

PA Supplier ID Number: _____

**MAILROOM EQUIPMENT SOFTWARE LICENSING AGREEMENT
BETWEEN THE COMMONWEALTH OF PENNSYLVANIA,
[USING AGENCY],
AND
[CONTRACTOR]**

This Mailroom Equipment Software Licensing Agreement (Agreement) by and between _____ (Licensor) and the Commonwealth of Pennsylvania, [Using Agency] (Commonwealth). This Agreement applies to any software solely dedicated to the operation of the mailroom equipment. The covered software may be either software that is self-contained within the equipment or software that is loaded onto a computer solely dedicated to the operation of the mailroom equipment. Mailroom Equipment as used within this Agreement shall refer to purchases made under the Commonwealth's statewide Mailroom Equipment Contract, Contract No. [_____]

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein and intending to be legally bound herby, the parties hereto covenant and agree as follows:

- 1. Execution of this Agreement:** This Agreement shall be executed by being attached to and referenced to within a Purchased Order issued against the Commonwealth's statewide Mailroom Equipment Contract. When the Purchase Order is fully executed, as referred to in Paragraph V.6 CONTRACT-005.1a (Purchase Orders), this Agreement shall also be deemed to be fully executed. If this Agreement is not attached to and referenced to within the Purchase Order, the Agreement will not be a valid part of the Purchase Order and will not be enforceable.
- 2. Choice of Law/Venue:** This Agreement shall be governed by and construed in accordance with the substantive laws of the Commonwealth of Pennsylvania, without regard to principles of conflict of laws. Venue for any actions will be in the appropriate court in the Commonwealth.
- 3. Indemnification:** The Commonwealth does not have the authority to and shall not indemnify any entity. The Commonwealth agrees to pay for any loss, liability or expense, which arises out of or relates to the Commonwealth's acts or omissions with respect to its obligations hereunder, where a final determination of liability on the part of the Commonwealth is established by a court of law or where settlement has been agreed to by the Commonwealth. This provision shall not be construed to limit the Commonwealth's rights, claims or defenses that arise as a matter of law or pursuant to any other provision of this Agreement. This provision shall not be construed to limit the sovereign immunity of the Commonwealth.

4. Patent, Copyright, Trademark, and Trade Secret Protection:

- (a) The Licensor shall, at its expense, defend, indemnify and hold the Commonwealth harmless from any suit or proceeding which may be brought by a third party against the Commonwealth, its departments, officers or employees for the alleged infringement of any United States patents, copyrights, or trademarks, or for a misappropriation of a United States trade secret arising out of performance of this Agreement (“Claim”), including all Licensed Products provided by the Licensor. For the purposes of this Agreement, “indemnify and hold harmless” shall mean the Licensor’s specific, exclusive, and limited obligation to (a) pay any judgments, fines, and penalties finally awarded by a court of competent jurisdiction, governmental/administrative body or any settlements reached pursuant to Claim and (b) reimburse the Commonwealth for its reasonable administrative costs or expenses, including without limitation reasonable attorney’s fees, it necessarily incurs in handling the Claim. The Commonwealth agrees to give Licensor prompt notice of any such claim of which it learns. Pursuant to the *Commonwealth Attorneys Act* 71 P.S. § 732-101, *et seq.*, the Office of Attorney General (OAG) has the sole authority to represent the Commonwealth in actions brought against the Commonwealth. The OAG may, however, in its sole discretion, delegate to Licensor its right of defense of a Claim and the authority to control any potential settlements thereof. Licensor shall not without the Commonwealth’s consent, which shall not be unreasonably withheld, conditioned, or delayed, enter into any settlement agreement which (a) states or implies that the Commonwealth has engaged in any wrongful or improper activity other than the innocent use of the material which is the subject of the Claim, (b) requires the Commonwealth to perform or cease to perform any act or relinquish any right, other than to cease use of the material which is the subject of the Claim, or (c) requires the Commonwealth to make a payment which Licensor is not obligated by this Agreement to pay on behalf of the Commonwealth. If OAG delegates such rights to the Licensor, the Commonwealth will cooperate with all reasonable requests of Licensor made in the defense and or settlement of a Claim. In all events, the Commonwealth shall have the right to participate in the defense of any such suit or proceeding through counsel of its own choosing at its own expense and without derogation of Licensor’s authority to control the defense and settlement of a Claim. It is expressly agreed by the Licensor that, in the event it requests that the Commonwealth provide support to the Licensor in defending any such Claim, the Licensor shall reimburse the Commonwealth for all necessary expenses (including attorneys' fees, if such are made necessary by the Licensor’s request) incurred by the Commonwealth for such support. If OAG does not delegate to Licensor the authority to control the defense and settlement of a Claim, the Licensor’s obligation under this section ceases. If OAG does not delegate the right of defense to Licensor, upon written request from the OAG, the Licensor will, in its sole reasonable discretion, cooperate with OAG in its defense of the suit.

- (b) The Licensor agrees to exercise reasonable due diligence to prevent claims of infringement on the rights of third parties. The Licensor certifies that, in all respects applicable to this Agreement, it has exercised and will continue to exercise due diligence to ensure that all Licensed Products provided under this Agreement do not infringe on the patents, copyrights, trademarks, trade secrets or other proprietary interests of any kind which may be held by third parties.
- (c) If the right of defense of a Claim and the authority to control any potential settlements thereof is delegated to the Licensor, the Licensor shall pay all damages and costs finally awarded therein against the Commonwealth or agreed to by Licensor in any settlement. If information and assistance are furnished by the Commonwealth at the Licensor's written request, it shall be at the Licensor's expense, but the responsibility for such expense shall be only that within the Licensor's written authorization.
- (d) If, in the Licensor's opinion, the Licensed Products furnished hereunder are likely to or do become subject to a claim of infringement of a United States patent, copyright, or trademark, or for a misappropriation of trade secret, then without diminishing the Licensor's obligation to satisfy any final award, the Licensor may, at its option and expense, substitute functional equivalents for the alleged infringing Licensed Products, or, at the Licensor's option and expense, obtain the rights for the Commonwealth to continue the use of such Licensed Products.
- (e) If any of the Licensed Products provided by the Licensor are in such suit or proceeding held to constitute infringement and the use thereof is enjoined, the Licensor shall, at its own expense and at its option, either procure the right to continue use of such infringing products, replace them with non-infringing items, or modify them so that they are no longer infringing.
- (f) If use of the Licensed Products is enjoined and the Licensor is unable to do any of the preceding set forth in item (e) above, the Licensor agrees to, upon return of the Licensed Products, refund to the Commonwealth the license fee paid for the infringing Licensed Products, pro-rated over a sixty (60) month period from the date of delivery plus any unused prepaid maintenance fees.
- (g) The obligations of the Licensor under this Section continue without time limit and survive the termination of this Agreement.
- (h) Notwithstanding the above, the Licensor shall have no obligation under this Section 4 for:
 - (1) modification of any Licensed Products provided by the Commonwealth or a third party acting under the direction of the Commonwealth;
 - (2) any material provided by the Commonwealth to the Licensor and incorporated into, or used to prepare the product;

- (3) use of the Software after Licensor recommends discontinuation because of possible or actual infringement and has provided one of the remedy's under (e) or (f) above;
 - (4) use of the Licensed Products in other than its specified operating environment;
 - (5) the combination, operation, or use of the Licensed Products with other products, services, or deliverables not provided by the Licensor as a system or the combination, operation, or use of the product, service, or deliverable, with any products, data, or apparatus that the Licensor did not provide;
 - (6) infringement of a non-Licensor product alone;
 - (7) the Commonwealth's use of the Licensed Product beyond the scope contemplated by the Agreement; or
 - (8) the Commonwealth's failure to use corrections or enhancements made available to the Commonwealth by the Licensor at no charge.
- (i) The obligation to indemnify the Commonwealth, under the terms of this Section, shall be the Licensor's sole and exclusive obligation for the infringement or misappropriation of intellectual property.

5. **Virus, Malicious, Mischievous or Destructive Programming:** Licensor warrants that the Licensed Product as delivered by Licensor does not contain any viruses, worms, Trojan Horses, or other malicious or destructive code to allow unauthorized intrusion upon, disabling of, or erasure of the Licensed Products (each a "Virus"). However, the Licensed Products may contain a key limiting use to the scope and quantity of the license(s) granted, and license keys issued by Licensor for temporary use are time-sensitive.

The Commonwealth's exclusive remedy, and Licensor's sole obligation, for any breach of the foregoing warranty shall be for Licensor to (a) replace the Licensed Products with a copy that does not contain Virus, and (b) if the Commonwealth, has suffered an interruption in the availability of its computer system caused by Virus contained in the Licensed Product, reimburse the Commonwealth for the actual reasonable cost to remove the Virus and restore the Commonwealth's most recent back up copy of data provided that:

- (a) the Licensed Products have been installed and used by the Commonwealth in accordance with the Documentation;
- (b) the Licensed Products has not been modified by any party other than Licensor;

- (c) the Commonwealth has installed and tested, in a test environment which is a mirror image of the production environment, all new releases of the Licensed Products and has used a generally accepted antivirus software to screen the Licensed Products prior to installation in its production environment.

Under no circumstances shall Licensor be liable for damages to the Commonwealth for loss of the Commonwealth's data arising from the failure of the Licensed Products to conform to the warranty stated above.

6. Limitation of Liability: The Licensor's liability to the Commonwealth under this Agreement shall be limited the total dollar amount of purchase orders issued for Licensed Products and services covered by this Agreement. This limitation does not apply to damages for:

- (a) bodily injury;
- (b) death;
- (c) intentional injury;
- (d) damage to real property or tangible personal property for which the Licensor is legally liable;
- (e) Licensor's indemnity of the Commonwealth for patent, copyright, trade secret, or trademark protection; or
- (f) damages related to a breach of the security of a system maintained or managed by the Licensor, including the costs for notification and mitigation.

In no event will the Licensor be liable for consequential, indirect, or incidental damages unless otherwise specified in the Agreement. Licensor will not be liable for damages due to lost records or data.

7. Termination:

- (a) Licensor may not terminate this Agreement, or an order from any Commonwealth agency issued pursuant to any of the Exhibits to this Agreement, for non-payment.
- (b) The Commonwealth may terminate this Agreement without cause by giving Licensor thirty (30) calendar days prior written notice (Notice of Termination) whenever the Commonwealth shall determine that such termination is in the best interest of the Commonwealth (Termination for Convenience).

8. Confidentiality: Each party shall treat the other party's confidential information in the same manner as its own confidential information. The parties must identify in writing

what is considered confidential information. "Confidential Information" is information disclosed by one party to the other party under this Agreement that is marked as "confidential." Confidential Information does not include information that the recipient already knew, that becomes public through no fault of the recipient, that was independently developed by the recipient, or that was rightfully given to the recipient by another party. Additionally, neither the Agreement nor any pricing information related to the Agreement, nor purchase orders issued pursuant to the Agreement, will be deemed confidential.

9. **Software portability.** The parties agree that a Commonwealth agency may move the software from the initial dedicated computer to another dedicated computer, as long as the use being made of the software comports with the extent of the licensed use.
10. **Compliance with United States Postal Service Requirements:** The Licensor warrants that any software included under this Agreement is compliant with all applicable rules and regulations of the United States Postal Service. Any components that are found to not be compliant with such rules and regulations shall be immediately corrected by the Licensor at no cost to the Commonwealth.
11. **Commonwealth Audit Responsibilities:** Commonwealth will maintain, and promptly provide to Reseller upon its request, accurate records regarding use of the Licensed Product by or for the Commonwealth. If the Commonwealth becomes aware of any unauthorized use of all or any part of the Licensed Product, the Commonwealth will notify Reseller promptly, providing reasonable details. The limit of the Commonwealth's responsibility for use of the Licensed Product by more individuals than are permitted by the licensing terms applicable to the Licensed Product shall be to purchase additional licenses and Maintenance and Support (if applicable) for such Licensed Products through the Commonwealth's software reseller..

Commonwealth will perform a self-audit upon the request of Licensor, which request may not occur more often than annually, and report any change in user count (hereinafter "True up number"). Commonwealth shall notify Licensor of the True up number no later than 45 calendar days after the request that the Commonwealth perform a self-audit. If the user count has increased, Commonwealth will make an additional purchase of the product through its reseller, which is equivalent to the additional users. This section sets out the sole software license audit right under this Agreement.

12. **List of Licensed Products:** Attached hereto and made a part hereof by this reference is Attachment 1, which sets out a list of products that will be licensed under this Agreement. With the consent of Commonwealth and in accordance with the Commonwealth's statewide contract for Mailroom Equipment, the list of products on Attachment 1 may be updated by Licensor providing Commonwealth with a revised Attachment 1 that adds the new product to the list.

Unless required by the Commonwealth's statewide Mailroom Equipment contract, no amendment will be required to add a new Licensed Product to the list.

13. Right to Know Law:

- (a) The Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101-3104, (“RTKL”) applies to this Agreement. For the purpose of these provisions, the term “the Commonwealth” shall refer to the contracting Commonwealth agency.
- (b) If the Commonwealth needs the Licensor’s assistance in any matter arising out of the RTKL related to this Agreement, it shall notify the Licensor using the legal contact information provided in this Agreement. The Licensor, at any time, may designate a different contact for such purpose upon reasonable prior written notice to the Commonwealth.
- (c) Upon written notification from the Commonwealth that it requires the Licensor’s assistance in responding to a request under the RTKL for information related to this Agreement that may be in the Licensor’s possession, constituting, or alleged to constitute, a public record in accordance with the RTKL (“Requested Information”), the Licensor shall:
 - (1) Provide the Commonwealth, within ten (10) calendar days after receipt of written notification, access to, and copies of, any document or information in the Licensor’s possession arising out of this Agreement that the Commonwealth reasonably believes is Requested Information and may be a public record under the RTKL; and
 - (2) Provide such other assistance as the Commonwealth may reasonably request, in order to comply with the RTKL with respect to this Agreement.
- (d) If the Licensor considers the Requested Information to include a request for a Trade Secret or Confidential Proprietary Information, as those terms are defined by the RTKL, or other information that the Licensor considers exempt from production under the RTKL, the Licensor must notify the Commonwealth and provide, within seven (7) calendar days of receiving the written notification, a written statement signed by a representative of the Licensor explaining why the requested material is exempt from public disclosure under the RTKL.
- (e) The Commonwealth will rely upon the written statement from the Licensor in denying a RTKL request for the Requested Information unless the Commonwealth determines that the Requested Information is clearly not protected from disclosure under the RTKL. Should the Commonwealth determine that the Requested Information is clearly not exempt from disclosure, the Licensor shall provide the Requested Information within five (5) business days of receipt of written notification of the Commonwealth’s determination.
- (f) If the Licensor fails to provide the Requested Information within the time period required by these provisions, the Licensor shall indemnify and hold the

Commonwealth harmless for any damages, penalties, costs, detriment or harm that the Commonwealth may incur as a result of the Licensor's failure, including any statutory damages assessed against the Commonwealth.

- (g) The Commonwealth will reimburse the Licensor for any costs associated with complying with these provisions only to the extent allowed under the fee schedule established by the Office of Open Records or as otherwise provided by the RTKL if the fee schedule is inapplicable.
- (h) The Licensor may file a legal challenge to any Commonwealth decision to release a record to the public with the Office of Open Records, or in the Pennsylvania Courts, however, the Licensor shall indemnify the Commonwealth for any legal expenses incurred by the Commonwealth as a result of such a challenge and shall hold the Commonwealth harmless for any damages, penalties, costs, detriment or harm that the Commonwealth may incur as a result of the Licensor's failure, including any statutory damages assessed against the Commonwealth, regardless of the outcome of such legal challenge. As between the parties, the Licensor agrees to waive all rights or remedies that may be available to it as a result of the Commonwealth's disclosure of Requested Information pursuant to the RTKL.
- (i) The Licensor's duties relating to the RTKL are continuing duties that survive the expiration of this Agreement and shall continue as long as the Licensor has Requested Information in its possession.

14. Attorneys' Fees: The Commonwealth will not pay attorneys' fees incurred by or paid by the Licensor.

15. Controversies.

- (a) In the event of a controversy or claim arising from the Agreement or Purchase Order, the Licensor must, within six months after the cause of action accrues, file a written claim with the contracting officer for a determination. The claim shall state all grounds upon which the Licensor asserts a controversy exists. If the Licensor fails to file a claim or files an untimely claim, the Licensor is deemed to have waived its right to assert a claim in any forum. At the time the claim is filed, or within sixty (60) days thereafter, either party may request mediation through the Commonwealth Office of General Counsel Dispute Resolution Program.
- (b) If the Licensor or the contracting officer requests mediation and the other party agrees, the contracting officer shall promptly make arrangements for mediation. Mediation shall be scheduled so as to not delay the issuance of the final determination beyond the required 120 days after receipt of the claim if mediation is unsuccessful. If mediation is not agreed to or if resolution is not reached through mediation, the contracting officer shall review timely-filed claims and issue a final determination, in writing, regarding the claim. The final determination shall be issued within 120 days of the receipt of the claim, unless extended by consent of the contracting officer and the Licensor. The contracting

officer shall send his/her written determination to the Licensor. If the contracting officer fails to issue a final determination within the 120 days (unless extended by consent of the parties), the claim shall be deemed denied. The contracting officer's determination shall be the final order of the purchasing agency.

- (c) Within fifteen (15) days of the mailing date of the determination denying a claim or within 135 days of filing a claim if, no extension is agreed to by the parties, whichever occurs first, the Licensor may file a statement of claim with the Commonwealth Board of Claims. Pending a final judicial resolution of a controversy or claim, the Licensor shall proceed diligently with the performance of the Agreement in a manner consistent with the determination of the contracting officer and the Commonwealth shall compensate the Licensor pursuant to the terms of the Agreement or Purchase Order.

16. Signatures: The fully executed Agreement shall not contain ink signatures by the Commonwealth. The Licensor understands and agrees that the receipt of an electronically-printed Agreement with the printed name of the Commonwealth purchasing agent constitutes a valid, binding contract with the Commonwealth. The printed name of the purchasing agent represents the signature of that individual who is authorized to bind the Commonwealth to the obligations contained in the Agreement. The printed name also indicates that all approvals required by Commonwealth contracting procedures have been obtained

IN WITNESS WHEREOF, the Parties to this Agreement have executed it, through their respective duly authorized representatives.

Licensor:

Licensee:

Signature Date

Signature Date

Printed Name

Printed Name

Title

Title

ATTACHMENT 1

LIST OF LICENSED PRODUCTS

With the consent of the Commonwealth additional products may be added to this attachment by Licensor providing Commonwealth with a new copy of this Attachment 1.

Licensed Product:

The Licensed Product includes (list all titles covered by this agreement)