

**MASTER PRODUCT AGREEMENT**  
**eLinear, Inc.**

Initial Order Description

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eLinear Inc., a United States based corporation with corporate headquarters located at 2901 West Sam Houston Pkwy, Suite E-300, Houston, TX, authorized to do business in the state of Texas. ("SELLER") agrees to supply equipment ("Machines"), software ("Programs") and Services to the City of College Station, a Texas home-rule municipal corporation ("Purchaser") and to make available the manufacturer's System Maintenance services ("Maintenance Services") to Purchaser under the terms of this Agreement. Collectively, Machines and Programs are referred to as "Products".

The Products, Services and Maintenance Agreement to be provided to Purchaser are specified in Exhibits 1, 2 and 3 respectively. The parties may enter into new product schedules from time to time which shall be governed by this Agreement, provided all such product schedules shall be in writing, shall be signed by both parties, shall be sequentially numbered (Product Schedule A-1, A-2, A-3, etc.), and shall reference this Agreement and may not alter, amend, or modify this Agreement. Alternatively, Purchaser may provide SELLER with a purchase order for additional Products or Maintenance Services, which is in Purchaser's standard form. However, Purchaser acknowledges and agrees that, notwithstanding anything in Purchaser's standard form purchase order to the contrary, the Additional Terms of this Agreement will govern all additional orders of Products, Services and/or Maintenance reflected on product schedules or purchase orders SELLER accepts from Purchaser after the date hereof. . No changes shall be made, nor will bills for changes, alterations, modifications, deviations, and extra orders be recognized or paid for except upon the prior written order from authorized personnel of the City.

The original contract price may not be increased by more than **twenty-five percent (25%)**. Written change orders that do not exceed **twenty-five percent (25%)** of the original contract amount may be made or approved by the City Manager or his delegate if the change order is less than **Twenty-five Thousand Dollars (\$25,000.00)**. Changes in excess of **Twenty-five Thousand Dollars (\$25,000.00)** must be approved by the City Council prior to commencement of the services, work or delivery of equipment. **Any change to the Contract Amount shall be made prior to the beginning of the work covered by the proposed change or the right to payment for Extra Work shall be waived.** No course of conduct or dealing between the parties, nor implied acceptance of additional Work or changes to the Contract shall be the basis for any claim for an increase in compensation or change in time. Any cost incurred by Seller in connection with any additional work, services or equipment shall be included in any change order and Seller's failure to include any such cost shall act to Waive and Release any claim for such non included cost.

The price for all Products, Services and the first year of Maintenance Support is shown in Exhibit 1. SELLER certifies that all known equipment, hardware, software and services to provide a complete turnkey telephone system as stated in SELLER's response to RFP #04-82, including modifications made by this Agreement and Exhibits is included in Exhibit 1. PURCHASER agrees to pay the total price of all Products, Project Management, Training and Support Materials. Services are described in the Statement of Work contained in Exhibit 2 and in the Technical Specifications to RFP #04-82 and SELLER's response to RFP #04-82 Technical Specifications, incorporated herein by reference. Maintenance Agreement Terms and Conditions are described in Exhibit 3.

**Warranty**

Seller represents and warrants that (1) the Hardware and the Licensed Software identified herein constitute all the applications or systems software or interfaces required by City to operate the Licensed Software; (2) the Licensed Software, as delivered to City hereunder, shall operate on or with the Hardware identified ; (3) the Licensed Software, as delivered to City hereunder shall meet the specifications, and documentation without the need for customization, or modification, or the delivery of any additional Services not included as part of this agreement; (4) the Licensed Software shall be compatible with City's existing data files, business information, and systems, such that significant additional applications or systems software or interfaces shall not be required to be produced or procured in order to complete the implementation of the Licensed Software; (5) and the Licensed Software shall be free of any defect in material of the media in which the Licensed Software is delivered, specified or provided by Licensor.

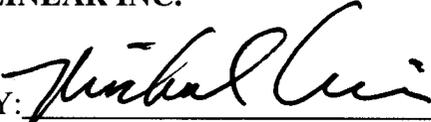
SELLER warrants that all equipment and parts delivered will be new and not reconditioned or previously used and will perform in accordance with manufacturer's specifications. eLinear shall maintain a trained staff capable of rendering the services set forth in this Agreement.

This Master Product Agreement, including the Additional Terms and Exhibits, form the complete Agreement (the "Agreement") regarding these Products, Services and Maintenance Agreements and replace and supercede any prior oral or written communication between us, including, without limitation, any purchase order that Purchaser issues for these Products, Services or Maintenance Agreements. The priority of documents shall be as follows:

- (1) This signed Agreement
- (2) Addendum to this Agreement
- (3) City's Request for Proposal
- (4) Contractor's Response to City's Request for Proposal
- (5) System specifications

By signing below, the parties agree to these terms.

Agreed to  
eLINEAR INC.

BY:   
Printed Name: Michael Lewis  
Title: CEO  
Date: 7/21/05

Agreed to:  
CITY OF COLLEGE STATION

BY: \_\_\_\_\_  
Ron Silvia, Mayor

Date: \_\_\_\_\_

ATTEST:

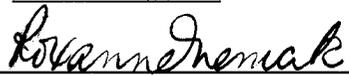
\_\_\_\_\_  
Connie Hooks, City Secretary

Date: \_\_\_\_\_

APPROVED:

\_\_\_\_\_  
Glenn Brown, Acting City Manager

Date: \_\_\_\_\_

  
City Attorney

Date: \_\_\_\_\_

\_\_\_\_\_  
Jeff Kersten, Finance & Strategic  
Planning Director

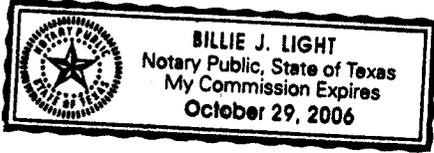
Date: \_\_\_\_\_

STATE OF TEXAS )

COUNTY OF Harris )

ACKNOWLEDGMENT

This instrument was acknowledged before me on the 21 day of July, 2005 by Michael Lewis in his/her capacity as CEO of eLinear Solutions, Inc., a corporation, on behalf of said corporation.



Billie J. Light  
Notary Public in and for  
the State of Texas

STATE OF TEXAS )

COUNTY OF BRAZOS )

ACKNOWLEDGMENT

This instrument was acknowledged before me on the \_\_\_ day of \_\_\_\_\_, 200\_\_\_, by \_\_\_\_\_, in his capacity as \_\_\_\_\_ of the **City of College Station**, a Texas home-rule municipality, on behalf of said municipality.

\_\_\_\_\_  
Notary Public in and for  
the State of Texas

**Order, Delivery and Installation**

Unless Purchaser requests otherwise and pays the corresponding charges, all Products are shipped via normal ground transportation. SELLER bears the risk of loss for each Product until it is accepted by Purchaser. Thereafter, Purchaser assumes the risk of loss

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**Acceptance Testing**

Delivery and installation of the Products covered under this Agreement will occur in phases and at various locations as specified in the Statement of Work (SOW) and in accordance with the Project Plan (to be submitted by SELLER at the Project Initiation Meeting and accepted by the City Project Manager as specified in the SOW). Once the Products are installed at any specific location as specified herein, SELLER shall notify the Purchaser that the Product(s) as specified has been installed in good working order and is ready for use, that the modifications or enhancements are completed as defined and specified herein, are in good working order, ready for use, and to the best of SELLER's knowledge is one hundred percent operational and that the Product(s) as then installed are ready for testing at that location.

Following installation of the Products at all locations, SELLER shall notify the Purchaser in writing that the Products as specified have been installed in good working order and are ready for use, that the modifications or enhancements are completed as defined and specified herein, are in good working order, ready for use, and to the best of SELLER's knowledge are one hundred percent operational and that the Products as then installed are ready for system testing. The date of this notification by SELLER, is termed the Installation Completion Date. At that point, Purchaser shall have 30 consecutive days to perform and complete acceptance testing on-site.

If the Product(s) as installed and represented passes such testing as specified in the RFP and SELLER's response to the RFP, Purchaser shall so notify SELLER in a writing termed the Certificate of Acceptance. The date of this document is designated as the **Acceptance Date**, and marks the beginning of the initial one year warranty period. If the Product(s) as installed fails to pass such testing, Purchaser shall notify SELLER in writing and SELLER shall then have 20 working days to correct any failure. SELLER shall then certify to Purchaser that the failure has been corrected and Purchaser shall have ten 10 working days for additional testing at which time Purchaser shall supply the Certificate of Acceptance if the deliverable(s) passes testing. If the Product(s) fails testing twice, at City's option, (1) the Correction Period may be extended as may be agreed by the parties; or (2) City may terminate this Agreement, return the specifications, product and documentation to SELLER and SELLER will refund to Purchaser any payments previously remitted for the Products(s).

**Payment and Assignment**

Purchaser agrees to supply tax exemption documentation to SELLER. SELLER will submit Invoices in duplicate to the City of College Station, Accounting Dept., P.O. Box 9973, College Station, Texas 77842-0973. If invoices are subject to cash discount, discount period to be taken from the date of completion of order or date of receipt of invoice, whichever occurs last regardless of whether or not correct discount terms appear on invoice. All undisputed invoices to be paid in full within 30 days of receipt of invoice. The City will make installment payments in accordance with the following schedule:

- 20% Down Payment, within 30 days of Contract award
- 30% Upon Delivery and Installation of Equipment and Cabling at 4 Core sites (as defined in RFP and Statement of Work)
- 30% Successful cutover to the new system
- 20% Systems acceptance (defined as the date on the written Certificate of Acceptance)

Training charges will not be invoiced until completion of training. All undisputed amounts payable under this Agreement that remain unpaid for more than thirty (30) days are subject to TEX. GOV'T. CODE SECTION 2251.001 ET. SEQ. as amended.

Purchaser selects SMARTnet 24x7x4 SMARTnet Maintenance Service and Software Application Support plus Upgrades under this agreement and described in Exhibit 3. All Products and Maintenance Services covered under this Agreement and Exhibits will be purchased from SELLER and not direct from any other vendor or Company.

**Title and License**

The application, use and other aspects of the Programs are solely governed by the terms and conditions of the applicable agreement between Purchaser and the Owner of the Program. Purchaser does not receive title to any Program, but only the right to use the Program under the applicable license agreement between Purchaser and the Owner of the Program.

Execution of this agreement is contingent on acceptance of the accompanying Master Services Agreement between Cisco Systems Inc and the City of College Station ("Purchaser") incorporated as Exhibit 3.

#### **Escrow**

Purchaser will not be furnished source code, but may at Purchaser's expense enter into a mutually acceptable agreement with SELLER to have source code deposited with a third party escrow agent.

#### **Copyright Notices**

SELLER and other third party software vendors shall have the unrestricted right to include copyright notices on all products provided by SELLER. Purchaser agrees to reproduce all copyright notices as provided by SELLER. and other third party software vendors and agrees not to make any adjustment or alteration to such copyright notices.

#### **Right to Use**

Purchaser shall have use of the Licensed Program Materials on computer processing units, switches, and routers as defined in the accompanying Cisco Master Services Agreement (Exhibit 3).

#### **Product Documentation**

SELLER will provide Purchaser two copies each of detailed technical documentation for the use of Purchaser's product. One copy will be in a searchable PDF document the other will be a printed document, organized in three-ring binders. Purchaser may reproduce additional copies of said documentation solely for its own use.

"Documentation" means all specifications, manuals, drawings, and other media and materials other than Equipment and Software. Other documentation such as Instruction Manuals and Training Manuals as specified in section 5.16.16 of RFP #04-82 Technical Specifications.

#### **WARRANTY**

**ELINEAR WARRENTS ALL PRODUCTS DELIVERED UNDER THIS AGREEMENT TO BE NEW AND DOES NOT CONTAIN RECONDITIONED PARTS, FREE OF DEFECTS IN MATERIAL AND WORKMANSHIP FOR A PERIOD OF ONE YEAR FROM INSTALLATION AND ACCEPTANCE BY PURCHASER. ELINEAR WILL REPLACE AND INSTALL, AT NO COST TO PURCHASER, ANY PRODUCTS THAT FAIL OR ARE DEFECTIVE OR NONCONFORMING WITH PRODUCT SPECIFICATIONS DURING THIS ONE YEAR PERIOD PROVIDED PURCHASER MAINTAINS AND OPERATES THE SYSTEM IN ACCORDANCE WITH SELLER'S INSTRUCTIONS AND WRITTEN DOCUMENTATION PROVIDED TO PURCHASER. THESE WARRANTIES ARE PURCHASER'S EXCLUSIVE WARRANTIES AND SELLER MAKES NO OTHER WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. SELLER DOES NOT WARRANT UNINTERRUPTED OR ERROR-FREE OPERATION OF ANY PRODUCT.**

#### **LIMITATION OF LIABILITY**

**IF EITHER PARTY IS ENTITLED TO RECOVER DAMAGES FROM THE OTHER, IN EACH INSTANCE, REGARDLESS OF THE BASIS ON WHICH DAMAGES CAN BE CLAIMED, EACH PARTY IS LIABLE ONLY FOR ACTUAL DAMAGES IN AN AMOUNT NO GREATER THAN THE PRICE PURCHASER HAS PAID FOR THE PRODUCT THAT IS THE SUBJECT OF THE CLAIM. UNDER NO CIRCUMSTANCES IS EITHER PARTY RESPONSIBLE FOR SPECIAL, INCIDENTAL, CONSEQUENTIAL OR OTHER INDIRECT DAMAGES (INCLUDING LOST PROFITS OR SAVINGS), EVEN IF EITHER PARTY IS INFORMED OF THEIR POSSIBILITY.**

**BY ENTERING INTO THIS AGREEMENT THE CITY DOES NOT GIVE ITS CONSENT TO SUIT, WAIVE ITS GOVERNMENTAL IMMUNITY OR THE LIMITATIONS AS TO DAMAGES IN THE TEXAS TORT CLAIMS ACT.**

#### **Governing Law and Venue**

This Agreement shall be governed by, subject to, and interpreted in accordance with the laws of the State of **Texas** and the United States of America, without regard to rules or laws regarding conflict of law. The parties hereto submit to the exclusive jurisdiction of the courts within the State of Texas.

#### **Indemnification**

**It is further agreed that the Seller (separately and collectively the "Indemnitee") shall indemnify, hold harmless, and defend the City, its officers, agents, and employees from and against any and all claims, losses, damages, causes of action, suits, and liability of every kind, including all expenses of litigation, court costs, and attorney's fees, for injury to or death of any person or for damage to any property arising out of or in connection with the hardware,**

services and software provided by the SELLER under this Contract. Such indemnity shall apply regardless of whether the claims, losses, damages, causes of action, suits, or liability arise in whole or in part from the negligence of the City, any other party indemnified hereunder, the Contractor, or any third party.

#### **Release**

SELLER assumes full responsibility for the work to be performed hereunder and hereby releases, relinquishes, and discharges the City, its officers, agents, and employees from all claims, demands, and causes of action of every kind and character, including the cost of defense thereof, for any injury to or death of any person and any loss of or damage to any property that is caused by, alleged to be caused by, arising out of, or in connection with the Seller's work to be performed hereunder. This release shall apply regardless of whether said claims, demands, and causes of action are covered in whole or in part by insurance and regardless of whether such injury, death, loss, or damage was caused in whole or in part by the negligence of the City, any other party released hereunder, the Contractor, or any third party.

#### **Severability**

If any provision of this Agreement shall be held to be invalid, illegal or unenforceable by a court or other tribunal of competent jurisdiction, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired thereby. The parties shall use their best efforts to replace the respective provision or provisions of this Agreement with legal terms and conditions approximating the original intent of the parties.

#### **Force Majeure**

Neither party shall be held responsible for delay or failure to perform when such delay or failure is due to any of the following unless the act or occurrence could have been foreseen and reasonable action could have been taken to prevent the delay of failure: fire, flood, epidemic, strikes, acts of God, unusually severe weather, acts of public authorities, or delays of defaults caused by public carriers, provided the defaulting party gives notice as soon as possible to the other party of the inability to perform.

#### **Term**

This Agreement is effective from the date on which both parties execute this Agreement as set forth on the signature page hereto and shall remain in effect for the term provided herein.

#### **Amendments**

No amendment to this Agreement shall be effective unless it is in writing and signed by the duly authorized representative of both parties. No term or provision hereof shall be deemed waived and no breach excused unless waiver or consent to breach is in writing. The SELLER's response to the City of College Station is incorporated as part of this agreement and is incorporated as Exhibit 4.

#### **Insurance**

Prior to the commencement of any work under this Contract, SELLER shall furnish an original completed Certificate(s) of Insurance to the City's Finance Department, Attention: Risk Manager, which shall be completed by an agent authorized to bind the named underwriter(s) and their company to the coverage, limits, and termination provisions shown thereon. The original certificate(s) must have the agent's original signature, including the signer's company affiliation, title and phone number, and be mailed directly from the agent to the Purchaser. Purchaser shall have no duty to pay or perform under the Contract until such certificate shall have been delivered to the City's Finance Department. The City reserves the right to review the insurance requirements herein during the effective period of the Contract, including any extensions or renewal of the Contract, and to modify insurance coverage and their limits when deemed necessary and prudent by the City's Risk Manager, based upon changes in statutory law, court decisions, or circumstances surrounding the Contract. In no instance will the City allow modification whereupon the City may incur increased risk. Seller shall obtain and maintain in full force and effect, at the its sole cost and expense, for the duration of the Contract, including any extensions or renewal hereof, insurance coverage written on an occurrence basis, by companies authorized and admitted to do business in the State of Texas and rated A- or better by A.M. Best Company and/or otherwise acceptable to Purchaser, in the types and amounts shown in Exhibit 5.