

ENSTOA – CONSULTING AGREEMENT

Consultant: Enstoa, Inc., a Delaware corporation authorized to transact business in the State of Florida, (“Consultant” or “Enstoa”)

Address: 655 Third Avenue, Floor 7, New York, NY 10017, USA

Primary Contact: Arnaud Giret email: agiret@enstoa.com

Customer: City of Fort Lauderdale, a Florida municipality (“Customer”)

Address: _____

Primary Contact: _____ email: _____

1. Engagement

(a) Customer hereby engages Consultant to provide the services and deliverables set forth on Appendix A (the “Project”) in accordance with the timetable set forth on Appendix A (as the same may be amended from time to time) (the “SOW”), and Consultant hereby accepts the engagement. Consultant will perform, and cause its employees and agents to perform, the Project in a competent and efficient manner and in compliance with all applicable laws, rules and regulations and Customer’s policies and procedures.

(b) Except as otherwise expressly set forth in any Appendix hereto, Consultant will supply, at Consultant’s sole cost and expense, all materials and supplies necessary for completing the Project. Any materials and supplies furnished by Customer shall remain at all times the property of Customer, and upon completion of the Project shall be returned to Customer in good condition, reasonable wear and tear excepted.

(c) Customer shall cooperate with Consultant by providing reasonable facilities and timely access to data, information and personnel and shall provide instructions and decisions in a timely manner.

2. Term and Termination.

(a) Term. The term of the engagement is set forth in Appendix A.

(b) Termination for Breach. Each party shall have the right to terminate this Agreement upon written notice to the other party if: (i) the other party is in material breach of the terms of this Agreement, and the breaching party fails to remedy such breach within thirty (30) days after receiving written notice of such breach from the non-breaching party; or (ii)(A) the other party makes an assignment for the benefit of creditors or makes an admission in writing of its inability to pay debts as they mature; (B) the other party files a voluntary petition for reorganization or arrangement under the U.S. Bankruptcy Code or files an answer consenting to or acquiescing in any such petition; (C) there is filed against the other party an involuntary petition under the U.S. Bankruptcy Code, an application for the appointment of a receiver for its assets, or an involuntary petition seeking liquidation, reorganization or arrangement under any other federal or state bankruptcy or insolvency laws, provided the same will not have been vacated, set aside or stayed within sixty (60) days after filing; (D) there is entered against the other party a final, non-appealable order for relief under any other bankruptcy, insolvency or similar law now or hereafter in effect; or (E) the other party ceases business operations in the ordinary course.

(d) Effect of Termination. Except as expressly set forth herein, upon termination or expiration of this Agreement or any engagement hereunder: (i) Except as otherwise provided by Florida law or Florida public records retention schedules, Customer shall promptly return to Enstoa all of Enstoa’s Confidential Information in its possession or under its control; (ii) Enstoa shall promptly return to Customer all of Customer’s Confidential Information in Enstoa’s possession or under its control; (iii) Customer shall promptly pay to Enstoa any undisputed fees which have accrued and are otherwise outstanding hereunder as of the effective date of termination.

3. Payment.

(a) Fees. The fees for the Project are specified in Appendix A hereto. Payments are due 45 calendar days from Customer’s receipt of proper invoice. No retainage shall be applied on invoice amounts.

(b) If on an invoice due date Customer has not paid it in full (subject to any deductions Customer is entitled to make), Consultant shall be entitled to give 14 (fourteen) days' notice of non-payment where after Consultant have the right to suspend all services provided to Customer. In these circumstances Consultant shall not be liable for any damages, delays, losses or expenses resulting from such suspension.

(c) Invoice payments are subject to Florida Prompt Payment Act for non-construction services.

4. Confidentiality.

(a) Consultant shall hold in confidence, and not disclose, distribute, sell, copy or otherwise disseminate or use, any information about or relating to the Project or any information (whether oral, electronic, automated, audio, video and image) pertaining to Customer's employees, research, development, plans, business affairs, properties, records, processes, techniques, contract terms or operating procedures (collectively, "Customer Confidential Information") disclosed to Consultant, except that Consultant may disclose Confidential Information to a third party that is performing work in connection with the Project on a "need to know" basis. Customer shall hold in confidence, and not disclose, distribute, sell, copy or otherwise disseminate or use, any non-public information of Consultant about or relating to the Project that is confidential pursuant to Florida law (whether oral, electronic, automated, audio, video and image) (collectively, "Consultant Confidential Information"), except that Customer may disclose Consultant Confidential Information to a third party that is performing work in connection with the Project on a "need to know" basis. Upon termination of the engagement, Consultant shall return to Customer any and all Customer Confidential Information in its possession or control and, except as otherwise provided by Florida law or Florida public records retention schedules, Customer shall return to Consultant any and all Consultant Confidential Information in its possession or control. Notwithstanding the foregoing, Confidential Information shall not include information that is in the public domain or has been generally known by Consultant prior to disclosure of the information.

(b) Each party shall promptly advise the other party of any unauthorized use or disclosure of the other party's Confidential Information.

5. Work for Hire.

(a) All data and information developed or prepared by Consultant in connection with the Project other than the Enstoa Panoptra, Enstoa Panoptra DataBridge, Enstoa Unifier AfterMods products and all other products listed on Enstoa's website (including the Object Codes and Source Codes thereof), ("Deliverables") shall be the sole property of Customer, and any copyrightable work or materials included in the Deliverables shall be deemed a work made for hire under federal copyright law, and shall belong solely to Customer. To the extent that any Deliverable may not, by operation of law, be a work made for hire, Consultant hereby grants, transfers, assigns and conveys to Customer the ownership of the copyright, patent or other intellectual property right in such Deliverable and Customer shall have the right to obtain and hold in its own name any such right or similar protection which may be available in such Deliverable. At Customer's request, Consultant shall promptly deliver, execute, file and record any and all documentation evidencing such assignment. Consultant shall indemnify and hold harmless Customer in connection with any claim by a third party (including, without limitation, any Consultant Personnel) to a Deliverable that infringes upon Customer's patent, copyright, license, trade secret or other proprietary right in the Deliverable. For the avoidance of doubt, Enstoa Panoptra, Enstoa Panoptra DataBridge, Enstoa Unifier AfterMods products and all other products listed on Enstoa's website (including the Object Codes and Source Codes thereof), the Documentation and the Know-how are not Deliverables hereunder.

(b) To the extent that Consultant uses any of its intellectual or other property in connection with performance of its services, Consultant shall retain all right, title and interest in and to such property and, except for the license expressly granted in the License Agreement, Customer shall acquire no right, title or interest in or to such property.

6. Independent Contractor. In the performance of the Project Consultant shall act solely as an independent contractor. Nothing in this Agreement shall constitute or be construed to be or create a partnership, joint venture, principal/agent or employment relationship between Customer and Consultant, nor shall Consultant have the right or authority to contractually bind or obligate Customer. Under no circumstances shall Consultant or any employee, agent or representative of Consultant ("Consultant Personnel") be deemed to be an employee,

agent or representative of Customer, and neither Consultant nor any Consultant Personnel shall be entitled to any disability benefit, workers' compensation or participation in any of Customer's pension, health or other benefit plans. Consultant agrees that all Consultant Personnel are employees, agents or representatives of the Consultant, and that during the course of providing services on behalf of Customer, Consultant retains authority and responsibility for (i) the supervision and control of the Consultant Personnel; (ii) determining the means and methods by which each Consultant Personnel provides services hereunder; and (iii) the compensation (and benefits) of the Consultant Personnel for their services, including, without limitation, the setting, modification and payment thereof, and the payment of all federal, state and local payroll taxes, including, without limitation, income taxes, Social Security taxes, federal unemployment compensation taxes and any other fees, charges licenses or payments required by law. Consultant hereby agrees to indemnify and hold harmless Customer against any fines, damages, assessments or attorneys' fees incurred by Customer in the event a court or administrative agency finds that Consultant or any Consultant Personnel is an employee of Customer.

7. Covenants; Representations and Warranties.

(a) Consultant covenants that (i) it shall comply with all Project specifications set forth in Appendix A; (ii) Customer shall have good title to all Deliverables free from any lien, claim, charge or encumbrance; (iii) the Deliverables will not infringe, misappropriate or violate the rights of any third party, including any copyright or patent rights, existing as of the date of delivery thereof and (iii) upon completion of the Project, the work product shall conform with Customer's specifications and intended use for ninety (90) days after the services delivery. In the event of a breach of the provisions of clause (iii), Consultant shall, at its sole cost and expense, promptly correct, repair or modify any defect or deviation identified by Customer in writing within thirty (30) days of Customer's written demand. If Consultant fails to correct, repair or modify the defect or deviation to Customer's satisfaction, Consultant shall promptly refund any and all sums previously paid to it by Customer in connection with the Project attributable to the time period after such notice of breach and this Agreement shall be deemed terminated without the need for further notice.

(b) Consultant represents and warrants that (i) it has full power and authority to enter into this Agreement and to perform its obligations hereunder, (ii) the Project and any materials created by or for Consultant in connection therewith will not violate or infringe upon any proprietary or other right of a third party in existence as of the date of delivery of the allegedly infringing item, and (iii) performance by Consultant of the terms and conditions of this Agreement is not restricted by or in violation of any applicable law to which it is subject or any agreement, commitment, order, ruling or proceeding to which it is a party or to which it or any of its assets are subject.

8. Warranty Disclaimer. THERE ARE NO OTHER WARRANTIES OR CONDITIONS (WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE ARISING UNDER LAW OR FROM A COURSE OF DEALING OR USAGE OF TRADE) FOR THE SERVICES. ENSTOA DISCLAIMS ALL STATUTORY OR IMPLIED WARRANTIES AND CONDITIONS, INCLUDING, WITHOUT LIMITATION, THE CONDITIONS AND/OR WARRANTIES OF MERCHANTABILITY, AND MERCHANTABILITY OR FITNESS FOR ANY PURPOSE, PARTICULAR, SPECIFIC OR OTHERWISE. ENSTOA DOES NOT WARRANT THAT THE FUNCTIONS CONTAINED IN THE SERVICES WILL MEET THE CUSTOMER'S REQUIREMENTS OR THAT THE OPERATION OF THE SERVICES WILL BE UNINTERRUPTED OR ERROR-FREE. FURTHER, ENSTOA DOES NOT WARRANT THAT ALL ERRORS IN THE SERVICES CAN OR WILL BE CORRECTED. CUSTOMER UNDERSTANDS AND AGREES THAT ANY MATERIAL OR DATA DOWNLOADED OR OTHERWISE OBTAINED THROUGH THE SERVICES IS DONE AT CUSTOMER'S OWN DISCRETION AND RISK, AND THAT CUSTOMER WILL BE SOLELY RESPONSIBLE FOR ANY DAMAGE TO CUSTOMER'S COMPUTER SYSTEM OR LOSS OF DATA THAT RESULTS FROM THE DOWNLOAD OR USE OF SUCH MATERIAL OR DATA. INASMUCH AS SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF CERTAIN WARRANTIES, SOME OF THE ABOVE EXCLUSIONS MAY NOT APPLY TO CUSTOMER.

9. Limitation Of Liability.

(a) Disclaimer of Consequential Damages. IN NO EVENT SHALL CONSULTANT BE LIABLE FOR ANY INDIRECT, SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGES.

(b) Limitation on Direct Damages. IN NO EVENT SHALL CONSULTANT'S AGGREGATE LIABILITY, IF ANY, ARISING OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT EXCEED THE FEES PAID BY CUSTOMER UNDER THIS AGREEMENT IN THE PREVIOUS TWELVE (12) MONTHS IF SUCH CLAIM IS BASED IN CONTRACT.

10. Insurance. Consultant shall maintain throughout the term of this Agreement (i) commercial general liability insurance, written on an occurrence basis, on a combined single limit of \$1,000,000 per occurrence for bodily injury or property damage \$2,000,000 annual aggregate, which insurance shall include broad form property damage and contractual liability endorsements; (ii) professional liability (errors and omissions) insurance in an amount not less than \$2,000,000 per claim and (iii) statutory workers' compensation insurance with Employers' Liability limits of \$500,000 per occurrence. Consultant shall provide certificate(s) of insurance evidencing the required coverages to Customer. The certificates shall name Customer as an additional insured with respect to the commercial general liability coverage.

11. Indemnification.

(a) Consultant shall defend, indemnify and hold harmless Customer and Customer's officers, trustees, employees and agents from and against any and all claims, liabilities, losses, expenses (including attorneys' fees), fines, penalties, taxes or damages (collectively, "Claims") arising out of bodily injury, death or physical damage to real or tangible personal property to the extent caused by or resulting from the negligence, recklessness, or willful misconduct of Consultant while engaged in the performance of its obligations hereunder.

(b) To the extent an SOW specifies Deliverables which have intellectual property rights appurtenant thereto, Consultant shall defend, indemnify and hold harmless Customer from all Claims attributable to third parties relating to infringement by the Deliverables of any federal patent or copyright or any unauthorized use of a trade secret. If the Deliverables, or any portion thereof, are found by final, non-appealable order of a court of competent jurisdiction to be such an infringement or unauthorized use, Consultant may, at its option and expense, (i) secure for Customer the right to continue the use of such infringing item or (ii) replace or modify such Deliverable so it becomes non-infringing, provided that such replacement or modification is capable of performing substantially the same function. If Consultant, in its reasonable discretion, is unable to perform either option, Customer shall return the Deliverable to Consultant and Consultant's sole liability shall be to refund to Customer the amount paid to Consultant for such item attributable to the time period after the return of such Deliverable, provided that the foregoing shall not be construed to limit Consultant's indemnification obligation set forth herein.

(c) The party seeking indemnification under this Agreement will give prompt written notice to the other party of the Claim against which it seeks to be indemnified; provided, however, that failure to give prompt notice will not relieve such other party of any liability hereunder (except to the extent the other party has suffered actual material prejudice by such failure). The party seeking indemnification will allow the other party to direct the defense and settlement of any such Claim, with counsel of such other party's choosing subject to the reasonable approval of the party seeking indemnification, and will provide such other party, at such other party's expense, with information and assistance reasonably necessary for the defense and settlement of the claim. The party seeking indemnification will have the right, at its sole expense, to retain separate counsel and to participate in (but not control) any such action. The other party will not settle any such action without the written consent of the party seeking indemnification, which consent will not be unreasonably withheld or delayed. The other party will not consent to the entry of any judgment or enter into any settlement that does not include as an unconditional term thereof the giving by the claimant or plaintiff to the party seeking indemnification a release from all liability with respect to the Claim.

12. Use of Name. Consultant shall not use the name of Customer in any advertising or for any commercial or promotional purpose without Customer's written consent.

13. Compliance with Law. Consultant shall comply with all applicable federal, state and local laws, including, without limitation, the prohibition against discrimination on the basis of race, religion, creed, color, national origin, age, disability, sex, marital status or veteran status.

14. Notices. All notices, demands and other communications hereunder ("Notice") shall be in writing and shall be effective for any purpose if hand delivered against receipt or sent by registered or certified mail, return receipt requested, postage prepaid. Notices to Consultant shall be sent to the address set forth above, or such other address designated by a party pursuant to the provisions of this paragraph; notices to Customer shall be sent to the address set forth above.

15. Assignment. Neither Party shall assign any of its rights or delegate any of its obligations under this Agreement without the prior written consent of the other Party, provided that such consent shall not be unreasonably withheld.

16. Survival. The provisions of this Agreement pertaining to confidentiality, public records, work for hire, use of name and indemnification shall survive the expiration or early termination of this Agreement.

17. Governing Law and Claims.

(a) This Agreement shall be governed and construed in accordance with the laws of the State of Florida without regard to any applicable conflicts of law. Venue for any lawsuit by either party against the other party, or otherwise arising out of this Agreement, and for any other legal proceeding, shall be in the courts in Broward County, Florida, or in the event of federal jurisdiction, in the United States District Court for the Southern District of Florida, Fort Lauderdale Division.

(b) [Reserved.]

18. Miscellaneous. This Agreement and the appendices hereto constitute the entire agreement between the parties and supersede any and all prior and collateral negotiations and agreements, both written and oral, between the parties. This Agreement may be amended only in writing signed by the parties hereto. The invalidity or unenforceability of any provision of this Agreement, as determined by a court of competent jurisdiction, shall not affect the validity or enforceability of any other provision of this Agreement, which shall remain in full force and effect. No waiver of any provision of this Agreement shall be binding on any party unless consented to in writing by such party. No waiver of any provision hereof shall constitute a waiver of any other provisions, nor limit or affect such party's rights with respect to any future breach of any of the provisions of this Agreement. If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid, illegal or unenforceable in any respect, such determination shall not impair or affect the validity, legality or enforceability of the remaining provisions hereof, and each provision is hereby declared to be separate, severable and distinct.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the last date set forth below.

CITY OF FORT LAUDERDALE:

John P. "Jack" Seiler, Mayor

ATTEST:

Jonda K. Joseph, City Clerk

Lee R. Feldman, City Manager

Approved as to form:

City Attorney

WITNESSES:

Print Name:

Witnesses: Enstoa, Inc.

Print Name:

By: _____
Print Name:
President

Print Name:

ATTEST:

(Corporate Seal)

Print Name:
Secretary

STATE OF _____
COUNTY OF _____

The foregoing instrument was acknowledged before me this _____ day of _____, 2013, by _____ as president for Enstoa, Inc., a Delaware corporation authorized to transact business in the State of Florida.

(Signature of Notary Public)
State of _____
(Print, Type, or Stamp Commissioned
Name of Notary Public)

(SEAL)

Personally Known _____ OR Produced Identification _____

Type of Identification Produced _____

Appendix A
THE PROJECT

The services to be provided by Consultant are detailed in the Statement of Work entitled Project & Asset Management Software for City of Fort Lauderdale Bid Number 432-11230 submitted May 16th, 2013.