

STATE OF SOUTH DAKOTA
CONSULTING CONTRACT

Agreement made and entered into by and between the South Dakota Department of Public Safety, a state agency, on behalf of the State 9-1-1 Coordination Board, of 118 West Capitol Avenue, Pierre, South Dakota 57501 (the "State"), and NextGen Communications, Inc., a wholly owned subsidiary of TeleCommunication Systems, Inc., of 275 West Street, Suite 400, Annapolis, MD 21401 (the "Consultant").

The State hereby enters into this Agreement for services with Consultant in consideration of and pursuant to the terms and conditions set forth herein.

1. SERVICES

- 1.1. Description.** As described more fully herein, the Consultant will design and maintain for the State a next generation 9-1-1 Internet Protocol based system (the "System"), which will include, but is not limited to: (a) structuring the System to specifications as set forth herein; (b) providing all equipment and software necessary for the System as set forth herein; (c) performing installation and all labor required for deployment of the System as set forth herein; (d) providing standardized interfaces from call and message services, capable of processing all types of emergency calls including non-voice (multi-media) messages as set forth herein; (e) acquiring and integrating additional data useful to call routing and handling as set forth herein; (f) delivering the calls or messages and the data to the participating Public Safety Answering Points ("PSAPs") and other emergency entities as set forth herein; (g) supporting data and communications needs for coordinated incident response and management as set forth herein; and (h) providing a secure environment for emergency communications utilizing an Emergency Services IP Network (ESInet) that uses broadband, packet switched technology capable of carrying voice and varying types of data using Internet Protocols and standards as set forth herein. It is intended that the System, once designed to the specifications and fully operational as set forth herein, will be provided to the State as a service.

For greater certainty, the Consultant specifically will deliver and support the System as more fully set forth in the Technical Proposal attached hereto as Exhibit A and by this reference incorporated herein as if fully set forth here, the Scope of Work attached hereto as Exhibit B and by this reference incorporated herein as if fully set forth here. All pricing shall be in accordance with the pricing schedule attached hereto as Exhibit C and hereby incorporated by reference as if fully set forth here. All references to the terms contained in this Agreement, include the terms set forth in Exhibits A, B, and C. In the event that any disagreement or inconsistency is found among or between any terms of this

Agreement, it is hereby agreed that the order of precedence will be as set forth in section 19.5.

- 1.2. **State Equipment.** The Consultant will not use State equipment, supplies or facilities except as otherwise specified herein. As specified in more detail herein, the System and all of its components will remain the property of the Consultant.
- 1.3. **Taxpayer Identification Number.** The Consultant will provide the State with its Employer Identification Number or Federal Tax Identification Number upon execution of this Agreement.
- 1.4. **No Additional Conditions.** The Consultant shall not condition any of the State's rights or the Consultant's obligations under this Agreement on the Consultant accepting or installing any enhancements or additional functionality provided by or through the Consultant that would increase the cost to the State.

2. TERM AND TERMINATION

- 2.1. **Term.** The Consultant's services under this Agreement shall commence on December 18, 2014 (the "Agreement Effective Date") and end on the date that is 60 months thereafter (such initial 60 month term, the "Initial Term"), unless sooner terminated pursuant to the terms hereof. This Agreement may be renewed for one (1) additional 60 month term at the sole option of the State. If the State chooses to exercise the renewal option, the State shall give the Consultant notice of the intent to renew at least ninety (90) days before the expiration of the Initial Term. If the renewal option is exercised the costs and fees shall be as stated for years 6-10 in the Payment Schedule attached hereto as Exhibit C and hereby incorporated by reference.
- 2.2. **Termination.** The Agreement may be terminated as provided below:
 - 2.2.1. **For Cause.** Either party may terminate the Agreement upon written notice to the other party if such other party materially breaches any term or condition of the Agreement and such other party (a) fails to cure such breach within thirty (30) days following receipt of written notice specifying the breach in detail, or (b) if such breach cannot be cured within such thirty (30) day period, fails to begin a reasonable good faith cure of such breach within such thirty (30) day period and continues to pursue such cure in good faith such that the non-breaching party is not materially prejudiced in any way.
 - 2.2.2. **For Non-Appropriations.** This Agreement depends upon the continued availability of appropriated funds and expenditure authority from the Legislature for this purpose. If for any reason the Legislature fails to appropriate sufficient funds or grant expenditure authority for

this Agreement, this Agreement may be immediately terminated by the State upon written notice to the Consultant. Termination of the Agreement for any of the reasons described in this Section 2.2.2 is not a default by the State nor does it give rise to a claim against the State.

- 2.3. Effect of Termination.** Termination of the Agreement shall not limit either party from pursuing other remedies available to it, including injunctive relief, nor shall such termination relieve the State of its obligation to pay all fees that have accrued under the Agreement prior to termination of the Agreement. The State shall not pay for any common stock items ordered for the System but not installed. Upon termination of the Agreement (i) the State's right to use any of the System shall immediately terminate; and (ii) upon Consultant's request, the State shall return any deliverables in its possession or control to Consultant. In addition to any other provisions of the Agreement that expressly survive termination of the Agreement, the parties' rights and obligations under Sections 2.3, 6.2, 17 and 18 shall survive termination of the Agreement. Upon termination of the Contract, the State furthermore, at the request of the Consultant, shall promptly certify that it has destroyed or returned to the Consultant all of the Consultant's Confidential Information, and all copies or derivatives in any form thereof, whether or not modified or merged into other materials.

3. COMPENSATION

- 3.1. Payments.** The State will make payment for non-recurring services as set forth in Exhibit C upon satisfactory completion of the milestones and at the rates set forth in Exhibit C. The State will make payment for recurring services as set forth in Exhibit C on a monthly basis due net 45 days from date of invoice. The TOTAL CONTRACT AMOUNT, if the renewal option is exercised, is an amount not to exceed \$32,944,020.00. The State will not pay the Consultant's expenses as a separate item. Payment will be made pursuant to itemized invoices submitted. Payment will be made consistent with SDCL ch. 5-26.
- 3.2. Invoice Disputes.** In the event the State disputes any invoice because the State reasonably and in good faith believes (a) the Consultant has materially failed to perform any of its duties or obligations as set forth in this Agreement; or (b) any deliverable or service has materially failed to meet or conform to any applicable specifications as set forth in this Agreement, and the Consultant has not remedied such occurrence of (a) or (b) in accordance with terms of this Agreement, the State will notify the Consultant within fifteen (15) business days following receipt of such invoice specifying in reasonable detail the disputed item. Following delivery of such notice, in addition to pursuing any other remedy provided herein or by law, the State may withhold compensation or payments to the Consultant with respect to the disputed item in such invoice, without penalty to the State, pending resolution of the dispute. In the event the State disputes any portion of any invoice, the parties agree to work together in

good faith to resolve the issue(s) relating to the disputed amount as promptly as reasonably possible. In no event shall objection by the State to any part of any invoice be cause to delay acceptance and/or payment on any undisputed portion of any invoice. No interest shall accrue or be paid to the Consultant on any compensation or other amounts withheld by the State in good faith under this section. The payment of any invoice by the State will not prejudice the State's right to object to or question that or any other invoice or matter in relation thereto.

3.3. Erroneous Payments. The Consultant shall promptly, but in all cases within forty-five (45) days of notification, pay to the State the full amount of any erroneous payment or overpayment to which the Consultant is not entitled. If the Consultant fails to make such a timely refund, the State may charge one percent (1%) per month on the amount due until paid in full.

3.4. Taxes. The State is a sovereign entity, and shall not be liable for the payment of federal, state or local sales, use or excise taxes, including any interest or penalties from any related deficiency, which may become due and payable as a consequence of this Agreement. The State will provide the Consultant with a letter indicating the State's exempt status.

4. ACCEPTANCE TESTING

4.1. General. The Consultant shall complete all work and provide all deliverables and services in accordance with the deadlines, timelines, terms, conditions, specifications and other requirements specified in this Agreement; unless signed, written permission to deviate from the requirements herein is provided by the State.

4.2. Acceptance Test Plan. Acceptance testing of deliverables is expected to occur in accordance with an acceptance test plan to be mutually agreed upon in good faith by the parties (the "Acceptance Test Plan"), as referred to and described in Exhibit B. Updates or changes to the Acceptance Test Plan may be made by mutual agreement of the parties without formally amending this Agreement. Upon completion of all work to be performed by the Consultant with respect to any deliverable, the Consultant shall pretest the deliverable to determine that it meets and operates in accordance with applicable specifications as provided herein. The Consultant shall then deliver a written notice to the State certifying that the deliverable meets and conforms to applicable specifications as provided herein and is ready for the State to conduct acceptance tests in accordance with the Acceptance Test Plan. The State shall have thirty (30) days from receipt of such notice to conduct the acceptance testing (the "Acceptance Period"). At the State's request, the Consultant shall reasonably assist the State in performing acceptance tests in accordance with the Acceptance Test Plan at no additional cost to the State.

4.3. Acceptance. Within five (5) business days after the State has completed its acceptance testing in accordance with the Acceptance Test Plan, the State shall provide the Consultant with written notice of acceptance or non-acceptance with respect to each deliverable submitted for testing. Upon the State's determination that a deliverable is acceptable, the State shall provide the Consultant with notice of acceptance as to that deliverable. If the State determines that a deliverable is not acceptable, the State shall provide the Consultant with notice of non-acceptance as to that deliverable. In the event the Acceptance Period expires without the State providing either a notice of acceptance or non-acceptance, the subject deliverable(s) shall be deemed accepted. In the event of any and each notice of non-acceptance, the Consultant shall correct and repair such deliverable and re-submit it to the State within thirty (30) days (or such other period of time as the parties mutually may agree to in writing in good faith) of the Consultant's receipt of notice of non-acceptance so that the State may re-conduct acceptance tests in accordance with the Acceptance Test Plan as to that deliverable in accordance with this section.

If, after resubmission of any deliverable for acceptance testing, a deliverable is still unacceptable, the State may (1) continue to require all necessary corrections for resubmission of the deliverable for accepting testing in accordance with this section; (2) refuse to accept the deliverable without any legal penalty or responsibility and have no liability or obligation for any payments for such deliverable; (3) accept the deliverable at a mutually agreed upon reduced price reflective of the loss of functionality and any reasonable and customary costs necessary to correct the deficiency; or (4) terminate this Agreement in accordance with the details of Section 2.2.

4.4. Final Acceptance. If the State determines that all deliverables satisfy the Acceptance Test Plan (which for purposes of such determination shall occur after thirty (30) calendar days of live "soak" following cutover of the System, or upon the resolution of all severity 1 and severity 2 trouble tickets opened by the State during such thirty (30) calendar day period, whichever occurs later), the State shall within five (5) days thereafter provide the Consultant with notice of final acceptance or non-acceptance. In the event the State has not delivered a notice of final acceptance or non-acceptance to Consultant within such five (5) day period, the Consultant shall issue a notice to the State indicating that the State has failed to timely deliver such notice. The State shall thereupon have ten (10) days to deliver a notice of final acceptance or non-acceptance, or the State shall be deemed to have accepted the system.

4.5. Effect of Acceptance. The Consultant's receipt of any notice of acceptance, including final acceptance, with respect to any deliverable(s) shall not be construed as a waiver of any of the State's rights to any legal or equitable remedy, to enforce the terms of this Agreement or negate the Consultant's applicable warranties as set forth in Section 7. In addition, the Consultant's receipt of any notice of acceptance with respect to any or all individual

deliverable(s) shall not be construed as a waiver by the State of its right to refuse to provide notice of final acceptance of the System. The State's right to exercise the foregoing rights and remedies, including termination of this Agreement, shall remain in effect until written notice of final acceptance shall have been provided by the State or deemed final acceptance shall have occurred.

5. PROJECT MANAGEMENT AND REPORTING

- 5.1. Designated Representative.** Upon execution of this Agreement, the Consultant shall designate, in writing, a Project Management Institute certified project manager or a project manager with equivalent experience acceptable to the State to serve until the expiration of this Agreement ("Project Manager"). The Consultant will assign a Project Manager of a management level sufficient to assure timely responses from all the Consultant personnel, timely completion of tasks and achievement of milestones, and whose resume and qualifications will be reviewed and approved by the State prior to her or his appointment as the Consultant's Project Manager. The Consultant represents that its Project Manager will be fully qualified to perform the tasks required of that position under this Agreement. The Consultant's Project Manager shall be able to make binding decisions, except as to increasing the scope of work or financial decisions, pursuant to this Agreement on behalf of and for the Consultant. Any written commitment by the Consultant's Project Manager and persons designated by her/him in writing for this purpose, within the scope of this Agreement, shall be binding upon the Consultant. The Consultant's Project Manager shall exercise her or his best efforts while performing under this Agreement. The Consultant's Project Manager shall be at the State's site as reasonably needed during the course of work under this Agreement and will be available either in person, by telephone or e-mail to respond promptly (in no event more than 4 hours after receipt of a request or inquiry from the State) during the business day to inquiries from the State.
- 5.2. Replacement of Project Manager.** The State considers the Consultant's Project Manager to be essential to a successful project. The Consultant shall not remove, reassign, transfer, or replace its Project Manager except in the event of death, illness, retirement, disability, termination from employment, conditions permitting absence from employment under the Family and Medical Leave Act of 1993, or in the event of the State's written consent (which shall not be unreasonably withheld or delayed). In the event the Consultant requests the State to consent to a removal, reassignment, transfer or other replacement of the Consultant's Project Manager the State may review the qualifications of the proposed substitute Project Manager before providing its written consent or rejecting such replacement. Any such replacement shall have substantially equivalent or better ability, experience and qualifications than the Consultant's Project Manager being replaced. The Consultant shall not separately charge the State and the State shall not separately pay for any proposed replacement

Project Manager to become acclimated to the project, and acquire the necessary skills and project knowledge to proceed with the work under this Agreement.

- 5.3. Replacement of Other Personnel.** If at any time during the term of this Agreement, the State becomes dissatisfied with the performance of any individual who is part of the Consultant's personnel performing services for the State hereunder, the State shall notify the Consultant of the reasons for such dissatisfaction and may request replacement of such individual. The Consultant will promptly investigate such request and the reasons for such dissatisfaction and report back to the State on the corrective action the Consultant believes is appropriate to address the State's concerns and dissatisfaction. If the parties determine that such individual needs to be replaced, the replacement shall be effected promptly with a substitute individual having equal or greater ability, experience and qualifications than the departing individual.
- 5.4. Reports.** The Consultant shall provide the State with weekly status reports that describe, at a minimum, the previous week's activities, including problems encountered and their disposition, results of tests, whether or not deadlines were met, status of deliverables, proposed changes to the project plan, any problems that may have arisen that need to be addressed before proceeding to the next week's activities, and any other information the State reasonably may request. The Consultant's proposed format and level of detail for its status reports shall be subject to the State's reasonable approval.
- 5.5. Review Meetings.** Upon execution of this Agreement, and until the System is completely functional and all participating PSAPs have migrated on to the System (i.e., final acceptance of the System has occurred), the Consultant's Project Manager shall meet weekly, either electronically, in person, or by teleconference with the State's Project Manager and representatives, unless otherwise determined by the State, to discuss progress made by the Consultant in the performance of this Agreement. At each review meeting, the Consultant's Project Manager shall provide a status report, which includes, at a minimum, the information provided in the weekly report and describes any problems or concerns encountered since the last meeting. At the next meeting after the State has identified a problem, the Consultant shall provide a report setting forth activities undertaken, or to be undertaken, to resolve the problem, together with the anticipated completion dates of such activities. Either party may recommend alternative courses of action or changes that will facilitate problem resolution. The Consultant shall maintain records of such reports and other communications issued in writing during the course of its performance under this Agreement. After full deployment of the System, meetings (either electronically, in person, or by teleconference) may be held at the request of the State, after reasonable notice to the Consultant.
- 5.6. Problem Reporting.** The State's receipt of a report, either written or verbal, that identifies any problems shall not relieve the Consultant of any obligation

under this Agreement or waive any other remedy under this Agreement or at law or equity that the State may have. The State's failure to identify the extent of a problem or deficiency, or the extent of damages incurred as a result of a problem or deficiency, shall not act as a waiver of the Consultant's required performance under this Agreement.

- 5.7. Change Order Procedure.** Either party may at any time request a change or modification to the technical requirements or other details of this Agreement. The requesting party shall specify in writing the desired changes or modifications with the same degree of specificity used in this Agreement. The Consultant, if the requesting party, shall submit to the State any proposed changes or modifications and a firm cost proposal, if applicable, for the requested changes or modifications. If the change or modification is requested by the State, the Consultant shall respond, and include a firm cost proposal, within thirty (30) days of receiving the State's request. The Consultant agrees that there shall be no additional cost or Consultant compensation for any requests for a change or modification that is merely incidental to implementing the specifications of the System included herein; provided that if the State is the requesting party such requested change or modification does not materially affect the Contractor's costs or ability to comply with any of the terms of the Agreement. Both parties must sign and date an amendment to this Agreement to authorize requested changes or modifications to this Agreement. No services shall be performed pursuant to a modification or change request and no payment shall be made on account of a modification or change request until such an amendment is fully executed by both parties. Upon such execution, an amendment shall alter only that portion of this Agreement to which it expressly relates and shall not otherwise affect the terms and conditions of this Agreement.

6. INTELLECTUAL PROPERTY RIGHTS AND OWNERSHIP

- 6.1. License.** The Consultant hereby grants to the State a limited, nontransferable and nonexclusive license to use the System for internal purposes during the term of this Agreement consistent with the provisions of this Agreement. The license granted under this Agreement to use the System extends to the State's employees and the PSAP employees authorized by the State to use the System (collectively, "Internal Users") for the permitted purposes described above. Each Internal User's use of the System shall be subject to all of the terms and conditions of the Agreement and the State shall be responsible to Consultant for the failure of any Internal User to comply with any terms or conditions of the Agreement. The State will not (nor permit any Internal User or third party not authorized by Consultant to) modify, enhance, translate, reverse engineer, decompile, disassemble or attempt to reconstruct, identify or discover any source code, underlying ideas or algorithms of the System or any other form of Consultant's intellectual property, disassemble or decompile the Products, nor cause, permit, or attempt any of the foregoing. The State shall not create (nor

permit any Internal User or third party not authorized by Consultant to create) any derivative works based upon the System or any of its components.

- 6.2. Ownership.** As between the State and the Consultant, title to all hardware and other communications equipment installed by the Consultant in connection with the System will remain with the Consultant. As between the State and the Consultant, title to all software provided by the Consultant and used by the State or the Consultant in connection with the System will remain at all times with the Consultant. The State acknowledges that except for the license expressly granted to the State under Section 6.1 to use the System all other intellectual property rights (in whatever form) in and to the System and any other development efforts hereunder are and will remain the property of the Consultant.
- 6.3. Verification Rights.** At the Consultant's written request, the State shall furnish Consultant with a certificate executed by an authorized agent of the State verifying that the System and all component parts are being used solely in accordance with the terms and conditions of this Agreement. At its expense and upon reasonable prior notice to the State, the Consultant may audit the State's use of the System. Any such audit shall be conducted during regular business hours at the State and/or PSAP facilities at which the System is being used by the State or any Internal Users and shall not unreasonably interfere with the State's or such PSAPs' business activities. Subject to the foregoing, the Consultant may conduct such an audit no more than twice per year. The State will cooperate with the Consultant's personnel or the Consultant's independent audit firm in connection with the performance of any such audit.

7. WARRANTY; REMEDIES; DISCLAIMERS

- 7.1. Warranty.** Consultant warrants to the State that the System provided to the State by Consultant will be provided in a good and workmanlike manner consistent with generally accepted professional standards and will conform in all material respects to applicable performance requirements set forth in the Agreement. Consultant is not responsible for conditions outside of Consultant's control.

The Consultant represents and warrants that it is fully aware of the State's business requirements and intended purposes and uses for the deliverables as set forth herein and the deliverables shall satisfy such requirements in all material respects and are fit for such intended purposes and uses as set forth in Exhibit A and supplemented by Exhibit B. The remedies and alternatives for unacceptable deliverables set forth in section 4.3 are included in this section 7 as if fully set forth here.

- 7.2. Representation as to Ownership and Rights.** The Consultant represents that to its knowledge as of the date of this Agreement it owns, possesses, holds, and

has received or secured all rights, permits, permissions, licenses and authority necessary to provide the services and deliverables to the State hereunder and to assign, grant and convey the rights, benefits, licenses and other rights assigned, granted or conveyed to the State hereunder without violating any rights of any third party. The Consultant further represents that to its knowledge as of the date of this Agreement, and except as noted below, there is no pending or threatened claim, litigation or action that is based on a claim of infringement or violation of an intellectual property right, proprietary right or personal right or misappropriation of a trade secret related to the deliverables. For greater certainty, it is acknowledged that (a) for several years Cassidian Communications (“Cassidian”) has been alleging to members of the NG9-1-1 industry that it believes its U.S. Patent No. 6,744,858, entitled “*System and Method for Supporting Multiple Call Centers*” (the “‘858 patent”) covers certain aspects of NG9-1-1 technology; (b) in 2012 Cassidian filed suit against TeleCommunication Systems, Inc. and certain of its subsidiaries (collectively, “TCS”) in the Eastern District of Texas alleging that TCS NG9-1-1 technologies infringed the ‘858 patent; (c) on December 20, 2013, following a multi-day trial in the Eastern District of Texas, a jury returned a verdict entirely in favor of TCS that (i) no asserted claims of the ‘858 patent are infringed by TCS, and (ii) all asserted claims of the ‘858 patent are invalid; (d) Cassidian is now appealing such jury verdict; and (e) TCS expects to continue to defend against any such appeal by Cassidian and believes that the alleged infringement will have no material impact on delivery of services hereunder. The Consultant further represents and warrants that it has not and will not grant any rights in any deliverables to any third party that are inconsistent with the rights granted to the State herein to peacefully and quietly enjoy use of the deliverables as provided herein; provided, however, that the right to quiet enjoyment does not limit or prevent Consultant’s rights to take legal action in the event the State or any Internal User is in breach of the Agreement nor does such warranty imply that operation of the System will be uninterrupted or error-free.

- 7.3. Remedies.** In accordance with the terms of services included in this Agreement, the Consultant shall be available at all reasonable times to assist the State with questions, problems and concerns about the System. If the System provided by Consultant hereunder fails to conform to the warranty set forth in Section 7.1, and the State notifies Consultant of such nonconformance in writing within thirty (30) days after the date of such nonconformance, Consultant shall use reasonable efforts to correct such nonconformance. If Consultant fails to correct such nonconformance or agree to a mutually acceptable plan within thirty (30) days of notification by the State, the State may terminate the Agreement in accordance with Section 2.2.1. For greater certainty, such thirty (30) days notice of nonconformance under this section shall mean and fulfill the requirement of the thirty (30) day cure period under Section 2.2.1.

Without terminating this Agreement, the State may correct any deficiencies with respect to any deliverable or service or cure any Consultant default under this Agreement without prejudice to any other remedy it may have if the Consultant fails to correct such deficiencies as required in this Agreement or if the Consultant otherwise defaults or fails to perform any provision of the Agreement within the time period specified by the State; provided that any such correction or cure otherwise meets the Consultant's specifications (or has been mutually agreed to by the Consultant) and the cost of such correction or cure is \$2,000 or less. The State may provide or procure the services reasonably necessary to correct any deficiencies or cure any Consultant default as described in the preceding sentence, in which event the Consultant shall reimburse the State for the actual costs incurred by the State for such deliverables or services, including the reasonable value of the time expended by any State employees or third parties who provide such services if the costs do not exceed the monetary limit specified in this section. If the State exercises its rights under this section, the Consultant shall cooperate with the State or any third parties (so long as such third parties are not a competitor or the Consultant) retained by the State who assist in curing such deficiency or default, including by allowing access to any pertinent materials or work product of the Consultant.

7.4. Disclaimers. THE CONSULTANT MAKES NO REPRESENTATIONS OR WARRANTIES WITH REGARD TO THE SYSTEM, ANY SERVICES OR OTHER ITEMS FURNISHED UNDER THIS AGREEMENT EXCEPT AS SET FORTH IN SECTION 7. FOR GREATER CERTAINTY, THE CONSULTANT DOES NOT WARRANT THAT THE SYSTEM, ANY SERVICES OR OTHER ITEMS FURNISHED UNDER THIS AGREEMENT WILL BE UNINTERRUPTED OR ERROR-FREE. THE CONSULTANT DISCLAIMS AND THE STATE WAIVES AND RELEASES ALL IMPLIED WARRANTIES INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, BUT ALL EXPRESS WARRANTIES STATED IN THIS AGREEMENT SHALL REMAIN IN FULL FORCE AND EFFECT.

7.5. Warranty Interpretation. All warranty details provided for in Section 7 shall be cumulative, shall be deemed consistent and not in conflict, are intended to be given full force and effect and to be interpreted expansively in accordance with their terms. The references in this Agreement to specific material breaches of this Agreement shall not be construed as implying that other breaches of this Agreement are not material.

8. INDEMNIFICATION

8.1. General. The Consultant agrees to indemnify and hold the State of South Dakota, its officers, agents and employees, harmless from and against any and all actions, suits, damages, liability or other proceedings that may arise as the result of performing services hereunder. This section does not require the

Consultant to be responsible for or defend against claims or damages arising solely from errors or omissions of the State, its officers, agents or employees.

- 8.2. IP Claims.** Subject to the State's compliance with the terms of Section 8.2 and Section 8.3, the Consultant shall defend, indemnify and hold harmless the State from and against any loss, damage, or liability, including reasonable costs and attorney fees, to the extent that such loss, damage or liability arises out of any third party claim, suit, or allegation specifically that the System provided by the Consultant under this Agreement specifically causes an infringement of the United States patent, trademark, copyright rights, trade secret rights or other proprietary rights of such third party (an "IP Claim"). The State shall not be entitled to any defense, indemnification or the like under this Section to the extent an IP Claim arises out of the unauthorized use, negligent use, or misuse of the System or out of the combination of the System with products or services provided by the State or any other third party.

In addition to and without limiting any of the foregoing, if any IP Claim has occurred, or in the Consultant's opinion is likely to occur, then the Consultant shall have the right, at its option and at no expense to the State, to (a) replace or modify the System with a non-infringing version of substantially equivalent function and performance, or (b) obtain for the State a license to continue using the System.

This Section 8.2, together with Section 8.3 below, sets forth the Consultant's entire obligation and the State's sole remedy with respect to infringement by the System, or any part thereof, of any patent, copyright, trademark or other intellectual property right.

- 8.3. Indemnification Procedure.** The State shall provide the Consultant with prompt written notice of any claim under Sections 8.1 or 8.2.
- 8.4. Acknowledgment.** Notwithstanding anything to the contrary in this Agreement, no provisions of this Agreement shall be construed as affecting or negating the standards, immunities or limitations for liability set forth in any applicable law limiting the liability of any party providing or assisting in providing any 9-1-1-related products or services, including without limitation SDCL § 34-45-17. The parties furthermore expressly agree that no provision of this Agreement is in any way intended to constitute a waiver by the State of any immunities from suit or from liability that the State may have by operation of law as to third parties. Both parties by their signatures below, also expressly agree to be bound by the terms of this Agreement.

9. INSURANCE

The Consultant, at all times during the term of this Agreement, shall obtain and maintain in force insurance coverage of the types and with the limits as follows:

A. Commercial General Liability Insurance:

The Consultant shall maintain occurrence based commercial general liability insurance or equivalent form with a limit of not less than \$1,000,000.00 for each occurrence. If such insurance contains a general aggregate limit it shall apply separately to this Agreement or be no less than two times the occurrence limit.

B. Professional Liability Insurance or Miscellaneous Professional Liability Insurance:

The Consultant agrees to procure and maintain professional liability insurance or miscellaneous professional liability insurance with a limit not less than \$1,000,000.00.

C. Business Automobile Liability Insurance:

The Consultant shall maintain business automobile liability insurance or equivalent form with a limit of not less than \$1,000,000.00 for each accident. Such insurance shall include coverage for owned, hired and non-owned vehicles.

D. Worker's Compensation Insurance:

The Consultant shall procure and maintain workers' compensation and employers' liability insurance as required by South Dakota law.

Before beginning work under this Agreement, the Consultant shall furnish the State with properly executed Certificates of Insurance which shall clearly evidence all insurance required in this Agreement. In the event of a substantial change in insurance, issuance of a new policy, cancellation or nonrenewal of the policy, the Consultant agrees to provide immediate notice to the State and provide a new certificate of insurance showing continuous coverage in the amounts required. The Consultant shall furnish copies of insurance policies if requested by the State.

10. INDEPENDENT CONTRACTOR

While performing services hereunder, the Consultant is an independent contractor and not an officer, agent, or employee of the State of South Dakota. Nothing in this Agreement shall be construed as creating or constituting the relationship of a partnership, joint venture or other association of any kind or agent/principal relationship between the parties hereto.

11. CERTAIN EVENT REPORTS

Each party agrees to promptly report to the other party any event it actually becomes aware of in the course of and related to its performance of this Agreement which results in injury to the person or property of third parties, or any notice of any legal proceeding it receives, which reasonably may subject the other party to potential liability.

Each party's obligation to report shall not require disclosure of any information subject to privilege or confidentiality under law (e.g., attorney-client communications). Reporting to the other party under this section shall not excuse or satisfy any obligation of a party to report any event to law enforcement or other entities under the requirements of any applicable law.

12. ASSIGNMENT; AMENDMENT

This Agreement may not be assigned by either party without the express prior written consent of the other party. This Agreement may not be amended except in writing, which writing shall be expressly identified as a part hereof, and be signed by an authorized representative of each of the parties hereto.

13. GOVERNING LAW; VENUE

This Agreement shall be governed by and construed in accordance with the laws of the State of South Dakota, exclusive of its choice of law principles. Any lawsuit pertaining to or affecting this Agreement, even after termination, shall be venued in Circuit Court, Sixth Judicial Circuit, Hughes County, South Dakota.

14. COMPLIANCE WITH LAWS

Each party will comply with all federal, state and local laws, regulations, ordinances, guidelines, permits and requirements applicable to it in connection with its obligations under this Agreement, and will be solely responsible for obtaining current information on such requirements.

15. SUBCONTRACTORS

The Consultant may not use subcontractors to perform the services described herein without the express prior written consent of the State. The State reserves the right to reasonably reject any person from the project contained within this Agreement presenting insufficient skills or inappropriate behavior. If permission for subcontractors is granted, the Consultant will include provisions in its subcontracts requiring any subcontractors to comply with the applicable provisions of this Agreement; to indemnify the State, and to provide insurance coverage for the benefit of the State in a manner consistent with this Agreement. The Consultant will cause its subcontractors, agents, and employees to comply, with applicable federal, state

and local laws, regulations, ordinances, guidelines, permits and requirements and will adopt such review and inspection procedures as are reasonably necessary to assure such compliance. The State, at its option, may require the vetting of any subcontractors. The Consultant is required to assist in this process as reasonably needed. The Consultant also agrees to take reasonable steps including, but not limited to, all steps explicitly required elsewhere in this Agreement and such other steps as are reasonable under the circumstances to ensure that its employees or agents act in accordance with the terms of this Agreement.

Consent is hereby given for the Consultant to utilize the services of South Dakota Network, LLC (hereinafter "SDN") as the local network backbone provider.

16. PERSONNEL QUALIFICATIONS

The Consultant will ensure that employees or agents who perform work under this Agreement have read, understood, and received appropriate instruction as to how to comply with the security provisions of this Agreement and have undergone all reasonable background screenings, and possess all reasonable qualifications required by the State prior to being granted access to State data or State facilities.

17. CONFIDENTIAL AND PROPRIETARY INFORMATION

By virtue of the Agreement, each party may have access to information that is confidential and/or proprietary to the other. For purposes of this Agreement, "Confidential and Proprietary Information" of a party shall include but not be limited to trade secrets, know-how, inventions, software programs, applications, documentation, schematics, processes and procedures, information, knowledge, data, techniques, designs, engineering, and other non-public information in addition to any and all written or verbal information furnished or disclosed, in whatever form or medium, to the receiving party by the disclosing party relating to the project contemplated by this Agreement. Neither receiving party shall: (i) disclose any Confidential and Proprietary Information of the disclosing party to any third person unless otherwise specifically allowed under this Agreement; (ii) make any use of Confidential and Proprietary Information of the disclosing party except to exercise rights and perform obligations under this Agreement; (iii) make Confidential and Proprietary Information of the disclosing party available to any of its employees, officers, or agents except those who have agreed to obligations of confidentiality at least as strict as those set out in this Agreement and who have a need to know such information. Each receiving party is held to the same standard of care in guarding Confidential and Proprietary Information of the other as it applies to its own confidential or proprietary information and materials of a similar nature, but no less than a reasonable standard of care. Each receiving party shall protect the Confidential and Proprietary Information of the disclosing party from the time of receipt to the time that such information is either returned to disclosing party or destroyed to the extent that it cannot be recalled or reproduced. Each receiving party agrees to return all Confidential and Proprietary Information received from the

disclosing party to the disclosing party's custody upon the end of the term of this Agreement, unless otherwise agreed in a writing signed by both parties. Confidential and Proprietary Information shall not include information that (i) was in the public domain at the time it was disclosed to receiving party; (ii) was known to the receiving party without restriction at the time of disclosure from the disclosing party; (iii) is disclosed with the prior written approval of the disclosing party's officers or employees having authority to disclose such information; (iv) was independently developed by the receiving party without the benefit or influence of the disclosing party's information; (v) becomes known to the receiving party without restriction from a source not connected to the disclosing party and without breach of any restriction on disclosure to the disclosing party. In addition, the restrictions on use and disclosure of Confidential and Proprietary Information in this section shall not apply to such information as is disclosed pursuant to the lawful requirement or request of a court or governmental agency, provided that the party making the disclosure has given prior notice to the other party so that it may appear and defend its interests in a timely manner.

Without limiting any of the foregoing, the State's Confidential and Proprietary Information shall include names, social security numbers, employer numbers, addresses and all other data about applicants, employers or other clients to whom the State provides services of any kind. The Consultant understands that this information is confidential and protected under State law and agrees to promptly notify the State if any such information is disclosed, either intentionally or inadvertently, in contravention to the terms of this Agreement.

The Consultant acknowledges that the State and its agencies are public entities and thus are bound by South Dakota open meetings and open records laws. It is therefore not a breach of this Agreement for the State to take any action that the State reasonably believes is necessary to comply with South Dakota open records or open meetings laws. If work assignments performed in the course of this Agreement require additional security requirements or clearance, the Consultant will be required to undergo investigation.

18. LIMITATIONS OF LIABILITY

EXCEPT FOR AMOUNTS PAYABLE BY THE STATE TO THE CONSULTANT UNDER SECTION 3.1 and THE INDEMNIFICATION OBLIGATIONS SET FORTH IN SECTION 8.2 EACH PARTY'S AGGREGATE LIABILITY TO THE OTHER PARTY, INCLUDING OFFICERS, AGENTS, AND EMPLOYEES OF THAT PARTY, FOR ALL CLAIMS (WHETHER IN TORT, CONTRACT OR OTHERWISE AND NOTWITHSTANDING ANY FAULT, NEGLIGENCE (WHETHER ACTIVE, PASSIVE OR IMPUTED), PRODUCT LIABILITY OR STRICT LIABILITY OF SUCH PARTY) UNDER THIS AGREEMENT AND WITH REGARD TO ALL SERVICES AND OTHER ITEMS FURNISHED UNDER THIS AGREEMENT WILL NOT EXCEED THE TOTAL COMPENSATION ACTUALLY PAID TO THE CONSULTANT FOR THE

PREVIOUS TWELVE MONTHS UNDER SECTION 3.1 OR \$1,000,000, WHICHEVER IS GREATER.

19. OTHER TERMS

19.1. Debarment or Suspension. The Consultant certifies that neither the Consultant nor its principals are presently debarred, suspended, proposed for debarment or suspension, or declared ineligible from participating in transactions by the federal government or any state or local government agency. The Consultant further agrees that it will promptly notify the State if during the term of this Agreement Consultant or its principals become subject to debarment, suspension or ineligibility from participating in transactions by the federal government, or by any state or local government agency.

19.2. Notices. Any notice or other communication required under this Agreement shall be in writing and sent to the addresses set forth above. Notices shall be given to **Shawnie Rechtenbaugh**, on behalf of the State, and to the attention of **Contracts Department**, on behalf of the Consultant, or such authorized designees as either party may from time to time designate in writing.

Notices or communications to or between the parties shall be deemed to have been delivered when mailed by first class mail, provided that notice of default or termination shall be sent by registered or certified mail, or, if personally delivered, when received by such party. Routine notices and communications concerning the project, other than notices of termination or default, may be sent electronically.

19.3. Severability. In the event that any court of competent jurisdiction shall hold any provision of this Agreement unenforceable or invalid, such holding shall not invalidate or render unenforceable any other provision hereof.

19.4. Waiver and Modification. Except as otherwise specifically provided herein, no term or condition of this Agreement shall be held to be waived, modified, or deleted except by an instrument, in writing, signed by both parties hereto. Any failure or delay by either party to exercise or partially exercise any right, power, or privilege under this Agreement may not be deemed a waiver of any such right, power, or privilege under this Agreement. Any waivers granted by either party for breaches hereof shall not indicate a course of dealing of excusing other or subsequent breaches. Either party's pursuit or non-pursuit of a remedy under this Agreement for the other party's breach of its obligations will neither constitute a waiver of any such remedies nor any other remedy that the non-breaching party may have at law or equity for any other occurrence of the same or similar breach, nor prevent the non-breaching party from pursuing such remedy.

19.5. Entire Agreement. This Agreement represents the entire Agreement between the parties concerning the subject matter hereof, and neither party is relying on any representation that may have been made which is not included in this Agreement. The State shall not be bound by any “shrink-wrap” agreement, “click-wrap” agreement, or “sneak-wrap” agreement (or any other similar agreement) that may accompany or relate to a deliverable. The Consultant acknowledges that it has thoroughly read this Agreement and all related schedules, exhibits, and other documents and has had the opportunity to receive competent advice and counsel necessary for it to form a complete understanding of all rights and obligations herein and to accept same freely and without coercion of any kind. Accordingly, this Agreement shall not be construed or interpreted against the State on the basis of draftsmanship or preparation thereof. The following attachments and their associated exhibits are hereby incorporated into this Agreement (collectively, the “Contract Documents”):

- Exhibit A Technical Proposal
- Exhibit B Scope of Work
- Exhibit C Payment Schedule

In the event of an irreconcilable conflict in the language of the Contract Documents, the following order of precedence shall apply: (1) this Agreement; (2) Exhibit A; (3) Exhibit B; and (4) Exhibit C.

19.6. Time of Essence. Time is of the essence with respect to the Consultant’s performance of all its obligations under this Agreement.

19.7. Certain Defined Terms. Any terms utilized in this Agreement which are defined in SDCL 34-45 have the same definition and meaning in this Agreement as the definitions and meanings given in SDCL 34-45. All terms defined in Exhibit B, consistent with the incorporation of all exhibits, have the same definition throughout this Agreement.

19.8. Successors. All the terms, provisions, and conditions of the Agreement shall be binding upon and inure to the benefit of the parties’ hereto and their respective successors, permitted assigns, and legal representatives.

19.9. Records Retention and Access. The Consultant shall maintain accurate, current, and complete books, documents and records that sufficiently and properly document the Consultant’s performance under this Agreement, including records that document all fees and other amounts charged during the term of this Agreement, for a period of at least three (3) years following the later of the date of final payment, termination or expiration of this Agreement, or the completion of any required audit. If any litigation, claim, negotiation, audit or other action involving the books, documents and records has been started before the expiration of the three-year period, the Consultant must retain

the records until completion of the action and resolution of all issues which arise from it, or until the end of the above-described three-year period, whichever is later.

Subject to the Consultant's reasonable security requirements and not more than once every twelve (12) months, the State may, at its own expense, review the Consultant's relevant records for a period not to exceed the preceding twelve (12) months of service actually provided hereunder for the purpose of (i) assessing the accuracy of the Consultant's invoices to the State; or (ii) evaluating the Consultant's performance under this Agreement. The foregoing limitations shall not apply if such a review or audit is a component of any type of investigation or legal proceeding. The Consultant shall not impose a charge or seek payment for any fee or expense associated with any such audit or examination of such books, documents and records by the State.

The State may employ such third party assistance, as it deems desirable, to conduct such reviews, but may not employ the assistance of any entity that derives a substantial portion of its revenues from the provision of services that are substantially similar to the services provided hereunder or any person who has previously made prohibited use of Consultant's confidential or protected information. The State shall cause any person retained for this purpose to execute a non-disclosure agreement imposing obligations of confidentiality substantially similar and at least as protective as those set forth in Section 17 above. Such reviews shall take place at a time and place agreed upon by the parties.

The Consultant shall reasonably cooperate in any State records review conducted under this Section, providing applicable records as reasonably necessary to verify the accuracy of invoices and its performance under this Agreement. The Consultant may redact from the records provided to the State any information that reveals the identity or non-public information of other Consultant customers or other Consultant confidential or protected information that is not relevant to the purposes of the review.

The Consultant shall require its subcontractors to agree to the provisions of this section.

19.10. Obligation of Joint Entities. If the Consultant is a joint entity, consisting of more than one individual, partnership, corporation or other business organization, all such entities shall be jointly and severally liable for carrying out the activities and obligations of this agreement, and for any default of such activities and obligations. For the avoidance of doubt, but without limiting the potential liability of other entities, TeleCommunication Systems, Inc. and NextGen Communications, Inc. will be jointly and severally liable and responsible for carrying out all obligations of the Consultant set forth or described in this Agreement.

- 19.11. Force Majeure Events.** Notwithstanding anything in this Agreement to the contrary, the Contractor shall not be deemed to be in default or liable for any delay or failure to provide or perform the services or any other responsibilities described hereunder, if the delay or failure is caused by war, terrorist attacks, riots, civil commotion, fire, flood, earthquake or any act of God, or other causes beyond Contractor's reasonable control. Provided, however, that in order to be excused from delay or failure to provide or perform, the Contractor must act diligently to remedy the cause of such delay or failure.
- 19.12. Exclusivity.** This Agreement is not exclusive. During the term of this Agreement, the State or other political subdivisions may obtain similar services from other service providers.
- 19.13. BIT Review.** It is understood and agreed to by all parties that the Bureau of Information and Telecommunications is representing that, as the State's technology governing organization, it has reviewed only the technical provisions of this contract.
- 19.14. Headings.** The headings appearing in this Agreement are for convenience and reference only and shall not be deemed to govern, limit, modify, or in any manner affect the scope, meaning, or intent of the provisions of this Agreement.
- 19.15. Counterparts.** This Agreement may be executed simultaneously in one or more counterparts, each of which will be considered an original, but all of which together will constitute one and the same instrument. The exchange of a fully executed Agreement (in counterparts or otherwise) by facsimile or electronic mail shall be sufficient to bind the parties to the terms and conditions of this Agreement.

[Signature page follows]

THE UNDERSIGNED PARTIES AGREE TO BE BOUND BY THE TERMS OF THIS AGREEMENT AS OF THE AGREEMENT EFFECTIVE DATE.

STATE

CONSULTANT

BY: Trevor Jones
Trevor Jones
Secretary, Department of Public Safety

BY: Richard A. Young
Richard A. Young
Executive Vice-President, COO

12-18-2014
Date

12/15/14
Date

BY: _____
Ted Ruffedt, Jr
Chair, State 9-1-1 Coordination Board

Date

The Bureau of Information and Telecommunications is representing solely that, as the State's technology governing organization, it has reviewed the technical provisions of this Agreement.

BY: _____
David Zolnowsky
Commissioner, BIT

Date

- State Agency Coding (MSA Center):
- State Agency MSA Company for which contract will be paid:
- Object/subobject MSA account to which voucher will be coded:
- Name and phone number of contact person in State Agency who can provide additional information regarding this contract **Shawnie Rechtenbaugh @ 773-8145**

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STATE

CONSULTANT

BY: _____
Trevor Jones

BY: _____
Richard A. Young

Secretary, Department of Public Safety

Executive Vice-President, COO
Title

Date

Date

BY: 
Ted Rufledt, Jr.

Chair, State 9-1-1 Coordination Board

12-11-2014
Date

The Bureau of Information and Telecommunications is representing solely that, as the State's technology governing organization, it has reviewed the technical provisions of this Agreement.

BY: _____
David Zolnowsky

Commissioner, BIT

Date

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STATE

CONSULTANT

BY: _____

Trevor Jones

Secretary, Department of Public Safety

Date

BY: _____

Richard A. Young

Executive Vice-President, COO

Title

Date

BY: _____

Ted Ruffedt, Jr

Chair, State 9-1-1 Coordination Board

Date

The Bureau of Information and Telecommunications is representing solely that, as the State's technology governing organization, it has reviewed the technical provisions of this Agreement.

BY:  _____

David Zolnowsky

Commissioner, BIT

12/12/2014

Date

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