

Sherpa Budget Formulation and Management License And Service Agreement

This software license agreement ("Agreement") is made this 31st day of October, 2019 ("Effective Date"), by and between SHERPA GOVERNMENT SOLUTIONS, LLC., a Colorado corporation ("Sherpa") and CITY OF FRESNO, a California municipal corporation, including, without limitation, all its subdivisions, departments, and constituent entities within its legal scope and jurisdiction (collectively, the "Licensee").

1.0 Background

- 1.1. Sherpa has developed and owns all rights to the Budget Formulation and Management ("BFM") software product ("Software"), which includes the computer software and development of documentation related thereto.
- 1.2. Sherpa has the right to license the Software to third parties.
- 1.3. The Licensee wishes to use the Software, and Sherpa has agreed to license such use, pursuant to the terms of this Agreement.
- 1.4. Now therefore, in consideration of the premises and the mutual covenants contained herein and other good and valuable consideration (the receipt and adequacy of which are hereby acknowledged), Sherpa and Licensee (collectively, the "Parties" and individually, a "Party") agree as follows:
 - 1.4.1. Subject to the terms of this Agreement, Sherpa hereby grants to Licensee a perpetual, Personal, non-transferable and non-exclusive license to use the Software and the Documentation provided therewith, solely for Licensee's own internal business purposes exclusively within the facilities and sites within the jurisdiction of the Licensee.
 - 1.4.2. If Licensee wishes to use the Software at or from an additional site or sites outside of its jurisdiction, Licensee agrees to obtain a separate license for such site(s). Licensee's right to use the Software is limited to those rights expressly set out herein.
 - 1.4.3. Licensee shall not use the Software, in whole or in part, on behalf of or for the benefit of any other Person, including an affiliate of the Licensee, except as expressly provided herein.
 - 1.4.4. Staff of the Licensee may use the Software from their home as an extension of the license granted to the Licensee, for business related purposes.
 - 1.4.5. Sherpa grants the Licensee a non-exclusive, non-transferable right to create customizations for internal use and only for use as part of and in conjunction with the related Software. The Licensee may only create customizations that do not require access and changes to the compiled source code. Permitted customizations include reports, changes to stored procedures, or database changes. Sherpa is not responsible for customizations that cause the compiled source code to malfunction.
 - 1.4.6. Independently, Sherpa is continually innovating and improving the Software to meet the needs of its customers. The Licensee acknowledges that, while it has the ability to create its own Permitted Customizations, Sherpa must not be prevented from continuing to develop and enhance its software in any respect, even if such modifications may be similar to the Customizations in functionality, appearance or otherwise. Therefore, if Sherpa develops any modifications which may be similar to the Permitted Customizations, Licensee agrees to not make any claim against Sherpa for infringement of any of its (or its subcontractors) rights in or to the Permitted Customizations. Sherpa shall not directly incorporate into its modifications any original source code independently developed by the Licensee.

- 1.5. Except as set forth herein, Licensee shall not copy the Software except to copy it onto the site servers being used by Licensee and to make one copy of the Software solely for backup or testing purposes. The Licensee shall not copy or publish any of the Software documentation for any use outside the site.

2.0 Ownership and Copyright

- 2.1 Sherpa is the owner of all intellectual property rights in the Software, related written materials, logos, names and other support materials provided pursuant to the terms of this Agreement. No title to the intellectual property in the Software or in any media provided therewith is transferred to the Licensee by this Agreement.
- 2.2 Sherpa shall defend Licensee against any claim that the Software infringes a patent, copyright, trademark or other intellectual property right of any third party and Sherpa will pay resulting cost, damages and reasonable legal fees finally awarded, provided that the Licensee promptly notifies Sherpa in writing of the claim. Sherpa shall have no obligation to defend Licensee or to pay costs, damages or legal fees for any claim based upon use of other than a current unaltered release of the Software, if such infringement would have been avoided by the use of a current unaltered release thereof. The foregoing states the entire obligations of Sherpa with respect to infringement or proprietary or intellectual rights of third parties.

3.0 Limited Warranty

Sherpa warrants that so long as Product Maintenance and Support services are provided by Sherpa that the Software, when properly installed, will perform substantially in accordance with the accompanying written materials. If the Software does not so perform during such period, Sherpa will correct, at no cost to Licensee, programming errors in the Software to make the Software perform provided that i) the Software has been properly used by the Licensee in accordance with the documentation furnished by Sherpa to Licensee in connection therewith; ii) Licensee notifies Sherpa of the programming errors and describes the nature of the suspected errors and of the circumstances in which they occur; iii) Sherpa, using reasonable efforts, is able to confirm the existence of the programming errors; and iv) Licensee or any third party has not changed or modified the Software.

The Licensee hereby agrees that Sherpa's maximum liability for any claim arising in connection with the Software, the documentation or any related materials (whether in contract, tort, including negligence, product liability or otherwise) shall not exceed the total License Fee paid by the Licensee.

The above express warranty is in lieu of all other warranties and conditions (express and implied) and those arising by statute or otherwise in law or from a course of dealing or usage of trade, including but not limited to warranties or conditions of merchantable quality or fitness for a particular purpose. No other warranties or conditions express or implied are given.

4.0 Limitations of Remedies and Damages.

Sherpa's entire liability and the Licensee's exclusive remedy under this agreement shall be if Sherpa is in breach of the Limited Warranty, to require Sherpa to replace any defective Software or to correct any defects and make any modifications which are necessary to cause the Software to conform in all material respects to the Software documentation. If defects cannot be corrected the Licensee may terminate this agreement. In the event of any such termination, Sherpa shall not be liable in the aggregate for any damages which exceed the amount paid hereunder by the Licensee to Sherpa as Software license or maintenance fees. In no event shall Sherpa be liable for indirect, special, incidental, or consequential damages, even if advised of the possibility of such damages.

5.0 Dispute Resolution

In the event of any dispute arising out of or relating to and/ or in connection with this Agreement, the parties' shall use every reasonable effort to resolve such dispute in good faith within thirty business days. If the parties have failed to resolve the dispute within such time frame, then the dispute shall be escalated to arbitration. The matter in dispute shall be referred to arbitration by a single arbitrator, if such parties agree upon one arbitrator, or otherwise by three arbitrators, of whom one shall be appointed by Licensee and one shall be appointed by Sherpa and the third shall be chosen by the first two named before the arbitration. The award and determination of such arbitrator, arbitrators or any two of such three arbitrators shall be binding upon the parties and their respective successors and permitted assigns. Licensee and Sherpa shall cooperate in completing any arbitration as expeditiously as possible and the arbitrator or arbitrators may hear such experts as may appear to him or them appropriate. Any interested party shall bear its costs and expenses incurred in connection with the arbitration except for the cost of the arbitrator or arbitrators and experts engaged by him or them which shall be borne by Sherpa and Licensee equally. Notwithstanding the foregoing, arbitration shall not preclude the right of either party to seek injunctive relief.

6.0 Irreparable Harm

Licensee acknowledges and agrees with Sherpa that the breach by it of any of the provisions of this Agreement would cause serious harm to Sherpa which could not adequately be compensated for in damages and in the event of a breach by Licensee of any of such provisions, Licensee understands that an injunction may be issued against it restraining it from any further breach of such provisions, but such actions shall not be construed so as to be in derogation of any other remedy which Sherpa may have in the event of such breach.

7.0 Product Maintenance and Support

For the first year of this Agreement, upon paying the Licensee Fee and for each year thereafter, provided that Licensee continues to pay the annual Maintenance Fee in accordance with the attached quotation, Sherpa shall provide the Maintenance services for the software.

7.1 Maintenance and Technical Support Services

- 7.1.1 Sherpa will provide enhancements, modifications or upgrades to the Software that Sherpa may from time to time make available to its Licensees.
- 7.1.2 Sherpa will install all Software updates as part of our Maintenance offering.
- 7.1.3 Sherpa supports only Microsoft platforms and is not responsible for Licensee changes to other database or operating systems not supported by Sherpa.
- 7.1.4 Issue Severity Descriptions and Escalation Procedures
 - *Critical:* Critical issues prevent business processes from being completed and have no viable workaround.
 - *Serious:* Serious incidents have workarounds but are either too complex to be sustained or have a significant user impact.
 - *Low:* Low issues do not impact system usage or are cosmetic.
- 7.1.5 Technical Support
 - Hours are Monday through Friday, 6am – 5pm Pacific Time. Extended coverage is available upon Licensee request subject to Sherpa availability.
- 7.1.6 Technical support services are provided. Support incidents are processed as following:
 - If related to the design and intent of the Software, incidents will be logged.
 - Critical (no workaround) or Serious incidents (workaround exists but only viable for short-term) will receive a response within 24 hours.
 - Sherpa will make a commercially reasonable effort to restore operation to the original intent and design of the software for all Critical and Serious incidents.

- Low-level incidents will be prioritized and included in the standard release schedule when possible.
 - Incidents not related to the design and intent of the Software will be added as Enhancement Requests and will be included in the standard release schedule when possible, at the sole discretion of Sherpa.
 - Maintenance and Technical Support Services do not include Licensee-developed customizations or reports.
- 7.1.7 Licensee is responsible for all hardware, network setup, network maintenance and setup, backups, and disaster recovery.
- 7.1.8 Sherpa is not responsible for Licensee hardware issues or data loss due to hardware or backup failure.
- 7.1.9 Sherpa may at its sole discretion, periodically make reasonable modifications or changes to the Maintenance and Technical Support Services provided.

7.2 Consideration

Business Objects (BOBJ): Due annually in October in the amount of \$10,632.00

BFM Maintenance: Due annually in December in the amount of \$23,100.00

7.3 Support Hours

Standard Support Hours:	6am – 6pm Pacific Time, Monday – Friday
After Hours Support:	After hours support is provided. A 24 hour notice is requested but not required
Support Email:	support@sherpagov.com
Support Phone Number:	(720) 644-9244

7.3.1. Issue Reporting and Tracking

The City will speak directly to its project team. If the project team cannot resolve the issue immediately, they reach out directly to the appropriate Sherpa team members to resolve the issue. Critical and Serious issues are immediately assigned to Sherpa's Technical Manager. Alternatively, issues can be entered directly into the BFM Request system or email/call Sherpa Support. Issues are tracked in the BFM Request system, entered either by your consultant team or by the client.

7.3.2. Release Cycle and Enhancements

BFM release schedule is as follows:

July – major release

September – minor release

March – minor release

Software updates are applied based on the client-defined schedule, regardless of hosted or on-premise. Clients can choose to take the software updates at its discretion. Most clients upgrade their systems a month prior to starting their budget preparation cycle. Clients that are not on current software may have to upgrade to a current version in event of software updates applied to resolve incidents.

7.3.3. Change Requests

Small Change: For small changes, contact your implementation team. If the change request is low-impact, then the change it will be made within a week. If the change is high-impact, then Sherpa will schedule it at the appropriate time.

Medium Change: Same procedure as Small Change, but the change may take 1-3 weeks to implement.

Large Change: There are two categories of large changes:

1. If the change is applicable to both the requesting client and other clients or is considered a change to add functionality absent in BFM, then this change request will be added to Sherpa's current development schedule.
2. If the change is client-specific, then Sherpa will estimate the cost (if any) for the system change and discuss implementation options with the client.

The Sherpa product manager and technical manager approve all new functionality. In some cases, change requests may be modified to make the request configurable and usable by multiple clients. Requesting clients can review these changes. Prioritization is done based on the critical nature of a change request to the requesting client as well as its applicability across clients.

8.0 Confidential Information

Each of the Parties shall use reasonable efforts (and, in any event, efforts that are no less than those used to protect its own confidential information) to protect from disclosure the confidential information only to its employees or agents who require access to it for the purpose of this Agreement or as otherwise provided in this Agreement. This Section shall survive the termination of the Agreement. For the purposes of this Section, "confidential information" means all data information which when it is disclosed by a Party is designated as confidential and shall include the Work and any other proprietary and trade secrets of Sherpa to which access is obtained or granted hereunder to Licensee; provided, however that confidential information shall not include any data or information which (a) is or becomes publicly available through no fault of the other Party, (b) is already in the possession of the Party prior to its receipt from the other Party, (c) is independently developed by the other Party, (d) is rightfully obtained by the other Party from a third party, (e) is disclosed with the written consent of the Party whose information it is, or (f) is disclosed pursuant to court order, or other legal compulsion.

9.0 Nondisclosure Agreement

Neither Party shall disclose the terms of this Agreement except as required by law or governmental regulation, without the other party's prior written consent, except that either Party may disclose the terms of this Agreement on a confidential basis to accountants, attorneys, and lenders.

10.0 Termination

This Agreement is effective as of the Effective Date and shall continue unless and until this Agreement is terminated. Licensee may terminate this Agreement if Sherpa is declared insolvent, has assigned this Agreement in violation of the terms and conditions herein, or has made an assignment for the benefit of creditors.

- 10.1 The Licensee may terminate this Agreement at any time for any reason, or no reason, provided their financial obligations to Sherpa have been satisfied and paid in full. This includes both software and reasonable professional services costs incurred as of the date of termination. If the Agreement is terminated in this manner, no refund will be provided for any maintenance or support services paid in advance.
- 10.2 In the event that Licensee shall be in breach of any provisions of the Dispute Resolution section outlined in this Agreement, Sherpa may provide notice of such breach to Licensee, who shall have thirty (30) days from the date of such notice to cure or rectify the said breach. Should Licensee fail to cure or rectify the said breach in the said thirty (30) days, Sherpa may terminate this Agreement. Such termination by Sherpa shall be in addition to and without prejudice to such rights and remedies as may be available to Sherpa including injunction and other equitable remedies.
- 10.3 The provisions of Sections 2, 4, 5, 6, 8, 9, 11, 12, and 15 herein shall survive the termination of this Agreement.

11.0 Notice

Any notice or other communication required or permitted to be given hereunder or for the purposes hereof to any party shall be in writing and shall be sufficiently given if delivered personally to such party, or if sent by prepaid registered mail to such Parties as detailed in the attached Quotation or at such other address or as the Party to whom such notice is to be given shall have last notified the Party giving such notice. Any notice delivered to the Party to whom it is addressed shall be deemed to have been given and received on the day it is delivered at such address, provided that if such day is not a business day, then the notice shall be deemed to have been given and received on the next following business day. Any notice mailed to a Party shall be deemed to have been given and received on the fifth business day following the date of its mailing.

12.0 Force Majeure

Except as expressly provided otherwise in this agreement, dates and times by which any Party is required to render performance under this agreement or any schedule hereto shall be postponed automatically to the extent and for the period that such Party is prevented from meeting them by reason of any cause beyond its reasonable control, provided that the Party prevented from rendering performance notifies the other Party immediately and in detail of the commencement and nature of such cause and the probable consequences thereof, and provided further that such Party uses its reasonable efforts to render performance in a timely manner utilizing to such end all resources reasonably required in the circumstances.

13.0 Source Code

In event of Sherpa's dissolution or insolvency, and only if Sherpa's BFM Software is not maintained by a Trustee or Assignee, Sherpa will provide the Source Code to the Licensee solely for Licensee's own internal business purposes exclusively within the facilities and sites within the jurisdiction of the Licensee.

14.0 Miscellaneous

This Agreement is the entire agreement between Licensee and Sherpa pertaining to Licensee's right to use the Software and supersedes all prior or collateral oral or written representations or agreement related thereto. This Agreement shall be governed by the law of the state of Colorado. Except as otherwise provided herein, no term or provisions hereof shall be deemed waived and no breach excused unless such waiver or consent shall be in writing and signed by the Party to, or waiver of, a breach by the other, whether expressed or implied, shall not constitute a consent to, waiver of, or excuse for any other different or subsequent breach.

15.0 Severability

In the event that any provision hereof is found invalid or enforceable pursuant to judicial decree or decision, any such provision shall be deemed to apply only to the maximum extent permitted by law, and the remainder of this Agreement shall remain valid and enforceable according to its terms.

16.0 Hosting

16.1 Regions

Sherpa offers hosting through AWS in two regions, US East (N. Virginia) and US West (Oregon). We locate each client closest geographically.

16.2 Backups and Retention

The servers are backed up nightly and kept for two weeks in the form of instance snapshots. We take special snapshots, like final budget, and store those indefinitely. Snapshots will be stored in the region they are created with high redundancy. For the non-database servers, if an instance goes down we recreate the instance from the most appropriate snapshot.

In the event of corrupted data on the database server, the most recent uncorrupted snapshot will be restored to a new server. In most cases, data can be recovered to as little as five minutes prior to the corruption. We can then create a backup of the restored database and refresh the corrupted database on the primary database server. In most cases the process takes a few hours, larger databases will take longer to be restored than smaller databases. In the absolute worst case scenario where the data center is no longer allowing RDS service, we can switch to a region has the RDS service running and bring a database online there.

16.3 Updates / Maintenance

Maintenance on the database server is managed by Amazon and will often happen once every few months. Amazon will schedule a maintenance window to apply the updates, but we can choose to apply them earlier by restarting the server. This will require some downtime. Usually the window is 30 minutes but typically would result in an outage of less than three minutes.

Maintenance on the non-database servers will occur on the first Sunday of every month; the system will search for updates and apply security and other crucial updates. It is possible to delay this if necessary. In the case of Windows based servers, typically windows updates require a reboot and this will make the system unavailable during the reboot timeframe. All services will restart automatically.

16.4 Security

Access to the servers are restricted to certain IPs via both the operating system firewall and Amazon's external firewall. No one from outside these specific IP addresses will be able to access the server. If an IP address changes, once notified we can block the old address and add the new one. In cases where there are additional needs a site-2-site VPN can be established to limit access.

Access to the cloud monitor is restricted to a few accounts. The AWS account is identified by ID numbers, so it harder for hackers to target a group by name. Furthermore, monitoring is run in the background to identify if any accounts are behaving suspiciously.

16.5 Configuration

16.5.1 Option 1 - Dedicated

Dedicated servers consist of:

- Server 1: Database / RDS xlarge, 32gb memory (2 databases)
- Server 2: Application xlarge, 32gb memory (2 environments)
- Server 3: Reporting xlarge, 32gb memory

16.5.2 Option 2 - Partly Shared

Shared servers consist of:

- Server 1: Database / RDS xlarge, 32gb memory – Shared (2 databases)
- Server 2: Application xlarge, 32gb memory – Shared (2 environments)
- Server 3: Reporting xlarge, 32gb memory – Dedicated

Shared servers are only offered where clients sharing these servers do not have peak times that coincide and it sufficient usage analysis has been performed to ensure that there will be no conflicts.

16.5.3. Additional

Additional configurations may be provided. Costs may be incurred for excessive throughput, VPN usage, Direct Connect, and additional environments.

IN WITNESS WHEREOF, the parties have executed this Agreement at Fresno, California, the day and year first above written.

CITY OF FRESNO,
a California municipal corporation

SHERPA GOVERNMENT SOLUTIONS LLC.,
a Colorado corporation

By: 
BRYON HORN, CIO
Information Services Department

By: 
Name: DAVID FARRELL

Title: CEO
(If corporation or LLC., Board
Chair, Pres. or Vice Pres.)


APPROVED AS TO FORM:
DOUGLAS T. SLOAN
City Attorney

By:  10-16-19
Date
Deputy City Attorney

By: 
Name: Dawn Rippentrop

Title: CFO, Director of operations
(If corporation or LLC., CFO,
Treasurer, Secretary or Assistant
Secretary)

ATTEST:
YVONNE SPENCE, CRM MMC
City Clerk

By: 
Deputy Marco Martinez 10/31/19

Addresses:

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Fresno, CA 93721
Phone: (559) 621-7101
FAX: (559) 457-1002

SHERPA GOVERNMENT SOLUTIONS LLC.
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