. Avaya shall indemnify and hold harmless Customer, Customer's agents, servants and employees against all claims, demands and judgments made or recovered against them by third parties for damages to real or tangible personal property or for bodily injury or death to any person arising out of, or in connection with this Agreement ("Claim"), to the extent such damage, injury or death was proximately caused by the negligence of Avaya, any subcontractor of Avaya or their employees, servants or agents while performing under this Agreement; provided, however, that such indemnification and save harmless obligation shall apply only to direct damages which are proven and shall not apply to the extent such damages, injury or death was caused by Customer's act or omission or the act or omission of Customer's agents, servants, employees or others; and, provided, further, that such indemnification and save harmless obligation is expressly conditioned on the following: (a) that Avaya shall be notified in writing promptly of any such Claim, (b) that Avaya shall have sole control of the defense of any action or such Claim and of all negotiations for its settlement or compromise provided that Customer's legal counsel may participate in such defense and settlement, at Customer's expense; and that (c) Customer shall cooperate with Avaya in a reasonable way to facilitate the settlement or defense of such Claim.

9. LIMITATION OF LIABILITY

IN NO EVENT WILL EITHER PARTY OR ITS RESPECTIVE LICENSORS OR SUPPLIERS HAVE ANY LIABILITY FOR ANY INCIDENTAL, SPECIAL, STATUTORY, INDIRECT OR CONSEQUENTIAL DAMAGES, LOSS OF PROFITS OR REVENUE, LOSS OR CORRUPTION OF DATA, OR TOLL FRAUD. THE TOTAL AGGREGATE LIABILITY OF EITHER PARTY FOR ALL CLAIMS ARISING OUT OF OR IN CONNECTION WITH THE AGREEMENT WILL NOT EXCEED AN AMOUNT EQUAL TO TWICE THE TOTAL CONTRACT PRICE (OR IN THE ABSENCE OF A CONTRACT PRICE, TWICE THE AMOUNT OF ALL FEES PAID OR PAYABLE UNDER THE AGREEMENT IN THE 24 MONTH PERIOD IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO THE CLAIM), UP TO \$5,000,000. THE LIMITATIONS OF LIABILITY IN THIS SECTION WILL APPLY TO ANY DAMAGES, HOWEVER CAUSED, AND ON ANY THEORY OF LIABILITY, WHETHER FOR BREACH OF CONTRACT, TORT (INCLUDING, BUT NOT LIMITED TO, NEGLIGENCE), OR OTHERWISE, AND REGARDLESS OF WHETHER THE LIMITED REMEDIES AVAILABLE TO THE PARTIES FAIL OF THEIR ESSENTIAL PURPOSE. HOWEVER, THEY WILL NOT APPLY IN CASES OF WILLFUL MISCONDUCT, PERSONAL INJURY, OR BREACHES OF AVAYA'S LICENSE RESTRICTIONS. THE LIMITATIONS OF LIABILITY IN THIS SECTION ALSO WILL APPLY TO ANY LIABILITY OF DIRECTORS, OFFICERS, EMPLOYEES, AGENTS AND SUPPLIERS. THE LIMITATIONS OF AGGREGATE LIABILITY WILL NOT APPLY TO CONTRACTUAL INDEMNIFICATION OBLIGATIONS PROVIDED IN THE AGREEMENT.

10. GOVERNING LAW AND DISPUTE RESOLUTION

10.1 Governing Law. The Agreement and any disputes arising out of or relating to the Agreement ("Disputes") will be governed by the laws of the state where the Customer resides, excluding conflict of law principles.

11. TERM AND TERMINATION

11.1 General Terms. The Agreement will be effective and continue in effect for three years from the Effective Date unless terminated earlier in accordance with this Section. Either party may terminate the Agreement by written notice to the other party effective immediately upon receipt, if the other party fails to cure any material breach of the Agreement within a 30 day period after having received a written notice from the non-breaching party detailing the breach and requesting the breach be cured. Customer may terminate the Agreement for convenience upon 30 days written notice and subject to termination or cancellation fees, if any. If Customer terminates this Agreement for convenience, Avaya shall submit to Customer a termination settlement claim containing any charges up to the date of termination and any applicable termination fees, in the form of an invoice, within ninety (90) days from the effective date of the termination. Notwithstanding the foregoing, except for Customer's termination for non-appropriation of funds as set forth in subsection 11.2 below, termination of Maintenance Services shall be as set forth in Attachment 3. The provisions concerning confidentiality, license grant to Customer, and indemnity (as well as any other terms which, by their nature, are intended to survive termination or expiration) of these General Terms will survive any termination or expiration of the Agreement and any order. Except as expressly provided otherwise in the Agreement and termination for uncured breach, any termination of the Agreement will not affect any rights or obligations of the parties under any order accepted before the termination of the Agreement became effective.

11.2 Availability of Funds. Customer warrants that it has funds available to pay all amounts due hereunder through the end of its current appropriation period and warrants further that it will request funds to make payments in each appropriation period from now until the end of the Agreement term. In the event that: (i) funds are not appropriated and are not otherwise available to Customer for any fiscal period following its current fiscal year ("subsequent fiscal period") for the acquisition of Services and functions which are the same as or similar to those for which the Products provided or installed under the Agreement was acquired, (ii) such non-appropriation has not resulted from Customer's act or failure to act, and (iii) Customer has exhausted all funds legally available for payment under the Agreement and no other legal procedure shall exist whereby payment thereunder can be made to Avaya, then Customer may terminate this Agreement as of the last day for which funds were appropriated or otherwise made available by giving sixty (60) days prior written notice of termination to Avaya. Notwithstanding the preceding paragraph, Customer shall remain responsible for payment to Avaya for all work completed and accepted, as well as for all Products delivered and accepted.

12. AUDIT

Customer may inspect Avaya's records and work-papers directly related to this Agreement to determine the validity of billings for work performed. Such inspections shall be conducted upon reasonable notice and during normal business hours. Adequate records to support these billings shall be maintained. Documentation must be retained for review for at least two (2) years subsequent to final payment.

13. MISCELLANEOUS

The parties will observe all applicable laws and regulations, including export and re-export laws and regulations, when using the Products and work product of any Services. Upon submission and approval of any statutorily required novation or assignment requests, Avaya may assign the Agreement and any order under the Agreement to any of its affiliated entities or to any entity to which Avaya may sell, transfer, convey, assign or lease all or substantially all of the assets or properties used in connection with its performance under the Agreement. Any other assignment of the Agreement or any rights or obligations under the Agreement without the express written consent of the other party will be invalid. Avaya may subcontract any or all of its obligations under the Agreement, but will retain responsibility for the work. Neither party will be liable for any delay or failure in performance to the extent the delay or failure is caused by events beyond the party's reasonable control, including without limitation, fire, flood, Act of God, explosion, war or the engagement of hostilities, strike, embargo, labor dispute, government requirement, civil disturbances, civil or military authority, and inability to secure materials or transportation facilities ("Force Majeure"). The Agreement constitutes the entire understanding of the parties with respect to the subject matter of the Agreement and will supersede all previous and contemporaneous communications, representations or understandings, either oral or written, between the parties relating to that subject matter and will not be contradicted or supplemented by any prior course of dealing between the parties. If any provision of the Agreement is determined to be unenforceable or invalid by court decision, the Agreement will not be rendered unenforceable or invalid as a whole, and the provision will be changed and interpreted so as to best accomplish the objectives of the original provision within the limits of applicable law. The failure of either party to assert any of its rights under the Agreement, including, but not limited to, the right to terminate the Agreement in the event of breach or default by the other party, will not be deemed to constitute a waiver by that party of its right to enforce each and every provision of the Agreement in accordance with their terms. All notices under the Agreement and any modifications or amendments to the Agreement must be in writing.

The parties have caused the Agreement to be executed by their duly authorized representatives with the intent to be legally bound, for good and valuable consideration, the receipt and adequacy of which is hereby acknowledged.

CUSTOMER LEGAL NAME: _____

AVAYA INC.

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

Customer Information: Street Address:
City, State, Zip Code:
Billing Address (if different from above):
Telephone Number: Fax Number:

AVAYA
CUSTOMER AGREEMENT
ATTACHMENT 3
MAINTENANCE/MANAGED SERVICES TERMS

These Maintenance/Managed Services Terms are part of the Customer Agreement between Avaya and Customer, which incorporates these Services Terms by reference (the "Agreement"). These Maintenance/Managed Services Terms apply if and to the extent Customer acquires Maintenance/Managed Services.

1. ORDER, PROVISION AND SCOPE OF SERVICES

1.1 Order and Provision of Services. In return for the payment of the fees specified in the order, Avaya will provide the maintenance/managed Services options for Supported Products or Supported Systems at Supported Sites, as described further in this Attachment and the SAS (for purposes of this Attachment, "Services"). The "Service Agreement Supplement" or "SAS" is the applicable Avaya Service Agreement Supplement then current as of the date of Avaya's acceptance of an order for Services and available to Customer upon request. The parties may execute a statement of work describing specific Services to be provided by Avaya ("Statement of Work" or "SOW"). As used in this Attachment, "SAS" refers to the Service Agreement Supplement or Statement of Work, as applicable. "Supported Products" are: (i) hardware or software products identified in the order; and (ii) Added Products (defined in Section 1.9). Supported Products may include non-Avaya products to the extent they are specified in the order. "Supported Systems" are a group of products or networks specified in the order. "Supported Sites" are locations specified in the order. Where Avaya provides hardware or software for Customer's use as part of the Services but retains ownership of them, including replacement parts for them, these are referred to as "Avaya Equipment" and are not considered Products as that term is defined in the General Terms of the Agreement.

1.2 Documents and Order of Precedence. In the event of conflict among the General Terms, these Maintenance/Managed Services Terms; the SAS and any ancillary attachments to or documents referenced in the SAS, the order of precedence is: (i) Maintenance/Managed Services Terms; (ii) General Terms; (iii) SAS; and (iv) ancillary documents.

1.3 Monitoring. Avaya may electronically monitor Supported Products and Supported Systems for the following purposes: (i) remote diagnostics and corrective actions; (ii) to determine system configuration and applicable charges; (iii) to verify compliance with applicable software license terms and restrictions; (iv) when providing managed Services, to assess Customer needs for additional products or Services; (v) as otherwise provided in the SAS.

1.4 Error Correction. Some Services options may include correction of Errors. An "Error" means a failure of a Supported Product to conform in all material respects to the manufacturer's specifications that were currently applicable when the Supported Product was purchased or licensed.

1.5 Help Line Support. Where the selected Services option includes help line support, Avaya will provide it in accordance with the coverage option (service hours, target response intervals, etc.) that Customer has selected.

1.6 Updates. Where the selected Services option includes the provision of Updates, Avaya will make Updates available to Customer if, and when, the manufacturer makes them generally available to its other customers. An "Update" is a change in software that typically provides maintenance correction only. It typically is designated as a change in the digit to the right of the second decimal point (e.g. n.y.[Z]). Avaya will provide Updates via a website, email or post mail, at Avaya's option. Updates may be remotely installed by Avaya or delivered to Customer for self-installation.

1.7 End of Support. Avaya may discontinue or limit the scope of Services for Supported Products that Avaya or the third party manufacturer has declared "end of life," "end of service," "end of support," "manufacture discontinued" or similar designation ("End of Support"). Customer may access Avaya's user support website (www.support.avaya.com) for End of Support notifications. Avaya targets posting of End of Support notifications for Avaya-manufactured Products at least six months in advance of the End of Support date. End of Support will be effective as of the effective date of the End of Support notice. Avaya also may provide End of Support notices by email to email addresses that Customer has registered with Avaya. If Services are discontinued for a Supported Product, the Supported Product will be removed from the order and rates will be adjusted accordingly. For certain Products subject to End of Support, Avaya may continue to offer a limited set of Services ("Extended Support"). Where Avaya has chosen to do this, the description of Extended Support available and related fees will be available at the time of Avaya's notice. These notices will communicate information such as Extended Support eligibility, Extended Support alerts related to parts shortages, and end of Services coverage eligibility (including Extended Support).

1.8 Replacement Hardware. Replacement hardware provided as part of Services may be new, factory reconditioned, refurbished, re-manufactured or functionally equivalent. It will be furnished only on an exchange basis. Returned hardware that has been replaced by Avaya, whether Avaya Equipment or otherwise, will become Avaya's property.

1.9 Added Products. If Customer acquires additional products of the same type and manufacturer(s) as the existing Supported Products and locates them with existing Supported Products at a Supported Site, they will be considered "Added Products", and will be added to the order automatically for the remainder of the term. Added Products purchased from a party other than the manufacturer or an authorized reseller are subject

to certification by Avaya at Avaya's then current Services rates. If Added Products fail certification, Avaya may choose not to add them to the Supported Products.

1.10 General Limitations. Unless the SAS provides otherwise, Avaya will provide software Services only for the unaltered current release of the software and the prior release. The following items are included in the Services only if the SAS specifically includes them: (i) support of user-defined applications; (ii) support of Supported Products that have been modified by a party other than Avaya (except for installation of standard, self-installed Updates provided by the manufacturer); (iii) making corrections to user-defined reports; (iv) data recovery services; (v) services associated with relocation of Supported Products; (vi) correction of Errors arising from causes external to the Supported Products (such as power failures or surges); and (vii) services for Supported Products that have been misused, used in breach of their license restrictions, improperly installed or configured, or that have had their serial numbers altered, defaced or deleted.

2. INVOICING AND PAYMENT

Avaya will invoice Customer for Services in advance unless another payment option is specified in the order.

3. CUSTOMER RESPONSIBILITIES

3.1 General. Customer will cooperate with Avaya as reasonably necessary for Avaya's performance of its obligations, such as: (i) providing Avaya with full, free and safe access to its facilities; (ii) providing telephone numbers, network addresses and passwords necessary for remote access; and (iii) providing interface information for Supported Products and necessary third party consents and licenses to access them. All items will be provided by Customer at Customer's expense. If Avaya provides an Update or other new release of software as part of the Services, Customer will implement it promptly.

3.2 Provision of Supported Products and Systems. Except for Avaya Equipment or Avaya hosted facilities identified in the SAS, Customer will provide all Supported Products, Supported Systems and Supported Sites. Customer continuously represents and warrants that: (i) Customer is either the owner of, or is authorized to access and use, each of them; and (ii) Avaya, its suppliers, and subcontractors are authorized to do the same to the extent necessary to provide the Services in a timely manner.

3.3 Moves of Supported Products. Customer will notify Avaya in advance before moving Supported Products. Only Avaya may move Avaya Equipment. Avaya may charge additional amounts to recover additional costs in providing the Services as a result of moved Supported Products.

3.4 Vendor Management. Where Avaya is to instruct or request products or services on Customer's behalf from third party vendors under Customer's supply contracts with the third party vendors ("Vendor Management"), Customer will provide Avaya upon request a letter of agency or similar document, in a form reasonably satisfactory to Avaya, permitting Avaya to perform the Vendor Management. Where the third party vendor's consent is required for Avaya to be able to perform Vendor Management in a timely manner, Customer will obtain the written consent of the vendor and provide Avaya a copy of it upon request.

3.5 Third Party Hosting. In the event one or more network address(es) to be monitored by Avaya are associated with systems owned, managed, and/or hosted by a third party service provider ("Host"), Customer will: (i) notify Avaya of the Host prior to commencement of the Services; (ii) obtain the Host's advance written consent for Avaya to perform the Services on the Host's computer systems and provide Avaya with a copy of the consent upon request; and (iii) facilitate necessary communications between Avaya and the Host in connection with the Services.

3.6 Access to Personal Data. Where Customer instructs Avaya to access any employee, customer or other individual's personal data contained in any Supported Product or Supported System, or to provide Customer or a third party identified by Customer with access, Customer will indemnify Avaya and its officers, directors, employees, subcontractors and affiliates against, and hold each of them harmless from, any and all liabilities, costs, damages, judgments and expenses (including reasonable attorney's fees and costs) arising out of Avaya accessing or providing access in accordance with Customer's instructions.

3.7 Avaya Equipment. Customer will not remove any identification tags or other markings on Avaya Equipment. Customer will keep Avaya Equipment free and clear of all levies, liens and encumbrances arising by or through Customer or arising in connection with the location of Avaya Equipment at a Supported Site, and consents to the filing of informational financing statements by the owner of the Avaya Equipment to give notice of ownership. Customer will, at its own expense, maintain insurance against loss, theft, destruction or damage to Avaya Equipment (each, a "Loss") for the full replacement value of the Avaya Equipment, will provide evidence of this insurance upon request, and will notify Avaya promptly in writing of any Loss.

4. TITLE AND RISK OF LOSS TO EQUIPMENT

Title to Avaya Equipment, whether new or replacement Avaya Equipment, will remain with Avaya or its suppliers and will not pass to Customer. Title to other Avaya-installed replacement hardware provided as part of Services will pass to Customer when installed. Title to all other hardware provided as part of Services will pass to Customer when it arrives at the Supported Site. Avaya may, without notice to Customer, assign, pledge, transfer or otherwise convey any or all of Avaya's right, title and interest in Avaya

Equipment. Customer will bear the risk of loss, theft, destruction or damage to Avaya Equipment except for losses caused by Avaya.

5. SOFTWARE LICENSE

Where Services include provision of patches, Updates or feature upgrades for Supported Products (“**New Software**”), they will be provided subject to the license grant and restrictions contained in the original agreement under which Customer licensed the original software from Avaya. Where there is no existing license from Avaya, New Software will be provided subject to the manufacturer’s then current license terms and restrictions for the New Software. New Software may include components provided by third party suppliers that are subject to their own end user license agreements. Customer may install and use these components in accordance with the terms and conditions of the “shrinkwrap” or “clickwrap” end user license agreement accompanying them. Software provided as part of Avaya Equipment is licensed in accordance with the license grant and restrictions contained in the General Terms, but only for the duration of the Services or until return of the Avaya Equipment is required, whichever is earlier.

6. WARRANTY AND LIMITATION OF LIABILITY

6.1 Warranty. Avaya warrants to Customer that Services will be carried out in a professional and workmanlike manner by qualified personnel.

6.2 Remedy. If Services are not in conformance with the above warranty and Avaya receives Customer’s detailed request to cure a non-conformance within 30 days of its occurrence, Avaya will re-perform those Services. This remedy will be Customer’s sole and exclusive remedy and will be in lieu of any other rights or remedies Customer may have against Avaya with respect to the non-conformance of Services.

6.3 Disclaimer. Services provided to enhance network security are not a guaranty against malicious code, deleterious routines, and other techniques and tools employed by computer “hackers” and other third parties to create security exposures. Neither Avaya nor its suppliers make any warranty, express or implied, that all security threats and vulnerabilities will be detected or that the Services will render an end user’s network or particular network elements safe from intrusions and other security breaches.

7. TERM AND TERMINATION

7.1 Term. Term. Unless a different term is defined in the order, Avaya will provide Services for an initial term of one year. Unless otherwise specified in the SAS, Customer may terminate maintenance Services in whole or in part upon 30 days written notice subject to cancellation fees equal to maintenance Service fees for 12 months or the remaining term, whichever is less.

7.2 Re-Delivery of Avaya Equipment. Within 30 days after the termination of the SOW, Customer will: (i) deliver at no cost to Avaya all Avaya Equipment located at a Supported Site subject to the termination to a location in the United States designated by Avaya, in the same condition as when originally delivered to the Supported Site, reasonable wear and tear excepted; and (ii) cease all use and return to Avaya all copies of software (including backup copies) provided as part of the Services.