



# Master Customer Agreement

Beyond delivering reliable computer solutions to our customers, First Call's goal is to create and maintain a satisfying business relationship for both parties.

First Call and our customers should be allies working together to benefit one another, not opponents trying to overcome the other. A Master Customer Agreement is nothing more than a tool to help the organizations satisfy one another.

This Agreement must be signed by both parties one time prior to Agreements, Orders or Statement of Works being fulfilled.

This **MASTER CUSTOMER AGREEMENT** (the "**Agreement**") is entered into as of September 1<sup>st</sup>, 2022 ("**Effective Date**") between First Call Computer Solutions ("**FCCS**") and Flathead Reservation Water Management Board ("**Customer**").

**1. SCOPE OF AGREEMENT.** This Agreement serves as a master agreement and applies to Customer's Service and Product purchases or subscriptions from FCCS. No Product or Services will be provided under this Agreement alone, but may require the execution of a "**Services Agreement**", "**Product Order**", or "**Statement of Work**" (collectively the "**Services**"). The parties hereby further agree that the parties may execute multiple Services under this Agreement. In the event of any conflict between the terms of the Services and those of this Agreement, the terms of the Services will prevail.

**2. TERM AND TERMINATION.** This Agreement will begin on the Effective Date and will continue until each Services expires or is terminated. FCCS may: (a) terminate a specific Order if Customer fails to pay any applicable fees due for that Services within 30 days after receipt of written notice from FCCS of non-payment; and/or (b) terminate this Agreement or any Services if Customer commits any other material breach of this Agreement and fails to cure such breach within thirty (30) days after receipt of written notice from FCCS. If any Services are terminated, Customer will promptly pay FCCS for Services rendered, and expenses incurred through the termination date. FCCS may terminate any license granted for a Deliverable (as defined below) if (i) Customer does not pay FCCS for that Deliverable in accordance with this Agreement, or (ii) if Customer materially breaches any part of Section 4 of this Agreement.

**3. PAYMENT AND DELIVERY.** Customer will pay FCCS all fees due upon receipt of an invoice specifying the amounts due ("**Fees**"). If payment is not received on or before any invoice due date FCCS reserves the right to charge an administrative fee calculated at a minimum rate of one and one-half percent (1.5%) per month from the date due until paid in full. Customer shall pay all expenses, including actual attorneys' fees, incurred by FCCS or its representatives in enforcing its rights under this Agreement, provided that FCCS is successful on the merits. Unless otherwise stated in Services, Customer agrees to pay or reimburse FCCS for all actual, necessary, and reasonable expenses incurred by FCCS in performance of such Services, which are capable of verification by receipt. FCCS will submit invoices to Customer for such fees and expenses either upon completion of the Services, or at stated intervals, in accordance with the applicable Services.

## **4. PROPRIETARY RIGHTS AND CONFIDENTIALITY.**

**4.1. Work Product Ownership.** The parties acknowledge and agree that any works, ideas, systems, programming code, or other materials prepared and delivered by FCCS (collectively the "**Work Product**") in the course of providing Services will not be considered "works made for hire" under the copyright laws of the United States and that all rights, title and interests with respect to such materials shall remain with FCCS. Customer shall be entitled to use said Work Product only as a licensee of FCCS, which license shall remain in effect during the term of this Agreement.

**4.2. Mutual Confidentiality.** This Section sets out the terms for identification of information which is considered confidential and proprietary by a party (the "**Discloser**"), and restrictions against use and disclosure of such Confidential Information after disclosure to the other party (the "**Recipient**").

**(a) Definition.** The term "**Confidential Information**" means all proprietary or confidential information that is disclosed to the Recipient by the Discloser, and includes, among other things (i) any and all information relating to products or services provided by a Discloser, its customer-related and financial information, source and executable code, flow charts, drawings, techniques, specifications, development and marketing plans, strategies, forecasts, and sales and marketing materials; (ii) the Product; and (iii) the terms of this Agreement. Confidential Information does not include information that Recipient can show: (A) was rightfully in Recipient's possession without any obligation of confidentiality before receipt from the Discloser; (B) is or becomes a matter of public knowledge through no fault of Recipient; (C) is rightfully received by Recipient from a third party without violation of a duty of confidentiality; or (D) is or was independently developed by or for Recipient.

**(b) Disclosure Restrictions.** Recipient may not disclose Confidential Information of Discloser to any third party without the prior written consent of Discloser and shall make reasonable attempts to prevent any unauthorized disclosure by its employees, agents, contractors, and consultants.

## 5. ALLOCATION OF RISK

**5.1. Disclaimer of Damages.** EXCEPT FOR VIOLATIONS OF SECTION 4, NEITHER PARTY, NOR ITS AFFILIATES AND LICENSORS, ARE LIABLE TO THE OTHER PARTY, OR ITS AFFILIATES OR LICENSORS, FOR ANY SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE WORK PRODUCT (INCLUDING WITHOUT LIMITATION LOST PROFITS, LOST COMPUTER USAGE, AND DAMAGE OR LOSS OF USE OF DATA), EVEN IF THAT PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND IRRESPECTIVE OF THE NEGLIGENCE OF EITHER PARTY OR WHETHER SUCH DAMAGES RESULT FROM A CLAIM ARISING UNDER TORT OR CONTRACT LAW.

**5.2. Limitation of Liability.** EXCEPT FOR VIOLATIONS OF SECTION 4, FCCS'S LIABILITY FOR DIRECT DAMAGES ARISING OUT OF OR RELATING TO THIS AGREEMENT IS LIMITED TO THE GREATER OF THE AMOUNT PAID OR PAYABLE BY CUSTOMER FOR THE APPLICABLE WORK PRODUCT OR SERVICE IN THE MONTH PROVIDED

**5.3. Injunctive Relief.** Both parties acknowledge that their violation of Section 4 may cause the other party immediate and irreparable harm. In the event of such breach, the breaching party agrees that the other party may seek, in addition to any and all other remedies available at law, an injunction, specific performance or other appropriate relief.

## 6. SERVICES-SPECIFIC TERMS.

**6.1. All Necessary Rights.** If, as part of FCCS's performance of Services, FCCS is required to use, copy or modify any third party system (hardware, software or other technology) provided or licensed to Customer, then prior to FCCS's performance of such Services, Customer will acquire all rights necessary for FCCS to perform such Services.

**6.2. Limited Warranty.** FCCS warrants that the Services performed will be of a quality conforming to generally accepted practices that are standard within the IT services industry for a period of thirty (30) days from completion of the Services under the applicable Statement of Work. Customer's exclusive remedy and FCCS's entire liability under this warranty will be for FCCS to re-perform any non-conforming portion of the Services within a reasonable period of time, or if FCCS cannot remedy the breach during such time period then refund the portion of the fee attributable to such nonconforming portion of the Services. This warranty will not apply to the extent Customer, its contractors or agents have modified any Deliverable, unless otherwise authorized by FCCS in writing. **THIS WARRANTY AND CONDITION IS IN LIEU**

**OF ALL OTHER WARRANTIES AND CONDITIONS. THERE ARE NO OTHER EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS, INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.**

**6.3. Hardware or Software.** Customer may, from time to time, purchase/acquire or subscribe Hardware and/or Software ("OEM Product") from FCCS in whole or in part of Services. In such cases, FCCS is acting as a reseller for a third party. All restrictions, and other terms pertaining to the OEM Product are found only in the applicable agreement provided by the original equipment manufacturer (OEM) of the OEM Product (the "OEM Agreement"), and such OEM Agreement is only between Customer and the OEM. Services providing OEM Product shall only be effective upon written acknowledgment and acceptance of such Services by FCCS.

(a) **NO WARRANTY, EXCEPT FOR WARRANTIES PROVIDED BY THE OEM IN THE OEM AGREEMENT, THE OEM PRODUCT IS PROVIDED "AS IS", WITH ALL FAULTS. FCCS SPECIFICALLY DISCLAIMS ALL WARRANTIES, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT AND QUIET ENJOYMENT.**

**6.4. Change Management.** The scope of the Services provided by FCCS is defined in the agreement for Services. Any change in the scope of the Services must be mutually agreed in writing by both parties. Any changes in the scope of work for the Services may be subject to a change in the associated price for the services.

## 7. INSURANCE AND RELATIONSHIP

**7.1. Insurance.** FCCS will provide and maintain during its rendition of the Services, but only for losses arising out of FCCS's work for Customer:

- (a) Worker's Compensation and related insurance as prescribed by the law of the state applicable to the employees performing such Services;
- (b) Employer's liability insurance;
- (c) Comprehensive/commercial general liability insurance;
- (d) Comprehensive motor vehicle liability insurance, including coverage for owned, hired, leased, and rented vehicles.

**7.2. Independent Contractor.** Nothing in this Agreement will be construed to make either party an employer, employee, agent or partner of the other, and this Agreement will not be construed to create rights, express or implied, on behalf of or for the use of any party other than FCCS and Customer. All of the Services performed by FCCS will be performed as an independent contractor. FCCS will perform such Services under the

general direction of Customer, but FCCS will have sole discretion to determine the manner, method and means of performing such Services subject to the provisions of this Agreement and applicable Statement of Work.

**7.3. Non-Solicitation or Hiring.** Customer understands that FCCS has gone through considerable time and expense in training, orienting, and equipping its employees with the knowledge and experience to perform their duties. To protect its relationships with its customers, FCCS has restricted its employees from soliciting FCCS customers after said employee is no longer employed by FCCS. Customer also agrees that it shall not retain any former employee of FCCS, without the prior written consent of Company, to perform any Services which are substantially similar to those provided by FCCS. Customer understands that a violation of this provision by Customer may also be deemed a tortious interference with FCCS' employment contract with its employee.

**7.4. Mutual Indemnity.** Each party will indemnify, defend and hold harmless the other party from all claims, liabilities or expenses for physical damage to real property or tangible personal property and bodily injury, including death, to the extent caused by the negligence or willful misconduct of the indemnifying party's employees or contractors arising out of this Agreement and while at the Customers premises. The foregoing indemnities are contingent upon the party seeking indemnity giving prompt written notice to the indemnifying party of any claim, demand or action, and cooperating with the indemnifying party in the defense or settlement of any such claim, demand or action.

## 8. MISCELLANEOUS/OTHER PROVISIONS.

**8.1. Severability.** Should any provision of this Agreement be invalid, or unenforceable, the remainder of the provisions will remain in effect. In the event of a dispute, the prevailing party in any litigation or arbitration will be entitled to recover its attorneys' fees and cost incurred from the other party.

**8.2. Notices.** Unless otherwise provided, notices to either party will be in writing to the address indicated above, or as later amended, and deemed effective when received.

**8.3. Pricing.** First Call is not liable for pricing errors. If an order is placed for a product that was incorrectly priced, we will cancel your order and credit you for any charges. In the event that we inadvertently ship an order based on a pricing error, we will issue a revised invoice to you for the correct price and contact you to obtain your authorization for the additional charge, or assist you with return of the product.

**8.4. Verification.** Upon FCCS's written request, Customer will provide FCCS with a certification signed by an officer of Customer verifying that Product is being used pursuant to the terms of this Agreement, including without limitation the licensed capacity of the Product. FCCS may, at its expense, audit Customer's use of Product to confirm Customer's compliance with this Agreement. Any such audit will be conducted during regular business hours at Customer's facilities and will not unreasonably interfere with Customer's business activities. If an audit reveals that Customer has underpaid Fees to FCCS, Customer will pay such underpaid Fees. If the underpaid Fees exceed five percent (5%) of the Fees paid, then Customer will also pay FCCS's reasonable costs of conducting the audit.

**8.5. Assignment.** Customer may not assign this Agreement or any rights granted in this Agreement to any third party, except with the prior written consent of FCCS.

**8.6. No Waivers.** Failure of a party to require performance by the other party under this Agreement will not affect the right of such party to require performance in the future. A waiver by a party of any breach of any term of this Agreement will not be construed as a waiver of any continuing or succeeding breach.

**8.7. Force Majeure.** Any delay or failure of any party to perform any obligation under this Agreement caused by governmental restrictions, labor disputes, storms or natural disasters, emergency, or other causes beyond the reasonable control of the party, will not be deemed a breach of this Agreement. This provision does not apply to the payment of monies or any breach of Section 4.

**8.8. Entire Agreement.** This Agreement, together with each Service, constitutes the entire agreement between Customer and FCCS, and supersedes any prior or contemporaneous negotiations or agreements, whether oral or written, concerning this subject matter. This Agreement, and each Service, may be modified only in a mutually signed writing between Customer and FCCS. In the event of a conflict between this Agreement, any Service, the terms of the Service will control, followed by the terms of the applicable Service and then this Agreement.

**8.9. Referencing.** Customer agrees that FCCS and its Affiliates may refer to Customer as a customer of FCCS, both internally and in externally published media.

**8.10. Governing Law. ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THE SERVICES, WORK PRODUCT AND/OR THIS AGREEMENT WILL BE VENUED IN THE STATE OF MONTANA FOURTH JUDICIAL DISTRICT,**



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MISSOULA COUNTY. THE PARTIES AGREE THAT SAID COURT SHALL HAVE JURIDICSION OVER ANY SUCH CLAIMS AND IS THE PROPER VENUE FOR ANY DISPUTES ARISING UNDER THIS AGREEMENT.

8.11. **Survival.** Sections 2, 4, 5, 6 and 7 will survive the termination or expiration of this Agreement. The prevailing party in any litigation proceeding is entitled to recover, from the other party, its reasonable attorneys' fees and necessary costs incurred in such proceeding.

This Agreement is effective only upon execution by FCCS and Customer. Each party hereto warrants and represents that this Agreement constitutes the legal, valid and binding obligation of such party as of the Effective Date.

First Call Computer Solutions		Customer	
Signature:		Signature:	
Printed Name:	Cassia Spurlock	Printed Name:	
Title:	Digital Marketing Director	Title:	
Date:	9/1/2022	Date:	