RESOLUTION 18-135

A RESOLUTION AUTHORIZING A CONTRACT WITH DUDE SOLUTIONS
FOR
A WORK AND ASSET MANAGEMENT SOLUTION

WHEREAS, the City of Spring Hill desires to contract with Dude Solutions a private company furnish and install a work and asset management solution for the Storm Water and Street Divisions; and

WHEREAS, the City of Spring Hill publicly advertised for proposals for such solutions; and

**WHEREAS,** Dude Solutions was the lowest responsible bidder; and

NOW, THEREFORE BE IT RESOLVED, that the City of Spring Hill Board of Mayor and Aldermen, authorize a contract with Dude Solutions to furnish and install a work and asset management solution for the Storm Water and Street Divisions in the amount of Twenty-One Thousand Twenty Dollars and forty-three Cents ($21,020.43) and that funding for this work shall be from the Storm Water Cost Center and General Fund Highways and Streets Cost Center.

Passed and Adopted by the Board of Mayor and Aldermen of the City of Spring Hill, Tennessee on the 20th day of August 2018.

_____
Rick Graham, Mayor

ATTEST:
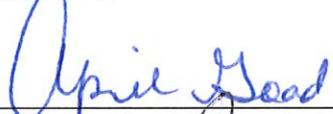
_____
April Goad, City Recorder

LEGAL FORM APPROVED:

_____
Patrick Carter, City Attorney

August 6, 2018

TO:	Board of Mayor and Aldermen	
CC:	Victor Lay, City Administrator	
FROM:	Philip Stuckert, P.E. Infrastructure Director	
SUBJECT:	Contract Award to Dude Solutions for Work and Asset Management Solution.	
Recommendation:	That the Board of Mayor and Aldermen, by resolution, authorize a contract award to Dude Solutions in the amount of Twenty-One Thousand Twenty Dollars ($21,020.43) to furnish and install a work and asset management solution.	

Summary:

Bid were opened up on Thursday, July 19 for services related to providing the City a work and asset management solution for the Public Works Department. The following companies provided bids for the City to consider:

Contractor/Location	Bid Amount
Dude Solutions/Cary, North Carolina	$21,020.43 plus $14,694.00 per year
Novotox/Clearfield, Utah	$64,800 plus yearly maintenance fee (Price Not Included)
MaintStar/Irvine, California	$143,500.00 plus $35,500 per year

Staff recommends purchasing a work and asset management solution to automate and simplify work order requests, preventive maintenance scheduling, work order approval, inventory tracking, job status tracking and reporting for labor hours and maintenance costs.

When evaluating proposals from various vendors, city staff investigated whether the work order system was cloud based, able to initiate, assign and track the progress of maintenance work, and was capable for interfacing with the City's geographical information system. Other components include having the ability to predict maintenance and develop advanced workflows with preventative maintenance scheduling. The system must be capable of working on a mobile platform and able to receive communication from all users.

Components of the Dude Work and Asset Management Solution software contains the following features and modules.

- Work Flow Management
    - Work order request management
    - Automatic request routing
    - Location/asset based work orders

- o Preventive Maintenance and Predictive Maintenance calendar scheduling
- o Worker order prioritization
- Work Tracking and Monitoring
    - o Work assignment
    - o Audit trail and log tracking
    - o Automated email notification
- Inventory
    - o Asset inventory
- Reporting and Analysis
    - o Predefined dashboard with reports and charts
    - o Budget tracking based on historic data and projects
    - o Printing/export to Excel, create PDF for reporting
    - o Data analyzer
    - o Support on any iphone or android device with apps from Apple or Google.
- Workshops-Information
    - o Annual workshops for city employees to learn about new features
    - o Free chat lines or direct phone calls from city employees making inquiries and asking for assistance with any feature/functionality of the system.

Based on the above solutions, we plan to use the work and asset management solution features to assist us in tracking the following work activities.

STREET MAINTENANCE WORK ACTIVITIES

- Bulky Waste Collection Request
    - o Generate work order request for bulky waste collection either through mobile devices such as smart phones, phone calls or our city website.
    - o Spatially locate the pickup location using the city's GIS system.
    - o Generating tables and address locations where bulky waste is picked up every Monday by our three knuckle boom trucks. In June we picked up bulky waste at 276 locations. As of July 30, we picked up bulky waste at 347 locations.

- Yard Waste Pickup Request (grass bags and branches, limbs and other brush)
    - o Generate work order request for yard waste collection either through mobile devices such as smart phones, phone calls or our city website.
    - o Spatially locate the pickup location using the city's GIS system.
    - o Generating tables and address locations where yard waste is picked up Tuesday through Friday by our three knuckle boom trucks. In June we picked up yard waste at 4968 locations. As of July 30, we picked up bulky waste at 4658 locations.

- Street Maintenance Request for sidewalk, curb and gutter and pavement repairs
    - o Generate work order request management for sidewalk, curb and gutter and pavement repairs from mobile devices such as smart phones, phone calls or our city website.
    - o Spatially locate the pickup location using the city's GIS system.

- o Generating tables and address locations where street maintenance requests are generated. We receive between two to three per week street maintenance requests.

- Street Signage
  - o Generate work order request for traffic sign maintenance via a preventative maintenance schedule set up by the work order system or via input from the public through mobile devices such as smart phones, phone calls or our city website.
  - o Sign Retroreflectivity. The Manual on Uniform Traffic Control Devices (MUTCD) requires agencies to establish and implement a sign assessment or management method that will maintain minimum levels of sign retroreflectivity. This work and asset management solution will make it possible for us to start tracking our sign database to meet the FHWA rules.
  - o Spatially locate the sign location using the city's GIS system.
  - o Generating tables and address locations of traffic signs. We current respond to 10 to 15 sign requests each month. The city has thousands of signs located throughout the community. They include stop signs, speed limit signs, yield signs, and others.

- Signal Request
  - o Generate work order request for traffic signals via a preventative maintenance schedule or reactive maintenance depending on the situation. Preventative maintenance schedules will be set up by the work order system while reactive maintenance will be set up through public input through mobile devices such as smart phones, phone calls or our city website.
  - o Spatially locate the traffic signals location using the city's GIS system and connect all work orders to the spatial location.
  - o Generating work order tables showing labor time, cost and inventory associated with the work at each location. The city has 17 traffic signals.

- ADA compliance at street intersections along with money allocation
  - o Generate work orders when new ADA ramps are installed or repaired. Maintenance request be set up in the work order system using public input through mobile devices such as smart phones, phone calls or our city website.
  - o These work orders will be spatially located connected to the City's GIS. City staff can then generate work order tables showing labor time, cost and inventory associated with the work at each location. The city has hundreds of ADA Ramps.

STORM WATER MAINTENANCE WORK ACTIVITIES

The Storm Water Division of Public Works has a number of work activities that will use the work and asset management software. The work activities include the following:

- Outfall inspections
  - o Generate routine work orders to perform outfall inspections in compliance with TDEC regulations. The City has over 250 storm water outfalls throughout the city which requires annual inspections. Records and photographs must be kept showing

for each outfall. Dude Solution will provide the means to upload photos to the work order system showing the data and time when the inspection takes place.

- o These work orders will be spatially located connected to the City's GIS. City staff can then generate work order tables showing labor time, cost and inventory associated with the work at each location.

- Detention Pond Inspections
  - o Generate routine work orders to conduct annual inspections on HOA owned and maintained detention ponds in accordance with TDEC rules and regulations. There are dozens of detention ponds that personnel in the Storm Water Division must inspect to meet TDEC regulations. Records and photographs must be kept showing each detention ponds. Dude Solution will provide the means to upload photos to the work order system showing the data and time when the inspection takes place.
  - o These work orders will be spatially located connected to the City's GIS. City staff can then generate work order tables showing labor time, cost and inventory associated with the work at each location.

- Storm Sewer Inlet Inspections
  - o As part of the six minimum measures spelled out in TDEC regulations, storm sewer inlet inspections are listed as a good house keeping measure to reduce stream pollution and litter. The work and asset management software will give us the opportunity to track inlet maintenance

- Hot Spot Inspections
  - o Hot spot locations are critical spots identified by the city where there is potential for illegal discharges into the city's storm sewer system. These locations must be routinely inspected and documented.
  - o Under this software, these inspections can be uploaded into the database as well as adding predictive maintenance options.
  - o The City has over 20 hot spots that require periodic inspections.

- Active Construction Site Inspections
  - o The city currently inspects forty-two active construction sites each month as per TDEC rules and regulations. The work and asset management software will give us the means to spatially determine what active construction site has been inspected and when is the next inspection scheduled.

- Stream Assessment Inspections
  - o Visual stream assessment must be conducted within the five-year permit cycle. Photographs and work order tracking will be used to document the work activities required for this program. The city has 63 miles of stream and tributaries inside the city limits.

- Citizen Drainage Request. Subdivision Development
  - o Generate work order request for citizen request pertaining to drainage issues and concerns. Photographs and other data can be uploaded through through mobile devices such as smart phones, phone calls or our city website.
  - o Spatially locate the drainage problems by interfacing with the GIS system.
  - o Generating tables and address locations where site inspections have taken place.
  - o We generate 3 to 10 requests monthly for this work activity

The above work activities summarize how the work and asset management solution software can interface with the Public Works Department. The software will interface with Request Tracker to expedite downloading of citizen request to the appropriate software and direct the work order to the appropriate supervisor.

Funding for this software will come from the storm water budget which allocated monies for the software. After reviewing the software and its features, it was a natural fit to expand the work order system to the Street Division. City staff recommends using monies from the contractual services line item since bids for the bulky waste hauling and disposal have come in nearly thirty thousand dollars under budget.

City staff has incorporated comments from Aldermen Fitterer as well as from the City Attorney into the Vendor Services Agreement and Dude Solution's Subscription Service Agreement.

City staff recommends that the Board of Mayor and Aldermen adopt a resolution authorizing a contract with Dude Solutions to provide the Storm Water and Streets Division an asset and work order solution in the amount of $21,020.43.

SPRING HILL VENDOR SERVICES AGREEMENT

THIS SERVICES AGREEMENT ("Agreement") is made by and between THE CITY OF SPRING HILL, TENNESSEE (the "City") and Dude Solutions ("Vendor") (collectively as "Parties"), and is entered into on _____August 20__, 2018, and is effective as of the Effective Date set forth herein.

RECITALS:

WHEREAS, the City requires work and asset management services it cannot provide itself and desires to contract with a third-party independent contractor to provide said services for the City's benefit; and

WHEREAS, pursuant to state law, the City published a Request for Proposal (RFP) and Vendor submitted a bid; and

WHEREAS, the City has selected Vendor to provide the services it desires.

NOW, THEREFORE, in consideration of the foregoing facts and circumstances, the mutual covenants and promises contained herein and other good and valuable consideration, the receipt and sufficiency of which is acknowledged by each of the Parties, the Parties do hereby agree to the following:

1.   **EFFECTIVE DATE.** The Effective Date of this Agreement shall be August 20, 2018.

2.   **TERM.** The term of this Agreement shall be continuous from the Effective Date herein unless either party initiates termination proceeding as outlined in Paragraph 8 below.

3.   **INSURANCE.** Vendor shall maintain in full force and effect, during the entire term of this Agreement, liability insurance, along with commercial general liability, workers' compensation and automobile insurance, in the minimum limits set forth below, naming City as an additional insured, and shall provide to the City certificates of insurance upon reasonable request.

   a.   Commercial general liability, including premises-operations, products/completed operations, broad form property damage, blanket contractual liability, independent contractors, personal injury or bodily injury with a policy limit of not less than One Million Dollars ($1,000,000), combined single limit, per occurrence;

   b.   Business automobile liability for owned vehicles, hired, and non-owned vehicles, with a policy limit of not less than One Million Dollars ($1,000,000), combined single limit, per occurrence for bodily injury and property damage;

   c.   Workers' compensation insurance as required by the State of Tennessee. The Provider agrees to waive, and to obtain endorsements from its workers' compensation insurer waiving subrogation rights under its workers' compensation insurance policy against the City, its officers, agents, employees, and volunteers arising from work performed by Provider for the City and to require each of its subcontractors, if any, to do likewise under their workers' compensation insurance policies.

4. **VENDOR RESPONSIBILITIES.**

   a. Furnish and install a work and asset management solution for the City of Spring Hill Storm Sewer work activities and Street Maintenance work activities in accordance with their Proposal dated July 19, 2018;
   b. Provide four days of onsite training to city users
   c. Provide an interface into the City's Civic Plus website for citizen input.

5. **CITY'S RESPONSIBILITIES.**

   a. Provide Dude Solution an interface with the City's GIS system;
   b. Execute a Subscription Services Agreement attached as Exhibit A. The Subscription Services Agreement is incorporated herein by reference. To the extent the terms of the Subscription Services Agreement conflict with this Vendor Services Agreement, the Vendor Services Agreement shall control;

6. **PRICE.** The price of these services shall not exceed $21,020.43.

7. **INDEPENDENT CONTRACTOR.** It is expressly agreed and understood that Vendor is an independent contractor and shall not represent itself, its agents or employees as agents or employees of the City. Nothing herein is to be construed as to create any employer-employee relationship between Vendor and the City; and neither Vendor nor any of its employees shall be deemed to be employees or agents of the City. At all times material to this Agreement, any subcontractors or agents employed by Vendor shall be considered acting under the supervision, direction and control of City.

8. **AMENDMENT AND TERMINATION.** This Agreement may be terminated without cause at any time by either Party through the issuance of a thirty (30) day written notice pursuant to this Agreement. Termination with cause shall not require advance notice.

9. **NO CONFLICT OF INTEREST.** No City official, employee or member of the governing body of the City shall be admitted to any share or part of this Agreement or to any benefit to arise from the same. Likewise, no officer, employee, or member of the governing body of Vendor or who exercises any function or responsibilities in connection with the carrying out of the project to which this Agreement pertains shall have any private interest, direct or indirect, in this Agreement.

10. **ASSIGNMENT; SUBCONTRACTING.** This Agreement may not be assigned by either Party. The Vendor shall not subcontract its responsibility pursuant to this Agreement to a third party.

11. **MODIFICATION.** This Agreement shall not be modified or amended except by an instrument in writing executed by or on behalf of Vendor and the City.

12. **NONDISCRIMINATION.** Consistent with the City's policy and state and federal law that harassment and discrimination are unacceptable conduct, the Vendor agrees that harassment or discrimination

directed toward a permit applicant, a City employee, or a citizen by the Vendor or Vendor's employee or subconsultant on the basis of race, religious creed, color, national origin, ancestry, handicap, disability, marital status, sex, age, or sexual orientation will not be tolerated. The Vendor agrees that any and all violations of this provision shall constitute a material breach of this Agreement.

13. **EXECUTION IN COUNTERPARTS.** This Agreement may not be amended, changed, modified, altered or terminated except by instrument in writing signed by the Parties. This Agreement may be executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

14. **TIME.** Time is and shall be of the essence with regards to this Agreement.

15. **VENUE AND JURISDICTION.** The venue and jurisdiction for any disputes arising pursuant to this Agreement shall be in the Circuit Court for Maury County, Tennessee.

16. **HOLD HARMLESS AND INDEMNITY.** Vendor shall provide a defense, indemnify and hold the City harmless from and against any and all claims arising from personal injury or property damage to the extent resulting from the negligent acts or omissions of the Vendor, including all damages, costs, reasonable attorney's fees, expenses and liabilities incurred in the defense of any claim or action arising there from.

17. **APPLICABLE LAW.** This Agreement shall be governed by and construed in accordance with the laws of the State of Tennessee.

18. **FORCE MAJEURE.** The Parties shall not be liable to each other or be deemed to be in breach of this Agreement for any failure or delay in rendering performance arising out of causes beyond their respective reasonable control and without its fault or negligence. Such causes may include, but are not limited to, acts of God or the public enemy, terrorism, significant fires, floods, earthquakes, epidemics, quarantine restrictions, strikes, freight embargoes, or Governmental Authorities approval delays which are not caused by any act or omission by the parties, and unusually severe weather. The Parties agree to notify each other of the existence and nature of any delay.

19. **BINDING EFFECT.** This Agreement shall inure to the benefit of and shall be binding upon City and Vendor and their respective heirs, administrators, successors and assigns.

20. **SEVERABILITY.** In the event any provision of this Agreement or any instrument delivered in connection herewith shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provisions hereof or thereof.

21. **NOTICES.** All notices or other communications hereunder shall be deemed sufficiently given and shall be deemed given when delivered by hand-delivery or mailed by first class, postage prepaid, registered or certified mail and addressed as follows:

If to Vendor: Melissa Buchanan, Contracts Manager
                                  11000 Regency Parkway, Suite 110

Cary, North Carolina 27518

If to City: Mayor Rick Graham
199 Town Center Parkway
P.O. Box 789
Spring Hill, TN 37174

Copy to: Patrick M. Carter, Esq.
Middle Tennessee Law Group, PLLC
d/b/a Wolaver, Carter & Heffington
809 South Main Street, Suite 100
Columbia, TN 38401

City and Vendor may, by notice given hereunder, designate from time to time any further or different addresses to which subsequent notices, certificates or other communications shall be sent.

22.   **CAPTIONS.** The paragraph headings in this Agreement are for convenience only, and they form no part of this Agreement and shall not affect its interpretation.

23.   **ENTIRE AGREEMENT.** This Agreement represents the entire agreement between Vendor and the City and supersedes all prior negotiations, representations and agreements either written or oral, unless otherwise expressly stated herein.

24.   **PAYMENT OF EXPENSES; BREACH.** Each of the Parties to this Agreement shall pay his/her/its own expenses, costs and attorney's fees associated with the negotiation, preparation, execution and delivery of this Agreement and the documents related thereto and the consummation of the transactions contemplated herein.

IN WITNESS WHEREOF, Vendor and the City have caused their duly authorized representatives to execute and deliver this Agreement, all as of the day and year first written above.

CITY OF SPRING HILL, a Tennessee municipality

By:_____
RICK GRAHAM
Mayor of Spring Hill
Date of Execution:_____ August 20, 2018 _____

By:_____
VENDOR REPRESENTATIVE

SUBSCRIPTION AGREEMENT

This Online Subscription Agreement (this "<u>Agreement</u>") shall govern Customer's (as defined below) access and use of the Service (as defined below) provided by Smartware Group, Inc. ("<u>Provider</u>"), an Affiliate (as defined below) of Dude Solutions, Inc. (including its successors and assigns, "<u>DSI</u>"). BY ACCEPTING THIS AGREEMENT, EITHER BY CLICKING A BOX INDICATING ACCEPTANCE, BY EXECUTING AN ORDER FORM THAT REFERENCES THIS AGREEMENT OR BY OTHERWISE ACCESSING AND USING THE SERVICE, YOU AGREE TO THE TERMS OF THIS AGREEMENT. AS A RESULT, PLEASE READ ALL THE TERMS AND CONDITIONS OF THIS AGREEMENT CAREFULLY.

IF YOU ARE ENTERING INTO THIS AGREEMENT ON BEHALF OF A COMPANY OR OTHER LEGAL ENTITY, YOU REPRESENT THAT YOU HAVE THE AUTHORITY TO BIND SUCH ENTITY AND ITS AFFILIATES TO THE TERMS AND CONDITIONS OF THIS AGREEMENT, IN WHICH CASE THE TERMS "YOU" OR "YOUR" SHALL REFER TO SUCH ENTITY AND ITS AFFILIATES. IF YOU DO NOT HAVE SUCH AUTHORITY, OR IF YOU DO NOT AGREE WITH THE TERMS AND CONDITIONS SET FORTH HEREIN, YOU MUST <u>NOT</u> ACCEPT THIS AGREEMENT AND MAY NOT USE THE SERVICE.

Section 1.0   Definitions

As used in this Agreement, the following terms shall have the meanings set forth below:

1.1   "<u>Access Credentials</u>" means any user name, identification number, password, license or security key, security token, PIN or other security code, method, technology or device used, alone or in combination, to verify an individual's identity and authorization to access and use the Service.

1.2   "<u>Account</u>" means Customer's specific account where Customer subscribes to access and use the Service.

1.3   "<u>Account User</u>" means each employee, consultant and contractor of Customer that has been granted Access Credentials.

1.4   "<u>Affiliate</u>" means, with respect to any legal entity, any other legal entity that (i) controls, (ii) is controlled by or (iii) is under common control of such legal entity. A legal entity shall be deemed to "control" another legal entity if it has the power to direct or cause the direction of the management or policies of such legal entity, whether through the ownership of voting securities, by contract, or otherwise.

1.5   "<u>Annual Fee</u>" means the annual fee invoiced to Customer by Provider (or its sales agent) prior to the Initial Term and each applicable Renewal Term, which is required to be paid in order for Customer to be permitted to access and use the Service and, if Customer purchases the Asset Essentials Connector Toolkit, the API.

1.6   "<u>API Toolkit</u>" or "<u>API</u>" means Provider's proprietary application programming interface and any accompanying or related documentation, software libraries, software tools, published specifications, and other materials, as amended from time-to-time in Provider's sole discretion.

1.7   "<u>Asset Essentials Connector Toolkit</u>" means Provider's add-on module that (i) enables Provider's customers to integrate (import/export) Customer Data with the Service in batch-mode or real-

time, and (ii) consists of the *"Connecter Tool"*, which is a client-side executable program installed locally on Customer's computer, and the API.

1.8   "Confidential Information" means any non-public information and/or materials disclosed in writing or orally by a party under this Agreement (the "Disclosing Party") to the other party (the "Receiving Party"), which (i) is designated in writing as confidential at the time of disclosure, or (ii) with respect to non-public information disclosed orally, the Disclosing Party sends the Receiving Party a written notice to Receiving Party within 15 days after oral disclosure identifying the non-public information that was disclosed as its confidential information, including when, where, how and to whom such non-public information was disclosed. For avoidance of doubt, Provider's Confidential Information shall include the source code, data structure, algorithms and logic of the Applications and Service. Notwithstanding the foregoing, Confidential Information shall not include any information that (i) is or becomes generally known to the public without breach of any obligation owed to the Disclosing Party, (ii) was known to the Receiving Party prior to its disclosure by the Disclosing Party without breach of any obligation owed to the Disclosing Party, (iii) is received from a Third Party without breach of any obligation owed to the Disclosing Party, or (iv) was independently developed by the Receiving Party.

1.9   "Content" means all of the audio and visual information, documents, content, materials, products and/or software contained in, or made available through, the Service.

1.10   "Customer" means the legal entity identified on the Account.

1.11   "Customer Data" means all data, information and other content provided by or on behalf of Customer to the Service, including that which the Account Users input or upload to the Service.

1.12   "Documentation" means the user documentation relating to the Service, including but not limited to descriptions of the functional, operational and design characteristics of the Service.

1.13   "DSI Data" means all data, information and other content provided by or on behalf of DSI customers to any of the DSI Services.

1.14   "DSI Services" means DSI's suite of facility management software-as-a-service applications, solution and services, as updated, enhanced or otherwise modified from time-to-time.

1.15   "Highly-Sensitive Personal Information" means an Account User's (i) government-issued identification number (including social security number, driver's license number or state-issued identified number), (ii) financial account number, credit card number, debit card number, credit report information, in each case with or without any required security code, access code, personal identification number or password that would permit access to such Account User's financial account; and/or (iii) biometric data.

1.16   "HIPAA" means the Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104-191) and all regulations promulgated thereunder (45 C.F.R. §§ 160-164), as amended by Subtitle D of the Health Information Technology for Economic and Clinical Health Act and all regulations promulgated thereunder, as Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5), as amended from time to time.

1.17   "Implementation, Training and Support Program" or "ITSP" means Provider's comprehensive implementation, training and support program provided to Provider's customers with respect to the Service.

1.18 "Intellectual Property Rights" means all ideas, concepts, designs, drawings, packages, works of authorship, processes, methodologies, information, developments, materials, inventions, improvements, software, and all intellectual property rights worldwide arising under statutory or common law, including without limitation, all (i) patents and patent applications owned or licensable by a party hereto; (ii) rights associated with works of authorship, including copyrights, copyright applications, copyright registrations, mask work rights, mask work applications and mask work registrations; (iii) rights related to protection of trade secrets and Confidential Information; (iv) trademarks, trade names, service marks and logos; (v) any right analogous to those set forth in clauses (i) through (iv); and (vi) divisions, continuations, renewals, reissues and extensions of the foregoing (as and to the extent applicable) now existing, hereafter filed, issued or acquired.

1.19 "Service" means the "*Asset Essentials*" SaaS-based application or the "*Asset Essentials Enterprise*" SaaS-based application, as applicable, which Customer subscribes to pursuant to this Agreement, in each case as updated, enhanced or otherwise modified from time-to-time.

1.20 "Third Party" means a party other than Customer, Provider or DSI.

Section 2.0   Use of the Service and the API; Proprietary Rights

2.1   Use of the Service and the API.

(a)   *Service Subscription.* Subject to the terms of this Agreement (including, without limitation, the responsibilities, limitations and restrictions set forth in this Section 2.1 and payment of the Annual Fees required hereunder), (i) Provider shall permit Customer's Account Users to access and use the Service during the Term, including access and use of all of the Content contained in or made available through the Service, (ii) Customer shall be automatically enrolled in the ITSP, and (iii) Provider shall use commercially reasonable efforts to make available to Customer each of the components described in the ITSP. Customer agrees that it shall use the Service solely for internal business purposes, and access and use of the Service and the ITSP shall be limited to Account Users.

(b)   *API License.* Subject to the terms of this Agreement (including, without limitation, the responsibilities, limitations and restrictions set forth in this Section 2.1 and payment of the Annual Fees required hereunder), underlined provided that Customer is purchasing the right to use the Asset Essentials Connector Toolkit, Provider hereby grants to Customer a limited, non_exclusive, non-transferable, revocable license (without the right to sublicense) to use and make calls to the API solely for the purpose of (i) extracting and transferring Customer Data from the Service to other Third Party applications used by the Customer for internal business purposes, and/or (ii) Customer's internal development efforts to develop applications to work in conjunction with the functionality and capabilities of the Service purchased by Customer ("Customer Applications"). Customer shall have no right to distribute, license (whether or not through multiple tiers) or otherwise transfer the API to any Third Party or incorporate the API in any software, product, or technology.

(c)   *Account Setup.* To subscribe to the Service, Customer must establish its Account, which may only be accessed and used by its Account Users. To setup an Account User, Customer must provide Provider (and agree to maintain, promptly update and keep) true, accurate, current and complete information for such Account User. If Customer or any applicable Account User provides any information that is untrue, inaccurate, not current or incomplete, Provider has the right to immediately suspend or terminate Customer's Account and usage of the Service and the API and refuse any and all future

use. Each Account User must establish and maintain personal, non-transferable Access Credentials, which shall not be shared with, or used by, any other Third Party. Customer may not transfer an Account User's Access Credentials and/or its right to access and use the Service to a different user. Customer shall be solely responsible for any and all activities that occur under its Account, including all acts and omissions of its Account Users. Customer shall notify Provider immediately of any unauthorized use of its Account and/or any other breach of security of the Service that it suspects or becomes aware of.

(d)   *Customer Responsibilities.* Customer shall: (i) take appropriate action to ensure that non-Account Users do not access or use the Service or the API; (ii) ensure that all Account Users comply with all of the terms and conditions of this Agreement, including the limitations and restrictions set out in Section 2.1(e); (iii) be solely responsible for the accuracy, integrity, legality, reliability and appropriateness of all Customer Data created by Account Users using the Service; (iv) access and use the Service solely in compliance with the Documentation and all applicable local, state, federal, and foreign laws, rules, directives and regulations (including those relating to export, homeland security, anti-terrorism, data protection and privacy); (v) allow e-mail notifications generated by the Service on behalf of Customer's Account Users to be delivered to Customer's Account Users; and (vi) promptly update and upgrade its system as requested or required in order to ensure continued performance and compatibility with upgrades to the Service and/or API Modifications (as defined in Section 2.1(g)). Customer shall be responsible for any breach of this Agreement by Account Users and any access or Use of the Service by persons other than Account Users.

(e)   *Limitations and Restrictions.* Customer agrees that it shall not, and shall not permit any Third Party to, directly or indirectly: (i) modify, alter, revise, decompile, disassemble, reverse engineer, create derivative works or attempt to derive the source code of the Service or the API; (ii) assign, transfer, lease, rent, sublicense, distribute or otherwise make available the Service or the API, in whole or in part, to any Third Party, including on a timesharing, software-as-a-service or other similar basis; (iii) share Access Credentials or otherwise allow access or use the Service or the API to provide any service bureau services or any services on a similar basis; (iv) use the Service or the API in a way not intended by Provider or for any unlawful purpose; (v) use the Service or the API to store or transmit infringing, libelous, or otherwise unlawful or tortious material, or to store or transmit material in violation of Third Party privacy rights; (vi) attempt to tamper with, alter, disable, hinder, by-pass, override, or circumvent any security, reliability, integrity, accounting or other mechanism, restriction or requirement of the Service or the API; (vii) remove, obscure or alter any copyright, trademark, patent or proprietary notice affixed or displayed by or in the Service; (viii) perform load tests, network scans, penetration tests, ethical hacks or any other security auditing procedures on the Service or the API; (ix) interfere with or disrupt the integrity or performance of the Service, the API or the data contained therein; (x) access or use the Service or the API in order to replicate applications, products or services offered by Provider or DSI and/or otherwise build a competitive product or service, copy any features, functions or graphics of the Service or the API or monitor the availability and/or functionality of the Service or the API for any benchmarking or competitive purposes; (xi) under any circumstances, through a Third Party application, a Customer Application or otherwise, repackage or resell the Service, the API or any data received via the API; (xii) store, manipulate, analyze, reformat, print, and display the Content for personal use; (xiii) upload or insert code, scripts, batch files or any other form of scripting or coding into the Service; and (xiv) store Highly-Sensitive Personal Information. Highly-Sensitive Personal Information should not be entered into the Service, as there are no data fields requesting this type of information.

(f)   *Additional Service Guidelines.* Provider reserves the right to establish or modify general practices and limits concerning use of the Service, including without limitation, the maximum number of

days that Customer Data shall be retained by the Service and the maximum disk space that shall be allotted on Provider servers on Customer's behalf. Provider shall provide at least sixty (60) days' prior notice of any such modification. Provider also reserves the right to block IP addresses originating a Denial of Service (DoS) attack or IP addresses causing excessive amounts of data to be sent to Provider servers. Provider shall notify Customer should this condition exist and inform Customer of its action. Once blocked, an IP address shall not be able to access the Service or the API and the block may be removed once Provider is satisfied corrective action has taken place to resolve the issue.

(g)   *API Modifications.* Provider may modify, amend, change, or deprecate all or part of the API in its sole discretion at any time (an "API Modification"). Provider shall use reasonable efforts to provide notice to Customer of any such API Modifications as soon as reasonably practical. Customer acknowledges that an API Modification may have a material adverse effect on any applications utilizing or relying upon the API (including Customer Applications), including but not limited to causing such applications not to operate as designed. Provider shall have no liability of any kind to Customer or any user of such applications with respect to such API Modifications or any adverse effects resulting from such API Modifications.

(h)   *Controlled API Usage.* Provider may limit or suspend Customer's usage of or access to the API if, in Provider's sole discretion, Customer or Customer's use of the API are adversely affecting the performance or operation of the API or the Service. Provider shall use reasonable efforts to provide notice to Customer of any such actions as soon as reasonably practical.

(i)   *Third Party Software.* The Service may incorporate and/or embed software and other technology owned and controlled by Third Parties. Any such Third Party software or technology that is incorporated and/or embedded into any Service shall be provided to Customer on the license terms set forth this Agreement, unless additional or separate license terms apply as indicated by Provider. To the extent that the Service links to any Third Party website, application or service, the terms and conditions thereof shall govern Customer's rights with respect to such website, application or service, unless otherwise expressly provided Provider. Provider shall have no obligations or liability arising from Customer's access and use of such linked Third Party websites, applications and services.

2.2   Proprietary Rights.

(a)   Customer acknowledges and agrees that (as between Customer and Provider) Provider retains all ownership right, title, and interest in and to the Service, the API, the Documentation and the Content, including without limitation all corrections, enhancements, improvements to, or derivative works thereof (collectively, "Derivative Works"), and in all Intellectual Property Rights therein or thereto. To the extent any Derivative Work is developed by Provider based upon ideas or suggestions submitted by Customer to Provider, Customer hereby irrevocably assigns all rights to modify or enhance the Service and/or the API using such ideas or suggestions or joint contributions to Provider, together with all Intellectual Property Rights related to such Derivative Works. Nothing contained in this Agreement shall be construed to convey to Customer (or to any party claiming through Customer) any Intellectual Property Rights in or to the Service, the API, the Documentation and the Content, other than the rights expressly set forth in this Agreement.

(b)   Provider acknowledges and agrees that (as between Customer and Provider) Customer retains all ownership right, title, and interest in and to the Customer Data, including all Intellectual Property Rights therein or thereto. Notwithstanding the foregoing, Customer hereby grants Provider and

its Affiliates a non-exclusive, royalty-free license to: (i) access, display, copy, distribute, transmit, publish, disclose and otherwise use all or any portion of the Customer Data to improve the Service, the API and the performance of Provider, including without limitation, submitting and sublicensing the Customer Data to Third Parties for analytical purposes, provided that (x) such Third Parties have entered into a written agreement with Provider to maintain the confidentiality of the Customer Data and (y) Provider shall not specifically identify the Customer Data as originating from Customer when providing the Customer Data to such Third Parties; (ii) integrate and incorporate the Customer Data with and into the DSI Data (collectively, the "Combined Data"); (iii) access, copy, view, analyze, process and use the Combined Data for the purpose of hosting, operating and providing the DSI Services; and (iv) use, copy and publish, and disclose, transmit and re-distribute all or any portion of the Combined Data to DSI customers in connection with their access and use of the DSI Services.

Section 3.0   Provider Responsibilities

3.1   <u>Implementation, Training and Support Program</u>. During the Term Provider (or its agent, representative or designee) shall provide and maintain the ITSP. The ITSP shall be performed in accordance with the terms set forth at: www.dudesolutions.com, as amended from time-to-time.

3.2   <u>Professional Services</u>. Provider shall provide and perform professional, technical, consulting and/or other services (collectively, "Professional Services") that are mutually agreed upon and described in one or more statements of work that expressly reference this Agreement. Each statement of work shall be effective, incorporated into and form a part of this Agreement when duly executed by an authorized representative of each of the parties. Each statement of work shall (i) describe the fees and payment terms with respect the Professional Services being provided pursuant to such statement of work, (ii) identify any work product that will be developed pursuant to such statement of work, and (iii) set forth each party's respective ownership and proprietary rights with respect to any work product developed pursuant to such statement of work. Provider represents and warrants that all such Professional Services shall be performed in a professional and workmanlike manner.

3.3   <u>Customer Data</u>. Provider shall not edit or disclose any information regarding Customer's Account, including any Customer Data, without Customer's prior permission, except in accordance with this Agreement. Notwithstanding the foregoing, Provider is hereby permitted to provide certain statistical information (*e.g.,* usage, average costs or time values, or user traffic patterns) in aggregated and de-identified form to Third Parties or to other subscribers.

3.4   <u>Service Levels</u>.

(a)   Provider shall use commercially reasonable efforts to make the Service available (i) 99.9% of the time during the hours of 6:00 a.m. (Eastern time) to 10:00 p.m. (Eastern time), Monday through Friday, excluding holidays ("Business Hours"), and (ii) 99.5% of the time, determined on a twenty-four (24) hours a day, seven (7) days a week basis. Availability shall be calculated on a monthly basis. For purposes of calculating availability, the Service shall not be deemed unavailable during any period arising from: (i) routine system maintenance that is performed weekly during non-Business Hours; (ii) scheduled downtime for extended system maintenance (of which Provider shall give at least 8 hours' prior notice and which Provider shall schedule to the extent reasonably practicable outside of Business Hours); and (iii) any unavailability caused by circumstances beyond Provider's reasonable control, including, for example, an act of God, act of government, flood, fire, earthquake, civil unrest, act of terror, strike or

other labor problem (other than one involving Our employees), Internet service provider failure or delay, non-Provider software or hardware, or denial of service attack.

(b)   Provider shall use reasonable efforts to ensure the availability of the API in accordance with the service levels described in Section 3.4(a). Notwithstanding the foregoing, Provider does not guarantee any required uptime, performance, or integrity of any product, application or service that integrates with and/or otherwise utilizes the API (including, without limitation, any such product, application or service developed by Customer). Moreover, Provider shall not be liable to Customer or any Third Party for the unavailability of the API or the failure of the API to perform in accordance with its specifications. Customer shall not represent to any Third Party any availability or performance levels with respect to the API.

3.5   Protection of Customer Data. Provider shall maintain commercially reasonable administrative, physical, and technical safeguards for protection of the security, confidentiality and integrity of Customer Data. In addition, if Customer is a "Covered Entity" under HIPAA, Provider shall be Customer's "Business Associate" under HIPAA, and any Customer Data provided by Customer to Provider in their capacities as a Covered Entity and Business Associate, respectively, Provider and Customer shall enter into a Business Associate Agreement (the form of which shall be reasonably satisfactory to Provider).

Section 4.0   Third Party Interactions

4.1   Relationship to Third Parties. In connection with Customer's use of the Service, Customer may: (i) enter into correspondence with and/or participate in promotions of advertisers or sponsors showing their goods and/or services through the Service; (ii) purchase goods and/or services, including implementation, customization, content, forms, schedules, integration and other services; (iii) exchange data, integrate, or interact between Customer's Account, the Service, the API and a Third Party provider; (iv) be offered additional functionality within the user interface of the Service through use of the API; and/or (v) be provided content, knowledge, subject matter expertise in the creation of forms, content and schedules. Any such activity, and any terms, conditions, warranties or representations associated with such activity, shall be solely between Customer and the applicable Third Party. Provider shall have no liability, obligation or responsibility for any such correspondence, purchase, promotion, data exchange, integration or interaction between Customer and any such Third Party.

4.2   Ownership. Customer is the owner of all Third Party content and data loaded into the Customer Account. As the owner, it is Customer's responsibility to make sure it meets its particular needs. Provider shall not comment, edit or advise Customer with respect to such Third Party content and data in any manner.

4.3   No Warranty or Endorsement. Provider does not warrant any Third Party providers or any of their products or services, whether or not such products or services are designated by Provider as "certified," "validated," "premier" and/or any other designation. Provider does not endorse any sites on the Internet which are linked through the Service. Provider is providing these links to Customer only as a matter of convenience, and in no event shall Provider be responsible for any content, products, or other materials on or available from such sites.

4.4   Additional Terms. The Disclaimer of Warranties (Section 8.1) and Limitation of Liability (Section 8.3) set forth herein shall apply to all Third Party interactions.

Section 5.0   Provider's Sales Agent

5.1   Sales Agent. Notwithstanding anything to the contrary in this Agreement, Customer acknowledges and agrees that DSI has acted on Provider's behalf under this Agreement in DSI's limited capacity as Provider's sales agent. Customer acknowledges and agrees that (i) Customer will process payment for all Annual Fees or expenses owing to Provider under this Agreement through DSI, as Provider's collection agent, and not through Provider directly, (ii) except as provided in clause (iii), Customer will direct all ITSP inquiries to DSI and not to Provider directly, and (iii) DSI did not design, develop or create the Service or the API and DSI has not itself provided any warranties with respect to the Service and/or the API, and therefore Customer will direct any warranty claims with respect to the Service directly to Provider and not to DSI.

5.2   Third-Party Beneficiary. Customer acknowledges and agrees that DSI is third-party beneficiary to this Agreement and this Agreement shall not be amended in any manner that affects DSI's rights hereunder without DSI's prior written consent.

Section 6.0   Annual Fees

6.1   Annual Fees. Customer shall, on or before the commencement of the Initial Term of a Service subscription, pay to DSI (as Provider's collection agent) the Annual Fee for such Service subscription. Thereafter, DSI (as Provider's collection agent) shall invoice Customer for each applicable Annual Fee at least sixty (60) days prior to the commencement of the applicable Renewal Term. Unless Customer provides written notice of non-renewal in accordance with Section 7.1, Customer agrees to pay all Annual Fees no later than thirty (30) days after the receipt of DSI's applicable invoice therefor. Customer is responsible for providing complete and accurate billing and contact information to DSI and Provider and notifying DSI and Provider of any changes to such information.

6.2   Automatic Payments. Customer shall, upon the written request from Provider or DSI, establish and maintain valid and updated credit card information or a valid ACH auto debit account (in each case, the "Automatic Payment Method"). Upon establishment of such Automatic Payment Method, DSI (as Provider's collection agent) is hereby authorized to charge any applicable Annual Fee using such Automatic Payment Method.

6.3   Renewal Charges. Provider maintains the right to increase Annual Fees and other applicable fees and charges in connection with each Renewal Term.

6.4   Taxes. Provider's fees do not include any taxes, levies, duties or similar governmental assessments of any nature, including, for example, value-added, sales, use or withholding taxes, assessable by any jurisdiction whatsoever (collectively, "Taxes"). Customer is responsible for paying all Taxes associated with its purchases hereunder. If Provider has the legal obligation to pay or collect Taxes for which Customer is responsible under this Section 6.4, DSI (as Provider's collection agent) shall invoice Customer and Customer shall pay that amount unless Customer provides DSI with a valid tax exemption certificate authorized by the appropriate taxing authority. Customer agrees to indemnify and hold Provider harmless from any encumbrance, fine, penalty or other expense which Provider may incur as a result of Customer's failure to pay any Taxes required hereunder. For clarity, Provider is solely responsible for taxes assessable against Provider based on its income, property and employees.

Section 7.0   Term and Termination

7.1   Term. This Agreement commences on the date Customer establishes its Account and continues until the Service subscription hereunder has expired or have been terminated (the "Term"). The initial term of the Service subscription shall be for a period of one (1) year (the "Initial Term"). Thereafter, the Service subscription shall automatically renew for successive one year periods (each, a "Renewal Term") unless either party has provided written notice of its intent to not renew the Service subscription not less than thirty (30) days prior to the expiration of the then-current Initial or Renewal Term applicable to the Service subscription.

7.2   Termination of Agreement for Breach. Either party may terminate this Agreement (including its Service subscription and Account) prior to the expiration of the Term if the other party commits a material breach of this Agreement and fails to cure such breach within thirty (30) days after written notice of such breach is given by the non-breaching party; provided that if the breach involves a failure of Customer to pay any of the fees required under this Agreement, the cure period shall be reduced to ten (10) days. Without limiting the foregoing, in the event of a breach that gives rise to the right by Provider to terminate this Agreement, Provider may elect, as an interim measure, to suspend Customer's access and use of the Service, the API (if applicable) and the Account until the breach is cured. Provider's exercise of its suspension right shall be without prejudice to Provider's right to terminate this Agreement upon written notice to Customer.

7.3   Termination for Convenience. Customer may terminate this Agreement (including its Service subscription and Account) at any time for convenience by providing DSI (as Provider's sales agent) forty-five (45) days' prior written notice to the following email address: notice@dudesolutions.com. Upon termination by Customer pursuant to this Section 7.3, Customer may request in writing and be granted a refund in accordance with the following: (i) if Provider receives Customer's written notice of termination within the first sixty (60) days after the commencement of the Initial Term, Provider shall refund to Customer eighty percent (80%) of the Annual Fee prepaid for the Initial Term (the "Initial Year Subscription Fee"); (ii) if Provider receives Customer's written notice of termination during the Initial Term but after the first sixty (60) days thereof, Provider shall refund to Customer a pro rata portion of the Initial Year Subscription determined based upon the number of full months remaining in the Initial Term (based upon the effective date of termination); (iii) if Provider receives Customer's written notice of termination during a Renewal Term, Provider shall refund to Customer a pro rata portion of the Annual Fee prepaid for such Renewal Term determined based upon the number of full months remaining in such Renewal Term (based upon the effective date of termination). For avoidance of doubt, no refund shall be granted with respect to fees for Professional Services.

7.4   Effect of Termination. Upon termination of this Agreement, (i) Customer's access and use of the Service shall automatically cease, however, Provider shall grant Customer a period of thirty (30) days following termination of the Agreement to download Customer's Data or forward the Customer Data to Customer in a mutually agreed upon format. Provider shall have no obligation to maintain the Customer Data or to forward the Customer Data to Customer or any Third Party after the aforementioned thirty (30) day period expires.

7.5   Survival. The following portions of this Agreement shall survive termination of this Agreement and continue in full force and effect: Sections 2.1(e), 2.2, 7.4, 8, 9 and 10. Termination of this Agreement, or any of the obligations hereunder, by either party shall be in addition to any other legal or equitable remedies available to such party, except to the extent that remedies are otherwise limited hereunder.

Section 8.0   Disclaimers and Indemnification

8.1   Disclaimer of Warranties. TO THE FULLEST EXTENT PERMITTED BY LAW, THE SERVICE, THE API, ALL SERVER AND NETWORK COMPONENTS, WEB SERVICES, SOFTWARE AND THE DOCUMENTATION, ARE PROVIDED ON AN "AS-IS" AND "AS AVAILABLE" BASIS, WITHOUT ANY WARRANTIES OF ANY KIND. PROVIDER EXPRESSLY DISCLAIMS ANY AND ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, TITLE, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT. CUSTOMER ACKNOWLEDGES THAT PROVIDER DOES NOT WARRANT THAT THE SERVICE OR THE API WILL BE UNINTERRUPTED, TIMELY, SECURE, ERROR-FREE, OR FREE FROM VIRUSES OR OTHER MALICIOUS SOFTWARE, OR THAT ANY DEFECT IN THE SERVICE OR THE API WILL BE CORRECTED. IN ADDITION, PROVIDER MAKES NO WARRANTIES THAT THE API SHALL NOT CAUSE DISRUPTIONS, ERRORS, LOSS OF DATA, LOSS OF USE, OR OTHER PROBLEMS WITH ANY THIRD PARTY APPLICATION, CUSTOMER APPLICATION AND/OR ANY COMPUTER ON WHICH ANY SUCH APPLICATION IS INSTALLED OR USED. PROVIDER IS NOT RESPONSIBLE FOR ANY DAMAGES OR HARM ARISING FROM CUSTOMER'S USE OF THE API AND/OR ANY CUSTOMER APPLICATION. NO INFORMATION OR ADVICE OBTAINED BY CUSTOMER OR OTHER THIRD PARTIES FROM PROVIDER OR THROUGH THE SERVICE OR THE API SHALL CREATE ANY WARRANTY NOT EXPRESSLY STATED IN THESE TERMS.

8.2   Indemnification.

(a)   *Indemnity by Provider.* Provider shall defend, indemnify and hold harmless Customer from any loss, damage or expense (including reasonable attorneys' fees) awarded by a court of competent jurisdiction, or paid in accordance with a settlement agreement signed by Customer, in connection with any Third Party claim (each, a "Claim") alleging that Customer's use of the Service as expressly permitted hereunder infringes upon any United States patent, copyright or trademark of such Third Party, or misappropriates the trade secret of such Third Party; provided that Customer (x) promptly gives Provider written notice of the Claim; (y) gives Provider sole control of the defense and settlement of the Claim; and (z) provides to Provider all reasonable assistance, at Provider's expense. If Provider receives information about an infringement or misappropriation claim related to the Service, Provider may in its sole discretion and at no cost to Customer: (i) modify the Service so that it no longer infringes or misappropriates, (ii) obtain a license for Customer's continued use of the Service, or (iii) terminate this Agreement (including Customer's Service subscriptions and Account) upon prior written notice and refund to Customer any prepaid Annual Fee covering the remainder of the term of the terminated Service subscriptions. Notwithstanding the foregoing, Provider shall have no liability or obligation with respect to any Claim that is based upon or arises out of (A) use of the Service in combination with any software or hardware not expressly authorized by Provider, (B) any modifications or configurations made to the Service by Customer without the prior written consent of Provider, and/or (C) any action taken by Customer relating to use of the Service that is not permitted under the terms of this Agreement. This Section 8.2(a) states Customer's exclusive remedy against Provider for any Claim of infringement of misappropriation of a Third Party's Intellectual Property Rights related to or arising from Customer's use of the Service.

(b)   Customer shall defend, indemnify and hold harmless Provider from any loss, damage or expense (including reasonable attorneys' fees) awarded by a court of competent jurisdiction, or paid in accordance with a settlement agreement signed by Provider, in connection with any Claim alleging that the Customer Data, or Customer's use of the Service or the API in breach of this Agreement, infringes upon any United States patent, copyright or trademark of such Third Party, or misappropriates the trade secret of such Third Party; provided that Provider (x) promptly gives Customer written notice of the Claim;

(y) gives Customer sole control of the defense and settlement of the Claim; and (z) provides to Customer all reasonable assistance, at Customer's expense. This Section 8.2(b) states Provider's exclusive remedy against Customer for any Claim of infringement of misappropriation of a Third Party's Intellectual Property Rights related to or arising from the Customer Data or Customer's use of the Service.

8.3   Limitation of Liability. IN NO EVENT SHALL PROVIDER, IN THE AGGREGATE, BE LIABLE FOR DAMAGES TO CUSTOMER IN EXCESS OF THE AMOUNT OF ANNUAL FEES PAID BY CUSTOMER TO PROVIDER (INCLUDING PAYMENTS TO DSI, AS PROVIDER'S COLLECTION AGENT, FOR USE OF THE SERVICE) PURSUANT TO THIS AGREEMENT DURING THE TWELVE MONTHS PRIOR TO THE LAST ACT OR OMISSION GIVING RISE TO THE LIABILITY. UNDER NO CIRCUMSTANCES SHALL PROVIDER HAVE ANY LIABILITY WITH RESPECT TO ITS OBLIGATIONS UNDER THIS AGREEMENT OR OTHERWISE FOR LOSS OF PROFITS, OR CONSEQUENTIAL, EXEMPLARY, INDIRECT, INCIDENTAL OR PUNITIVE DAMAGES, EVEN IF PROVIDER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OCCURRING, AND WHETHER SUCH LIABILITY IS BASED ON CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY, PRODUCTS LIABILITY OR OTHERWISE. FOR AVOIDANCE OF DOUBT, CUSTOMER ACKNOWLEDGES AND AGREES THAT DSI IS NOT A PARTY TO THIS AGREEMENT AND, THEREFORE, IN NO EVENT SHALL DSI BE LIABLE FOR DAMAGES TO CUSTOMER HEREUNDER.

Section 9.0   Confidentiality

9.1   Protection of Confidential Information. The Receiving Party agrees that it shall (i) hold the Disclosing Party's Confidential Information in strict confidence and shall use the same degree of care in protecting the confidentiality of the Disclosing Party's Confidential Information that it uses to protect its own Confidential Information, but in no event less than reasonable care, (ii) not use the Confidential Information of the Disclosing Party for any purpose not permitted by this Agreement; (iii) not copy any part of the Disclosing Party's Confidential Information except as expressly permitted by this Agreement, (iv) limit access to the Confidential Information of the Disclosing Party to those of its employees, contractors and agents who need such access for purposes consistent with this Agreement and who have signed confidentiality agreements with the Receiving Party containing protections no less stringent than those herein.

9.2   Compelled Disclosure. The Receiving Party may disclose Confidential Information of the Disclosing Party if it is compelled by law to do so, provided the Receiving Party gives the Disclosing Party prior notice of such compelled disclosure (to the extent legally permitted) and reasonable assistance, at the Disclosing Party's cost, if the Disclosing Party wishes to contest the disclosure. If the Receiving Party is compelled by law to disclose the Disclosing Party's Confidential Information as part of a civil proceeding to which the Disclosing Party is a party, and the Disclosing Party is not contesting the disclosure, the Disclosing Party shall reimburse the Receiving Party for its reasonable cost of compiling and providing secure access to such Confidential Information.

9.3   Remedies. Recipient acknowledges that Disclosing Party would have no adequate remedy at law should Receiving Party breach its obligations relating to Confidential Information and agrees that Disclosing Party shall be entitled to enforce its rights by obtaining appropriate equitable relief, including without limitation a temporary restraining order and an injunction.

Section 10.0   Miscellaneous

10.1   Authority. Customer represents and warrants that: (i) it has full right, title and authority to enter into this Agreement; and (ii) this Agreement constitutes a legal, valid and binding obligation of Customer, enforceable against it in accordance with its terms.

10.2   Acceptance of Privacy Policy. All data and information provided by Customer through its use of the Service is subject to Provider's privacy policy, as amended from time-to-time, which can be viewed by clicking the "Privacy" hypertext link located within the Service. By using the Service, Customer accepts and agrees to be bound and abide by such privacy policy.

10.3   Governing Law, Venue and Jurisdiction. This Agreement shall be governed by and construed in accordance with the laws of the State of Tennessee. The venue and jurisdiction for any dispute arising pursuant to this Agreement shall be in the Circuit Court for Maury County, Tennessee.

10.4   Relationship of the Parties. Provider is performing pursuant to this Agreement only as an independent contractor. Provider has the sole obligation to supervise, manage, contract, direct, procure, perform or cause to be performed its obligations set forth in this Agreement, except as otherwise agreed upon by the parties. Nothing set forth in this Agreement shall be construed to create the relationship of principal and agent between Provider and Customer. Provider shall not act or attempt to act or represent itself, directly or by implication, as an agent of Customer or its affiliates or in any manner assume or create, or attempt to assume or create, any obligation on behalf of, or in the name of, Customer or its affiliates.

10.5   Waiver. No failure or delay by either party in enforcing any of its rights under this Agreement shall be construed as a waiver of the right to subsequently enforce any of its rights, whether relating to the same or a subsequent matter.

10.6   Assignment. Customer shall have no right to transfer, assign or sublicense this Agreement or any of its rights, interests or obligations under this Agreement to any Third Party and any attempt to do so shall be null and void. Provider shall have the full ability to transfer, assign or sublicense this Agreement or any of its rights, interests or obligations under this Agreement.

10.7   Force Majeure. Subject to the limitations set forth below and except with respect to any payment obligations of Customer, neither party shall be held responsible for any delay or default, including any damages arising therefrom, due to any act of God, act of governmental entity or military authority, explosion, epidemic casualty, flood, riot or civil disturbance, war, sabotage, unavailability of or interruption or delay in telecommunications or Third Party services, failure of Third Party software, insurrections, any general slowdown or inoperability of the Internet (whether from a virus or other cause), or any other similar event that is beyond the reasonable control of such party (each, a "Force Majeure Event"). The occurrence of a Force Majeure Event shall not excuse the performance by a party unless that party promptly notifies the other party of the Force Majeure Event and promptly uses its best efforts to provide substitute performance or otherwise mitigate the force majeure condition.

10.8   Notices. Except as otherwise specified in Section 7.3 of this Agreement, all notices, instructions, requests, authorizations, consents, demands and other communications hereunder shall be in writing and shall be delivered by one of the following means, with notice deemed given as indicated in parentheses: (a) by personal delivery (when actually delivered); (b) by overnight courier (upon written verification of receipt); (c) by certified or registered mail, return receipt requested (upon verification of receipt); or (d) solely with respect to notices to Customer, via electronic mail to the e-mail address maintained on Customer's Account. All notices to Provider shall be addressed as follows: Smartware Group, Inc., P.O. Box 188, Center Harbor, NH 03226, Attention: Legal Department.

10.9   Interpretation of Agreement. The Section headings contained in this Agreement are solely for the purpose of reference, are not part of the agreement of the parties, and shall not affect in any way the meaning or interpretation of this Agreement. Any reference to any federal, state, local or foreign statute or law shall be deemed to refer to all rules and regulations promulgated thereunder, unless the context requires otherwise.

10.10   Third Party Beneficiaries. Customer acknowledges and agrees that DSI is third-party beneficiary to this Agreement and this Agreement shall not be amended in any manner that affects DSI's rights hereunder without DSI's prior written consent. Except as expressly provided in the foregoing sentence, no person or entity not a party to this Agreement will be deemed to be a third-party beneficiary of this Agreement or any provision hereof.

10.11   Severability. The invalidity of any portion of this Agreement shall not invalidate any other portion of this Agreement and, except for such invalid portion, this Agreement shall remain in full force and effect.

10.12   Entire Agreement. This Agreement is the entire agreement between Customer and Provider regarding Customer's use of the Service and supersedes all prior and contemporaneous agreements, proposals or representations, written or oral, concerning its subject matter. No modification, amendment, or waiver of any provision of this Agreement shall be effective unless in writing and signed by the party against whom the modification, amendment or waiver is to be asserted. The parties agree that any term or condition stated in any purchase order or in any other order documentation is void.

10.13   Modifications. Provider may revise the terms of this Agreement from time-to-time and shall post the most current version of this Agreement on its website. If a revision meaningfully reduces Customer's rights, Provider shall notify Customer.