Peace Officer Background Investigation Tracking System
-----   Service Agreement and Terms   -----

PLEASE READ THE FOLLOWING AGREEMENT CAREFULLY.

This is a legal agreement ("AGREEMENT") between The City of Santa Fe New Mexico, "SUBSCRIBER", as an individual or a single legal entity and Essential Software Development, LLC ("PROVIDER") for use of Peace Officer Background Investigation Tracking System, known as POBITS, and referred to herein as "the SOFTWARE". SUBSCRIBER's use of the SOFTWARE generates data referred to herein as "DATA". PROVIDER delivers the SOFTWARE under a subscription service herein referred to as the "PLAN".

A. TERM OF AGREEMENT

1. Use of the SOFTWARE is provided to SUBSCRIBER for a period of one (1) year from the effective date of this agreement.
2. At the conclusion of the term, SUBSCRIBER may renew its subscription at its sole discretion so long as PROVIDER continues to offer the SOFTWARE to the general public.
3. Upon renewal, SUBSCRIBER may elect a new PLAN.

B. FEES AND PAYMENTS

1. SUBSCRIBER shall pay to PROVIDER an annual fee of $750.00 per system user. A system user is any POBITS user in SUBSCRIBER's account assigned to the role of Manager or Investigator.
2. SUBSCRIBER shall pay PROVIDER the full annual subscription fee for any PLAN of nine (9) or fewer users. For subscriptions of ten (10) or more users, SUBSCRIBER may pay the full annual fee in advance OR may pay a monthly fee based on the number users divided by 12.
3. Invoices are due and payable upon receipt and payable only by bank check, direct deposit or other electronic funds transfer method in which no fee is levied to PROVIDER. IF SUBSCRIBER desires to pay invoice by credit card, PROVIDER agrees to pay a transaction fee of 3% of total subscription fee.

C. PLAN

SUBSCRIBER agrees to the following payment schedule:

$3,000.00 for service from December 1, 2021 through November 30, 2022.

$3,000.00 for service from December 1, 2022 through November 30, 2023.

$3,000.00 for service from December 1, 2023 through November 30, 2024.

$3,000.00 for service from December 1, 2024 through November 30, 2025.

Monthly PLANs will be invoiced by email on the day of the month commensurate with the start date of the PLAN i.e., if the PLAN starts on the 10th of the month, monthly invoices will be provided on the 10th of each month for the term of the PLAN. Payment terms are net 30 days from date of invoice.

Invoices will be delivered via email to AnnaMarie Bowen at acbowen@santafenm.gov.

D. CHANGE IN SERVICE

1. During the term of the AGREEMENT, SUBSCRIBER may increase the number of users in the current PLAN. Payment for such an increase will be in accordance with the initial terms of the PLAN i.e., if paid annually, SUBSCRIBER will pay for the number of users added prorated for the number of months remaining in the term. Days in excess of 10 days will be considered a full month. If paid monthly, the monthly payment will be modified to reflect the modified number of users.
2. For any change in service, SUBSCRIBER and PROVIDER will execute the Change in Service Agreement (Exhibit A) included in this AGREEMENT.
3. During the term of the AGREEMENT, SUBSCRIBER may not reduce the number of users in the PLAN and PROVIDER shall not modify payment terms to reflect any reduction in service to the PLAN.

E. RIGHT OF USAGE

1. Subject to the terms of this AGREEMENT, PROVIDER hereby grants to SUBSCRIBER a non-exclusive, non-transferable right to use the SOFTWARE exclusively for SUBSCRIBER'S internal business purposes.

F. RESTRICTIONS

1. SUBSCRIBER may not transfer any of the rights granted under this AGREEMENT.
2. SUBSCRIBER may not reverse engineer, decompile, disassemble or otherwise attempt to determine source code or protocols from the SOFTWARE except where such restriction is prohibited by applicable law.

G. OWNERSHIP RIGHTS

1. THE SOFTWARE is protected by copyright laws and international treaty provisions. PROVIDER retains all right, title, and interest in and to the SOFTWARE, including all copyrights, patents, trade secret rights, trademarks and other intellectual property rights therein. SUBSCRIBER's use of the SOFTWARE does not transfer to SUBSCRIBER title to the intellectual property in the SOFTWARE.

H. SOFTWARE MODIFICATIONS

1. PROVIDER reserves the right to make modifications to the SOFTWARE as PROVIDER deems necessary to keep the SOFTWARE viable in the market served. PROVIDER makes such modifications in collaboration with a large constituency of other subscribers and SUBSCRIBER is encouraged to work with PROVIDER to influence decisions regarding features and modifications.
2. PROVIDER reserves the right at any time not to release or to discontinue release of any changes or features and to alter prices, features, specifications, capabilities, functions, licensing terms, release dates, general availability, or other characteristics of the SOFTWARE. Such modifications will not alter the general concepts and key features described in EXHIBIT B – SOFTWARE DESCRIPTION.
3. PROVIDER warrants that modifications or failure to release or discontinue release of any software features will be undertaken in a manner which will not render SUBSCRIBER's use of SOFTWARE ineffective or result in additional cost to SUBSCRIBER.

I. DATA PRESERVATION

1. PROVIDER shall make every effort to preserve the DATA as maintained by the SOFTWARE by using industry standards and good practices for data backup, maintenance, and preservation. This includes regular data backups preserved in a physical location dislocated from the primary database.
2. PROVIDER is not responsible for and does not provide a service for retrieval of DATA that may be deleted by the SUBSCRIBER using normal functions of the SOFTWARE for data deletion.
3. Upon termination of service, it shall be SUBSCRIBER's responsibility to download records and reports from the SOFTWARE under the current terms of use.
4. If PROVIDER terminates agreement at any time other than established end of term date, SUBSCRIBER will be given 60 days from time of written termination notice to download records and reports from the SOFTWARE.
5. PROVIDER shall delete SUBSCRIBER's account and DATA only when SUBSCRIBER provides written authorization from SUBSCRIBER's Authorized Representative; email will be considered as written authorization.
6. PROVIDER shall have the option to permanently delete SUBSCRIBER's DATA without written authorization if SUBSCRIBER does not render payment for a period of 60 days of invoicing and has made no good faith effort towards payment of said invoice.

J. DATA SECURITY

1. PROVIDER is responsible for assuring that the DATA is secure and accessible only by authorized users.
2. Subscriber acknowledges that data is encrypted in transit via SSL and not encrypted at rest.
3. The PROVIDER will host the SOFTWARE and all DATA with Amazon Web Services.
4. PROVIDER shall notify SUBSCRIBER of any data breach that PROVIDER becomes aware of and shall make every effort to comply with any applicable law or regulation regarding notification of data breach to affected parties.
5. SUBSCRIBER acknowledges that PROVIDER employs computer hardware, software, and services to provide the SOFTWARE over which PROVIDER has no control or influence. SUBSCRIBER further acknowledges that for these and other reasons, PROVIDER cannot and does not warrant that the SOFTWARE or the DATA is invulnerable to unauthorized access. PROVIDER will employ all reasonable means and measures to protect and secure this DATA.

K. DATA TRANSFER

1. SUBSCRIBER acknowledges that its DATA is contained in a complex relational database that includes records for numerous accounts and that export of SUBSCRIBER's DATA, in the form of database tables and records, is difficult to provide at any cost.
2. SUBSCRIBER acknowledges that PROVIDER does not provide a service to transfer DATA, in the form of tables and records, from the SOFTWARE for provision to SUBSCRIBER other than that which is exportable from the user interface through reports and defined queries.
3. Subscriber acknowledges that it is its responsibility to extract data and reports as needed and at will within the terms of this agreement. Provider offers to services or extension of service for this purpose.

L. TECHNICAL SUPPORT

1. PROVIDER shall provide technical support to SUBSCRIBER and normal users of SUBSCRIBER's account on a "best available" basis. Support requests may be made by telephone, email, or support ticket via PROVIDER's Support Center web site. SUBSCRIBER can generally expect an acknowledgement or response within one hour during normal workdays (8:00am through 8:00pm Monday through Friday Eastern Time).

2. SUBSCRIBER shall not be assessed any charge or fee for normal technical support requests.

M. PRICE GUARANTEE

1. PROVIDER may from time to time alter the price schedule for the SOFTWARE in order to meet market demand. SUBSCRIBER's price, or rate, shall remain at the level of the original subscription rate without respect to any price modifications so long as SUBSCRIBER maintains a paid subscription to the SOFTWARE.
2. SUBSCRIBER is not entitled to any price reduction or refund on its current subscription in the event that PROVIDER lowers the subscription rate. However, the subscriber may renew at the reduced rate should the advertised rate to the general public be lower at the time of renewal.
3. PROVIDER reserves the right to make unique pricing or rate agreements with other subscribers outside of its advertised rates.

N. REFUNDS

1. Whereas SUBSCRIBER has been provided ample opportunity to use and test the SOFTWARE prior to purchasing a subscription, no refund of any kind is provided for early termination by SUBSCRIBER.
2. In any case where PROVIDER discontinues providing the SOFTWARE to the general public and in such case that PROVIDER terminates service prior to the end of the term purchased by SUBSCRIBER, PROVIDER shall reimburse SUBSCRIBER on a monthly prorated basis for service not rendered. In this event, denial of service for a period of fifteen (15) or more days shall be considered as a whole month.

O. LEVEL OF SERVICE

1. SUBSCRIBER can generally expect to receive full service i.e., use of the SOFTWARE and technical support, on a 24x7x365 basis notwithstanding technical issues beyond the control of PROVIDER and normal maintenance events.
2. SUBSCRIBER acknowledges that PROVIDER will occasionally stop service for general maintenance and that PROVIDER's notification of such occurrences will be in the form of messages within the SOFTWARE or banner notifications when the SOFTWARE is in maintenance status. Any such maintenance events shall be kept to the minimum required for the required service and will be conducted at periods of minimal usage such as evening hours.
3. In any event resulting in loss of full service to SUBSCRIBER, SUBSCRIBER is entitled only to compensation in the form of an extension to the current PLAN.
4. SUBSCRIBER acknowledges that technical issues may arise from time to time resulting in minor unscheduled service interruptions. PROVIDER deems any unscheduled service interruption of four (4) continuous hours or less to be a minor disruption and provides no compensation to SUBSCRIBER for such occurrences. For major occurrences i.e., denial of service exceeding four (4) continuous hours, PROVIDER will compensate SUBSCRIBER in the form of extension of service in accordance with the following schedule.

Hours of Service Denial	Service Extension Compensation
4 – 8 Hours	1 Week
8 – 24 Hours	2 Weeks
24 – 72 Hours	1 Month
> 72 Hours	Determined By Provider

P. DISCLOSURE

1. Provider shall have the right to disclose SUBSCRIBER as a current or former subscriber to the SOFTWARE as a reference. PROVIDER will limit this disclosure to prospect customers only and will not publicize SUBSCRIBER on promotional literature, web sites, or other advertisements.

Q. WARRANTY AND DISCLAIMER

1. Limited Warranty. PROVIDER warrants that the SOFTWARE will perform substantially in accordance with its advertised purpose and EXHIBIT B – SOFTWARE DESCRIPTION. PROVIDER's entire liability and SUBSCRIBER's exclusive remedy shall be, at PROVIDER's option either, (i) refund of the prorated purchase price paid for the subscription, if any, or (ii) software changes to remedy malfunctions.
2. Disclaimer. Except for the Limited Warranty, the SOFTWARE is provided "AS IS". To the maximum extent permitted by applicable law, PROVIDER disclaims all warranties, expressed or implied, including but not limited to implied warranties of merchantability and fitness for a particular purpose with respect to the SOFTWARE. PROVIDER does not warrant that operation of the SOFTWARE will be uninterrupted or error-free or that the SOFTWARE will meet your requirements.
3. SUBSCRIBER acknowledges that the SOFTWARE is not purposed to be a perpetual records repository and that DATA in the SOFTWARE should not be considered or treated as official records.

R. LIMITATION OF LIABILITY

1. To the maximum extent permitted by applicable law, in no event shall PROVIDER be liable for any special, incidental, indirect, or consequential damages including, without limitation: damages for loss of profits or confidential or other information, for business interruption, for personal injury, and for any other damages or losses arising out of or in any way related to the use of or inability to use the SOFTWARE, the provision of or failure to provide support services, or otherwise under or in connection with any provision of this AGREEMENT, even if PROVIDER has been advised of the possibility of such damages.
2. PROVIDER shall, for the term of this agreement, maintain an insurance policy covering general liability and data breach.
3. PROVIDER shall provide proof of liability insurance to SUBSCRIBER upon SUBSCRIBER's request.

S. TERMINATION

1. SUBSCRIBER's discontinuance of use of the SOFTWARE or failure to pay a valid invoice, does not in itself constitute termination of this AGREEMENT or relieve SUBSCRIBER from its obligation to pay for use of the SOFTWARE under the PLAN.
2. This agreement may be terminated unilaterally by PROVIDER if SUBSCRIBER fails to pay an invoice for services after 60 calendar days of receipt or 60 calendar days after the end of the subscription term, whichever occurs last.
3. Subscriber has ability to download reports and data at any time.

T. GOVERNING LAW

1. This agreement shall be governed by the laws of the State of New Mexico.

U. SEVERABILITY

1. If any provision of this AGREEMENT is held to be unenforceable, this AGREEMENT will remain in effect with the provision omitted, unless omission would frustrate the intent of the parties, in which case this AGREEMENT will immediately terminate.

V. NOTICE

1. Any notice required to be given hereunder shall be deemed to have been given when received by the party to whom it is directed by courier service, hand delivery, certified U.S. mail (return receipt requested) at the following addresses:

TO SUBSCRIBER:

Name:	Andrew Padilla
Title:	Chief of Police
Address:	2515 Camino Entrada
City State Zip:	Santa Fe New Mexico
Phone:	505-955-5102
Email:	aapadilla@santafenm.gov

TO PROVIDER:

Name	Kingsley Klosson
Title	Owner
Address	9430 Silver King Ct #302
City State Zip	Fairfax, VA 22031
Phone:	540-222-1254
Email:	kklosson@esdevllc.com

W. SUBSCRIBER'S FISCAL LIMITATIONS

1. SUBSCRIBER's total liability for all charges for services which may become due under this AGREEMENT is limited to the total maximum expenditure(s) authorized in SUBSCRIBER's purchase order(s) to the PROVIDER.

X. SECURITY

1. PROVIDER and its Consultants will be subject to SUBSCRIBER'S background checks. SUBSCRIBER will not permit anyone with a background history showing a conviction for a felony; theft history of any kind; sex offense history, or any crime involving moral turpitude; illegal drug or narcotics use, sale or possession; or anyone showing a felony charge pending; or who has any outstanding warrants of any type, including misdemeanor traffic or felony warrants, may be subject to arrest, and will not be allowed to work under this AGREEMENT.

Y. ENTIRE AGREEMENT

1. This AGREEMENT is the entire agreement between SUBSCRIBER and PROVIDER relating to its subject matter. It supersedes all prior or contemporaneous oral or written communications, proposals, representations, and warranties, and prevails over any conflicting or additional terms of any order, acknowledgment, or other communication between the parties relating to its subject matter during the term of this AGREEMENT.

Effective Date: _____

For Organization City of Santa Fe:

Jarel LaPan Hill
Jarel LaPan Hill (Dec 14, 2021 10:38 MST)
_____

City Manager

Attest:

Kristine Mihelcic
_____ *XIV*
XIV

Kristine Bustos Mihelcic, City Clerk

City Attorney's Office:

Marcos Martinez
Marcos Martinez (Dec 1, 2021 09:40 MST)
_____

Senior Assistant City Attorney

Approved for Finances:

Mary McCoy
_____

Mary McCoy, Finance Director

For Essential Software Development, LLC:

Kingsley Klosson 12/1/2021
_____

Kingsley Klosson
Principal
Essential Software Development, LLC
540-222-1254
kklosson@esdevllc.com

EXHIBIT A - CHANGE IN SERVICE AGREEMENT

At SUBSCRIBER's request, a change in the PLAN is executed as follows:

The current effective date remains Click here to enter a date.. The current subscription PLAN remains in effect from Click here to enter a date. **to** Click here to enter a date..

The number of POBITS users is increased from _____ to _____.

☐ Monthly invoicing will increase from _____ to _____ due based on _ additional users per month for the remainder of the subscription term.

For City of Santa Fe: For Essential Software Development, LLC:

_____   _____

City Manager   Kingsley Klosson
                                                            Principal
                                                            Essential Software Development, LLC
                                                            540-222-1254
                                                            kklosson@esdevllc.com

EXHIBIT B – SOFTWARE DESCRIPTION

The following is a non-exclusive description of POBITS. It generalizes its operational concepts, core functionality, and purpose. It is not meant to provide an exhaustive list of features or to describe all features. It does generalize POBITS' capabilities at a high level and this description is provided to describe the concepts and key features as a general description. It is understood that the SOFTWARE does and will continue to operate in accordance with this general description.

A. CONCEPT AND KEY FEATURES

1. POBITS provides a database system for managing background investigations on candidates for positions in law enforcement in which an extensive review of the candidate's personal history is required. POBITS enables the candidate to use the system to respond to an extensive on-line questionnaire that covers several investigative areas which include:
   a. Personal references and contact information
   b. Primary relatives
   c. Employment history
   d. Current and previous residences
   e. Education history
   f. Military service history
   g. Financial responsibility history
   h. Legal history
   i. Sexual conduct
   j. Drug use history
   k. Driving history
   l. Other topics
2. POBITS enables the investigator to "invite" the candidate thus enabling the candidate to use the system to complete his or her questionnaire. POBITS performs a number of validations to ensure the candidate completes the questionnaire thoroughly.
3. As a key feature, POBITS generates a report that summarizes areas of concern based on the candidate's responses to the questionnaire.
4. When invited by the investigator, POBITS enables relatives, references, landlords, and employers to use POBITS to complete a questionnaire specific to their relationship with the candidate.
5. POBITS provides the investigator the ability to make comments regarding contact with the various people and entities involved, and to enter narrative assessments for each investigative area.
6. POBITS provides a comprehensive Background Investigation Report that encapsulates all relevant information into a single PDF document. This document is intended as a final report and constitutes the official record of the investigation.
7. While the "data" contained in POBITS may be retained in perpetuity or until SUBSCRIBER requests its deletion per Section J DATA PRESERVATION, the Background Investigation Report is intended to be produced in POBITS and retained by the SUBSCRIBER on its own computer system as the official record of the investigation. System changes over time may alter the content of this report and may not accurately reflect the questions asked at the time of the actual questionnaire response by the candidate.

City of Santa Fe (Subscriber) and Essential Software Dev. (Provider) ADDENDUM

This agreement incorporates the additional terms and conditions in the addendum between Essential Software (Provider) and the City of Santa Fe (Subscriber).

TERMINATION

This Agreement may be terminated by City upon 30 days written notice to the Provider.

NEW MEXICO TORT CLAIMS ACT

Any liability incurred by the SUBSCRIBER in connection with this Agreement is subject to the immunities and limitations of the New Mexico Tort Claims Act, Section 41-4-1, et. seq. NMSA 1978, as amended. The SUBSCRIBER and its "public employees" as defined in the New Mexico Tort Claims Act, do not waive sovereign immunity, do not waive any defense, and do not waive any limitation of liability pursuant to law. No provision in this Agreement modifies or waives any provision of the New Mexico Tort Claims Act.

APPLICABLE LAW; CHOICE OF LAW; VENUE

PROVIDER shall abide by all applicable federal and state laws and regulations and all ordinances, rules, and regulations of the SUBSCRIBER of Santa Fe. In any action, suit, or legal dispute arising from this Agreement, the PROVIDER agrees that the laws of the State of New Mexico shall govern. The parties agree that any action or suit arising from this Agreement shall be commenced in a federal or state court of competent jurisdiction in New Mexico. Any action or suit commenced in the courts of the State of New Mexico shall be brought in the First Judicial District Court.

APPROPRIATIONS

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the SUBSCRIBER for the performance of this Agreement. If sufficient appropriations and authorization are not made by the SUBSCRIBER, this Agreement shall terminate upon written notice being given by the SUBSCRIBER to PROVIDER. The SUBSCRIBER's decision as to whether sufficient appropriations are available shall be accepted by PROVIDER and shall be final.

RELEASE

PROVIDER, upon acceptance of final payment of the amount due under this Agreement, releases the SUBSCRIBER, its officers, and employees from all liabilities, claims, and obligations whatsoever arising from or under this Agreement. PROVIDER agrees not to purport to bind the SUBSCRIBER to any obligation not assumed herein by the SUBSCRIBER unless PROVIDER has express written authority to do so, and then only within the strict limits of that authority.

THIRD PARTY BENEFICIARIES

By entering into this Agreement, the parties do not intend to create any right, title, or interest in or for the benefit of any person other than the SUBSCRIBER and the PROVIDER.