**<FULL LEGAL NAME OF LOCALITY>**

**ADDENDUM TO CONTRACTOR’S STANDARD FORM**

**CONTRACTOR NAME: <FULL LEGAL NAME OF CONTRACTOR>**

**CONTRACTOR’S EIN: <CONTRACTOR’S EMPLOYER IDENTIFICATION NUMBER>**

**TITLE OF CONTRACTOR’S FORM: <FULL TITLE OF ATTACHED AGREEMENT>**

The <FULL LEGAL NAME OF LOCALITY> (the “Government”) and the Contractor named above are this day entering into a contract. For their mutual convenience, the Government and the Contractor are using the standard form agreement (the “Contractor’s Form”) provided by the Contractor and identified above by title. This Addendum, signed by duly authorized representatives of the Government and the Contractor, incorporates by reference the Supplemental Conditions for Information Technology Purchases attached hereto and is hereby attached to and made a part of the Contractor’s Form. The terms of this Addendum shall control in the event of a conflict between the Contractor’s Form and this Addendum. Together, this Addendum and the Contractor’s Form constitute the “Contract.” The Contract is effective as of the date on which the Government’s duly authorized representative signs this Addendum. The Government and the Contractor agree as follows:

A. **Contractor Status.** The Contractor represents and warrants that it is a legal entity authorized to perform in Virginia the business for which the Contract provides and, if the Contractor is not an entity formed in Virginia, the Contractor maintains a registered agent and a certification of authority to transact business in Virginia. In its performance under the Contract, the Contractor acts and will act as an independent contractor and not as an agent or employee of the Government.

B. **Government’s Liability.** Notwithstanding anything to the contrary in the Contractor’s Form, the payments to be made by the Government for all goods, services, and other deliverables under the Contract shall not exceed **$<CONTRACT AMOUNT>**. Payments will be made only upon receipt of a proper invoice, detailing the goods and services provided and submitted to the Government. The total cumulative liability of the Government, its officers, its employees, and its agents in connection with the Contract or in connection with any goods, services, actions, or omissions relating to the Contract shall not under any circumstances exceed payment of the dollar amount set forth in this paragraph. The Government shall be bound hereunder only to the extent that the governing body of the Government has appropriated funds that are legally available or may hereafter become legally available for the purpose of the Contract.

C. **Exceptions to Contractor’s Form.** The Contractor’s Form is, with the exceptions noted herein, acceptable to the Government. Nonetheless, because the Government cannot accept certain standard clauses that may appear in, or be incorporated by reference into, the Contractor’s Form, and in consideration of the convenience of using that form, and this form, without the necessity of specifically negotiating a separate contract document, the Government and the Contractor specifically agree that, notwithstanding any provisions appearing in or incorporated by reference into the attached Contractor’s Form, none of the following provisions shall have any effect or be enforceable against the Government:

1. Requiring the Government to maintain any type of insurance either for the Government’s benefit or the Contractor’s benefit;

2. Renewing or extending the Contract beyond the initial term or automatically continuing the contract period from term to term;

3. Requiring or stating that the terms of the Contractor’s Form shall prevail over the terms of this Addendum in the event of conflict or otherwise;

4. Requiring the Government to indemnify, hold harmless, or defend the Contractor for third-party claims of any kind or waiving the Government’s sovereign immunity;

5. Imposing interest or finance charges exceeding those permitted by Va. Code § 2.2-4352, concerning prompt payment;

6. Requiring the application of the law of any state other than Virginia in interpreting or enforcing the Contract;

7. Requiring or permitting that any dispute under the Contract be resolved in any court other than the Circuit Court of the <APPROPRIATE LOCALITY>, Virginia;

8. Requiring the City to pay liquidated damages, pay termination fees or charges, or make any payment for lost profits or lost revenues if the Contract is terminated before its ordinary term ends;

9. Requiring that the Contract be “accepted” or endorsed by the home office or by any other officer subsequent to signature by the Government’s duly authorized representative before the Contract is considered in effect;

10. Delaying the formation or effective date of the Contract beyond the date on which the Government’s duly authorized representative signs this Addendum;

11. Limiting or adding to the time period within which claims can be made or actions can be brought;

12. Limiting the liability of the Contractor for property damage, personal injury, wrongful death, or infringement of intellectual property rights;

13. Permitting unilateral modification of the Contract by the Contractor or deeming the Government to agree to a modification of the Contract by means other than affirmatively signing a contract modification on paper;

14. Binding the Government to any arbitration or to the decision of any arbitration board, commission, panel, or other entity;

15. Obligating the Government to pay amounts beyond the contract amount specified in section (B) of this Addendum or any costs of collection or attorneys’ fees;

16. Granting the Contractor a security interest in property of the Government;

17. Establishing a presumption of severe or irreparable harm to the Contractor by the actions or inactions of the Government or any officer, employee, or agent thereof, granting the Contractor a right to an injunction against the Government, or granting a right to any other form of equitable relief not authorized by the Constitution or laws of the Commonwealth of Virginia;

18. Requiring the Government to keep confidential any records subject to disclosure under the Virginia Freedom of Information Act or with respect to which the Contractor has not complied with all requirements of Va. Code § 2.2-4342;

19. Limiting the Government’s selection and approval of counsel and approval of any settlement in any claim arising under the Contract and in which the Government or any of its officers, employees, or agents is a named party;

20. Requiring the Government to limit its rights or waive its remedies at law or in equity, including the right to a trial by jury;

21. Making any party a third-party beneficiary to the Contract;

22. Requiring any dispute resolution procedure other than in accordance with Va. Code § 2.2-4363; and

23. Granting any right or incurring any obligation that is beyond the duly granted authority of the undersigned Government representative to grant or incur on behalf of the Government, or requiring the Government to violate any applicable law or regulation.

D. **Mandatory Contractual Provisions.** The Government and the Contractor agree that, because the Virginia Public Procurement Act mandates that certain contractual provisions be included in each contract, the contractual provisions mandated by Va. Code §§ 2.2-4311 (i.e., nondiscrimination requirement for contracts above $10,000), 2.2-4311.1 (i.e., compliance with federal immigration law), 2.2-4311.2 (i.e., authorization to transact business in Virginia, if legally required), 2.2-4312 (i.e., drug-free workplace requirement for contracts above $10,000), 2.2-4354 (i.e., requirement to pay subcontractors), 2.2-4363 (i.e., procedure for filing claims), and 2.2-4372(D) (i.e., recovery of kickback payments). Pursuant to Va. Code § 2.2-4343.1(D), the Government does not discriminate against faith-based organizations.

E. **Entire Agreement.** This Contract constitutes the entire agreement between the Government and the Contractor and may not be waived or modified except by written agreement between the Government and the Contractor.

**SIGNATURES ON FOLLOWING PAGE**

IN WITNESS WHEREOF, the Government and the Contractor have caused the Contract to be duly executed, intending thereby to be legally bound.

For the Contractor:

By:

Printed Name:

Title:

Date:

For the Government:

By:

Printed Name:

Title:

Date:

**SUPPLEMENTAL CONDITIONS FOR INFORMATION TECHNOLOGY PURCHASES**

A. **Applicability and Terminology.** These Supplemental Conditions, together with the Addendum and the Contractor’s Form, govern the use, maintenance, and support of any and all software licensed by the Government under the Contract. The terms “Client,” “Customer,” “You,” or like terms used in the Contract mean the Government, acting through its duly authorized officers, employees, and agents. The term “Software” means any software to which the Contractor’s Form grants a license. Any license of the Software shall be deemed to be held by the Government.

B. **Additional Exceptions to Contractor’s Form.** In addition to the exceptions noted in paragraph C of the Addendum and notwithstanding any provisions appearing in the Contractor’s Form, none of the following provisions shall have any effect or be enforceable against the Government:

1. Permitting the Contractor to access any Government records or data, except pursuant to court order;

2. Permitting the Contractor to use any information provided by the Government except for the Contractor’s own internal administrative purposes;

3. Enforcing the United Nations Convention on Contracts for the International Sale of Goods and all other laws and international treaties or conventions relating to the sale of goods, which are hereby expressly disclaimed, except that Uniform Computer Information Transactions Act shall apply to this Contract only to the extent required by Va. Code § 59.1-501.15;

4. Requiring that the Government, which is tax exempt, be responsible for payment of any taxes, duties, or penalties;

5. Requiring or construing that any provision in this Contract conveys any rights or interest in the Government’s data to the Contractor;

6. Permitting termination by the Contractor of the Contract or the licenses granted thereunder, or permitting suspension of services by the Contractor, except pursuant to an order from a court of competent jurisdiction;

7. Defining “perpetual” license rights to have any meaning other than license rights that exist in perpetuity unless otherwise terminated in accordance with the applicable provisions of the Contract;

8. Permitting modification or replacement of the Contract pursuant to any new release, update, or upgrade of the Software or subsequent renewal of maintenance;

9. Requiring purchase of a new release, update, or upgrade of the Software or subsequent renewal of maintenance in order for the Government to receive or maintain the benefits of the Contractor’s indemnification of the Government against any claims of infringement on any third-party intellectual property rights; and

10. Granting the Contractor or an agent of the Contractor the right to audit or examine the books, records, or accounts of the Government.

C. **Requirements of Contractor.** Notwithstanding any provisions appearing in the Contractor’s Form, the Government and the Contractor further agree as follows:

1. The Contractor warrants that it is the owner of the Software or otherwise has the right to grant to the Government the license to use the Software granted hereunder without violating or infringing any law, rule, regulation, copyright, patent, trade secret, or other proprietary right of any third party.

2. If the Contractor provides an update or upgrade subject to additional payment, the Government has the right to reject such update or upgrade.

3. The Contractor agrees to indemnify, defend and hold harmless the Government or its officers, employees, and agents (“Government’s Indemnified Parties”) from and against any and all third party claims, demands, proceedings, suits and actions, including any related liabilities, obligations, losses, damages, fines, judgments, settlements, expenses (including attorneys’ and accountants’ fees and disbursements) and costs (each, a “Claim” and collectively, “Claims”), incurred by, borne by or asserted against any of Government’s Indemnified Parties to the extent such Claims in any way relate to, arise out of or result from: (i) any intentional or willful conduct or negligence of any employee or subcontractor of the Contractor, (ii) any act or omission of any employee or subcontractor of the Contractor, (iii) breach of any representation, warranty or covenant of the Contractor contained herein, (iv) any defect in the Software, or (v) any actual or alleged infringement or misappropriation of any third party’s intellectual property rights by any of the Software.

4. The Government may rely on independent contractors, acting on behalf of the Government, to perform functions requiring the use of and access to the Software. Nothing in the Contractor’s Form shall limit such third parties from using or accessing the Software in order to perform such functions.

5. If any invention, work of authorship, or confidential information is developed exclusively by an employee, consultant, or third-party contractor or subcontractor of the Government during the performance of services by the Contractor, the Contractor shall have no ownership claim to such invention, work of authorship, or confidential information.

6. Any travel expenses incurred by the Contractor in the course of performing the services must be preapproved by the Government and shall be reimbursed only in accordance with the Government’s travel procedures.

7. The Government may require that the Contractor’s personnel submit to a criminal background check prior to performance of any services under this Contract.

8. Payments for license fees, including subscription fees, and maintenance and support services may be made only to the Contractor. No software reseller or software publisher or licensor who is not the Contractor identified in the Contract is authorized to invoice the Government directly, and the Government will not pay any such invoices.

**END OF SUPPLEMENTAL CONDITIONS**

**INSTRUCTIONS FOR USERS**

A. **When to Use.**

1. This Addendum to Contractor’s Standard Form is intended for use when it is not possible to award a contract without using the contractor’s contract form in the following situations:

a. Small purchases pursuant to Va. Code § 2.2-4303(G) where no solicitation has been issued incorporating the <LOCALITY NAME>’s standard terms and conditions;

b. Only practical source purchases pursuant to Va. Code § 2.2-4303(E);

c. Emergency purchases pursuant to Va. Code § 2.2-4303(F); or

d. Cooperative purchases pursuant to Va. Code § 2.2-4304(B) or (D)(3).

2. A contractor’s contract form must be carefully read, and those provisions that are contrary to the interests of the <LOCALITY NAME> or in conflict with state law must be lined out, rewritten, or removed.

3. If it is not feasible to award a contract without using the contractor’s standard contract form, and clauses which are not in the best interests of the <LOCALITY NAME> or not permitted by state law cannot be crossed out, the contractor should sign the Addendum to Contractor’s Standard Form.

4. Consult your assigned attorney before using a contractor’s contract form or this Addendum to Contractor’s Standard Form if:

a. The contract has a value greater than $<DOLLAR AMOUNT>;

b. The contract is for construction or professional services; or

c. The contract results from a cooperative purchase.

B. **How to Use.**

1. Fill in the contractor’s name, the contractor’s employer identification number, the title of the contractor’s contract form, and the maximum amount of the contract in the yellow-highlighted placeholders on the first page of the Addendum to Contractor’s Standard Form.

2. If the contract is for information technology, include both (i) the yellow-highlighted text “incorporates by reference the Supplemental Conditions for Information Technology Purchases attached hereto and” where indicated and (ii) the three-page Supplemental Conditions for Information Technology Purchases attachment. If the contract is not for information technology, remove that text and do not include that attachment.

3. If possible, attach the contractor’s contract form without signing that contract form, so that the Addendum to Contractor’s Standard Form is the only document signed.

4. If the contractor insists on signatures to both this Addendum to Contractor’s Standard Form and the contractor’s contract form that is attached to this Addendum, then the contractor’s duly authorized representative must sign both forms before submitting them to the <LOCALITY> for the <LOCALITY>’s representative to sign.

**INSTRUCTIONS FOR LOCAL GOVERNMENT LAWYERS**

A. **General Comments and Instructions.**

1. These model documents include the Addendum to Contractor’s Standard Form, the Supplemental Conditions for Information Technology Purchases, and the Instructions to Users. These forms and instructions are derived from documents used by state agencies. All have been edited heavily for use by local governments.

2. These Instructions for Local Government Lawyers explain aspects of the Addendum to Contractor’s Standard Form, the Supplemental Conditions for Information Technology Purchases, and the Instructions to Users to local government lawyers and provide guidance for those lawyers on the intended use of these documents. The Instructions for Local Government Lawyers are not intended or recommended for sharing with clients or contractors.

3. The term “Government” is used instead of “City,” “County,” “Locality,” or “Town” to refer to the purchaser throughout because doing so requires less customization based on the type of locality and because local government lawyers may consider using these forms for entities other than localities, such as school boards and authorities. Lawyers may choose to change “Government” to the appropriate reference throughout, but both forms and the Instructions to Users should be usable for any local government client without making those changes.

B. **Comments and Instructions on the Addendum to Contractor’s Standard Form.**

1. This form is adapted from a form provided for state agency use by the Virginia Division of Purchases and Supply.

2. The yellow-highlighted placeholders and language are intended for the locality’s purchasing agent to review and modify or complete on a transaction-by-transaction basis as described in the Instructions to Users.

3. The Addendum to Contractor’s Standard Form contains three placeholders highlighted in green—for the full legal name of the purchaser in two places and the jurisdiction of the appropriate circuit court in the third place. The lawyer should replace the green-highlighted placeholders with the appropriate text before sharing the form with clients.

4. The Addendum to Contractor’s Standard Form contains several citations to state law, especially in items 3, 18, and 22 of section C and in section D. Before providing the form to clients, the local government lawyer should ensure that those references are correct for that locality if the locality has adopted alternative policies and procedures pursuant to Va. Code § 2.2-4343(A)(10).

5. The Exceptions to Contractor’s Form in section C of the Addendum to Contractor’s Standard Form address a hodgepodge of business and legal terms commonly encountered in contractors’ form contract documents. Terms that are strictly “business” in nature can be negotiated, and it is recommended that the local government lawyer be involved in those negotiations. Terms that are “legal” in nature address particular legal limitations applicable to Virginia localities and should never be altered. In section C, the drafter of this form considers items 1, 9, 10, 12, 14, 19, 20, 21, and 22 to be strictly business terms, items 3, 4, 5, 6, 15, 16, 18, and 23 to be strictly legal terms, and items 2, 7, 8, 11, 13, and 17 potentially to be classified as either business terms or legal terms. Of course, local government lawyers may and should draw their own conclusions. Further explanation of the third category items is as follows:

a. Item 2 prohibits the automatic renewal of the contract. Minds may differ on whether automatic renewals are desirable or permissible. The drafter considers automatic renewals undesirable and potentially impermissible because (i) it is necessary to ensure at least annually the ongoing availability of funds for the contract, (ii) it is advisable to ensure the government’s control over its use of the contract, and (iii) despite the administrative burden, it is desirable to ensure that the contract is reviewed with respect to the government’s needs and the contractor’s performance before each renewal rather than simply have the contract continue perpetually on autopilot.

b. Item 7 requires a forum and venue choice in the circuit court that has jurisdiction over the locality. From a legal perspective, it is questionable whether a locality has the authority to submit to the jurisdiction of the courts of a state other than Virginia. From a business perspective, it is advisable to avoid the expense of litigating in the courts of another state or even of another Virginia locality, even if the local government lawyer concludes that doing so would be lawful.

c. Item 8 prohibits the imposition of early termination penalties, whatever they are called, on the government. Unless the potential amount of those penalties is included in the appropriation for the contract, the imposition of such penalties could exceed the amount of funds available for the government’s performance of the contract.

d. Item 11 prohibits the contract from deviating from the applicable statute of limitations under state law. One can debate whether the government has been authorized to deviate contractually from the statute of limitations set forth in state law, but it is nevertheless advisable from a business perspective to prevent a contractor from reducing the amount of time the government has or increasing the amount of time the contractor has to file suit.

e. Item 13 prohibits unilateral modification of the contract by the contractor. Even to the extent that a local government in Virginia is authorized to agree to future modifications of a contract without knowing what they might be or whether they might be lawful, allowing one party to unilaterally modify a contract is ill advised.

f. Item 17 is designed to limit provisions in the contract that allow or make it easier for the contractor to obtain an injunction or another form of equitable relief against the government. At least one city charter expressly limits injunctions against the city and its officers, employees, or agents under certain circumstances. Even if a locality’s charter or other state laws do not include such a limitation, it is at best ill advised to agree that either the contractor is entitled to such relief or the contractor need not prove particular elements required at common law to obtain an injunction.

C. **Comments and Instructions on the Supplemental Conditions for Information Technology Purchases.**

1. The Supplemental Conditions for Information Technology Purchases form is adapted from a form used by the Virginia Information Technologies Agency to address issues that commonly arise in information technology contracts but that the Addendum to Contractor’s Standard Form does not address. It is designed as an attachment to the Addendum to Contractor’s Standard Form that may be used for information technology purposes and excluded for purchases of other than information technology.

2. Neither the Supplemental Conditions for Information Technology Purchases form nor the Instructions to Users documents defines “information technology.” The local government lawyer may advise the client as to the meaning of “information technology” for purposes of determining when the form should be used as the lawyer deems appropriate for the client. Although Va. Code § 2.2-2006 defines “information technology” as applicable to the Virginia Information Technologies Agency to mean “communications, telecommunications, automated data processing, applications, databases, data networks, the Internet, management information systems, and related information, equipment, goods, and services,” many of the provisions in this form primarily address issues found in software license agreements.

3. As in the Addendum to Contractor’s Standard Form, the Additional Exceptions to Contractor’s Form in section B address a hodgepodge of business and legal terms commonly encountered in contractors’ form contract documents. Terms that are strictly “business” in nature can be negotiated, and it is recommended that the local government lawyer be involved in those negotiations. Terms that are “legal” in nature address particular legal limitations applicable to Virginia localities and should never be altered. In section B, the drafter of this form considers items 2, 6, 7, 9, and 10 to be strictly business terms, items 1, 3, and 5 to be strictly legal terms, and items 4 and 8 potentially to be classified as either business terms or legal terms. Of course, local government lawyers may and should draw their own conclusions. Further explanation of the third category items is as follows:

a. Item 4 negates any requirement that the government pay taxes on the transaction. Generally, of course, the government is tax exempt pursuant to Va. Code § 58.1-609.1(4). However, there may be circumstances, such as when financing is involved, where the local government lawyer must negotiate this provision.

b. Item 8 prohibits changes to the contract that purport to occur automatically, without review or approval by the purchaser, when a new version of software is released or when software maintenance is renewed. See Item B(5)(e) above for additional discussion of unilateral modifications to a contract by the contractor.

4. The Requirements of Contractor in section C likewise contain both business and legal terms. In section C, the drafter of this form considers items 2, 3, 4, and 6 to be strictly business terms, items 1, 5, and 8 to be strictly legal terms, and item 7 potentially to be classified as either a business term or a legal term. Of course, local government lawyers may and should draw their own conclusions.

Item 7 provides for the government to require the Contractor’s personnel to submit to a criminal background check. Whether this is a legal requirement or a business preference will depend on the particular situation.

D. **Comments and Instructions on the Instructions to Users.**

1. The Instructions to Users is a one-page document intended for distribution to clients. The content of the Instructions for Users is based in part on the instructions for use of a contractor’s standard contract form found in the Virginia Division of Purchases and Supply’s Agency Procurement and Surplus Property Manual § 4.26. Lawyers should feel free to modify this document as needed for their particular clients.

2. The Instructions to Users contains six blanks highlighted in green. Five of these blanks are for the appropriate reference to the purchaser locality. The sixth blank is for a numerical dollar amount in the sixth place; see item D(3) below. The lawyer should replace the green-highlighted text with the appropriate text before sharing the Instructions to Users with clients.

3. The dollar amount condition in item A(4)(a) of the Instructions for Users is an option for the lawyer. Agency Procurement and Surplus Property Manual § 4.26 authorizes state purchasing agents to use the Commonwealth’s Addendum to Contractor’s Standard Form for contracts valued at up to $50,000 and requires consultation with the state using agency’s legal advisor before using it for contracts valued at $50,000 or more. The local government lawyer may consider such factors as the current small purchase limits in effect and the experience of the purchasing agents when setting such a dollar amount or simply eliminate that dollar value ceiling altogether.