

**GALVESTON COUNTY COMMISSIONERS COURT
GALVESTON COUNTY COURTHOUSE
722 MOODY (FIRST FLOOR) - GALVESTON
NOVEMBER 18, 2011 – 4:00 P.M.**

CONSENT AGENDA: ALL ITEMS MARKED WITH A SINGLE ASTERISK (*) ARE PART OF THE CONSENT AGENDA AND REQUIRE NO DELIBERATION BY THE COMMISSIONERS COURT. ANY COMMISSIONERS' COURT MEMBER MAY REMOVE AN ITEM FROM THIS AGENDA TO BE CONSIDERED SEPARATELY. **APPEARANCES:** SHOULD ANYONE WISH TO ADDRESS THE COMMISSIONERS COURT ON A SPECIFIC ITEM, PLEASE ARRIVE PRIOR TO THE MEETING AND SIGN IN WITH THE COUNTY CLERK. COMMENTS ARE LIMITED TO 5 MINUTES.

SPECIAL MEETING – AGENDA – 4:00 P.M.

1. Call to Order Specially Scheduled Meeting - 4:00 p.m.
2. Consideration of Order Granting Professional Services Exemption from competitive bidding or proposal requirements for contract with, and authorizing executor of contract with, Foxhoven, Inc. d/b/a Net Sales Direct, submitted by the County Judge.
3. Adjourn Special Meeting.

AGENDA

ITEM

#2

Galveston County in its review and investigation of the management and operation of the County's Information Technology Department and to that end a contract for the provision of such services, the "NSD Professional Services Agreement" has been prepared and is attached hereto.

Now, Therefore, it is hereby ORDERED by the Commissioners' Court of Galveston County, Texas, that

The Commissioners' Court **FINDS** that the services to be performed by Net Sales Direct pursuant to the NSD Professional Services Agreement constitute professional services,

The Commissioners' Court **GRANTS** an exemption from the competitive bidding or procurement requirements prescribed by the County Purchasing Act for such Information Technology Services,

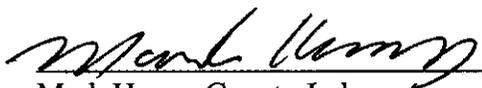
The Commissioners' Court **APPROVES** the NSD Professional Services Agreement that is attached hereto and **INCORPORATES** same herein for all purposes, and

The Commissioners' Court **AUTHORIZES** the County Judge, or in his absence that member of the Commissioners' Court serving as the Acting County Judge/Presiding Officer of the Commissioners' Court Meeting of November 18, 2011, to **EXECUTE** the NSD Professional Services Agreement that is attached hereto and incorporated herein

Upon Motion Duly Made and Seconded, the above **ORDER** is hereby **ADOPTED**, on this, the 18th day of November, 2011

COUNTY OF GALVESTON, TEXAS,

By:



Mark Henry, County Judge

ATTEST:

Dwight D. Sullivan,
County Clerk of Galveston County, Texas

By  Deputy
Mac Ross

Mac Ross



NSD Professional Services Agreement

TABLE 1

Professional Service Plan	Fees
NSD Professional Services - Payment	\$50,000 /month
Initial Lockdown, Assessment, Restructure ("Lockdown Fee")	\$40,000
Texas State Sales Tax	\$ _____
Lockdown Fee Due on ___/___/_____	\$40,000
First Month Due Within 30 Days of Invoice	\$50,000
Normal Hours 8AM-5PM, M-F	Included
Agreement Effective Date	11/10/2011
Agreement End Date	02/09/2012
Potential for Auto-Renewal of Agreement	Y ___ N ___

Service Location(s)
Service Location(s) for (Client name) <u>Galveston County Facilities, all of which are located in Galveston County</u>
<ul style="list-style-type: none"> (Client address) <u>See above</u>

Emergency Contact Information
NSD Emergency/Account Contact Name <u>James Johnson</u>
Cell Phone Number (832) <u>348-0388, james@netsalesdirect.com</u>

"PARTIES" TO THE AGREEMENT. This NSD Professional Services Agreement (the "Agreement") is between

Foxhoven, Inc., DBA as Net Sales Direct ("NSD") having its principal place of business at 10203 Birchridge Dr Suite 330-B, Humble, TX 77338,

AND

Galveston County ("Client"), having its principal place of business at 722 Moody, 2nd Floor, Galveston, Texas 77550



Client's Account Primary Contact:

Name	<u>Mark Henry</u>
Telephone	<u>(409) 770-5806</u>
Email	<u>mark henry@co.galveston.tx us</u>

NSD's Account Primary Contact:

Name.	<u>Brett Foley</u>
Telephone	<u>(713) 444-6338</u>
Email	<u>Brett@NSDVault.com</u>

**ARTICLE I
OVERVIEW**

1.1 Overview

This Agreement sets forth the terms and conditions under which NSD will provide the services described in Section 3.1. Among the reasons that the Parties are entering into this Agreement is Client's desire to audit, evaluate, and make recommendations regarding Client's IT solutions.

1.2 Exclusivity

Client AGREES that NSD shall be Client's exclusive provider of the Services listed below under Section 3.1 during the Agreement Term. Nothing in this Agreement shall be construed to prevent or inhibit NSD in any way from providing similar services to Client's competitors. See Confidentiality Clause.

1.3 Account Contact

Each Party will designate an individual to serve as its "Account Contact" under this Agreement. Each Party's Account Primary Contact will (i) serve as the principal point of contact for coordinating and managing that Party's obligations under this Agreement, and (ii) be authorized to act for and on behalf of that Party as that Party's agent with respect to all matters relating to this Agreement, subject to the limitations set forth in this Agreement and any other limitations of which the other Party is notified and to which it agrees in writing, which Agreement will not be unreasonably withheld.

1.4 Access to Client's Facility

Client (i) shall grant to, or obtain reasonable access for, NSD during Client's normal business hours (and at any other hour as reasonably requested by NSD) to the equipment, facilities, and systems in Client's possession or control to which NSD reasonably requires access to perform its obligations under this Agreement, and (ii) shall use commercially reasonable efforts to grant to, or obtain reasonable access for NSD during normal business hours (and at any other hour as reasonably requested by NSD) to Client's equipment, facilities, and systems to which NSD reasonably requires access to perform its Services under this Agreement, subject to the following conditions:

- (a) **Rules** NSD Personnel and each business invitee of such NSD Personnel shall obey all generally applicable rules and procedures at any Client facility of which Client has notified NSD. When



NSD Professional Services Agreement

NSD Personnel are located at Client's facility, NSD shall use, and shall cause all NSD Personnel to use, such facility only to provide the Services, provided that such NSD Personnel may perform limited back office work at Client Service Locations that is incidental to the provision of the Services

- (b) **Alteration.** NSD shall not make any structural, mechanical or electrical alterations to Client's facilities without, as applicable, Client's prior approval
- (c) **Structure** Subject to Client's obligations under Section 2.6, when a portion of Client's facilities occupied by NSD Personnel is no longer required to perform the Services, NSD shall return such portion to Client in the same condition as when NSD began use of such portion, except for (i) authorized alterations and modifications, and (ii) reasonable wear and tear
- (d) **Limited Access** Client may impose reasonable security procedures to limit access to those portions of Client's facilities being used by NSD to perform the Services
- (e) **Changes by Client** Client shall not make any changes to a facility owned, leased or controlled by Client where the Services are being performed if Client reasonably expects such change (i) to have a material adverse effect on NSD ability to perform its obligations (including its obligation to meet any Service Levels) hereunder, or (ii) materially to increase the cost to NSD to perform its obligations hereunder, without prior written notice to and approval by NSD (such approval not to be unreasonably withheld or delayed)

1.5 On-Site: Client Obligation

As to any portion of Client's facilities to be occupied by NSD Personnel under Section 2.5 to provide the Services, Client shall provide to the assigned NSD Personnel at no charge, for use primarily in connection with performance of the Services (i) a reasonable work environment, including office space, basic furniture, a telephone, utilities and common office supplies, (ii) reasonable access to photocopy, printer, facsimile, and similar office equipment, (iii) reasonable facility maintenance and janitorial services, (iv) desktop computers, workstations, terminals, printers and other equipment reasonably required by NSD Personnel in connection with the performance of the Services, and (v) reasonable access to the networks located at facilities within their responsibility and required for the provisions of the Services

1.6 Conduct of NSD Personnel

While at Client's Location, NSD Personnel will conduct themselves in a businesslike manner and will comply with the Client's reasonable requests and generally applicable rules and regulations, including all safety and security rules and regulations of which NSD has been notified



**ARTICLE II
SCHEDULE OF FEES, HOURS, TERM DATES, SITE INFORMATION,
AND EMERGENCY NSD CONTACT**

2.1 Schedule of Fees, Hours, Term Dates, Site Information, and Emergency NSD Contact

NSD and Client AGREE that the fees, payment dates, term dates, and site information identified in Table 1 above represent the agreement of the Parties for the services provided under Section 3.1 of this Agreement.

**ARTICLE III
DESCRIPTION OF SERVICES PROVIDED UNDER THE
“NSD PROFESSIONAL AGREEMENT”**

3.1 Description of Services Provided Under the “NSD Professional Services Agreement”

Commencing on the Agreement Effective Date and continuing throughout the Agreement Term, NSD shall provide, as an independent contractor, as consideration for the fees Client pays to NSD pursuant to the Schedule of Fees above, the following services and functions and assume the following responsibilities, as they may evolve during the Agreement Term and as they may be supplemented, enhanced, modified, or replaced in accordance with the terms of this Agreement.

- **NSD to perform General Audit**
- **NSD to perform Network Audit Discovery**
- **NSD to perform Policies & Procedures Review**
- **NSD to perform Vendor Review**
- **NSD to perform Customer Service Review**
- **NSD to provide Final Report to Client**
- **NSD to make Recommendations for Future**

3.2 Services Required for Proper Performance of Services Provided Under “NSD Professional Services Agreement” Listed Above

Any services, functions, or responsibilities that are not specifically described in Section 3.1 above, but which are required for the proper performance and delivery of the services, functions, and responsibilities that are specifically described in Section 3.1, including, but not limited to, any services, functions or responsibilities that are reasonably (i) required for the performance of obligations under this Agreement, or (ii) required sub-tasks for the proper performance and provision of the services, functions and responsibilities described in Section 3.1, which services shall be deemed to be implied by, and included within, the scope of the NSD Professional Services Agreement to be provided by NSD to the same extent and in the same manner as if specifically described in the definition thereof, provided, however, that, notwithstanding the foregoing, services, functions or responsibilities that are specifically excluded from the scope of NSD Professional Services Agreement under this Agreement (e.g., the “Additional Services” and those services for which this Agreement expressly states shall cause Client to pay additional fees) shall not be deemed to be within the scope of the NSD Professional Services Agreement.



3.3 Service Location

The services provided for under this Agreement shall occur on-site and remotely. The On-Site Support services covered by this Agreement are limited to the Service Location provided for Table 1 of this Agreement. If Client requests support at locations other than the Service Location, Client AGREES that it shall pay additional fees for support services provided at these other locations.

3.4 Use Restriction

Client will use its best efforts to prevent any unauthorized use of the Services and documentation and immediately notify NSD in writing of any unauthorized use that comes to Client's attention. If there is unauthorized use by anyone who obtained access to the Services directly or indirectly through Client, Client will take all steps reasonably necessary to terminate the unauthorized use. Client will cooperate and assist with any actions taken by NSD to prevent or terminate unauthorized use of the Services.

ARTICLE IV

ADDITIONAL SERVICES; AFTER-HOURS SUPPORT and EMERGENCY SUPPORT for ADDITIONAL SERVICES

4.1 Additional Services

Unless otherwise agreed by the Parties, Client will pay NSD for Additional Services at the rates set forth in Section 4.2, and as such rates are adjusted annually. NSD will deliver invoices to Client in accordance with Article V, for all amounts due and payable, and each such invoice will be due pursuant to Section 5.1 the due-date for which shall be indicated on the invoice. The parties UNDERSTAND and AGREE that the following services are NOT included in the "NSD Professional Services Agreement" and constitute "Additional Services," provided however, any services that would result in increased charges to the Client require prior written approval by one of Client's authorized agents:

- ♦ **Any services, replacement of equipment, and/or upgrades** under Section 3.1 that are not covered services under this Agreement.
- ♦ **Operating System / Application Reload Services:** Any services that include reloading a Server's Operating System, or reloading applications that reside on a Server, shall be invoiced at the hourly-rate, as specified below.
- ♦ **Router and Switch IOS Upgrades:** Any services that include installing IOS upgrades on Routers and Switches will be invoiced at the hourly-rate, as specified below.
- ♦ **CLIENT Hosted MS Exchange Maintenance & Upgrades:** MS Exchange maintenance and software upgrades will be invoiced at the hourly-rate, as specified below.
- ♦ **Server Operating System Upgrades:** Installation and configuration of a Server Operating System Upgrades shall require a new Agreement between CLIENT and NSD and is not covered by this Agreement.
- ♦ **Emergency and After-Hours support:** CLIENT shall incur additional fees for emergency and after-hours support, which means, for purposes of this Agreement, support provided during days and times that are not Normal Business Hours, as defined above.
- ♦ **NEW Solutions and Capabilities:** NSD will invoice for services that provide new capabilities and/or solutions to the CLIENT.



- ♦ **Locations Not Listed In This Agreement:** CLIENT shall incur additional fees if CLIENT requests On-Site Services or support for locations not listed in this Agreement. These charges will be invoiced at the hourly-rate, as specified below.
- ♦ **Cabling and relocation services:** CLIENT shall incur additional fees for additional network “cabling drops,” relocating workstations, and telephones that CLIENT requests.
- ♦ **Off-site storage of data backup:** Off-site data storage is not included as part of this Agreement. If CLIENT desires to provide significantly heightened protection for its data via off-site storage, CLIENT and NSD must sign a new Agreement covering this service.
- ♦ **Hardware and Software:** CLIENT shall incur additional fees for repair of, or new parts for, the workstations, cables, peripheral, printer parts and all other repair parts.

4.2 Fees for Additional Services; After-Hour’s Support and Emergency Support for Additional Services

Should Additional Services be requested, CLIENT shall incur additional fees at the following hourly rates and minimums, provided however, that the total fees under this Agreement shall not exceed two-hundred thousand dollars (\$200,000.00) unless both Parties mutually AGREE in writing to services and fees beyond that amount.

- Additional Services shall be billed according to the amounts indicated in NSD’s written proposal for those Additional Services, whether written in an individual proposal or in an email to Client, at the Standard rate of **\$125.00 per hour**.
- After-hours support, meaning support provided for Additional Services that does not occur between the hours of 8:00 a.m. and 5:00 p.m. Monday through Friday, shall be billed at rate of **\$187.50 per hour** (“time and a half”),
- Emergency remote support, meaning support provided for Additional Services that does not occur between the hours of 8:00 a.m. and 5:00 p.m. Monday through Friday and for which the support is requested to begin within an hour of said request and shall occur remotely, shall be billed at an Emergency Remote rate of **\$175.00 per hour**, with a minimum 1-hour charge per emergency, and
- Emergency onsite support, meaning support provided for Additional Services that does not occur between the hours of 8:00 a.m. and 5:00 p.m. Monday through Friday and for which the support is requested to begin within an hour of said request and shall occur on-site (Client’s facility), shall be billed at an Emergency Onsite rate of **\$250.00 per hour** with a minimum 2-hour charge per emergency.

Notwithstanding the above, the Parties AGREE that during the first three (3) weeks after full execution of this Agreement, the after-hours support, emergency remote support, and emergency onsite support costs shall not apply.

Please ask NSD personnel for a list of other Additional Services that NSD can provide to Client, if requested and terms for which are negotiated between the Parties.



**ARTICLE V
BILLING, PAYMENTS, AGREEMENT TERM**

5.1 Billing and Payments

Client AGREES to pay the installation/set-up fee on the day that Client is invoiced for said fee. For the remaining monthly fees, NSD shall send invoices to Client and Client AGREES to pay for the services listed in the amount invoiced **by 5:00 p.m. on the thirtieth (30th) day following the date the invoice is received by Client**. NSD will invoice Client monthly for (i) the Services performed during the previous month, including, to the extent applicable, NSD's good faith estimate of its fees and expenses for any Services to be provided on a time and materials or similar basis, (ii) any Additional Services in accordance with the terms of the applicable Proposal for Additional Services, (iii) all reimbursable expenses incurred and all pass-through expenses for which invoices were received during the previous month, and (iv) an adjustment for any underpayments or overpayments made in connection with any previous month's estimated fees or expenses or other applicable correction.

5.2 Disputed Invoice(s)

If Client reasonably and in good faith disputes the amounts due under any invoice, Client shall give prompt notice of such dispute to NSD's account manager in writing within thirty (30) days after receiving the applicable invoice, together with a reasonably detailed written explanation signed by the Client's Primary Account Manager of the disputed amount and grounds for the dispute.

If the aggregate amounts payable under all invoices disputed by Client is less than or equal to \$200.00, Client may withhold payment of such amounts. Client's failure to pay amounts disputed in accordance with this paragraph will not (prior to the resolution of the applicable dispute) be grounds for a claim of breach or suspension of work by NSD unless Client fails to pursue a prompt resolution of such dispute within thirty (30) days after the applicable invoice date in good faith.

5.3 Adjustment of Fee Amounts

Client UNDERSTANDS and AGREES that NSD reserves the right to increase fees, if necessary, after the completion of the initial Term of the Agreement, or if Client's needs increase, provided that Client agrees to said fee increases.

If free parking is not provided, NSD shall charge the Client for actual parking fees incurred. Client UNDERSTANDS and AGREES that if NSD is required to travel to remote Client locations, or on behalf of the Client, for any reason, travel charges will be invoiced to the Client.

5.4 Overpayment(s)

NSD will credit any overpayments made by Client against the Client's account after discovery of the overpayment, or, upon request by Client, promptly returned to Client. Any such credits owed to Client at the termination or expiration of this Agreement will be paid to Client by NSD within sixty (60) days after termination or expiration of this Agreement except as provided otherwise in this Agreement.



5.5 Agreement Term

This Agreement between the Client and NSD is effective upon the date the Agreement is executed in full and shall remain in force until the Agreement End Date in Table 1 above

5.6 Early Termination

If Client terminates this Agreement at any time prior to the Agreement End Date in Table 1 above Client AGREES to pay the Lockdown Fee in its entirety and the fees due for services performed up until the date that services actually terminate on a pro rata basis

ARTICLE VI

FAILURE TO PAY; TERMINATION OF AGREEMENT; RISK OF LOSS; WARRANTY DISCLAIMER; LIMITATION OF LIABILITY; AND MUTUAL INDEMNIFICATION

6.1 Failure to Pay

Client UNDERSTANDS this Agreement and ACCEPTS responsibility for payment of all services rendered under this Agreement, whether covered by the monthly fee; installment fee, lump-sum fee, or incurred as an additional fee for additional services (if any), after-hours services (if any), and emergency support (if any) The Parties AGREE that if Client fails to pay the installation/set-up fee in Table 1 upon receipt of invoice for said fee and/or Client's payment to NSD is not received by the thirtieth (30th) day following Client's receipt of invoice, then Client is late and shall be in breach of this Agreement If Client is in default for failure to pay the installation/set-up fee and/or the monthly service fee(s), Client shall provide NSD with written explanation for the failure to pay the monthly service fee and inform NSD of when Client intends to pay the outstanding balance If Client is in default, NSD may be released from its obligations under this Agreement without liability, if, in NSD's sole discretion, NSD decides to discontinue services under this Agreement or terminate the Agreement based on Client's default Client shall be provided written notice (which may occur via email notice to Client's Primary Account Contact) of NSD's decision, and said notice, including the date of the termination of NSD's services, whether immediate or on a date certain, shall be effective upon receipt of said notice by Client

Late payments of amounts properly due and not subject to a dispute or an unsatisfied milestone, and any amounts due from Client that are not paid within thirty (30) days of the applicable date such amounts become due to Client, shall accrue interest pursuant to the Prompt Pay Act

6.2 Termination of Agreement

The Parties UNDERSTAND and AGREE that either or both Party may, for any reason, or no reason, terminate this Agreement by providing the other Party with thirty (30) days advanced written notice (which may occur via email notice to either Party's Primary Account Contact) Unless Client is in default pursuant to Section 6.1, NSD shall continue providing the services under this Agreement for thirty (30) days from the date that either Party sends written notice of its intent to terminate the Agreement If the thirty-day period ends on a date other than the first of the month, the service fees for that month shall be pro-rated



6.3 Risk of Loss

Client ACKNOWLEDGES and UNDERSTANDS that, although NSD will take reasonable measures to ensure that none of Client's data is lost, there are no measures that can be taken to guarantee one hundred percent (100%) that there will never be a loss of data

6.4 Warranty Disclaimer

NSD WARRANTS THAT ALL SERVICES RENDERED UNDER THIS AGREEMENT SHALL BE PERFORMED IN A PROFESSIONAL, GOOD, AND WORKMANLIKE MANNER AND THAT IT WILL EXERT ITS BEST EFFORTS TO DILIGENTLY PERFORM ITS DUTIES UNDER THIS AGREEMENT

EXCEPT AS PROVIDED ABOVE, NSD MAKES NO REPRESENTATION, WARRANTY, OR GUARANTY AS TO THE RELIABILITY, TIMELINESS, QUALITY, SUITABILITY, AVAILABILITY, ACCURACY OR COMPLETENESS OF THE SERVICES NSD DOES NOT REPRESENT OR WARRANT THAT (A) THE USE OF THE SERVICES WILL BE SECURE, TIMELY, UNINTERRUPTED OR ERROR-FREE OR OPERATE IN COMBINATION WITH ANY OTHER HARDWARE, SOFTWARE, SYSTEM OR DATA, (B) THE SERVICES WILL MEET CLIENT'S REQUIREMENTS OR EXPECTATIONS, (C) ANY STORED DATA WILL BE ACCURATE OR RELIABLE, (D) THE QUALITY OF ANY PRODUCTS, SERVICES, INFORMATION, OR OTHER MATERIAL PURCHASED OR OBTAINED BY CLIENT THROUGH THE SERVICES WILL MEET CLIENT'S REQUIREMENTS OR EXPECTATIONS, (E) ERRORS OR DEFECTS WILL BE CORRECTED, OR (F) THE SERVICES OR THE SERVER(S) THAT MAKE THE SERVICES AVAILABLE ARE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS THE SERVICES ARE PROVIDED TO CLIENT STRICTLY ON AN "AS IS" BASIS ALL CONDITIONS, REPRESENTATIONS AND WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR NON- INFRINGEMENT OF THIRD PARTY RIGHTS, ARE HEREBY DISCLAIMED TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW BY NSD.

6.5 Limitation of Liability

NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS AGREEMENT, NSD WILL NOT, UNDER ANY CIRCUMSTANCES, BE LIABLE TO CLIENT FOR CONSEQUENTIAL, INCIDENTAL, SPECIAL, OR EXEMPLARY DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT, INCLUDING, BUT NOT LIMITED, TO LOST PROFITS, LOSS OF BUSINESS, AND/OR LOSS OF DATA, EVEN IF NSD IS APPRISED OF THE LIKELIHOOD OF SUCH DAMAGES OCCURRING

UNDER NO CIRCUMSTANCES WILL NSD'S TOTAL LIABILITY OF ALL KINDS ARISING OUT OF OR RELATED TO THIS AGREEMENT (INCLUDING, BUT NOT LIMITED TO, WARRANTY CLAIMS), REGARDLESS OF THE FORUM AND



REGARDLESS OF WHETHER ANY ACTION OR CLAIM IS BASED ON CONTRACT, TORT, OR OTHERWISE, EXCEED THE TOTAL AMOUNT PAID BY CLIENT TO NSD DURING THE SIX (6) MONTHS IMMEDIATELY PRECEDING THE CLAIM (DETERMINED AS OF THE DATE OF ANY FINAL JUDGMENT IN AN ACTION)

EACH PROVISION OF THIS AGREEMENT THAT PROVIDES FOR A LIMITATION OF LIABILITY, DISCLAIMER OF WARRANTIES, OR EXCLUSION OF DAMAGES IS TO ALLOCATE THE RISKS OF THIS AGREEMENT BETWEEN THE PARTIES THIS ALLOCATION IS REFLECTED IN THE PRICING OFFERED BY NSD TO CLIENT AND IS AN ESSENTIAL ELEMENT OF THE BASIS OF THE BARGAIN BETWEEN THE PARTIES EACH OF THESE PROVISIONS IS SEVERABLE AND INDEPENDENT OF ALL OTHER PROVISIONS OF THIS AGREEMENT THE LIMITATIONS IN THIS SECTION 6.5 WILL APPLY NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY IN THIS AGREEMENT

6.6 Indemnification

NSD shall indemnify and hold Client and its parent organization, subsidiaries, affiliates, officers, directors, employees, attorneys and agents, if any, harmless from and against any and all claims, costs, damages, losses, liabilities and expenses (including attorneys' fees and costs) (provided these claims, costs, damages, losses, liabilities and expenses do not exceed the total amount paid by the Client to NSD for a specific end customer during the twelve (12) months immediately preceding the claim), arising out of or in connection with: (a) a claim alleging that the Services as made available by NSD directly infringe a copyright or a trademark of a third party; or (b) a claim arising from breach of this Agreement by NSD, provided that Client (i) promptly give written notice of the claim to NSD; (ii) give NSD sole control of the defense and settlement of the claim (provided that NSD may not settle or defend any claim unless it unconditionally releases Client of all liability), (iii) provide to NSD all available information and assistance; and (iv) have not compromised or settled such claim. NSD shall have no indemnification obligation for claims arising from any alleged infringement involving the combination of the Services with any of Client's products, service, hardware or business.

ARTICLE VII CONFIDENTIALITY

7.1 Confidential Information Defined

Each Party AGREES that all information of the other Party, including, but not limited to.

- (i) information regarding the other Party's trade secrets, business activities and plans,
- (ii) information regarding the other Party's customers, vendors suppliers, and other business partners,
- (iii) information regarding the other Party's marketing, engineering, and financial strategy and information, business methods, data contained in the systems and market segmentation related thereto,



- (iv) information regarding the other Party's technologies, systems, and processes, as well as other financial, business, and technical information, research, designs, plans, compilations, methods, techniques, procedures and know-how communicated, accessed by, or revealed, transmitted, processed, stored, archived, or maintained in connection with this Agreement or its performance,
- (v) information of a third party, including customers and suppliers of the other Party, obtained or created in connection with the Services,
- (vi) information that is confidential by State and/or Federal law (examples of this kind of information include information considered confidential under the Transportation Code, the Medical Practice Act, the Americans with Disabilities Act, etc. The list herein is not exhaustive) NSD understands and agrees that the unlawful disclosure or release or sharing of such information is an offense
- (vii) the terms of this Agreement,

regardless of whether any of the foregoing is in tangible or intangible form, and whether or not stored, compiled, or memorialized physically, electronically, graphically, photographically or in writing is, collectively, "*Confidential Information* "

All Confidential Information of the disclosing Party shall be treated as strictly confidential. Each Party's Confidential Information shall be and remain the property of such Party. None of the other Party's Confidential Information or any part thereof, shall be sold, assigned, leased, or otherwise disposed of to any third-party by the other party, or commercially exploited by or on behalf of the other party, its employees or agents. Each Party shall use commercially reasonable efforts to cause its agents, employees, and third-party contractors to comply with this Section 7.1 to the extent that they have access to the Confidential Information of the other Party. In addition, Client shall use commercially reasonable efforts to cause its agents, employees, third-party contractors, and clients to comply with this Section 7.1 to the extent that they have access to NSD's Confidential Information.

Notwithstanding the foregoing, the Parties hereto AGREE and UNDERSTAND that Client is a governmental body subject to the Public Information Act ("PIA"), and is required to release information in accordance with the PIA. Client AGREES that it shall provide notice to NSD in accordance with the PIA in the event the Client receives a PIA request for NSD's information.

7.2 Exceptions

Confidential Information shall not include information that (i) is known by the receiving Party without an obligation of confidentiality on the date of its disclosure to the receiving Party, (ii) is independently developed by the receiving Party without any use of or reliance on the disclosing Party's Confidential Information, (iii) is or becomes publicly available without a breach of this Agreement by the receiving Party, (iv) is disclosed to the receiving Party by a third person who is not required to maintain its confidentiality, or (v) is required to be disclosed by reason of legal or accounting requirements beyond the reasonable control of the receiving Party, provided, however, in such event, the Party subject to such legal or accounting requirement shall notify the other Party in writing promptly and shall cooperate reasonably with the other party at the other Party's expense in seeking a Protective Order or other appropriate



remedy The receiving Party shall have the burden of proving the applicability of any of the foregoing exceptions

7.3 Duty of Care

Each Party shall use at least the same degree of care as it employs with respect to its own Confidential Information of like importance but, in any event, no less than a reasonable degree of care, to avoid unauthorized disclosure or use of the other Party's Confidential Information

7.4 Permitted Disclosure

Each Party may disclose Confidential Information only to its own officers, directors and employees and to its subcontractors, consultants or advisors, who reasonably need to know it for the purpose of performing their obligations under this Agreement and who are under a duty of confidentiality with respect to such Confidential Information

7.5 Impermissible Uses

Neither Party may use the other party's Confidential Information to compete with, or to allow others to compete with, the other Party, or for any purpose not in furtherance of this Agreement In addition, each Party shall (1) notify the other Party promptly of any material unauthorized possession, use, or attempted access to the other Party's Confidential Information by any person or entity which may become known to such Party, (2) promptly furnish to the other Party full details of such unauthorized possession, use, or attempted access, (3) use reasonable efforts to cooperate with the other Party, at the other Party's cost, in any litigation and investigation against third parties reasonably deemed necessary by the other Party to protect its proprietary rights in and to the Confidential Information, and (4) use its commercially reasonable efforts to prevent a recurrence of any such unauthorized possession, use, or attempted access of the other Party's Confidential Information

7.6 Return of Confidential Information

Promptly after the expiration or termination of this Agreement, each Party shall return promptly or, with the written consent of the other Party, destroy all of the other Party's Confidential Information, except for (i) archival and backup copies that are not readily available for use (other than archival and backup copies of data and information specifically created as part of the Services and transferred to the Party for which the copy was created), (ii) records that are required by law or this Agreement to be retained, and (iii) any item with respect to which a Party shall have been given ownership or a perpetual license NSD shall use commercially reasonable efforts to cause its officers, directors, employees, subcontractors, consultants, advisors and its Affiliates to comply with the provisions of this Section 7 6 Client shall use commercially reasonable efforts to cause its officers, directors, employees, subcontractors, consultants, advisors, clients and its Affiliates to comply with the provisions of this Section 7 6

7.7 Survival

The Parties' duties under this Article VII shall expire five (5) years after disclosure of the relevant Confidential Information, notwithstanding any earlier termination of this Agreement, provided that such Confidential Information is not a trade secret (as determined by applicable law) The Parties' duties under this Article VII with respect to Confidential Information that is a trade secret shall continue for so long as such Confidential Information remains a trade secret



7.8 Residual Knowledge

Client ACKNOWLEDGES that NSD is in the business of providing services including, but not limited to, IT audit services, IT services, and data back-up and redundancy services. Without limiting NSD's obligations with regard to Confidential Information under Article VII, Client ACKNOWLEDGES that NSD shall (i) have the right to provide services or resources to NSD's other customers or other third parties that are similar to the activities performed or resources provided by NSD hereunder, and (ii) be free to use the residual knowledge of a general nature retained by NSD Personnel in a non-tangible form, provided that the use of the residual knowledge does not violate a patent owned by Client or any of its Affiliates, or any other intellectual property or proprietary right of Client, any of its Affiliates or the Franchisees/Licensees.

Force Majeure Clause

Neither party shall be liable in damages or have the right to terminate this Agreement for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its control including, but not limited to Acts of God, Government restrictions (including the denial or cancellation of any export or other necessary license), wars, insurrections and/or any other cause beyond the reasonable control of the party whose performance is affected.

Construction of Agreement

THE PARTIES AGREE that this Agreement is subject to all applicable federal and state laws, rules, and regulations. Invalidity of any portion of this Agreement under the laws of the State of Texas or of the United States shall not affect the validity of the remainder of the Agreement.

Governing Law and Venue

This Agreement shall be governed by the laws of the State of Texas and the Parties AGREE that venue shall lie exclusively in Galveston County, Texas.

Non-Assignment

NSD shall not assign any of its rights, duties or obligations under this Agreement without prior written consent of Client.

Insurance

NSD, at its sole cost, shall obtain and maintain commercial general liability insurance throughout the term of this Agreement in the types specified herein and in the amounts of not less than the minimal amounts specified herein or as required by law, whichever is greater. NSD shall obtain and maintain worker's compensation coverage in accordance with the laws of the State of Texas with a limit of not less than \$500,000 per accident. NSD shall obtain and maintain commercial general liability insurance of not less than \$2,000,000 general aggregate limit, \$1,000,000 bodily injury and property damage, each occurrence, combined single limit, insurance to be on an occurrence basis. NSD shall furnish certificates of insurance evidencing such coverage to the Galveston County Purchasing Agent. Certificates of insurance shall name the County as an additional insured.

Independent Contractors



NSD Professional Services Agreement

None of the provisions of this Agreement are intended to create, nor shall be deemed or construed to create, any relationship between Galveston County and NSD other than that of independent entities contracting with each other solely for the purposes of effectuating the provisions of this Agreement. In the performance of the work, duties, and obligations hereunder, NSD is at all times acting and performing as an independent contractor. NSD is not an agent or employee of Galveston County for any purpose.

Non-Solicitation

The Parties AGREE that during Agreement Term, and for twelve (12) months following the expiration or termination of the Agreement, neither Party will directly or indirectly hire any Employees and/or Contractors of the other Party or solicit or induce or attempt to induce such persons to leave the employment of the other Party. For purposes of this Section, "Contractors" include any person who is actually providing contractor services to a Party for the immediate month following the expiration or termination of the Agreement, and "Employee" include any person who is actually employed by a Party for the immediate month following the expiration or termination of the Agreement.

Entire Agreement

THE PARTIES AGREE THAT THIS AGREEMENT IS INTENDED TO AND DOES REPRESENT THE ENTIRE AGREEMENT OF THE PARTIES IN ONE DOCUMENT. THIS AGREEMENT SUPERSEDES ALL PRIOR AGREEMENTS AND REPRESENTATIONS, WHETHER MADE ORALLY OR OTHERWISE, CONCERNING THE SERVICES BEING OFFERED AND/OR THE FEES PAID FOR SAID SERVICES. NO AMENDMENTS TO THIS AGREEMENT SHALL BE BINDING UNLESS AUTHORIZED BY NSD, REDUCED TO WRITING, AND SIGNED BY BOTH PARTIES.

NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, EACH PARTY HERETO REPRESENTS AND WARRANTS ON BEHALF OF ITSELF THAT THE INDIVIDUAL EXECUTING THIS AGREEMENT ON ITS BEHALF HAS THE FULL POWER AND AUTHORITY TO DO SO AND TO LEGALLY BIND THE PARTY TO THE TERMS HEREIN. BY THE SIGNATURES OF THE DULY AUTHORIZED REPRESENTATIVES BELOW, NSD AND CLIENT, INTENDING TO BE LEGALLY BOUND, AGREE TO ALL OF THE PROVISIONS OF THIS AGREEMENT.

Now, therefore, the Parties hereby EXECUTE this Agreement in triplicate counterparts, each of which shall be deemed an original.

PARTIES TO THE AGREEMENT

NSD

BY 

NAME Aric Foxhoven

TITLE President

DATE 11-15-11

Galveston County

BY 

NAME MARK HENRY

TITLE COUNTY JUDGE

DATE 11/18/11