

## **Amendment 1 of Exhibit D – Special Terms and Conditions**

### **1. AUTHORIZED USERS:**

- a. Authorized Users means (i) State of California government entities that participate in this MSA (“State Authorized Users”), and (ii) Local government entities that participate in this MSA (“Local Authorized Users”). State and Local entities are further defined in Section 1.b below.
- b. Pursuant to Government Code §11000, State of California government entities include every state office, officer, department, division, bureau, board, and commission. Pursuant to Public Contract Code §10298, and for purposes of this agreement, a Local government entity is any city, county, district, or other local governmental body or corporation empowered to expend public funds for the acquisition of goods, information technology, or services. Further, for purposes of this agreement, reference to Local government entities will also include the California State Universities (CSU) and University of California (UC) systems, school districts and community colleges.
- c. This Master Services Agreement (MSA) is designated as mandatory for State of California government entities that seek to acquire credit card payment acceptance services. Each entity is required to adhere to Department of General Services (DGS) contract and procurement policy and procedures. See the following link for the State of California Agency List (exclude any local government agencies described above): <http://www.ca.gov/About/Government/agencyindex.html>
- d. Local government use of this MSA is optional. Local government entities may execute a contract under this MSA using (i) the standard form Std. 213 or appropriate equivalent contract form, and (ii) Selected Services Signature Page, Exhibit D Attachment III. Upon execution of the contract form they shall become Authorized Users and the provision of services by the Contractor to such Authorized Users will be governed by the terms of this MSA.
- e. However, the Contractor has authorization to negotiate with Local Authorized Users the specific provisions cited below.
  - Invoicing and Payment Provisions (Exhibit B, Section 1.a-c):
  - Reporting Requirements (Exhibit B, Section 3)
  - Governing Law, Jurisdiction (Exhibit C, Section 14)
  - Local Authorized User’s additional specific terms and conditions (noted in Exhibit D, Section 2)
  - Elavon’s Standard Proposed Local Negotiation Language for Local Authorized Users (Appendix 1)
  - Convenience and Service Fees (Exhibit E Section 4a. last paragraph - referring only to Local Authorized User)

### **2. AUTHORIZATION TO RENDER SERVICES:**

Unless otherwise provided in this Agreement, Contractor may not decline a State of California government entity’s or a local government entity’s request to utilize

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services offered under this Agreement unless Authorized User is unable to meet all applicable system requirements, PCI compliance, product certification, or compliance with Association Rules.

Prior to rendering services, Contractor and a State of California government entity or a local government entity (as applicable) must execute a separate subscription agreement that incorporates all of the terms of this MSA by reference and may contain additional agency specific terms and conditions, none of which may alter, rescind, or be in conflict with the terms and conditions of this MSA. The duly executed Std. 213, or the appropriate equivalent contract form for Local Authorized Users, in combination with the Selected Services Signature Page, Exhibit D Attachment II are herein referred to as the “Subscription Agreement”.

The Subscription Agreement shall describe the particular requirements of the Authorized User, usually reflected in detailed scope of work and payment provisions. State Authorized User’s Subscription Agreements shall be processed in accordance with State contracting laws, policy, and procedures. The duly executed Std. 213, or the appropriate equivalent contract form for Local Authorized Users, in combination with the Selected Services Signature Page, Exhibit D Attachment II (State Authorized Users) or Attachment III (Local Authorized Users) are herein referred to as the “Subscription Agreement”.

### **3. ENTIRE AGREEMENT & AMENDMENTS:**

This MSA Agreement includes the Std 213 form, Exhibits **A-K** and its attachments; documents incorporated by reference, and mutually approved amendments. This MSA constitutes and contains the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes any prior oral or written agreements. Each party acknowledges and agrees that the other has not made any representations, warranties or agreements of any kind or nature, except as expressly set forth herein. This Agreement may not be modified or amended, including by custom, usage of trade, or course of dealing, except by an instrument in writing signed by duly authorized officers of both parties hereto.

### **4. ORDER OF PRECEDENCE:**

In the event of any inconsistency between articles, attachments, specifications or provisions which constitute this Agreement, the following order of precedence shall apply:

- a. All federal, state, local laws and regulations
- b. Exhibit C Terms & Conditions
- c. Exhibit A Scope of Services
- d. Exhibit B Budget and Payment Provisions

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- e. Exhibit D Special Terms & Conditions
- f. State of California MSA Standard Agreement (STD 213)
- g. Exhibit E Fees and Costs
- h. Exhibit F Equipment
- i. Exhibit G Agreement For Merchant Processing Services
- j. Exhibit **H-K** (as applicable)
- k. Association Rules.

### **5. SECURITY, PRIVACY, DISCLOSURE, & HIPAA COMPLIANCE:**

The parties acknowledge that this Agreement is subject to the California Public Records Act (Govt. Code section 6250 et seq.), California Government Code sections 6164 and 11019.9; and California Civil Code Section 1798 et seq; and the applicable provisions of the Health Insurance Portability and Accountability Act of 1996 (Code of Federal Regulations (CFR), Title 45, Sections 164.501 et seq. and HIPAA requirements posted on the California Office of HIPAA Implementation (CalOHI) webpage at: <http://www.hipaa.com/legislation/45CFR-164.501.html>.

Authorized Users agree not to disclose Cardholder account numbers and/or Card Identification Numbers (“CIDs”) unless required by law or other legal process, or for internal State purposes.

Contractor agrees it will not use the names, addresses, and any other personally identifying information of State, city, county, school, or other public employees for any purpose not directly related to this Agreement.

### **6. REGULATORY AUTHORITIES (Industry Related Rules and Regulations):**

Contractor warrants and certifies that prior to, and in the performance of this Agreement, it will acquire, maintain, and remain in compliance with all mandatory regulatory approvals with respect to its performance under this Agreement required by any applicable governmental agency having jurisdiction over Contractor. If such regulatory approvals are not obtained by Contractor prior to the performance of this Agreement, this Agreement shall be of no force or effect.

### **7. LICENSES AND PERMITS:**

Contractor shall be responsible for obtaining and maintaining at its expense all applicable licenses, registrations, permits, and certifications applicable to its performance under this Agreement during the entire term of this Agreement required

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by federal law, the State of California, and local jurisdictions in California.

### **8. INSURANCE & BONDING:**

Contractor agrees that the liability insurance herein provided for and employee fidelity bond insurance policies covering all employees engaged in the performance of this Agreement shall be in effect at all times during the term of this Agreement. If insurance or bonding coverage expires at any time during the term of this Agreement and those Subscription Agreements executed directly with the Authorized Users, Contractor agrees to provide to the Authorized Users, upon expiration of coverage, a new certificate of insurance evidencing the renewal of such insurance coverage as provided for herein. New certificates of insurance are subject to the approval of the Department of General Services, such approval not to be unreasonably withheld.

The Contractor agrees to maintain commercial general liability, and employee fidelity bond insurance policies of not less than \$1,000,000 per occurrence and \$3,000,000 in aggregate and worker's compensation insurance in accordance with applicable statutory requirements.

Upon request, the Contractor shall furnish to the State and/or Authorized Users certificates of insurance stating each type and amount of insurance, as set forth above, is presently in effect for Contractor.

### **9. SUBCONTRACTORS:**

Each party (Contractor or Authorized User) is responsible, without recourse to the other party, for the settlement and satisfaction of its own contractual and administrative obligations arising out of each party's respective subcontracts to render (in the case of Contractor) or receive (in the case of Authorized Users) the services outlined in this Agreement.

The State and Authorized User acknowledge that for purposes of Exhibit K, "Contractor" refers to Official Payments Corporation for all aspects of transaction processing except the provision of settlement services, for which "Contractor" refers to Elavon, Inc. In performing Exhibit K services, Official Payments Corporation is not acting as a subcontractor of Elavon, Inc.

### **10. SEVERABILITY:**

To be effective, the waiver by either party of a breach of any provision contained herein shall be in writing and shall in no way be construed as a waiver of any subsequent breach of such provision or the waiver of the provision itself. If any provision of this Agreement shall be held illegal, invalid or unenforceable, that

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provision shall be limited or eliminated to the minimum extent necessary so that this Agreement shall otherwise remain in full force and effect.

### **11. TERMINATION (By State or Authorized User, Contractor Termination Provisions in Other Exhibits):**

- a. The State may terminate the MSA and any Authorized User may terminate its respective Subscription Agreement for cause upon a reasonable and good faith determination that the Contractor failed to perform the material requirements of this Agreement at the time and in the manner herein provided.

In addition to the termination rights specified in the preceding paragraph, in the event of a breach, the State or Authorized User may elect to send the Contractor a notice specifying the breach and providing the Contractor an opportunity to cure the breach within a period of time no less than thirty (30) days “Cure Period”. If the breach is not cured within the Cure Period, the State or Authorized User has the right to terminate the Agreement by notice to the Contractor.

However, Authorized Users will provide a Cure Period, rather than immediate termination, if a breach involves meeting a service level agreement identified in Exhibit A section 4.b-c. Nonetheless, the State and Authorized Users reserve the right to terminate for cause without providing additional Cure Periods if a service level issue for which a Cure Period has previously been provided recurs.

- b. The State may terminate the MSA without cause upon sixty (60) days advance written notice to the Contractor. Authorized Users may terminate their respective Subscription Agreements without cause upon thirty (30) days advance written notice to the contractor. In the event of a termination without cause, Contractor shall not be responsible for any costs to the State or an Authorized User associated with such termination and any sum due the Contractor under this Agreement (which sum due to the Contractor shall include, but not be limited to, the fees as set forth in this Agreement for Charges up to the date of a termination for which Authorized User receives payment from Contractor) shall be paid to the Contractor within thirty (30) days of termination, excluding any Chargebacks, fees, fines or penalties owed by the State or Authorized User that are presented after termination, which shall be paid within thirty (30) days of presentment.
- c. After receipt of a notice of termination by the State or an Authorized User, and except as otherwise directed by the State or Authorized User, Contractor shall:
  - (i) Stop work as specified in the notice of termination.
  - (ii) Place no further subcontracts for materials, services, or facilities, except as necessary to complete the continuing portion of the Agreement.
  - (iii) Terminate all subcontracts to the extent they relate to the work terminated.

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- (iv) After receipt of a notice of termination and prior to the contract termination effective date, Contractor agrees to diligently proceed without interruption in the performance of this Agreement. Contractor's failure to diligently proceed in accordance with this Agreement shall be considered a material breach of this Agreement.

### **12. PHASE IN & PHASE OUT TRANSITION SERVICES:**

Prior to the end of this Agreement's contract term, or if this Agreement is terminated by the State, Contractor agrees to reasonably assist in transitioning the services provided under this Agreement within a period of time, not to exceed one hundred eighty (180) day calendar period. Contractor shall cooperate with any new contractor(s) and State staff in effectuating an orderly transition.

### **13. DISPUTE RESOLUTION:**

In the event a dispute arises with respect to the interpretation or performance of, or the relationship created by, all or any part of this Agreement, the parties will attempt in good faith to resolve the dispute.

### **14. FINANCIAL AND OTHER INFORMATION**

Authorized User must provide to Contractor promptly, upon request, information about Authorized User's finances and operations. However, with respect to State Authorized Users, the posting of such financial information at the <http://www.ebudget.ca.gov> website (or any successor website thereto) shall be deemed to fulfill this requirement.

### **15. WARRANTIES; EXCLUSION OF CONSEQUENTIAL DAMAGES; LIMITATION ON LIABILITY**

- 15.1 **Disclaimer of Warranties.** THIS MSA AND ANY AMENDMENTS IS AN AGREEMENT FOR SERVICES AND EXCEPT AS EXPRESSLY PROVIDED IN THIS MSA AND ANY AMENDMENTS, CONTRACTOR AND ITS AFFILIATES DISCLAIM ALL REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, MADE TO AUTHORIZED USER OR ANY OTHER PERSON, INCLUDING WITHOUT LIMITATION, ANY WARRANTIES REGARDING QUALITY, SUITABILITY, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR OTHERWISE (REGARDLESS OF ANY COURSE OF DEALING, CUSTOM OR USAGE OF TRADE) OF ANY SERVICES OR ANY GOODS PROVIDED INCIDENTAL TO THE SERVICES PROVIDED UNDER THIS AGREEMENT.
- 15.2 **Exclusion of Consequential Damages.** NOTWITHSTANDING ANYTHING IN THIS MSA AND ANY AMENDMENTS TO THE CONTRARY, IN NO EVENT

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SHALL EITHER PARTY OR ITS AFFILIATES BE LIABLE UNDER ANY THEORY OF TORT, CONTRACT, OR OTHER LEGAL THEORY FOR LOST PROFITS, LOST REVENUES, LOST BUSINESS OPPORTUNITIES, SPECIAL, INCIDENTAL, INDIRECT, OR CONSEQUENTIAL DAMAGES, EACH OF WHICH IS HEREBY EXCLUDED BY AGREEMENT OF THE PARTIES, REGARDLESS OF WHETHER SUCH DAMAGES WERE FORESEEABLE OR WHETHER ANY PARTY OR ANY ENTITY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

### **16. NOTICES:**

All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed given if delivered (a) personally, (b) via facsimile, electronic mail or overnight express service or (c) by certified or registered mail, postage prepaid, return receipt requested, in each case, to the addresses, facsimile numbers and/or electronic mail addresses set forth below. The parties hereto may change their street addresses, facsimile numbers and electronic mail addresses for purposes of this Agreement by notifying the other party in the manner specified in this section.

The notice address for Elavon shall be: 7200 Chapman Highway, Knoxville, TN, 37920, Attention: Tim Miller Senior Vice President Operations, with a copy to Attention: General Counsel's Office at One Concourse Parkway, Suite 300, Atlanta, GA 30328,

The notice address for Bank shall be: Attn: President, U.S. Bank, N.A., U.S. Bancorp Center, 500 Nicollet Mall, Minneapolis, MN 55402, with a copy to Attn: General Counsel at the same address.

Notwithstanding the foregoing, in the event notice is given for termination or Cure Periods as provided in this Agreement, then such notice may not be given via electronic mail.

### **17. PROPRIETARY RIGHTS AND PERMITTED USES**

- a. Neither party may issue any press release about this Agreement or the State without the other party's prior written consent.
- b. An Authorized User may use and display the Associations' marks, and shall display such Marks in accordance with the standards for use established by the Associations. The Authorized User's right to use all such Marks will terminate upon termination of the Agreement or upon notice by an Association to discontinue such use, and the Authorized User must thereafter promptly return any materials displaying the Marks. The Authorized User's use of promotional materials provided by the Associations will not indicate, directly or indirectly, that such Associations

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endorse any goods or services other than their own and the Authorized User may not refer to any Associations in stating eligibility for its products or services.

- c. Neither the State nor any Authorized User has any interest whatsoever, including, without limitation, copyright interests, franchise interests, license interests, patent rights, property rights, or other interest in any services, software, or hardware provided by Contractor, unless specifically agreed to in a separate license or use agreement between the parties. Nothing in the Agreement shall be construed as granting the State or any Authorized User any patent rights or patent license in any patent which Contractor may obtain with respect to Contractor's services, software, or equipment. The State and Authorized Users will make no attempt to duplicate or otherwise ascertain the components, circuit diagrams, logic diagrams, flow charts, source and object code, schematics or operation of, or otherwise attempt to reverse engineer any of Contractor's services, equipment, or software.

### **18. INTERPRETATION**

In construing this Agreement, unless the context requires otherwise: (i) the singular includes the plural and vice versa; (ii) the term "or" is not exclusive; (iii) the term "including" means "including, but not limited to;" (iv) the term "day" means "calendar day"; (v) any reference to any agreement (including this Agreement), instrument, contract, policy, procedure, or other document refers to it as amended, supplemented, modified, suspended, replaced, restated, or novated from time to time; and (vi) all captions, headings, and similar terms are for reference only. Capitalized terms used in this Agreement and not defined in the same Exhibit may be defined in other Exhibits hereto or in the Operating Procedures, as applicable.