

Before the Board of Supervisors in and for the County of Monterey, State of California

Agreement No.: A-10088

- a. Approve and authorize the Contracts/Purchasing Officer on behalf of the Information Technology Department to execute a renewal Agreement with Paetec Software Corp. in the amount not to exceed \$68,644 for the period of April 1, 2012 to March 31, 2015 for the provision of software maintenance/support which includes up to eighty (80) hours of software and database modifications as needed during the term of the Agreement;
- a. Accept non-standard insurance language provided by the vendor as recommended by the Director of Information Technology; and
- b. Authorize the Contracts/Purchasing Officer to sign future renewals to software maintenance with the same liability and indemnification provisions as recommended by the Director of Information Technology.....

Upon motion of Supervisor Salinas, seconded by Supervisor Armenta, and carried by those members present, the Board of Supervisors hereby:

- a. Approved and authorized the Contracts/Purchasing Officer on behalf of the Information Technology Department to execute a renewal Agreement with Paetec Software Corp. in the amount not to exceed \$68,644 for the period of April 1, 2012 to March 31, 2015 for the provision of software maintenance/support which includes up to eighty (80) hours of software and database modifications as needed during the term of the Agreement;
- b. Accepted non-standard insurance language provided by the vendor as recommended by the Director of Information Technology; and
- c. Authorized the Contracts/Purchasing Officer to sign future renewals to software maintenance with the same liability and indemnification provisions as recommended by the Director of Information Technology.

PASSED AND ADOPTED on this 27th day of March 2012, by the following vote, to-wit:

AYES: Supervisors Armenta, Calcagno, Salinas, Parker, and Potter
 NOES: None
 ABSENT: None

I, Gail T. Borkowski, Clerk of the Board of Supervisors of the County of Monterey, State of California, hereby certify that the foregoing is a true copy of an original order of said Board of Supervisors duly made and entered in the minutes thereof of Minute Book 76 for the meeting on March 27, 2012.

Dated: March 27, 2012

Gail T. Borkowski, Clerk of the Board of Supervisors County of Monterey, State of California

By Denise Hancock
Deputy

**Agreement Between the
County of Monterey
And
PAETEC Software Corp.**

This AGREEMENT is made and entered into by and between the County of Monterey, a political subdivision of the State of California, hereinafter referred to as “County”, and PAETEC Software Corp. a subsidiary of Windstream Corporation, hereinafter referred to as “CONTRACTOR”.

In consideration of the mutual covenants and conditions set forth in this Agreement, the parties agree as follows:

1. **SERVICES TO BE PROVIDED.** The County hereby engages the CONTRACTOR to perform, and CONTRACTOR hereby agrees to perform, the services described in EXHIBIT A in conformity with the terms of this AGREEMENT. The services are generally described as follows: **Provide software support, maintenance, software modification, and database updates.**

2. **PAYMENTS BY COUNTY.** County shall pay the CONTRACTOR in accordance with the payment provisions set forth in EXHIBIT A, subject to the limitation set forth in this AGREEMENT. The total amount payable by County to CONTRACTOR under this AGREEMENT shall not exceed **\$68,644.00**

3. **TERM OF AGREEMENT.** The term of this AGREEMENT is from **April 1, 2012 to March 31, 2015**, unless sooner terminated pursuant to the terms of this AGREEMENT. This AGREEMENT is of no force or effect until signed by both CONTRACTOR and County and with the County signing last, and CONTRACTOR may not commence work before County signs this AGREEMENT.

4. **ADDITIONAL PROVISIONS/EXHIBITS.** The following attached exhibits are incorporated herein by reference and constitute a part of this AGREEMENT:

EXHIBIT A Scope of Services/Payment Provisions
EXHIBIT B PINNACLE Customer Care Guide

5. **PERFORMANCE STANDARDS.**

5.01. CONTRACTOR warrants that CONTRACTOR and CONTRACTOR’s agents, employees, and subcontractors performing services under this Agreement are specially trained, experienced, competent, and appropriately licensed to perform the work and deliver the services required under this Agreement and are not employees of the County, or immediate family of an employee of the County.

5.02. CONTRACTOR, its agents, employees, and subcontractors shall perform all work in a safe and skillful manner and in compliance with all applicable laws and regulations. All work performed under this Agreement that is required by law to be performed or supervised by licensed personnel shall be performed in accordance with such licensing requirements.

5.03. CONTRACTOR shall furnish, at its own expense, all materials, equipment, and personnel necessary to carry out the terms of this Agreement, except as otherwise specified in this Agreement. CONTRACTOR shall not use County premises, property (including equipment, instruments, or supplies) or personnel for any purpose other than in the performance of its obligations under this Agreement.

6. PAYMENT CONDITIONS.

6.01. CONTRACTOR shall submit to the Contract Administrator an invoice on a form acceptable to County. If not otherwise specified, the CONTRACTOR may submit such invoice periodically or at the completion of services, but in any event, not later than 30 days after completion of services. The invoice shall set forth the amounts claimed by CONTRACTOR for the previous period, together with an itemized basis for the amounts claimed, and such other information pertinent to the invoice as the County may require. The Contract Administrator or his or her designee shall certify the invoice, either in the requested amount or in such other amount as the County approves in conformity with this Agreement, and shall promptly submit such invoice to the County Auditor-Controller for payment. The County Auditor-Controller shall pay the amount certified within 30 days of receiving the certified invoice.

6.02. CONTRACTOR shall not receive reimbursement for travel expenses unless set forth in this Agreement.

7. TERMINATION.

7.01. During the term of this Agreement, the County may terminate the Agreement for any reason by giving written notice of termination to the CONTRACTOR at least thirty (30) days prior to the effective date of termination. Such notice shall set forth the effective date of termination. In the event of such termination, the amount payable under this Agreement shall be reduced in proportion to the services provided prior to the date of termination.

7.02. The County may cancel and terminate this Agreement for good cause effective immediately upon written notice to CONTRACTOR. "Good cause" includes the failure of CONTRACTOR to perform the required services at the time and in the manner provided under this Agreement. If County terminates this Agreement for good cause, the County may be relieved of the payment of any consideration to CONTRACTOR, and the County may proceed with the work in any manner which County deems proper. The cost to the County shall be deducted from any sum due the CONTRACTOR under this Agreement.

8. INDEMNIFICATION. Contractor shall indemnify, defend, and hold harmless the County of Monterey (hereinafter "County"), its officers, agents, and employees from any claim, liability, loss, injury or damage arising out of, or in connection with, performance of this Agreement by Contractor and/or its employees or sub-contractors while on site, excepting only loss, injury or damage caused by the negligence or willful misconduct of personnel employed by the County. It is the intent of the parties to this Agreement to provide the broadest possible coverage for the County. The Contractor shall reimburse the County for all costs, attorneys' fees, expenses and liabilities incurred with respect to any litigation in which the Contractor is obligated to indemnify, defend and hold harmless the County under this Agreement.

9. **LIMITATION OF LIABILITY.** PAETEC's total liability, regardless of the form of action, will not exceed the fees to be paid by the County hereunder. In no event will PAETEC be liable to the County for indirect, special, consequential or punitive damages incurred by the County including, without limitation, damages for delay, increased expenditures, loss of revenues, profits, data or use, even if PAETEC has been advised of the possibility of such damages."

10. **INSURANCE.**

10.01. Evidence of Coverage: Prior to commencement of this Agreement, the Contractor shall provide a "Certificate of Insurance" certifying that coverage as required herein has been obtained.

This verification of coverage shall be sent to the County's Contracts/Purchasing Department, unless otherwise directed. The Contractor shall not receive a "Notice to Proceed" with the work under this Agreement until it has obtained all insurance required and the County has approved such insurance. This approval of insurance shall neither relieve nor decrease the liability of the Contractor.

10.02 Qualifying Insurers: All coverage's, except surety, shall be issued by companies which hold a current policy holder's alphabetic and financial size category rating of not less than A- VII, according to the current Best's Key Rating Guide or a company of equal financial stability that is approved by the County's Purchasing Manager.

10.03 Insurance Coverage Requirements: Without limiting CONTRACTOR's duty to indemnify, CONTRACTOR shall maintain in effect throughout the term of this Agreement a policy or policies of insurance with the following minimum limits of liability:

Commercial general liability insurance, including but not limited to premises and operations, including coverage for Bodily Injury and Property Damage, Personal Injury, Contractual Liability, Broad form Property Damage, Independent Contractors, Products and Completed Operations, with a combined single limit for Bodily Injury and Property Damage of not less than \$1,000,000 per occurrence.

Exemption/Modification (Justification attached; subject to approval).

Business automobile liability insurance, covering all motor vehicles, including owned, leased, non-owned, and hired vehicles, used in providing services under this Agreement, with a combined single limit for Bodily Injury and Property Damage of not less than \$500,000 per occurrence.

Exemption/Modification (Justification attached; subject to approval).

Workers' Compensation Insurance, if CONTRACTOR employs others in the performance of this Agreement, in accordance with California Labor Code section 3700 and with Employer's Liability limits not less than \$1,000,000 each person, \$1,000,000 each accident and \$1,000,000 each disease.

Exemption/Modification (Justification attached; subject to approval).

Professional liability insurance, if required for the professional services being provided, (e.g., those persons authorized by a license to engage in a business or profession regulated by the California Business and Professions Code), in the amount of not less than \$1,000,000 per claim and \$2,000,000 in the aggregate, to cover liability for malpractice or errors or omissions made in the course of rendering professional services. If professional liability insurance is written on a "claims-made" basis rather than an occurrence basis, the CONTRACTOR shall, upon the expiration or earlier termination of this Agreement, obtain extended reporting coverage ("tail coverage") with the same liability limits. Any such tail coverage shall continue for at least ~~three~~ one years following the expiration or earlier termination of this Agreement.

Exemption/Modification (Justification attached; subject to approval).

10.04. Other Insurance Requirements: All insurance required by this Agreement shall be with a company having the qualifications stated in section 10.02 of this Agreement and which is authorized to transact Insurance business in the State of California. Unless otherwise specified by this Agreement, all such insurance shall be written on an occurrence basis, or, if the policy is not written on an occurrence basis, such policy with the coverage required herein shall continue in effect for a period of ~~three~~ one years following the date CONTRACTOR completes its performance of services under this Agreement.

Each policy shall provide coverage for Contractor and additional insureds with respect to claims arising from each subcontractor, if any, performing work under this Agreement, or be accompanied by a certificate of insurance from each subcontractor showing each subcontractor has identical insurance coverage to the above requirements.

Commercial general liability and automobile liability policies shall provide a certificate of insurance naming the County of Monterey, its officer, agents, and employees as Additional Insureds with respect to liability arising out of the CONTRACTOR's work, including ongoing and completed operations, and shall further provide that such insurance is primary insurance to any insurance or self-insurance maintained by the County and that the insurance of the Additional Insured shall not be called upon to contribute to a loss covered by CONTRACTOR'S insurance.

Prior to the execution of this Agreement by the County, CONTRACTOR shall file certificates of insurance with the County's contract administrator and County's Contracts/Purchasing Division, showing that the CONTRACTOR has in effect the insurance required by this Agreement. The CONTRACTOR shall file a new or amended certificate of insurance within five calendar days after any change is made in any insurance policy, which would alter the information on the certificate then on file. Acceptance or approval of insurance shall in no way modify or change the indemnification clause in this Agreement, which shall continue in full force and effect.

CONTRACTOR shall at all times during the term of this Agreement maintain in force the insurance coverage required under this Agreement and shall send, without demand by County, annual certificates to County's Contract Administrator and County's Contracts/Purchasing Division. If the certificate is not received by the expiration date, County shall notify CONTRACTOR and CONTRACTOR shall have five calendar days to send in the certificate, evidencing no lapse in coverage during the interim. Failure by CONTRACTOR to maintain such insurance is a default of this Agreement, which entitles County, at its sole discretion, to terminate this Agreement immediately.

11. RECORDS AND CONFIDENTIALITY.

11.01. Confidentiality. CONTRACTOR and its officers, employees, agents, and subcontractors shall comply with any and all federal, state, and local laws, which provide for the confidentiality of records and other information. CONTRACTOR shall not disclose any confidential records or other confidential information received from the County or prepared in connection with the performance of this Agreement, unless County specifically permits CONTRACTOR to disclose such records or information. CONTRACTOR shall promptly transmit to County any and all requests for disclosure of any such confidential records or information. CONTRACTOR shall not use any confidential information gained by CONTRACTOR in the performance of this Agreement except for the sole purpose of carrying out CONTRACTOR's obligations under this Agreement.

11.02. County Records. When this Agreement expires or terminates, CONTRACTOR shall return to County any County records which CONTRACTOR used or received from County to perform services under this Agreement.

11.03. Maintenance of Records. CONTRACTOR shall prepare, maintain, and preserve all reports and records that may be required by federal, state, and County rules and regulations related to services performed under this Agreement. CONTRACTOR shall maintain such records for a period of at least three years after receipt of final payment under this Agreement. If any litigation, claim, negotiation, audit exception, or other action relating to this Agreement is pending at the end of the three year period, then CONTRACTOR shall retain said records until such action is resolved.

11.04. Access to and Audit of Records. The County shall have the right to examine, monitor and audit all records, documents, conditions, and activities of the CONTRACTOR and its subcontractors related to services provided under this Agreement. Pursuant to Government Code section 8546.7, if this Agreement involves the expenditure of public funds in excess of \$10,000, the parties to this Agreement may be subject, at the request of the County or as part of any audit of the County, to the examination and audit of the State Auditor pertaining to matters connected with the performance of this Agreement for a period of three years after final payment under the Agreement.

11.05. Royalties and Inventions. County shall have a royalty-free, exclusive and irrevocable license to reproduce, publish, and use, and authorize others to do so, all original computer programs, writings, sound recordings, pictorial reproductions, drawings, and other works of similar nature produced in the course of or under this Agreement. CONTRACTOR shall not publish any such material without the prior written approval of County.

12. **NON-DISCRIMINATION.** During the performance of this Agreement, CONTRACTOR, and its subcontractors, shall not unlawfully discriminate against any person because of race, religious creed, color, sex, national origin, ancestry, physical disability, mental disability, medical condition, marital status, age (over 40), or sexual orientation, either in CONTRACTOR's employment practices or in the furnishing of services to recipients. CONTRACTOR shall ensure that the evaluation and treatment of its employees and applicants for employment and all persons receiving and requesting services are free of such discrimination. CONTRACTOR and any subcontractor shall, in the performance of this Agreement, fully comply with all federal, state, and local laws and regulations which prohibit discrimination. The provision of services primarily or exclusively to such target population as may be designated in this Agreement shall not be deemed to be prohibited discrimination.

13. **INDEPENDENT CONTRACTOR.** In the performance of work, duties, and obligations under this AGREEMENT, CONTRACTOR is at all times acting and performing as an independent contractor and not as an employee of the County. No offer or obligation of permanent employment with the County or particular County department or agency is intended in any manner, and CONTRACTOR shall not become entitled by virtue of this AGREEMENT to receive from County any form of employee benefits including but not limited to sick leave, vacation, retirement benefits, workers' compensation coverage, insurance or disability benefits. CONTRACTOR shall be solely liable for and obligated to pay directly all applicable taxes, including federal and state income taxes and social security, arising out of CONTRACTOR's performance of this AGREEMENT. In connection therewith, CONTRACTOR shall defend, indemnify, and hold harmless from any and all liability with County may incur because of CONTRACTOR's failure to pay such taxes.

14. **NOTICES.** Notices required under this Agreement shall be delivered personally or by first-class, postage pre-paid mail to the County and CONTRACTOR'S contract administrators at the addresses listed below:

FOR COUNTY: Dan Mikulich Telecommunications Operations Manager	FOR CONTRACTOR: Connie Dragoone
Name and Title	Name and Title
1590 Moffett Street Salinas, Ca. 93905	770 Canning Parkway Victor, NY 14564
Address	Address
(831)759-6918	585-340-2779
Phone	Phone

15. **MISCELLANEOUS PROVISIONS.**

15.01 Conflict of Interest. CONTRACTOR to the best of its knowledge represents that it presently has no interest and agrees not to acquire any interest during the term of this Agreement, which would directly, or indirectly conflict in any manner or to any degree with the full and complete performance of the professional services required to be rendered under this Agreement.

15.02 Amendment. This Agreement may be amended or modified only by an instrument in writing signed by the County and the CONTRACTOR.

15.03 Waiver. Any waiver of any terms and conditions of this Agreement must be in writing and signed by the County and the CONTRACTOR. A waiver of any of the terms and conditions of this Agreement shall not be construed as a waiver of any other terms or conditions in this Agreement.

15.04 Contractor. The term "CONTRACTOR" as used in this Agreement includes CONTRACTOR's officers, agents, and employees acting on CONTRACTOR's behalf in the

performance of this Agreement.

15.05 Disputes. CONTRACTOR shall continue to perform under this Agreement during any dispute.

15.06 Assignment and Subcontracting. The CONTRACTOR shall not assign, sell, or otherwise transfer its interest or obligations in this Agreement without the prior written consent of the County except to a successor in interest of CONTRACTOR. None of the services covered by this Agreement shall be subcontracted without the prior written approval of the County. Notwithstanding any such subcontract, CONTRACTOR shall continue to be liable for the performance of all requirements of this Agreement.

15.07 Successors and Assigns. This Agreement and the rights, privileges, duties, and obligations of the County and CONTRACTOR under this Agreement, to the extent assignable or delegable, shall be binding upon and inure to the benefit of the parties and their respective successors, permitted assigns, and heirs.

15.08 Compliance with Applicable Law. The parties shall comply with all applicable federal, state, and local laws and regulations in performing this Agreement.

15.09 Headings. The headings are for convenience only and shall not be used to interpret the terms of this Agreement.

15.10 Governing Law. This Agreement shall be governed by and interpreted under the laws of the State of California.

15.11 Time is of the Essence. Time is of the essence in each and all of the provisions of this Agreement.

15.12 Non-exclusive Agreement. This Agreement is non-exclusive and both County and CONTRACTOR expressly reserve the right to contract with other entities for the same or similar services.

15.13 Construction of Agreement. The County and CONTRACTOR agree that each party has fully participated in the review and revision of this Agreement and that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this Agreement or any amendment to this Agreement.

15.14 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same Agreement.

15.15 Authority. Any individual executing this Agreement on behalf of the County or the CONTRACTOR represents and warrants hereby that he or she has the requisite authority to enter into this Agreement on behalf of such party and bind the party to the terms and conditions of this Agreement.

15.16 Integration. This Agreement, including the exhibits, represent the entire Agreement between the County and the CONTRACTOR with respect to the subject matter of this Agreement and

shall supersede all prior negotiations, representations, or agreements, either written or oral, between the County and the CONTRACTOR as of the effective date of this Agreement, which is the date that the County signs the Agreement.

15.17 Interpretation of Conflicting Provisions. In the event of any conflict or inconsistency between the provisions of this Agreement and the Provisions of any exhibit or other attachment to this Agreement, the provisions of this Agreement shall prevail and control.

This section left blank intentionally.

IN WITNESS WHEREOF, County and CONTRACTOR have executed this Agreement as of the day and year written below.

COUNTY OF MONTEREY

By: [Signature]
FOR Contracts/Purchasing Manager

Date: 4-2-12

By: _____
Department Head (if applicable)

Date: _____

Approved as to Form

By: [Signature]
Deputy County Counsel

Date: 2/23/12

Approved as to Fiscal Provisions

By: [Signature]
Auditor/Controller

Date: 2-24-12

Approved as to Liability Provisions

By: _____
Risk Management

Date: _____

CONTRACTOR

PAETEC Software Corp.

Contractor's Business Name*

By: [Signature]
(Signature of Chair, President, or Vice-President)*

Larry D. Foster VP
Name and Title

Date: 2-15-12

By: [Signature]
(Signature of Secretary, Asst. Secretary, CFO, or Asst. Treasurer)*

Kristi Moody Assistant Secretary
Name and Title

Date: 2-15-12

*INSTRUCTIONS: If CONTRACTOR is a corporation, including limited liability and non-profit corporations, the full legal name of the corporation shall be set forth above together with the signatures of two specified officers. If CONTRACTOR is a partnership, the name of the partnership shall be set forth above together with the signature of a partner who has authority to execute this Agreement on behalf of the partnership. If CONTRACTOR is contracting in an individual capacity, the individual shall set forth the name of the business, if any, and shall personally sign the Agreement.

EXHIBIT A
SCOPE OF SERVICES/PAYMENT PROVISIONS

I. Scope of Services

Contractor shall provide maintenance support of the PINNACLE Telemanagement Software and provide software modifications and database updates as needed by the County.

- a. The maintenance and support services will be for the following modules within the application:
- Service Manager, Usage, Chargeback, Optimization, Service Desk, and Inventory
 - Infrastructure & E911 (for 4,000 lines, within 2 nodes)
 - Switch Manager for Ericsson MD-110 Resynch

The terms and conditions of the maintenance and support are specified in **Exhibit B**, Pinnacle Customer Care Guide incorporated as part of this Agreement.

The yearly Maintenance and Support costs will be as follows:

Term	Amount
April 1, 2012 - March 31, 2013	\$16,548
April 1, 2013 - March 31, 2014	\$16,879
April 1, 2014 - March 31, 2015	\$17,217

- b. The software and database modifications services will be provided by the Contractor on an as needed basis at the rate of \$225/hour billed on an **incurred basis**. The maximum hours of software and database modifications **shall not exceed 80 hours or \$18,000** for the term of the Agreement.
- c. For all software and database modifications as requested by the County, the Contractor shall provide a quote of the estimated hours and defined services, which are hereby incorporated by reference. County shall review and approve any labor prior to the Contractor performing any modifications.
- d. County shall provide access to the vendor to the database as needed to perform the changes.

II. Term of the Agreement

The term of this Agreement shall be from April 1, 2012 through March 31, 2015 unless sooner terminated pursuant to the terms of this Agreement.

III. Payment Provisions

- a. For the services described in this Agreement, the maximum obligation of the County shall be:

Term	Amount
April 1, 2012 - March 31, 2013 (Yearly Rate)	\$16,548
April 1, 2013 - March 31, 2014 (Yearly Rate)	\$16,879
April 1, 2014 – March 31, 2015 (Yearly Rate)	\$17,217
Software & Database Modifications (Hourly Labor as incurred)	\$18,000
Maximum Agreement Amount	\$68,644

In order to be reimbursed for travel costs, Contractor must comply with Monterey County Travel Policy which is available on the County website at <http://www.co.monterey.ca.us/auditor/pdfs/travelpolicy2008.pdf>

- b. Payment conditions as specified in Section 6 of the body of this Agreement shall apply. In the event that the Agreement is terminated prior to completion of the services, the amount paid shall be prorated over the length of the Agreement and should the County determine a reimbursement is owed, the Contractor shall reimburse the County within thirty (30) days of the termination.
- c. Invoices shall be mailed to:

Monterey County Information Technology
1590 Moffett Street
Salinas, Ca. 93905
Attn: Accounts Payable