

SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS <i>OFFEROR TO COMPLETE BLOCKS 12, 17, 23, 24, & 30</i>				1. REQUISITION NO. 01-03IM00009.000A	PAGE 1 OF 13
2. CONTRACT NO. DE-AM01-03IM00009	3. AWARD/EFFECTIVE DATE See Block 31.c.	4. ORDER NO.	5. SOLICITATION NO. NOT APPLICABLE	6. SOLICITATION ISSUE DATE N/A	
7. FOR SOLICITATION INFORMATION CALL	a. NAME Patrick A. Thornton	A111	b. TELEPHONE NO. (No collect calls) 202-287-1532	8. OFFER DUE DATE/LOCAL TIME N/A	
9. ISSUED BY US DEPARTMENT OF ENERGY Office of HQ Procurement Services Operations Branch A-1/ME-641.1 1000 Independence Avenue, SW Washington, DC 20585		CODE D3*	10. THIS ACQUISITION IS <input checked="" type="checkbox"/> UNRESTRICTED SET ASIDE: _____ % FOR XX SMALL BUSINESS <input type="checkbox"/> SMALL DISADV. BUSINESS 8(A) Native Alaskan/ Tribal	11. DELIVERY FOR FOB DESTINATION UNLESS BLOCK IS MARKED <input type="checkbox"/> SEE SCHEDULE <input type="checkbox"/> 13a. THIS CONTRACT IS A RATED ORDER N/A UNDER DPAS (15 CFR 700) 13b. RATING N/A	12. DISCOUNT TERMS Net 30
15. DELIVER TO US Department of Energy, 19901 Germantown Road, Attn: IM-12/Barbara Griffin, Germantown MD 20874. Ph.(301) 903-0263		CODE MA-541	16. ADMINISTERED BY Same as Block 9.		CODE A103
17a. CONTRACTOR/OFFEROR OPSWARE, Inc. 3 Bethesda Metro Center, Suite 700/John Menkart Bethesda MD 20814 TIN: 94-3340178 Ph. (301) 941-1894 / fax (301) 941-1886		CODE FACILITY CODE	18a. PAYMENT WILL BE MADE BY U.S. DEPARTMENT OF ENERGY ACCOUNTS PAYABLE DIVISION, PO BOX 500 GERMANTOWN, MD 20875-5000 (301) 903-4340, fax (301) 903-5977		
<input type="checkbox"/> 17b. CHECK IF REMITTANCE IS DIFFERENT AND PUT SUCH ADDRESS IN OFFER		18b. SUBMIT INVOICES TO ADDRESS SHOWN IN BLOCK 18a UNLESS BLOCK BELOW IS CHECKED <input type="checkbox"/> SEE ADDENDUM			
19. ITEM NO.	20. SCHEDULE OF SUPPLIES/SERVICES	21. QUANTITY	22. UNIT	23. UNIT PRICE	24. AMOUNT
	The Contractor shall provide the proprietary computer software and related support set forth in the Schedule to the Department of Energy, as directed by individual Delivery Order issued by authority of this Indefinite Delivery/Indefinite Quantity (IDIQ) contract <i>(Attach Additional Sheets as Necessary)</i>				\$4,500,000.00 Not-to-Exceed Ceiling
ACCOUNTING AND APPROPRIATION DATA: Obligations will be individual Delivery Order				26. TOTAL AWARD AMOUNT (For Govt. Use Only) \$ -0-	
27a. ___ SOLICITATION INCORPORATES BY REFERENCE FAR 52.212-1, 52.212-4, FAR 52.212-3 AND 52.212-5 ARE ATTACHED. ADDENDA ___ ARE ___ ARE NOT ATTACHED.					
27b. X -CONTRACT/PURCHASE ORDER INCORPORATES BY REFERENCE FAR 52.212-4, FAR 52.212-5 IS ATTACHED. ADDENDA X ARE ___ ARE NOT ATTACHED.					
28. CONTRACTOR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN <u>1</u> COPIES TO ISSUING OFFICE. CONTRACTOR AGREES TO FURNISH AND DELIVER ALL ITEMS SET FORTH OR OTHERWISE IDENTIFIED ABOVE AND ON ANY ADDITIONAL SHEETS SUBJECT TO THE TERMS AND CONDITIONS SPECIFIED HEREIN. <input checked="" type="checkbox"/>			29. AWARD OF CONTRACT: REFERENCE _____ OFFER DATED _____ YOUR OFFER ON SOLICITATION (BLOCK 5), INCLUDING ANY ADDITIONS OR CHANGES WHICH ARE SET FORTH HEREIN, IS ACCEPTED AS TO ITEMS: <input type="checkbox"/>		
30a. SIGNATURE OF OFFEROR/CONTRACTOR 			31a. UNITED STATES OF AMERICA (SIGNATURE OF CONTRACTING OFFICER) 		
30b. NAME AND TITLE OF OFFEROR (TYPE OR PRINT) BEN HOROWITZ PRESIDENT AND CEO		30c. DATE SIGNED 6/9/03	31b. NAME OF CONTRACTING OFFICER (TYPE OR PRINT) Patrick A. Thornton		31c. DATE SIGNED JUN 10 2003
ACCEPTED AND CONFORMS TO THE <input type="checkbox"/> RECEIVED <input type="checkbox"/> INSPECTED <input type="checkbox"/> CONTRACT, EXCEPT AS NOTED			33. SHIP NUMBER <input type="checkbox"/> PARTIAL <input type="checkbox"/> FINAL	34. VOUCHER NUMBER	35. AMOUNT VERIFIED CORRECT FOR
32b. SIGNATURE OF AUTHORIZED GOVT		32c. DATE	36. PAYMENT <input type="checkbox"/> COMPLETE <input type="checkbox"/> PARTIAL <input type="checkbox"/> FINAL		37. CHECK NUMBER
41a. I CERTIFY THIS ACCOUNT IS CORRECT AND PROPER FOR PAYMENT		40. PAID BY			
41b. SIGNATURE AND TITLE OF CERTIFYING OFFICER		41c. DATE	42a. RECEIVED BY (Print)		42d. TOTAL CONTAINERS
			42b. RECEIVED AT (Location)		
			42c. DATE REC'D (YY/MM/DD)		

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SECTION B Continuation of Standard Form 1449

- B.2 Continuation of Block 15 – Deliver To:

U.S. Department of Energy
ATTN: IM-12/Barbara Griffin
19901 Germantown Road
Germantown MD 20874
Ph. (301) 903-0263/Fax (301) 903-4125

NOTE: Ms. Griffin is also designated as Contracting Officer Technical Representative (COTR) and Invoice Approving Official.

B.3 Continuation of Block 16 – Administered By:

U. S. Department of Energy
Office of Headquarters Procurement Services
Attn: ME-641.1/Patrick A. Thornton
1000 Independence Avenue, S.W.
Washington, DC 20585
Ph. (202) 287-1532/FAX (202) 287-1456/1457

B.4 Continuation of Block 18A – Payment Will Be Made By:

U. S. Department of Energy
Capital Accounting Center/Commercial Payments
P.O. Box 500
Germantown, Maryland 20875-0500
Phone: (301) 903-4340/FAX: (301) 903-5977

FUNDING. All funds shall be obligated on individual delivery orders. For Accounting and Appropriation Data, see the individual delivery orders. Note: Any other IM-12 Invoice Approving Official may act for the COR in the absence of the COR for invoice approval only; not as an alternate Contracting Officer's Representative.

B.5 Continuation of Blocks 19 Through 24 - Schedule of Supplies/Services, Quantity, Unit, Unit Price and Amount.

(1) SCHEDULE OF PRODUCTS AND PRICES

Item 1. Provide proprietary computer software, maintenance and other related support as set forth in Addendum D.2, Summary/Price & Product Schedule, in response to delivery orders issued under this contract with concurrence of the Office of the Chief Information Officer (OCIO), DOE Headquarters, or other DOE organizations authorized by the OCIO. Performance shall be in accordance with the terms of this contract and its Addenda as listed in Section D above.

Item 2. The Contractor shall provide reporting, both on-line/real-time and via documentation, as required by and to the Contracting Officer's Technical Representative (COTR).

NOTE 1: For all delivery orders not issued by the OCIO, the Contractor is required to obtain written concurrence from the OCIO prior to acceptance of the delivery orders.

NOTE 2: The Fixed Rate Direct Productive Labor-Hours (DPLH) required by DOE via individual Delivery Orders may not exceed 3,000 in any 12-month calendar year of the contract. An 80-DPLH minimum is applicable for each labor category for each individual instance it is required.

NOTE 4: FIXED DIRECT LABOR RATES. The DPLH provided under this contract are incidental to its primary purpose, which is acquisition of proprietary computer software licensing and maintenance support. All DPLH ordered shall be from the two labor categories set forth below at the fixed hourly labor rates indicated and must be fully funded at award. Since this is not a Time & Materials contract it is not eligible for incremental funding of labor requirements.

The Direct Labor Productive Hour is based on a fully burdened fixed hourly rate for each labor category and is all inclusive of all costs associated with direct labor including wages, fringe benefits, labor overhead, clerical/secretarial expense, general & administrative expenses and profit. The labor rates indicated for each period of the contract shall apply to all DPLH provided during that respective year of the contract. The contractor may only bill the labor categories identified in this contract. There are no overtime rates.

BASE PERIOD: 06/09/2003-07/11/2005
 Base Year 1: 06/09/2003-07/11/2003 (balance)
 Base Year 2: 07/12/2003-07/11/2004
 Base Year 3: 07/12/2004-07/11/2005
OPTION PERIOD 1: 07/12/2005-07/11/2006 (one year).
OPTION PERIOD 2: 07/12/2006-07/11/2007 (one year).

<u>LABOR CATEGORY</u>	<u>Base Year 1 Rate/DPLH</u>	<u>Base Year 2 Rate/DPLH</u>	<u>Base Year 2 Rate/DPLH</u>
Project Manager	\$150.00	\$ 158.00	\$ 165.00
Consulting Engineer	\$175.00	\$ 184.00	\$ 193.00

<u>LABOR CATEGORY</u>	<u>Option Period 1</u>	<u>Option Period 2</u>
	<u>Rate/DPLH</u>	<u>Rate/DPLH</u>
Project Manager	\$174.00	\$ 182.00
Consulting Engineer	\$203.00	\$ 213.00

NOTE 5/OPTION PRICING: For Option Periods 1 and 2, applicable pricing shall be that contained in this master contract, or in the Opsware GSA Schedule, whichever is less. The Government has the right to exercise these Options, in whole or in part, at any time prior to the dates of the respective Periods.

SECTION C CONTRACT CLAUSES

C.1 CONTRACT TERMS AND CONDITIONS - COMMERCIAL ITEMS (FAR 52.212-4) (FEB 2002)

(a) Inspection/Acceptance. The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. The Government must exercise its post-acceptance rights -

(1) Within a reasonable time after the defect was discovered or should have been discovered; and

(2) Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

(b) Assignment. The Contractor or its assignee may assign its rights to receive payment due as a result of performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C. 3727). However, when a third party makes payment (e.g., use of the Government-wide commercial purchase card), the Contractor may not assign its rights to receive payment under this contract.

(c) Changes. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

(d) Disputes. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).

Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

(e) Definitions. The clause at FAR 52.202-1, Definitions, is incorporated herein by reference.

(f) Excusable delays. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

(g) Invoice. (1) The Contractor shall submit an original invoice and three copies (or electronic invoice, if authorized) to the address designated in the contract to receive invoices. An invoice must include--

- (i)** Name and address of the Contractor;
- (ii)** Invoice date and number;
- (iii)** Contract number, contract line item number and, if applicable, the order number;
- (iv)** Description, quantity, unit of measure, unit price and extended price of the items delivered;
- (v)** Shipping number and date of shipment, including the bill of lading number and weight of shipment if shipped on Government bill of lading;
- (vi)** Terms of any discount for prompt payment offered;
- (vii)** Name and address of official to whom payment is to be sent;
- (viii)** Name, title, and phone number of person to notify in event of defective invoice; and
- (ix)** Taxpayer Identification Number (TIN). The Contractor shall

include its TIN on the invoice only if required elsewhere in this contract.

(x) Electronic funds transfer (EFT) banking information.

(A) The Contractor shall include EFT banking information on the invoice only if required elsewhere in this contract.

(B) If EFT banking information is not required to be on the invoice, in order for the invoice to be a proper invoice, the Contractor shall have submitted correct EFT banking information in accordance with the applicable solicitation provision, contract clause (e.g., 52.232-33, Payment by Electronic Funds Transfer--Central Contractor Registration, or 52.232-34, Payment by Electronic Funds Transfer--Other Than Central Contractor Registration), or applicable agency procedures.

(C) EFT banking information is not required if the Government waived the requirement to pay by EFT.

(2) Invoices will be handled in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) prompt payment regulations at 5 CFR part 1315.

(h) Patent indemnity. The Contractor shall indemnify the Government and its officers, employees and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark or copyright, arising out of the performance of this contract, provided the Contractor is reasonably notified of such claims and proceedings.

(i) Payment. Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract. The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and OMB prompt payment regulations at 5 CFR part 1315. If the Government makes payment by Electronic Funds Transfer (EFT), see 52.212-5(b) for the appropriate EFT clause. In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the specified payment date if an electronic funds transfer payment is made.

(j) Risk of loss. Unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this contract shall remain with the

Contractor until, and shall pass to the Government upon:

- (1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or
- (2) Delivery of the supplies to the Government at the destination specified in the contract, if transportation is f.o.b. destination.

(k) Taxes. The contract price includes all applicable Federal, State, and local taxes and duties.

(l) Termination for the Government's convenience. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(m) Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(n) Title. Unless specified elsewhere in this contract, title to items furnished under this contract shall pass to the Government upon acceptance, regardless of when or where the Government takes physical possession. NOTE: DOE does not take title to the Contractor's software products.

(o) Warranty. The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in

this contract.

(p) Limitation of liability. Except as otherwise provided by an express warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items.

(q) Other compliances. The Contractor shall comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract.

(r) Compliance with laws unique to Government contracts. The Contractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 18 U.S.C. 431 relating to officials not to benefit; 40 U.S.C. 327, *et seq.*, Contract Work Hours and Safety Standards Act; 41 U.S.C. 51-58, Anti-Kickback Act of 1986; 41 U.S.C. 265 and 10 U.S.C. 2409 relating to whistleblower protections; 49 U.S.C. 40118, Fly American; and 41 U.S.C. 423 relating to procurement integrity.

(s) Order of precedence. Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order:

- (1) The contract, excluding 52.212-5 but including Addenda D.1 and D.5.
- (2) The Assignments, Disputes, Payments, Invoice, Other Compliances, and Compliance with Laws Unique to Government Contracts paragraphs of this clause.
- (3) The clause at 52.212-5.
- (4) Other Addenda to this solicitation or contract, including D.2-D.4 inclusive.
- (5) Solicitation provisions if this is a solicitation.
- (6) Other paragraphs of this clause.
- (7) The Standard Form 1449.
- (8) Other documents, exhibits, and attachments.
- (9) The specification.

(End of clause)

C.2 CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS - COMMERCIAL ITEMS (FAR 52.212-5) (APR 2003)

(a) The Contractor shall comply with the following FAR clauses, which are incorporated in this contract by reference, to implement provisions of law or executive orders

applicable to acquisitions of commercial items:

- (1) 52.222-1, Convict Labor (E.O. 11755).
- (2) 52.213-3, Protest after Award (31 U.S.C. 3553).

(b) The Contractor shall comply with the FAR clauses in this paragraph (b) that the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or Executive orders applicable to acquisitions of commercial items or components:

[Contracting Officer shall check as appropriate.]

(1) 52.201-6, Restrictions on Subcontractor Sales to the Government, with Alternate I (41 U.S.C. 253g and 10 U.S.C. 2402).

(2) 52.219-1, Notice of Total HUBZone Small Business Set-Aside (Jan 1999).

(3) 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns (Jan 1999) (if the offeror elects to waive the preference, it shall so indicate in its offer).

(4)(i) 52.219-5, Very Small Business Set-Aside (Pub. L. 101-403, section 304, Small Business Reauthorization and Amendments Act of 1994).

(ii) Alternate I to 52.219-5.

(iii) Alternate II to 52.219-5.

(5) 52.219-8, Utilization of Small Business Concerns (15 U.S.C. 637 (d)(2) and (3)).

(6) 52.219-9, Small Business Subcontracting Plan (15 U.S.C. 617(d)(4)).

(7) 52.219-14, Limitations on Subcontracting (15 U.S.C. 617(a)(14)).

(8)(i) 52.219-21, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns (Pub. L. 101-355, section 7102, and 10 U.S.C. 2323) (if the offeror elects to waive the adjustment, it shall so indicate in its offer).

(ii) Alternate I of 52.219-21.

(9) 52.219-25, Small Disadvantaged Business Participation Program - Disadvantaged Status and Reporting (Pub. L. 101-355, section 7102, and 10 U.S.C. 2323).

- (10) 52.219-26, Small Disadvantaged Business Participation Program - Incentive Subcontracting (Pub. L. 101-355, section 7102, and 10 U.S.C. 2323).
- (11) 52.222-21, Prohibition of Segregated Facilities (Feb 1999)
- (12) 52.222-26, Equal Opportunity (E.O. 11246).
- (13) 52.222-15, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (38 U.S.C. 4212).
- (14) 52.222-16, Affirmative Action for Workers with Disabilities (29 U.S.C. 793).
- (15) 52.222-17, Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (38 U.S.C. 4212).
- (16) 52.222-19, Child Labor - Cooperation with Authorities and Remedies (E.O. 11126).
- (17)(i) 52.221-9, Estimate of Percentage of Recovered Material Content for EPA-Designated Products (42 U.S.C. 6962(c)(3)(A)(ii)).
- (ii) Alternate I of 52.221-9 (42 U.S.C. 6962(i)(2)(C)).
- (18) 52.225-1, Buy American Act--Supplies (41 U.S.C. 10a-10d).
- (19)(i) 52.225-1, Buy American Act--North American Free Trade Agreement--Israeli Trade Act (41 U.S.C. 10a-10d, 19 U.S.C. 3301 note, 19 U.S.C. 2112 note).
- (ii) Alternate I of 52.225-1.
- (iii) Alternate II of 52.225-1.
- (20) 52.225-5, Trade Agreements (19 U.S.C. 2501, *et seq.*, 19 U.S.C. 3301 note).
- (21) 52.225-11, Restriction on Certain Foreign Purchases (E.O. 12722, 12724, 13059, 13067, 13121, and 13129).
- (22) 52.225-15, Sanctioned European Union Country End Products (E.O. 12849).
- (23) 52.225-16, Sanctioned European Union Country Services (E.O. 12849).
- (24) 52.212-33, Payment by Electronic Funds Transfer - Central Contractor

Registration (31 U.S.C. 3332).

(25) 52.212-34, Payment by Electronic Funds Transfer - Other than Central Contractor Registration (31 U.S.C. 3332).

(26) 52.212-36, Payment by Third Party (31 U.S.C. 3332).

(27) 52.219-1, Privacy or Security Safeguards (5 U.S.C. 552a).

(28)(i) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (46 U.S.C. 1241).

(ii) Alternate I of 52.247-64.

(c) The Contractor shall comply with the FAR clauses in this paragraph (c), applicable to commercial services, which the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or executive orders applicable to acquisitions of commercial items or components:

[Contracting Officer check as appropriate.]

(1) 52.222-41, Service Contract Act of 1965, As Amended (41 U.S.C. 351, *et seq.*).

(2) 52.222-42, Statement of Equivalent Rates for Federal Hires (29 U.S.C. 206 and 41 U.S.C. 351, *et seq.*).

(3) 52.222-41, Fair Labor Standards Act and Service Contract Act - Price Adjustment (Multiple Year and Option Contracts) (29 U.S.C. 206 and 41 U.S.C. 351, *et seq.*).

(4) 52.222-44, Fair Labor Standards Act and Service Contract Act - Price Adjustment (29 U.S.C. 206 and 41 U.S.C. 151, *et seq.*).

(5) 52.222-47, SCA Minimum Wages and Fringe Benefits Applicable to Successor Contract Pursuant to Predecessor Contractor Collective Bargaining Agreement (CBA) (41 U.S.C. 351, *et seq.*).

(d) *Comptroller General Examination of Record.* The Contractor shall comply with the provisions of this paragraph (d) if this contract was awarded using other than sealed bid, is in excess of the simplified acquisition threshold, and does not contain the clause at 52.215-2, Audit and Records - Negotiation.

(1) The Comptroller General of the United States, or an authorized representative of the Comptroller General, shall have access to and right to examine any of the Contractor's directly pertinent records involving transactions related to this contract.

(2) The Contractor shall make available at its offices at all reasonable times the records, materials, and other evidence for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in FAR Subpart 4.7, Contractor Records Retention, of the other clauses of this contract. If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement. Records relating to appeals under the disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are finally resolved.

(3) As used in this clause, records include books, documents, accounting procedures and practices, and other data, regardless of type and regardless of form. This does not require the Contractor to create or maintain any record that the Contractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(e) Notwithstanding the requirements of the clauses in paragraphs (a), (b), (c) or (d) of this clause, the Contractor is not required to include any FAR clause, other than those listed below (and as may be required by an addenda to this paragraph to establish the reasonableness of prices under Part 15), in a subcontract for commercial items or commercial components -

- (1) 52.222-26, Equal Opportunity (E.O. 11246);
- (2) 52.222-15, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (38 U.S.C. 4212);
- (3) 52.222-16, Affirmative Action for Workers with Disabilities (29 U.S.C. 793);
- (4) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (46 U.S.C. Appendix 1241 and 10 U.S.C. 2611) (flow down required in accordance with paragraph (d) of FAR clause 52.247-64); and
- (5) 52.222-41, Service Contract Act of 1965, As Amended (41 U.S.C. 351, *et seq.*).

(End of clause)



Department of Energy

OPSWARE

Performance Based Statement of Work

Office of the Chief Information Officer
May 22, 2003

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Performance-Based Statement of Work

Performance Objective /Performance Measures/Quality Expectations

Quality expectations and performance requirements in this Plan are expressed in the following manner:

Each requirement will contain the following three elements, and when taken together these elements constitute the Surveillance Plan.

- **Performance Objective** – A statement of the outcome or results expected in a specific task area.
- **Performance Measures** – The critical few characteristic or aspects of achieving the objective that will be monitored by the Government, those things that the Government will be gathering data about. Each objective may have one or more measures.
- **Quality Expectations** – The targeted level or range of levels of performance/expectation for each performance measure.

Required Service: DOE has established the required service in both the performance objective and the quality expectations. Each task will address specific objectives the contractor must meet.

Standards: The contractor shall provide deliverables established within the task assignments, inline with the performance measures and the level of quality expectation as established within this surveillance plan.

Maximum Error Rate: This Surveillance Plan, Quality Expectation sets the quality assurance requirement of the contractor.

Method of Surveillance: The Task Monitors and the DOE Contracting Officer Technical Representative (COTR) will review the performance of the contractor on a six-month time frame or at the end of each task order which ever comes first. A written evaluation will be provided to the Contracting Officer and the COTR for the files.

Remedy: DOE/IM-1 and Contractor will work closely to improve performance, enhance reliability, ensure compliance, meet deliverable schedules, and any additional requirement outlined that might be specific to each task or sub-task assignment. If DOE/IM-1 determines that the Contractor cannot meet the deliverable, or cannot revise the deliverable at no additional cost to the government, the government reserves the right not to exercise the options within the SOW.

1. Introduction

1.1 Purpose

This document details the Project Plan of the OPSWARE initiative at the DOE relative to the planning, installation, configuration, engineering, testing, training and DOE adoption of OPSWARE technology. The Plan relates the management approach, roles and responsibilities, communications plans, sequence of activities, and target timelines to initiate and fulfill the objectives of the OPSWARE project.

1.2 Background

The Office of the CIO's objectives are solutions that will create efficiencies in enterprise licensing, improve systems reliability, and enhance cyber security. The CIO has asked Oracle and OPSWARE to provide the foundation for this enterprise initiative. This commercially available solution must be able to support the entire Department. Focusing the efforts of the Department's Programs on their missions is a key element of this initiative. The OPSWARE initiative must not be compulsory, but must compel the programs to adopt the Systems Management Platform for the advantages it provides: lower costs, higher quality, greater systems reliability, precise systems management, and more secure operating systems and databases.

Currently, DOE operates from a decentralized IT planning, acquisition, implementation, and services model. This model has led to the creation of nonstandard systems and applications leading to interoperability issues and duplication of services, security issues, lack of effective management, server sprawl and loss of control. This model does not present the most effective and efficient operation and prevents the development of a corporate approach to information technology, including strategic and capital planning and proper budget alignment.

The IT industry and the business communities have recognized that this current approach to support combined with the service levels DOE has committed to deliver is expensive. The incorporation of OPSWARE at DOE will provide a significant reduction against this expense while ensuring configuration management and security of assets.

1.3 Goals and Objectives

The goals and objectives of the OPSWARE project are to establish a methodology and mechanism for supporting software license management and Certification and Accreditation of servers at the Department. This will be accomplished by providing automated infrastructure provisioning of operating systems and applications. This will dramatically reduce the time and labor required to provision large number of servers while at the same time providing better infrastructure consistency and security management.

The initial objectives will be to implement IT management tools to monitor, manage, and maintain the operational integrity and service availability of the IT infrastructure at DOE Headquarters (GTN). Operating system models will be developed to meet the requirements established by the CIO for Accreditation and Certification. An OPSWARE infrastructure will be built and operational procedures will be developed to provision servers with the established models. This will enforce security policies, best practices, software updates and patch rollout governance across large-scale, heterogeneous DOE environments.

Procedures will be developed for delivery and license management of Oracle software via OPSWARE in accordance with the Enterprise License Agreement established with Oracle. These specifications will be detailed in a separate document titled, "Oracle Enterprise License Management Product Requirements Document." Once the specific requirements are established Opsware will provide DOE a quotation for any required resources beyond the onsite Opsware engineer (already provided for in the Initial Deliver Order) and recommended method for meeting these requirements.

The OPSWARE initiative supports the Department's corporate management goals by developing a framework for existing information technology and building a roadmap for corporate direction of the implementation of the President's E-government initiatives (CM2). The OPSWARE program will also assist the Department of Energy in ensuring secure, efficient, effective and economical operations of its information technology systems and infrastructure (CM3). Furthermore OPSWARE will facilitate the corporate management of information technology systems and infrastructure to improve the Department's efficiency and effectiveness (CM4).

Performance Measures	Quality Expectations
a) Completeness	Deliverables will be 100% complete.
b) Accuracy	Deliverables will be 100% accurate.
c) Effectiveness	All deliverables must contribute to the overall success of the sub-task.
d) Timeliness	All deliverables will be on time and within schedule.

1.4 Benefits

OPSWARE will yield the following benefits:

- Economies of scale that reduce the cost of operation, as well as allowing program and staff offices to focus on their primary missions;
- Developing a common operations environment for information technology to include site-operations and enterprise applications, network infrastructure, common user environment, and shared labor and computing resources;
- Further reduction of costs by leveraging enterprise buys on OPSWARE standard platforms and applications;
- Improving cyber security through the standardization of platforms, reduction in number of systems to be secured, and more immediate response to security patches, response to operational threats, and consistent and timely virus protection; and,

- Reducing trouble resolution time through the use of automated tools such as remote control, software distribution, and management and monitoring of network components.
- Leverage work done by highly skilled expensive IT specialists.

Performance Measures	Quality Expectations
a) Completeness	Deliverables will be 100% complete.
b) Accuracy	Deliverables will be 100% accurate.
c) Effectiveness	All deliverables must contribute to the overall success of the sub-task.
d) Timeliness	All deliverables will be on time and within schedule.

1.5 High-Level OPSWARE Deployment Scope

The scope of the OPSWARE initiative will be divided into 3 phases. Phases 1 and 2 timelines are sequential while Phase 3 activities may happen in parallel with Phase 2 activities as necessary to accomplish DOE objectives. These phases are described below. Greater detail as to the composition of each phase is provided in section 3, “Project Milestones and Phases”.

- **PHASE 1 - Deploy OPSWARE Testing and Integration Core:** Objectives are focused on providing an applied introduction to OPSWARE so as to allow DOE to become familiar with the OPSWARE toolset and capabilities. Activities to include the installation, configuration, testing, training and adoption of OPSWARE at DOE (GTN). Additionally, this phase will begin the adoption of DOE technologies into the OPSWARE framework
- **PHASE 2 – Deploy Initial Production OPSWARE Core:** The goal of the Phase 2 deployment is installation of the first production OPSWARE Core and managed devices at the DOE (GTN) facility. Activities to include the adoption, installation, configuration, testing and training of OPSWARE at DOE (GTN).
- **PHASE 3 – Post Deployment Activity:** Phase 3 activities are focused on the long term objectives described in section 1.3 “Goals and Objectives” and are outside the scope of Phase 1 and 2 completion criteria. This is due to certain required inputs to Phase 3 activities not yet being defined at the time this document publication. Activities for this phase to include the deployment of a second production OPSWARE Core, Oracle License Management development, as well as policy and procedure development for DOE requirements.

Performance Measures	Quality Expectations
a) Completeness	Deliverables will be 100% complete.
b) Accuracy	Deliverables will be 100% accurate.
c) Effectiveness	All deliverables must contribute to the overall success of the sub-task.
d) Timeliness	All deliverables will be on time and within schedule.

2. Project Overview and Deliverables

OPSWARE will design and develop a common, consistent operating environment, which will complement DOE's, Enterprise Architecture (EA) while meeting DOE Headquarters' general needs and the unique requirements and service levels of each program office it serves. OPSWARE will provide the capability to deliver a variety of operating system environments which will be Certified and Accredited, monitored and managed for security upgrades. OPSWARE will implement license management to support the Department to assist with proper management and delivery of software. OPSWARE will achieve these objectives through economies of scale, standardization, and collaboration.

OPSWARE Deliverables include:

Deliverable	Description	Status
Project Plan	Project plan incorporating a project timeline, key objectives and milestones to facilitate progress reporting and measurement against project objectives.	Complete and up to date as of Phase 2 completion.
Staffing Plan	The contractor will provide a staffing plan to support the DOE systems management initiatives. The staffing plan will outline the personnel requirements and skill sets needed to insure successful implementation of OPSWARE and the resulting systems management capabilities for DOE.	Complete
T&I Core deployment	Germantown integration and test OMP – the deployment and integration of an OPSWARE integration and testing environment at the DOE Germantown facility. The I & T environment will provide the development and staging environment for all future OPSWARE integration, testing and deployment on operational DOE systems and sites.	Complete
First Production Opsware core deployment	The deployment and integration of the two production OPSWARE Management Platforms (OMP) at the DOE Germantown facility. It is anticipated that integration with the Application Hosting Environment will be part of this plan.	Complete
Second Production Opsware core deployment	The deployment and integration of the two production OPSWARE Management Platforms (OMP) at the DOE Germantown facility. It is anticipated that integration with the Application Hosting Environment will be part of this plan.	DOE has not designated site. Agreed that would consider complete
Testing and Acceptance Plan	An OPSWARE systems testing and acceptance plan will be developed and coordinated by the contractor program manager in conjunction with contractor and DOE technical personnel.	Complete
The Cyber Security Program Plan	A cyber security program plan for the OPSWARE systems will be developed and coordinated by the contractor program manager in conjunction with contractor and DOE technical personnel.	In process working with DOE Staff
Oracle License Management Plan	OPSWARE will develop and engineer a specific management plan for the Oracle enterprise software license. OPSWARE will develop and deliver an enterprise license tracking report. These specifications will be detailed in a separate document titled, "Oracle Enterprise License Management Product Requirements Document."	Delivered "Oracle Enterprise License Management Product Requirements Document."
Documentation	OPSWARE will provide OPSWARE system documentation to include all logical and physical diagrams, deployment procedures, management procedures and technical references to insure smooth and rapid knowledge transfer to the department's IT personnel. This documentation will include operational details for on site personnel to mitigate possible loss of knowledge in the event of discontinuation of	Complete and up to date as of Phase 2 completion.

	service.	
Opware Training	OPSWARE will provide classroom training and training materials. Key elements covered in the program of instruction are: OPSWARE overview, architecture, provisioning, deployment, configuration and system maintenance.	Completed to date
OPSWARE backup and recovery procedures	OPSWARE will develop and coordinate OPSWARE backup and recovery procedures, providing the methodology for system restoration and management.	Complete
Reporting	OPSWARE program manager will be responsible for all project management reports to the COTR.	Complete to current state of project
Additional Application Packaging and Provisioning	This requirement is still being defined however Oracle9iAS packaging is currently considered the highest packaging priority for DOE.	In Progress, as applicable
Truth APIs	APIs to allow integration of Opware Care Data into existing DOE Data Bases and management tools. Pursuant to Section 3.2(d) of the license.	Scheduled to coincide with a later Opware software release
Installed and Supported Technologies	Contractor will provision and assist in provisioning operating systems and applications using OPSWARE. Supported technologies include: Solaris, AIX, MS W2K, NT; Linux, Supported versions of Oracle database and application server and all options for these products; Weblogic 5, 6; MSiis 5. The rollout of these technologies into the DOE environment is currently being defined.	Solaris, Linux and Windows Complete

Performance Measures	Quality Expectations
a) Completeness	Deliverables will be 100% complete.
b) Accuracy	Deliverables will be 100% accurate.
c) Effectiveness	All deliverables must contribute to the overall success of the sub-task.
d) Timeliness	All deliverables will be on time and within schedule.

3. Project Milestones and Phases

Following are the major OPSWARE project milestones and their estimated target dates. Activity details will be provided in the OPSWARE project work breakdown structure (WBS).

MAJOR MILESTONE	TARGET COMPLETION DATE	STATUS
Phase 1 - Deploy DOE Testing and Integration Core	10/15/02	Completed
Phase 2 - Deploy Initial Production OPSWARE Core	1/10/03	Completed
Phase - 3 Post Deployment Activities	TBD, as appropriate for DOE objectives	Ongoing

PHASE 1 - Deploy OPSWARE Testing and Integration Core

OPSWARE deployment services comprised in this phase include:

Deliverable	Description	Status
Contractor Deployment Services	Contractor will provide deployment services, which will include the planning, installation, configuration and testing of the OPSWARE software.	Completed
OS Provisioning	Contractor will provision and assist in provisioning operation systems using OPSWARE. Sun Solaris2.7 and 2.8, Microsoft Windows NT and Windows 2000, and Red Hat Linux 6.2 and 7.1 comprise the current operating systems supported by OPSWARE. Scope of phase 1 technologies will be comprised of mutually agreed upon subset the aforementioned Operating Systems and Oracle 9i. Additional operating systems applications and versions will be provided to DOE when supported by OPSWARE.	Completed
Training	Provide training for OPSWARE usage including Command Center (formerly Work Center) usage and OPSWARE administration.	Completed
Documentation	Provide documentation suite including Command Center user guide, troubleshooting guide and ad-hoc technical briefs as necessary.	Completed
Third Party Product Integration	OPSWARE will provide assistance and training to Oracle and other application experts on the structures and methodologies required to integrate, or "package" third party applications for automated deployment by the OMP. OPSWARE uses RPM and Microsoft's MSI packaging technologies, industry standards for cross-platform packaging.	Completed

Performance Measures	Quality Expectations
a) Completeness	Deliverables will be 100% complete.
b) Accuracy	Deliverables will be 100% accurate.
c) Effectiveness	All deliverables must contribute to the overall success of the sub-task.
d) Timeliness	All deliverables will be on time and within schedule.

PHASE 2 – Deploy Initial Production OPSWARE Core

OPSWARE deployment services comprised in this phase include:

Deploy OPSWARE software for DOE	Contractor will provide deployment services, which will include the planning, installation, configuration, testing and training of OPSWARE software.	Completed
Provision Operating Systems	Contractor will provision and assist in provisioning operation systems using OPSWARE. Scope of Phase 2 technologies will be similar to Phase 1 technologies.	Completed

Performance Measures	Quality Expectations
a) Completeness	Deliverables will be 100% complete.
b) Accuracy	Deliverables will be 100% accurate.
c) Effectiveness	All deliverables must contribute to the overall success of the sub-task.
d) Timeliness	All deliverables will be on time and within schedule.

PHASE 3 – Post Deployment Activity

OPSWARE deployment services comprised in this phase include:

Deliverable	Description	Status
Install 1 st Production Core	First Production Core (Phase 2) Server Provisioning and Management Activities.	Completed
Application Packaging	Additional Application Packaging and Provisioning. This requirement is still being defined however Oracle9iAS packaging is currently considered the highest packaging priority for DOE.	Completed and ongoing
Truth APIs	APIs to allow integration of Opware Care Data into existing DOE Data Bases and management tools. Pursuant to Section 3.2(d) of the license.	Slated for later release of Opware
Cyber Security	Cyber Security Plan as described in Project Overview and Deliverables section of this document. Timing for completion of this plan is currently being defined.	In progress (see above)
Deploy Software	Deploy software for DOE for the second production OPSWARE core. Contractor will provide deployment services, which will include the planning, installation, configuration and testing of OPSWARE software.	DOE needs to designate location considered completed for contract purposes
Provision Operating Systems and Software onto servers	Contractor will provision and assist in provisioning operating systems and applications using OPSWARE. Supported technologies include: Solaris, AIX, MS W2K, NT; Linux, Supported versions of Oracle database and application server and all options for these products; Weblogic 5, 6; MSiis 5. The rollout of these technologies into the DOE environment is currently being defined.	Completed
Oracle License Management Plan	Third party integration assistance – Contractor will provide assistance and training to Oracle and other application experts on the structures and methodologies required to integrate, or “package”, third party applications for automated deployment by the OMP. The contract between Oracle and DOE is currently being finalized.	Provided referenced Opware PRD

Performance Measures	Quality Expectations
a) Completeness	Deliverables will be 100% complete.
b) Accuracy	Deliverables will be 100% accurate.
c) Effectiveness	All deliverables must contribute to the overall success of the sub-task.
d) Timeliness	All deliverables will be on time and within schedule.

4. Project Organization

The success of the OPSWARE project is dependent upon the energies and efforts of a wide range of individuals. These individuals serve a variety of functions from management and oversight to implementation and maintenance. Each of these functions is necessary to achieving

OPSWARE’s goals and objectives. The following paragraphs detail the specific roles and responsibilities of each OPSWARE project team member.

4.1 Roles and Responsibilities

Office of the Chief Information Officer (CIO)

The Office of the Chief Information Officer (CIO) will provide policy, goals, strategy, planning, performance measurements, service level agreements, governance, memoranda of understanding (MOU), and implementation plans (schedules) of all OPSWARE initiatives in coordination with the program offices.

Program Management Office (PMO)

The Program Management office will have overall management, administrative, and oversight responsibility for the OPSWARE project. The PMO will work closely with the CIO and will develop the OPSWARE Project Plan, create and monitor OPSWARE schedules, milestones, and budgets, allocate human and material resources, and determine the composition of all OPSWARE project teams (e.g., technical working group, program support team, etc.). Make DOE resources available, resolve DOE owned issues. Responsible for providing technical resource support including network engineers, system administrators, database administrators, and application subject matter experts.

Program Management Support (OPSWARE)

Contractor will provide program management support both on site and at the contractor facility for up to 800 hours of support. The designated program manager will act as the primary DOE interface for all contractor services, support and reporting. Provide a change order process to identify record, cost, assess and approve or reject changes to the Departments Production OPSWARE Management Platforms.

Operations Support Team (OST)

The Operations Support Team (OST) is comprised of Federal and contractor personnel and will be responsible for day-to-day support activities. The OST will test and implement OPSWARE technical architecture changes, develop and modify standard operating procedures (SOP), and generate performance metric reports for quality review and assessment of SLA/OLA conformance.

4.2 Project Team

The OCIO will develop the organizational entities necessary to administer, transition, operate, and sustain operations of the OPSWARE Project Objectives as listed in this Project Plan. The following chart identifies the members of the OPSWARE Project Team and their project responsibilities.

ROLE	NAME	PROJECT RESPONSIBILITY
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Chief Information Officer	Karen Evans	Provides overall policy, planning, and QA guidance and direction.
OPSWARE Program Manager	Gordon Errington	Provides overall project management and oversight, acts as the single point of contact for approving project changes, resolves issues, and ensures that all project objectives are met.
Project Manager/Service Provider/Integrator	Jim Sledge	Plans and directs the project. Provides support and guidance to the team managers and the team. Ensures proper staffing. Provides project reporting to the OPSWARE Program Manager and facilitates communication.
OPSWARE Project Manager	Matt Laird	Plans, directs and assures proper staffing of OPSWARE Inc. staff. Provides support and guidance to the team managers and the team. Provides project management support and reporting to the Project Manager and the team.

4.3 Problem Escalation

Problem situations are to be resolved in an orderly and timely manner. This project is time critical and unresolved problems or issues can severely impact the project schedule. The severity of the problem will dictate who is responsible for resolving the problem and the time period allowed for resolution. If no decision is made about the issue in the amount of time specified in following table, the Program Manager will proceed forward with what it is considered the best practice. Problem escalation on this table should proceed from the top down, beginning with the Program Manager.

POSITION	DESCRIPTION	BUSINESS DAYS
OPSWARE Program Manager	Resolves conflicts within the project team (e.g., TWG, OST, PST, TT) associated with OPSWARE planning, procedure development, implementation, performance, and oversight.	1
Deputy CIO	Resolves conflicts concerning overall project direction, compliance with DOE and Federal directives, and OPSWARE technical architecture, COE, and configuration changes.	2
CIO	Resolves major issues and discrepancies between the OPSWARE project team and DOE Headquarters program offices relating to MOUs, SLAs/OLAs, project scope, funding, or deployment scheduling.	3

5. Management Approach

5.1 Management Priorities

The OPSWARE project team will maintain customer satisfaction as its number one priority, but must do so without sacrificing standards, regulatory requirements, or the directives of the CIO.

The sections below address the project management activities that will help to meet these priorities and the project's objectives. This includes how project progress will be tracked and reported, how problems will be addressed and resolved, and assumptions and dependencies that are key to the project's success.

5.2 Project Tracking and Control

The OPSWARE Program Manager is responsible for the development and effective execution of the project plan and is responsible for all status and progress reporting. Reports will be based upon the project schedule and will be distributed as separate documents due to their dynamic, working content. These reports will be used to track the progress of transition activities. The OPSWARE Program Manager will ensure that all line items (activities, tasks, and sub-tasks) on the schedule are updated as changes occur.

The OPSWARE Program Manager will generate a weekly status report. It will contain a summary of progress on the project, identify all outstanding issues, and identify task and milestone completions. This report will be provided to the Program Manager each Monday morning. A status/in progress review meeting will be held every Thursday at 2 PM during the course of the project. During this meeting, progress for the week will be reported, issues requiring resolution will be reviewed, and a description of next week's activities will be provided. A verbal impact assessment will be provided on any issues that will affect the schedule or functionality. In addition, a formal written Monthly Activity Report will be provided in accordance with CIO standards.

5.3 Risk Management

Risk Category: Schedule

The OPSWARE project will be based on the agreed upon schedule. Since OPSWARE transition involves operational entities and supporting staff, real time situations and issues have the potential to impact the schedule. The transition consolidation will involve physical relocation of some staff, potential reallocation of space, and changes to existing program office systems and applications that are critical to operations. Any changes to the plan or preemption of project events may effect the completion date.

Risk Mitigation: Every attempt will be made to identify project events that have a probability of disrupting day-to-day operations. To the extent possible these events will be scheduled for after hours or on weekends. For those situations where this cannot be done, the event will be identified to the OPSWARE Program Manager early enough to allow for a decision to be made with regard to accomplishment. On these occasions, the OPSWARE project team will prepare a risk and impact assessment and provide it to the OPSWARE Program Manager to determine the best course of action and mitigate adverse effects on schedule and budget.

Risk Category: Use of Existing Staff

Many of the technical staff required to support this project are involved in day-to-day operations. Subsequently, there is a potential conflict between maintaining effective day-to-day operations while developing and transitioning to the OPSWARE technical architecture and COE. This poses a simultaneous strain on resources and operational effectiveness. There is no doubt that these resources possess the skills and capabilities to ensure the successes of OPSWARE project. However, operational and business issues may contend with OPSWARE schedule, performance, and budgetary objectives.

Risk Mitigation: The OPSWARE project is a major undertaking that will require extensive personnel and material resources. To mitigate this risk in total, the OPSWARE project team must be composed of full-time, dedicated contractor and Federal personnel from project inception through final program office transition.

Risk Category: Possible Security Policy Changes

Many of the DOE security policies are in the process of being revisited. While the project team is making every proactive effort to anticipate the security standards that will be applicable to the OPSWARE deployment there has been difficulty in obtaining the final policy confirmation in some areas. This difficulty is due to an acknowledged change to current security policies.

Risk Mitigation: The project team is aware that the introduction of previously unknown security requirements has the potential to adversely effect project timelines. The team is drawing on previous experience with US Government project security policies and attestations as well as using recent template examples to gauge the appropriate security level.

Risk Category: Expectation accuracy

The project team is making every effort to distribute knowledge throughout DOE of current, future and custom OPSWARE functionality. However, there is the potential for individuals not directly involved with daily communication to make assumptions about OPSWARE functionality. While the team is currently not aware of any inaccurate expectations, these assumptions could lead to improper expectations being set.

Risk Mitigation: This risk will be mitigated via a number of methods, primarily through clear and extensive communication to the project team. These communication mediums take the form of onsite resources, weekly team meetings and large distribution of team status and other documents. Additionally, a phased rollout approach is employed for this project. This provides for mutually agreed upon deployment specifications within each phase and allows the team a better opportunity to adjust to new requirements.

Opsware Systems Management Software Summary/Schedule

for

U.S. Department of Energy

Offer Date: May 27, 2003

Offer Expiration: June 2, 2003

I. Opsware License Executive Summary

The proposed license will include all the products listed below in the noted quantities. The license will be procured via a direct Indefinite Delivery/ Indefinite Quantity (IDIQ) contract in place between US Department of Energy (DOE) and Opsware, Inc. This direct vehicle will allow for a project oriented approach to the license and professional services that are being provided to DOE to set up and customize the Opsware installation for DOE. Note: This contract is based upon prior DOE purchase of some software licenses/support under delivery order DE-AD01-02SO30285, DLT Solutions, Inc. and additional capabilities described here acquired under this contract initial Delivery Order (DO) DE-AD01-03IM00025. The three (3) year base period is considered to have started July 12, 2002, the date of the initial DLT Solutions delivery order. This contract <DE-AM01-03IM00009> portion of the base period is therefore June 1, 2003-July 11, 2005.

The license will be directed and managed by DOE CIO Office and will provide Opsware technology as defined below for the use of DOE and the DOE labs according to the license agreement. DOE CIO will deploy three (3) Opsware 'cores' [two (2) cores in DOE datacenters used for production management of DOE Corporate servers and one (1) I&T core used for development and testing only]. The production cores can be used to manage any server owned, leased and managed by DOE for support of the DOE mission. Included in the overall license is an unlimited number of Opsware agents deployed during the three (3) year base period on any server owned, leased and managed by DOE for support of the DOE mission including those deployed at any DOE field site.

A license for two (2) Multimaster options allows the two current production cores to synchronize the Opsware information about the DOE environment between them. This allows both sites to be managed from a single console and the DOE specific data (relationship map, configuration information and environmental blueprint) is replicated to simplify disaster recovery.

If additional Opsware Cores and Multimaster modules are required by DOE CIO or the DOE labs these can be procured via this contract according to the IDIQ CLINs provided. This will allow for smooth expansion of the capacity of the corporate solution and enable the DOE field sites to acquire Opsware server management capability for their own specific requirements as needed. Any DOE organizations that are interested in potentially procuring Opsware technology or services via this contract should contact the DOE CIO office to coordinate their requirements and access the contract CLINs.

The corporate license includes the Opware Enterprise Intelligent Software Module (ISM) license. The Enterprise ISM license allows DOE to use any ISM that Opware currently provides commercially in any and all DOE licensed Opware Cores. It does not imply that Opware will provide DOE a license for the software that is managed using the ISM (i.e. the ISM for Oracle does not include a license for Oracle itself) but those software packages for which DOE has a license from the vendor of that product the Opware ISM for that product can be used in provisioning and deploying that product in the DOE environment consistent with the vendors software license terms.

Licensed Opware Technology

Description	Quantity
Opware Core - limited license for I&T	1
Licensed SAMs: OS Provisioning , Software Provisioning, Patch Management, Code Deployment & Rollback, Asset Tracking	
Opware Core- Enterprise Edition (number of servers under management limited only by hardware limitations and bandwidth to remote servers)	2
Licensed SAMs: OS Provisioning , Software Provisioning, Patch Management, Code Deployment & Rollback, Asset Tracking	
Opware <u>Multimaster Module</u>	3
Opware Agents	Unlimited ¹
Opware <u>Intelligent Software Modules (ISM)- Enterprise Package</u> ²	NA

¹ There is no limit to the number of agents which may be deployed in the three (3) year base period. (see above) At the end of the three (3) year base period of the agreement, the number of deployed agents will be reported to Opware, Inc., and that number will be used to calculate the baseline for maintenance. Additional Agents required after the end of the base period beyond will be licensed & maintained at the prices established for the option periods.

² The Enterprise Package of ISMs allows use of all commercially available ISMs that are 'off the shelf' at any given point in time.

Software Maintenance & Services

As a result of the two delivery orders, the following services will be acquired and would apply to the licensed products above. For additional quantities of any items, please see Section IV below.

Item	Description
Software Maintenance	All commercially supplied upgrades and updates for licensed technologies under maintenance will be supplied to DOE for the three (3) year base period of the agreement. Additional products and modules will be provided consistent with Opware standard commercial practice and may require license be procured to receive and use these additional functions.
Support	Opware Gold level (24x7) central site support for three (3) year base period of the agreement
On Site Engineering Support	A full time equivalent. up to 1800 hours per year. are included for

	three (3) year base period of the agreement
Training	10 Students - User & Admin Training
Project Management	500 hours of project management services, billed hourly, are included under the initial DO (DE-AD01-03IM00025) and base period pricing.

II. License & Maintenance acquired via DLT GSA Schedule

This section addresses Opware licenses and services previously acquired under under DLT GSA schedule delivery order DE-AD01-02SO30285 (\$1,326,793.00).

The following items have been procured and by DOE using the DLT schedule to date.

Items Delivered	Description
I&T Opware Platform	Opware Core used for I&T
Opware Agent Software	Fixed numbers of Opware Agent software that are used to allow systems to be managed by the Opware platform
Maintenance & Support	One (1) year of Maintenance and Support for the software configuration that was proposed by Opware and listed in CLIN OPS-L-001
Project Management Hours	300 hours for July to September 2002
Training	5 seats charged for September training

III. New Licensing Acquired under initial DO DE-AD01-03IM00025

CLIN	Description	Qty	Contract price
OPS-L-001	Includes the products and Services as Follows		
	Opware Core- Enterprise Edition *	2	
	Licensed SAMs: OS Provisioning , Software Provisioning, Patch Management, Code Deployment & Rollback, Asset Tracking		
	Opware Multimaster Module	2	
	Opware Agents upgrade to Unlimited	NA **	
	Opware Intelligent Software Modules (ISM)- Enterprise Package ***	NA	
	Upgrade Opware Platinum Maintenance &	Three (3)	

	Support	year Base period	
	DE-AD01-03IM00025 License/Support Price		\$934,419.00

*There is no license restriction with regard to the numbers of servers that may managed by an enterprise core the limits are only those imposed by systems sizing and bandwidth for the management tasks itself. Additional cores may be required to allow the management platform to be deployed in proximity to the servers managed thus relieving the bandwidth issues. Additional Cores are available in IDIQ portion of the contract

** There is no limit to the number of agents which may be deployed in the three (3) year base period of the contract. At the end of the three (3) year base period, the number of deployed agents will be reported to Opsware, Inc., and that number will be used to calculate the baseline for maintenance. Additional Agents beyond that reported at the end of the three (3) year base period will be licensed at the prices listed for the option periods.

*** The Enterprise Package of ISMs allows use of all commercially available ISMs that are "off the shelf" at any given point in time.

CLIN	Description	Contract price
OPS-S-001	Includes Services as Follows	
	500 hours of project management services, billed hourly, are committed under the contract.	
	Opsware User & Admin Training for 5 Students	
	DE-AD01-03IM00025 Service Price	\$88,860.00

IV. IDIQ Products & Services

The CLINs below may be ordered IDIQ

Base Contract Period

CLIN	Description	Type	Contract Price Base Period 1*	Contract Price Base Period 2**	Contract Price Base Period 3***
OPS-L-002	Opsware System Automation Modules (Core) - SE * (limited to 200 Servers under management)	Perpetual License	\$165,000	\$165,000	\$165,000
OPS-LM-002	SAM (Core) SE Gold Maintenance & Support	Yearly	\$41,250	\$41,250	\$41,250

OPS-L-003	System Automation Modules (Core) - EE ** (no license limitation for servers managed by this single instance)	Perpetual License	\$270,000	\$270,000	\$270,000
OPS-LM-003	SAM (Core) EE Gold Maintenance & Support	Yearly	\$67,500	\$67,500	\$67,500
OPS-L-004	Multimaster Module (per Core)	Perpetual License	\$120,000	\$120,000	\$120,000
OPS-LM-004	Multimaster Gold Maintenance & Support	Yearly	\$30,000	\$30,000	\$30,000
OPS-PS-001	Project Management Services (80 Hour per order minimum)	Hourly	\$150/hour	\$158/hour	\$165/hour
OPS-PS-002	Consulting Engineering Services (80 Hour per order minimum)	Hourly	\$175/hour	\$184/hour	\$193/hour
OPS-PS-003	Opware Core Installation and Integration	TBD	To Be Quoted	To Be Quoted	To Be Quoted
OPS-T-001	User Training 3-day course (Max 10 Students) (excludes T&L and Facilities)	UNIT	\$11,865	\$12,458	\$13,081
OPS-T-002	Admin Training 2-day course (Max 5 Students) (excludes T&L and Facilities)	UNIT	\$3,955	\$4,153	\$4,360

*July 12, 2002-July 11,2003

**July 12,2003- July 11, 2004

***July 12, 2004-July 11, 2005

Contract Option Period 1 – (July 12, 2005-July 11, 2006)

CLIN	Description	Type	Contract Price Option Year 1
OPS-L-002	Opware System Automation Modules (Core) - SE * (limited to 200 Servers under management)	Perpetual License	\$181,500
OPS-LM-002	SAM (Core) SE Gold Maintenance & Support	Yearly	\$45,375
OPS-L-003	System Automation Modules (Core) - EE ** (no license limitation for servers managed by this single instance)	Perpetual License	\$297,000
OPS-LM-003	SAM (Core) EE Gold Maintenance & Support	Yearly	\$74,250

OPS-L-004	Multimaster Module (per Core)	Perpetual License	\$132,000
OPS-LM-004	Multimaster Gold Maintenance & Support	Yearly	\$33,000
OPS-L-005	Agent (Universal) <per Server Managed>	Perpetual License	\$1,100
OPS-LM-005	Agent (Universal) Gold Maintenance & Support	Yearly	\$275
OPS-PS-001	Project Management Services (80 Hour minimum)	Hourly	\$174/hour
OPS-PS-002	Consulting Engineering Services (80 Hour minimum)	Hourly	\$203/hour
OPS-PS-003	Opware Core Installation and Integration	TBD	To Be Quoted
OPS-OSS-001	On-Site Engineering Support Annual FTE (Contract Year min/max Qty 1)	Year	\$302,500
OPS-T-001	User Training 3-day course (Max 10 Students) (excludes T&L and Facilities)	UNIT	\$13,735.22
OPS-T-002	Admin Training 2-day course (Max 5 Students) (excludes T&L and Facilities)	UNIT	\$4,578
OPS-LMB-001	Opware Maintenance & Support (Gold) for Baseline Technology in CLIN OPS-L-001	Yearly	\$641,250

Contract Option Period 2 - (July 12, 2006-July 11, 2007)

CLIN	Description	Type	Contract Price Option Year 2
OPS-L-002	Opware System Automation Modules (Core) - SE * (limited to 200 Servers under management)	Perpetual License	\$190,575
OPS-LM-002	SAM (Core) SE Gold Maintenance & Support	Yearly	\$47,644
OPS-L-003	System Automation Modules (Core) - EE ** (no license limitation for servers managed by this single instance)	Perpetual License	\$311,850
OPS-LM-003	SAM (Core) EE Gold Maintenance & Support	Yearly	\$77,963

OPS-L-004	Multimaster Module (per Core)	Perpetual License	\$138,600
OPS-LM-004	Multimaster Gold Maintenance & Support	Yearly	\$34,650
OPS-L-005	Agent (Universal) <per Server Managed>	Perpetual License	\$1,155
OPS-LM-005	Agent (Universal) Gold Maintenance & Support	Yearly	\$289
OPS-PS-001	Project Management Services (80 Hour minimum)	Hourly	\$182/hour
OPS-PS-002	Consulting Engineering Services (80 Hour minimum)	Hourly	\$213/hour
OPS-PS-003	Opware Core Installation and Integration	TBD	To Be Quoted
OPS-OSS-001	On-Site Engineering Support Annual FTE (Contract Year min/max Qty 1)	Year	\$317,625
OPS-T-001	User Training 3-day course (Max 10 Students) (excludes T&L and Facilities)	UNIT	\$14,421.98
OPS-T-002	Admin Training 2-day course (Max 5 Students) (excludes T&L and Facilities)	UNIT	\$4,807
OPS-LMB-001	Opware Maintenance & Support (Gold) for Baseline Technology in CLIN OPS-L-001	Yearly	\$641,250

*There is a license limitation of 200 servers under management for a SE core.

** There is no license restriction with regard to the numbers of servers that may managed by an enterprise core the limits are only those imposed by systems sizing and bandwidth for the management tasks itself. Additional cores may be required to allow the management platform to be deployed in proximity to the servers managed thus relieving the bandwidth issues.

Opware Specific Terms & Conditions

1. License for Software will be governed by the Opware License Agreement (incorporated by reference) , (See Addendum 2)
2. Terms for Opware Maintenance and Professional Services will be governed by the Opware Service & Maintenance Agreement (See Addendum 3)
3. The Unlimited Agent license will apply to any server owned, leased and managed by DOE or DOE Field Activity (including M&O contractors) for

support of the DOE mission. (managing services or systems for organizations external to DOE is specifically excluded from this license)



Opsware License Agreement

This LICENSE AGREEMENT (this "License Agreement") is entered into as of _____, 2002 ("Effective Date"), by and between Opsware Inc., a Delaware corporation having its principal place of business at 599 North Mathilda Avenue, Sunnyvale, California 94085 ("Opsware"), and United States Department of Energy (DOE) ("Licensee").

1. TERMS AND CONDITIONS

- 1.1 License Agreement. This License Agreement establishes the terms and conditions under which Licensee may use the Technology.
- 1.2 Maintenance Agreement. If purchased by Licensee, a separate Maintenance Agreement establishes the terms and conditions under which Opsware will support the Technology.
- 1.3 Attachment A. This document defines the quantity, type and pricing for Opsware Technology offered to the Licensee

2. DEFINITIONS

- 2.1 "Technology" means the "Opsware Automation Platform," "Opsware Agents," "Opsware Command Center," "Service Automation Modules", "Opsware Intelligent Software Modules" and associated Documentation that are identified in Attachment A and for which valid orders have been executed by the Licensee, together with any tools and APIs provided by Opsware to Licensee under this License Agreement and any error corrections, patches, work-arounds and updates provided by Opsware to Licensee under a Maintenance Agreement entered into by the parties.
- 2.2 "Core" means the portion of the Technology comprising the Opsware Automation Platform, the Opsware Command Center, and selected Service Automation Modules as identified by Opsware.

- 2.3 "Documentation" means end user installation and user guides, manuals, and other technical information in printed or machine-readable form that is normally provided by Opsware to end users of the Technology.
- 2.4 "Confidential Information" means all non-public information disclosed in tangible, visual or verbal form by the either party to the other. Confidential Information may include, but is not limited to, services, pricing information, computer programs, source code, names and expertise of employees and consultants, know-how, and other technical, business, financial and product development information. "Confidential Information" does not include any information that the receiving party can demonstrate by its written records (a) was rightfully known to it without obligation of confidentiality prior to its disclosure hereunder by the disclosing party; (b) is or becomes publicly known through no wrongful act of the receiving party; (c) has been rightfully received without obligation of confidentiality from a third party authorized to make such a disclosure; or (d) is independently developed by the receiving party without reference to confidential information disclosed hereunder. Without limiting the foregoing, source code for Opsware shall be subject to the additional restrictions on use and access set forth in this Agreement.
- 2.5 "Intellectual Property Rights" means patents, design patents, and designs (whether or not capable of registration), copyright, and any other form of statutory protection of any kind (other than trademarks) and applications for any of the foregoing respectively, all moral rights, Confidential Information, know-how and trade secrets.
- 2.6 "Derivative Works" means (1) for material subject to copyright protection, any work which is based upon one or more pre-existing works of the Technology, such as a revision, modification, translation, abridgment, condensation, expansion, collection, compilation or any other form in which such pre-existing works may be recast, transformed or adapted; (2) for patentable or patented materials, any addition, improvement or combination of the Technology; and (3) for material subject to trade secret protection, any new material, information or data relating to and derived from the Technology.

3. LICENSE GRANTS AND RESTRICTIONS

- 3.1 License. Subject to paragraph 8.1 below and subject to Licensee's continued compliance with the terms of this License Agreement, Opsware grants to Licensee a worldwide, limited, royalty-bearing, non-exclusive, non-transferable license as described in this Section 3.
- 3.2 Authorized Uses. Licensee may:
- (a) Install the Opsware Technology identified on Attachment A for which valid orders have been placed and in quantities consistent with those orders.
 - (b) Use the Technology solely to support the internal operations of Licensee;
 - (c) Install Opsware Agents on any number of devices that are managed by or for Licensee consistent with Attachment A .

- (d) Use the tools and APIs provided by Opware to extend those portions of the Technology that are accessible through such APIs and tools.
- (e) Use its own tools to gain read-only access to Licensee data stored in the Opware Automation Platform

3.3 Ancillary Rights

- (a) The foregoing authorized uses may be exercised on Licensee's behalf only by appropriately trained technical employees and contractors of Licensee (hereafter referred to as "Authorized Persons").
- (b) Licensee may examine and copy the Documentation in support of Licensee's authorized use of the Technology.
- (c) Licensee may copy the Technology for archival or backup purposes, provided that all titles, trademarks and proprietary rights notices shall be reproduced in such copies.
- (d) There are no implied licenses under this License Agreement and Opware reserves all rights and licenses in and to the Technology not expressly granted to Licensee under this License Agreement.

3.4 United States Government Users. If a user or licensee of the Technology is an agency, department, or other entity of the United States Government ("Government"), the use, duplication, reproduction, release, modification, disclosure or transfer of the Technology, or any related documentation of any kind, including technical data or manuals, is restricted in accordance with Federal Acquisition Regulation 52.227-19 for civilian agencies and Defense Federal Acquisition Regulation 227.7202 for military agencies. For purposes of clarification, Licensee's rights to modify, adapt, or combine the Technology with other computer software pursuant to subsection 52.227-19(c)(iv) does not include a right to access or modify the source code to the Technology, except to the extent provided in Section 3.2 (d) of this Agreement. The Technology is commercial computer software and the related documentation is commercial computer software documentation. The use of the Technology and related documentation is further restricted in accordance with the terms of this License Agreement, and any modification hereto.

3.5 Limits. Licensee may not (directly or indirectly, in whole or in part):

- (a) Install an Opware Agent on any device that is not managed by Licensee or its contractors;
- (b) Provide access to the Technology to anyone other than Authorized Persons;
- (c) Transfer, sublicense, distribute, lease, rent, or commercially share (including timeshare) the Technology or any of Licensee's rights herein;
- (d) Obtain any ownership or leasehold rights in, place a lien or encumbrance upon, or otherwise interfere with Opware's ownership and right to possession of the Technology for any reason; or

(e) Modify, translate, reverse engineer, decrypt, decompile, disassemble, create Derivative Works based on, or otherwise attempt to discover the Technology source code or underlying ideas or algorithms, except as expressly provided in Section 3.2(d).

3.6 Delivery/Acceptance. The Technology shall be deemed accepted by Licensee upon delivery by Opware.

4. OWNERSHIP

4.1 Except as provided in Section 4.2, all rights, title, and interest in the Technology, including all intellectual property rights therein, are and will remain the property of Opware or its licensors, including any modifications, enhancements and Derivative Works thereto, except those made by Licensee, and all maintenance releases, error corrections, updates, upgrades, new versions and other releases, made by or for Opware.

4.2 If Licensee or any Authorized Person of Licensee extends the Technology by creating a new Intelligent Software Modules, or by modifying any Intelligent Software Modules licensed to Licensee hereunder ("Licensee Extensions"), then Licensee shall own the intellectual property rights to such Licensee Extensions. Such Licensee Extensions shall be considered Derivative Works, and Licensee's ownership interest and intellectual property rights therein shall not extend to the underlying Opware Technology upon which they are based. Licensee agrees to use Licensee Extensions only with the Technology and solely to support the internal operations of Licensee. Licensee agrees to cease use of all Licensee Extensions upon termination of this License Agreement.

4.3 License Of Licensee Derivative Works To Opware. Licensee will deliver to Opware a copy of all such Derivative Works made by Licensee, and Opware shall have a non-exclusive, worldwide license to use, reproduce and modify such Derivative Works, and to distribute copies thereof to any person or entity; provided, however, that Opware's right to distribute such Derivative Works shall be subject to such reasonable limits as Licensee may require in the interest of national security.

5. COMMITMENTS, FEES AND PAYMENT

5.1 Fees. The license rights set forth herein are conditioned upon Licensee's payment to Opware of the license fees set forth in the Attachment A and for which valid orders have been provided to Opware, and any other fees as agreed in writing by the parties.

5.2 Reports. Every twelve (12) months, Licensee will provide a report identifying the number and type of Devices on which an Opware Agent has been installed as well as all other Devices known to or managed by the Technology. At the end of the first three (3) contract years a report of installed Opware Agents shall be provided to Opware and serve as the baseline number of Agents which Licensee has the license to use. After that point additional Opware Agents required beyond the baseline number will be required to be purchased from Opware at the pricing contained in Attachment A.

5.3 Payments. All payments shall be made in U.S. dollars and are due Net 30 of receipt of Invoice from Opsware. The CLINs OPS-L-001 and OPS-S-001 denoted in Attachment A are ordered by formal execution of this License Agreement. Additional licenses or Facilities purchased by Licensee will be due Net 30 of receipt of invoice by Opsware.

6. VERIFICATION, REPORTING AND AUDIT

- 6.1 Certification and Information. At Opsware's written request, not more frequently than annually, Licensee shall furnish Opsware with a signed certification verifying that the Technology is being used pursuant to the provisions of this License Agreement, and identifying the number, type and location of Devices that are being managed by Licensee using the Technology. At Opsware's reasonable request, Licensee will cooperate with Opsware to provide such additional usage information as might be useful to Opsware in its efforts to improve and market the Technology.
- 6.2 Audits. During the term of this License Agreement and for a period of one (1) year thereafter, Licensee will maintain complete and accurate books, records and electronic backups in connection with its use of the Technology, in sufficient detail to permit Opsware to verify Licensee's compliance with the terms and conditions of this License Agreement. Opsware will have the right, through independent auditors, to inspect Licensee's facilities, equipment and records, including access to the Technology, no more than twice annually to verify compliance with the terms and conditions of this License Agreement, including the amounts payable to Opsware hereunder. Any such audit will be conducted during regular business hours at Licensee's offices and will not interfere unreasonably with Licensee's business activities. Where the Licensee's Security Plan precludes access to protected areas for audit purposes by outside vendors, certification of compliance to the terms and conditions of the Opsware License Agreement will be provided via a signed affidavit and provided to Opsware no more than twice a year. All information disclosed to Opsware shall be treated as Licensee Confidential Information. If an audit reveals that Licensee has underpaid the total fees or charges to Opsware by more than five percent (5%) for the period covered by the audit, then Licensee will pay Opsware's reasonable costs of conducting the audit, in addition to the underpaid amount and Opsware shall, in addition to any other rights or remedies it may have, be entitled to an additional audit within the same year.

7. RESPONSIBILITIES FOR THIRD PARTY SOFTWARE LICENSES

Licensee Responsibility. The Technology requires use of certain third party software. Opsware will inform Licensee from time to time as to the identity of the third party software licenses that are required. Unless otherwise specified in the Order Form, Licensee will acquire, at Licensee's expense, all such licenses; provided, however, that if additional third party software licenses are required in connection with a Technology refresh or upgrade, Licensee may elect not to accept such refresh or upgrade. In that event, Opsware will support the prior version to the extent provided in the Opsware Maintenance Agreement. Upon Opsware's request, Licensee will provide evidence of having obtained such licenses.

8. TERM AND TERMINATION

- 8.1 Term. Subject to Section 8.2, the Term of all licenses granted hereunder will be perpetual.
- 8.2 Termination. Either party may immediately terminate this License Agreement if the other party (a) becomes insolvent and becomes unwilling or unable to meet its obligations under this License Agreement, (b) files a petition in bankruptcy, (c) is subject to the filing of an involuntary petition for bankruptcy which is not rescinded within a period of forty-five (45) days, (d) fails to cure a material breach of or failure to comply with any material term or condition of this License Agreement within thirty (30) days of receipt of written notice specifying such breach, or (e) materially breaches its obligations of confidentiality hereunder.
- 8.3 Effects of Termination. Upon termination of this License Agreement for any reason, any amounts owed to Opware under this License Agreement before such termination will be immediately due and payable. Except in the case of termination of this License Agreement by Licensee due to the actions of Opware under Section 8.2 above, all licensed rights granted in this License Agreement will immediately cease to exist, and Licensee must promptly discontinue all use of the Technology, erase all copies of the Technology from Licensee's computers, and return to Opware or destroy all copies of the Technology and Documentation on tangible media in Licensee's possession or control and certify in writing to Opware that it has fully complied with these requirements.
- 8.4 Survival. The following provisions of this License Agreement will remain in effect following the expiration or termination of this License Agreement for any reason: 4 (Ownership), 6 (Verification, Reporting and Audit), 9 (Disclaimers), 10 (Limitations of Liability), 11 (Indemnification), 12 (Confidentiality) and 14 (General).

9. **DISCLAIMERS**

Opware does not warrant that its Technology will meet all of Licensee's requirements, or that its services or Technology will be secure, uninterrupted or error-free. OPSWARE MAKES NO WARRANTY OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE RELATING TO THE TECHNOLOGY OR TO OPSWARE'S SERVICES. OPSWARE SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF DESIGN, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NONINFRINGEMENT. OPSWARE AND ITS SUPPLIERS DO NOT WARRANT OR REPRESENT THAT THE SOFTWARE WILL BE FREE FROM BUGS OR THAT ITS USE WILL BE UNINTERRUPTED OR ERROR-FREE, OR MAKE ANY OTHER REPRESENTATIONS REGARDING THE USE, OR THE RESULTS OF THE USE, OF THE SOFTWARE OR DOCUMENTATION IN TERMS OF ACCURACY, RELIABILITY, OR OTHERWISE. THESE DISCLAIMERS SHALL APPLY NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY PROVIDED HEREIN.

10. LIMITATIONS OF LIABILITY

- 10.1 EXCEPT FOR LIABILITY ARISING OUT OF (1) A PARTY'S INDEMNIFICATION OBLIGATIONS UNDER SECTIONS 11.1 OR 11.3, OR ANY BREACH OF CONFIDENTIALITY HEREUNDER, (2) ACTS OF LICENSEE EXCEEDING THE SCOPE OF THE LICENSES GRANTED UNDER THIS LICENSE AGREEMENT, AND (3) EXCEPT FOR LICENSEE'S OBLIGATIONS TO MAKE PAYMENTS TO OPSWARE AS SET FORTH HEREUNDER, IN NO EVENT WILL EITHER PARTY'S TOTAL COMBINED, CUMULATIVE LIABILITY ARISING OUT OF OR RELATED TO THIS LICENSE AGREEMENT AND THE STATEMENT OF WORK AND ANY OPSWARE ANNUAL MAINTENANCE AGREEMENT ENTERED INTO BY THE PARTIES RELATED TO THE TECHNOLOGY LICENSED HEREUNDER, UNDER ANY THEORY OF LAW, EXCEED THE SUM OF FEES PAID OR PAYABLE BY LICENSEE UNDER THIS LICENSE AGREEMENT DURING THE THREE MONTHS IMMEDIATELY PRECEDING THE DATE THE CAUSE OF ACTION AROSE. THE EXISTENCE OF ONE OR MORE CLAIMS SHALL NOT EXPAND SUCH LIMIT.
- 10.2 EXCEPT FOR LIABILITY ARISING OUT OF (1) A PARTY'S INDEMNIFICATION OBLIGATIONS UNDER SECTIONS 11.1 OR 11.3, OR ANY BREACH OF CONFIDENTIALITY HEREUNDER, OR (2) ACTS OF LICENSEE EXCEEDING THE SCOPE OF THE LICENSES GRANTED UNDER THIS LICENSE AGREEMENT, IN NO EVENT WILL EITHER PARTY OR THEIR LICENSORS OR SUPPLIERS HAVE ANY LIABILITY TO THE OTHER PARTY FOR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES HOWEVER CAUSED AND UNDER ANY THEORY OF LIABILITY (WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE) WHETHER OR NOT THE LIABLE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE.
- 10.3 IN NO EVENT WILL EITHER PARTY OR ITS LICENSORS OR SUPPLIERS HAVE ANY LIABILITY TO THE OTHER PARTY FOR ANY LOST PROFITS, LOSS OF DATA, LOSS OF USE, OR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES.

11. INDEMNIFICATION

- 11.1 Opware Obligation. Opware shall at its own expense defend Licensee from and against any third party claims brought against Licensee, and shall pay or reimburse Licensee for any and all damages, costs and expenses payable by Licensee to such third party to the extent they are awarded in a final judgment or agreed to in a settlement, as a result of any third party claims against Licensee alleging that any of the Technology infringes any U.S. patent, copyright, trademark or trade secret, provided that Licensee: (1) promptly notifies Opware in writing of the claim; (2) grants Opware sole control of the defense and settlement of the claim; and (3) provides Opware, at Opware's expense, with all assistance, information and authority reasonably required for the defense and settlement of the claim.
- 11.2 Exceptions. Opware's indemnity obligations do not apply to (1) any use of the Technology beyond the scope of license granted herein, (2) any modification or Derivative Works made by or for Licensee, (3) use of a superseded infringing version of the Licensed Technology by

Licensee after release of a non-infringing version by Opsware, (4) any use or combination of the Technology with any technology, software or hardware not supplied by Opsware, if such alleged infringement would be avoided by use of the Technology alone or with other technology, software or hardware, (5) the negligent use of the Technology by Licensee, (6) any third party software or technology that is included or provided with the Technology, or that operates in conjunction with the Technology; or (7) any use of the Technology connection with any ultra-hazardous activity, or any other activity for which its failure might result in serious property damage, or death or serious bodily injury.

11.3 Claim of Infringement. If a claim of infringement under Section 11.1 occurs, or if Opsware determines that a claim is likely to occur, Opsware will attempt, in the following order of precedence, to: (1) procure for Licensee the right or license to continue to use the Technology free of the infringement claim; or (2) replace or modify the Technology to make them non-infringing provided that the replacement Technology substantially conforms to Opsware's then-current specification for the Technology. If these remedies are not reasonably available to Opsware despite Opsware's commercially reasonable efforts, Opsware may terminate this License Agreement.

11.4 Licensee Obligation. Licensee shall at its own expense defend Opsware from and against any third party claims brought against Opsware, and shall pay or reimburse Opsware for any and all damages, costs and expenses payable by Opsware to such third party to the extent they are awarded in a final judgment or agreed to in a settlement, as a result of any third party claims against Opsware arising out of (1) a modification of the Technology by or for Licensee; (2) the combination of the Technology with software or hardware not supplied by Opsware; or (3) any use of the Technology in connection with any ultra-hazardous activity, or any other activity for which its failure might result in serious property damage, or death or serious bodily injury; provided that Opsware: (i) promptly notifies Licensee in writing of the claim; (ii) grants Licensee sole control of the defense and settlement of the claim; and (iii) provides Licensee, at Licensee's expense, with all assistance, information and authority reasonably required for the defense and settlement of the claim.

11.5 Exclusive Remedy. Sections 11.1, 11.2 and 11.3 state the sole and exclusive obligations and limitations of liability of Opsware for any patent, copyright, trademark, trade secret or other intellectual property rights infringement related to the Technology and is in lieu of any warranties of non-infringement, all of which are disclaimed.

12. **CONFIDENTIALITY.** Neither party will use any Confidential Information of the other party except as expressly permitted in this License Agreement or as expressly authorized in writing by the other party. Each party shall use the same degree of care to protect the disclosing party's Confidential Information as it uses to protect its own Confidential Information of like nature, but in no circumstance less than a commercially reasonable standard of care. Neither party may disclose the other party's Confidential Information to any person or entity other than Authorized Persons who need access to such Confidential Information solely for the purpose of fulfilling that party's obligations or exercising that party's rights hereunder. The foregoing obligations will not restrict either party from disclosing Confidential Information of the other party: (1) pursuant to the order or requirement of a court, administrative agency, or other governmental body, provided that the party required to make such a

disclosure gives reasonable notice to the other party to contest such order or requirement; and (2) on a confidential basis to its legal or financial advisors. In addition, each party may disclose the terms and conditions of this License Agreement: (i) as required under applicable securities regulations; and (ii) on a confidential basis to private investors in or acquirers of such party.

13. EXPORT

The Technology and related technical data may be subject to U.S. export control laws, including without limitation the U.S. Export Administration Act and its associated regulations, and may be subject to export or import regulations in other countries. Licensee shall comply with all such regulations and agrees to obtain all necessary licenses to export, re-export, or import the Technology or any related technical data.

14. GENERAL

14.1 No Agency. Opware and Licensee each acknowledge and agree that the relationship established by this License Agreement is that of independent contractors, and nothing contained in this License Agreement shall be construed to: (i) give either party the power to direct or control the day-to-day activities of the other; (ii) deem the parties to be acting as partners, joint venturers, co-owners or otherwise as participants in a joint undertaking; or (iii) permit either party or any of either party's officers, directors, employees, agents or representatives to create or assume any obligation on behalf of or for the account of the other party for any purpose whatsoever.

14.2 Compliance with Laws. Each party agrees to comply with all applicable laws, regulations, and ordinances relating to their performance hereunder. Without limiting the foregoing, Licensee warrants and covenants that it will comply with all then current laws and regulations of the United States and other jurisdictions relating or applicable to Licensee's use of the Technology including, without limitation, those concerning Intellectual Property Rights, invasion of privacy, defamation, and the import and export of software.

14.3 Notices. Any notice required or permitted hereunder shall be in writing and shall be delivered as follows (with notice deemed given as indicated): (i) by personal delivery when delivered personally; (ii) by established overnight courier upon written verification of receipt; (iii) by facsimile transmission when receipt is confirmed orally; or (iv) by certified or registered mail, return receipt requested, upon verification of receipt. Either party may change its contact person for notices and/or address for notice by means of notice to the other party given in accordance with this Section. Notices shall be sent to the following:

To Opsware:

Mr. Ben Horowitz, President and CEO
Opsware, Inc.
599 N. Mathilda Avenue
Sunnyvale, CA 94085

with a copy to Opsware's General Counsel (same address)

To Licensee:

U.S. Department of Energy
Office of the Chief Information Officer
ATTN: IM-12/B. Griffin
19901 Germantown Road
Germantown MD 20874

- 14.4 Third Party Beneficiaries. This License Agreement is solely for the benefit of the parties and their successors and permitted assigns, and does not confer any rights or remedies on any other person or entity.
- 14.5 Entire Agreement and Waiver. This License Agreement and any schedules or appendices hereto, as well as the Statement of Work and any purchase requisition and related payment terms agreed to in writing by the parties, shall constitute the entire agreement between Opsware and Licensee with respect to the subject matter hereof and all prior agreements, representations, and statements with respect to such subject matter are superseded hereby. The terms of this License Agreement shall control in the event of any inconsistency with the terms of any Schedule hereto. This License Agreement may be changed only by written agreement signed by both Opsware and Licensee. No failure of either party to exercise or enforce any of its rights under this License Agreement shall act as a waiver of subsequent breaches; and the waiver of any breach shall not act as a waiver of subsequent breaches.
- 14.6 Severability. In the event any provision of this License Agreement is held by a court or other tribunal of competent jurisdiction to be unenforceable, that provision will be enforced to the maximum extent permissible under applicable law, and the other provisions of this License Agreement will remain in full force and effect. The parties further agree that in the event such provision is an essential part of this License Agreement, they will begin negotiations for a suitable replacement provision.
- 14.7 Counterparts. This License Agreement may be executed in any number of counterparts, each of which, when so executed and delivered, shall be deemed an original, and all of which shall constitute one and the same Agreement.
- 14.8 Remedies. Except as provided herein, the rights and remedies of each party set forth in this License Agreement are not exclusive and are in addition to any other rights and remedies available to it at law or in equity.

14.13 Construction. The parties have participated jointly in the negotiation and drafting of this License Agreement. In the event an ambiguity or question of intent or interpretation arises, the License Agreement shall be construed as if drafted jointly by the parties and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this License Agreement.

SIGNATURES

Licensee

Authorized Signature

Name

Title

Date

OPSWARE

Authorized Signature

Name

Title

Date



Opsware Maintenance Agreement

This **MAINTENANCE AGREEMENT** is entered into in connection with, and as of _____, 20__ the ("Effective Date"), by and between Opsware Inc., a Delaware corporation having its principal place of business at 599 North Mathilda Avenue, Sunnyvale, California 94085 ("Opsware"), and United States Department of Energy ("Licensee").

1. TERMS AND CONDITIONS

- 1.1 License Agreement. This Maintenance Agreement is expressly subject to the Opsware License Agreement between the parties dated _____, 20__ ("the License Agreement"), which must be in effect throughout the term of this Maintenance Agreement, including any renewals of such term.
- 1.2 Maintenance Agreement. This Maintenance Agreement establishes the terms and conditions under which Opsware will support the Technology that is the subject of the License Agreement following its receipt by Licensee.
- 1.3 Order Form. The level of support purchased by Licensee, the price, and the initial term of this Agreement shall be specified in Attachment A of the License Agreement. The terms of referenced Attachment A are incorporated herein by reference. No term in the Attachment A may modify any provision in this Maintenance Agreement, and in the event of a conflict between the two documents, the terms of this Maintenance Agreement shall prevail.

2. DEFINITIONS

Capitalized terms that are defined in the License Agreement but are not defined in this document shall have the meanings provided in the License Agreement.

- 2.1 "Update" means a modification to the Technology which incorporates corrections of Errors and which may also provide minor functional or performance improvements.
- 2.2 "Upgrade" means a release of the Technology that includes significant new features or functionality, and may also include correction of Errors, and functional or performance improvements

- 2.3 “Error” means a failure of the Technology software to operate as described in the End-User Documentation, provided that such condition is reported by Licensee to Opsware during the term of this Maintenance Agreement and can be verified by both Parties. The further definition and classification of Errors is set forth in section 6.2 of this Maintenance Agreement.
- 2.4 “Integration” means the activities comprising Opsware deployment and installation, ISM creation, and OSS integration using Opsware APIs, as defined in the License Agreement.
- 2.5 “Support” means the support and Error correction services provided hereunder.
- 2.6 “Time and Materials” means:

Time: Opsware services billed at the applicable hourly rate in effect at the time the service is provided.

Materials: Reimbursement by Licensee to Opsware for Travel Expenses, as defined, and all direct and out-of-pocket expenses reasonably and necessarily incurred by Opsware in connection with the service that is being billed on a Time and Materials basis.

Travel Expenses: Travel expenses include all out-of-pocket expenses reasonably and necessarily incurred by Opsware when providing services to Licensee away from Opsware’s principal place of business in Sunnyvale, California. Opsware will comply with Licensee’s reasonable travel policy if it is made available to Opsware.

3. SCOPE OF AGREEMENT

3.1 Coverage

(a) Technology

This Maintenance Agreement covers the Technology identified in the License Agreement. This Maintenance Agreement will also cover Error corrections, Updates and Upgrades furnished to Licensee under this Maintenance Agreement.

(b) Multiple Licensee Locations

This Maintenance Agreement covers the Technology at all Licensee-managed locations at which the Technology is permitted to be installed under the License Agreement.

3.2 Exclusions

(a) Licensee Extensions

Licensee shall inform Opsware in writing of any extensions to the Technology made by Licensee (Licensee Extensions). Opsware shall not be responsible for maintaining or supporting Licensee Extensions or for maintaining portions of the Technology affected by Licensee Extensions.

(b) Software, Content

Opware shall not be responsible for maintaining software, content or documentation provided by Licensee or a third party.

(c) Hardware

Opware shall not be responsible for maintaining hardware, including but not limited to servers, computers, network devices, peripheral devices, telecommunication equipment, and storage media, provided by Licensee or a third party.

(d) Superseded Version

Opware will support the current version of the Technology. Opware will continue to provide support for Licensee's use of the version prior to the current version for twelve (12) months following release of the current version, but Opware will not provide Error correction to such prior version if the Error is corrected avoided through the use of the current version. Licensee must ensure that each location is maintained at the same release level.

(e) Time and Materials Charges

Should Opware determine that a request for support from Licensee is the result of one of the excluded elements described in this section 3.2, Opware may request that Licensee reimburse Opware on a Time and Materials basis for its services rendered in connection with such support request.

4. CUSTOMER SUPPORT

Opware shall not be required to provide customer support to Licensee's customers.

5. SUPPORT OF LICENSEE

During the term of this Maintenance Agreement, in consideration for the Fees set forth in this Maintenance Agreement and in the License Agreement, Opware agrees to provide Licensee with the following support services:

- 5.1 Telephone, E-mail, Verbal and Remote Access Support. Opware will provide Telephone, E-mail, Verbal and, upon Licensee's request, Remote Access Support. Such support will be given (i) to answer routine questions regarding the use of the Technology; (ii) to assist Licensee in identifying and reporting Errors; and (iii) to provide work-around solutions when reasonably available.

Telephone support and E-mail support refers to assistance given by Opware personnel by telephone or e-mail, respectively, to authorized Licensee personnel. Verbal Support refers to such assistance given by Opware personnel other than by telephone or modem (i.e., in person, or in writing). At Licensee's request, Verbal Support may be provided at the Licensee's facilities, in which case Licensee will pay such support on a Time and Materials basis. Remote Access Support refers to secure remote access to Licensee's equipment and Licensee's copy of the Technology by Opware personnel from Opware's place of business or another remote location.

- 5.2 Response Time. Opware will provide support during the hours and days that are included in Licensee's Maintenance Plan (i.e., Silver, Gold or Platinum). Opware will respond to reported Errors in the time frame set forth in section 6.
- 5.3 Electronic Support Capability. If Licensee requests Electronic Support, then Opware and Licensee will maintain secure telecommunications facilities (e.g., VPN) enabling Opware to remotely access Licensee's Opware Management Platform. If Licensee declines to permit Opware to use remote Electronic Support, then Licensee will reimburse Opware on a Time and Materials basis for on-site support that is required as a result.
- 5.4 Training. Training is not included within this Maintenance Agreement but may be purchased separately from Opware.
- 5.5 Installation and Integration. Installation and Integration are Licensee's responsibility. At Licensee's request, and subject to availability of Opware personnel, Opware will provide assistance to Licensee on a Time and Materials basis.

6. ERROR CORRECTION

- 6.1 Request for Correction. Opware shall provide Error correction, as set forth herein, during the Term of this Maintenance Agreement. Such Error correction will be provided as follows: Licensee's Primary Contacts (as defined in Section 8.2) may identify an Error by giving notice (in writing, if so requested by Opware) to Opware specifying in detail the nature of such Error and the circumstances under which the Error occurs. Upon Opware's request, Licensee shall deliver or make available to Opware any Licensee hardware, software and technical data needed to reproduce and verify the Error, unless such access is prohibited by Licensee's security policies or by applicable law.

6.2 Classification. Errors shall be classified by Opsware and entered into its ticketing system as follows:

Severity	Definition / Response
<p>"P1" Critical</p>	<p>Operations on production servers have stopped because of this issue and/or a critical feature is not working, requiring immediate real-time attention.</p> <p>Within one (1) hour of receiving the problem report, Opsware will initiate an effort to replicate and verify the reported problem. Opsware will then provide continuous effort to arrive at a fix or work-around, and provide Licensee with the final form of the fix either in the form of a patch or in the next succeeding maintenance release.</p>
<p>"P2" Urgent</p>	<p>High-impact problem where operations on production servers are proceeding, but in a significantly impaired fashion: time sensitive issue that is not causing an immediate work stoppage or significant customer concern.</p> <p>Within four (4) business hours of receiving the problem report, Opsware will initiate an effort to replicate and verify the reported problem. Opsware will use commercially reasonable efforts to provide Licensee with a work-around or fix within ten (10) days of receipt of the problem, and to provide the final form of fix either in the form of a patch or in the next succeeding maintenance release.</p>
<p>"P3" Important</p>	<p>Operations on non-production servers are impaired; or an Important issue affecting production servers which does not have significant current operational or productivity impact for the customer.</p> <p>Within one (1) business day of receiving the problem report, Opsware will initiate an effort to replicate and verify the reported problem. Opsware will use commercially reasonable efforts to provide Licensee with a work-around or fix within ninety (90) days of receipt of the problem, and to provide the final form of fix either in the form of a patch or in the next succeeding maintenance release.</p>
<p>"P4" Needed</p>	<p>Customer business is not impacted, but there continues to be a problem which is a nuisance</p>

Opware will begin work on error identification and verification within five business (5) days, and include a final fix either in the form of a patch or in the next succeeding Update or Upgrade after the fix or work-around has been developed.

- 6.3 Records. Opware will maintain a record of all reported Errors. Upon request, Opware will provide Licensee with a report of the recorded information and the status of each reported Error.

7. PRODUCT CHANGES

- 7.1 Included: Opware will provide a licensed copy of all Updates and Upgrades which Opware commercially releases during the term of this Maintenance Agreement subject to the terms and conditions of the License Agreement and of this Maintenance Agreement. Licensee will reimburse Opware for any third-party fees that Opware is required to pay in connection with those items. New products that are distinct from those licensed to Licensee are not included.
- 7.2 Changes Initiated by Opware. Opware reserves the right to add new features and functions to the Technology, and the right to discontinue features. Upon Licensee's reasonable request and on mutually agreeable terms, Opware may provide reasonable cooperation to Licensee to enable Licensee to continue to use discontinued features or functions.

8. LICENSEE RESPONSIBILITIES

Opware's obligations to Licensee under this Maintenance Agreement are expressly made conditional upon the following:

- 8.1 Compliance With All Agreements. Licensee shall at all times be in full compliance with all terms and conditions of the License Agreement and this Maintenance Agreement. Upon prior written notice, Opware may suspend service under this Maintenance Agreement for any period in which Licensee is not in such compliance.
- 8.2 Primary Contacts. At each location where the Technology is installed, Licensee will designate one (1) person and one (1) backup person properly trained in the use of the Technology to serve as Licensee's primary contact with Opware for support, Error correction and other maintenance services. Licensee may request the appointment of additional authorized persons, subject to Opware's then-current fees for such additional

contacts. Licensee shall provide written notice to Opsware giving the name and contact information for designated persons. Once a Primary Contact initiates a request for support, maintenance or Error correction, that Contact or his backup shall remain available to Opsware to assist in the problem resolution.

8.3 Licensee shall devote such personnel and resources as Opsware reasonably requests as necessary to assist Opsware in the successful and timely provision of maintenance services. Licensee shall make commercially reasonable efforts to ensure that its personnel are properly trained in the operation and use of the Technology.

8.4 Access. Licensee shall provide Opsware with in-person and telephone access, (and if Electronic Support is requested, remote electronic access) to Licensee's equipment, software, data and personnel, as reasonably requested by Opsware to enable Opsware to perform its services under this Maintenance Agreement.

9. FEES

9.1 Fees. Licensee will pay the annual fee shown on the Attachment A upon signing this Maintenance Agreement. The annual fee for any renewal term will be due thirty (30) days prior to the commencement of such term.

9.2 Time and Materials Charges. In addition the basic fees, Licensee shall pay for selected services on a Time and Materials basis, where expressly indicated in this Maintenance Agreement. Time and Materials charges are payable net 30 upon invoice from Opsware.

10. DISCLAIMERS

Opsware does not warrant that its services hereunder will meet all of Licensee's requirements, or that its services or Technology will be secure, uninterrupted or error-free. OPSWARE MAKES NO WARRANTY OF ANY KIND, WHETHER EXPRESS, IMPLIED, STATUTORY, OR OTHERWISE RELATING TO THE TECHNOLOGY OR TO OPSWARE'S SERVICES. OPSWARE SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES OF DESIGN, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NONINFRINGEMENT. OPSWARE AND ITS SUPPLIERS DO NOT WARRANT OR REPRESENT THAT THE SOFTWARE WILL BE FREE FROM BUGS OR THAT ITS USE WILL BE UNINTERRUPTED OR ERROR-FREE, OR MAKE ANY OTHER REPRESENTATIONS REGARDING THE USE, OR THE RESULTS OF THE USE, OF THE SOFTWARE OR DOCUMENTATION IN TERMS OF ACCURACY, RELIABILITY, OR OTHERWISE. THESE DISCLAIMERS SHALL APPLY NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY PROVIDED HEREIN.

11. LIMITATIONS OF LIABILITY

The liability of the Parties hereunder shall be limited as set forth in Section 11 (Limitations of Liability) of the License Agreement.

12. FORCE MAJEURE

Neither party shall be liable hereunder by reason of any failure or delay in the performance of its obligations hereunder (except for the payment of money) on account of strikes, shortages, riots, insurrection, fires, flood, storm, explosions, acts of God, war, governmental action, labor conditions, earthquakes, material shortages or any other cause which is beyond the reasonable control of such party.

13. TERM OF AGREEMENT; TERMINATION

- 13.1 Term. The initial term of this Maintenance Agreement shall be the period specified on the Attachment A; or, if no such term is specified, one (1) year from the Effective Date. At the end of the initial or any renewal term this Maintenance Agreement will automatically renew for successive periods of one (1) year, unless either party terminates it by providing written notice of non-renewal to the other party at least sixty (60) days prior to the expiration of the then-current term. The term is subject to any earlier Termination under Section 14.2.
- 13.2 Termination. This Maintenance Agreement will terminate immediately upon the termination of the License Agreement for any reason. Further, either party may immediately terminate this Agreement if the other party (a) becomes insolvent and becomes unwilling or unable to meet its obligations under this Agreement, (b) files a petition in bankruptcy, (c) is subject to the filing of an involuntary petition for bankruptcy which is not rescinded within a period of forty-five (45) days, (d) fails to cure a material breach of or failure to comply with any material term or condition of this Agreement within thirty (30) days of receipt of written notice specifying such breach, or (e) materially breaches its obligations of confidentiality hereunder.
- 13.3 Payment Upon Termination or Expiration Any unpaid portion of any fee payable by Licensee to Opsware under this Maintenance Agreement shall be immediately due and payable upon its expiration or termination for any reason.
- 13.4 Survival. The following provisions of this Agreement will remain in effect following the expiration or termination of this Agreement for any reason: 10 (Disclaimers) and 12 (Limitations of Liability).

SIGNATURES

OPSWARE INC.

LICENSEE

Authorized Signature

Name

Title

Date

Authorized Signature

Name

Title

Date

9. OPTION TO EXTEND THE TERM OF THE CONTRACT. (FAR 52.217) (MAR 2000)

(a) The Government may extend the term of this contract by written notice to the Contractor within [*insert the period of time within which the Contracting Officer may exercise the option*]; provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least [30] days [*60 days unless a different number of days is inserted*] before the contract expires. The preliminary notice does not commit the Government to an extension.

(b) If the Government exercises this option, the extended contract shall be considered to include this option clause.

(c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed [60](months)(five years).

10. F.O.B. DESTINATION (FAR 52.247-34)(NOV 1991)

(a) The term "f.o.b. destination," as used in this clause, means-

(1) Free of expense to the Government, on board the carrier's conveyance, at a specified delivery point where the consignee's facility (plant, warehouse, store, lot, or other location to which shipment can be made) is located; and

(2) Supplies shall be delivered to the destination consignee's wharf (if destination is a port city and supplies are for export), warehouse unloading platform, or receiving dock, at the expense of the Contractor. The Government shall not be liable for any delivery, storage, demurrage, accessorial, or other charges involved before the actual delivery (or "constructive placement" as defined in carrier tariffs) of the supplies to the destination, unless such charges are caused by an act or order of the Government acting in its contractual capacity. If rail carrier is used, supplies shall be delivered to the specified unloading platform of the consignee, except when the supplies delivered meet the requirements of Item 568 of the National Motor Freight Classification for "heavy or bulky freight." When supplies meeting the requirements of the referenced Item 568 are delivered, unloading (including movement to the tailgate) shall be performed by the consignee, with assistance from the truck driver, if requested.

If the Contractor uses rail carrier or freight forwarder for less than carload shipments, the Contractor shall assure that the carrier will furnish tailgate delivery, when required, if transfer to truck is required to complete delivery to consignee.

(b) The Contractor shall-

- (1) (i) Pack and mark the shipment to comply with contract specifications; or
(ii) In the absence of specifications, prepare the shipment in conformance with carrier requirements;
- (2) Prepare and distribute commercial bills of lading;
- (3) Deliver the shipment in good order and condition to the point of delivery specified in the contract;
- (4) Be responsible for any loss of and/or damage to the goods occurring before receipt of the shipment by the consignee at the delivery point specified in the contract;
- (5) Furnish a delivery schedule and designate the mode of delivering carrier; and
- (6) Pay and bear all charges to the specified point of delivery.

10. CORRESPONDENCE PROCEDURES (JAN 1990)

To promote timely and effective administration, correspondence submitted under this contract shall include the contract number and shall be subject to the following procedures:

(a) Technical Correspondence. Technical correspondence (as used herein, this term excludes technical correspondence where patent or technical data issues are involved and correspondence which proposes or otherwise involves waivers, deviations, or modifications to the requirements, terms, or conditions of this contract) shall be addressed to the DOE Contracting Officer's Representative (COR), with an information copy of the correspondence to the DOE Contracting Officer (see below paragraph (c) and to the cognizant Government Contract Administration Office (if other than DOE) designated in Block 31 of the Solicitation/Contract/Order for Commercial Items (SF 1449).

(b) Other Correspondence.

(1) If no Government Contract Administration Office is designated on the Contract Form of this contract, all correspondence, other than technical correspondence, shall be addressed to the DOE Contracting Officer, with information copies of the correspondence to the DOE Project Manager, and to the DOE Patent Counsel (where patent or technical data issues are involved).

(2) If a Government Contract Administration Office is designated on the Contract Form of this contract, all administrative correspondence, other than technical correspondence, shall be addressed to the Government Contract Administration Office so designated, with information copies of the correspondence to the DOE Contracting Officer, DOE Project Manager, and to the DOE Patent Counsel (where patent or technical data issues are involved).

(c) The DOE Contract Specialist for the contract is located at the address in (d) below and is as follows:

Contract Specialist: Patrick A. Thornton
Telephone: (202) 287-1532
FAX Number: (202) 287-1456/1457.
Email: Patrick.Thornton@pr.doe.gov

The Contractor shall use the DOE Contract Specialist as the focal point for all matters regarding this contract except technical matters.

(d) DOE Contracting Officer address: The Contracting Officer address is as follows:

Contracting Officer (Do not use name of Contracting Officer)
U. S. Department of Energy
Headquarters Procurement Services
Operations Branch A-1/ME-641.1
1000 Independence Avenue S. W.
Washington, D. C. 20585
ATTN: DE-AM01-03IM00009

11. BILLING INSTRUCTIONS

NOTE: This clause applies only to Orders issued by DOE Headquarters and prevails if any difference exists between it and Clause C.1(g) of the contract. Billing instructions for Delivery Orders placed by non-Headquarters DOE organizations or by authorized contractors or subcontractors shall be included in the Orders and all billing/payment actions will be accomplished by the ordering activity or firm.

(a) The Contractor shall submit the original and three copies of invoices or vouchers in accordance with the Payments provisions of this contract and in accordance with the payment provisions of the delivery orders issued under this contract.

(b) Each invoice or voucher submitted shall include the following:

- (1) Contract Number and Delivery Order Number
- (2) Contractor Name
- (3) Date of Invoice
- (4) Invoice Number
- (5) Amount of Invoice
- (6) Line items, quantities, unit and extended prices and period covered

Follow-up Invoices shall be marked "DUPLICATE ORIGINAL." For any questions regarding payment status of orders issued by DOE Headquarters, the contractor may call DOE Commercial Payments, Germantown MD, at (301) 903-4340, fax (301) 903-5977. For delivery orders placed by field activities or organizations, the point of contact is designated by that ordering activity.

12. CREDITS

Any credits due to the Government may be applied against the Contractor's invoices with appropriate information attached. The Contracting Officer involved shall notify the Contractor and the Payment Office involved in writing of the reason for the adjustment.

13. REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF THE OFFEROR (NOV 1987)

The Representations, Certifications and Other Statements of the Offeror, dated May 30, 2003 for this contract, are hereby incorporated by reference.

14. TECHNICAL DIRECTION (JAN 1990)

(a) Performance of the work under this contract shall be subject to the technical direction of the Contracting Officer's Technical Representative (COTR) identified elsewhere in this contract, or in the order. The term "technical direction" is defined to include, without limitation:

(1) Directions to the Contractor which redirect the contract effort, shift work emphasis between work areas or tasks, require pursuit of certain lines of inquiry, fill in details or otherwise serve to accomplish the contractual Statement of Work.

(2) Provision of written information to the Contractor which assists in the interpretation of drawings, specifications or technical portions of the work description.

(3) Review and, where required by the contract, approval of technical reports, drawings, specifications and technical information to be delivered by the Contractor to the Government under the contract.

(b) Technical direction must be within the scope of work stated in the contract. The COTR does not have the authority to, and may not, issue any technical direction which:

(1) Constitutes an assignment of additional work outside the Statement of Work;

- (2) Constitutes a change as defined in the contract clause entitled "Changes";
 - (3) In any manner causes an increase or decrease in the total estimated contract cost, the fixed fee (if any), or the time required for contract performance;
 - (4) Changes any of the expressed terms, conditions or specifications of the contract;
- or
- (5) Interferes with the Contractor's right to perform the terms and conditions of the contract.
- (c) All technical directions shall be issued in writing by the COTR.
- (d) The Contractor shall proceed promptly with the performance of technical directions duly issued by the COTR in the manner prescribed by this clause and within his authority under the provisions of this clause. If, in the opinion of the Contractor, any instruction or direction by the COTR falls within one of the categories defined in (b)(1) through (5) above, the Contractor shall not proceed but shall notify the Contracting Officer in writing within five (5) working days after receipt of any such instruction or direction and shall request the Contracting Officer to modify the contract accordingly. In the event any such instruction or direction by the COTR falls within the categories defined in (b)(1) through (5) above and determined by the Contractor to be of an urgent or compelling nature, the Contractor shall notify the Contracting Officer by verbal means within 24 hours to be followed up in writing within 24 hours after verbal notification. Upon receiving the notification from the Contractor, the Contracting Officer will:
- (1) Advise the Contractor in writing within thirty (30) days after receipt of the Contractor's letter that the technical direction is within the scope of the contract effort and does not constitute a change under the Changes' clause of the contract;
 - (2) Advise the Contractor within a reasonable time that the Government will issue a written change order.
- (e) A failure of the Contractor and Contracting Officer to agree that the technical direction is within the scope of the contract, or a failure to agree upon the contract action to be taken with respect thereto shall be subject to the provisions of the clause entitled "Disputes - Alternate 1."

15. MODIFICATION AUTHORITY (APR 1984)

Notwithstanding any of the other provisions of this contract, the Contracting Officer for the delivery order involved shall be the only individual authorized to:

- (a) accept nonconforming work,

- (b) waive any requirement of this contract, or
- (c) modify any term or condition of this contract.

16. INTERPRETATION OF CONTRACT REQUIREMENTS

No interpretation of any provision of this contract, including applicable specifications, shall be binding on the Government unless furnished or agreed to in writing by the Contracting Officer.

17. HANDICAPPED EMPLOYEE REQUIREMENTS

The Department of Energy (DOE) takes a pro-active part in supporting the Handicapped Employee Program. Individual requirements are satisfied through the Information Technology Support program. Additional requirements over and above the ITS program are provided as needs arise. The Department of Energy requires the contractor to be in line with the following area:82

“All work performed under this contract must be compliant with Section 508 of the Rehabilitation Act, 29 U.S.C. &794d, as amended. See www.access-board.gov/sec508/508standards.htm for details of Section 508 standards. This Act ensures that Federal employees with disabilities will be able to use information technology to do their jobs.”

CLAUSES INCORPORATED BY REFERENCE

The following clauses are hereby incorporated by reference. The full text of any clause is available upon request from the Contracting Officer.

- 18. BANKRUPTCY (FAR 52.242-13) (APR 1991)
- 19. AUTHORIZATION & CONSENT (FAR 52.227-1)(JUL 1995)
- 20. NOTICE & ASSISTANCE REGARDING PATENT & COPYRIGHT INFRINGEMENT (FAR 52.227-2) (AUG 1996)
- 21. PATENT INDEMNITY (FAR 52.227-3)(APR 1984)
- 22. COMMERCIAL COMPUTER SOFTWARE–RESTRICTED RIGHTS (FAR 52.227-19)(JUN 1987)
- 23. RIGHTS IN PROPOSAL DATA (DEAR 952.227.
- 24. SECURITY REQUIREMENTS (DEAR 952.204-2)(MAY 2002)
- 25. CLASSIFICATION
- 26. FACILITY CLEARANCE (DEAR 952.204-73)(MAY 2002)

PAYMENT INFORMATION FORM**ACH VENDOR PAYMENT SYSTEM**

This form is used for ACH payments with an addendum record that carries payment-related information. Recipients of these payments should bring this information to the attention of their financial institution when presenting this form for completion.

PAPER REDUCTION ACT STATEMENT

The information being collected on this form is required under the provision of 31 U. S. C. 3322 and 31 CFR 210. This information will be used by the U.S. Treasury Department to transmit payment data by electronic means to vendors' financial institutions. Failure to provide the required information may delay or prevent the receipt of payments through the Automated Clearing House (ACH) Payment System.

COMPANY INFORMATION

Name:		
Taxpayer Identification Number (TIN):		DUNS No. (Optional):
Address:		
Name of Contact:	Date:	Telephone Number:

AGENCY INFORMATION

Name:		
U. S. Department of Energy, CR-54, Accounts Payable Division		
Address:		
P.O. Box 500		
Germantown, MD 20874-0500		
Name of Contact:	Date:	Telephone Number: (301)
Ms. Sharll Hane	December 2001	(301) 903-5887/fax 5977

FINANCIAL INSTITUTION INFORMATION

Name:		
Address:		
Name of ACH Coordinator:	Date:	Telephone Number:
Nine Digit Routing Transit Number:		
Depositor's Account Title:		
Depositor's Account Number:		
Type of Account:		
CHECKING	SAVINGS	LOCKBOX
SIGNATURE AND TITLE OF REPRESENTATIVE:	Date:	Telephone Number

Instructions for Completing SF 3881 Form

1. **Agency information Section** - Federal agency prints or types the name and address of the Federal program agency originating the vendor/miscellaneous payment, agency identifier, agency location code, contact person name and telephone number of the agency.
2. **Payee/Company Information Section** - Payee prints or types the name of the payee/company address that will receive ACH vendor/miscellaneous payments, social security or taxpayer identification number, and contact person name and telephone number of the payee/company. Payee also provides depositor account number, account title, and type of account entered by your financial institution in the Financial Institution Information Section.
3. **Financial Institution Information Section** - Financial institution prints or types the name and address of the payee/company's financial institution who will receive the ACH payment, coordinator name and telephone number, nine-digit routing transit number, depositor (payee/company) account title and account number. Also, the box for type of account is checked and the signature, title, and telephone number of the appropriate financial institution official is included.

Burden Estimate Statement

The estimated average burden associated with this collection of information is 15 minutes per respondent or record keeper, depending on individual circumstances. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Financial Management Service, Facilities Management Division, Property and Supply Branch, Room B-101, 3700 East-West Highway, Hyattsville, Maryland 20782 and the Office of Management and Budget, Paperwork Reduction Project (0056), Washington, DC 20503.

Pointers for Completing SF 3881 Form

To answer some of questions that vendors and agencies have raised when completing the vendor enrollment form and prevent some of the mistakes that have occurred, the FMS is presenting these additional pointers.

1. **The Federal agency initiates the SF 3881 form to enroll its vendors to receive payment by electronic funds transfer.**
2. **A vendor must complete a separate enrollment form (SF 3881) for each agency with which it does business.**
3. **in the Payee/Company information Section, it should be noted that the "TAXPAYER IDENTIFICATION NUMBER (TIN)" may be used by the Government to collect and report on any delinquent amounts arising out of the offeror's relationship with the Government (31 U.S.C. 770~ (**
4. **The financial institution and the vendor should each keep a copy of the completed form.**
5. **The vendor should return the completed SF3881 to the address indicated on the form.**