



**CONTRACT AGREEMENT NUMBER MA-012-15010841
FOR
E-BOOK/E-AUDIO PURCHASES WITH DATABASE MAINTENANCE
BETWEEN
OC COMMUNITY RESOURCES/OC PUBLIC LIBRARIES
AND
OVERDRIVE INC.**

This Contract Agreement Number MA-012-15010841 is made and entered into upon execution of all necessary signatures between the County of Orange, OC Community Resources/OC Public Libraries, a political subdivision of the State of California, with a place of business at 1501 E. St. Andrew Place, Santa Ana, CA 92705-4930, hereinafter referred to as (“County”) and OverDrive Inc. with a place of business at One OverDrive Way, Cleveland, OH 44125-4210, hereinafter referred to as (“Contractor”), which are sometimes individually referred to as (“Party”) or collectively referred to as (“Parties”).

ATTACHMENTS

This Contract is comprised of this document and the following Attachments, which are incorporated by reference into this Contract:

Attachment A-Scope of Services/Specifications
Attachment B- Compensation and Payment Terms
Exhibit 1-EFT Authorization Form

RECITALS

WHEREAS, County and Contractor are entering into a Contract Agreement Number MA-012-15010841 for the e-Book/e-Audio Purchases and Database Maintenance; and

WHEREAS, Contractor is familiar with the County, including the OCPL, and the County has reviewed and evaluated other sources, and Contractor’s proprietary collection and databases provide a range of titles in the same format and with the same access that is unique and not available elsewhere; and

NOW, THEREFORE, the Parties mutually agree as follows:

ARTICLES

I. TERMS AND CONDITIONS

- 1. Scope of Contract:** This Contract specifies the contractual terms and conditions by which the County shall procure and receive goods and services from the Contractor as set forth in Attachment A, Scope of Work/Specifications and Attachment B, Compensation and Payment Terms.

- 2. Term of Contract:** ~~This initial Contract will be issued for a period of one year effective tentatively December 9, 2014 through December 8, 2015. This Contract may be renewed as set forth in paragraph 3 below. Initial term of the Contract was effective December 9, 2014 through December 8, 2016. This Contract is renewed for the 3rd year period effective December 9, 2016 through December 8, 2017.~~
- 3. Renewals:** ~~This Contract may be renewed for four (4) additional 1 year periods. The County does not have to give reason if it elects not to renew. Renewal periods may be subject to approval by the County of Orange Board of Supervisors. This Contract may be renewed for two (2) additional 1 year periods. The County does not have to give reason if it elects not to renew. Renewal periods may be subject to approval by the Orange Board of Supervisors.~~
- 3.4. Compensation and Payment:** The Contractor agrees to accept the specified compensation, as set forth in Attachment B, Compensation and Payment, as full remuneration for performing all services and materials called for. The Contractor assumes responsibility for performance of all its duties and obligations hereunder.
- 4.5. Fiscal Appropriations:** This Contract is subject to and contingent upon applicable budgetary appropriations being approved by the County of Orange Board of Supervisors for each fiscal year during the term of this Contract. If such appropriations are not approved, the Contract will be terminated without penalty to the County.
- 5.6. Contingency of Funds:** Contractor acknowledges that funding or portions of funding for this Contract may be contingent upon state budget approval; receipt of funds from, and/or obligation of funds by, the state of California to County; and inclusion of sufficient funding for the services hereunder in the budget approved by County's Board of Supervisors for each fiscal year covered by this Contract. If such approval, funding or appropriations are not forthcoming, or are otherwise limited, County may immediately terminate or modify this Contract without penalty.
- 6.7. Termination-Default:** If Contractor is in default of any of its obligations under this Contract and has not commenced cure within ten days after receipt of a written notice of default from County and cured such default within the time specified in the notice, such period not to be less than thirty (30) days, the County shall immediately be entitled to either commence resolution in accordance with this paragraph or to terminate this Contract by giving written notice to take effect immediately. Default shall include failure to carry out any of the requirements of this Contract, including, but not limited to not providing enough properly skilled workers or proper materials, persistently disregarding laws and or ordinances, not proceeding with the work as agreed to herein, or otherwise substantially violating any provision of this Contract. Upon termination of the Contract with Contractor, the County may begin negotiations with a third-party Contractor to provide goods and/or services as specified in this Contract.
- The right of either party to terminate this Contract hereunder shall not be affected in any way by its waiver of or failure to take action with respect to any previous default.
- 7.8. Termination – Orderly:** After receipt of a termination notice from the County of Orange, the Contractor shall submit to the County a termination claim, if applicable. Such claim shall be submitted promptly, but in no event later than 60 days from the effective date of the termination, unless one or more extensions in writing are granted by the County upon written requests of the Contractor. Upon termination, County agrees to pay the Contractor for all services performed prior to termination which meet the requirements of the Contract, provided, however, that such compensation plus previously paid compensation shall not

exceed the total compensation set forth in the Contract. Upon termination or other expiration of this Contract, each Party shall promptly return to the other Party all papers, materials, and other properties of the other held by each for purposes of execution of the Contract.

8.9. Termination – Convenience of the County: The County may terminate performance of work under this contract for its convenience in whole, or, from time to time, in part if the user agency/department determines that a termination is in the County's interest. The agency/department assigned buyer shall terminate the contract by delivering to the contractor a written notice of termination specifying the extent of the termination and the effective date thereof. The parties agree that, as to the terminated portion of the contract, the contract shall be deemed to remain in effect until such time as the termination settlement, if any, is concluded and the contract shall not be void.

After receipt of a notice of termination and, except as directed by the assigned buyer, the contractor shall immediately proceed with the following obligations, as applicable, regardless of any delay in determining or adjusting any amounts due under this clause. The contractor shall:

1. Stop work as specified in the notice of termination;
2. Place no further subcontracts or orders for materials, services, or facilities, except as necessary to complete the continued portion of the contract;
3. Terminate all orders and subcontracts to the extent they relate to the work terminated;
4. Settle all outstanding liabilities and termination settlement proposals arising from the termination of any subcontracts, the approval or ratification of which will be final for purposes of this clause;
5. Complete performance of the work not terminated; and
6. Take any action that may be necessary or as the County may direct for the protection and preservation of the property related to this contract that is in the possession of the contractor and in which the County has or may acquire an interest and to mitigate any potential damages or requests for contract adjustment or termination settlement to the maximum practical extent.

At the completion of the contractor's termination efforts, the contractor may submit to the assigned buyer a list indicating quantity and quality of termination inventory not previously disposed of and request instructions for disposition of the residual termination inventory.

After termination the contractor shall submit a final termination settlement proposal to the user agency/department in a format acceptable to the County. The contractor shall submit the proposal promptly, but no later than 60 days from the effective date of the termination, unless extended in writing by the County upon written request of the contractor within the 90-day period. However, if the agency/department determines that the facts justify it, a termination settlement proposal may be received and acted on after the expiration of the filing period or any extension.

The contractor and the County may agree upon the whole or any part of the amount to be paid because of the termination. The amount may include a reasonable allowance for profit on work done, including a reasonable amount for accounting, legal, clerical and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data, and storage, transportation and other costs incurred,

reasonably necessary for the preservation, protection, or disposition of the termination inventory. However, the agreed amount may not exceed the total contract price as reduced by (a) the amount of payment previously made and (b) the contract price of work not terminated. The contract shall be amended and the contractor paid the agreed amount.

If the contractor and the County fail to agree on the whole amount to be paid because of the termination of work, the County shall pay the contractor the amounts determined by the County as follows, but without duplication of any amounts agreed on as set forth above:

1. The contract price for completed supplies or services accepted by the County (or sold or acquired) not previously paid for, adjusted for any savings of freight and other charges; and
2. Except for normal spoiling and except to the extent that the County expressly assumes the risk of loss, the County shall exclude from the amounts payable to the contractor the fair value, as determined by the agency/department, of property that is destroyed, lost, stolen, or damaged so as to become undeliverable to the County.

The contractor shall use generally accepted accounting principles and sound business practices in determining all costs claimed, agreed to, or determined under this clause. Such costs shall be allocable to the terminated contract or portion thereof, allowable under applicable laws, regulations, generally accepted accounting principles and good business judgment and objectively reasonable.

The contractor shall have the right to appeal, under the County's protest procedure, any determination made by the County, except that if the contractor failed to submit the termination settlement proposal within the time provided and failed to request a time extension, there is no right of appeal.

In arriving at the amount due the contractor under this clause, there shall be deducted:

1. All payment to the contractor under the terminated portion of this contract;
2. Any claim which the County has against the contractor under this or any other contract; and
3. The agreed price for or proceeds of sale of materials, supplies, or other things acquired by the contractor or sold under the provisions of this clause and not recovered by or credited to the County.

If the termination is partial, the contractor may file a proposal with the agency/department for an equitable adjustment of the price(s) of the continued portion of the contract. The agency/department shall make any equitable adjustment agreed upon. Any proposal by the contractor for an equitable adjustment under this clause shall be requested within 30 days from the effective date of termination unless extended in writing by the agency/department.

The County may:

1. Under the terms and conditions it prescribes, make partial payment and payments against costs incurred by the contractor for their terminated portion of the contract, if the County believes that the total of these payments will not exceed the amount to which the contractor will be entitled; and

2. If the total payments exceed the amount finally determined to be due, the contractor shall repay the excess to the County upon demand.

In determining the amount payable to the contractor and notwithstanding any other provision, if it appears that the contractor would have sustained a loss on the entire contract had it been completed, the County shall allow no profit and shall reduce the settlement to reflect the indicated rate of loss.

Unless otherwise provided in this contract or by statute, the contractor shall maintain all records and documents relating to the terminated portion of this contract for three years after final settlement. This includes all books and other evidence bearing on the contractor's costs and expenses under this contract. The contractor shall make these records and documents available to the County, at the contractor's office, at all reasonable times, without any direct charge, with thirty (30) days prior written notice by County. If approved by the County, photographs, microphotographs, electronic storage, or other authentic reproductions may be maintained instead of original records and documents.

9-10. Waivers: The failure of the County in any one or more instances to insist upon strict performance of any of the terms of this Contract or to exercise any option contained herein shall not be construed as a waiver or relinquishment to any extent of the right to assert or rely upon any such terms or option on any future occasion.

10-11. Disputes-Contract: The Parties shall deal in good faith and attempt to resolve potential disputes informally. If the dispute concerning a question of fact arising under the terms of this contract is not disposed of in a reasonable period of time by the contractor's project manager and the County's project manager, such matter shall be brought to the attention of the County Purchasing Agent by way of the following process:

1. The contractor shall submit to the agency/department assigned buyer a written demand for a final decision regarding the disposition of any dispute between the parties arising under, related to, or involving this contract, unless the County, on its own initiative, has already rendered such a final decision.
2. The contractor's written demand shall be fully supported by factual information, and, if such demand involves a cost adjustment to the contract, the contractor shall include with the demand a written statement signed by a senior official indicating that the demand is made in good faith, that the supporting data are accurate and complete, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the County is liable.

Pending the final resolution of any dispute arising under, related to, or involving this contract, the contractor agrees to diligently proceed with the performance of this contract, including the delivery of goods and/or provision of services. The contractor's failure to diligently proceed shall be considered a material breach of this contract.

Any final decision of the County shall be expressly identified as such, shall be in writing, and shall be signed by the County Purchasing Agent or his designee. If the County fails to render a decision within 90 days after receipt of the contractor's demand, it shall be deemed a final decision adverse to the contractor's contentions. The County's final decision shall be conclusive and binding regarding the dispute unless the contractor

commences action in a court of competent jurisdiction to contest such decision within 90 days following the date of the County's final decision or one year following the accrual of the cause of action, whichever is later.

11.12. Orders/Usage: Orders may be placed against this Contract at the convenience of the using department. No guarantee is given to the Contractor regarding usage of this Contract. Usage figures, if provided, are approximate based upon last usage. The Contractor agrees to supply commodities and/or services requested, as needed by the County, at prices listed in the Contract, regardless of quantity requested.

12.13. Notices: Any and all notices, requests demands and other communications contemplated, called for, permitted, or required to be given hereunder shall be in writing, except through the course of the parties' project managers' routine exchange of information and cooperation during the terms of the work and services. Any written communications shall be deemed to have been duly given upon actual in-person delivery, if delivery is by direct hand, or upon delivery on the actual day of receipt or no greater than four calendar days after being mailed by US certified or registered mail, return receipt requested, postage prepaid, whichever occurs first. The date of mailing shall count as the first day. All communications shall be addressed to the appropriate party at the address stated herein or such other address as the parties hereto may designate by written notice from time to time in the manner aforesaid.

For Contractor: OverDrive Inc.
 One OverDrive Way
 Cleveland, OH 44125-4210
 Tel: 216-573-6886
 Fax: 216-573-6889
 Email: mkertesz@overdrive.com

For County: OC Community Resources/OC Public Libraries/
 Administration
 Attn: Shirley Quan, Bibliographic Services Manager/DSR
 1501 E. St. Andrew Place
 Santa Ana, CA 92705-4930
 Phone: 714-566-3012
 Email: shirley.quan@occr.ocgov.com

OC Community Resources
 Purchasing & Contract Services
 Attn: Marijo Sio, Deputy Purchasing Agent
 1770 N. Broadway
 Santa Ana, CA 92706-2642
 Phone: 714-480-2939
 Fax: 714-480-2819
 Email: marijo.sio@occr.ocgov.com

13.14. Breach of Contract: The failure of the contractor to comply with any of the material provisions, covenants or conditions of this contract shall be a material breach of this contract. In such event the County may, and in addition to any other remedies available at law, in equity, or otherwise specified in this contract:

1. Afford the contractor written notice of the breach and thirty (30) calendar days or such shorter time that may be specified in this contract within which to cure the breach;
2. Discontinue payment to the contractor for and during the period in which the contractor is in breach; and
3. Offset against any monies billed by the contractor but yet unpaid by the County those monies disallowed pursuant to the above.

14.15. Binding: This Contract shall be binding and inure to the benefit of the parties hereto and their respective successors. In the event Contractor enter into an agreement to sell substantially all the assets of Contractor, this Contract shall be binding upon the purchaser.

15.16. Interpretation of Contract: In the event of a conflict or question involving the provisions of any part of this contract, interpretation and clarification as necessary shall be determined by the County's assigned buyer. If disagreement exists between the contractor and the County's assigned buyer in interpreting the provision(s), final interpretation and clarification shall be determined by the County's Purchasing Agent or his designee.

16.17. Precedence: The Contract documents consist of this Contract and its attachments. In the event of a conflict between the Contract documents, the order of precedence shall be the provisions of the main body of this Contract (such as those provisions set forth in the recitals and articles of this Contract), then the attachments.

II. GENERAL TERMS AND CONDITIONS

- A. **Governing Law and Venue:** This Contract has been negotiated and executed in the State of California and shall be governed by and construed under the laws of the State of California. In the event of any legal action to enforce or interpret this Contract, the sole and exclusive venue shall be a court of competent jurisdiction located in Orange County, California, and the Parties hereto agree to and do hereby submit to the jurisdiction of such court, notwithstanding Code of Civil Procedure section 394. Furthermore, the Parties specifically agree to waive any and all rights to request that an action be transferred for trial to another county.
- B. **Entire Contract:** This Contract, including its Attachments, when accepted by the Contractor either in writing or by the shipment of any article or other commencement of performance hereunder, contains the entire Contract between the Parties with respect to the matters herein and there are no restrictions, promises, warranties or undertakings other than those set forth herein or referred to herein. No exceptions, alternatives, substitutes or revisions are valid or binding on County unless authorized by County in writing.
- C. **Amendments:** No alteration or variation of the terms of this Contract shall be valid unless made in writing and signed by the Parties; no oral understanding or agreement not incorporated herein shall be binding on either of the Parties; and no exceptions, alternatives, substitutes or revisions are valid or binding on County unless authorized by County in writing.
- D. **Taxes:** Unless otherwise provided herein or by law, price quoted does not include California state sales or use tax.
- E. **Delivery:** Time of delivery of services is of the essence in this Contract. County reserves the right to refuse any services and to cancel all or any part of the services that do not conform to the prescribed Scope of Work. Delivery shall not be deemed to be complete until all services have actually been received and accepted in writing by County.

- F. **Acceptance/Payment:** Unless otherwise agreed to in writing by County, 1) acceptance shall not be deemed complete unless in writing and until all the services have actually been received, and 2) payment shall be made in arrears after satisfactory acceptance and within 30 calendar days upon the Auditor-Controller's receipt of an approved invoice submitted in accordance with the terms set forth herein, unless otherwise stated. The invoice must be verified and approved by the County's Project Manager and is subject to routine processing requirements of the County. Payments made by the County shall not preclude the right of the County from thereafter disputing any services involved or billed under this Contract and shall not be construed as acceptance of any part of the services.
- G. **Warranty:** Although Contractor believes the Licensed Content to be reliable, Contractor does not guarantee or warrant any information or materials contained in or produced by the Licensed Content or the accuracy, completeness or reliability of the Licensed Content Any data or information contained in or provided in connection with the Licensed Content may be incomplete or condensed. All content is provided in this contract is on an "as is" basis without warranty of any kind and Contractor further disclaim any and all warranties, expressed or implied, including, without limitation, warranties of merchantability or fitness for a particular purpose. Acceptance of this order shall constitute an agreement upon Contractor's part to indemnify, defend and hold County and its indemnities as identified in paragraph "HH" below, and as more fully described in paragraph "HH", harmless from liability, loss, damage and expense, including reasonable counsel fees, incurred or sustained by County by reason of the failure of the services due to faulty work performance, grossly negligent or intentionally unlawful acts, and non-compliance with any applicable state or federal codes, ordinances, orders, or statutes, including the Occupational Safety and Health Act (OSHA). Such remedies shall be in addition to any other remedies provided by law.
- H. **Patent/Copyright Materials/Proprietary Infringement:** Unless otherwise expressly provided in this Contract, Contractor shall be solely responsible for clearing the right to use any patented or copyrighted materials in the performance of this Contract. Contractor warrants that any software as modified through services provided hereunder will not infringe upon or violate any patent, proprietary right, or trade secret right of any third party. Contractor agrees that, in accordance with the more specific requirement contained in paragraph "HH" below, it shall indemnify, defend and hold County and County INDEMNITEES harmless from any and all such claims and be responsible for payment of all costs, damages, penalties and expenses related to or arising from such claim(s), including, but not limited to, attorney's fees, costs and expenses.
- I. **Assignment or Sub-contracting:** The terms, covenants, and conditions contained herein shall apply to and bind the heirs, successors, executors, administrators and assigns of the Parties. Furthermore, neither the performance of this Contract nor any portion thereof may be assigned or sub-contracted by the Contractor without the express written consent of County. Any attempt by Contractor to assign or sub-contract the performance or any portion thereof of this Contract without the express written consent of County shall be invalid and shall constitute a breach of this Contract.
- J. **Non-Discrimination:** In the performance of this Contract, Contractor agrees that it will comply with the requirements of Section 1735 of the California Labor Code and not engage nor permit any subcontractors to engage in discrimination in employment of persons because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of such persons. Contractor acknowledges that a violation of this provision shall subject Contractor to all the penalties imposed for a violation of Anti-Discrimination Law or regulation, including but not limited to, Section 1720 et seq. of the California Labor Code.

- K. **Termination:** In addition to any other remedies or rights it may have by law and those set forth in this Contract, County has the right to terminate this Contract without penalty immediately with cause or after 30 days' written notice without cause, unless otherwise specified. Cause shall be defined as any breach of contract, any material misrepresentation or fraud on the part of the Contractor. Exercise by County of its right to terminate the Contract shall relieve County of all further obligations.
- L. **Consent to Breach Not Waiver:** No term or provision of this Contract shall be deemed waived and no breach excused, unless such waiver or consent shall be in writing and signed by the Party claimed to have waived or consented. Any consent by any Party to, or waiver of, a breach by the other, whether express or implied, shall not constitute consent to, waiver of, or excuse for any other different or subsequent breach.
- M. **Remedies Not Exclusive:** The remedies for breach set forth in this Contract are cumulative as to one another and as to any other provided by law, rather than exclusive; and the expression of certain remedies in this Contract does not preclude resort by either Party to any other remedies provided by law.
- N. **Independent Contractor:** Contractor shall be considered an independent contractor and neither the Contractor, employees nor anyone working for Contractor under this Contract shall be considered an agent or an employee of County. Neither the Contractor, employees nor anyone working for the Contractor under this Contract shall qualify for workers' compensation or other fringe benefits of any kind through County.
- O. **Performance:** Contractor shall perform all work under this Contract, taking necessary steps and precautions to perform the work to County's satisfaction. Contractor shall be responsible for the professional quality, technical assurance, timely completion and coordination of all documentation and other services furnished by the Contractor under this Contract. Contractor shall perform all work diligently, carefully, and in a good and workman-like manner; shall at its sole expense obtain and maintain all permits and licenses required by public authorities, including those of County required in its governmental capacity, in connection with performance of the work; and, if permitted to subcontract, shall be fully responsible for all work performed by subcontractors.
- P. **Insurance Provisions:**

Prior to the provision of services under this Contract, the Contractor agrees to purchase all required insurance at Contractor's expense and to deposit with the County Certificates of Insurance, including all endorsements required herein, necessary to satisfy the County that the insurance provisions of this Contract have been complied with and to keep such insurance coverage and the certificates therefore on deposit with the County during the entire term of this contract. In addition, all subcontractors performing work on behalf of Contractor pursuant to this Contract shall obtain insurance subject to the same terms and conditions as set forth herein for contractor.

All self-insured retentions (SIRs) and deductibles shall be clearly stated on the Certificate of Insurance. If no SIRs or deductibles apply, indicate this on the Certificate of Insurance with a 0 by the appropriate line of coverage. Any self-insured retention (SIR) or deductible in excess of \$25,000 (\$5,000 for automobile liability), shall specifically be approved by the County Executive Office (CEO)/Office of Risk Management.

If the contractor fails to maintain insurance acceptable to the County for the full term of this contract, the County may terminate this contract.

Qualified Insurer

Minimum insurance company ratings as determined by the most current edition of the **Best's Key Rating Guide/Property-Casualty/United States or ambest.com** shall be A- (Secure A.M. Best's Rating) and VIII (Financial Size Category).

The policy or policies of insurance must be issued by an insurer licensed to do business in the state of California (California Admitted Carrier). If the carrier is a non-admitted carrier in the state of California, CEO/Office of Risk Management retains the right to approve or reject carrier after a review of the company's performance and financial ratings. If the non-admitted carrier meets or exceeds the minimum A.M. Best rating of A-/VIII, the agency can accept the insurance.

The policy or policies of insurance maintained by the Contractor shall provide the minimum limits and coverage as set forth below:

Coverage	Minimum Limits
Commercial General Liability	\$1,000,000 per occurrence \$2,000,000 aggregate
Automobile Liability including coverage for owned, non-owned and hired vehicles	\$1,000,000 limit per occurrence
Workers' Compensation	Statutory
Employers' Liability Insurance	\$1,000,000 per occurrence

Required Coverage Forms

The Commercial General Liability coverage shall be written on Insurance Services Office (ISO) form CG 00 01, or a substitute form providing liability coverage at least as broad.

The Business Auto Liability coverage shall be written on ISO form CA 00 01, CA 00 05, CA 00 12, CA 00 20, or a substitute form providing liability coverage as broad.

Required Endorsements

The Commercial General Liability policy shall contain the following endorsements, which shall accompany the Certificate of insurance:

- 1) An Additional Insured endorsement using ISO form CG 2010 or CG 2033 or a form at least as broad naming the County of Orange, its elected and appointed officials, officers, employees, agents as Additional Insureds.
- 2) A primary non-contributing endorsement evidencing that the contractor's insurance is primary and any insurance or self-insurance maintained by the County of Orange shall be excess and non-contributing.

All insurance policies required by this contract shall waive all rights of subrogation against the County of Orange and members of the Board of Supervisors, its elected and appointed officials, officers, agents and employees when acting within the scope of their appointment or employment.

All insurance policies required by this contract shall give the County of Orange 30- day notice in the event of cancellation and 10 days for non-payment of premium. This shall be evidenced by policy provisions or an endorsement separate from the Certificate of Insurance.

The Commercial General Liability policy shall contain a severability of interest's clause, also known as a "separation of insureds" clause (standard in the ISO CG 001 policy).

Insurance certificates should be forwarded to the agency/department address listed on the solicitation.

If the contractor fails to provide the insurance certificates and endorsements within seven days of notification by CEO/Purchasing or the agency/department purchasing division, award may be made to the next qualified vendor.

County expressly retains the right to require Contractor to increase or decrease insurance of any of the above insurance types throughout the term of this Contract. Any increase or decrease in insurance will be as deemed by County of Orange Risk Manager as appropriate to adequately protect County.

County shall notify Contractor in writing of changes in the insurance requirements. If Contractor does not deposit copies of acceptable certificates of insurance and endorsements with County incorporating such changes within thirty days of receipt of such notice, this Contract may be in breach without further notice to Contractor, and County shall be entitled to all legal remedies.

The procuring of such required policy or policies of insurance shall not be construed to limit Contractor's liability hereunder nor to fulfill the indemnification provisions and requirements of this Contract, nor act in any way to reduce the policy coverage and limits available from the insurer.

- Q. **Bills and Liens:** Contractor shall pay promptly all indebtedness for labor, materials and equipment used in performance of the work. Contractor shall not permit any lien or charge to attach to the work or the premises, but if any does so attach, Contractor shall promptly procure its release and, in accordance with the requirements of paragraph "P" above, indemnify, defend, and hold County harmless and be responsible for payment of all costs, damages, penalties and expenses related to or arising from or related thereto.
- R. **Changes:** Contractor shall make no changes in the work or perform any additional work without the County's specific written approval.
- S. **Change of Ownership:** Contractor agrees that if there is a change or transfer in ownership of Contractor's business prior to completion of this Contract, the new owners shall be required under terms of sale or other transfer to assume Contractor's duties and obligations contained in this Contract and complete them to the satisfaction of County.
- T. **Force Majeure:** Contractor shall not be assessed with liquidated damages or unsatisfactory performance penalties during any delay beyond the time named for the performance of this Contract caused by any act of God, war, civil disorder, employment strike or other cause beyond its reasonable control, provided Contractor gives written notice of the cause of the delay to County within 36 hours of the start of the delay and Contractor avails himself of any available remedies.
- U. **Confidentiality:** Contractor agrees to maintain the confidentiality of all County and County-related records and information pursuant to all statutory laws relating to privacy and confidentiality that currently exist or exist at any time during the term of this Contract. All such records and information shall be considered confidential and kept confidential by Contractor and Contractor's staff, agents and employees.
- V. **Compliance with Laws:** Contractor represents and warrants that services to be provided under this Contract shall fully comply, at Contractor's expense, with all standards, laws, statutes, restrictions, ordinances, requirements, and regulations (collectively "laws"), including, but not limited to those issued by County in its governmental capacity and all other laws applicable to the services at the time services are provided to and accepted by County. Contractor acknowledges that County is relying on Contractor to ensure such compliance,

- and pursuant to the requirements of paragraph “HH” above, Contractor agrees that it shall defend, indemnify and hold County and County INDEMNITEES harmless from all liability, damages, costs and expenses arising from or related to a violation of such laws.
- W. **Freight (F.O.B. Destination):** Contractor assumes full responsibility for all transportation, transportation scheduling, packing, handling, insurance, and other services associated with delivery of all products deemed necessary under this Contract.
- X. **Pricing:** Quoted pricing shall include full compensation for providing all services as specified herein or when applicable, in the scope of services attached to this Contract, and no additional compensation will be allowed therefore, unless otherwise provided for in this Contract.
- Y. **Waiver of Jury Trial: [Omitted]**
- Z. **Terms and Conditions:** Contractor acknowledges that it has read and agrees to all terms and conditions included in this Contract.
- AA. **Headings:** The various headings and numbers herein, the grouping of provisions of this Contract into separate clauses and paragraphs, and the organization hereof are for the purpose of convenience only and shall not limit or otherwise affect the meaning hereof.
- BB. **Severability:** If any term, covenant, condition or provision of this Contract is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions hereof shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby.
- CC. **Calendar Days:** Any reference to the word “day” or “days” herein shall mean calendar day or calendar days, respectively, unless otherwise expressly provided.
- DD. **Attorneys Fees:** In any action or proceeding to enforce or interpret any provision of this Contract, or where any provision hereof is validly asserted as a defense, each Party shall bear its own attorney’s fees, costs and expenses.
- EE. **Interpretation:** This Contract has been negotiated at arm’s length and between persons sophisticated and knowledgeable in the matters dealt with in this Contract. In addition, each Party has been represented by experienced and knowledgeable independent legal counsel of their own choosing, or has knowingly declined to seek such counsel despite being encouraged and given the opportunity to do so. Each Party further acknowledges that they have not been influenced to any extent whatsoever in executing this Contract by any other Party hereto or by any person representing them, or both. Accordingly, any rule of law (including California Civil Code Section 1654) or legal decision that would require interpretation of any ambiguities in this Contract against the Party that has drafted it is not applicable and is waived. The provisions of this Contract shall be interpreted in a reasonable manner to affect the purpose of the Parties and this Contract.
- FF. **Authority:** The Parties to this Contract represent and warrant that this Contract has been duly authorized and executed and constitutes the legally binding obligation of their respective organization or entity, enforceable in accordance with its terms.
- GG. **Employee Eligibility Verification:** The Contractor warrants that it fully complies with all Federal and State statutes and regulations regarding the employment of aliens and others and that all its employees performing work under this Contract meet the citizenship or alien status requirement set forth in Federal statutes and regulations. The Contractor shall obtain, from all employees, consultants and subcontractors performing work hereunder, all verification and other documentation of employment eligibility status required by Federal or State statutes and regulations including, but not limited to, the Immigration Reform and Control Act of

1986, 8 U.S.C. §1324 et seq., as they currently exist and as they may be hereafter amended. The Contractor shall retain all such documentation for all covered employee, consultants and subcontractors for the period prescribed by the law. The Contractor shall indemnify, defend with counsel approved in writing by County, and hold harmless, the County, its agents, officers, and employees from employer sanctions and any other liability which may be assessed against the Contractor or the County or both in connection with any alleged violation of any Federal or State statutes or regulations pertaining to the eligibility for employment of any persons performing work under this Contract.

HH. Indemnification Provisions: Contractor agrees to indemnify, defend with counsel approved in writing by County, and hold County, its elected and appointed officials, officers, employees, agents and those special districts and agencies which County's Board of Supervisors acts as the governing Board ("COUNTY INDEMNITEES") harmless from any claims, demands or liability of any kind or nature, including but not limited to personal injury or property damage, arising from or related to the services, products or other performance provided by Contractor pursuant to this Contract. If judgment is entered against Contractor and County, by a court of competent jurisdiction because of the concurrent active negligence of County or COUNTY INDEMNITEES, Contractor and County agree that liability will be apportioned as determined by the Court. Neither party shall request a jury apportionment.

II. Audits/inspections: Contractor agrees to permit the County's Auditor-Controller or the Auditor-Controller's authorized representative (including auditors from a private auditing firm hired by the County) access during normal working hours to all books, accounts, records, reports, files, financial records, supporting documentation, including payroll and accounts payable/receivable records, and other papers or property of contractor for the purpose of auditing or inspecting any aspect of performance under this contract. The inspection and/or audit will be confined to those matters connected with the performance of the contract including, but not limited to, the costs of administering the contract. The County will provide reasonable notice of such an audit or inspection.

The County reserves the right to audit and verify the contractor's records before final payment is made.

Contractor agrees to maintain such records for possible audit for a minimum of three years after final payment, unless a longer period of records retention is stipulated under this contract or by law. Contractor agrees to allow interviews of any employees or others who might reasonably have information related to such records. Further, contractor agrees to include a similar right to the County to audit records and interview staff of any subcontractor related to performance of this contract.

Should the contractor cease to exist as a legal entity, the contractor's records pertaining to this agreement shall be forwarded to the surviving entity in a merger or acquisition or, in the event of liquidation, to the County's project manager.

-Signature page follows-

SIGNATURE PAGE

The Parties hereto have executed this Agreement on the dates shown opposite their respective signatures below:

OVERDRIVE INC.*

By: _____

By: _____

Print Name: _____

Print Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

* (Pursuant to California Corporations Code Section 313, the signatures of two corporate officials are required to bind the corporation, one from each of the following two groups: If the contracting party is a corporation, (2) two signatures are required: one (1) signature by the Chairman of the Board, the President or any Vice President; and one (1) signature by the Secretary, any Assistant Secretary, the Chief Financial Officer of any Assistant Treasurer.

In the alternative, a single corporate signature is acceptable when accompanied by a corporate resolution demonstrating the legal authority of the signatory to bind the corporation.

County of Orange, OC Community Resources, a political subdivision of the state of California

Print Name Title

Signature Date

**Approved as to form, County Counsel
County of Orange, California**

By: _____

Date: _____

ATTACHMENT A
SCOPE OF SERVICES/SPECIFICATIONS

1. DIGITAL LIBRARY RESERVE APPLICATION SERVICES

- 1.1 OverDrive will create and host a Library Website for Library's use of the Application Services. OverDrive shall provide the Application Services to the Library under the terms of this Access Agreement (collectively referred to as the "Agreement").
- 1.2 OverDrive shall create an account in OverDrive's content selection platform, OverDrive Marketplace, for Library to select Digital Content to make available at the Library Website to Authorized Patrons and to access reports.
- 1.3 OverDrive will use commercially reasonable efforts to make the Application Services perform substantially in accordance with the terms herein. From time to time, OverDrive may make modifications or updates to the operation, performance, or functionality of the Application Services as it sees fit or as required by OverDrive's suppliers. Library may be required to complete additional forms, documents or other associated materials provided by OverDrive as long as the additional forms, documents or other associated materials do not conflict or materially alter the obligations contained in this Contract. Library shall use commercially reasonable efforts to complete the documents in a timely manner.
- 1.4 OverDrive will use commercially reasonable efforts to provide Secondary Support to Library.
- 1.5 OverDrive shall have sole discretion to approve any and all libraries that seek to participate in Library's DLR Service, as well as approve any other terms and conditions related to such expansion of the DLR Service to additional libraries. OverDrive shall have sole discretion to honor any prior version of an order form, participation form or related material completed by Library. OverDrive may require Library to complete an updated version of the same.
- 1.6 If Library seeks a modification of the Application Services or integration of the Application Services beyond those offered on the Order Form, the Parties shall cooperate to agree on the specifications for the additional services and any associated terms and conditions.
- 1.7 Nothing under the Agreement grants any right to Library to the use of, or access to, any Application Services source code. Library does not have the right to reproduce the Application Services, to distribute copies or versions of any modules of the Application Services to any third parties including its Authorized Patrons, or to make and/or sell variations or derivative works of the Application Services. Sole ownership of copyrights and other intellectual proprietary rights shall remain solely with OverDrive or its suppliers. OverDrive reserves the right, at its sole discretion, to display its branding, trademarks, logos, and/or third party marketing or promotional materials on the Library Website.

2. LIBRARY WEBSITE

- 2.1 Library shall use commercially reasonable efforts to ensure that use of the Applications Services, the Library Website and the Digital Content are in compliance with this Agreement and with permitted uses as communicated by OverDrive to Library. Library shall use commercially reasonable efforts to prevent unauthorized use of the Digital Content from OverDrive by their users and Authorized Patrons.
- 2.2 OverDrive grants the Library and Authorized Patrons a non-assignable, non-transferable, limited license to use the Digital Content provided by OverDrive's suppliers for personal, non-commercial use.

Authorized Patrons and/or Library may access and/or download, the Digital Content:

- (a) On Library-issued devices or computers with exclusive and individual unique user accounts;
- (b) On Library-issued devices which are circulated in accordance with the OverDrive Test Drive program;
- (c) On Authorized Patrons personal devices directly;
- (d) On shared Library computers which employ an application that restores the computer to its original configuration after use by an individual Authorized Patron (e.g. Deep Freeze, Windows SteadyState, or other similar application); and
- (e) For any use consistent with the relevant fair use doctrine or similar law in your jurisdiction.

2.3 Library shall reasonably cooperate with OverDrive to limit access to the DLR Service to end users who are Authorized Patrons. In the event Library desires to provide access to the DLR Service to users other than Authorized Patrons, OverDrive reserves the right to limit availability of certain Digital Content, as may be required by supplying publishers. Online library card applications, with or without fees that provide access, temporary or permanent, to the DLR Service to users who do not otherwise qualify as Authorized Patrons shall not be permitted.

2.4 Library represents and warrants that it will not make any representations or create any warranties, expressed or implied, concerning the Application Services and Digital Content, and will take reasonable steps to ensure that its employees, agents, and others under its direction abide by the Agreement.

2.5 Library agrees to perform Primary Support for its Authorized Patrons, unless Library has completed the Front Line Tech Support Order Form and paid for Front Line Tech Support services. OverDrive will provide Library with training and documentation for Library's provision of Primary Support. Library will cooperate with OverDrive to implement customer support practices recommended by OverDrive, including but not limited to directing Authorized Patrons to OverDrive-supplied FAQs and support pages on its Library Website.

2.6 Library shall not access the Application Services in a manner not explicitly permitted by the Agreement, including but not limited to scraping the Library Website and/or web traffic or data to and from the Library Website, intercepting, redirecting, capturing or holding OverDrive-initiated email or other electronic communications, nor shall it allow any third party to access the Application Services in a manner as described in this paragraph.

2.7 OverDrive may employ commercially reasonable efforts to monitor and maintain the availability of its Application Services, including review of traffic for request volume levels, unusual behaviors or patterns, attempts to create a denial of service response, and/or excessive or abusive usage as determined by OverDrive, in its sole discretion.

3. Termination: Upon termination of this Contract, the access granted to Library by this agreement shall be terminated immediately and Library shall make no further use of all or any part of the Application Services, or any confidential information received from OverDrive.

4. Definitions

“Application Services” or “DLR Service”-the Library website and digital content distribution service provided to Library, which utilize OverDrive® and other third party technologies and services.

“Authorized Patron(s)”- those individuals who provide proof of residency, ownership of property, employment, or enrollment in school or similar institution in the Library’s service area and which the Library authorizes to download and/or access Digital Content from the Library Website or otherwise utilize the Application Services.

“Digital Content”- the digital titles (e.g. eBooks, audiobooks, music and video) made available from OverDrive at the Library Website.

“Library”- shall mean the Orange County Public Libraries.

“Library Website” -the Internet-based application hosted and operated by OverDrive that provides Authorized Patrons access to Digital Content.

“OverDrive” -OverDrive, Inc., a Delaware Corporation, and its subsidiaries and affiliates.

“Primary Support”- the services provided by Library to its Authorized Patrons for its day-to-day help, support, technical aid and other assistance for their use of the Library Website and Digital Content.

“Secondary Support”-the technical support services provided by OverDrive to Library in the English language, including reasonable efforts to assist Library in providing Primary Support.

5. OverDrive Digital Library Features included with Annual Fee:

Collection:

- more than 20,000 classic ebooks from Project Gutenberg-free
- Web-based staff training to use collection development tools in OverDrive’s Marketplace catalog of 700,000+ popular & educational eBooks, audiobooks, music & video

Services:

- Library-branded website plus system-wide updates
- Authentication options
- Web-based staff training-lead by expert trainer (live)
- Web-based staff training-access to online Learning center (recordings)
- Reporting module
- Customizable marketing resources to promote service to staff and community both inside & outside the Library
- Secondary-level user support
- Cataloging of titles

Technology:

- OverDrive apps for eBooks, audiobooks, music, video
- Support for Kindle® (US only), NOOK™ and iPad®, plus all major devices
- Configuration and license fee
- Third-party licenses for digital rights management
- Maintenance, hosting & support services
- Bandwidth for all downloads

- OverDrive Media stations at branch locations

ATTACHMENT B

COMPENSATION, PRICING AND PAYMENT TERMS

- I. COMPENSATION:** This is a Contract between the County and Contractor for the eBooks, eAudio and Database Maintenance.

The Contractor agrees to accept the specified compensation as set forth in this Contract as full remuneration for performing all services and furnishing all staffing, and materials required, for any reasonably unforeseen difficulties which may arise or be encountered in the execution of the services until acceptance, for risks connected with the services, and for performance by the Contractor of all its duties and obligations hereunder.

The Contractor shall only be compensated as set forth herein below for work performed in accordance with the Scope of Work. The County shall have no obligation to pay any sum in excess of total Contract amount specified herein unless authorized by amendment in accordance with the County contract terms and conditions.

II. ANNUAL FEE:

Library will be invoiced an annual fee according to the fee schedule below:

Term	Service Periods	Annual Fees
Year 1	12/01/14-11/30/15	\$12,000.00
Year 2	12/01/15-11/30/16	\$13,000.00
Year 3	12/01/16-11/30/17	\$14,000.00
Year 4	12/01/17-11/30/18	\$16,000.00
Year 5	12/01/18-11/30/19	\$16,000.00

Initial Fees	# of Units	Unit Price	Extended Price
Setup and Configuration Fee: Includes configuration and installation of one OMS license, best practices guide (Also includes 1 year of maintenance fees**)	1	\$5,995.00	\$5,995.00
Additional OMS Licenses:	4	\$495.00	\$1980.00
Hardware: All-in-One Touchscreen Desktop	5	\$1,599.99	\$7,999.95
Total First Year Cost:			\$16,974.95 (WAIVED)
**Year 1 begins 90 Days following OverDrive's receipt of this order form.			

Ongoing Fees	# of Units	Unit Price	Extended Price
Annual Maintenance Fees: Includes support and future updates to OMS			
Years 2+ (First License):	1	\$599.00	\$599.00
Years 2+ (Additional Licenses):	4	\$99.00	\$396.00
Ongoing Annual Cost (Starting in Year 2):			\$995.00

Cataloging of titles to be purchase @\$1.50 per record.

Total Contract Amount not to exceed \$500,000.00 per year. Contract Amount per year is \$500,000.00.

In the event Library spends at least \$475,000.00 on Digital Content during Year 3, Year 4, or Year 5 during a single Term, Library shall be invoiced an Annual Fee of \$14,000.00 for the following Term. Library may renew at an Annual Fee of \$14,000.00 for each successive Term as long as spending on Digital Content during the preceding Term exceeds \$475,000.

Invoices for the Annual Fees are payable 30 days in advance, unless otherwise directed in this Contract. Invoices are to be submitted to the user agency/department to the ship-to address. Payment will be net 30 days after receipt of an invoice in a format acceptable to the County of Orange and verified and approved by the agency/department and subject to routine processing requirements. The responsibility for providing an acceptable invoice rests with the Contractor.

- III. PRICING:** Prices shall be in accordance with the Contractor's pricing published at its website, <https://marketplace.overdrive.com/Account/Login>, as in effect at time of order/renewal, and pricing discounts afforded to public libraries or other discounts that may be mutually agreed to by the Contractor and OC Public Libraries contract that are based on standard rates or list prices.

Prices are subject to change by publishers without notice. Billing increases or decreases shall be honored upon the approval of invoice by the department.

IV. PAYMENT TERMS-PAYMENT IN ARREARS:

Billing shall cover services and/or goods not previously invoiced. The contractor shall reimburse the County of Orange for any monies paid to the contractor for goods or services not provided or when goods or services do not meet the contract requirements.

Payments made by the County shall not preclude the right of the County from thereafter disputing any items or services involved or billed under this contract and shall not be construed as acceptance of any part of the goods or services.

- V. PAYMENT (Electronic Funds Transfer (EFT):** The County of Orange offers contractors the option of receiving payment directly to their bank account via an Electronic Fund Transfer (EFT) process in lieu of a check payment. Payment made via EFT will also receive an Electronic Remittance Advice with the payment details via e-mail. An e-mail address will need to be provided to the County of

Orange via an EFT Authorization Form. Upon completion of the form, please mail, fax or email to the address or phone listed on the form. (See Exhibit 1).

VI. PAYMENT-Invoicing Instructions: The Contractor will provide an invoice on the Contractor's letterhead for services rendered. Each invoice will have a number and will include the following information:

1. Contractor's name and address
2. Contractor's remittance address, if different from 1, above
3. Contractor's Tax ID Number (TIN or EIN)
4. Name of County agency/department
5. Delivery/service address
6. Contract Agreement Number: **MA-012-15010841**
7. Date of order/service
8. Product/service description, quantity, and prices
9. Sales Tax, if applicable
10. Freight/delivery charges, if applicable
11. Total

VII. Billing Instructions: Billing shall be provided on a Summary Bill with detailed line, circuit or calling information available. All billing/invoicing shall be in accordance with rates quoted herein. OC Public Libraries shall not be subject to charges not detailed or quoted herein.

Invoices and supporting documentation shall be forwarded to:

OC Community Resources
Attn: Accounts Payable
1770 North Broadway, 4th Floor
Santa Ana, CA 92706-2606

EXHIBIT 1
EFT AUTHORIZATION FORM

(See separate sheet)