

# COMMUNICATIONS SYSTEM AGREEMENT

Motorola, Inc., a Delaware corporation ("Motorola"), by and through the United States & Canada Group of its Commercial, Government, and Industrial Solutions Sector ("CGISS"), and the City of Miami Beach, a municipal corporation organized under the laws of the State of Florida ("Customer" or "City") enter into this Communications System Agreement (the "Agreement"), effective as of the last date signed below (the "Effective Date"), pursuant to which Customer will purchase and Motorola will provide Customer with a Communications System.

## Section 1 EXHIBITS

The Exhibits below are hereby incorporated into and made a part of this Agreement. In interpreting this Agreement and resolving any ambiguities, the main body of this Agreement will take precedence over the Exhibits and any inconsistency between the Exhibits will be resolved in the order in which the Exhibits appear below.

- Exhibit A Motorola Software License Agreement ("Software License Agreement")
- Exhibit B Memoranda of Negotiation
- Exhibit C Maintenance Terms & Conditions
- Exhibit D Performance Schedule
- Exhibit E Equipment List
- Exhibit F Pricing Summary Attachment
- Exhibit G Coverage Prediction
- Exhibit H Acceptance Test Plans (Includes all ATPs)
- Exhibit I Enhanced System Support Statement of Work and Software Subscription Agreement
- Exhibit J Statement of Work and Addendums 1 & 2
- Exhibit K Training

## Section 2 DEFINITIONS

Capitalized terms used in this Agreement and not otherwise defined within the Agreement have the following meanings:

**"Acceptance Tests"** means those tests described in the Acceptance Test Plan.

**"Contract Price"** means the price for the System, and includes any taxes and all freight to Customer sites.

**"Communications System"** or **"System"** or **"Project"** is the communications system described in Exhibits E through J, including the Equipment and Software described in the System Description, Statement of Work, Acceptance Test Plan and Equipment List, Exhibit E.

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**"Effective Date"** means that date upon which the last party to sign this Agreement has executed the Agreement.

**"Equipment"** is the equipment (and not Software) specified in the Equipment List included in Exhibit E.

**"Final Project Acceptance"** means all work has been completed, all existing Equipment has been removed from the site, and all punchlist items have been completed.

**"Infringement Claim"** means a claim that the Equipment manufactured by Motorola or the Motorola Software infringes a United States patent or copyright.

**"Motorola Software"** is software whose copyright is owned by Motorola.

**"Non-Motorola Software"** is software whose copyright is owned by a party other than Motorola.

**"Software"** includes Motorola and any Non-Motorola Software that may be furnished with the Communications System.

### Section 3 SCOPE OF AGREEMENT

- A. **SCOPE OF WORK.** Motorola will assemble and integrate the Equipment and Software, and deliver, install and test the Communications System at designated sites, as specified in accordance with this Agreement. Customer will perform its responsibilities as specified in accordance with this Agreement.
- B. **TERM.** Unless otherwise terminated or extended in accordance with the provisions of this Agreement or extended by mutual agreement of the parties, the term of this Agreement shall begin on the Effective Date and shall continue until the date of System Acceptance or expiration of the Warranty Period as set forth in Section 9, whichever occurs last; except for Exhibits A, B, C, F, I and J, which terms shall be governed by the terms specified in each Exhibit.
- C. **CHANGE ORDERS.** Changes in the quantity or character of the scope of work contemplated in this Agreement, including changes resulting in changes in the Contract Price or the time for performance, shall be authorized only by a written Change Order approved by Customer.

Motorola shall not be obligated to start work on any alteration requiring an increase in price or extension of time for completion until a Change Order setting forth the adjustment(s) has been approved by Customer. In the event satisfactory adjustment cannot be reached for any item requiring a Change Order, the parties may submit the matter to dispute for resolution as set forth in Section 14. During the pendency of the dispute resolution, Motorola shall proceed with the work set forth within the Change Order on a time and materials basis, which Motorola shall adequately document pending final resolution of such dispute(s).

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- D. **ADDITIONAL PRODUCTS.** For ten (10) years after the Effective Date of this Agreement, Customer may submit purchase orders for additional Motorola non-subscriber products manufactured by Motorola's CGISS which are currently available at the time of order. For seven (7) years after the Effective Date of this Agreement, Customer may purchase Motorola subscriber products as set forth in Memorandum of Negotiation #5 of this Agreement (Exhibit B). If Customer and Motorola have agreed to a convention for processing electronic data interchange ("EDI") transactions, purchase orders may be transmitted electronically. Each purchase order must specifically refer to this Agreement and will be an offer by Customer subject to Motorola's acceptance. Except for pricing and delivery terms, which must be stated on the purchase order, Customer and Motorola agree that the applicable terms of the main body of this Agreement will be the only terms and conditions that govern the purchase and sale of products identified on such purchase orders. Customer and Motorola agree that payment for all additional products so purchased will be due within forty-five (45) days after the date of Motorola's invoice for the products.
- E. **MAINTENANCE SERVICE.** During the first year after System Acceptance, maintenance services and software support are provided pursuant to the terms of this Agreement, including the Software Subscription Agreement and ESS (Exhibit I), and Statement of Work (Exhibit J). Such services are included in the Contract Price. After the first year following System Acceptance, Customer may purchase maintenance services and software support for the fixed infrastructure equipment of the Communications System pursuant to a separately executed Maintenance Agreement and Software Subscription Agreement. Motorola will provide Customer with two additional years of Warranty subscribers at no additional cost to Customer per Section 9A of this Agreement. After the third year following System Acceptance Customer may purchase maintenance for subscribers pursuant to a separately executed Maintenance Agreement and Software Subscription Agreement.
- F. **MOTOROLA SOFTWARE.** Any Motorola Software furnished will be licensed to Customer solely according to the terms and restrictions of the Software License Agreement attached as Exhibit A. Customer hereby accepts all of the terms and restrictions of the Software License Agreement.
- G. **NON-MOTOROLA SOFTWARE.** Any Non-Motorola Software furnished by Motorola will be subject to the terms and restrictions of its copyright owner unless such copyright owner has granted to Motorola the right to sublicense such Non-Motorola Software, in which case the Software License Agreement (including any addendum to satisfy such copyright owner's requirements) shall apply.
- H. **SUBSTITUTIONS.** At no additional cost to Customer, Motorola reserves the right to substitute any Equipment, Software, or services to be provided by Motorola, but only if the substitute meets the specifications and is of equivalent or better quality and value to the Customer. Any such substitution will be reflected in a Change Order.

### **Section 4      PERFORMANCE SCHEDULE**

- A. Motorola and Customer agree to perform their responsibilities in accordance with the Performance Schedule in Exhibit D.

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- B. By executing this Agreement, Customer authorizes Motorola to proceed with the manufacture, assembly, integration, delivery, installation, and testing of the Communications System after the parties' mutual acceptance of the Detailed Design Review. No further notice to proceed, purchase order, authorization, resolution, or any other action will be required.

### **Section 5      PAYMENT SCHEDULE**

- A. The total contract price is \$7,874,421 ("Contract Price"). Except for the first payment, which is due when Customer executes this Agreement, Customer agrees to make payments to Motorola for work performed in accordance with this Agreement, within forty -five (45) days after the date of invoices that will be submitted by Motorola according to the following payment schedule:

- 5% of the contract value due upon contract execution;
- 10% of the contract value due upon mutual acceptance of Detailed Design Review;
- 35% of the contract value for preparation of the sites (to be paid out in proportion to the work done on at each site) for the sites as follows:

|                                      |    |
|--------------------------------------|----|
| Fire Station 2 or alternate          | 9% |
| 75 <sup>th</sup> Street or alternate | 9% |
| 41 <sup>st</sup> site                | 8% |
| Rebecca Towers                       | 3% |
| Old City Hall                        | 3% |
| New City Hall                        | 3% |
- 10% of the contract value due upon FNE shipment;
- 25% of the contract value due upon installation of all sites (to be paid out proportionately on a per site basis) for the sites as follows:

|                                      |    |
|--------------------------------------|----|
| Fire Station 2 or alternate          | 7% |
| 75 <sup>th</sup> Street or alternate | 6% |
| 41 <sup>st</sup> site                | 6% |
| Rebecca Towers                       | 2% |
| Old City Hall                        | 2% |
| New City Hall                        | 2% |
- 5% of the contract value due upon System cutover;
- 10% of the contract value due upon at Final Project Acceptance. Final Project Acceptance includes removal of all existing Equipment and resolution of punch list items.

- B. The Customer is tax-exempt and will not pay or be charged freight costs.

- C. Motorola's invoice(s) shall include a breakdown of the components of the work performed and the portion of work completed and the amount due, together with such supporting evidence as may be reasonably required by Customer.

- D. Customer may withhold final payment or any progress payment to such extent as may be necessary on account of defective work not remedied by Motorola.

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### Section 6 INSTALLATION AND SITE CONDITIONS

- A. In addition to its responsibilities described in the Statement of Work, Customer agrees to provide a designated project director; use best efforts to obtain any necessary City of Miami Beach approvals (including design and planning approvals); provide access to the sites identified in the Exhibits as requested by Motorola, and use best efforts to have such sites available for installation of the Equipment by Motorola in accordance with the Performance Schedule and Statement of Work.
- B. If Customer determines during the course of performance of this Agreement that the sites identified in the Exhibits are no longer available or desired, or, if subsurface, structural, adverse environmental or latent conditions at any site differ from those indicated on the specifications in the Exhibits, Motorola and Customer will promptly investigate the conditions and jointly select replacement sites, as necessary and issue a written Change Order adjusting the installation plans and specifications.
- C. If Customer and Motorola determine that any change in sites, site availability, installation plans, or specifications will require an adjustment in the Contract Price or in the time required for the performance of this Agreement, the parties will agree to subtract the total cost of the site to be eliminated and replace it with the cost of the site to be added. However, the Equipment used for any new site will be at the price of this Agreement and the price for the 75<sup>th</sup> Street replacement site will not exceed the proposed price for the 75<sup>th</sup> Street site. All replacement site costs will be available to the Customer or its agents for review prior to any payment by the Customer. In no event shall Motorola be required to disclosed confidential or proprietary cost or pricing data.
- D. Customer will ensure that all existing work sites it provides will be safe, secure, and in compliance with all applicable industry and OSHA standards. To the extent applicable and unless the Statement of Work specifically states to the contrary, Customer will ensure that these work sites will have (i) adequate physical space for the installation, use and maintenance of the System; (ii) adequate air conditioning and other environmental conditions; (iii) adequate electrical power outlets, distribution and Equipment for the installation, use and maintenance of the System; and (iv) adequate telephone or other communication lines (except microwave circuits) for the installation, use and maintenance of the System, including modem access, and adequate interfacing networking capabilities. Before installing the Equipment at a work site, Motorola will inspect the work site and advise Customer in writing of any apparent deficiency or non-conformity with the requirements of this Section. Notwithstanding the preceding sentence, once Motorola has installed the Equipment in a particular work site, it shall be deemed to have accepted said work site. This Agreement is predicated upon normal soil conditions as defined by the version of E.I.A. standard RS-222 in effect on the Effective Date.

### Section 7 TRAINING

If training is included in this Agreement, Customer agrees to notify Motorola immediately if a date change for a scheduled training program is required. A charge will apply to a training program rescheduled by Customer less than fourteen (14) days prior to its scheduled start date.

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### Section 8 SYSTEM ACCEPTANCE

- A. The City will not intentionally use the Communications System prior to cutover. Motorola will test the Communications System in accordance with the Acceptance Test Plan. System Acceptance will occur upon the successful completion of such testing (i.e., after the system operates for 30 days without major failures, exclusive of minor punch list items) at which time both parties shall promptly execute a certificate of System Acceptance. Minor omissions or variances in performance, which do not materially affect the operation of the Communications System as a whole, will not postpone System Acceptance. Customer and Motorola will jointly prepare a list of such omissions and variances which Motorola will correct according to an agreed upon schedule. If the Acceptance Test Plan includes separate tests for individual subsystems, both parties shall promptly execute certificates of subsystem acceptance upon the successful completion of testing of such subsystems. Warranty of the Communications System will begin immediately upon System Acceptance.
- B. Motorola agrees to notify Customer in writing when the Communications System is ready for acceptance testing. Motorola and Customer agree to commence acceptance testing within ten (10) business days after receiving such notification. Unless such testing is delayed for reasons beyond the control of Customer, in which case the parties agree to commence acceptance testing as soon as possible thereafter. Unless, testing is delayed for reasons beyond Customer's control, final payment will be due within forty-five (45) days after such notification from Motorola as provided herein, and the Warranty Period will commence immediately.
- C. Motorola may, but is not obligated to, issue written authorization for Customer's use of the Communications System or its subsystem(s) for limited training or testing purposes, prior to the completion of testing by Motorola. Any intentional use of the Communications System without prior written authorization by Motorola shall constitute System Acceptance.
- D. **FINAL PROJECT ACCEPTANCE.** Final Project Acceptance will occur after System Acceptance and when all deliverables and other work have been completed including removal of all existing Equipment and resolution of punch list items. When Final Project Acceptance occurs, the parties will promptly memorialize this final event by so indicating in the appropriate place on the System Acceptance Certificate. The acceptance of final payment shall constitute a waiver of all claims by Motorola, except those previously made in writing and identified by Motorola as unsettled at the time of the final application for payment.

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## Section 9 WARRANTY

- A. **WARRANTY PERIOD.** Upon System Acceptance, the System Functionality representation described below is fulfilled. The Equipment and Motorola Software for the fixed infrastructure is warranted for a period of one (1) year after System Acceptance; subject to the warranties provided in the Memorandum of Negotiation #3 (Exhibit B). The subscribers are warranted for a period of three (3) years (i.e., initial warranty plus two additional years of warranty) following System Acceptance. All warranties shall be in accordance with the applicable limitations shown below. Customer must notify Motorola in writing if Equipment or Motorola Software does not conform to these warranties no later than one month after the expiration of the Warranty Period.
- B. **SYSTEM FUNCTIONALITY.** Motorola represents that the Communications System will satisfy the functional requirements in the Exhibits. Upon System Acceptance this System Functionality representation is fulfilled. After System Acceptance, the Equipment Warranty set forth below, and the Software Warranty set forth in the Software License Agreement will apply. Motorola will not be responsible for performance deficiencies of the System caused by ancillary equipment not furnished by Motorola, without the prior written authorization of Motorola, attached to or used in connection with the System. Additionally, Motorola will not be responsible for System performance where the functionality is reduced for reasons beyond Motorola's control including but not limited to (i) an earthquake, adverse atmospheric conditions, or other natural causes; (ii) the construction of a building that adversely affects the microwave path reliability or radio frequency (RF) coverage; (iii) the addition of frequencies at System sites that cause RF interference or intermodulation; or (iv) Customer changes to load usage or configuration outside the specifications.
- C. **EQUIPMENT WARRANTY.** Motorola warrants the Equipment against material defects in material and workmanship under normal use and service during the Warranty Period. Unless otherwise specified in writing, the Warranty Period for non-Motorola manufactured Equipment will be as stated in this Section.

At no additional charge and at its option, Motorola will either: repair the defective Equipment or replace it with the same or equivalent Equipment, and such action on the part of Motorola will be the full extent of Motorola's liability hereunder; provided that the System is functional as warranted; and provided further that the use of any "equivalent" Equipment shall first be approved in writing by Customer. Repaired or replaced Equipment is warranted for the balance of the original applicable Warranty period. All replaced parts of the Equipment shall become the property of Motorola.

Motorola warrants to Customer that Equipment as whole furnished under this Agreement will be new, and that all work will be of good quality and in conformance with the Agreement. All work not conforming to these requirements, including substitutions not approved and authorized in writing by Customer, may be considered defective. This warranty shall also extend to repaired or replaced Equipment.

### THIS WARRANTY DOES NOT APPLY TO

- a) Defects or damage resulting from use of the Equipment in other than its normal and customary manner.

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- b) Defects or damage occurring from misuse, accident, water, foreign liquids, acts of God or neglect.
  - c) Defects or damage occurring from testing, operation, maintenance, installation, alteration, modification, or adjustment not provided by Motorola, or in the case of non-Motorola supplied Equipment, not authorized by Motorola, pursuant to this Communications System Agreement.
  - d) Breakage or damage to antennas unless caused directly by defects in material or workmanship.
  - e) Equipment that has been subjected to unauthorized Equipment modifications, disassembly or repairs (including the addition to the Equipment of non-Motorola supplied Equipment if not authorized by Motorola) which adversely affect performance of the Equipment or interfere with Motorola's normal warranty inspection and testing of the Equipment to verify any warranty claim.
  - f) Equipment which has had the serial number removed or made illegible.
  - g) Batteries (because they carry their own separate limited warranty).
  - h) Equipment which, due to illegal or unauthorized alteration of the software in the Equipment, does not function in accordance with Motorola's published specifications or with the FCC type acceptance labeling in effect for the Equipment at the time the Equipment was initially distributed from Motorola.
  - i) Scratches or other cosmetic damage to Equipment surfaces that does not affect the operation of the Equipment.
  - j) Software (because it carries its own separate warranty).
  - k) Normal and customary wear and tear.
- D. **MOTOROLA SOFTWARE WARRANTY.** Motorola Software is warranted in accordance with the terms of the Software License Agreement attached as Exhibit A.
- E. These express limited warranties as set forth in this Section are extended by Motorola to the original end user purchasing or leasing the System for commercial, industrial, or governmental use only, and are not assignable or transferable. These are the complete warranties for the Equipment and Software provided pursuant to this Agreement.
- F. **THESE WARRANTIES ARE GIVEN IN LIEU OF ALL OTHER WARRANTIES. MOTOROLA DISCLAIMS ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. IN NO EVENT WILL MOTOROLA BE LIABLE FOR DAMAGES IN EXCESS OF THE PURCHASE PRICE OF THE EQUIPMENT. IN NO EVENT WILL MOTOROLA BE LIABLE FOR ANY LOSS OF USE, LOSS OF TIME, INCONVENIENCE, COMMERCIAL LOSS, LOST PROFITS OR SAVINGS OR OTHER INCIDENTAL, SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES ARISING OUT OF THE USE OR INABILITY TO USE THE EQUIPMENT, TO THE FULL EXTENT SUCH MAY BE DISCLAIMED BY LAW.**



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### Section 10 RESERVED.

### Section 11 DELAYS

- A. Successful Project implementation will require cooperation and fairness between the parties. Because it is impractical to provide for every contingency, which may arise during the course of performance of this Agreement, the parties agree to notify the other if they become aware that any condition will significantly delay performance. The parties will agree to reasonable extensions of the Project Schedule by executing a written Change Order.
- B. Under no circumstances will either party be responsible for delays or lack of performance resulting from events beyond the reasonable control of that party ("Excusable Delays"). Excusable Delays include, but are not limited to: acts of God, weather conditions, compliance with laws and regulations (excluding Customer's failure to properly and timely apply for all required FCC licenses), governmental action, bid protests, fire, strikes, lock-outs, and other labor disruptions, material shortages, riots, acts of war, and an Excusable Delay of a Motorola subcontractor.
- C. Customer will use its best efforts to make available to Motorola the sites as scheduled in Exhibit D, and Customer will not otherwise unreasonably delay or prevent Motorola's performance of its responsibilities when the sites are available. Customer agrees to give Motorola at least two weeks' notice if it delays Motorola's performance if a site is unavailable per Exhibit D, the Performance Schedule for more than thirty days (30), the Performance Schedule will be extended and, if requested by Motorola, compensate Motorola for all reasonable charges incurred because of such delay.
- D. Prior to the mutual approval of the DDR, Motorola will be entitled to a day-for-day adjustment in the schedule due to a Customer delay. After mutual approval of the DDR, any claim for actual, demonstrated costs directly due to a Customer delay will be reduced to writing in a Change Order; said costs not to exceed \$1000 per day for a cumulative maximum of thirty (30) days.

### Section 12 DEFAULT

- A. If Motorola fails to complete delivery, installation or acceptance testing in accordance with this Agreement, or otherwise breaches a material obligation under this Agreement, Customer may consider Motorola to be in default, unless such failure has been caused by an Excusable Delay. Customer agrees to give Motorola written notice of such default. Motorola will have thirty (30) business days from the receipt of such notice to provide a plan of action that is acceptable to Customer to cure the default. If Motorola provides a cure plan, it will begin implementing cure plan immediately after receipt of Customer's approval of the plan.
- B. If Motorola fails to cure the default, Customer may terminate any unfulfilled portion of this Agreement. If Customer completes the Communications System through a third party, Customer may recover the reasonable costs of completing the Communications System to a capability not exceeding that specified in the Agreement for the terminated portion. Customer agrees to use its best efforts to

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mitigate such costs. Motorola's liability under this Section is subject to the limitations of the Section entitled Limitation of Liability of this Agreement.

- C. THE REMEDIES PROVIDED IN THIS SECTION OF THE AGREEMENT WILL BE THE FULL EXTENT OF MOTOROLA'S LIABILITY IN THE EVENT OF DEFAULT.
- D. If Customer fails to pay any amount when due under this Agreement; indicates that it is unable to pay any amount when due, or otherwise breaches a material obligation under this Agreement, Motorola may consider Customer to be in default, unless Motorola or an Excusable Delay causes such failure. If Motorola asserts a default, it will give Customer written and detailed notice of the default and Customer will have thirty (30) business days thereafter to (i) dispute the assertion, (ii) cure any monetary default, or (iii) provide a written plan to cure the default that is acceptable to Motorola. If Customer provides a cure plan, it will begin implementing the cure plan immediately after receipt of Motorola's approval of the plan. Motorola shall carry on the Project and adhere to the Performance Schedule during all disputes or disagreements with Customer. No work shall be delayed or postponed pending resolution of disputes or disagreements, EXCEPT in the event that Customer shall fail to pay Motorola pursuant to the Payment Schedule in Section 5, provided Motorola has submitted an invoice with proper documentation, and no monies are being withheld to remedy defective work. In that event, Motorola may, upon seven (7) business days prior written notice to Customer, stop work until payment is made.

### Section 13 INDEMNIFICATION

- A. Motorola shall indemnify and hold harmless Customer, its officers and employees, from liabilities, damages, losses and costs, including, but not limited to reasonable attorney's fees, to the extent caused by the negligence, recklessness or intentional wrongful misconduct of Motorola and persons employed or utilized by Motorola in the performance of this Agreement. These indemnifications shall survive the term of this Agreement. In the event that any action or proceeding is brought against Customer by reason of any such claim or demand, Motorola shall, upon written notice from Customer, resist and defend such action or proceeding by counsel.

The indemnification provided above shall obligate Motorola to defend at its own expense to and through appellate, supplemental or bankruptcy proceeding, or to provide for such defense, at Customer's option, any and all claims of liability and all suits and actions of every name and description covered herein that may be brought against Customer for action caused by Motorola or persons employed or utilized by Motorola.

- B. PATENT AND COPYRIGHT INFRINGEMENT. Motorola will defend, at its own expense, any suit brought against the Customer to the extent that it is based on a claim that the Equipment or Motorola Software infringe a United States patent or copyright, and Motorola will pay those costs and damages finally awarded against the Customer in any such suit which are attributable to any such claim, but such defense and payments are conditioned on the following: i) Motorola must be notified promptly in writing by Customer of any notice of such claim; ii) Motorola will have sole control of the defense of such suit and all negotiations for its settlement or compromise; and iii) should a judgment for a claim be entered against Motorola for an infringement of a United States patent or copyright, Customer will permit Motorola, at its option and expense, either to procure for Customer the right to continue using the Equipment or Motorola Software or to replace or modify the same so that it becomes non-infringing.

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Motorola will have no liability with respect to any claim of patent or copyright infringement which is (i) based upon the combination of the Equipment or Motorola Software furnished hereunder with software, apparatus or devices not furnished or otherwise authorized by Motorola, (ii) the use of ancillary equipment or software not furnished or authorized by Motorola which is attached to or used in connection with the Equipment or Motorola Software, (iii) any Equipment that is not Motorola's design or formula and that is not so authorized by Motorola, (iv) a modification, not authorized by Motorola, of the Motorola Software by a party other than Motorola, or (v) the failure by Customer to install an enhancement release to the Motorola Software that is intended to correct the claimed infringement. The foregoing states the entire liability of Motorola with respect to infringement of patents and copyrights by the Equipment and Motorola Software or any parts thereof.

- C. Motorola's indemnification of Customer under this Section will be the full extent of Motorola's indemnification of Customer from liabilities that are in any way related to Motorola's performance under this Agreement.

### Section 14 DISPUTES

- A. Motorola and Customer will attempt to settle any claim or controversy arising from this Agreement through consultation and negotiation in good faith and a spirit of mutual cooperation. If those attempts fail, the dispute will be mediated by a mediator chosen jointly by Motorola and Customer within thirty days after notice by one of the parties demanding non-binding mediation. Mediation shall take place in Miami-Dade County. Any mediator used shall be certified in accordance with Florida law. Neither party may unreasonably withhold consent to the selection of a mediator, and Motorola and Customer will share the cost of the mediation equally. The parties may postpone mediation until they have completed some specified but limited discovery about the dispute. The parties may also replace mediation with some other form of non-binding alternate dispute resolution ("ADR") procedure. Pending final resolution of a claim, including mediation or any other form of ADR, unless otherwise agreed to in writing, Motorola shall proceed diligently with performance of the Agreement.
- B. Any dispute that cannot be resolved between the parties through negotiation or mediation within two months after the date of the initial demand for non-binding mediation may then be submitted by either party to a court of competent jurisdiction in Miami-Dade County, Florida. Each party consents to jurisdiction over it by such a court. The use of any ADR procedures will not be considered under the doctrine of laches, waiver, or estoppel to affect adversely the rights of either party. Either party may resort to the judicial proceedings in Miami -Dade County, described in this paragraph prior to the expiration of the two-month period if (a) good faith efforts to attempt resolution of the dispute under these procedures have been unsuccessful or (b) interim relief from the court is necessary to prevent serious and irreparable injury to such party or any of its affiliates, agents, employees, customers, suppliers, or subcontractors.
- C. WAIVER OF JURY TRIAL. This Agreement shall be interpreted and construed in accordance with and governed by the laws of the State of Florida. Any controversies or legal problems arising out of this Agreement and any action involving the enforcement or interpretation of any rights hereunder shall be submitted to the

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jurisdiction of the State courts of the Eleventh Judicial Circuit of Miami-Dade County, Florida, the venue sites, and shall be governed by the laws of the State of Florida. By entering into this Agreement, Motorola and Customer hereby expressly waive any rights either party may have to a trial by jury of any civil litigation related to, or arising out of the Project.

### **Section 15      LIMITATION OF LIABILITY**

Notwithstanding any other provision to this Agreement, except for personal injury or death, Motorola's or Customer's total liability, whether for breach of contract, warranty, negligence, strict liability in tort, indemnification, or otherwise, is limited to the direct damages recoverable under law, but not to exceed the Contract Price of the Equipment or services with respect to which losses or damages are claimed. IN NO EVENT WILL MOTOROLA OR CUSTOMER BE LIABLE FOR ANY LOSS OF USE, LOSS OF TIME, INCONVENIENCE, COMMERCIAL LOSS, LOST PROFITS OR SAVINGS, OR OTHER INCIDENTAL OR CONSEQUENTIAL DAMAGES RELATED TO OR ARISING FROM THIS AGREEMENT, THE SALE OR USE OF THE EQUIPMENT, OR THE PERFORMANCE OF SERVICES BY MOTOROLA TO THE FULL EXTENT THAT SUCH MAY BE DISCLAIMED BY LAW. This Limitation of Liability will survive the expiration or termination of this Agreement.

Nothing contained in this paragraph or elsewhere in this Agreement is in any way intended to be a waiver of the limitation placed upon the City's liability as set forth in Section 768.28, Florida Statutes.

### **Section 16      GENERAL**

- A. **TITLE AND RISK OF LOSS.** Title to the Equipment will pass to Customer upon shipment of the Equipment, except for damage in transit and title to Software will not pass to Customer at any time. Risk of loss will pass to Customer upon System Acceptance.
- B. **TAXES.** The Contract Price does not include any amount for federal, state, or local excise, sales, lease, service, rental, use, property, occupation, or other taxes, all of which (other than federal, state, and local taxes based on Motorola's income or net worth) will be paid by Customer except as exempt by law. If Motorola is required to pay or bear the burden of any such taxes, Motorola will send an invoice to Customer and Customer will pay to Motorola the amount of such taxes (including any interest and penalties) within thirty days after the date of the invoice. Customer will be solely responsible for reporting the Equipment for personal property tax purposes.
- C. **CONFIDENTIAL INFORMATION.** Customer will not disclose any material or information identified as Motorola proprietary and confidential to third parties without Motorola's prior written permission, unless Motorola makes such material or information public or disclosure is required by Florida law. If Customer is required by Florida law to disclose such material or information, Customer will notify Motorola prior to such disclosure.

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- D. **DISCLAIMER OF LICENSE.** Except as explicitly provided in the Motorola Software License Agreement included in Exhibit A, nothing in this Agreement will be deemed to grant, either directly or by implication, estoppel, or otherwise, any license or right under any patents, patent applications, copyrights, trade marks, trade secrets or other intellectual property of Motorola.
- E. **ASSIGNABILITY.** This Agreement may not be assigned by either party without the prior consent of the other party except that Motorola may assign this Agreement to any of its affiliates, or its right to receive payment without the prior consent of Customer.
- F. **WAIVER.** Failure or delay by either party to exercise any right or power under this Agreement will not operate as a waiver of such right or power.
- G. **SEVERABILITY.** If any portion of this Agreement is held to be invalid or unenforceable, that provision will be considered severable and the remainder of this Agreement will remain in full force and effect as if the invalid provision were not part of this Agreement.
- H. **HEADINGS AND SECTION REFERENCES.** The headings given to the sections of this Agreement are inserted only for convenience and are not to be construed as part of this Agreement or as a limitation of the scope of the particular Section to which the heading refers.
- I. **ENTIRE AGREEMENT.** This Agreement (including the Exhibits) constitutes the entire agreement of the parties regarding the subject matter of this Agreement and supersedes all previous agreements and understandings, whether written or oral, relating to such subject matter. This Agreement may be altered, amended, or modified only by a written instrument signed by the duly authorized representatives of both parties.
- J. **GOVERNING LAW.** This Agreement will be governed by and construed in accordance with the laws of the State of Florida.
- K. **NOTICES.** Notices authorized or required under this Agreement must be in writing and sent to the below addresses:

Customer: City of Miami Beach  
Attn: Director, Information Technology  
Address1 1100 Washington Ave.  
City, St, Zip: Miami Beach, FL 33139

Motorola, Inc., Southern Division  
Attn: Division Contract Manager  
789 International Parkway  
Sunrise, FL 33325

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In witness whereof, the parties have caused duly authorized representatives to execute this Agreement on the dates set forth below.

IN WITNESS WHEREOF:

**Customer:** City of Miami Beach, FL  
**By:** *[Signature]*  
**Name:** LUIS R. GARCIA, JR.  
**Title:** VICE-MAYOR  
**Date:** APRIL 30, 2003

**Motorola, Inc.**  
**By:** *[Signature]*  
**Name:** Mark F. Moon  
**Title:** Vice President and General Manager, Southern Division  
**Date:** May 1, 2003

**ATTEST:** Robert Pancher  
City Clerk

**CONTRACTS DEPT.  
APPROVAL**  
*[Signature]*  
**MOTOROLA**

**APPROVED AS TO  
FORM & LANGUAGE  
& FOR EXECUTION**

*[Signature]*      *5/26/03*  
**City Attorney**      **Date**