



Staff Summary Report

REVISED

Council Meeting Date: 02/19/2009

Agenda Item Number: 27

SUBJECT: Request approval of a one-year renewal of contracts with Matrix Resources, Inc. and Network Secure, LLC for the purchase of information technology consulting services used by the Information Technology Department to support numerous software applications throughout the City, including Kid Zone, GIS, Utility Billing, and public safety computer aided dispatching.

DOCUMENT NAME: 20090219fst03 **PURCHASES (1004-01)**

SUPPORTING DOCS: Yes

COMMENTS: (T07-087-02 and 04) Total amount not to exceed \$1,000,000.

PREPARED BY: Ted Stallings, CPPB, Procurement Officer, 480-350-8617

REVIEWED BY: Michael Greene, CPM, Central Services Administrator, 480-350-8516
Gene Obis, IT Manager, 480-350-8353

**LEGAL REVIEW AS
TO CONTRACT FORM**

ONLY: Jenae Naumann, Assistant City Attorney, 480-350-8402

FISCAL NOTE: Sufficient funds have been appropriated in various cost centers for the anticipated expenditures in the current fiscal year.

RECOMMENDATION: Approve the renewal of the contracts.

ADDITIONAL INFO: Staff is requesting that the contracts be renewed for an additional year under the available renewal options. These contracts are used for the purchase of information technology consulting services to support the City's computer software applications for modification, updates and upgrades.

Agreement # 07-087-02B-A1
INFORMATION TECHNOLOGY CONSULTANT CONTRACT
BETWEEN THE CITY OF TEMPE
AND MATRIX RESOURCES, INC.

THIS CONSULTANT CONTRACT ("CONTRACT") is made and entered into on by and between the City of Tempe, hereinafter called CITY, and Matrix Resources, Inc., hereinafter called the CONSULTANT.

The Parties hereby agree as follows:

SECTION I - CONSULTANT SERVICES

The CITY wishes to hire the CONSULTANT to provide qualified information technology consultants on various projects for the CITY. Such consultants shall perform the professional services in accordance with the accepted industry standards of the areas in which the services are rendered, as will be more fully detailed in future Statements of Work (SOW) (see Exhibit A) as agreed upon and entered into under this Contract for specific information technology projects. The separate SOW shall be entered into and signed by the CONSULTANT and the CITY'S Information Technology Manager.

SECTION II - TERM AND DELIVERY OF SERVICES

A. Term: The term of this Contract begins February 14, 2009 and will be for one year from that date, unless reauthorized by the City Council. A separate SOW shall be issued for specific projects and any funds expended pursuant to the SOW shall decrease the amount of funds authorized under this main Contract. This Contract may be renewed in writing upon approval by the CONSULTANT and the CITY. Any separate SOW shall expire according to its specified terms.

B. Delivery: The CONSULTANT shall complete all services as indicated by the separate SOW. In the event delays are experienced beyond the control of the CONSULTANT, the Schedule under such SOW may be revised as mutually agreed upon by the CITY and the CONSULTANT. CONSULTANT agrees to submit to CITY for its approval, and in accordance with the Schedule, any work product required. No changes may be made in the Schedule without the CITY'S approval. Upon receipt, CITY shall promptly review and determine whether each such work product meets with its satisfaction. In the event that the CITY does not find a particular work product acceptable, CITY shall notify CONSULTANT in writing, and CONSULTANT shall have ten (10) business days from receipt of such notice to cure and correct such work product to meet the City's satisfaction.

SECTION III - CONSULTANT'S COMPENSATION

A. The separate SOW shall specify the maximum hourly rate payable to CONSULTANT as well as any limitation on hours.

- B. CONSULTANT shall submit bi-weekly invoices to CITY for the services provided by CONSULTANT for that period and for travel and other expenses incurred hereunder during the preceding period. Payment of invoices shall be due within thirty (30) days of receipt. Without limitation of the foregoing, failure to pay any invoice when due on undisputed amounts billed shall constitute a material breach of this Agreement and CONSULTANT shall have the right to (in addition to any other rights available to it in law or equity) immediately cease performing services hereunder upon written notice to the CITY.

If CITY fails to object, in writing, to any invoice with fifteen (15) days of the date of receipt of the invoice, then CITY will be deemed to have accepted the amounts due under the invoice and will be barred from raising any objection or defense thereto. If CITY does so object, it must specify the quantity of the hours objected to and describe the reasons for such objection. All fees not objected to shall be paid in accordance with this Section.

- C. The total amount expended under this main Contract as provided by subsections A and B of this Section III shall not exceed \$300,000. This total amount can be increased by a written amendment to this Contract, if agreed to by the parties and signed by the appropriate representatives of each party.

SECTION IV - WARRANTY

As an inducement for CITY to enter into this Contract, CONSULTANT makes the following representations and warranties:

A. **Qualifications.** CONSULTANT hereby represents and warrants to CITY that all statements and materials regarding its qualifications to perform the work contemplated under this Contract are true and correct and are not misleading or incomplete for any reason including by reason of omission. CONSULTANT recognizes and agrees that CITY may immediately terminate this Contract if CONSULTANT has misstated its qualifications or the qualifications of its employees, consultants, contractors, agents, or representatives to perform the work contemplated under this Contract or otherwise breached its representations and warranties set forth in this Section IV.

B. **Quality of Services.** CONSULTANT hereby represents and warrants to CITY that all services, work, and deliverables to be performed hereunder shall be performed by qualified personnel in a professional and workmanlike manner, in accordance with the highest industry standards.

C. **Good Title.** CONSULTANT hereby represents and warrants to CITY that CITY will receive good and valid title to all deliverables delivered by CONSULTANT to CITY under this Contract, free and clear of all encumbrances and liens of any type.

D. **Performance to Specifications.** CONSULTANT hereby represents and warrants that any software delivered to CITY will perform substantially in accordance with the

specifications set forth in any Statements of Work. Should there be defects in programming and/or operation, CONSULTANT shall provide such programming, design, and installation services as may be necessary to correct such errors without any additional charges to CITY.

SECTION V - ADDITIONAL SERVICES

Additional services which are outside the scope of basic services contained in this Contract shall not be performed by the CONSULTANT without prior written authorization from the CITY. Additional services, when authorized by an executed contract or an amendment to this Contract shall be compensated for by a fee mutually agreed upon between the CITY and the CONSULTANT.

SECTION VI -WORK FOR HIRE AND OWNERSHIP OF DELIVERABLES

A. Work for Hire. The parties acknowledge that any work performed by CONSULTANT for CITY is being created at the insistence of CITY and shall be deemed "work made for hire" under the United States copyright law. In the event, for any reason, such results and proceeds are not deemed work for hire, CONSULTANT shall be deemed hereby to have assigned to CITY all of its right, title and interest in such results and proceeds and content to CITY.

B. Ownership. CITY shall have the right to use the whole work, any part of parts thereof, or none of the work, as it sees fit. CITY may alter the work, add to it, or combine it with any other work or works, at its sole discretion. Notwithstanding the foregoing, all original material submitted by CONSULTANT as part of the work or as part of the process of creating the work, including but not limited to programs, listings, printouts, documentation, notes, flow charts, and programming aids, shall be the property of CITY whether or not CITY uses such material. No rights are reserved by CONSULTANT.

1. All work products (electronically or manually generated) including but not limited to custom software source code, specifications, cost estimates, studies, design analyses, computer aided drafting and design (CADD) file diskettes and other related products which are prepared in the performance of this Contract are the property of the CITY and are to be delivered to the CITY on the particular type of storage media on which they are stored (e.g. CD, thumb drive, etc.) before the final payment is made to the CONSULTANT. The CITY shall retain ownership of these original works, however, if approved in writing by the CITY CONSULTANT may retain the originals and supply the CITY with a copy of the work. Title to all material and documentation, including, but not limited to systems specifications, furnished by CITY to CONSULTANT or delivered by CITY into CONSULTANT'S possession shall remain with CITY. CONSULTANT shall immediately return all such material or documentation within seven (7) days of any request by CITY or upon the termination or conclusion of this Contract, whichever shall occur first.

2. Whenever an invention or discovery is made by CONSULTANT either solely or in collaboration with others, including employees of CITY under or relating to this Contract, the CONSULTANT shall promptly give CITY written notice thereof and shall furnish

CITY with complete information thereon including, as a minimum, (1) a complete written disclosure of each such invention and (2) information concerning the date and identity of any public use, sale, or publication of such invention made by or known to CONSULTANT or of any contemplated publication by CONSULTANT. As used herein, the term (1) "invention" or "discovery" includes any art, machine, manufacture, design, or composition of matter or any new and useful improvement thereof where it is or may be patentable under the patent laws of the United States or of any foreign country; and (2) "made," when used in relation to any invention or discovery, means the conception of the first actual or constructive reduction to practice of such invention.

3. CONSULTANT hereby grants, assigns, and conveys to CITY all right, title, and interest in and to all inventions, works of authorship, and other proprietary data, and all other materials (as well as the copyrights, patents, trade secrets, and similar rights attendant hereto) conceived, reduced to practice, authored, developed, or delivered by CONSULTANT or its employees, agents, consultants, contractors, and representatives either solely or jointly with others, during and in connection with the performance of services under this Contract with CITY. CONSULTANT agrees that it will not seek, and that it will require its employees, agents, consultants, contractors, and representatives not to seek patent, copyright, trademark, registered design, or other protection for any rights in any such inventions, works or authorship, proprietary data, or other materials. CONSULTANT shall have no right to disclose or use any such inventions, works of authorship, proprietary data, or other materials for any purpose whatsoever and shall not communicate to any third party the nature of or details relating to such inventions, works of authorship, proprietary data, or other materials. CONSULTANT agrees that it shall do and that it will require its employees, agents, consultants, contractors, and representatives to do, at CITY's expense, all things and execute all documents as CITY may reasonably require to vest in CITY or its nominees the rights referred to herein and to secure for CITY or its nominees all patent, trademark, or copyright protection.

4. CONSULTANT'S obligations under this Contract shall survive expiration or termination of this Contract and any amendments thereto. Furthermore, CONSULTANT irrevocably waives its moral rights in any work created, developed, or delivered hereunder.

5. CONSULTANT agrees it will not disclose to any third party, without the prior written consent of CITY, any invention, discovery, copyright, patent, trade secret, or similar rights attended hereto, made under or relating to this Contract or any proprietary or confidential information acquired from CITY under this Contract, including trade secrets, business plans, and confidential or other information that may be proprietary to CITY.

6. CONSULTANT warrants and represents that it has or will have the right, through written contracts with its employees, to secure for CITY the rights called for in this Section VI. Further, in the event CONSULTANT uses any subcontractor, CONSULTANT, or other third party to perform any of the services contracted for under this Contract, CONSULTANT agrees to enter into and provide to CITY such written

contracts with such third party, and to take such other steps as are or may be required to secure for CITY the rights called for in this Section VI. CONSULTANT further agrees to provide the names and addresses of all agents, contractors, consultants, representatives, or other third parties who perform work on behalf of CONSULTANT under this Contract.

SECTION VII - RELATIONSHIP OF THE PARTIES; INDEPENDENT CONTRACTOR STATUS

Nothing in this Contract shall be construed to establish a joint venture, agency, employment or partnership between the parties. CONSULTANT is an independent contractor and shall be solely responsible for any unemployment or disability insurance payments, or any social security, income tax or other withholdings, deductions or payments that may be required by federal, state or local law with respect to any compensation paid to the CONSULTANT hereunder or for any and all services or materials provided by or rendered to CONSULTANT hereunder in connection with any of the projects.

SECTION VIII - TERMINATION.

CITY shall be entitled to terminate this Contract at any time, in its discretion. In the event of termination for other than CONSULTANT'S material breach of the Contract, CONSULTANT shall be entitled to retain all compensation paid to the date of termination. CITY shall own all the results and proceeds of CONSULTANT'S services rendered to the date of such termination as work for hire, and CONSULTANT shall promptly deliver all materials, information, documents, drafts and any other property secured, produced and/or developed by CONSULTANT pursuant to this Contract, including, without limitation, all work product as prepared to the date of termination, in full satisfaction of the parties' obligations to each other under this Contract. Regardless of termination under this or any other provision of this Contract, CITY shall be entitled, in its discretion, to continue, discontinue, modify, or change its plans regarding any projects.

SECTION IX - INSURANCE

Without limiting any of their obligations or liabilities, the CONSULTANT, at its own expense, shall purchase and maintain the minimum insurance specified below with companies duly licensed or otherwise approved by the State of Arizona, Department of Insurance, and with forms reasonably satisfactory to the CITY. Each insurer shall have a current A.M. Best Company, Inc. rating of not less than A-VII. Use of alternative insurers requires prior approval from CITY.

A. General Clauses

1. **Additional Insured.** The insurance coverage, except Workers' Compensation and Professional Liability, required by this CONTRACT, shall name the CITY, its agents, representatives, directors, officials, and employees, as additional insured, and shall specify that insurance afforded the CONSULTANT shall be primary insurance, and that any self insured retention and/or insurance coverage carried by the CITY or its employees shall be excess coverage, and not contributory coverage that is provided by the CONSULTANT.

2. Coverage Terms. All insurance required herein shall be maintained in full force and effect until the services required to be performed under the terms of this CONTRACT are satisfactorily completed and formally accepted; failure to do so may constitute a material breach of this Contract, at the sole discretion of the CITY.
3. Primary Coverage. The CONSULTANT'S insurance shall be primary insurance with respect to CITY and any insurance or self insurance maintained by CITY shall be excess of the CONSULTANT'S insurance and shall not contribute to it.
4. Claim Reporting. Any failure to comply with the claim reporting provisions of the policies or any breach of a policy warranty shall not affect coverage afforded under the policy to protect the CITY.
5. Waiver. The policies, except Worker's Compensation and Professional Liability, shall contain a waiver of transfer of rights of recovery (subrogation) against CITY, its agents, representatives, directors, officers, and employees for any claims arising out of the work of the CONSULTANT.
6. Deductible/Retention. The policies may provide coverage which contains deductibles or self-insured retentions. Such deductible or self insured retentions shall not be applicable with respect to the coverage provided to CITY under such policies. The CONSULTANT shall be solely responsible for deductible or self insured retentions and the CITY may require the CONSULTANT to secure payment of such deductible or self-insured retentions by a surety bond or an irrevocable and unconditional letter of credit.
7. Policies and Endorsements. CITY reserves the right to request and to receive, within 10 working days, certified copies of any or all of the above policies or endorsements. CITY shall not be obligated, however, to review same or to advise CONSULTANT of any deficiencies in such policies, and such receipt shall not relieve CONSULTANT from, or be deemed waiver of CITY'S right to insist on, strict fulfillment of CONSULTANT'S obligations under this Contract.
8. Certificates of Insurance. Prior to commencing services under this Contract, CONSULTANT shall furnish CITY with Certificates of Insurance, or formal endorsements as required by the Contract, issued by CONSULTANT'S insurer(s), as evidence that policies providing the required coverage, conditions, and limits required by this Contract are in full force and effect.

B. Workers' Compensation

Workers' Compensation and Employers Liability is required to meet statutory limits as required by the State of Arizona.

In case services are subcontracted, the CONSULTANT will require the Sub-consultant to provide Workers' Compensation and Employer's Liability to at least the same extent as provided by CONSULTANT.

C. Automobile Liability

Commercial/Business Automobile Liability insurance with a combined single limit for bodily injury and property damages of not less than \$1,000,000, each occurrence regarding any owned, hired, and non-owned vehicles assigned to or used in performance of the

CONSULTANT services. Coverage will be at least as broad as covers Code 1 "any auto" (Insurance Service Office policy form CA 0001 1/87 or any replacements thereof). Such coverage shall include coverage for loading and unloading hazards.

D. Commercial General Liability

Commercial General Liability insurance with unimpaired limit of not less than \$2,000,000 for each claim with a \$2,000,000 General Aggregate limit. The general aggregate limit shall apply separately to the services under this Contract or the general aggregate shall be twice the required per claim limit. The policy shall be primary and include operations, and blanket contractual covering, but not limited to, the liability assumed under the indemnification provisions of this Contract which coverage will be at least as broad as Insurance Service Office policy form CG 0002 1-11-88 or any replacement thereof.

In the event the general liability insurance policy is written on a "claims made" basis, coverage shall extend for two years past completion and acceptance of the services as evidenced by annual Certificates of Insurance.

Such policy shall contain a "severability of interests provision (aka "Cross liability" and "separation of insured").

E. Professional Liability

The CONSULTANT retained by the CITY, to provide the services required by the Contract will maintain Professional Liability insurance covering errors and omissions arising out of the services performed by the CONSULTANT or any person employed by him, with an unimpaired limit of not less than \$1,000,000 each claim and \$1,000,000 all claims. In the event the insurance policy is written on a "Claims made" basis, coverage shall extend for two years past completion and acceptance of services as evidenced by annual Certificates of Insurance.

F. Property Coverage-Valuable Papers

Property coverage on an all-risk, replacement cost; agreed amount form with Valuable Papers insurance sufficient to assure the restoration of any documents, memoranda, reports, or other similar data relating to the services of the CONSULTANT used in the completion of this Contract.

SECTION X - INDEMNIFICATION

To the fullest extent permitted by law, the CONSULTANT shall defend, indemnify and hold harmless the CITY, its agents, officers, officials, and employees from and against any and all claims, damages, losses, and expenses (including but not limited to attorney's fees, court costs, and the costs of appellate proceedings), relating to, arising out of, or alleged to have resulted from the acts, errors, mistakes, omissions, work, services, or professional services of the CONSULTANT, its agents, employees, or any other person (not the CITY) for whose acts, errors, mistakes, omissions, work, services, or professional services the CONSULTANT may be legally liable in the performance of this Contract.

CONSULTANT'S duty to defend, hold harmless and indemnify the CITY, its agents, officers, officials, and employees shall arise in connection with any claim for damage, loss, or expense

that is attributable to bodily injury, sickness, disease, death, or injury to, impairment, or destruction of any person or property, including loss of use resulting there from, caused by any acts, errors, mistakes, omissions, work, services, or professional services in the performance of this Contract by CONSULTANT or any employee of the CONSULTANT, or any other person (not the CITY) for whose acts, errors, mistakes, omissions, work, or services the CONSULTANT may be legally liable. The amount and type of insurance coverage requirement set forth herein will in no way be construed as limiting the scope of the indemnity in this paragraph.

SECTION XI - CONFLICT OF INTEREST

The CONSULTANT shall not engage the services on this Contract of any present or former CITY employee who was involved as a decision maker in the selection or approval processes, or who negotiated or approved billings or contract modifications for this Contract. This Contract is subject to A.R.S. § 38-511.

SECTION XII - CURE PERIOD

Neither party shall be deemed in breach of this Contract unless and until they have been provided with written notice of the alleged breach and ten (10) working days to cure.

SECTION XIII - CONFIDENTIALITY

CONSULTANT agrees that it (and its employees, directors, agents and/or contractors) shall not disclose (except as requested by the CITY in the Site) any Confidential Information (defined below) acquired or learned by CONSULTANT (its employees, directors, agents and/or contractors), except with CITY'S prior written permission.

Confidential Information shall include all proprietary material and information of CITY, all information regarding the financial and business operations of the CITY, except Confidential Information shall not include any information or material that is generally known, is a public record, or becomes generally known to the public, other than through violation of this Section. In the event that CONSULTANT is compelled by law (whether through court order or subpoena) to disclose Confidential Information, CONSULTANT shall provide CITY with notice or such compelled disclosure and a reasonable opportunity to contest it.

SECTION XIV - ASSIGNMENT

This Contract shall not be assigned by either party without the other's prior written permission, except that CONSULTANT may assign its rights under this Contract to another division of the CONSULTANT or in connection with the sale, disposition or transfer of a division of the CONSULTANT.

SECTION XV - GOVERNING LAW

This Contract shall be governed by the laws of the State of Arizona. Both parties hereby consent to the jurisdiction of the state and federal courts located in Maricopa County, Arizona.

SECTION XVI - DISPUTE RESOLUTION

In the event of a dispute between the parties to this Contract regarding a provision of this Contract, a party's performance of its obligations as stated in this Contract or any other matter governed by the terms of this Contract, the parties will meet in good faith to attempt to resolve the dispute. If the parties fail to resolve the dispute, then the parties agree that the dispute may be resolved through mediation. If mediation is agreed to by the disputing parties, the disputing parties shall mutually agree upon the services of one (1) mediator whose fees and expenses shall be borne equally by the disputing parties. If the dispute is not resolved within a reasonable time, the disputing parties shall be free to use other remedies available to them to resolve the dispute.

SECTION XVII - REMEDIES

Either party may pursue any remedies provided by law for the breach of this Contract. All remedies, rights, undertaking, obligations, and Contract contained in this Contract shall be cumulative, and none of them shall be in limitation of any other remedy, right, undertaking,

SECTION XVIII - SEVERABILITY

In the event that any phrase, clause, sentence, paragraph, section or other portion of this Contract shall become illegal, null or void or determined to be against public policy, for any reason, or shall be held by a court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Contract shall not be affected thereby and shall remain in full force and effect to the fullest extent permitted by law, provided that the overall intent of the parties is not materially vitiated by such severability.

SECTION XIX - WAIVER

A waiver by either party of any term or condition of this Contract in any instance shall not be deemed or construed as a waiver of a subsequent breach thereof. All remedies, rights, undertaking, obligations, and agreement contained in this Contract shall be cumulative, and none of them shall be in limitation of any other remedy, right, undertaking, obligation or agreement by either party.

SECTION XX - NOTICES

All notices or other communications required to be in writing shall be given either by personal delivery, e-mail, or regular mail to the persons and/or addresses below:

CITY

City of Tempe
Purchasing Dept.
ATTN: Ted Stallings
P.O. Box 5002
20 E. 6th St.
Tempe, AZ 85281
(480) 350- 8324

CONSULTANT

Matrix Resources, Inc.
115 Perimeter Pl. NE
Suite 250
Atlanta, GA 30346
Local: 4500 N. 32nd St.
Suite 106
Phoenix, AZ 85018

(602) 522-3499
(602) 616-6376

SECTION XXI – CITY PROPERTY

All CITY property in the possession or control of CONSULTANT including, but not limited to specifications, documentation, source code, magnetic media, and building entry keys and cards, as well as all material developed or derived by CONSULTANT in performing its duties under this Contract will be returned by CONSULTANT to CITY on demand, or at the termination of this Contract, whichever shall come first.

SECTION XXII - SURVIVABILITY OF PROVISIONS

The provisions of the following Sections shall survive termination or expiration of this Contract. Section IV: Warranty; Section VI: Work for Hire and Ownership; Section IX: Insurance; Section X: Indemnification; Section XIII: Confidentiality; Section XIV: Governing Law; Section XVI: Dispute Resolution; Section XVII: Remedies; Section XVIII: Severability; Section XIX: Waiver; Section XX: Notices; and Section XXIII: Entire Agreement.

SECTION XXIII - ENTIRE AGREEMENT

This Contract and any subsequent Statements of Work will constitute the complete understanding of the parties. Any amendment or modification shall be in writing and require the signature of both parties.

IN WITNESS WHEREOF, the parties hereto have executed this Contract this ____ day of _____, 2009.

“CONSULTANT”

Matrix Resources, Inc.

By: _____

Its: _____

“CITY”

City of Tempe, a municipal corporation

Hugh Hallman, Mayor

By: _____

Its: Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

Exhibit A – Statement of Work template

**Statement of Work
to
Information Technology Consultant Contract**

Specifications and/or Deliverables

Consultant will provide _____ *{name of individual}* to the City of Tempe to perform the following professional services:

*{List services to be performed and/or a description of the project tasks assigned}
Provide milestones and deliverables*

Schedule

Consultant shall complete the above professional services no later than _____ *{date}*.

Price

The hourly rate paid to the Consultant shall not exceed \$ _____ per hour. The total amount expended under this Statement of Work shall not exceed \$ _____, unless agreed to in writing by the Information Technology Department manager.

Hours

The hours expended by the Consultant shall not exceed _____ hours, unless extended by written approval of the Information Technology Department manager.

Payment Terms

Consultant shall submit bi-weekly invoices to City for the services provided and any expenses incurred hereunder during the preceding period. Payment of invoices shall be due within 30 days of receipt. This Statement of Work is subject to the terms of the main Information Technology Consultant Contract entered into between Consultant and the City.

CONSULTANT

{name of company}

By _____
Its _____

Date: _____

CITY

City of Tempe

By _____
Gene Obis, Information Technology
Department Manager

Date: _____

EXHIBIT A

(602) 522-3499
(602) 616-6376

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IN WITNESS WHEREOF, the parties hereto have executed this Contract this ___ day of _____, 2009.

“CONSULTANT”
Michelle Glen Chamberlain
Matrix Resources, Inc.
By: [Signature]
Its: Mayor

“CITY”
City of Tempe, a municipal
corporation
Hugh Hallman, Mayor
By: _____
Its: Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

Agreement # 07-087-04A-A1

**INFORMATION TECHNOLOGY CONSULTANT CONTRACT
BETWEEN THE CITY OF TEMPE
AND NETWORK SECURE LLC**

THIS CONSULTANT CONTRACT ("CONTRACT") is made and entered into on by and between the City of Tempe, hereinafter called CITY, and Network Secure LLC, hereinafter called the CONSULTANT.

The Parties hereby agree as follows:

SECTION I - CONSULTANT SERVICES

The CITY wishes to hire the CONSULTANT to provide qualified information technology consultants on various projects for the CITY. Such consultants shall perform the professional services in accordance with the accepted industry standards of the areas in which the services are rendered, as will be more fully detailed in future Statements of Work (SOW) (see Exhibit A) as agreed upon and entered into under this Contract for specific information technology projects. The separate SOW shall be entered into and signed by the CONSULTANT and the CITY'S Information Technology Manager.

SECTION II - TERM AND DELIVERY OF SERVICES

A. Term: The term of this Contract begins February 15, 2009 and will be for one year from that date, unless reauthorized by the City Council. A separate SOW shall be issued for specific projects and any funds expended pursuant to the SOW shall decrease the amount of funds authorized under this main Contract. This Contract may be renewed in writing upon approval by the CONSULTANT and the CITY. Any separate SOW shall expire according to its specified terms.

B. Delivery: The CONSULTANT shall complete all services as indicated by the separate SOW. In the event delays are experienced beyond the control of the CONSULTANT, the Schedule under such SOW may be revised as mutually agreed upon by the CITY and the CONSULTANT. CONSULTANT agrees to submit to CITY for its approval, and in accordance with the Schedule, any work product required. No changes may be made in the Schedule without the CITY'S approval. Upon receipt, CITY shall promptly review and determine whether each such work product meets with its satisfaction. In the event that the CITY does not find a particular work product acceptable, CITY shall notify CONSULTANT in writing, and CONSULTANT shall have ten (10) business days from receipt of such notice to cure and correct such work product to meet the City's satisfaction.

SECTION III - CONSULTANT'S COMPENSATION

A. The separate SOW shall specify the maximum hourly rate payable to CONSULTANT as well as any limitation on hours.

- B. CONSULTANT shall submit bi-weekly invoices to CITY for the services provided by CONSULTANT for that period and for travel and other expenses incurred hereunder during the preceding period. Payment of invoices shall be due within thirty (30) days of receipt. Without limitation of the foregoing, failure to pay any invoice when due on undisputed amounts billed shall constitute a material breach of this Agreement and CONSULTANT shall have the right to (in addition to any other rights available to it in law or equity) immediately cease performing services hereunder upon written notice to the CITY.

If CITY fails to object, in writing, to any invoice with fifteen (15) days of the date of receipt of the invoice, then CITY will be deemed to have accepted the amounts due under the invoice and will be barred from raising any objection or defense thereto. If CITY does so object, it must specify the quantity of the hours objected to and describe the reasons for such objection. All fees not objected to shall be paid in accordance with this Section.

- C. The total amount expended under this main Contract as provided by subsections A and B of this Section III shall not exceed \$300,000. This total amount can be increased by a written amendment to this Contract, if agreed to by the parties and signed by the appropriate representatives of each party.

SECTION IV - WARRANTY

As an inducement for CITY to enter into this Contract, CONSULTANT makes the following representations and warranties:

A. **Qualifications.** CONSULTANT hereby represents and warrants to CITY that all statements and materials regarding its qualifications to perform the work contemplated under this Contract are true and correct and are not misleading or incomplete for any reason including by reason of omission. CONSULTANT recognizes and agrees that CITY may immediately terminate this Contract if CONSULTANT has misstated its qualifications or the qualifications of its employees, consultants, contractors, agents, or representatives to perform the work contemplated under this Contract or otherwise breached its representations and warranties set forth in this Section IV.

B. **Quality of Services.** CONSULTANT hereby represents and warrants to CITY that all services, work, and deliverables to be performed hereunder shall be performed by qualified personnel in a professional and workmanlike manner, in accordance with the highest industry standards.

C. **Good Title.** CONSULTANT hereby represents and warrants to CITY that CITY will receive good and valid title to all deliverables delivered by CONSULTANT to CITY under this Contract, free and clear of all encumbrances and liens of any type.

D. **Performance to Specifications.** CONSULTANT hereby represents and warrants that any software delivered to CITY will perform substantially in accordance with the

specifications set forth in any Statements of Work. Should there be defects in programming and/or operation, CONSULTANT shall provide such programming, design, and installation services as may be necessary to correct such errors without any additional charges to CITY.

SECTION V - ADDITIONAL SERVICES

Additional services which are outside the scope of basic services contained in this Contract shall not be performed by the CONSULTANT without prior written authorization from the CITY. Additional services, when authorized by an executed contract or an amendment to this Contract shall be compensated for by a fee mutually agreed upon between the CITY and the CONSULTANT.

SECTION VI -WORK FOR HIRE AND OWNERSHIP OF DELIVERABLES

A. Work for Hire. The parties acknowledge that any work performed by CONSULTANT for CITY is being created at the insistence of CITY and shall be deemed "work made for hire" under the United States copyright law. In the event, for any reason, such results and proceeds are not deemed work for hire, CONSULTANT shall be deemed hereby to have assigned to CITY all of its right, title and interest in such results and proceeds and content to CITY.

B. Ownership. CITY shall have the right to use the whole work, any part of parts thereof, or none of the work, as it sees fit. CITY may alter the work, add to it, or combine it with any other work or works, at its sole discretion. Notwithstanding the foregoing, all original material submitted by CONSULTANT as part of the work or as part of the process of creating the work, including but not limited to programs, listings, printouts, documentation, notes, flow charts, and programming aids, shall be the property of CITY whether or not CITY uses such material. No rights are reserved by CONSULTANT.

1. All work products (electronically or manually generated) including but not limited to custom software source code, specifications, cost estimates, studies, design analyses, computer aided drafting and design (CADD) file diskettes and other related products which are prepared in the performance of this Contract are the property of the CITY and are to be delivered to the CITY on the particular type of storage media on which they are stored (e.g. CD, thumb drive, etc.) before the final payment is made to the CONSULTANT. The CITY shall retain ownership of these original works, however, if approved in writing by the CITY CONSULTANT may retain the originals and supply the CITY with a copy of the work. Title to all material and documentation, including, but not limited to systems specifications, furnished by CITY to CONSULTANT or delivered by CITY into CONSULTANT'S possession shall remain with CITY. CONSULTANT shall immediately return all such material or documentation within seven (7) days of any request by CITY or upon the termination or conclusion of this Contract, whichever shall occur first.

2. Whenever an invention or discovery is made by CONSULTANT either solely or in collaboration with others, including employees of CITY under or relating to this Contract, the CONSULTANT shall promptly give CITY written notice thereof and shall furnish

CITY with complete information thereon including, as a minimum, (1) a complete written disclosure of each such invention and (2) information concerning the date and identity of any public use, sale, or publication of such invention made by or known to CONSULTANT or of any contemplated publication by CONSULTANT. As used herein, the term (1) "invention" or "discovery" includes any art, machine, manufacture, design, or composition of matter or any new and useful improvement thereof where it is or may be patentable under the patent laws of the United States or of any foreign country; and (2) "made," when used in relation to any invention or discovery, means the conception of the first actual or constructive reduction to practice of such invention.

3. CONSULTANT hereby grants, assigns, and conveys to CITY all right, title, and interest in and to all inventions, works of authorship, and other proprietary data, and all other materials (as well as the copyrights, patents, trade secrets, and similar rights attendant hereto) conceived, reduced to practice, authored, developed, or delivered by CONSULTANT or its employees, agents, consultants, contractors, and representatives either solely or jointly with others, during and in connection with the performance of services under this Contract with CITY. CONSULTANT agrees that it will not seek, and that it will require its employees, agents, consultants, contractors, and representatives not to seek patent, copyright, trademark, registered design, or other protection for any rights in any such inventions, works or authorship, proprietary data, or other materials. CONSULTANT shall have no right to disclose or use any such inventions, works of authorship, proprietary data, or other materials for any purpose whatsoever and shall not communicate to any third party the nature of or details relating to such inventions, works of authorship, proprietary data, or other materials. CONSULTANT agrees that it shall do and that it will require its employees, agents, consultants, contractors, and representatives to do, at CITY's expense, all things and execute all documents as CITY may reasonably require to vest in CITY or its nominees the rights referred to herein and to secure for CITY or its nominees all patent, trademark, or copyright protection.

4. CONSULTANT'S obligations under this Contract shall survive expiration or termination of this Contract and any amendments thereto. Furthermore, CONSULTANT irrevocably waives its moral rights in any work created, developed, or delivered hereunder.

5. CONSULTANT agrees it will not disclose to any third party, without the prior written consent of CITY, any invention, discovery, copyright, patent, trade secret, or similar rights attended hereto, made under or relating to this Contract or any proprietary or confidential information acquired from CITY under this Contract, including trade secrets, business plans, and confidential or other information that may be proprietary to CITY.

6. CONSULTANT warrants and represents that it has or will have the right, through written contracts with its employees, to secure for CITY the rights called for in this Section VI. Further, in the event CONSULTANT uses any subcontractor, CONSULTANT, or other third party to perform any of the services contracted for under this Contract, CONSULTANT agrees to enter into and provide to CITY such written

contracts with such third party, and to take such other steps as are or may be required to secure for CITY the rights called for in this Section VI. CONSULTANT further agrees to provide the names and addresses of all agents, contractors, consultants, representatives, or other third parties who perform work on behalf of CONSULTANT under this Contract.

SECTION VII - RELATIONSHIP OF THE PARTIES; INDEPENDENT CONTRACTOR STATUS

Nothing in this Contract shall be construed to establish a joint venture, agency, employment or partnership between the parties. CONSULTANT is an independent contractor and shall be solely responsible for any unemployment or disability insurance payments, or any social security, income tax or other withholdings, deductions or payments that may be required by federal, state or local law with respect to any compensation paid to the CONSULTANT hereunder or for any and all services or materials provided by or rendered to CONSULTANT hereunder in connection with any of the projects.

SECTION VIII - TERMINATION.

CITY shall be entitled to terminate this Contract at any time, in its discretion. In the event of termination for other than CONSULTANT'S material breach of the Contract, CONSULTANT shall be entitled to retain all compensation paid to the date of termination. CITY shall own all the results and proceeds of CONSULTANT'S services rendered to the date of such termination as work for hire, and CONSULTANT shall promptly deliver all materials, information, documents, drafts and any other property secured, produced and/or developed by CONSULTANT pursuant to this Contract, including, without limitation, all work product as prepared to the date of termination, in full satisfaction of the parties' obligations to each other under this Contract. Regardless of termination under this or any other provision of this Contract, CITY shall be entitled, in its discretion, to continue, discontinue, modify, or change its plans regarding any projects.

SECTION IX - INSURANCE

Without limiting any of their obligations or liabilities, the CONSULTANT, at its own expense, shall purchase and maintain the minimum insurance specified below with companies duly licensed or otherwise approved by the State of Arizona, Department of Insurance, and with forms reasonably satisfactory to the CITY. Each insurer shall have a current A.M. Best Company, Inc. rating of not less than A-VII. Use of alternative insurers requires prior approval from CITY.

A. General Clauses

1. **Additional Insured.** The insurance coverage, except Workers' Compensation and Professional Liability, required by this CONTRACT, shall name the CITY, its agents, representatives, directors, officials, and employees, as additional insured, and shall specify that insurance afforded the CONSULTANT shall be primary insurance, and that any self insured retention and/or insurance coverage carried by the CITY or its employees shall be excess coverage, and not contributory coverage that is provided by the CONSULTANT.

2. **Coverage Terms.** All insurance required herein shall be maintained in full force and effect until the services required to be performed under the terms of this CONTRACT are satisfactorily completed and formally accepted; failure to do so may constitute a material breach of this Contract, at the sole discretion of the CITY.
3. **Primary Coverage.** The CONSULTANT'S insurance shall be primary insurance with respect to CITY and any insurance or self insurance maintained by CITY shall be excess of the CONSULTANT'S insurance and shall not contribute to it.
4. **Claim Reporting.** Any failure to comply with the claim reporting provisions of the policies or any breach of a policy warranty shall not affect coverage afforded under the policy to protect the CITY.
5. **Waiver.** The policies, except Worker's Compensation and Professional Liability, shall contain a waiver of transfer of rights of recovery (subrogation) against CITY, its agents, representatives, directors, officers, and employees for any claims arising out of the work of the CONSULTANT.
6. **Deductible/Retention.** The policies may provide coverage which contains deductibles or self-insured retentions. Such deductible or self insured retentions shall not be applicable with respect to the coverage provided to CITY under such policies. The CONSULTANT shall be solely responsible for deductible or self insured retentions and the CITY may require the CONSULTANT to secure payment of such deductible or self-insured retentions by a surety bond or an irrevocable and unconditional letter of credit.
7. **Policies and Endorsements.** CITY reserves the right to request and to receive, within 10 working days, certified copies of any or all of the above policies or endorsements. CITY shall not be obligated, however, to review same or to advise CONSULTANT of any deficiencies in such policies, and such receipt shall not relieve CONSULTANT from, or be deemed waiver of CITY'S right to insist on, strict fulfillment of CONSULTANT'S obligations under this Contract.
8. **Certificates of Insurance.** Prior to commencing services under this Contract, CONSULTANT shall furnish CITY with Certificates of Insurance, or formal endorsements as required by the Contract, issued by CONSULTANT'S insurer(s), as evidence that policies providing the required coverage, conditions, and limits required by this Contract are in full force and effect.

B. Workers' Compensation

Workers' Compensation and Employers Liability is required to meet statutory limits as required by the State of Arizona.

In case services are subcontracted, the CONSULTANT will require the Sub-consultant to provide Workers' Compensation and Employer's Liability to at least the same extent as provided by CONSULTANT.

C. Automobile Liability

Commercial/Business Automobile Liability insurance with a combined single limit for bodily injury and property damages of not less than \$1,000,000, each occurrence regarding any owned, hired, and non-owned vehicles assigned to or used in performance of the

CONSULTANT services. Coverage will be at least as broad as covers Code 1 "any auto" (Insurance Service Office policy form CA 0001 1/87 or any replacements thereof). Such coverage shall include coverage for loading and unloading hazards.

D. Commercial General Liability

Commercial General Liability insurance with unimpaired limit of not less than \$2,000,000 for each claim with a \$2,000,000 General Aggregate limit. The general aggregate limit shall apply separately to the services under this Contract or the general aggregate shall be twice the required per claim limit. The policy shall be primary and include operations, and blanket contractual covering, but not limited to, the liability assumed under the indemnification provisions of this Contract which coverage will be at least as broad as Insurance Service Office policy form CG 0002 1-11-88 or any replacement thereof.

In the event the general liability insurance policy is written on a "claims made" basis, coverage shall extend for two years past completion and acceptance of the services as evidenced by annual Certificates of Insurance.

Such policy shall contain a "severability of interests provision (aka "Cross liability" and "separation of insured").

E. Professional Liability

The CONSULTANT retained by the CITY, to provide the services required by the Contract will maintain Professional Liability insurance covering errors and omissions arising out of the services performed by the CONSULTANT or any person employed by him, with an unimpaired limit of not less than \$1,000,000 each claim and \$1,000,000 all claims. In the event the insurance policy is written on a "Claims made" basis, coverage shall extend for two years past completion and acceptance of services as evidenced by annual Certificates of Insurance.

F. Property Coverage-Valuable Papers

Property coverage on an all-risk, replacement cost; agreed amount form with Valuable Papers insurance sufficient to assure the restoration of any documents, memoranda, reports, or other similar data relating to the services of the CONSULTANT used in the completion of this Contract.

SECTION X - INDEMNIFICATION

To the fullest extent permitted by law, the CONSULTANT shall defend, indemnify and hold harmless the CITY, its agents, officers, officials, and employees from and against any and all claims, damages, losses, and expenses (including but not limited to attorney's fees, court costs, and the costs of appellate proceedings), relating to, arising out of, or alleged to have resulted from the acts, errors, mistakes, omissions, work, services, or professional services of the CONSULTANT, its agents, employees, or any other person (not the CITY) for whose acts, errors, mistakes, omissions, work, services, or professional services the CONSULTANT may be legally liable in the performance of this Contract.

CONSULTANT'S duty to defend, hold harmless and indemnify the CITY, its agents, officers, officials, and employees shall arise in connection with any claim for damage, loss, or expense

that is attributable to bodily injury, sickness, disease, death, or injury to, impairment, or destruction of any person or property, including loss of use resulting there from, caused by any acts, errors, mistakes, omissions, work, services, or professional services in the performance of this Contract by CONSULTANT or any employee of the CONSULTANT, or any other person (not the CITY) for whose acts, errors, mistakes, omissions, work, or services the CONSULTANT may be legally liable. The amount and type of insurance coverage requirement set forth herein will in no way be construed as limiting the scope of the indemnity in this paragraph.

SECTION XI - CONFLICT OF INTEREST

The CONSULTANT shall not engage the services on this Contract of any present or former CITY employee who was involved as a decision maker in the selection or approval processes, or who negotiated or approved billings or contract modifications for this Contract. This Contract is subject to A.R.S. § 38-511.

SECTION XII - CURE PERIOD

Neither party shall be deemed in breach of this Contract unless and until they have been provided with written notice of the alleged breach and ten (10) working days to cure.

SECTION XIII - CONFIDENTIALITY

CONSULTANT agrees that it (and its employees, directors, agents and/or contractors) shall not disclose (except as requested by the CITY in the Site) any Confidential Information (defined below) acquired or learned by CONSULTANT (its employees, directors, agents and/or contractors), except with CITY'S prior written permission.

Confidential Information shall include all proprietary material and information of CITY, all information regarding the financial and business operations of the CITY, except Confidential Information shall not include any information or material that is generally known, is a public record, or becomes generally known to the public, other than through violation of this Section. In the event that CONSULTANT is compelled by law (whether through court order or subpoena) to disclose Confidential Information, CONSULTANT shall provide CITY with notice of such compelled disclosure and a reasonable opportunity to contest it.

SECTION XIV - ASSIGNMENT

This Contract shall not be assigned by either party without the other's prior written permission, except that CONSULTANT may assign its rights under this Contract to another division of the CONSULTANT or in connection with the sale, disposition or transfer of a division of the CONSULTANT.

SECTION XV - GOVERNING LAW

This Contract shall be governed by the laws of the State of Arizona. Both parties hereby consent to the jurisdiction of the state and federal courts located in Maricopa County, Arizona.

SECTION XVI - DISPUTE RESOLUTION

In the event of a dispute between the parties to this Contract regarding a provision of this Contract, a party's performance of its obligations as stated in this Contract or any other matter governed by the terms of this Contract, the parties will meet in good faith to attempt to resolve the dispute. If the parties fail to resolve the dispute, then the parties agree that the dispute may be resolved through mediation. If mediation is agreed to by the disputing parties, the disputing parties shall mutually agree upon the services of one (1) mediator whose fees and expenses shall be borne equally by the disputing parties. If the dispute is not resolved within a reasonable time, the disputing parties shall be free to use other remedies available to them to resolve the dispute.

SECTION XVII - REMEDIES

Either party may pursue any remedies provided by law for the breach of this Contract. All remedies, rights, undertaking, obligations, and Contract contained in this Contract shall be cumulative, and none of them shall be in limitation of any other remedy, right, undertaking,

SECTION XVIII - SEVERABILITY

In the event that any phrase, clause, sentence, paragraph, section or other portion of this Contract shall become illegal, null or void or determined to be against public policy, for any reason, or shall be held by an court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Contract shall not be affected thereby and shall remain in full force and effect to the fullest extent permitted by law, provided that the overall intent of the parties is not materially vitiated by such severability.

SECTION XIX - WAIVER

A waiver by either party of any term or condition of this Contract in any instance shall not be deemed or construed as a waiver of a subsequent breach thereof. All remedies, rights, undertaking, obligations, and agreement contained in this Contract shall be cumulative, and none of them shall be in limitation of any other remedy, right, undertaking, obligation or agreement by either party.

SECTION XX - NOTICES

All notices or other communications required to be in writing shall be given either by personal delivery, e-mail, or regular mail to the persons and/or addresses below:

CITY
City of Tempe
Purchasing Dept.
ATTN: Ted Stallings
P.O. Box 5002
20 E. 6th St.
Tempe, AZ 85281
(480) 350- 8324

CONSULTANT
Network Secure LLC
P.O. Box 372
Spirit Lake, IA 51360
Tempe, AZ 85283
(480) 389-6009

SECTION XXI - CITY PROPERTY

All CITY property in the possession or control of CONSULTANT including, but not limited to specifications, documentation, source code, magnetic media, and building entry keys and cards, as well as all material developed or derived by CONSULTANT in performing its duties under this Contract will be returned by CONSULTANT to CITY on demand, or at the termination of this Contract, whichever shall come first.

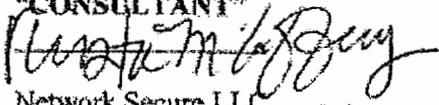
SECTION XXII - SURVIVABILITY OF PROVISIONS

The provisions of the following Sections shall survive termination or expiration of this Contract. Section IV: Warranty; Section VI: Work for Hire and Ownership; Section IX: Insurance; Section X: Indemnification; Section XIII: Confidentiality; Section XIV: Governing Law; Section XVI: Dispute Resolution; Section XVII: Remedies; Section XVIII: Severability; Section XIX: Waiver; Section XX: Notices; and Section XXIII: Entire Agreement.

SECTION XXIII - ENTIRE AGREEMENT

This Contract and any subsequent Statements of Work will constitute the complete understanding of the parties. Any amendment or modification shall be in writing and require the signature of both parties.

IN WITNESS WHEREOF, the parties hereto have executed this Contract this ____ day of _____, 2009.

"CONSULTANT"

Network Secure LLC
By: Trista McCaffery
Its: Managing Partner

"CITY"
City of Tempe, a municipal corporation
Hugh Hallman, Mayor
By: _____
Its: Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

Exhibit A - Statement of Work template