

# City of Columbia

701 East Broadway, Columbia, Missouri 65201



**Agenda Item Number:** B 246-15

**Department Source:** Water & Light

**To:** City Council

**From:** City Manager & Staff

**Council Meeting Date:** 8/17/2015

**Re:** Software License Agreement with Tripwire Inc.

## Documents Included With This Agenda Item

Council memo, Resolution/Ordinance, Agreement

**Supporting documentation includes:** None

## Executive Summary

Water and Light has awarded Open Systems International (OSI) the contract to provide the Energy Management System (EMS) to the City. OSI has provided Tripwire software to provide cybersecurity tools for the EMS system. The City must sign a separate license agreement with Tripwire Inc.

## Discussion

Water and Light issued a request for proposals (RFP 139-2014) to replace its aging SCADA system. OSI was awarded the contract based on their proposal. The Tripwire software was purchased through OSI in accordance with the Implementation Service Contract that was authorized by the Purchasing Agent. This agreement is required by Tripwire Inc. to provide licenses to use the software.

## Fiscal Impact

Short-Term Impact: None. There are no recurring license fees.

Long-Term Impact: None.

## Vision, Strategic & Comprehensive Plan Impact

Vision Impact: Not Applicable

Strategic Plan Impact: Infrastructure

Comprehensive Plan Impact: Infrastructure

## Suggested Council Action

Authorize City Manager to sign Software License Agreement between City and Tripwire Inc. as part of the Energy Management System implementation.

## Legislative History

# City of Columbia

701 East Broadway, Columbia, Missouri 65201



None.

  
Department Approved

  
City Manager Approved

Introduced by \_\_\_\_\_

First Reading \_\_\_\_\_

Second Reading \_\_\_\_\_

Ordinance No. \_\_\_\_\_

Council Bill No. B 246-15

**AN ORDINANCE**

authorizing a license agreement with Tripwire, Inc. to provide cybersecurity tools as part of the Energy Management System (EMS) implementation; and fixing the time when this ordinance shall become effective.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF COLUMBIA, MISSOURI, AS FOLLOWS:

SECTION 1. The City Manager is hereby authorized to execute a license agreement with Tripwire, Inc. to provide cybersecurity tools as part of the Energy Management System (EMS) implementation. The form and content of the license agreement shall be substantially in the same form as set forth in "Exhibit A" attached hereto.

SECTION 2. This ordinance shall be in full force and effect from and after its passage.

PASSED this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

ATTEST:

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
Mayor and Presiding Officer

APPROVED AS TO FORM:

\_\_\_\_\_  
City Counselor

## TRIPWIRE LICENSE AGREEMENT

This Tripwire License Agreement (the "Agreement") is by and between Tripwire, Inc., having a principal place of business at 101 SW Main, Suite 1500, Portland, OR 97204 ("Tripwire"), and the following customer ("Customer") effective on the date of last signature below.

Customer Corporate Name:	City of Columbia, Missouri
Customer Address:	701 East Broadway, P.O. Box 6015
	Columbia, Missouri 65205

Effective as of the date above, the parties agree as follows:

### 1. ORDERS, FEES AND PAYMENT.

1.1 To the extent Customer (or upon agreement by Tripwire, Customer's appointed third party buying agent) places and Tripwire accepts purchase orders, each such purchase order will constitute a contract between Customer and Tripwire, which shall be governed solely and exclusively by the terms and conditions of this Agreement, any applicable addenda and the applicable quotation (collectively the "Order") approved by the parties, whether or not these documents are referenced in the Customer's purchase order. Any additional or conflicting terms and conditions appearing in the Customer's purchase order will not be effective unless agreed in writing by both parties' authorized representatives.

1.2 All license fees are non-refundable, except as expressly provided in this Agreement. Any past due invoices will be subject to interest charges in the amount of one and one-half percent per month or the applicable legal rate currently in effect, whichever is lower. Prices do not include freight, insurance, customs duties, taxes or other similar charges, which Tripwire will invoice separately. Unless provided with a certificate of exemption, Tripwire will invoice Customer for all applicable taxes. Notwithstanding anything to the contrary, if Customer appoints a third party buying agent to place purchase orders and/or make payments on Customer's behalf, Customer shall be liable for payment under such orders in the event of default by the third party buying agent.

1.3 Any products delivered electronically shall be deemed delivered when made available to Customer for download, and any products delivered in tangible media are delivered FOB Origin. Tripwire's delivery of Software by electronic means is subject to Customer's provision of both a primary and an alternate e-mail address.

### 2. OWNERSHIP; GRANT OF LICENSE.

2.1 The software installed, downloaded, or otherwise acquired by Customer under this Agreement, including any upgrades, updates, modifications, revisions, copies, and documentation ("Software") are copyrighted, trade secret and confidential information of Tripwire or its licensors, who maintain exclusive title to all Software and retain all rights not expressly granted by this Agreement. Tripwire grants to Customer, subject to Customer's compliance with the terms and conditions of this Agreement including but not limited to payment of applicable license fees, a nontransferable, nonexclusive license to use Software solely: (a) in machine-readable, object or executable code form; (b) as specified in the Order; and (c) for Customer's internal business purposes.

2.2 The Order will identify the specific type of Software licenses purchased and additional restrictions may apply, for example: (a) use of the Software is permitted solely for the specific number of processors or "nodes" (e.g. "File Systems" or "Network Devices") identified in the Order; (b) the Software may contain third-party backend databases (e.g. MySQL) which the Customer is only authorized to use if identified in the Order; (c) use of the Software is permitted solely on the authorized hardware; (d) use of the Software may be restricted to a specific site (e.g. Software identified in an Order for "Large Stores" or "Small Stores" may only be used at a single store location's site) or territory, if referenced in the Order; (e) if "EPS" is referenced in the Order, Software is restricted by events per second; and (f) use of the Software may be limited to a restricted period of time, if referenced in the Order, and such limitations may be technically implemented through the use of authorization codes, license keys, or similar devices. Customer may choose to, but is not required to, provide suggestions, data, or other information to Tripwire regarding possible improvements in the operation, functionality or use of Software, whether in the course of receiving services, evaluating Software or otherwise, and any inventions, product improvements, modifications or developments made by Tripwire, at its sole discretion, will be the exclusive property of Tripwire.

2.3 Customer agrees that purchases under this Agreement are not contingent on the delivery of any future functionality or features, and are not dependent on any oral or written comments made by Tripwire regarding future functionality or features.

### 3. BETA CODE. If Beta Code is provided to Customer, the following provisions apply:

3.1 Certain Software may contain code for experimental testing and evaluation ("Beta Code"). If Tripwire authorizes Customer to use Beta Code, Tripwire grants to Customer a temporary, nontransferable, nonexclusive license for experimental use to test and evaluate Beta Code without charge for up to 60 days unless otherwise specified by Tripwire in writing, on a single local area network at one location. This grant and Customer's use of Beta Code shall not be construed as marketing or offering to sell a license to Beta Code, which Tripwire may

choose not to release commercially in any form.

3.2 Customer agrees to evaluate and test Beta Code under normal conditions as directed by Tripwire. Customer acknowledges the experimental nature of Beta Code and agrees not to rely on correct functioning or performance of Beta Code. Customer will contact Tripwire periodically during Customer's use of Beta Code to discuss any malfunctions or suggested improvements. Upon completion of Customer's evaluation and testing, Customer will send a written evaluation, which may be in the form of an email, of Beta Code to Tripwire, including its strengths, weaknesses and recommended improvements.

3.3 Customer agrees to maintain Beta Code in confidence and shall restrict access to Beta Code, including any functionality, methods and concepts, solely to those employees authorized by Tripwire to perform Beta Code testing. Customer agrees that any written evaluations and all inventions, product improvements, modifications or developments that Tripwire conceived or made during or subsequent to this Agreement, including those based partly or wholly on Customer's feedback, will be the exclusive property of Tripwire. Tripwire will have exclusive rights, title and interest in all such property.

#### 4. CONDITIONS.

4.1 Customer may not use the Software for any purpose other than for use on its computers and networks, as specified in the Order. Customer may not loan, rent, lease, distribute, or otherwise transfer Software without Tripwire's prior written consent, except as part of a permanent transfer of the Software as permitted by this Agreement. Customer may copy Software only as reasonably necessary to support the authorized use. Each copy must include all notices and legends embedded in Software and affixed to its medium and container as received from Tripwire. All copies shall remain the property of Tripwire or its licensors. Customer shall maintain a record of the number and primary location of all copies of Software, including copies merged with other software, and shall make those records available to Tripwire upon request. Customer may allow third party consultants or contractors ("Authorized Third Party") to access and use the Software on Customer's behalf provided that: (a) the use is solely for Customer's internal business operations; (b) Authorized Third Party is bound by a written agreement with Customer protecting Tripwire's intellectual property and Confidential Information with terms no less stringent than this Agreement; (c) Customer ensures that such Authorized Third Party's use of the Software complies with the terms of this Agreement; and (d) upon completion of the Authorized Third Party's services requiring use of the Software, Customer ensures that the Software is immediately, completely and irretrievably uninstalled from Authorized Third Party's equipment and/or premises, as applicable. Under no circumstances shall Customer use Software or allow its use for the purpose of developing, enhancing or marketing any product that is in any way competitive with Software, or disclose to any third party the results of or information pertaining to any benchmark. Except as otherwise permitted for purposes of interoperability as specified by applicable and mandatory local law, Customer shall not reverse-assemble, reverse-compile, reverse-engineer or in any way derive any source code from Software. If Customer wishes to exercise any rights to reverse-engineer to ensure interoperability in accordance with applicable law, Customer must first provide Tripwire with written notice and all reasonably requested information to [TW-Contracts@tripwire.com](mailto:TW-Contracts@tripwire.com) within 30 days and permit Tripwire to assess the claim and, at Tripwire's sole discretion, to make an offer to provide alternatives that reduce any adverse impact on Tripwire's intellectual property or other rights.

4.2 Except as provided herein, Customer may not sublicense, assign or otherwise transfer Software, this Agreement or the rights under it, whether by operation of law or otherwise ("attempted transfer"), without Tripwire's prior written consent and payment of Tripwire's then-current applicable transfer charges. Any attempted sublicense, assignment or transfer without Tripwire's prior written consent shall be a material breach of this Agreement and may, at Tripwire's option, result in the immediate termination of this Agreement and licenses granted under this Agreement. The terms of this Agreement, including without limitation the licensing and assignment provisions, shall be binding upon Customer's permitted successors in interest and assigns.

4.3 Notwithstanding Section 4.2 or the restrictions in any Order as described in Section 2.2, (a) at Tripwire's sole discretion, Customer may move the Software from one node (i.e. authorized hardware) to another without charge provided that, upon Tripwire's request, an officer of Customer certifies deletion and destruction of the Software on the original node location; and (b) Customer may change the site to another provided Customer notifies Tripwire in writing in advance and provided that Customer otherwise complies with this Agreement. In no circumstance shall a transfer under this section authorize the Customer to increase the value of, or number of nodes for which it is using, the Software.

5. **SUPPORT SERVICES.** Any support services associated with the Software will be referenced in the Order. Support services are generally offered in one-year increments, unless otherwise expressly stated in the Order. To the extent Customer purchases support services for Software, Tripwire will provide Customer with Updates and Upgrades, if and when available, and technical support for the Software that are made generally available by Tripwire in accordance with Tripwire's then current Support Policies at [https://secure.tripwire.com/customers/\\_files/TW\\_Support\\_Guidelines.pdf](https://secure.tripwire.com/customers/_files/TW_Support_Guidelines.pdf). "Upgrades," as referenced in the Support Policies, refers to new versions of the original Software (identified by a version change to the left of the decimal point, e.g. 8.0 to 9.0) which add functionality and do not extend to other Tripwire product offerings. "Updates," as referenced in the Support Policies, refers to changes in the Software that improve usability (identified by a version change to the right of the decimal point, e.g. 8.0 to 8.1) which are generally an

accumulation of maintenance changes to the Software in response to resolutions of customers' service requests. Upon Customer's use of a Software Update or Upgrade, Customer agrees to cease all use of the prior version of the Software and destroy all copies. If there is a conflict between the Support Policies and this Section 5, this Section 5 shall control. Beyond the initial two years of maintenance included in the initial Order, Customer may continue support services by paying Tripwire's customary fees for support services.

## **6. CONFIDENTIAL INFORMATION.**

6.1 "Confidential Information" means: (a) byte code or source code provided by Tripwire; (b) any authorization keys and passwords delivered in order to operate the Software; (c) documentation, product road maps and development plans; ; (d) any business, technical or training information of a party that, if disclosed in writing, is marked "confidential" or "proprietary" at the time of disclosure, or, if disclosed orally, is identified as "confidential" or "proprietary" at the time of disclosure; and (e) the specific business terms of this Agreement. Confidential Information does not include information that: (i) is or becomes generally known or available to the public through no act or omission of Customer; (ii) is rightfully known to or received by Customer prior to receiving such information from Tripwire or its representatives without restriction as to use or disclosure; or (iii) is independently developed by Customer without use of Confidential Information and without a breach of this Agreement; or (iv) is a open public record pursuant to the Missouri Sunshine Law. The existence of this Agreement and the nature of the business relationship between the parties are not Confidential Information.

6.2 Customer will not use Confidential Information except as necessary to exercise the rights granted under this Agreement or to evaluate opportunities to license additional Tripwire product offerings. Customer will not disclose Confidential Information to any person or entity except to Customer's employees or Authorized Third Party, whose job performance requires access and who are under obligations of confidentiality. The foregoing obligations will not restrict Customer's disclosure of Confidential Information pursuant to the order or requirement of a court, administrative agency, or other governmental body, provided that Customer gives reasonable notice to Tripwire to contest such order or requirement. Customer shall give Tripwire written notice of any unauthorized disclosure or use of the Software as soon as Customer learns or becomes aware of such unauthorized disclosure or use.

## **7. LIMITED WARRANTY.**

7.1 During the warranty period, Tripwire warrants that its standard, generally supported Software (excluding Beta Code), when properly installed, will substantially conform to the functional specifications set forth in the applicable user manual. The warranty period is 90 days from the date of Customer's initial receipt of Software. Customer must notify Tripwire in writing of any nonconformity within the warranty period. This warranty applies only to the initial shipment of Software under the applicable Order and does not renew with the delivery of (a) Software Updates or Upgrades or (b) new or reissued authorization codes. This warranty shall not be valid if Software has been subject to misuse, modification or improper installation. TRIPWIRE OFFERS NO WARRANTY THAT THE SOFTWARE WILL DETECT OR PROTECT AGAINST ALL THREATS OR BE ERROR-FREE OR FREE FROM INTERRUPTIONS OR OTHER FAILURES. TRIPWIRE'S ENTIRE LIABILITY AND CUSTOMER'S EXCLUSIVE REMEDY SHALL BE, AT TRIPWIRE'S OPTION, EITHER (A) REFUND OF THE PRICE PAID UPON RETURN OF SOFTWARE TO TRIPWIRE AND A CERTIFICATION THAT CUSTOMER HAS DESTROYED ALL COPIES OR (B) MODIFICATION OR REPLACEMENT OF SOFTWARE THAT DOES NOT MEET THIS LIMITED WARRANTY, PROVIDED CUSTOMER HAS OTHERWISE COMPLIED WITH THIS AGREEMENT. TRIPWIRE OFFERS NO WARRANTIES WITH RESPECT TO: (A) SERVICES; (B) SOFTWARE WHICH IS LICENSED AT NO CHARGE; OR (C) BETA CODE; ALL OF WHICH ARE PROVIDED "AS IS."

7.2 SUBJECT TO SECTION 10.1, THE WARRANTIES SET FORTH IN THIS SECTION 7 ARE EXCLUSIVE. NEITHER TRIPWIRE NOR ITS LICENSORS OFFER ANY OTHER WARRANTIES, TERMS OR CONDITIONS, EXPRESS, IMPLIED OR STATUTORY, WITH RESPECT TO SOFTWARE OR OTHER MATERIAL PROVIDED UNDER THIS AGREEMENT. TRIPWIRE AND ITS LICENSORS SPECIFICALLY DISCLAIM ALL IMPLIED WARRANTIES, TERMS, CONDITIONS, AND REPRESENTATIONS OF (A) MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE AND NON- INFRINGEMENT OF INTELLECTUAL PROPERTY, AND (B) THOSE ARISING OUT OF COURSE OF DEALING, USAGE OR TRADE. No oral or written information or advice given by Tripwire or Tripwire's authorized representatives shall create a warranty or other obligations on behalf of Tripwire.

**8. CUSTOMER OBLIGATIONS.** Customer shall assume responsibility for selecting the Software to achieve its intended results, and for the installation of, use of, and results obtained from the Software. To the extent allowed by law, Customer agrees to indemnify Tripwire and its licensors from any claims, loss, cost, damage, expense or liability, including attorneys' fees, arising out of or in connection with Customer's failure to maintain a secure or compliant system. As conditions to Customer's obligations under this Section 8, Tripwire must: (a) notify Customer promptly in writing of the action; and (b) grant Customer sole authority and control of the defense or settlement of the action.

## **9. INFRINGEMENT.**

9.1 Tripwire will defend or settle any action brought against Customer by paying all costs, damages and reasonable attorneys' fees that are finally awarded against Customer to the extent those amounts are based upon a claim that the Software directly infringes any copyright or misappropriates any trade secret or infringes any U.S. patent. Customer agrees that as conditions to Tripwire's obligations under this Section 9, Customer must: (a) notify Tripwire promptly in writing of the action; (b) provide Tripwire all reasonable information and assistance to settle or defend the action; and (c) grant Tripwire sole authority and control of the defense or settlement of the action. Tripwire will not enter into any settlement that holds Customer liable or subjects Customer to the payment of fees of any kind without Customer's prior written consent, which consent shall not be unreasonably withheld or delayed.

9.2 If a claim is made under Subsection 9.1, Tripwire may at its option and expense: (a) replace or modify Software so that it becomes non-infringing; or (b) procure for Customer the right to continue using Software; or (c) require the return of Software or, if obtained electronically, require a certification from Customer that the Software has been destroyed, and refund to Customer any license fee paid, less an allowance for use based on a five year straight line depreciation method beginning on the initial date of delivery of the Software.

9.3 Tripwire has no liability to Customer if the claim is based upon: (a) the combination of Software with any product not furnished by Tripwire; (b) the modification of Software other than by Tripwire or modifications made by Tripwire in conformance with Customer's specifications; (c) the use of other than a current unaltered release of Software; (d) any Beta Code or Software licensed at no charge; (e) any Software provided by Tripwire's licensors who do not provide such indemnification to Tripwire's customers; (f) Software not used in accordance with this Agreement; or (g) infringement by Customer that is deemed willful by a court of law. Tripwire will not be responsible for any compromise made or expense incurred without its prior written consent.

9.4. THIS SECTION 9 SETS FORTH TRIPWIRE'S SOLE AND EXCLUSIVE OBLIGATIONS, AND CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES, WITH RESPECT TO INFRINGEMENT OR MISAPPROPRIATION OF INTELLECTUAL PROPERTY RIGHTS OF ANY KIND. EXCEPT AS SET FORTH ABOVE, TRIPWIRE AND ITS LICENSORS DISCLAIM ALL IMPLIED OBLIGATIONS WITH RESPECT TO INTELLECTUAL PROPERTY INDEMNIFICATION.

## **10. LIMITATION OF LIABILITY.**

10.1 Tripwire's liability shall not be limited or excluded in relation to: (a) death or personal injury caused by its negligence or intentional misconduct (or that of its employees or agents); or (b) fraudulent misrepresentation; or (c) any other liability that cannot under applicable law be limited or excluded.

10.2 SUBJECT TO SECTION 10.1, IN NO EVENT SHALL TRIPWIRE OR ITS LICENSORS BE LIABLE FOR: (A) LOSS OF PROFITS; (B) LOSS OF DATA; (C) LOSS OF REVENUE; (D) LOSS OF USE; OR (E) PUNITIVE, EXEMPLARY, INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, WHETHER BASED ON CONTRACT, TORT OR ANY OTHER LEGAL THEORY, EVEN IF TRIPWIRE OR ITS LICENSORS HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

10.3 SUBJECT TO SECTIONS 10.1 AND 10.2, IN NO EVENT SHALL TRIPWIRE'S OR ITS LICENSORS' LIABILITY UNDER THIS AGREEMENT EXCEED IN AGGREGATE, AN AMOUNT EQUAL TO THE AMOUNT PAID OR PAYABLE BY CUSTOMER FOR THE SOFTWARE OR SERVICE GIVING RISE TO THE CLAIM. IN THE CASE WHERE NO AMOUNT WAS PAID, TRIPWIRE AND ITS LICENSORS' DAMAGES SHALL BE CAPPED AT \$1,000 USD.

10.4 Customer acknowledges that the fees reflect the allocation of risk set forth in this Agreement and that Tripwire would not enter into this Agreement without these limitations on its liability. Some jurisdictions do not allow the exclusion or limitation of liability for incidental or consequential damages, so the above limitation may not apply to the extent prohibited by such local laws.

## **11. TERM AND TERMINATION.**

11.1 This Agreement remains effective until terminated. This Agreement will immediately terminate upon notice if Customer exceeds the scope of license granted or otherwise fails to comply with Sections 2, 3, 4 or 6. For any other material breach under this Agreement, Tripwire may terminate this Agreement upon 30 days written notice if Customer is in material breach and fails to cure such breach within the 30 day notice period. If a Software license was provided for limited term use, such license will automatically terminate at the end of the authorized term. Customer may terminate this Agreement at any time by returning or certifying destruction of all copies of the Software used by Customer and providing written notice to Tripwire.

11.2 Upon termination of this Agreement or any Software license under this Agreement, Customer shall ensure that all use of the affected Software ceases, and shall return it to Tripwire or, if Customer obtained the Software electronically, certify the destruction of all copies of the Software used by Customer to Tripwire's reasonable satisfaction. Termination of this Agreement or any Software license granted under this Agreement will not affect Customer's obligation to pay for products shipped or licenses granted prior to the termination, which amounts shall immediately be payable at the date of termination. The following sections will survive any termination of this Agreement: 1.2, 2.2, 3.3, 4.1, 4.2, 6.2, 7.2, 8, 9.4, 10, 11, 14, 15, 16 and 17.

**12. U.S. GOVERNMENT LICENSE RIGHTS.** All Software is commercial computer software within the meaning of the applicable acquisition regulations. Accordingly, pursuant to US FAR 48 CFR 12.212 and DFAR 48 CFR 227.7202, use, duplication and disclosure of the Software by or for the U.S. Government or a U.S. Government subcontractor is subject solely to the terms and conditions set forth in this Agreement, except for provisions which are contrary to applicable mandatory federal laws.

**13. THIRD PARTY SOFTWARE.** The Software may include software components under licenses from third parties. If the Software identified in the Order is Tripwire For Servers for the Linux platform, it is provided with the GNU C Library subject to the Lesser General Public License. In addition to Tripwire, Oracle USA, Inc. is and other licensors may be third party beneficiaries of this Agreement with the right to enforce the obligations set forth in this Agreement. Third party licenses are located in the "License Agreements" section found in the "Help" menu of the Software, for all products excluding Tripwire For Servers. If any third party licenses require that Tripwire provide recipients with rights to use, copy or modify a software program that are broader than the rights granted in this Agreement, then such rights shall take precedence over the rights and conditions in this Agreement with regard to those components. Customer's use of third party components in conjunction with the Software in accordance with this Agreement is permitted under all such licenses.

**14. EXPORT.** Customer agrees to comply with all international and national laws that apply to the Software, including, but not limited to, the U.S. Export Administration Regulations, economic sanctions regulations administered by the Office of Foreign Assets Control, as well as similar restrictions issued by U.S. and other governments, which prohibit the provision of Software to specified destinations, end-users and end uses. Customer specifically represents and warrants that it will not export, re-export, sell, supply or transfer the Software to any country or person to which the United States has embargoed or restricted the provision of the Software, including, but not limited to, Cuba, Iran, North Korea, Sudan (North) or Syria, nationals of those countries, or to any other embargoed or restricted destination or person.

**15. CONTROLLING LAW AND JURISDICTION.** This Agreement shall be governed by and construed under the laws of the State of Missouri, USA, excluding choice of laws rules. Any action or proceeding arising from or relating to this Agreement, must be brought in a federal or state court in the jurisdiction of the non-moving party, and each party irrevocably submits to the jurisdiction and venue of any such court in any such action or proceeding. This Section 15 shall not restrict Tripwire's right to bring an action against Customer or its subsidiary in the jurisdiction where Customer's or its subsidiary's place of business is located. The United Nations Convention on Contracts for the International Sale of Goods does not apply to this Agreement..

**16. REVIEW OF LICENSE USAGE.** On Tripwire's written request, Customer will furnish to Tripwire: (a) a certification signed by an officer indicating whether the Software is being used in accordance with this Agreement; and (b) a copy of any usage reports generated from the Software, if applicable. With prior written notice, Tripwire may engage an independent auditor to review Customer's Software usage and related records during Customer's normal business hours to confirm compliance with this Agreement (a "Review"). Customer will provide the auditor with access to the relevant records and facilities for the Review. If the Review reveals Customer has underpaid fees to Tripwire, then Customer will promptly pay Tripwire for actual usage based on Tripwire's then-current list price. Tripwire will bear the expense of the Review unless a material non-compliance is revealed. Tripwire will treat all information disclosed during the Review as confidential information and will only use or disclose such information as required by law or to enforce its rights under this Agreement.

**17. MISCELLANEOUS.** If a court of competent jurisdiction finds any provision of this Agreement invalid or unenforceable, that provision will be enforced to the maximum extent permissible and the other provisions of this Agreement will remain in full force and effect. This Agreement may only be modified in writing by authorized representatives of the parties. All notices required or authorized under this Agreement must be in writing and shall be sent, as applicable, to Customer's legal department or to Tripwire at: Tripwire, Inc., Attn.: Legal Department, P.O. Box 2727, Portland, OR 97208-2727 USA. Waiver of terms or excuse of breach must be in writing and shall not constitute subsequent consent, waiver or excuse.

**18. Nature of Customer's Obligations.** All obligations of the Customer under this Agreement, which require the expenditure of funds, are conditional upon the availability of funds budgeted and appropriated for that purpose.

**19. Harmful Code.** Tripwire will use standard industry practices to test the Software delivered or transmitted to Customer in connection with this Agreement and remove any Harmful Code it discovers prior to delivery thereof. "Harmful Code" shall mean any code which is designed with intent to harm, or otherwise disrupt in any unauthorized manner, the operation of a recipient's computer programs or computer systems or destroy or damage recipient's data in an unauthorized manner. Harmful Code shall not include software bugs or



errors handled through support or maintenance, or any license key or other equivalent code which may limit the functionality or scope of the use of any Software to the scope of the license purchased by Customer hereunder.

20. **Public Records Act.** Customer is subject to the Missouri Sunshine Law. The Parties agree that this Agreement shall be interpreted in accordance with the provisions of the Missouri Sunshine Law as amended.

21. **Employment of Unauthorized Aliens.** Tripwire agrees to comply with Missouri State Statute Section 285.530 in that Tripwire shall not knowingly employ, hire for employment, or continue to employ an unauthorized alien to perform work within the state of Missouri. As a condition for the award of this contract Tripwire shall, by sworn affidavit and provision of documentation, affirm its enrollment and participation in a federal work authorization program with respect to the employees working in connection with the contracted services. Tripwire shall also sign an affidavit affirming that it does not knowingly employ any person who is an unauthorized alien in connection with the contracted services.

22. **No Waiver of Immunities.** In no event shall the language of this Agreement constitute or be construed as a waiver or limitation for either Party's rights or defenses with regard to each Party's applicable sovereign, governmental, or official immunities and protections as provided by federal and state constitution or law.

**ACCEPTED AND AGREED** as of the Effective Date by the following authorized representatives of the parties:

**CUSTOMER**

By: \_\_\_\_\_  
Printed  
Name: Mike Matthes \_\_\_\_\_  
Title: City Manager \_\_\_\_\_  
Date: \_\_\_\_\_

**TRIPWIRE, INC.**

By: \_\_\_\_\_  
Printed  
Name: Jennifer Allison \_\_\_\_\_  
Title: Director, Legal Affairs \_\_\_\_\_  
Date: 5/21/15 \_\_\_\_\_

**ATTEST:**

\_\_\_\_\_  
Sheela Amin, City Clerk  
Date: \_\_\_\_\_

Approved as to Form:

\_\_\_\_\_  
Nancy Thompson, City Counselor  
Date: \_\_\_\_\_

