

# REPORT / RECOMMENDATION



**To:** MAYOR AND CITY COUNCIL

**Agenda Item #:** IV.J.

**From:** Tom M. Schmitz, Fire Chief

**Action**

**Discussion**

**Date:** November 3, 2014

**Information**

**Subject:** Approve Avolve Software Corporation Licensing Agreement

**Action Requested:**

Approve and authorize Mayor and City Manager to sign attached agreement with Avolve Software Corporation

**Information / Background:**

On October 21, 2014, the City Council approved the purchase for electronic plan review software. The approved Request for Purchase was to Avolve Software Corporation for ProjectDox ePlan software. Legal counsels for all parties have reviewed this proposed agreement. Staff recommends approval.

**Attachments:**

Avolve Agreement



**AVOLVE SOFTWARE CORPORATION**  
**Software License, Maintenance, and Services Agreement**  
**Terms and Conditions**

This agreement ("Agreement") is made this 31<sup>st</sup> day of **October, 2014** ("Effective Date") by and between Avolve Software Corporation, a Delaware corporation with offices at 4835 E. Cactus Road, Suite 420, Scottsdale, Arizona 85254, United States of America, ("Avolve" or "Licensor") and **City of Edina** with offices at **4801 W.50<sup>th</sup> Street, Edina, MN 55424** ("Customer" or "Licensee").

WHEREAS Licensor has created a computer software program called ProjectDox ("Software") hereafter more fully described;

WHEREAS the parties wish to provide the terms and conditions under which the Licensor will provide the Software for the use by Licensee;

WHEREAS Customer wishes Avolve to deliver, install, and maintain the specified Software;

NOW THEREFORE, in consideration of the foregoing and of the mutual covenants and promises set forth herein, Avolve and Customer agree that Avolve shall provide products and services, and Customer shall pay prices, as set forth in this Agreement.

**SECTION A – SOFTWARE LICENSE AGREEMENT**

1. License Grant.
  - a. Upon the Effective Date, Avolve hereby grants to Licensee a non-exclusive, non-transferable, royalty-free, revocable license to use the Avolve Software set forth in the Sales Order attached hereto as Exhibit 1 ("Sales Order") and related interfaces (collectively, the "Avolve Software") and Avolve User Guides and Software Documentation provided in or with the Avolve Software ("User Guides" and "Documentation") for Licensee's internal business purposes only and otherwise subject to the terms and conditions of this Agreement. Licensee shall not license, sell, rent, lease, copy, distribute, host, outsource, or otherwise commercially exploit the Software. This license is revocable by Avolve if Licensee fails to comply with the terms and conditions of this Agreement, including without limitation, Licensee's failure to timely pay the Software fees in full. Upon Licensee's payment in full for the Avolve Software, this license will become irrevocable, subject to the restrictions on use and other terms set forth in this Agreement.
  - b. Avolve shall retain ownership of, including all intellectual property rights in and to, the Avolve Software, Documentation, and User Guides.
  - c. Licensee acknowledges and agrees that the Avolve Software and User Guides are proprietary to Avolve and have been developed as trade secrets at Avolve's expense. Licensee shall use best efforts to keep the Avolve Software, Documentation, and User Guides confidential and to prevent any misuse, unauthorized use or unauthorized disclosure of the Avolve Software, Documentation, or User Guides by any party.
  - d. The Avolve Software may not be modified by anyone other than Avolve. If Licensee modifies the Avolve Software without Avolve's prior written consent, Avolve's obligations to provide maintenance services on, and the warranty for, the Avolve Software will be void. Licensee shall not modify, make derivative works of, disassemble, reverse compile, or reverse engineer any part of the Software, or access or use the Software in order to build a similar or competitive product or service.
  - e. Licensee may make copies of the Avolve Software for archive purposes only. Licensee shall repeat any and all proprietary notices on any copy of the Avolve Software. Licensee may make copies of the Avolve User Guides for internal use only.



- f. Licensee may use the Application Programming Interfaces ("APIs") of the Software to program those APIs (a "Custom Application") but only as described in the Documentation for the Software and only to the extent necessary to permit the Licensee's Custom Application to function with the Software through the APIs as described in the Documentation.
2. License Fees. Licensee agrees to pay Avolve, and Avolve agrees to accept from Licensee as payment in full for the license granted herein, the Software fees set forth in the Sales Order. The license fees constitute payment for Software listed in the Sales Order. Any license fees not paid when due shall, which unless otherwise specified will be thirty (30) calendar days from invoice, accrue interest at the rate of 18% eighteen percent (18%) per annum, but not to exceed the maximum amount as allowed by law
3. Verification. Licensee agrees to permit Avolve to audit the Licensee's use of the Avolve Software and Documentation. Audits may be conducted at least once annually and in accordance with Avolve standard procedures, which may include on-site and/or remote audit. Licensee shall cooperate reasonably in the conduct of such audits. In the event an audit reveals that (i) Licensee underpaid license fees and/or Avolve Support fees to Avolve and/or (ii) that Licensee has used the Software in excess of the license quantities or levels stated in the Sales Order, Licensee shall pay such underpaid fees upon receipt of Avolve's invoice for the fees.
4. Limited Warranty. Avolve warrants, for Licensee's benefit alone and for a period of thirty (30) days, that the Software will substantially conform to the specifications contained in the Documentation and User Guide for thirty (30) days following initial installation. The warranty shall not apply if the Software: (i) is not used in accordance with the Documentation; (ii) is not initially installed by Avolve or its agents; (iii) defect is caused by Licensee or third-party software developed software. Avolve does not warrant that the Software will operate uninterrupted or that it will be free from minor defects or errors that do not materially affect such performance, or that the applications contained in the Software are designed to meet all of Licensee's business requirements. Provided Licensee notifies Avolve in writing with a specific description of the Software's nonconformance within the warranty period and Avolve validates the existence of such nonconformance, Avolve will, at its option: a) repair or replace the nonconforming Software, or b) refund the license fees paid for the applicable nonconforming Software in exchange for a return of such nonconforming Software. EXCEPT FOR THE WARRANTIES SET FORTH ABOVE, THE SOFTWARE, AND THE SOFTWARE CONTAINED THEREIN, ARE LICENSED "AS IS," AND LICENSOR DISCLAIMS ANY AND ALL OTHER WARRANTIES, WHETHER EXPRESSED OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. THE LICENSEE ASSUMES THE ENTIRE RISK AS TO THE QUALITY OF PERFORMANCE WITH RESPECT TO THE SOFTWARE AND THE SOFTWARE CONTAINED THEREIN, EXCEPT AS SPECIFICALLY PROVIDED IN THIS AGREEMENT.
5. Intellectual Property Infringement and Indemnification. Avolve's Obligations. Avolve shall defend and indemnify Customer against any claim by an unaffiliated third party of this Agreement that an Avolve Software Product, if used within the scope of this Agreement, directly infringes that party's registered United States patent, copyright or trademark issued and existing as of the Effective Date or as of the distribution date of a release to the Avolve Software Product, and will pay the amount of any resulting adverse final judgment issued by a court of competent jurisdiction or of any settlement made by Avolve in writing.
  - a. Customer's Obligations. Avolve obligations in this section are contingent on the Customer performing all of the following in connection with any claim as described herein:
    - i. Promptly notifies Avolve in writing of any such claim;
    - ii. Gives Avolve reasonable cooperation, information, and assistance in connection with the claim; and



- iii. Consents to Avolve's sole control and authority with respect to the defense, settlement or compromise of the claim.
- b. Exceptions to Avolve's Obligations. Avolve will have no liability hereunder if the claim of infringement or an adverse final judgment rendered by a court of competent jurisdiction results from:
  - i. Customer's use of a previous version of a Avolve Software Product and the claim would have been avoided had Customer used the current version of the Avolve Software Product;
  - ii. Customer's combining the Avolve Software Product with devices or products not provided by Avolve;
  - iii. Use of a Avolve Software Product in applications, business environments or processes for which the Avolve Software Product was not designed or contemplated, and where use of the Avolve Software Product outside such application, environment or business process would not have given rise to the claim;
  - iv. Corrections, modifications, alterations or enhancements that Customer made to the Avolve Software Product and such correction, modification, alteration or enhancement is determined by a court of competent jurisdiction to be a contributing cause of the infringement;
  - v. Use of the Avolve Software Product by any person or entity other than Customer, Customer's employees, or Licensee's authorized external users; or
  - vi. Customer's willful infringement, including Customer's continued use of the infringing Avolve Software Product after Customer becomes aware that such infringing Avolve Software Product is or is likely to become the subject of a claim hereunder.
- c. Remedy. In the event a Avolve Software Product is, by a court of competent jurisdiction, finally determined to be infringing and its use by Customer is enjoined, Avolve will, at its election:
  - i. Procure for Customer the right to continue using the infringing Avolve Software;
  - ii. Modify or replace the infringing Avolve Software so that it becomes non-infringing; or
  - iii. Terminate Customer's license for the infringing Avolve Software Product and refund to Customer the Software fee paid for the infringing Avolve Software Product, as depreciated on a straight-line basis over a seven (7) year period commencing on the Effective Date.

The foregoing states Avolve's entire liability and Customer's sole and exclusive remedy with respect to the subject matter hereof.

- 6. Limitation of Liability. In no event will Avolve be liable for special, indirect, incidental, consequential, or exemplary damages, including, without limitation, any damages resulting from loss of use, loss of data, interruption of business activities, or failure to realize savings arising out of or in connection with the use of the Avolve Software. Except as otherwise expressly set forth in this Software License Agreement and except for direct damages and expenses associated with Avolve's obligation to indemnify Customer pursuant to Section D (6) (a), Avolve's liability for damages and expenses arising out of this Software License Agreement, whether based on a theory of contract or tort, including negligence and strict liability, will be limited to the amount of software license fees set forth in the Sales Order and paid by Licensee. Such license fees reflect and are set in reliance upon this limitation of liability.



## SECTION B – SOFTWARE MAINTENANCE AGREEMENT

1. Scope of Agreement. Customer agrees to purchase and Avolve agrees to provide maintenance services for the Avolve Software in accordance with the following terms and conditions. The maintenance services described below does not expand or change any warranty provisions set forth in the Agreement.
2. Term of Agreement. This Maintenance Agreement is effective beginning on the Effective Date and will remain in force for an initial one (1) year term, and will renew automatically for additional one (1) year terms at Avolve's then-current Maintenance fees unless terminated in writing by either party at least thirty (30) days prior to the end of the then-current term.
3. Payment.
  - a. Maintenance fees will be invoiced by Avolve annually in advance. Avolve shall provide Customer with not less than forty-five (45) days written notice of any change in annual Maintenance fees.
  - b. Additional Charges. Any maintenance services performed by Avolve for Customer which are not covered by this Maintenance Agreement, as set forth in Section B (4), including materials and expenses, will be billed to Customer at Avolve's then current rates.
  - c. Avolve reserves the right to suspend maintenance services if Customer fails to pay undisputed Maintenance fees within sixty (60) calendar days of the due date. Avolve shall reinstate maintenance services upon Customer's payment of all past due Maintenance fees, including all such fees for the periods during which services were suspended.
4. Maintenance Services Terms and Conditions. For as long as a current Maintenance Agreement is in place, Avolve shall:
  - a. In a professional, good and workmanlike manner, perform its obligations in accordance with Avolve's then-current Support Process and Service Level Agreement (Avolve's current Support Process and Service Level Agreement is set forth in the document attached hereto as Exhibit 2) in order to conform the Avolve Software to the applicable warranty under this Agreement. If Customer modifies the Avolve Software without Avolve's prior written consent, Avolve's obligations to provide maintenance services on and warrant the Avolve Software will be void.
  - b. Provide technical support on the Avolve Software. Avolve personnel shall accept technical support requests and provide technical support during the hours set forth in Exhibit 2 – Support Process and Service Level Agreement.
  - c. Maintain personnel that are appropriately trained to be familiar with the Avolve Software in order to provide maintenance services.
  - d. Provide a customer-accessible system that enables trouble tickets to be entered and tracked through resolution and / or closure.
  - e. Provide Customer with all releases Avolve makes to the Avolve Software that Avolve makes generally available without additional charge to customers possessing a current Avolve annual Maintenance Agreement. Third Party Products; and installation, Consulting and Training services related to the new releases will be provided to Customer at Avolve's then-current rates.
  - f. Support prior releases of the Avolve Software in accordance with Avolve's then-current release life cycle policy.
5. Credits. Should Avolve fail to meet the Problem Determination and Resolution commitments set forth in its then-current Support Process and Service Level Agreement, AS CUSTOMER'S SOLE AND EXCLUSIVE REMEDY,



Customer shall be entitled to receive a service credit of 2% of the licensee's monthly prorated support fees, per incident in a given month, up to a maximum 50% of monthly prorated support fee payable by the customer. The amount of compensation may not exceed 50% of the licensee's monthly support fee. This means that if a customer has two (2) incidents in which Avolve failed to respond within the time frame stated by Avolve's Problem Determination and Resolution commitments set forth in its then-current Support Process and Service Level Agreement, they are entitled to receive a service credit of 4% of the prorated monthly support fee.

6. Limitations and Exclusions. Maintenance fees do not include installation or implementation of the Avolve Software, onsite support (unless Avolve cannot remotely correct a defect in an Avolve Software Product), application design, other consulting services, support of an operating system or hardware, and support outside Avolve's normal business hours. If Avolve provides technical support for a problem caused by a third-party product or the failure of Customer's computer system or environment to comply with the technical specification requirements included in the Documentation provided with the Software (or Avolve's technical support efforts are materially increased as a result of Customer's use of third-party product or failure to comply with the technical specification requirements), Avolve reserves the right to charge Customer time and materials for such extra services at Avolve's then current published rates for customized, premium technical support services
7. Customer Responsibilities. Customer shall provide, at no charge to Avolve, full and free access to the Avolve Software; working space; adequate facilities within a reasonable distance from the equipment; and use of machines, attachments, features, or other equipment necessary to provide maintenance services set forth herein.
8. Limitation of Liability. In no event shall Avolve be liable for special, indirect, incidental, consequential, or exemplary damages, including, without limitation, any damages resulting from loss of use, loss of data, interruption of business activities, or failure to realize savings arising out of or in connection with the provision or quality of maintenance services or use of the Avolve Software. Except for direct damages and expenses associated with Avolve's obligation to indemnify Customer pursuant to Section D (6) (a), Avolve's liability for damages and expenses arising out of this Maintenance Agreement, whether based on a theory of contract or tort, including negligence and strict liability, will be limited to the amount of Maintenance fees set forth in the Sales Order and paid by Customer. Such Maintenance fees reflect and are set in reliance upon this limitation of liability

## **SECTION C – PROFESSIONAL SERVICES AGREEMENT**

1. Services. Avolve shall provide the services set forth in the Sales Order at Customer's election, including Consulting, Training, Conversion, and other miscellaneous Services.
2. Professional Services Fees.
  - a. All Services will be provided by Avolve on a time and materials basis at Avolve's then current Professional Services hourly rates unless otherwise agreed by the parties and indicated in the Sales Order.
  - b. Travel expenses will be billed in accordance with the then-current Avolve Business Travel Policy, based on Avolve's usual and customary practices. Copies of receipts will be provided on an exception basis at no charge.
  - c. Unless otherwise agreed in the Sales Order, Avolve shall invoice Customer monthly and Customer shall pay such invoice net thirty (30) days from the date of invoice. Any Professional Services fees not paid when due shall, which unless otherwise specified will be thirty (30) calendar days from invoice, accrue interest at the rate of eighteen percent (18%) per annum, but not to exceed the maximum amount as allowed by law.



3. Additional Services.

- a. Training and/or consulting services utilized in excess of those set forth in the Sales Order and additional related services not set forth in the Sales Order will be billed at Avolve's then-current rates.
- b. Programming and/or interface quotes are estimates based on Avolve's understanding of the specifications supplied by Customer. In the event Customer requires additional work performed above the specifications provided, Avolve will submit to Customer a Change Order containing an estimate of the charges for the additional work. Work on additional specifications will not begin until the Change Order is accepted and signed by the customer.

4. Customer's Responsibilities.

- a. Customer shall provide and make available all Customer personnel that Avolve reasonably requires in connection with performance of the Services and as may be further addressed in an applicable Sales Order.
- b. If the Services are performed at a Customer site, Customer agrees to provide necessary access to its site including, but not limited to, appropriate access to Customer premises, computer systems, Internet connections and other facilities.
- c. Customer acknowledges that the implementation of the Avolve Software is a cooperative process requiring the time and resources of Customer personnel. Customer shall, and shall cause Customer personnel to, use all reasonable efforts to cooperate with and assist Avolve as may be reasonably required to meet the project deadlines and other milestones agreed to by the parties for implementation.

5. Cancellation. In the event Customer cancels Services less than twenty-one (21) days in advance, Customer is liable to Avolve for (i) all non-refundable expenses incurred by Avolve on Customer's behalf; and (ii) daily fees associated with the cancelled services if Avolve is unable to re-assign its personnel.

6. Services Warranty. Avolve warrants that all Services provided hereunder will be performed in a workmanlike manner, in conformity with the professional standards for comparable services in the industry. For any breach of this warranty for service, Customer's exclusive remedy shall be the re-performance of the deficient services, and if Avolve is unable to re-perform the deficient services as warranted, Customer shall be entitled to recover the portion of the Professional Services fees paid to Avolve for such deficient services, and such refund shall be Avolve's entire liability.

7. Limitation of Liability. In no event shall Avolve be liable for special, indirect, incidental, consequential, or exemplary damages, including, without limitation, any damages resulting from loss of use, loss of data, interruption of business activities, or failure to realize savings arising out of or in connection with the provision or quality of the services or the use of the Avolve Software. Except for direct damages and expenses associated with Avolve's obligation to indemnify Customer pursuant to Section D (6) (a), Avolve's liability for damages and expenses arising out of this Professional Services Agreement, whether based on a theory of contract or tort, including negligence and strict liability, will be limited to the amount of fees set forth in the Sales Order and paid by Customer. Such fees reflect and are set in reliance upon this limitation of liability.

## **SECTION D – GENERAL TERMS AND CONDITIONS**

1. Term. The term of this License Agreement shall commence as of the Effective Date and shall continue unless and until terminated pursuant Section 2 below.
2. Termination. Each party has the right to terminate this agreement, by giving written notice of termination to the other party, if (a) the other party breaches this agreement and (b) either the breach cannot be cured or, if the breach can be cured, it is not cured by the breaching party within thirty (30) days after receiving written



notice of the breach from the non-breaching party. A substantial deviation of a Software Product from the specifications in the corresponding Documentation will not be considered a breach of this agreement that allows you to terminate the agreement, but it could give rise to a warranty claim under Section A (4).

- 3. Taxes. The fees set forth in the Sales Order do not include any taxes, including, without limitation, sales, use or excise tax. Customer will be responsible for remitting all applicable taxes to the proper authorities. If tax-exempt, Customer will provide Avolve with Customer's tax-exempt certificate.
- 4. Force Majeure. Any delay or nonperformance of any provision of this Agreement (other than for the payment of amounts due hereunder) caused by conditions beyond the reasonable control of the performing party shall not constitute a breach of this Agreement, and the time for performance of such provision, if any, shall be deemed to be extended for a period equal to the duration of the conditions preventing performance.
- 5. Data Practices. All data created, received, maintained or disseminated for any purpose in the course of this Agreement is governed by the Minnesota Government Data Practices Act, Minn. Stat. Ch. 13, any other applicable state statute, or any state rules adopted to implement the act, as well as federal regulations on data privacy.
- 6. Indemnification.
  - a. Avolve shall indemnify and hold harmless Customer and its agents, officials and employees from and against any and all direct claims, losses, liabilities, damages, costs and expenses (including reasonable attorney's fees and costs) for personal injury or property damage arising from Avolve's negligence or willful misconduct.
  - b. Subject to the limitation and immunities in MN. Statutes Chapter 466 the customer shall indemnify and hold harmless Avolve and its agents, officials and employees from and against any and all direct claims, losses, liabilities, damages, costs and expenses (including reasonable attorney's fees and costs) for personal injury or property damage arising from Customer's negligence or willful misconduct.
- 7. Disclaimer. THE RIGHTS, REMEDIES, AND WARRANTIES SET FORTH IN THIS AGREEMENT ARE EXCLUSIVE AND IN LIEU OF ALL OTHER RIGHTS, REMEDIES, AND WARRANTIES EXPRESSED, IMPLIED, OR STATUTORY, INCLUDING, WITHOUT LIMITATION, THE WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND SYSTEM INTEGRATION, WHICH ARE HEREBY DISCLAIMED BY AVOLVE.
- 8. Notices: Any notices being given by this Agreement shall be in writing and shall be effective if delivered personally, sent by prepaid courier service, sent by prepaid mail, or sent by facsimile or electronic communication (confirmed on the same or following day by prepaid mail). All correspondence shall be addressed to the parties as follows:

<p>If to Avolve:</p> <p>Mr. Ron Loback          President and CEO          Avolve Software Corporation          4835 E. Cactus Rd., Suite 420          Scottsdale, AZ 85254</p>	<p>If to Customer:</p> <p>Dave Fisher          Chief Building Official          City of Edina          4801 W. 50<sup>th</sup> Street          Edina, MN 55424</p>
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- 9. Governing Law. This Agreement will be governed by and construed in accordance with the laws of Customer's state of domicile.
- 10. Entire Agreement. This Agreement constitutes the entire agreement and understanding between the parties and supersedes any prior agreements, representation, or understandings, whether oral or written, relating to the Software.



- 11. Severability. Should any court of competent jurisdiction declare any term of this Agreement void or unenforceable, such declaration shall have no effect on the remaining terms hereof.
- 12. Assignment. This License, the Licensed Software and any other information or rights provided by Avolve, may not be sold, leased, assigned, sublicensed or otherwise transferred in whole or in part. Customer may not assign this Agreement or the benefits there from in whole or in part without the prior written consent of Avolve, which consent shall not be unreasonably withheld. Any assignment made in conflict with this provision shall be voidable at the option of Avolve.
- 13. Independent Contractor. Avolve is an independent contractor and not an employee of the Customer. Any personnel performing services under this Agreement on behalf of Avolve shall at all times be under Avolve's exclusive direction and control. Avolve shall pay all wages, salaries, and other amounts due such personnel in connection with their performance of services under this Agreement and as required by law. Avolve shall be responsible for all reports and obligations respecting such additional personnel, including, but not limited to: social security taxes, income tax withholding, unemployment insurance, and worker's compensation insurance.
- 14. Amendment. This Agreement may only be modified by written amendment signed by authorized representatives of both parties.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the dates set forth below.

Avolve Software Corporation

City of Edina

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: Ron Loback

Name: \_\_\_\_\_

Title: President and Chief Executive Officer

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_