765

SUBMITTAL TO THE BOARD OF SUPERVISORS
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA

FROM: OASIS

SUBMITTAL DATE:
May 24, 2011

SUBJECT: APPROVE THE SOLE SOURCE PURCHASE AGREEMENT WITH DLT SOLUTIONS FOR SOFTWARE LICENSING

RECOMMENDED MOTION: That the Board of Supervisors:

1) Approve and direct the Auditor-Controller to adjust OASIS budget as set out in Schedule A;
2) Approve the Sole Source purchase with DLT Solutions in the amount of $77,746 for Quest Stat licensing and software maintenance services;
3) Approve and authorize the Chair to execute the software licensing agreement with DLT Solutions;
4) Authorize the Purchasing Agent to approve annual renewals for an additional four (4) years renewable in one (1) year increments; annual renewals not to exceed 20% ($15,550) of the purchase price.
5) Direct the Clerk of the Board to return four (4) original signed agreements to OASIS.

BACKGROUND: The County's Enterprise Resource System, PeopleSoft, uses Quest Stat for its primary change control. All system changes are tracked and made through this application.

Michael Dearman, OASIS Director / Asst. CIO

Current F.Y. Total Cost:	$ 77,746	**In Current Year Budget:**	No
Current F.Y. Net County Cost:	$	**Budget Adjustment:**	Yes
Annual Net County Cost:	$	**For Fiscal Year:**	FY 10/11

SOURCE OF FUNDS: OASIS Financials and HRMS unrestricted net assets.

Positions To Be Deleted Per A-30 ☐

Requires 4/5 Vote ☒

C.E.O. RECOMMENDATION:

APPROVE

BY: Serena Chow
Serena Chow

County Executive Office Signature

FORM APPROVED COUNTY COUNSEL 5/17/11
BY: NEAL R. KIPNIS DATE

Departmental Concurrence

PURCHASING & FLEET SERVICES: Robert Howdyshell, Director

FISCAL PROCEDURES APPROVED
PAUL ANGULO, CPA, AUDITOR-CONTROLLER
BY SAMUEL WONG 5/17/11

Dep't Recomm.: ☐ Consent ☑ Policy

Per Exec. Ofc.: ☐ Consent ☑ Policy

Prev. Agn. Ref.: 7/17/08, Agenda Number: 3.98	**District:**	**Agenda Number:**

3.35

ATTACHMENTS FILED
WITH THE CLERK OF THE BOARD

Background continued:

Quest Stat has modified its licensing and OASIS must change the license type to an enterprise license agreement to accommodate this change. OASIS will terminate its current licensing model (specific number of user licenses) with Quest and purchase the Enterprise license.

PRICE REASONABLENESS

Going forward, the Enterprise license allows the department to add users and not acquire additional licenses. With the merger of OASIS and RCIT, the department will not have to purchase additional licenses; this will be covered under the enterprise license agreement.

REVIEW/APPROVAL: Purchasing and County Counsel concurs with this request.

Schedule A

Increase Appropriations:

45420-1109200000-546280　　　　Capitalized Software　　　　$51,312

45420-1109300000-546280　　　　Capitalized Software　　　　$26,434

Use of Net Assets:

45420-1109200000-380100　　　　Unrestricted Net Assets　　　　$51,312

45420-1109300000-380100　　　　Unrestricted Net Assets　　　　$26,434

May 9, 2011

From: Michael Dearman   Department/Agency: OASIS

To: Board of Supervisors/Purchasing Agent

Via: Purchasing Agent

Subject: Sole Source Procurement; Request for Quest Stat Licensing

The below information is provided in support of my Department requesting approval for a sole source. Outside of a duly declared emergency, the time to develop a statement of work or specifications is not in itself justification for sole source.

1. **Supply/Service being requested:** Additional license and annual software maintenance for Quest Stat.

2. **Supplier being requested:** DLT Solutions.

3. **Alternative suppliers that can or might be able to provide supply/service:** There are other County authorized resellers; however, other resellers cannot receive price quotes direct from Quest. DLT Solutions provides all procurement for Quest. Additionally, other resellers must go through DLT Solutions to get their pricing.

4. **Extent of market search conducted:** None required. DLT Solutions handles all of the procurement for Quest software with Quest as the technical support provider.

5. **Unique features of the supply/service being requested from this supplier, which no alternative supplier can provide:** Stat is a proprietary application. It cannot be substituted.

6. **Reasons why my department requires these unique features and what benefit will accrue to the county:** The County's Enterprise Resource System, PeopleSoft, uses Quest Stat for its primary change control. All changes to the system are tracked and made through this application.

7. **Price Reasonableness:** Using another vendor (other than DLT Solutions) would likely increase the price.

8. **Does moving forward on this product or service further obligate the county to future similar contractual arrangements or any ongoing costs affiliated with this sole source? (Maintenance, support, or upgrades, if so, please explain).** No.

9. **Period of Performance:** First year maintenance and upgrades are included in purchase of license. Maintenance is renewed annually, renewed upon date of purchase. Annual renewals for an additional five years renewable in one year increments; annual renewals not to exceed 20% of the original purchase price.

Form # 116-333 rev 3/28/11

(signature)

Department Head Signature   **Date**

Purchasing Department Comments:

(Approve)   Approve with Condition/s   Disapprove

(signature)

Purchasing Agent   **Date**

Agreement Between County of Riverside
and DLT Solutions

1. Structure of Agreement.

This Software License Agreement (the "Agreement") and the attached Quote (Quote #4086903) is made between DLT Solutions, a Virginia corporation with its principal place of business located at 13861 Sunrise Valley Drive, Suite 400 Herndon, VA 20171, USA (hereafter referred to as "DLT Solutions") and the County of Riverside (hereafter referred to as "Licensee").
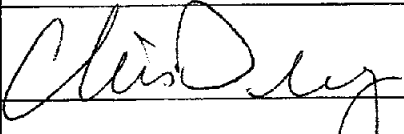
This agreement shall apply only to the COUNTY's OASIS department; and shall not apply to any other COUNTY departments or other entities involved with the Agreement. All terms and conditions applicable to those other COUNTY departments or entities shall remain in full force and effect.

DLT Solutions does not currently have access to Licensee's systems and/or data. Also, Licensee will not request or allow DLT Solutions to access Licensee's systems and/or data.

This Agreement shall be governed by and construed in accordance with the laws of the State of California. Any action seeking enforcement of the Agreement or any provision hereof shall be brought exclusively in the state or federal courts located in the County of Riverside, State of California, United States of America. Each party hereby agrees to submit to the jurisdiction of such courts.

2. Signatures.

Intending to be legally bound and having reviewed this Agreement in its entirety, DLT Solutions, and Licensee have caused this Agreement to be executed by their authorized representatives effective as of the date of the later signature below.

	Licensee	DLT Solutions
EFFECTIVE DATE:		5/16/11
AUTHORIZED SIGNATURE:		*[signature]*
PRINTED NAME:	Bob Buster	Chris Dewey
TITLE:	Chairman, Board of Supervisors	VP Sales
COMPANY NAME, ADDRESS, TELEPHONE:	County of Riverside 7898 Mission Grove Parkway South Suite 200, Riverside, CA 92508-5054 (951) 358-6328	DLT Solutions 13861 Sunrise Valley Drive, Suite 400, Herndon, VA 20171 (703) 773-9265

3. Attachments

3.1 DLT Solutions Quotation #4086903

3.2 Terms and Conditions of the Manufacturer's Standard Commercial License and Subscription Agreement

FORM APPROVED COUNTY COUNSEL

BY: *[signature]* 5/17/11

NEAL R. KIPNIS   DATE

DLTSOLUTIONS

Price Quotation

Quote: 4086903
Reference: 673929
Date: 05/10/2011
Expires: 05/26/2011

To: Mary Cain
County of Riverside
,

Phone: (951) 358-6328
Fax:
Email: MCain@co.riverside.ca.us

From: Joe Simpson
DLT Solutions
13861 Sunrise Valley Drive
Suite 400
Herndon, VA 20171

Phone: (703) 773-9265
Fax: (866) 708-7064
Email: joe.simpson@dlt.com

#	DLT Part No.	Contract	Qty	Unit Price	Ext. Price
1	9923-15779	OM	1	$69,350.00	$69,350.00
	STAT UNLIMITED TECHNICAL AND FUNCTIONAL USERS PROMO LICENSE/MAINT Note: 1st Year Maintenance and Upgrades Included in purchase of license. Maintenance is renewed anually depending on date of purchase.				
2	9923-16636	OM		$8,396.12	$8,396.12
	STAT PRODUCTION SERVER MAINTENANCE RENEWAL QQ-1-69AJJS Inv:1000002855 PO:3410343 PoP: 6/30/2011 through 6/30/2012				

Total: $77,746.12

Contract Number: OPEN MARKET
DUNS #: 78-646-8199
Federal ID #: 54-1599882
CAGE Code: 0S0H9
FOB: Destination
Terms: Net 30 (On Approved Credit)
DLT accepts VISA/MC/AMEX
DLT's standard Terms & Conditions apply

PLEASE REMIT PAYMENT TO:
ACH: DLT Solutions
SunTrust Bank
ABA # 061000104
Acct # 1000032705898

-OR-

Mail: DLT Solutions
PO Box 102549
Atlanta, GA 30368

Customer orders subject to applicable sales tax in: CA, CO, CT, DC, FL, GA, HI, IL, IN, KS, KY, LA, MA, MD, MI, MO, MS, NC, NM, NJ, NV, NY, OH, OK, PA, RI, SC, TN, TX, VA, WA, WI

The terms and conditions of the Manufacturer's standard commercial license and subscription agreement are made a part of this quotation and shall govern purchaser's use of any Manufacturer product. Contact the DLT Sales Rep if further information is required.

DLT SOLUTIONS

Price Quotation

Quote: 4086903
Reference: 673929
Date: 05/10/2011
Expires: 05/26/2011

Documentation to be submitted to validate Invoice for payment:
a. Authorized Services shall be invoiced with a corresponding time report for the period of performance identifying names, days, and hours worked.
b. Authorized reimbursable expenses shall be invoiced with a detailed expense report, documented by copies of supporting receipts.
c. Authorized Education or Training shall be invoiced with a Report identifying date and name of class completed, and where applicable the name of attendees.

Transaction Product Agreement

PLEASE READ THIS AGREEMENT CAREFULLY BEFORE USING THIS PRODUCT. BY DOWNLOADING, INSTALLING OR USING THIS PRODUCT, YOU INDICATE ACCEPTANCE OF AND AGREE TO THE TERMS AND CONDITIONS OF THIS AGREEMENT. FOR ORDERS PLACED OUTSIDE OF THE UNITED STATES, PLEASE SEE WWW.QUEST.COM/LICENSEAGREEMENTS FOR THE APPLICABLE LOCALIZED VERSION OF YOUR AGREEMENT. IF YOU DO NOT AGREE TO THE TERMS AND CONDITIONS OF THIS AGREEMENT OR THE LOCALIZED AGREEMENT, DO NOT DOWNLOAD, INSTALL OR USE THIS PRODUCT. NEITHER THIS AGREEMENT NOR THE LOCALIZED AGREEMENT SHALL SUPERSEDE ANY OTHER SIGNED AGREEMENT BETWEEN YOU AND QUEST THAT EXPRESSLY GOVERNS THE ORDER FOR THIS PRODUCT.

This Transaction Product Agreement (the "Agreement") is made between Quest Software, Inc., with its principal place of business located at 5 Polaris Way, Aliso Viejo, California, 92656 ("Quest") and you, the customer ("Customer").

1.   **Definitions.** Capitalized terms not defined in context shall have the meanings assigned to them below:

(a)   "Affiliate" means any legal entity controlling, controlled by, or under common control with a party to this Agreement, for so long as such control relationship exists.

(b)   "Documentation" means the user manuals and documentation that Quest delivers with the Software, and all copies of the foregoing.

(c)   "Hardware" means the hardware products purchased by Customer under this Agreement.

(d)   "License Type" means the model by which the Software is licensed (e.g., by server, by mailbox, by managed user) as may be indicated in the applicable Order.

(e)   "Partner" means a reseller or distributor that is under contract with Quest or another Partner and is authorized via the contract to resell the Products and/or Maintenance Services.

(f)   "Product Guide" means the document located at http://www.quest.com/productguide that contains the Product Terms.

(g)   "Product Terms" means the usage rights and other terms associated with each License Type or individual Product. The Product Terms for Software identified in an Order that is issued to Quest shall be as stated in the Order, or, if no Product Terms are stated in the Order, then the Product Terms for such Software shall be as stated in the Product Guide as of the date of the Order. The Product Terms for Software ordered from a Partner shall be as stated in the Product Guide as of the date of the Order.

(h)   "Products" means the Software licenses and/or Hardware purchased by Customer under this Agreement.

(i)   "Order" means the document by which Customer orders the Product(s) or, if Customer orders the Product(s) from Quest's eStore (https://estore.quest.com), the process by which Customer orders the Product(s). Orders executed by Customer and Quest shall be governed solely by the terms of this Agreement and the applicable Order. Orders placed with Quest by Customer purchase order only and all Orders placed through a Partner shall be governed solely by the terms of this Agreement. Any conflicting or additional terms in or accompanying an Order will not be binding on Quest unless Quest accepts such terms in writing. Each Order shall be the Customer's irrevocable commitment to purchase and pay for the Products and/or Maintenance Services stated in the Order.

(j)   "Software" means the object code version of the software that is delivered pursuant to an Order as well as any corrections, enhancements, and upgrades to such software that Quest may provide to Customer pursuant to this Agreement, and all copies of the foregoing.

2.   **Software License.**

(a)   **Internal Use License.** Subject to the terms of this Agreement, Quest grants to Customer, and Customer accepts from Quest, a perpetual (unless otherwise set forth in an Order), non-exclusive, non-transferable (except as otherwise set forth herein) and non-sublicensable license to (i) install, execute, access, run, or otherwise use the quantities of each item of Software identified in the applicable Order within the parameters of the Product Terms associated with the applicable Product and License Type, (ii) make a reasonable number of additional copies of the Software to be used solely for non-productive archival or passive disaster recovery purposes, so long as neither the original and a copy nor two copies of the same Software are used at the same time, and (iii) make and use copies of the Documentation as reasonably necessary to support Customer's authorized users in their use of the Software (collectively, "License"). Except for MSP Licenses (as defined below), each License shall be used by Customer solely to manage its own internal business operations as well as the business operations of its Affiliates.

(b)   **MSP License.** If an MSP License is specifically identified in an Order, Customer shall be granted a License to use the Software identified in the Order and the associated Documentation as a managed service provider ("MSP") to provide software and systems management services, including, without limitation, application, operating system, and database implementation, performance tuning, and maintenance services ("Management Services"), for the benefit of a single named client ("Client"), pursuant to the terms of this Agreement and the MSP Use Terms in the Product Guide.

(c)   **Evaluation License.** If an Order indicates that Software is to be used for evaluation purposes or if the Software is otherwise obtained from Quest for evaluation purposes, Customer shall be granted a non-production License to use such Software and the associated Documentation solely for Customer's own internal evaluation purposes for an evaluation period of up to thirty (30) days from the date of delivery of the

Software, plus any extensions granted by Quest in writing (the "Evaluation Period"). There is no fee for Customer's use of the Software for non-production evaluation purposes during the Evaluation Period, however, Customer is responsible for any applicable shipping charges or taxes which may be incurred, and any fees which may be associated with usage beyond the scope permitted herein. Customer's opportunity for a free evaluation of the Software is limited to one Evaluation Period per release of the Software. Notwithstanding anything otherwise set forth in this Agreement, Customer understands and agrees that evaluation Software is provided "AS IS" and that Quest does not provide a Warranty or Maintenance Services for evaluation Licenses.

(d) **Third Party Use.** If Customer contracts with a third party who performs Software implementation, configuration, consulting or outsourcing services ("Service Provider"), the Service Provider may use the Software and Documentation Licensed by Customer hereunder solely for purposes of providing such services to Customer, provided that (i) Customer ensures that the Service Provider uses the Software and Documentation in accordance with the terms of this Agreement, (ii) the use of the Software and Documentation by the Service Provider will not violate the terms of the export restrictions set forth herein, and (iii) the Service Provider is not a Quest competitor. Customer shall be jointly and severally liable to Quest for the acts and omissions of its Service Providers in connection with their permitted use of the Software and Documentation.

(e) **Freeware.** If a freeware version of Quest software ("Freeware") is downloaded by Customer from a Quest website, the terms of such use shall be governed by the applicable Freeware definition provided at: www.quest.com/productguide.

3. **Restrictions.** Except to the extent expressly permitted by applicable law, and to the extent that Quest is not permitted by such applicable law to exclude or limit the following rights, Customer may not reverse engineer, decompile, disassemble, or attempt to discover or modify in any way the underlying source code of the Products, Documentation or any part thereof. In addition, Customer may not (i) modify, translate, localize, adapt, rent, lease, loan, create or prepare derivative works of, or create a patent based on the Products, Documentation or any part thereof, or (ii) resell the Products or Documentation or use the Products or Documentation in any commercial time share arrangement, in connection with the operation of any nuclear facilities, or for purposes which are competitive to Quest. Each permitted copy of the Software and Documentation made by Customer hereunder must contain all titles, trademarks, copyrights and restricted rights notices as in the original. Customer understands and agrees that the Products may work in conjunction with third party products and Customer agrees to be responsible for ensuring that it is properly licensed to use such third party products. Notwithstanding anything otherwise set forth in this Agreement, the terms and restrictions set forth herein shall not prevent or restrict Customer from exercising additional or different rights to any open source software that may be contained in or provided with the Products in accordance with the applicable open source licenses.

4. **Reservation of Rights and Ownership.** Quest reserves any and all rights, implied or otherwise, which are not expressly granted to Customer in this Agreement. Customer understands and agrees that (i) the Products are protected by copyright and other intellectual property laws and treaties, (ii) Quest and/or its suppliers own the title, copyright, and other intellectual property rights in the Products, (iii) the Software is licensed, and not sold, and (iv) this Agreement does not grant Customer any rights to Quest's trademarks or service marks.

5. **Hardware.** In the event Customer acquires Hardware under this Agreement, title to such Hardware shall pass to Customer upon shipment (unless such Hardware is rented, leased or loaned to Customer).

6. **Payment.** Customer agrees to pay to Quest (or, if applicable, the Partner) the fees specified in each Order, including any applicable shipping fees. Customer will be invoiced promptly following delivery of the Products or prior to the commencement of any Renewal Maintenance Period and Customer shall make all payments due to Quest in full within thirty (30) days from the date of each invoice or such other period (if any) stated in an Order signed by Quest. Any amounts payable to Quest by Customer that remain unpaid after the due date shall be subject to a late charge of 1.5% of the invoice amount per month from the due date until such amount is paid, or the maximum rate permitted by law if less.

7. **Taxes.** The fees stated in an Order may not include taxes. If Quest is required to pay sales, use, property, value-added or other taxes based on the Products or Maintenance Services provided under this Agreement or on Customer's use of Products or Maintenance Services, then such taxes shall be billed to and paid by Customer. This Section does not apply to taxes based on Quest's income.

8. **Termination.** This Agreement and/or the License(s) granted hereunder may be terminated (i) by mutual agreement of Quest and Customer, (ii) by Quest, if Customer or a Service Provider commits a material breach of this Agreement and fails to cure such breach to Quest's reasonable satisfaction within thirty (30) days following receipt of Quest's notice thereof, or (iii) by Customer for any reason upon thirty (30) days written notice to Quest. Upon termination of this Agreement or expiration or termination of a License for any reason, all rights granted to Customer for the applicable License(s) shall immediately cease and Customer shall immediately: (i) cease using the applicable Software and Documentation, (ii) return the applicable Software to Quest together with all Documentation and other materials associated with the Software and all copies of any of the foregoing, or destroy such items, (iii) cease using the Maintenance Services associated with the applicable License(s), (iv) pay Quest or the applicable Partner all amounts due and payable up to the date of termination, and (v) give Quest a written certification that Customer has complied with all of the foregoing obligations. Termination of this Agreement or a License shall be without prejudice to any other remedies that the terminating party may have under law, subject to the limitations and exclusions set forth in this Agreement. Any provision of this Agreement that requires or contemplates execution after termination of this Agreement or expiration of a License is enforceable against the other party and their respective successors and assignees notwithstanding termination or expiration, including, without limitation, the *"Payment," "Taxes," "Termination," "Warranty Disclaimer," "Infringement," "Limitation of Liability," "Nondisclosure," "Usage Verification,"* and *"General"* Sections of this Agreement.

9. Export. Customer acknowledges and agrees that the Products are subject to the export control laws, rules, regulations, restrictions and national security controls of the United States and other applicable foreign agencies (the "Export Controls"), and agrees not to export or re-export, or allow the export or re-export of the Products or any copy, portion or direct product of the foregoing in violation of the Export Controls. Customer hereby represents that (i) Customer is not an entity or person to which shipment of Products is prohibited by the Export Controls; and (ii) Customer will not export, re-export or otherwise transfer the Products to (a) any country subject to a United States trade embargo, (b) a national or resident of any country subject to a United States trade embargo, (c) any person or entity to which shipment of Products is prohibited by the Export Controls, or (d) anyone who is engaged in activities related to the design, development, production, or use of nuclear materials, nuclear facilities, nuclear weapons, missiles or chemical or biological weapons.

10. Maintenance. During any Maintenance Period and for the applicable fees, Quest shall make available to Customer the Maintenance Services for the Software as defined in this Section. The first Maintenance Period begins on the date of delivery of the Software following an Order and ends twelve (12) months thereafter unless otherwise set forth in the applicable Order (the "Initial Maintenance Period"). Following the Initial Maintenance Period, Maintenance Services shall automatically renew for additional terms of twelve (12) months (each, a "Renewal Maintenance Period") unless the renewal has been cancelled by either party giving written notice to the other at least sixty (60) days prior to the first day of the applicable Renewal Maintenance Period. Cancellation of Maintenance Services will not terminate Customer's rights to continue to use the Software. Maintenance fees shall be due in advance of a Renewal Maintenance Period and shall be subject to the payment requirements set forth in this Agreement. The procedure for reinstating Maintenance Services after it has lapsed is posted at http://support.quest.com/Maintenance_Service.asp. Except as otherwise stated in the Product Guide, "Maintenance Services" shall be available via the Internet, e-mail, or telephone and shall mean the following:

(a) Quest shall make available to Customer new versions and releases of the Software, including Software corrections, enhancements and upgrades, if and when Quest makes them generally available without charge as part of Maintenance Services.

(b) Quest shall respond to unlimited communications from Customer that report Software failures not previously reported to Quest by Customer. Nothing in the foregoing shall operate to limit or restrict follow up communication by Customer regarding Software failures.

(c) Quest shall respond to requests from Customer's technical coordinators for assistance with the operational/technical aspects of the Software; provided that Quest shall have the right to limit such responses if Quest determines, in its sole reasonable discretion, that on-site consulting services would be more appropriate to address the scope and nature of the requests. Any such onsite consultation would be pursuant to a services agreement as agreed upon by the parties.

(d) Customer shall have access to Quest's Support Web site at http://support.quest.com ("SupportLink").

(e) Maintenance Services are available during standard support hours ("Business Hours") as indicated on SupportLink. In addition, Customer may purchase Business Critical Support (i.e. 24x7 Severity Level 1 support) for certain Software. The list of Software for which Business Critical Support is available and/or required is set forth on SupportLink.

(f) During Business Hours, Quest will respond within one (1) hour to a call from Customer which reports a critical Software condition (a "Severity Level 1 Problem"). Customer must use commercially reasonable efforts to provide Quest with the necessary remote access to facilitate the identification and resolution of a Severity Level 1 Problem. Quest's ability to identify and resolve a Severity Level 1 Problem may be delayed without such remote access.

(g) The Maintenance Services for those Software products that Quest has obtained through an acquisition or merger may, for a period of time following the effective date of the acquisition or merger, be governed by terms other than those in this Section 10. The applicable different terms, if any, shall be stated on SupportLink.

11. Warranties.

(a) **Software Warranty.** Quest warrants that, for a period of thirty (30) days following the initial delivery of Software pursuant to an Order (the "Warranty Period"), (i) the media provided by Quest, if any, on which the Software is recorded will be free from material defects in materials and workmanship under normal use, (ii) the operation of the Software, as provided by Quest, will substantially conform to the Documentation applicable to such Software, and (iii) the Software as delivered by Quest does not contain any viruses, worms, Trojan Horses, or other malicious or destructive code designed by Quest to allow unauthorized intrusion upon, disabling of, or erasure of the Software (however, the Software may contain a key limiting use of the Software to within the scope of License granted, and license keys issued by Quest for temporary use are time-sensitive) (the "Warranties"). Customer must give written notice to Quest of any breach of the Warranties no later than five days following the expiration of the Warranty Period.

Customer's exclusive remedies, and Quest's sole obligations, for any such breach of these Warranties shall be as follows: (a) for the warranty in subsection (i), Quest shall, at its expense, replace any defective media; (b) for the warranty in subsection (ii), Quest shall correct or provide a workaround for reproducible errors in the Software that cause a breach of the warranty within a reasonable time considering the severity of the error and its effect on Customer, or, at Quest's option, refund the license fees paid for the nonconforming Software upon return of such Software to Quest and termination of the related License(s) hereunder; and (c) for the warranty in subsection (iii), Quest shall provide a copy of the Software that is in conformance with such warranty.

The foregoing Warranties shall not apply to any non-conformance (i) that Quest cannot recreate after exercising commercially reasonable efforts to attempt to do so; (ii) caused by misuse of the Software or by using the Software in a manner that is inconsistent with this Agreement or the Documentation; or (iii) arising from the modification of the Software by anyone other than Quest.

(b) **Hardware Warranty.** Hardware shall be warranted in accordance with the warranty document delivered with the Hardware and/or included on the hardware manufacturers' website. In the event Customer acquires Hardware that is delivered with a third party warranty ("Third Party Warranty"), Customer will rely solely on the applicable third party for all Third Party Warranty obligations.

(c) **Warranty Disclaimer.** THE EXPRESS WARRANTIES AND REMEDIES SET FORTH IN THIS SECTION ARE THE ONLY WARRANTIES AND REMEDIES PROVIDED BY QUEST HEREUNDER. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, ALL OTHER WARRANTIES OR REMEDIES ARE EXCLUDED, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE, NON-INFRINGEMENT, SATISFACTORY QUALITY, AND ANY WARRANTIES ARISING FROM USAGE OF TRADE OR COURSE OF DEALING OR PERFORMANCE. QUEST DOES NOT WARRANT UNINTERRUPTED OR ERROR-FREE OPERATION OF THE PRODUCTS.

12. Infringement. Quest will at its own expense defend or settle any claim, suit, action, or proceeding brought against Customer by a third party to the extent it is based on an allegation that the Software directly infringes any patent, copyright, trademark, or other proprietary right enforceable in the country in which the Software is delivered to Customer, or misappropriates a trade secret in such country (a "Claim"). Additionally, Quest shall pay any judgments finally awarded against Customer under a Claim or any amounts assessed against Customer in any settlements of a Claim, and reasonable administrative costs or expenses, including without limitation reasonable attorneys' fees, necessarily incurred by Customer in responding to the Claim. Quest's obligations under this Section are conditioned upon Customer (i) giving prompt written notice of the Claim to Quest; (ii) permitting Quest to retain sole control of the investigation, defense or settlement of the Claim, and (iii) providing Quest with such cooperation and assistance as Quest may reasonably request from time to time in connection with the investigation, defense or settlement of the Claim. Quest shall have no obligation hereunder to defend Customer against any Claim (a) resulting from use of the Software other than as authorized in this Agreement, (b) resulting from a modification of the Software other than by Quest, or (c) based on Customer's use of the Software after Quest recommends discontinuation because of possible or actual infringement, (d) based on Customer's use of a superseded or altered release of Software if the infringement would have been avoided by use of a current or unaltered release of the Software made available to Customer, or (e) to the extent the Claim arises from or is based on the use of the Software with other products, services, or data not supplied by Quest if the infringement would not have occurred but for such use. If Customer's use of the Software is enjoined as a result of a Claim, Quest shall, at its expense and option either (i) obtain for Customer the right to continue using the Software, (ii) replace the Software with a functionally equivalent non-infringing product, (iii) modify the Software so that it is non-infringing, or (iv) accept the return of the infringing Software and refund the license fee paid for the infringing Software, pro-rated over a sixty (60) month period from the date of delivery of the Software following an Order . This Section states the entire liability of Quest, and Customer's sole and exclusive remedy, with respect to a Claim.

13. Limitation of Liability. EXCEPT FOR (A) ANY BREACH OF THE "*RESTRICTIONS*" OR "*NONDISCLOSURE*" SECTIONS OF THIS AGREEMENT, (B) AMOUNTS CONTAINED IN JUDGMENTS OR SETTLEMENTS WHICH QUEST IS LIABLE TO PAY ON BEHALF OF CUSTOMER UNDER THE "*INFRINGEMENT*" SECTION OF THIS AGREEMENT, OR (C) ANY LIABILITY TO THE EXTENT LIABILITY MAY NOT BE EXCLUDED OR LIMITED AS A MATTER OF LAW, IN NO EVENT SHALL QUEST, ITS AFFILIATES, OR SUPPLIERS, OR CUSTOMER BE LIABLE FOR ANY LOSS OF REVENUE, LOSS OF ACTUAL OR ANTICIPATED PROFITS, LOSS OF BUSINESS, LOSS OF CONTRACTS, LOSS OF GOODWILL OR REPUTATION, LOSS OF ANTICIPATED SAVINGS, LOSS OF, DAMAGE TO OR CORRUPTION OF DATA, OR FOR ANY INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL LOSS OR DAMAGE OF ANY KIND, IN EACH CASE HOWSOEVER ARISING, WHETHER SUCH LOSS OR DAMAGE WAS FORESEEABLE OR IN THE CONTEMPLATION OF THE PARTIES AND WHETHER ARISING IN OR FOR BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), BREACH OF STATUTORY DUTY, OR OTHERWISE.

EXCEPT FOR (A) ANY BREACH OF CUSTOMER'S PAYMENT OBLIGATIONS; (B) ANY BREACH OF THE "*SOFTWARE LICENSE,*" *RESTRICTIONS*," "*EXPORT*" OR "*NONDISCLOSURE*" SECTIONS OF THIS AGREEMENT, OR ANY OTHER VIOLATION OF THE OTHER PARTY'S INTELLECTUAL PROPERTY RIGHTS; (C) QUEST'S EXPRESS OBLIGATIONS UNDER THE "*INFRINGEMENT*" SECTION OF THIS AGREEMENT; OR (D) ANY LIABILITY TO THE EXTENT LIABILITY MAY NOT BE EXCLUDED OR LIMITED AS A MATTER OF LAW, THE MAXIMUM AGGREGATE AND CUMULATIVE LIABILITY OF QUEST, ITS AFFILIATES AND SUPPLIERS, AND CUSTOMER UNDER THIS AGREEMENT, WHETHER ARISING IN OR FOR BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), BREACH OF STATUTORY DUTY, OR OTHERWISE, SHALL NOT EXCEED THE FEES PAID AND/OR OWED (AS APPLICABLE) BY CUSTOMER FOR THE PRODUCTS OR MAINTENANCE SERVICES THAT ARE THE SUBJECT OF THE CLAIM. FOR MAINTENANCE SERVICES OR A PRODUCT SUBJECT TO RECURRING FEES, THE LIABILITY SHALL NOT EXCEED THE AMOUNT PAID AND/OR OWED (AS APPLICABLE) FOR SUCH MAINTENANCE SERVICE OR PRODUCT DURING THE TWELVE (12) MONTHS PRECEDING THE CLAIM.

Quest's Affiliates and suppliers shall be beneficiaries of this "*Limitation of Liability*" section and Customer's Service Providers are entitled to the rights granted under the "*Third Party Use*" section of this Agreement; otherwise, no third party beneficiaries exist under this Agreement. Quest expressly excludes any and all liability to Customer's Service Providers, Clients and to any other third party.

14. Nondisclosure. "Confidential Information" means information or materials disclosed by one party (the "Disclosing Party") to the other party (the "Receiving Party") that are not generally available to the public and which, due to their character and nature, a reasonable person under like circumstances would treat as confidential, including, without limitation, the Disclosing Party's personal data, financial information, marketing information, trade secrets, know-how, proprietary tools, proprietary knowledge and proprietary methodologies. Confidential Information of Quest further includes this Agreement, the Products (in source code and/or object code form), the pricing and discounting offered by Quest to Customer hereunder, information regarding the functionality and performance of the Products, benchmark test results regarding the Products,

and any Software license keys provided to Customer. Additionally, Confidential Information shall include "Individually Identifiable Health Information" (as that term is defined in 45 CFR § 164.501) or "Nonpublic Personal Information" (as that term is defined in Title V of the Gramm-Leach-Bliley Act of 1999) that Quest may come into contact with under this Agreement. Confidential Information shall not include information or materials that (a) were, on the date of disclosure, generally known to the public; (b) become generally known to the public other than as a result of the act or omission of the Receiving Party; (c) were known to the Receiving Party without an obligation of confidentiality prior to that party receiving the same from the Disclosing Party; (d) the Receiving Party lawfully received from a third party without that third party's breach of agreement or obligation of trust; or (e) are or were independently developed by the Receiving Party without access to or use of the Disclosing Party's Confidential Information. Additionally, it shall not be a breach of this Section for the Receiving Party to disclose the Disclosing Party's Confidential Information as may be required by operation of law or legal process, provided that the Receiving Party provides prior notice of such disclosure to the Disclosing Party unless expressly prohibited from doing so by a court, arbitration panel or other legal authority of competent jurisdiction. The Receiving Party shall not (1) make the Disclosing Party's Confidential Information available to any Affiliates, directors, officers, employees, consultants or representatives (collectively, the "Representatives") who do not have a "need to know" in order to carry out the purposes of this Agreement; (2) otherwise disclose the Disclosing Party's Confidential Information to any third party without the written consent of the Disclosing Party; or (3) use the Disclosing Party's Confidential Information for any purpose other than as contemplated by this Agreement. The Receiving Party shall inform its Representatives of the confidential nature of the Disclosing Party's Confidential Information and the requirements regarding restrictions on disclosure and use as set forth in this Section and shall disclose the Disclosing Party's Confidential Information only to its Representatives who are legally bound to protect the Confidential Information under terms at least as restrictive as those provided herein. The Receiving Party agrees to protect the Disclosing Party's Confidential Information from unauthorized use or disclosure by exercising at least the same degree of care it uses to protect its own similar information, but in no event less than a reasonable degree of care. The Receiving Party shall be liable to the Disclosing Party for any disclosure or other breach in violation of this Agreement by any of its Representatives. The Receiving Party shall promptly notify the Disclosing Party of any known unauthorized use or disclosure of the Disclosing Party's Confidential Information and will cooperate with the Disclosing Party in any litigation brought by the Disclosing Party against third parties to protect its proprietary rights.

15. Usage Verification. At Quest's request, but not more frequently than once per year, Customer shall furnish Quest with a document signed by an authorized representative verifying Customer's installations and usage of the Products. Customer will permit Quest to review Customer's deployment and use of the Products for compliance with the terms and conditions of this Agreement. Any such reviews shall be scheduled at least fifteen (15) days in advance, shall be conducted during normal business hours at Customer's facilities, and shall not unreasonably interfere with Customer's business activities. If Customer's use of the Products is found to be greater than contracted for Customer will be invoiced for the additional use and the unpaid fees shall be payable in accordance with this Agreement. Additionally, if the unpaid fees exceed five percent (5%) of the fees paid for the subject Products, then Customer shall also pay Quest's reasonable costs of conducting the audit. This Section shall not limit or restrict any other rights or remedies of Quest that are otherwise set forth in this Agreement or available at law.

16. General.

(a) **Governing Law and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of California, without giving effect to any conflict of laws principles that would require the application of laws of a different state. The parties agree that neither the United Nations Convention on Contracts for the International Sale of Goods, nor the Uniform Computer Information Transaction Act (UCITA) shall apply to this Agreement, regardless of the states in which the parties do business or are incorporated. Any action seeking enforcement of this Agreement or any provision hereof shall be brought exclusively in the state or federal courts located in the County of Orange, State of California, United States of America. Each party hereby agrees to submit to the jurisdiction of such courts.

(b) **Assignment.** Except as otherwise set forth herein, Customer shall not, in whole or part, assign or transfer any part of this Agreement or any rights hereunder without the prior written consent of Quest. Any attempted transfer or assignment by Customer that is not permitted by this Agreement shall be null and void.

(c) **Severability.** If any provision of this Agreement shall be held by a court of competent jurisdiction to be contrary to law, such provision will be enforced to the maximum extent permissible and the remaining provisions of this Agreement will remain in full force and effect. Notwithstanding the foregoing, the terms of this Agreement that limit, disclaim, or exclude warranties, remedies or damages are intended by the parties to be independent and remain in effect despite the failure or unenforceability of an agreed remedy. The parties have relied on the limitations and exclusions set forth in this Agreement in determining whether to enter into it.

(d) **Use by U.S. Government.** The Software is a "commercial item" under FAR 12.201. Consistent with FAR section 12.212 and DFARS section 227.7202, any use, modification, reproduction, release, performance, display, disclosure or distribution of the Software or Documentation by the U.S. government shall be governed solely by the terms of this Agreement and shall be prohibited except to the extent expressly permitted herein.

(e) **Personal Data.** Customer hereby acknowledges and agrees that Quest's performance of this Agreement may require Quest to process or store personal data of Customer, its employees and Affiliates and to transmit such data internally within Quest or to Quest Affiliates. Such processing, storage, and transmission shall only be to the extent necessary for, and for the sole purpose of, enabling Quest to perform its obligations under this Agreement and may take place in any of the countries in which Quest and its Affiliates conduct business, which may include countries outside of the European Economic Area. Quest hereby affirms to Customer that Quest Software, Inc. currently abides by the safe harbor framework as set forth by the U.S. Department of Commerce regarding the collection, use and retention of data from the European Union.

(f) **Notices.** All notices provided hereunder shall be in writing, delivered personally, sent by facsimile or e-mail, or mailed by first class mail, postage prepaid, addressed to the legal department of the respective party or to such other address as may be specified in an Order or in writing by either of the parties to the other in accordance with this Section. All notices, requests, demands or communications shall be deemed effective upon personal delivery or four (4) days following deposit in the mail in accordance with this paragraph.

(g) **Disclosure of Customer Status.** Quest may include Customer in its listing of customers and, upon written consent by Customer, announce Customer's selection of Quest in its marketing communications.

(h) **Waiver.** Performance of any obligation required by a party hereunder may be waived only by a written waiver signed by an authorized representative of the other party, which waiver shall be effective only with respect to the specific obligation described therein. Any waiver or failure to enforce any provision of this Agreement on one occasion will not be deemed a waiver of any other provision or of such provision on any other occasion.

(i) **Injunctive Relief.** Each party acknowledges and agrees that in the event of a material breach of this Agreement, including but not limited to a breach of the "*Software License*," "*Restrictions*" or "*Nondisclosure*" Sections of this Agreement, the non-breaching party shall be entitled to seek immediate injunctive relief, without limiting its other rights and remedies.

(j) **Force Majeure.** Each party will be excused from performance for any period during which, and to the extent that, it is prevented from performing any obligation or service as a result of causes beyond its reasonable control, and without its fault or negligence, including without limitation, acts of God, strikes, lockouts, riots, acts of war, epidemics, communication line failures, and power failures. Nothing in the foregoing shall be deemed to relieve Customer or its Affiliates of its obligation to pay fees owed under this Agreement.

(k) **Equal Opportunity.** Quest Software Inc. is a federal contractor and Affirmative Action employer (M/F/D/V) as required by the Equal Opportunity clause C.F.R. § 60-741.5(a).

(l) **Headings.** Headings in this Agreement are for convenience only and do not affect the meaning or interpretation of this Agreement. This Agreement will not be construed either in favor of or against one party or the other, but rather in accordance with its fair meaning. When the term "including" is used in this Agreement it will be construed in each case to mean "including, but not limited to."

(m) **Entire Agreement.** This Agreement is intended by the parties as a final expression of their agreement with respect to the subject matter hereof and may not be contradicted by evidence of any prior or contemporaneous agreement unless such agreement is signed by both parties. In the absence of such an agreement, this Agreement shall constitute the complete and exclusive statement of the terms and conditions and no extrinsic evidence whatsoever may be introduced in any judicial proceeding that may involve the Agreement. In the event of a conflict between the terms of this Agreement and the terms contained in an Order, the terms in the Order shall only control if the Order is signed by both Quest and Customer; otherwise, the terms of this Agreement shall control. Neither this Agreement, nor an Order, may be modified or amended except by a writing executed by a duly authorized representative of each party. No other act, document, usage or custom shall be deemed to amend or modify this Agreement or an Order. Delivery of Products shall be FOB Shipping Point.