

9-0657

INDEPENDENT CONTRACTOR AGREEMENT  
CONTRACT NUMBER P6303

TITLE: Jail Management System  
Contract Value: \$2,096,504.34  
Contract Type: Fixed price

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COUNTY:

Spokane County Washington  
C/O Spokane County Purchasing Department  
901 N. Monroe, Suite 350B  
Spokane, WA 99201  
Contract Facilitator: Brett Ryberg; Phone: (509) 477-2302; Fax: (509) 477-6627;  
Email: bryberg@spokanecounty.org  
Project Manager: Jay Hughes; Phone: (509) 477-5170; Fax: (509) 477-6430;  
Email: jhughes@spokanecounty.org

CONTRACTOR:

DSI/ITI, LLC  
5000 Sixth Ave., Suite 1  
Altoona, PA 16602  
Project Manager: Tom Donahue; Phone: (814) 312-7457; Fax: (814) 949-3307;  
E-mail: tdonahue@dsiiti.com

**THIS AGREEMENT** made and entered into by and between **Spokane County**, a political subdivision of the State of Washington, having offices for the transaction of business at, 1116 W. Broadway Avenue, Spokane, WA 99260-0430, hereinafter referred to as the "COUNTY," and **DSI/ISI, LLC**, having offices for the transaction of business at 5000 Sixth Ave., Suite 1, Altoona, PA 16602, hereinafter referred to as "DSI," jointly, hereinafter referred to along with the County as the "Parties."

RECITALS

**WHEREAS**, the Board of County Commissioners of Spokane County pursuant to the provisions of the Revised Code of Washington Section 36.32.120(6) has the care of County property and the management of County funds and business; and

**WHEREAS**, the Board of County Commissioners of Spokane County pursuant to the above cited statutory section and those provisions as set forth in the Revised Code of Washington Section 39.04.270, et seq. did let out for proposal the furnishing and installation of a Jail Management System; and

**WHEREAS**, the Board of County Commissioners of Spokane County did, on July 21, 2009, (per Resolution No. 9-0657) accept the proposal of Digital Solutions, Inc. herein as the most advantageous for Spokane County Request for Proposal No. P6303; and

## **ARTICLE 1 - TERM OF AGREEMENT**

This Agreement shall remain in effect for nine (9) years from the first date the software/equipment provided for in Attachment "A" is in use at Spokane County and for the periods provided for Inmate Telephone Services listed in Attachment "C."

With respect to the purchased System, the following clauses shall remain operative for so long as the System remains in use by the County: \*Governing Law \*Severability \*Waiver \*Software Documentation \*Confidentiality/Protection of Proprietary Information \*Independent Status of DSI \*Anti-Trust Violations \*Maintenance Documentation \*Patent and Copyright Indemnification \*Notices \*Counterparts \*Limitation of Liability \* Entire Agreement

## **ARTICLE 2 - INCORPORATED DOCUMENTS**

This Agreement shall consist of the terms and conditions as set forth herein and the following documents that are incorporated herein by reference. If any provision of this Agreement shall be deemed to be in conflict with any statute or rule of law, such provisions shall be deemed modified to conform to said statute of law. In the event of any inconsistency in this Agreement, the inconsistency shall be resolved in the order listed below:

1. Applicable Federal and State Statutes and Regulations; and
2. The Terms and Conditions of this Agreement; and
3. Attached Schedules and Exhibits (Attachments); and
4. Addenda; and
5. Digital Solution, Inc.'s Proposal dated March 9, 2009; and
6. Spokane County's Request for Proposal (RFP) No. P6303.

## **ARTICLE 3 - NON-EXCLUSIVE RIGHTS**

Nothing in the Agreement shall preclude COUNTY from purchasing similar services, software, hardware or documentation from another provider except for the Telephone Services portion of the agreement provided for in Attachment "C."

## **ARTICLE 4 - COUNTY'S PROJECT MANAGER AND FACILITATOR**

COUNTY'S Project Manager for this Agreement will be Jay Hughes, who will provide oversight of the activities conducted hereunder. COUNTY'S Project Manager will manage this Agreement on behalf of COUNTY and will be the principal point of contact for DSI'S concerning DSI'S performance hereunder. COUNTY shall notify DSI, in writing, when there is a change in staffing and a new Project Manager is assigned to this Agreement.

County's "Contract Facilitator" is the responsible buyer in the Spokane County Purchasing Department as assigned by the Purchasing Director. The Contract Facilitator's responsibilities include the following, each of which are subject to the initiation and final review and approval made by the Project Manager, and where applicable, approval by the Board of County Commissioners: (a) the receipt, reviewing and processing of changes and modifications to this

Agreement; (b) executing contract term renewals; (c) adding additional users, and (d) the processing of any other form of action that could change the Agreement.

#### **ARTICLE 5 - DSI'S PROJECT MANAGER**

DSI'S Project Manager for the project will be Ryan M. Westrick, who will be the principal point of contact for the County concerning DSI'S performance hereunder. DSI'S Project Manager will also serve as the focal point for business matters, support coordination, administrative activities and will oversee delivery, installation, acceptance test, training and system turnover to COUNTY.

DSI'S Project Manager shall produce and maintain a complete "Plan" for all DSI-related activities concerning installation and training. The Plan shall also clearly identify items that depend upon the timely completion of specified County responsibilities. DSI'S Project Manager will coordinate all activities with COUNTY'S Project Manager. Provided, that for purposes of the software provisions of the Agreement outlined in Attachment "A," the Parties Project Mangers will perform the duties as described in Attachment "A," Section 33.

#### **ARTICLE 6 - JAIL MANAGEMENT SYSTEM CONDITION**

DSI warrants that all Jail Management System software/hardware shall be new equipment that has been tested and approved by GTL. Appurtenances, accessories, components and materials not herein mentioned, but necessary to furnish a complete job ready for use upon completion, shall be included and conform to the best practice known to the trade in design, quality or material and workmanship and be subjected to these specifications in full. The specifications shall be construed as minimum.

Should the manufacturer's current published data or specifications exceed these, they shall be considered minimum and be furnished. COUNTY reserves the right to waive or take exception to these specifications, if it's to COUNTY'S advantage or best interests.

#### **ARTICLE 7 - ANCILLARY SOFTWARE AND HARDWARE**

DSI shall provide all Jail Management System software, hardware or accessories set forth in DSI'S proposal delivered and installed hereunder, a complete operating System at no additional cost to COUNTY and as set forth in Attachment "A."

DSI shall further install and operate the inmate telephone system under the terms and conditions as set out in Attachment "C."

#### **ARTICLE 8 - TRANSPORTATION**

DSI shall ship all Jail Management System software/hardware purchased pursuant to the Agreement prepaid, FOB Destination. The method of shipment shall be consistent with the nature of the item and the hazards of transportation. DSI shall pay all shipping charges.

## ARTICLE 9 - SITE PREPARATION GUIDELINES

DSI shall furnish site preparation guidelines, in writing, at least 20 days prior to the date DSI shall install the Systems. These guidelines shall be in sufficient detail to facilitate preparing the site to permit the System being installed to operate efficiently from the point of view of environment and power. DSI specialists will be available at no separate cost to COUNTY apart from costs presented in DSI'S proposal to provide required consultation relative to site planning

## ARTICLE 10 - TRAINING AND DOCUMENTATION

DSI will provide the training as specified in Attachment "A." All training, end-user help programs, supporting documentation and scheduling must be defined and agreed upon in advance by COUNTY and DSI prior to implementation and use by COUNTY.

## ARTICLE 11 - SOFTWARE LICENSING

All DSI software provided by DSI for installation on or within the System shall be subject to the following provisions:

Freedom of Use. DSI understands that COUNTY provides documents/imaging/results/information/data collected and maintained for COUNTY. COUNTY documents/imaging/results/information/data collected and maintained by the Jail Management System may be released to the public; local and State governments; and, other tax supported entities. Software delivered hereunder will be used in the delivery of these services. DSI acknowledges and agrees that said use of DSI software products for such use is acceptable under the licensing terms contained herein.

Software Ownership. DSI as Licensor hereby warrants and represents to COUNTY as Licensee that DSI is the owner of the DSI developed software and licensed programs delivered hereunder or otherwise has the right to grant to COUNTY the license to use the DSI developed software and licensed programs without violating any rights of any third party, and that there is currently no actual or threatened suit by any such third party based on an alleged violation of such right by DSI.

Software Documentation. DSI will provide one copy of all pertinent documentation for each system program licensed herein. All documentation shall be delivered with or before delivery of the software.

Software Maintenance, Upgrades and Enhancements. Software/hardware provided by DSI shall be the most current version (release level) of the software that has been tested and approved by DSI at the time of delivery to COUNTY. DSI shall make available to COUNTY the option to license later versions of the software; as such later versions (or releases) become commercially available.



Contractor Correction of Software Malfunction. DSI shall provide a correction service at no additional cost to COUNTY for any error, malfunction, or defect, if any, in DSI developed software which, when used as delivered, fails to perform in accordance with COUNTY'S officially announced technical specifications as listed in the RFP and/or DSI'S proposal, and those which COUNTY shall bring to DSI'S attention. DSI shall undertake such correction service in a timely manner.

## ARTICLE 12 – DSI SOFTWARE PROVISIONS

DSI grants COUNTY a personal, non transferable and non-exclusive right to use, in object code form, all DSI software and related documentation furnished under this Agreement. This grant shall be limited to use with the Equipment for which the software was obtained or, on a temporary basis, on back up Equipment when the original Equipment is inoperable. Use of software on multiple processors is prohibited unless otherwise agreed to in writing by DSI. COUNTY agrees to use its reasonable care to see that its employees and users of all software licensed under this Agreement comply with these terms and conditions and COUNTY will refrain from taking any steps, such as reverse assemble or reverse compilation, to derive a source code equivalent of the software.

COUNTY is permitted to make a single archive copy of DSI software. Any copy must contain the same copyright notice and proprietary markings as the original software. Use of software on any Equipment other than that for which it was obtained, removal of software from the United States, or any other material breach shall automatically terminate this license.

COUNTY agrees that any software or technical and business information ("Information") owned by DSI or its suppliers and furnished to COUNTY shall remain the property of DSI or the supplier, and shall:

1. Be used only to install, operate or maintain the product for which it was originally furnished;
2. Not be reproduced or copied, in whole or in part, except as necessary for use as authorized under this Agreement or unless otherwise agreed to in writing;
3. Not be used to develop other software;
4. Together with any copies, be returned or destroyed when no longer needed
5. Be permitted for use with the product for which it was initially furnished; and
6. Not be removed from the United States.

Software and information designated "confidential" or "proprietary" shall be kept in confidence, unless required to be disclosed by Washington's Public Records Act (RCW 42.56) and except for any part that:

1. COUNTY rightfully obtains free of any obligation to keep confidential;
2. Becomes generally known to the public through acts not attributable to COUNTY; or
3. COUNTY independently develops.

### **ARTICLE 13 - SOFTWARE CHANGES**

DSI warrants that installation of such software changes as DSI may from time to time require or recommend shall not cause the performance of the System, as modified, to be materially degraded below DSI'S official published specifications at the time of installation of the System. Any such changes are to be installed at a mutually agreeable time.

### **ARTICLE 14 - DSI COMMITMENTS, WARRANTIES, AND REPRESENTATIONS**

Any written commitment, executed by a party authorized to commit DSI within the scope of this Agreement shall be binding upon DSI. Failure of DSI to fulfill such a commitment after reasonable time to cure may constitute breach and shall render DSI liable for damages due to COUNTY under the terms of this Agreement.

For purposes of this Agreement, a commitment by DSI, which must be in writing, includes: (1) prices and options committed to remain in force over a specified period(s) of time; (2) any warranty or representation made by DSI in a proposal as to service or system or equipment performance; (3) any warranty or representation made by DSI concerning the characteristics or items in (2) above, contained in any literature, descriptions, drawings or specifications accompanying or referred to in a proposal; (4) any modification of or affirmation or representation as to the above which is made by DSI in writing whether or not incorporated into a formal amendment to the proposal in question; and (5) any representation by the DSI in a proposal, supporting documents or amendments thereto as to training to be provided, services to be performed, prices and options committed to remain in force over a fixed period of time, or any other similar matter regardless of the fact that the duration of such commitment may exceed the duration of this Agreement.

All DSI developed software provided under the terms of this Agreement is subject to a limited warranty. DSI warrants to COUNTY that the physical medium on which this software is distributed is free from defects in materials and workmanship under normal use, the Software will perform according to its printed documentation, and to the best of DSI's knowledge COUNTY's use of this Software according to the printed documentation is not an infringement of any third party's intellectual property rights. This limited warranty lasts for a period of thirty (30) days after the first productive use of this system. To the extent permitted by law, THE ABOVE-STATED LIMITED WARRANTY REPLACES ALL OTHER WARRANTIES EXPRESS OR IMPLIED, AND DSI DISCLAIMS ALL IMPLIED WARRANTIES INCLUDING ANY IMPLIED WARRANTY OF TITLE, MERCHANTABILITY, NON-INFRINGEMENT, OR OF FITNESS FOR A PARTICULAR PURPOSE. No agent of DSI is authorized to make any other warranties or to modify this limited warranty. Any action for breach of this limited warranty must be commenced within one year of the expiration of the warranty. Because some jurisdictions do not allow any limit on the length of an implied warranty, the above limitation may not apply to this Licensee. If the law does not allow disclaimer of implied warranties, then any implied warranty is limited to thirty (30) days after installation of the software in operable fashion that is satisfactory to the COUNTY. COUNTY has specific legal rights pursuant to this warranty and, depending on COUNTY'S jurisdiction, may have additional rights.

All Hardware or Third Party Software provided under the terms of this Agreement shall be subject only to the Manufacturer's Warranty, if any, after the title to the Hardware or Software (if applicable) has been transferred to COUNTY.

#### **ARTICLE 15 - STANDARD OF PERFORMANCE**

DSI shall comply, in all respects, with this standard of performance before COUNTY accepts the Systems. The OMS system will be fully operational under the "Standards of Performance" provisions of this contract prior to the commencement of the Inmate Telephone Agreement in Attachment "C".

The performance period begins on the day following the day when DSI installs the Systems and shall end when the System has met this standard of performance for a period of 14 consecutive days by operating according to COUNTY'S mandatory technical and operational requirements; and, performs in strict accordance with DSI'S manufacturer's technical specifications set forth in DSI'S proposal for the installation.

COUNTY shall, consistent with DSI'S commitments in DSI'S proposal, determine whether the Systems have successfully demonstrated and satisfied the requirements set forth in this standard of performance, conforms with the overall mandatory and technical requirements of COUNTY'S RFP, and conforms with DSI'S manufacturer's technical specifications and any other commitments set forth in DSI'S proposal. DSI shall satisfy and conform to the standards of performance and conforms with the mandatory and technical requirements of COUNTY'S RFP as well as DSI'S manufacturer's technical specifications and any other commitments set forth in DSI'S proposal per the delivery date in a project plan that is mutually agreed upon during the OMS project kickoff meeting between DSI and COUNTY held after execution of this Agreement. If the standards of performance are not satisfied per the project plan, County may rely on the available remedies in ARTICLE 31 of this agreement in addition to the remedies outline in this Article and ARTICLE 19.

In the event the System fails to satisfy the standard of performance established in this provision, COUNTY may, at its sole discretion: 1) Require DSI to replace the System or take other corrective action with whatever resource is necessary to bring the System within compliance to the performance requirements of COUNTY'S REP at no cost or expense to COUNTY; or 2) Terminate this Agreement in accordance with the provision of this Agreement entitled TERMINATION FOR DEFAULT. DSI acknowledges responsibility, as specified in "Article 19 - Payment" below, for additional cost to COUNTY under the TERMINATION FOR DEFAULT provisions; or 3) continue the performance test. In this event, the date of the start of the successful performance period will be revised to the first day of the current continuous period of adequate performance day following the last service call. The performance test will be restarted as of the revised date.

COUNTY'S option to terminate this Agreement under this standard of performance provision remains in effect until successful completion of testing and acceptance by COUNTY.

COUNTY will not have accepted the OMS System or make any payments to DSI for the services/software/hardware provided for in Attachments "A" and "C" until the OMS System meets the standard of performance established in this standard of performance provision.

#### **ARTICLE 16 – PRICES**

DSI agrees to provide the goods and services at the costs, rates and fees set forth in Exhibit "E" to this Agreement and also subject to the inmate telephone services agreement set forth as Attachment "C" to this Agreement. No other costs, rates, or fees shall be payable to DSI for implementation of DSI'S proposal.

Such costs, rates and fees may not be increased during the term of this Agreement unless specified otherwise in Attachment "C."

#### **ARTICLE 17 – TAXES**

COUNTY will pay sales and use taxes imposed on goods or services acquired hereunder. DSI must pay all other taxes including, but not limited to, Washington Business and Occupation Tax, taxes based on DSI'S income, or personal property taxes levied or assessed on DSI'S personal property to which COUNTY does not hold title.

#### **ARTICLE 18 – INVOICES**

DSI will submit properly certified itemized invoices and/or vouchers to COUNTY. Invoices shall provide and itemize at a minimum:

1. Service Completed,
2. Price for Service in Accordance with Exhibit E and Attachment "C." Note: For time and material items, invoices shall detail all labor costs (listing each employee, their job classification, hours and hourly rate) and material costs (list materials, material cost and mark-up; and, attach copies of supplier invoices).
3. Applicable Taxes,
4. Other Applicable Charges,
5. Applicable Discounts, and
6. Total Charge.

Payment of maintenance service or other use charges or fees of less than one month's duration shall be prorated at 1/30th of the basic monthly charges for each calendar day.

Agreement Number P6303 must appear on all invoices, bills of lading, packages, and correspondence relating to this Agreement. All payments to DSI shall be remitted by mail. COUNTY shall not honor drafts, nor accept goods on a sight draft basis.

Maintenance charges will commence following expiration of DSI'S provided warranty as set forth elsewhere in this Agreement in the provision entitled "EQUIPMENT WARRANTY." Maintenance charges are as set forth in Exhibit "E" to this Agreement.



## ARTICLE 19 - PAYMENT

DSI shall not submit invoices to COUNTY, and COUNTY shall not make payments pursuant to this Agreement, until COUNTY has accepted the System in accordance with the provision of this Agreement entitled "STANDARD OF PERFORMANCE" for the Software/hardware to be installed under Exhibit "E".

If the OMS is not finally accepted by COUNTY in accordance with the provisions of this Agreement entitled STANDARDS OF PERFORMANCE within one year of the installation date mutually agreed by the parties in the kickoff meeting held after execution of this agreement by the Parties, DSI shall pay COUNTY an additional twenty-five percent (25%) commission on gross revenue from the Inmate Telephone Services Revenues every thirty (30) days for the first sixty days that the system is not satisfactorily installed thereafter and fifty percent (50%) for every month thereafter as liquidated damages. Upon final acceptance of the OMS, any additional commission payments that had been imposed as liquidated damages will cease, and the commission shall revert immediately to the original forty-five percent (45%) commission. If the OMS is not finally accepted by COUNTY within eighteen (18) months of the installation date mutually agreed by the parties in the kickoff meeting held after execution of this Agreement in accordance with the provisions of this agreement entitled STANDARDS OF PERFORMANCE, DSI shall be considered in Breach and COUNTY shall be entitled all other remedies for which it is entitled under this Agreement. If COUNTY is solely at fault for the delay of acceptance that causes DSI to be in breach, the additional commission rate described above as liquidated damages shall be delayed as further described in this provision. Any reasonable amount of time that the project is delayed by the COUNTY, for any reason, shall be added to the one year of the installation date mutually agreed upon before triggering application of the liquidated damages. "Fault" and "reasonable amount of time that the project is delayed by the COUNTY" shall be mutually agreed upon by the parties in writing in order for the agreed one year installation to be extended beyond the mutually agreed installation date.

Payments to COUNTY under the inmate telephone services agreement will be made by DSI pursuant to the terms provided for under Attachment "C". If the liquidated damages described above are imposed because of a breach by DSI regarding the OMS, and the COUNTY subsequently terminates the OMS portion of the Agreement only, the commission for the Inmate Phone System shall immediately revert back to the original forty-five percent (45%) commission for the duration of the Inmate Phone System Agreement. Nothing in this provision shall be construed to prevent the COUNTY from exercising its right to terminate both the OMS agreement and the telephone services agreement between the parties in the event of a breach by DSI.

COUNTY shall pay monthly service charges, annual maintenance and support charges, as well as all other costs and charges within 30 days after receipt of such service or 30 days of receipt of DSI'S properly completed invoices, whichever is later. Annual maintenance and support fees will be billed and are payable in advance in September of each year for years two (2) through nine (9) of the Agreement.



COUNTY shall be allowed to conduct random performance audits/reviews of the records generated by DSI in performance of this Agreement at COUNTY'S sole expense. The COUNTY will provide DSI with reasonable advance notice of the records reviews/performance audits. Any records obtained by COUNTY or compiled pursuant to audits/reviews of the records generated by DSI in performance of this Agreement, under this provision shall be considered confidential and shall not be disclosed unless as required by Chapter 42.56 RCW, court order or as otherwise required by law.

#### **ARTICLE 20 - INDEPENDENT STATUS OF CONTRACTOR**

The Parties intend that an independent contractor relationship will be created by this Agreement. No agent, employee, servant or otherwise of DSI shall be or shall be deemed to be an employee, agent, servant or otherwise of COUNTY for any purpose, and the employees of DSI are not entitled to any of the benefits that COUNTY provides for Spokane County employees. DSI will be solely and entirely responsible for its acts and for the acts of its agents, employees, servants, subcontractors, or otherwise during the performance of this Agreement. In the performance of the services herein contemplated DSI is an independent contractor with the authority to control and direct the performance and details of the work, COUNTY being interested only in the results obtained; however, the work contemplated herein shall meet the approval of COUNTY pursuant to the provisions of the Agreement under which the services and work were let to DSI.

#### **ARTICLE 21 - SUBCONTRACTORS**

"Contractor" means any firm, provider, organization, individual, or other entity performing services under this Agreement. It shall include any subcontractor retained by DSI as permitted under the terms of this Agreement. "Subcontractor" means one not in the employment of DSI, or its parent Global Tel\*Link Corporation, who is performing all or part of the services under this Agreement under a separate contract with DSI. DSI may, with prior written permission from COUNTY, enter into subcontracts with third parties for its performance of any part of DSI'S duties and obligations. DSI shall have the right to contract with, and substitute any subcontractor, firm, third party provider, organization, individual or other entity performing services under this Agreement at any time during the term of the contract. COUNTY reserves the right to reasonably disallow a subcontractor to perform under the DSI contract. In the event COUNTY does not allow a DSI subcontractor to perform, COUNTY will allow DSI a reasonable amount of time to secure a replacement subcontractor. In no event shall the existence of a subcontract operate to release or reduce the liability of DSI to COUNTY for any breach in the performance of DSI'S duties. DSI agrees that all subcontractors shall be agents of DSI, and DSI further agrees to hold COUNTY harmless for omissions of DSI'S subcontractors, their agents or employees. COUNTY shall not be liable for any loss or damage resulting from personal injury, physical loss, harassment of employee, or violations of the "PATENT AND COPYRIGHT INDEMNIFICATION" provisions of this Agreement occasioned by the acts or omissions of DSI'S subcontractors, their agents or employees. The "PATENT AND COPYRIGHT INDEMNIFICATION" provisions of this Agreement shall apply to all subcontractors.

## **ARTICLE 22 — TITLE**

Upon acceptance of the System, consistent with the standard of performance provisions set forth elsewhere herein and upon completion of the initial term of the Inmate Telephone Services Agreement in Attachment "C" with the exception of Call IQ and CorEMR software, DSI shall convey to COUNTY good title to the purchased System, as described in Attachment "A", free and clear of all liens, pledges, mortgages, encumbrances or security interests. Call IQ is a product that will only operate within the confines of the DSI telephone platform and CorEMR is a third party company who will not convey title to the product at any time. Should the COUNTY choose to select a different EMR vendor in the future, CorEMR will provide the COUNTY with a read-only version of their product in order for the COUNTY to access historical records. All phones, phone related equipment, hardware and software provided by DSI, including NCOTS and all components thereof, and DSI's proprietary Call Recording System Technology (the CRTS) shall remain the property of DSI, PROVIDED that any recordings made for COUNTY under the inmate telephone services contract shall at all times remain the sole property and responsibility of COUNTY.

## **ARTICLE 23 - QUIET POSSESSION AND USAGE**

COUNTY, upon paying the amounts due hereunder and performing all other covenants, terms, and conditions on its part to be performed hereunder, may and shall peacefully and quietly have, possess, and enjoy the goods and services obtained hereunder without suit, molestation, or interruption.

## **ARTICLE 24 - INTENTIONALLY LEFT BLANK**

## **ARTICLE 25 - RISK OF LOSS**

DSI agrees to bear all risks of loss, injury, or destruction of goods ordered hereunder which occur prior to delivery and installation at COUNTY'S destination; and such loss, injury or destruction shall not release DSI from any obligation hereunder. DSI and its insurers, if any, release COUNTY of responsibility for all risks of loss or damage to the system software/hardware prior to both delivery and installation. After installation, the risk of loss or damage shall be borne by COUNTY except loss or damage attributable to DSI'S fault or negligence.

## **ARTICLE 26 - WORK PERFORMED AT CONTRACTOR'S RISK**

DSI, its agents, employees or subcontractors shall conform in all respects with reasonable physical, fire, or other published security regulations while on COUNTY premises.

For the duration of this Agreement DSI will provide, maintain, and pay for insurance in the amounts and coverage's according to the terms and conditions stated in Attachment "B," attached hereto and incorporated herein by reference.

DSI shall take all precautions necessary and shall be responsible for the safety of the work and shall maintain all necessary protections for that purpose. All work shall be done at DSI'S risk, and if any loss or damage shall result from fire or from other causes, DSI shall promptly repair or replace such loss or damage free from all expense to COUNTY. DSI shall be responsible for any loss or damage to material, tools or other articles used or held for use in connection with the work. The work shall be carried on to completion without damage to any work or property of COUNTY or of others and without interference with the operation of existing machinery or equipment.

#### ARTICLE 27 – INDEMNIFICATION

For the purpose of this Section, the terminology "COUNTY" shall also include the "SHERIFF."

- (a) The COUNTY shall indemnify and hold harmless DSI and its officers, agents, and employees, from any and all claims, actions, suits, liability, loss, costs, expenses, and damages of any nature whatsoever, by any reason of or arising out of any negligent act or omission of the COUNTY, its officers, agents and employees, relating to or arising out of performing Services pursuant to this Agreement. In the event that any suit based upon such claim, action, loss, or damages is brought against DSI, the COUNTY shall defend the same at its sole cost and expense; provided that DSI reserves the right to participate in said suit if any principle of governmental or public law is involved; and if final judgment in said suit be rendered against DSI, and its officers, agents, and employees, or jointly against DSI and the COUNTY and their respective officers, agents, and employees, the COUNTY shall satisfy the same.
- (b) DSI shall indemnify and hold harmless the COUNTY and its officers, agents, and employees, from any and all claims, actions, suits, liability, loss, costs, expenses, and damages of any nature whatsoever, by any reason of or arising out of any negligent act or omission of DSI, its officers, agents and employees, relating to or arising out of performing Services pursuant to this Agreement. In the event that any suit based upon such claim, action, loss, or damages is brought against the COUNTY, DSI shall defend the same at its sole cost and expense; provided that the COUNTY reserves the right to participate in said suit if any principle of governmental or public law is involved; and if final judgment in said suit be rendered against the COUNTY, and its officers, agents, and employees, or jointly against the COUNTY and DSI and their respective officers, agents, and employees, DSI shall satisfy the same.
- (c) Notwithstanding Article 27a-b, if the comparative negligence of the PARTIES and their officers and employees is a cause of such damage or injury, the liability, loss, cost, or expense shall be shared between the PARTIES in proportion to their relative degree of negligence and the right of indemnity shall apply to such proportion.

- (d) Notwithstanding Article 27c, where an officer or employee of a Party is acting under the direction and control of the other Party, the Party directing and controlling the officer or employee in the activity and/or omission giving rise to liability shall accept all liability for the other Party's officer or employee's negligence.
- (e) Each Party's duty to indemnify shall survive the termination or expiration of the Agreement.
- (f) The foregoing indemnity is specifically intended to constitute a waiver of each Party's immunity under Washington's Industrial Insurance Act, chapter 51 RCW, respecting the other Party only, and only to the extent necessary to provide the indemnified Party with a full and complete indemnity of claims made by the indemnitor's employees. The PARTIES acknowledge that these provisions were specifically negotiated and agreed upon by them.

During the term of this Agreement, including any renewal period(s), COUNTY agrees to:

- (1) Stipulate that DSI has no responsibility to advise COUNTY with respect to any applicable law, regulation, or guideline that may govern or control telephone call recordation or monitoring by COUNTY or compliance therewith. COUNTY has its own legal counsel to advise it concerning any and all such applicable law, regulation, or guideline, and compliance therewith. DSI disclaims any responsibility to provide, and in fact has not provided, COUNTY any legal advice concerning such applicable law, regulation, or guideline, or compliance therewith. COUNTY agrees to indemnify, defend, and hold DSI harmless from any liability, claims, suits, proceedings, damages, costs, and expenses (including attorney's fees) relating to any claims against DSI by any person arising out of failure of COUNTY to comply with such applicable law, regulation or guideline that may govern or control telephone call recordation or monitoring by COUNTY or compliance therewith.
- (2) Acknowledge that all call detail records (CDRs) and call recordings contained in the inmate telephone system equipment provided by DSI to COUNTY are the exclusive property of the COUNTY for the term of this Agreement and any resulting extensions of this Agreement. COUNTY agrees to indemnify, defend, and hold DSI harmless from any liability, claims, suits, proceedings, damages, costs (including attorney's fees) relating to any claims made against DSI by any person arising out of failure of COUNTY to comply with such applicable law, regulation or guideline relating to CDR's.

DSI and COUNTY specifically warrant that the foregoing indemnity provisions are the subject of explicit negotiation by the parties, and are specifically and expressly agreed to in consideration of the mutual benefits derived under the terms of the Agreement herein and take precedence over any provisions that may be in conflict within this Agreement.

## **ARTICLE 28 - LIMITATION OF LIABILITY**

The Parties agree that neither DSI nor COUNTY shall be liable to each other, regardless of the form of action, for consequential damages. The Parties further agree that neither shall be liable to the other for any lost profits or any demand or claim, regardless of the form of action, against either party by any other person except a claim or demand based on patent or copyright infringement, in which case liability shall be as set forth elsewhere in this Agreement.

Neither DSI nor COUNTY shall be liable for damages arising from causes beyond the reasonable control and without the fault or negligence of either DSI or COUNTY, or their respective subcontractors.

Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of any government body acting in either its sovereign or contractual capacity, war, explosions, fires, floods, epidemics, quarantine restrictions, strikes freight embargoes, and unusually severe weather; but in every case the delays must be beyond the reasonable control and without fault or negligence of DSI, COUNTY, or their respective subcontractors.

If delays are caused by the default of a subcontractor without its fault or negligence, neither DSI nor COUNTY shall be liable for damages for delays, unless the goods and/or services to be furnished by their subcontractors were obtained on comparable terms from other sources in sufficient time to permit DSI or COUNTY to meet its required performance schedule.

Neither party shall be liable for personal injury or damage to tangible property except personal injury or damage to tangible property proximately caused by each party's respective fault or negligence.

DSI'S lifetime liability under this Agreement shall be limited to direct damages that are proven, in an amount not more than \$15,000,000 aggregate.

## **ARTICLE 29 - PATENT AND COPYRIGHT INDEMNIFICATION**

DSI will at its expense defend COUNTY against a claim that the system software, hardware or documentation supplied hereunder infringes a U.S. or foreign patent or copyright, or that the system's operation pursuant to a current release and modification level of any programming supplied by DSI infringes a U.S. or foreign patent or copyright. DSI will pay resulting costs, and attorney's fees finally awarded provided that COUNTY promptly notifies DSI in writing of the claim and DSI has sole control of the defense and all related settlement negotiations.

If such claim has occurred or in DSI'S opinion is likely to occur, COUNTY agrees to permit DSI, at its option and expense, either to procure for COUNTY the right to continue using the system or to replace or modify the same so that they become non-infringing and functionally equivalent. If neither of the foregoing alternatives is reasonably available, COUNTY agrees to return the system software, hardware and/or documentation at DSI'S risk and expense upon written request by DSI. In the event the Jail Management System has been installed less than one year, transportation to the initial installation site, if paid by COUNTY, shall be refunded by



DSI. DSI agrees to grant COUNTY a credit for returned hardware as depreciated. The depreciation shall be an equal amount per year over the life of the hardware.

For this section only, the depreciation shall be calculated on the basis of a useful life of five (5) years commencing on the effective date of purchase and shall be an equal amount per year over said useful life. The depreciation for fractional parts of a year shall be prorated on the basis of 365 days per year.

DSI has no liability for any claim based upon alteration or modification of the Jail Management System supplied hereunder, if such claim would have been avoided by the absence of such alteration or modification.

The foregoing states the entire obligation of DSI with respect to infringement of patents and copyright.

#### **ARTICLE 30-INSURANCE**

Insurance will be provided pursuant to the terms of Attachment "B."

#### **ARTICLE 31 - TERMINATION FOR DEFAULT**

In the event DSI terminates without cause or defaults on any of its obligations under any of the provisions of this agreement, COUNTY shall thereupon have the right to procure on the open market a system substantially similar in price and functionality hereunder required in lieu thereof, and DSI shall be liable for damages as set forth herein. Termination by DSI by reason of default under this provision shall not be effected until COUNTY provides DSI written notice of the violation or failure to perform and DSI thereafter fails to correct the failure to perform or violation within thirty (30) days of such notice. Final termination will then be by written notice by COUNTY to DSI. COUNTY shall thereupon have the right to deduct from any monies due or that thereafter become due to DSI, without penalty, or to require DSI to pay COUNTY for additional actual costs for procuring another Jail Management System including the following:

1. After thirty (30) days notice and failure to cure, DSI agrees to compensate COUNTY for the difference between the cost of the DSI OMS system and the cost of the replacement OMS system (cost to DSI not to exceed five-hundred thousand dollars (\$500,000)) procured on the open market that is substantially similar in price and functionality to the OMS system to be installed in ATTACHMENT "A" (i.e., the difference in the cost of the replacement OMS system procured and the Two Million, Ninety-six Thousand, Five Hundred and Four Dollars and Thirty-Four Cents (\$2,096,504.34) price of the DSI OMS system). The cost difference payable by DSI shall be further reduced by Nineteen Thousand, Four Hundred and Twelve Dollars and Eight Cents (\$19,412.08) for each full month the telephone services contract in ATTACHMENT "C" has been completed not to exceed the initial term of that agreement. COUNTY shall have the option of purchasing the equipment listed in EXHIBIT "E" under the same pricing formula upon termination for cause by COUNTY.

2. Solely in the case of default by DSI, administrative costs for acquiring a replacement Jail Management System including, but not limited to, cost of competitive bidding, mailing, advertising, applicable excess financing charges or penalties, staff time and the like shall be the responsibility of DSI. DSI'S administrative cost liability under this Agreement shall not exceed \$50,000 actual costs. DSI'S administrative cost limitation of \$50,000 of actual costs stated herein is considered an exclusive and separate redress and does not modify any provisions regarding other damages, or any other conditions as are agreed to by the parties, set forth elsewhere in this Agreement.
3. After a failure to cure with thirty days notice, cancel the Telephone Services Contract in Attachment "C".

This provision shall not apply to any DSI failure(s) to perform that result from the negligent acts or omissions of COUNTY.

DSI may, by written notice to COUNTY, and thirty (30) days to cure by COUNTY, terminate this Agreement, in whole or in part for failure of COUNTY to perform any of the obligations or provisions hereof. If COUNTY fails to fulfill in a timely and proper manner its performance obligations under this Agreement, or if COUNTY violates any of the performance warranties made herein, then DSI shall give COUNTY written notice of such failure or violation which shall be corrected by COUNTY within thirty (30) days. If such failure or violation is not corrected, this Agreement may be terminated immediately by written notice from DSI to COUNTY, and DSI shall remove all hardware and software immediately without recourse from COUNTY.

#### **ARTICLE 32 - TERMINATION PROCEDURE**

Upon termination of this Agreement, COUNTY, in addition to any other rights provided in this Agreement, may require DSI to deliver to COUNTY any software, hardware or user documentation specifically produced or acquired for the performance of such part of this Agreement as has not been terminated.

In the event of COUNTY'S default or termination of this agreement without cause, COUNTY shall pay to DSI the agreed upon price for software, hardware or documentation described in Attachment "A" and Exhibit "E" received by COUNTY as provided for in Attachment "C," and the amount agreed upon by DSI and COUNTY official for (i) software, hardware or user documentation, and incurred expenses which were received by or purchased on behalf of COUNTY, and (ii) the protection and preservation of property unless the termination is for default, in which case the Parties shall determine the extent of the liability of COUNTY; PROVIDED that, in no event shall COUNTY pay to DSI an amount greater than DSI would have been entitled to if this Agreement had not been terminated. Failure to agree with such determination shall be a dispute within the meaning of the DISPUTES clause of this Agreement.

The rights and remedies of COUNTY provided in this Agreement shall be exclusive.

After receipt of a Notice of Termination, and except as otherwise specified by COUNTY, DSI shall:

1. Stop work under this Agreement on the date, and to the extent specified, in the Notice.
2. Place no further orders or subcontracts for materials, services, or facilities except as may be necessary for completion of such portion of the work under this Agreement that is not terminated.
3. As to the portion of the Contract terminated, assign to COUNTY, in the manner, at the times, and to the extent specified by COUNTY official, all of the rights and interest of DSI under the orders and subcontracts so terminated, that would have been assigned if the contract had not been terminated, in which case COUNTY shall settle or pay any or all valid claims of DSI arising out of the COUNTY's termination of such orders and subcontracts, or due DSI under the Agreement up to the date of termination.
4. Settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of COUNTY to the extent COUNTY may require. Such approval or ratification shall be final for all the purposes of this section. COUNTY shall reimburse DSI for all settled outstanding liabilities and claims arising out of the COUNTY's termination of orders and subcontracts.
5. Transfer title to COUNTY and/or deliver in the manner, at the times, and to the extent directed by the COUNTY contracting official, any property or licenses to use that are required to be furnished to COUNTY.
6. Complete performance of such part of the work as shall not have been terminated by COUNTY contracting official.
7. Take such action as may be necessary, or as COUNTY may direct for the protection and preservation of the property related to this Agreement which is in the possession of DSI and in which COUNTY has an interest. COUNTY's direction shall take precedence over DSI's requirements to take such action as DSI deems "necessary." DSI shall not be responsible if preservation and protection actions directed by COUNTY result in incomplete or incorrect protection and preservation of said property. Costs above those deemed "necessary" by DSI to protect and preserve property shall be passed on to COUNTY if actions directed by COUNTY cause DSI to incur additional costs. COUNTY shall take possession of, and DSI shall have no responsibility for any property thirty (30) days past termination.

### **ARTICLE 33 - TERMINATION FOR BANKRUPTCY**

Upon filing of a petition for bankruptcy or financial reorganization or in the event of insolvency of DSI, COUNTY may terminate this Agreement upon thirty (30) days written notice signed by COUNTY. Termination under such conditions shall constitute default by DSI. Should such petition be dismissed or such insolvency no longer exists or should adequate evidence of DSI'S

ability to continue performance be provided to COUNTY within thirty (30) days notice of termination for default, no termination or default shall result.

#### **ARTICLE 34 - TERMINATION DUE TO NON-APPROPRIATION OF FUNDS**

In the event that either funding from the County or other sources is withdrawn, reduced, or limited, or the authority of the County to perform any of its duties is withdrawn, reduced, or limited in any way after the effective date of this Agreement and prior to normal completion, the County shall have the authority to exercise the termination for convenience option to terminate this Agreement, in whole or in part. If the COUNTY is compelled to terminate the agreement due to funding issues outlined in this article, the County will provide fourteen (14) days written notice terminating this agreement in whole or in part.

If this Agreement is terminated for the reasons stated in this article, the COUNTY is only liable for payment required by the terms of this Agreement, for services rendered or software/hardware received and accepted or software/hardware ordered by DSI that is non-returnable, non-refundable or has been altered to meet COUNTY specifications but not delivered prior to the effective date of termination.

#### **ARTICLE 35 – DISPUTES**

Except as otherwise provided in this Agreement, when a bona fide dispute concerning a question of fact arises between the Parties, and it cannot be resolved, either party may initiate COUNTY dispute resolution procedure provided herein.

Time is of the essence in resolving disputes. The initiating party shall reduce its description of the dispute to writing and deliver it to the responding party. The responding party must respond in writing within ten (10) COUNTY working days. Then both parties shall have ten (10) COUNTY working days to negotiate in good faith to resolve the dispute.

Both Parties agree to exercise good faith in dispute resolution.

The Parties agree that, the existence of a dispute notwithstanding, they will continue without delay to carry out all their respective responsibilities under this Agreement that are not affected by the dispute. If said dispute(s) cannot be resolved between the Parties, then each Party shall have the right to pursue all rights and remedies available to that party as stated in the contract.

#### **ARTICLE 36 – ASSIGNMENT**

DSI may not, without the express written consent of COUNTY, assign, sublet or transfer in whole or in part its interest in this Agreement. DSI may not assign this Agreement to a present or future affiliate or subsidiary or assign its rights to receive payment without COUNTY'S written consent, except DSI may assign this AGREEMENT to any parent or successor of DSI without the written consent of COUNTY upon thirty (30) days written notice to COUNTY.

Such assignment shall not operate to relieve DSI of any of its duties and obligations hereunder, nor shall such assignment affect any remedies available to COUNTY that may arise from any breach of the provisions of this Agreement, its supplements, or warranties made herein.

#### **ARTICLE 37 – NOTICES**

Any notice required or permitted to be given under this Agreement (except notice of software or hardware problems) shall be effective on the date stated within or, if no date is given, upon receipt; and shall be effective only if it is in writing and as an alternative to personal delivery, sent by certified, registered or overnight U.S. Mail postage prepaid, if to the Parties as listed on the face page of this Agreement or to such other address as each party may notify the other in writing.

#### **ARTICLE 38 - VENUE STIPULATION**

This Agreement has and shall be construed as having been made and delivered within the State of Washington and the laws of the State of Washington shall be applicable to its construction and enforcement. Any action at law, suit in equity or judicial proceeding for the enforcement of this Agreement or any provisions hereto shall be instituted only in the courts of competent jurisdiction within Spokane County, Washington.

#### **ARTICLE 39 – SEVERABILITY**

If any term or condition of this Agreement or the application thereof to any person(s) or circumstances is held invalid, such invalidity shall not affect other terms, conditions or applications which can be given effect without the invalid term, condition or application; to this end the terms and conditions of this Agreement are declared severable.

#### **ARTICLE 40 - UCC APPLICABILITY**

Except to the extent the provisions of this Agreement are clearly inconsistent, this Agreement shall be governed by any applicable provisions of the Uniform Commercial Code, hereinafter referred to as the UCC, as set forth in Title 62A RCW.

To the extent this Agreement entails delivery or performance of services, such services shall be deemed “goods” within the meaning of the UCC, except when to so deem such services as “goods” would result in an absurdity.

In the event of any clear inconsistency or contradiction between this Agreement and the UCC, the terms and conditions of this Agreement shall take precedence and prevail unless otherwise provided by law.



#### **ARTICLE 41 - ATTORNEYS' FEES AND COSTS**

If any litigation is brought to enforce, or arising out of this Agreement or any term, clause, or provision hereof, the prevailing party shall be awarded its reasonable attorneys' fees together with expenses and costs incurred with such litigation including necessary fees, costs, and expenses for services rendered at both trial and appellate levels as well as subsequent to judgment in obtaining execution thereof.

#### **ARTICLE 42 - LICENSING STANDARDS**

DSI shall comply with all applicable local, State and Federal licensing requirements and standards necessary in the performance of this Agreement.

#### **ARTICLE 43 - OSHA/WISHA**

DSI represents and warrants that its products are designed and manufactured to meet Federal and Washington State safety and health regulations that are in effect at the time of their shipment to COUNTY.

DSI further agrees to indemnify and hold harmless COUNTY from all damages assessed against COUNTY as a result of the failure of the items furnished under this Agreement to so comply.

#### **ARTICLE 44 - NON-DISCRIMINATION**

DSI shall not discriminate against any employee who is employed in connection with the work, or against any applicant for such employment, because of race, creed, color, sex or national origin, marital status, or the presence of any sensory, mental and physical handicap or sexual orientation.

#### **ARTICLE 45 - COVENANT AGAINST CONTINGENT FEES**

DSI warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon any agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or a bona fide established commercial or selling agency of DSI.

COUNTY shall have the right, in the event of breach by DSI of the above-stated provision, to: annul this Agreement without liability, or

In its discretion, deduct from this Agreement price or consideration or otherwise recover the full amount of such commission, percentage, brokerage, or contingent fee.

#### **ARTICLE 46 - ANTI-TRUST VIOLATIONS**

The Parties recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the purchaser. Therefore, DSI hereby assigns to

COUNTY any and all claims recovery for such overcharges as to goods and services purchased in connection with this Agreement, except as to overcharges not passed on to COUNTY resulting from antitrust violations commencing after the date of the bid, quotation, or other event establishing the pricing under this Agreement.

#### **ARTICLE 47 - PROTECTION OF PROPRIETARY & CONFIDENTIAL CONTRACTOR INFORMATION**

Any specific information that is contained in DSI'S Proposal that is confidential or proprietary must be clearly identified by DSI. If a request is made to view DSI'S proprietary information, COUNTY will comply with the Open Public Records Act, chapter 42.56 RCW to the extent required, but will provide DSI with ten (10) days advance notice of COUNTY'S intent to fulfill its obligations under the Act. COUNTY will specify any information that was marked as confidential or proprietary by DSI but COUNTY deems not to be proprietary and plans to release or that COUNTY has determined is otherwise subject to disclosure.

#### **ARTICLE 48 - PUBLICITY**

DSI agrees to submit to COUNTY all advertising, sales promotion, and other publicity matters relating to any product furnished by DSI wherein COUNTY'S name is mentioned. DSI further agrees not to publish or use such advertising, sales promotion, or publicity matter without the prior written consent of COUNTY. COUNTY shall respond to any request by DSI within twenty (20) business days or DSI shall be entitled to assume implied permission.

#### **ARTICLE 49 - WAIVER**

Only the Parties' or the Parties' delegate by writing shall have the express, implied, or apparent authority to alter, amend, modify or waive any clause or condition of this Agreement. No waiver of any breach of this Agreement shall be held to be a waiver of any other or subsequent breach. All remedies afforded in this Agreement or a law shall be taken and construed as cumulative, that is, in addition to every other remedy provided herein or by law. Failure of either party to enforce at any time any of the provisions of this Agreement or to require at any time performance by either party of any provision hereof, shall in no way be construed to be a waiver of such provisions, nor in any way affect the validity of this Agreement or any part hereof, or the right of either party to hereafter enforce each and every such provision.

#### **ARTICLE 50 - LIMITATION OF THE COUNTY'S AUTHORITY**

Only COUNTY or COUNTY'S delegate by writing shall have the express, implied, or apparent authority to alter, amend, modify, or waive any clause or condition of this Agreement on the part of the COUNTY. Furthermore, any alteration, amendment, modification, or waiver of any clause or condition of this Agreement is not effective or binding until made in writing and signed by both Parties unless otherwise provided herein.

#### **ARTICLE 51 – HEADINGS**

The article headings in this Agreement have been inserted solely for the purpose of convenience and ready reference. In no way do they purport to, and shall not be deemed to, define, limit, or extend the scope or intent of the articles to which they appertain.

#### **ARTICLE 52 - MODIFICATIONS AND AMENDMENTS**

No modification or amendment to this Agreement shall be valid until the same is reduced to writing, in the form of an amendment, and executed with the same formalities as this Agreement.

#### **ARTICLE 53 - ENTIRE AGREEMENT**

This Agreement, including all exhibits and attachments incorporated herein, sets forth the entire Agreement between the Parties with respect to the subject matter hereof and except as provided in the provision entitled “CONTRACTOR COMMITMENTS, WARRANTIES AND REPRESENTATIONS” understandings, agreements, representations, or warranties not contained in this Agreement or a written amendment hereto shall not be binding on either party. Except as provided herein, no alteration of any of the terms, conditions, delivery, price, quality, or specifications of this Agreement will be effective without the written consent of both COUNTY and DSI.

[Signature Page Follows]

