

SmartMsg Standard SOFTWARE MAINTENANCE AGREEMENT

THIS SOFTWARE MAINTENANCE AGREEMENT ("Agreement") is made as of the Effective Date by and between Codespear, LLC with offices located at 370 E. Maple, Suite 350, Birmingham, MI 48009 ("Vendor") and Detroit Public Schools., ("Customer").

WITNESSETH:

WHEREAS, Vendor has licensed to Customer that certain Licensed Software and Documentation as defined in that certain Software License Agreement by and between Vendor as Licensor and Customer as Licensee for that certain computer software known as SmartMsg ("Software License"), which is incorporated herein by this reference; and

WHEREAS, effective use of the Licensed Software and Documentation requires certain maintenance, training and user support services; and

WHEREAS, Vendor is in the business of maintaining the Licensed Software and Documentation and has the expertise to maintain the Licensed Software and Documentation; and

WHEREAS, Vendor is in the business of providing computer software training and support services for the Licensed Software; and

WHEREAS, Customer desires Vendor to provide Customer with computer software maintenance, training and user support services for the Licensed Software and Documentation.

NOW, THEREFORE, in consideration of the mutual benefits of the covenants and restrictions herein contained, Vendor and Customer hereby agree as follows:

ARTICLE I: RECITALS AND DEFINITIONS

Section 1.01 -- Recitals: The above recitals and identification of parties is true and correct.

Section 1.02 -- Definitions: The following definitions shall apply:

- (1) Computer: The term "Computer" shall mean the computer(s) as defined in the Software License, including any and all additional or replacement equipment attached thereto or integrated therewith by Customer during the Maintenance Term as well as any updates, revisions, or upgrades thereto.
- (2) Defect: The term "Defect" shall mean any deviation between the actual performance, utility and functionality of the Licensed Software on the Computer and the performance, utility, and functionality of the Licensed Software as represented in the Documentation. The term "Defect" shall also mean any inefficiency or problem encountered in using, operating or executing the Licensed Software.
- (3) Documentation: The term "Documentation" shall mean the user manuals, systems documentation, brochures, product and service descriptions and training materials for the Licensed Software (which are incorporated herein by this reference) including all modifications, improvements, replacements, updates, enhancements, additions, upgrades and changes thereto made from time to time during the Maintenance Term.
- (4) Effective Date: The term "Effective Date" shall mean the date this Agreement is signed by the Software Licensee.
- (5) Enhancement: The term "Enhancement" shall mean a change to the Licensed Software desired by Customer involving substantial programming additions or modifications to the source code of the Licensed Software which is performed by Vendor pursuant to Section 3.02 of this Agreement for use solely by Customer.
- (6) Implement: The term "implement" and variants thereof (including, but not limited to, the terms "implementation", "implementing" and "implemented") shall mean to install and make fully operational for user access and use.
- (7) Licensed Software: The term "Licensed Software" shall mean SmartMsg as defined in the Software License and as improved, modified, replaced, updated, enhanced, upgraded, corrected, maintained and further developed from time to time by Vendor during the Maintenance Term.
- (8) Maintenance Fee: The term "Maintenance Fee" shall mean an amount of money equal to: Included in the net license fees of SmartMsg for one year from the date of software delivery (Effective Date) The second and future years maintenance fee will be based on a percentage of the net license fees paid, dependent upon then current percentage fee for Standard, or Premium support plans. Proceeding years will be quoted sixty days prior to maintenance period expiring.

- (9) Maintenance Term: The term "Maintenance Term" shall mean a period starting with the Effective Date and continuing for one year.
- (10) Update: The term "Update" shall mean any and all corrections, updates, additions, or changes to the Licensed Software.

ARTICLE II: MAINTENANCE SERVICES

Section 2.01 -- Error Correction: Vendor shall correct any Defects in the Licensed Software within a reasonable time after such Defect is reported to Vendor by Customer, as follows:

- (1) Problem Reporting: Upon discovering a Defect, Customer shall report the Defect ("Service Request").
- (2) Telephone Support: Shall be available Monday thru Friday, 9:00 a.m. to 5:00 p.m. eastern time. Within four hours of receiving a Service Request, Vendor shall provide unlimited telephone support in the form of consultations, assistance and advice concerning use of the Licensed Software and correction of the Defect.
- (3) Off-site Support: If a Defect is not corrected through telephone support within twenty-four hours after receiving a Service Request, Vendor shall immediately begin conducting tests and analyses at Vendor's facility designed to reproduce, isolate and correct the Defect on a priority basis using data and information provided to Vendor by Customer. Customer shall submit to Vendor all such data and information which Vendor may reasonably require to reproduce the Defect on Vendor's computer located at Vendor's facility.
- (4) On-Site Support: If a Defect is not corrected by Vendor within three calendar business days after receiving a Service Request, Vendor shall locate qualified software engineers at Customer's facility for the purpose of correcting the Defect ("On-site Services"). Within seventy-two hours of commencing such On-site Services, Vendor shall implement work around processes designed to minimize the impact of the Defect while Vendor continues on-site testing and analysis procedures for the purposes of reproducing, isolating and correcting the Defect. If a Defect is not corrected within 14 days of Service Request, Customer at its option, may terminate this Agreement and receive a refund amount calculated in accordance with Section 6.05.

Section 2.02 -- Software Updates: Customer shall implement all Updates on the Computer within ninety days after the date that such Update is released by Vendor. Along with any Updates provided to Customer by Vendor hereunder, Vendor shall provide documentation describing the purpose, function and utility of such Update.

ARTICLE III: CUSTOMER SUPPORT

Section 3.01 -- Customer Consultations: Vendor shall provide Customer with unlimited telephone consultations in answering questions concerning use of the Licensed Software. Vendor shall respond to any such questions on a priority basis.

Section 3.02 -- Program Modifications: Upon discovering a desired Enhancement in the Licensed Software, Customer may request implementation of the Enhancement. Vendor shall implement such Enhancements as of the software release of the Licensed Software next following the date implementation of the Enhancement is requested. Along with any Enhancements provided to Customer by Vendor hereunder, Vendor shall provide documentation describing the purpose, function and utility of such Enhancement, which shall be incorporated herein by reference. If Enhancement requested by Customer becomes part of the generally available Licensed Software, the Enhancement will be provided at no charge to the Customer. If Enhancement requested by Customer is Specific to Customers business and will not be part of the generally available Licensed Software, Enhancement will be done on a time and material basis. Time will be billed at a rate of \$100.00 per hour. At anytime in the future that Enhancement becomes part of the generally available software; Customer will be refunded all fees paid for such Enhancement.

Section 3.03 -- Preventive Maintenance: Upon request by Customer, at no additional charge, Vendor shall perform an audit of the Licensed Software as applied and used by Customer. Such audit shall involve reviewing procedures for using and operating the Licensed Software, the performance of the Licensed Software on the Computer, input and output procedures and processes, and data management issues.

Section 3.04 -- File Expansion and Reorganization: Vendor shall expand or reorganize the files of the Licensed Software upon Customer request. At the option of Customer, Licensed Software file expansion or reorganization can be performed by Customer pursuant to guidance provided by Vendor by telephone.

ARTICLE IV: TRAINING

Section 4.01 -- On-Site Training: During the first sixty days of the License Term, Vendor shall provide on-site individual training as required by Customer at pre-negotiated, or then current daily training fees. Such on-site training shall include individualized

instruction and training on using and operating the Licensed Software for persons designated by Customer. Such training shall include instructions and guidelines on performing all of the functions and processes described in the Documentation.

ARTICLE V: PAYMENT

Section 5.01 -- Maintenance Fees: Customer shall pay the Maintenance Fee on each anniversary of the Effective Date, subject to receipt of written notice from Vendor that such Maintenance Fee is due and payable. Payment of the Maintenance Fee shall be subject to a thirty-day grace period.

Section 5.02 -- Customer Support Fees: The program modification services described in Section 3.02 shall be performed at the published labor rates of Vendor. The file expansion and reorganization services described in Section 3.04 shall be performed by Vendor at the published labor rates of Vendor, except that telephone guidance provided by Vendor for expansion and reorganization of files by Customer shall be provided by Vendor at no charge to Customer.

Section 5.03 -- Costs: The fees set forth above shall be inclusive of all costs and applicable taxes.

Section 5.04 -- Invoicing and Payment: Vendor shall invoice Customer monthly for any customer support or training fees for providing services under this Agreement. Customer shall pay any such invoice in full within thirty days after approval thereof by Customer.

ARTICLE VI: TERMINATION

Section 6.01 -- Termination Limitations: This Agreement may only be terminated as provided under this Article VI.

Section 6.02 -- Termination: Starting one year after the Effective Date, either party may terminate this Agreement at anytime and for any reason with sixty days written notice of termination to the other party.

Section 6.03 -- Termination for Vendor Failure: Notwithstanding any provision to the contrary herein, Customer shall have the right to terminate this Agreement upon providing Vendor with ten day advance written notice in the event any one of the following occurs:

- (1) Termination of Business Activity: Vendor terminates or suspends business operations;
- (2) Breach of Software License: Vendor breaches Vendor's obligations as Licensor under the Software License, and/or as Vendor under this Agreement;
- (3) Bankruptcy: Vendor becomes insolvent, bankrupt, makes an assignment for the benefit of creditors or becomes subject to any bankruptcy or insolvency proceeding under any Federal or state statute;
- (4) Rejection of Software: Customer fails to accept the Licensed Software as provided under the Software License.

Section 6.04 -- Force Majeure: If Customer is unable to perform its obligations under this Agreement or to enjoy the benefits of either the Software License or this Agreement because of natural disaster, actions or decrees of any governmental bodies which are not the fault of Customer, Customer shall have the right to terminate this Agreement and the Software License.

Section 6.05 -- Refund: If Customer terminates this Agreement pursuant to Section 6.03, Vendor shall pay Customer an amount equal to the Refund Amount. The refund Amount shall be the Maintenance Fee multiplied by a fraction, the numerator of which shall be the number of months (including fractions thereof) remaining in the Maintenance Year as of the effective date of termination and the denominator of which shall be twelve. For purposes of this Section 6.05, the term Maintenance Year shall mean each twelve consecutive month period starting with the first anniversary of the Effective Date and each anniversary thereafter.

ARTICLE VII: WARRANTY AND INDEMNIFICATION

Section 7.01 -- Maintenance Warranty: Vendor warrants that Vendor shall maintain the Licensed Software free from all Defects and that the Licensed Software shall conform to the performance capabilities functions and other standards applicable thereto as set forth in this Agreement, the Software License and the Documentation. Vendor warrants that all Updates and Enhancements implemented by Vendor shall be fully compatible with each other, the Licensed Software and the Computer. Vendor warrants that the Licensed Software shall be kept current and consistent with the tax reporting, regulatory compliance and other business needs of Customer, and that all Updates and Enhancements shall be made available to Customer upon release by Vendor.

Section 7.02 -- Service Warranty: The services to be provided by Vendor hereunder shall be performed on a best efforts basis and in a timely and professional manner by qualified software personnel familiar with the Licensed Software, and shall conform to the commercially reasonable standards generally observed in the industry for similar services. Such services shall be in compliance with all applicable laws, rules, regulations or orders.

Section 7.03 -- Software Modifications: If the Licensed Software is modified by any party other than Vendor or Customer, the maintenance warranty granted in Section 7.01 shall be void.

Section 7.04 -- Original Development: Licensor represents and warrants that use of the Licensed Software and any Updates or Enhancements by Customer shall not infringe upon or violate any patent, copyright, trade secret or other property right of any third party.

Section 7.05 -- Documentation Warranty: Vendor warrants that the Documentation shall be kept current with the Updates and Enhancements for the Licensed Software as such Updates and Enhancements are released.

Section 7.06 -- Indemnification: Vendor shall defend, indemnify and hold harmless Customer (including employees, consultants, agents, and subcontractors of Customer) against any liability arising from the failure of Vendor to perform the services described under this Agreement or any claim by any third party against Customer arising from, or related to, Customer's use of any Update or Enhancement, including (but not limited to) any claimed violations of trade secrets, proprietary information, trademark, copyright or any patent rights. If Customer's quiet enjoyment and use of any Update or Enhancement is disrupted as a result of a third party claim, Vendor shall perform one or all of the following actions within ninety (90) days of the date such third party's claim is discovered by Customer:

- (1) Replacement: Replace the Update or Enhancement, at Vendor's cost, with a compatible, functionally equivalent and non-infringing software product; or
- (2) Modification: Modify the Update or Enhancement, at Vendors cost, to avoid the infringement without frustrating the purpose for which the Update or Enhancement was developed or reducing the capability of the Update or Enhancement; or
- (3) License: Obtain a license, at Vendor's cost, for Customer to use the Update or Enhancement for the remainder of the Maintenance Term.

Section 7.07 -- Authorized Vendor: Vendor hereby represents and warrants that Vendor is authorized to provide the maintenance, customer support and training services described under this Agreement.

ARTICLE VIII: INTELLECTUAL PROPERTY AND INSURANCE

Section 8.01 -- Update Ownership and Title: Title to any Update or Enhancement including applicable ownership rights to patents, copyrights, trademarks and trade secrets therein shall remain the exclusive property of Vendor.

Section 8.02 -- Confidentiality: Vendor hereby acknowledges that in providing the maintenance, training and customer support services described hereunder, Vendor may learn information which is deemed to be Confidential Information as that term is defined in the Software License Agreement. Vendor hereby agrees not to disclose any information identified by Customer as confidential or proprietary.

Section 8.03 -- Insurance: Vendor hereby represents and warrants that Vendor has insurance against all losses, claims, demands, proceedings, damages, costs, charges and expenses for injuries or damage to any person or property which are the result of the fault or negligence of the Vendor in providing the services described under this Agreement, including, without limitation, workmen's compensation, public liability, property damage and automobile liability.

Section 8.04 -- Security Regulation: In providing services under this Agreement, Vendor shall insure that its employees, servants and agents obey all reasonable instructions, directions and regulations of Customer while on the premises of Customer.

Section 8.05 -- Continuation: The terms and provisions of Articles VII and VIII shall survive termination of this Agreement.

ARTICLE IX: MISCELLANEOUS

Section 9.01 -- Reasonable Assistance: Customer shall provide Vendor with reasonable access to the Licensed Software, Documentation and the Computer upon request by Vendor for purposes of rendering services hereunder.

Section 9.02 -- Assignments: All assignments of rights under this Agreement by Vendor without the prior written consent of Customer shall be void.

Section 9.03 -- Entire Agreement: Excepting the Software License, this Agreement contains the entire understanding of the parties and supersedes previous verbal and written agreements between the parties concerning maintenance, customer support or training services for the Licensed Software.

Section 9.04 -- Equitable Remedies: The parties hereby acknowledge that damages at law may be an inadequate remedy. Therefore, Customer shall have the right of specific performance, injunction or other equitable remedy in the event of a breach of this Agreement by Vendor.

Section 9.05 -- Amendments and Modifications: Waivers, alterations, modifications or amendments of a provision of this Agreement shall not be binding unless such waiver, alteration, modification or amendment is in writing and signed by an authorized representative of both parties.

Section 9.06 -- Severability: If a provision of this Agreement is rendered invalid by legislation, or by a court of last resort, the remaining provisions shall remain in full force and effect.

Section 9.07 -- Captions: The headings and captions of this Agreement are inserted for reference convenience and do not define, limit or describe the scope or intent of this Agreement or any particular section, paragraph, or provision.

Section 9.08 -- Counterparts: This Agreement may be executed in multiple counterparts, each of which shall be an original, but which together shall constitute one and the same instrument.

Section 9.09 -- Governing Law: This Agreement is governed by the laws of the State of Michigan.

Section 9.10 -- Notice: Notices shall be in writing and shall be deemed delivered in person when delivered by hand or mailed postage prepaid by Certified or Registered Mail -- Return Receipt Requested -- to the person and address designated below. Notice shall be deemed given on the date of receipt -- as evidenced in the case of Certified or Registered Mail by Return Receipt.

<u>VENDOR:</u>	<u>ADDRESS:</u>
Codespear, LLC	370 E. Maple, Suite350 Birmingham, MI 48009

<u>CUSTOMER:</u>	<u>ADDRESS:</u>
Detroit Public Schools	

Section 9.11 -- Pronouns/Gender: Pronouns shall refer to the masculine, feminine, neuter, singular or plural as the context shall require.

Section 9.12 -- Bankruptcy: If either party must institute, defend, appear or attend a bankruptcy proceeding as a result of the filing of bankruptcy by the other party, fees and expenses shall be born by the filing party. If either party has a bankruptcy proceeding filed against it, the other party shall recover attorney fees, expert witness fees, and other costs incurred in connection with the bankruptcy proceeding, hearing or trial.

Section 9.13 -- Waiver: Waiver of breach of this Agreement shall not constitute waiver of another breach. Failing to enforce a provision of this Agreement shall not constitute a waiver or create an estoppel from enforcing such provision.

Section 9.14 -- Relationship of the Parties: It is agreed that the relationship of the parties is primarily that of Customer and Vendor. Nothing herein shall be construed as creating partnership, employment relationship, or agency relationship between the parties, or as authorizing either party to act as agent for the other. Each party maintains its separate identity.

Section 9.15--Arbitration: Any controversy or claim arising out of or relating to this Agreement, or breach thereof, shall be settled by arbitration in accordance with the Arbitration Rules of The State of Michigan. Judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Qualified Arbitrators shall be selected by the parties in accordance with the Arbitration Rules of The State of Michigan. Each party shall have the right of discovery as set forth in the Federal Rules of Civil Procedure.

Section 9.16 -- Assurances: Each party hereby represents and warrants that all representations, warranties, recitals, statements and information provided to each other under this Agreement are true, correct and accurate as of the date of this Agreement to the best of their knowledge.

IN WITNESS WHEREOF, this Agreement has been executed as of the date first written above.

WITNESS: VENDOR: Codespear, LLC

_____ BY:

As to Vendor

DATE:

CUSTOMER:

_____ BY: _____

As to Customer

DATE: