



# MARIPOSA COUNTY

Human Resources/Risk Management • (209) 742-1379



## **RESOLUTION - ACTION REQUESTED 2016-274**

MEETING: June 14, 2016

TO: The Board of Supervisors

FROM: Steve Johnson, Human Resources Director - Risk Manager

RE: Approve a Contract with Trakstar for Performance Management Software

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### **RECOMMENDATION AND JUSTIFICATION:**

Approve an Agreement with Trakstar to Provide Performance Evaluation Software to Mariposa County; and Authorize the Board of Supervisors Chair to Sign the Agreement.

After a series of interviews and evaluations of five different vendors, the County's Performance Evaluation Team selected Trakstar as the best overall product based on content, flexibility, library and training and support. The software would benefit all 22 County departments and is estimated to save the County an estimated \$10,948 in the first year through improvements in staff time spent on developing and reviewing performance evaluations. A smaller portion of this savings will also be realized from a reduction in paper and copier usage.

The County currently uses five different performance evaluation forms on a paper-based platform. These forms have evolved over time but do not currently meet the needs of the County's departments. The County's Performance Evaluation Team, a cross-sectional committee including Department Heads, Supervisors and line staff, has been working since September 2015 to strengthen and improve the current performance evaluation system.

Staff is seeking approval of a one-year contract for the period of July 1, 2016 to June 30, 2017, at a cost of \$16,050. The annual cost in future fiscal years will be slightly less due to a reduction in the training component that is included in this first year contract.

### **BACKGROUND AND HISTORY OF BOARD ACTIONS:**

The Board of Supervisors has not authorized a computer based Performance Evaluation system in the past.

### **ALTERNATIVES AND CONSEQUENCES OF NEGATIVE ACTION:**

The Board may reject the recommendation to authorize a contract with

Trakstar and continue the current, paper-driven County evaluation process.

**FINANCIAL IMPACT:**

**A one-year agreement including the software, training, etc. would cost \$16,050 and this amount has been included in the Requested Budget for FY 2016-17.**

**ATTACHMENTS:**

**Mariposa County - Trakstar Customer Agreement (3) (PDF)**

**CAO RECOMMENDATION**

Requested Action Recommended

  
Mary Hodson, CAO 6/8/2016

**RESULT: ADOPTED BY CONSENT VOTE [UNANIMOUS]**

**MOVER:** Kevin Cann, District IV Supervisor

**SECONDER:** Marshall Long, District III Supervisor

**AYES:** Rosemarie Smallcombe, Marshall Long, Kevin Cann, John Carrier

**EXCUSED:** Merlin Jones

# Trakstar Customer Agreement

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Organization: Mariposa County

Presented to: Steve Johnson

Date: 5/27/2016

Start Date: 07/01/2016

End Date: 06/30/2017

Prepared by: Aaron Davidson

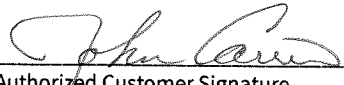
Email: aaron@trakstar.com

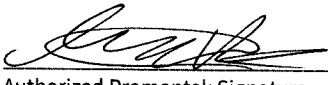
Phone: (360) 637-4624




### Trakstar Price Quotation

What's Included:	Total
<b>Trakstar Features</b>	<b>\$ 18,213.00</b>
<ul style="list-style-type: none"> <li>• Unlimited Online Reviews for [ 376 - 400 ]</li> <li>• Goal Tracking Module</li> <li>• Multi-rater (360 Degree) Feedback Module</li> <li>• Implementation/Customization</li> <li>• Unlimited phone and email support for your administrative team</li> <li>• Manager Training Session (1) 60 min. training for Managers + free recording for playback</li> <li>• Employee Training Session (1) 30-min. session for Employees + free recording for playback</li> <li>• PDF QuickStart Guides for Managers and Employees</li> <li>• VideoTutorials online</li> <li>• Online Knowledge Base of support articles</li> <li>• Trakstar Administrator Webinars, offered throughout the year</li> </ul>	<ul style="list-style-type: none"> <li>- Included -</li> <li>- Included -</li> <li>- Included -</li> <li>- Included -</li> <li>- Included -</li> <li>- Included -</li> <li>- Included -</li> <li>- Included -</li> <li>- Included -</li> <li>- Included -</li> </ul>
HRIS Import (optional) <input type="checkbox"/>	\$ 0.00
SSO/LDAP (optional) <input type="checkbox"/>	\$ 0.00
<b>Discount</b>	<b>\$ 2,163.00</b>
<b>1st Year Subscription Cost</b>	<b>\$ 16,050.00</b>
<b>Annual Subscription Cost</b>	<b>\$ 16,050.00</b>

  
 \_\_\_\_\_  
 Authorized Customer Signature  
**Chairman, Mariposa County**  
 \_\_\_\_\_  
 Title  
 \_\_\_\_\_  
 Date  
 10-15-16

  
 \_\_\_\_\_  
 Authorized Promantek Signature  
**Sales Account Manager**  
 \_\_\_\_\_  
 Title  
 \_\_\_\_\_  
 Date  
 5/31/16

**APPROVED AS TO FORM:**

  
**STEVEN W. DAHLEM**  
**COUNTY COUNSEL**

### Organizational Information

Organization:	Mariposa County-Human Resources/Risk Management Department
Address Line 1:	P.O. Box 1917
Address Line 2:	
City, State, Zip:	Mariposa, CA. 95338
Phone Number:	209-742-1379
Support Contact	Steve Johnson
Support Contact Email Address:	Sjohnson@mariposacounty.org

### Accounting Information

Contact for Accounts Payable	Debbie Isaacs
Email for Accounts Payable	Disaacs@mariposacounty.org

### Promantek, Inc. Information

Address Line 1:	Promantek, Inc. % System Six Bookkeeping	<p>Please return a signed copy of this Customer Agreement back to Promantek, Inc. at your earliest convenience, and keep a copy for yourself.</p> <p>Promantek will return a signed copy of this Agreement to you. We will send an invoice to your organization that will be due at the Agreement begin date.</p> <p>Thank you for doing business with us!</p>
Address Line 2:	P.O. Box 70259	
City, State, Zip:	Seattle, WA 98127	
Phone Number:	877-489-5651	
Email	<a href="mailto:bookkeeping@trakstar.com">bookkeeping@trakstar.com</a>	

# Trakstar Terms and Conditions

## Customer Agreement

By using the licensed Trakstar software (“Trakstar” or “Trakstar software”) the Customer acknowledges receipt of this document (“Agreement”) and understands its contents. Use of Trakstar shall imply that the Customer and Promantek, Inc. (each a “Party” and collectively the “Parties”) agree on the deliverables, fees, Customer and Promantek, Inc. responsibilities and confidentiality of Customer Confidential Information, and that both parties consent to be legally bound by all terms and conditions contained in this Agreement.

The initial term of this Agreement shall commence on July 1, 2016 and shall continue to June 30, 2017, one year later. Renewal is optional. Customer will make a good faith effort to inform Trakstar if they choose to abstain from renewal.

A Trakstar Customer Experience Manager will contact the customer upon contract Begin Date. Trakstar Implementation and all associated services, including all implementation meetings and all purchased employee/manager training, must be completed and scheduled between the Customer and Promantek, Inc. within 120 calendar days following the Agreement Begin Date. The Agreement Begin Date will not be adjusted in the event of a customer delay. Promantek, Inc. will provide a login to the Trakstar software to the Customer at the initial Implementation Kickoff meeting.

### **Payment to Promantek, Inc.**

Payment Terms: Due at Contract Beginning Date, US Dollars, Net 30 Days for a cost not to exceed \$16,050

### **Trakstar License Count**

A Trakstar Software License must be purchased for every employee, manager, and contractor entered into the Trakstar database. Each individual shall be referred to as an “employee” and counted for pricing purposes regardless of whether or not they are appraised or complete a self-appraisal. If an employee or contractor leaves the Customer’s organization, the license may be re-assigned.

### **Trakstar Subscription**

If a Customer terminates the Agreement if an annual fee has been paid, there will be no refund for the remainder of the term.

### **Additional Users**

Additional users above the original subscription tier window may be added to the subscription fee during the initial term and subsequent renewal periods. The fee for additional users will be

the rate on Trakstar's website: [www.trakstar.com/pricing](http://www.trakstar.com/pricing) at the time of requesting additional users. Customer is required to inform Promantek, Inc. when the number of added users exceeds the current pricing tier during the contract period. Promantek reserves the right to issue an adjusted invoice at any time.

### **Taxes**

Taxes are generally not applicable. Fees do not include taxes or duties. If Promantek, Inc. is required to pay or collect any federal, state, local, value added, tax or duty on any fees charged under this Agreement, or any other similar taxes or duties levied by any governmental authority, excluding taxes levied on Promantek, Inc. net income, then such taxes and/or duties shall be billed to and paid by Customer immediately upon receipt of invoices and supporting documentation for the taxes and duties charged.

## **Promantek, Inc. Deliverables**

### **License**

Promantek, Inc. grants to Customer and its Contractors a non-exclusive, non-transferable, term-based, right-to-use license to access and execute Trakstar software on supported browsers which are listed on Exhibit A for internal business purposes and for testing, training and other non-production purposes.

### **Authorized Users**

Customer shall use the Trakstar software for internal business operations including affiliated entities that control, or are controlled, by the Customer ("Affiliated Entities"). Customer shall not permit Trakstar to be used by or for the benefit of anyone other than the Authorized Users. Customer shall not have the right to re-license or sell rights to access and/or use Trakstar, or to transfer or assign rights to access or use Trakstar, except as provided in the Assignment section.

### **Intellectual Property**

Customer may not modify, translate, reverse engineer, de-compile, or create derivative works based upon Trakstar software. The Customer agrees to use Trakstar in a manner that complies with all applicable laws including intellectual property and copyright laws.

### **Title**

The proprietary rights embodied in the installed Trakstar software system operating on Promantek, Inc. or the Customer servers are the sole and exclusive property of Promantek, Inc.

### **Hold Harmless**

Promantek, Inc. represents and warrants that Promantek, Inc. has the authority to license Trakstar. Promantek, Inc. and shall defend, indemnify, and hold the Authorized Users harmless from any and all claims and damages arising out of (1) the lack or right of authority to license Trakstar, or (2) infringement of any copyright, trade secret, or patent known to Promantek, Inc. as the result of a current, unmodified copy of Trakstar; provided Promantek, Inc. is promptly notified in writing of any such suit or claim. Furthermore, the Customer must permit Promantek,

Inc. to defend, compromise, or settle any such suit or claim and provide all available information and reasonable assistance to enable Promantek, Inc. to do so.

### **Audit**

Promantek, Inc. reserves the right to audit the Customer to ensure license use compliance.

### **Technical Support**

Support is included with the Trakstar License. This includes but is not limited to interim and code correction releases within the release version and major upgrades. The Customer is entitled to telephone support for Trakstar-related questions during normal business hours and days, Monday-Friday 9:00 AM – 8:00 PM US EST. The Customer may also e-mail questions to support@trakstar.com, with response within 1 business day.

### **Trakstar Hosting Service**

Promantek, Inc. represents that it identifies Amazon EC2, a web hosting service, as its provider. Promantek, Inc. represents that Amazon provides a reliable environment for Trakstar. Promantek, Inc. represents that the Trakstar application and data strives for 99.9% up time and Promantek, Inc. adheres to best practices when it comes to security and confidentiality.

### **Data Backup**

Promantek, Inc. represents that it backs up all Trakstar data every day for disaster recovery purposes, and that it retains seven (7) days of full daily backups plus twelve (12) months of monthly backups. Backups are used for disaster recovery procedures, not recovery from user error.

### **Outages**

Promantek, Inc. shall strive to provide maximum availability but will not be held accountable for outages beyond its reasonable control. Promantek, Inc. will use reasonable efforts to notify the Customer in advance regarding possible outages. Promantek, Inc. represents that scheduled maintenance of the service is after 8:00 p.m. PST for minor upgrades and fixes. Promantek, Inc. will use reasonable and good faith efforts to schedule maintenance between the hours of 8:00 PM EST – 8:00 AM EST. Promantek, Inc. will give Customer as much notice as reasonably possible of any emergency procedures outside of scheduled maintenance. Promantek, Inc. will give Customer 3 weeks' notice for scheduling major upgrades.

## **Customer Responsibility**

### **Internet and Browser**

The Customer shall be responsible for providing, at its own expense and risk, all Internet devices, supported browsers, Internet connections, and Internet Service Providers.

### **Principal Administrator**

The Customer shall designate one employee as the Principal Administrator to communicate with Promantek, Inc. regarding technical issues. The Customer may change the Principal



Administrator from time to time by written notice to Promantek, Inc.'s contact person. All notices and communications from Promantek, Inc. shall be directed to the Customer.

### **Cooperation**

Customer acknowledges that certain services and obligations of Promantek, Inc. may be dependent on Customer providing certain data, information, or assistance to Promantek, Inc. from time to time. Customer acknowledges that such cooperation may be essential to the performance of services by Promantek, Inc. The Parties agree that any delay or failure by Promantek, Inc. to provide services hereunder which is caused by Customer's failure to provide timely cooperation reasonably requested by Promantek, Inc. shall not be deemed to be a breach of Promantek, Inc.'s performance obligations under this Agreement.

## **Termination**

### **Termination for Cause**

If either Party materially fails to comply with any of the material terms and conditions of this Agreement, including without limitation the payment of any undisputed subscription license fee or reimbursement due and payable under this Agreement, the non-defaulting Party may terminate this Agreement upon thirty (30) days written notice to the defaulting party specifying such breach, unless within the period of such notice, all breaches specified therein have been remedied. Notwithstanding the foregoing, Promantek, Inc. shall have the right to terminate this Agreement immediately upon giving notice to Customer if Customer becomes insolvent, assigns or attempts to assign its business assets for the benefit of creditors, institutes or has instituted against it proceedings in bankruptcy, or dissolves or liquidates the business. In the event that Promantek, Inc. terminates this Agreement for cause, Promantek, Inc. will retain all subscription license fees already paid to Promantek, Inc. These fees will not be refunded to Customer. In the event Customer terminates this Agreement for cause, the prorated license fee for the paid portion of the subscription will be refunded to Customer. Upon termination, Customer must immediately discontinue use of and destroy all copies of software and documentation in its possession.

### **Export Customer Data**

If requested, by Customer at any time during the term of this Agreement or within [10] business days after the effective date of termination of this Agreement, Trakstar (on behalf of the customer) will export Customer data into a .csv. Following Customer's successful receipt of Customer Data, Customer shall confirm the same to Promantek, Inc. in writing after which time Promantek, Inc. shall delete Customer Data, unless legally prohibited (in which case, Promantek, Inc. may save a copy of the Customer Data, but may not access or use same), that is in its possession or under its control and Promantek, Inc. shall have no further obligation regarding same. In the event that Customer does not request desired data prior to the disabling of Trakstar, Promantek, Inc. shall have the right to delete Customer's content and Promantek, Inc. shall have no further obligation.

### **Continuing Obligations**

The following obligations shall survive the expiration or termination hereof: (1) any and all warranty disclaimers, limitations of liability and indemnities granted by either Party herein, (2)

any covenant granted herein for the purpose of determining ownership of, or protecting, the proprietary rights, including without limitation, the confidential information of either Party, or any remedy for breach thereof (3) the payment of any undisputed taxes, duties, or any monies due.

## **Ownership and Confidentiality**

### **Ownership**

Title to the proprietary rights embodied in the Trakstar software system shall remain in and be the sole and exclusive property of Promantek, Inc. Customer shall not alter, change, or remove any proprietary notices or confidentiality legends placed in the Trakstar software system.

### **Confidentiality of Trakstar Software**

Customer acknowledges that the Trakstar software embodies logic, design, and coding methodology, which constitute valuable confidential information that is proprietary to Promantek, Inc. and its licensors. Customer shall safeguard the right to access the Trakstar software system using the same standard of care that Customer uses for its Customer Confidential Information (as defined below), but in no event less than reasonable care.

### **Confidentiality of Customer Information**

All confidential and proprietary information of Customer and its Authorized Users and associated appraisals disclosed to Promantek, Inc. in connection with the performance of this Agreement shall be held as confidential by Promantek, Inc. and shall not, without prior written consent of Customer, be disclosed other than for the performance of this Agreement. Promantek, Inc. shall safeguard the confidentiality of employee names and associated appraisals using the same standard of care that Promantek, Inc. uses for its own confidential information, but in no event less than reasonable care. The foregoing obligation shall not apply to any Customer Confidential Information which: (1) is generally known or available, or hereafter becomes known, through no act of failure to act on the part of Promantek, Inc.; (2) is known by Promantek, Inc. at the time of receiving such information as evidenced by its written records; (3) is hereafter furnished to Promantek, Inc. by a third party, as a matter of right and without restriction on disclosure; (4) is independently developed by Promantek, Inc. as evidenced by its written and dated records and without any breach of this Agreement; or (5) is the subject of a prior written permission to disclose provided by Customer. Further, notwithstanding the foregoing, disclosure of Customer Confidential Information shall not be precluded if such disclosure: (1) is in response to a valid order of a court or other government body of the United States or (2) is otherwise required by law. However, if Promantek, Inc. is compelled by the circumstances set forth in the preceding sentence to disclose Customer Confidential Information, it shall provide Customer with prior notice of such compelled disclosure to the extent legally permitted.

# Warranties

## Operational Warranty

During the term thereof, Promantek, Inc. warrants that the Trakstar software system will conform to, operate, and be accessible through the Internet (“Operational Warranty”).

## Suitability and Liability

Except as otherwise set forth in this Agreement, Promantek, Inc., does not warrant that the Trakstar software or the hosted service will be uninterrupted or error-free or meet any particular criteria, performance, quality, accuracy, purpose, or need assumed by the Customer. In no event shall Promantek, Inc., or the Customer be liable to the other for any indirect or consequential damages.

## Remedy

Promantek, Inc.’s sole and exclusive liability for breach of the Operational Warranty shall be the replacement of service for any time the Promantek, Inc. Application Server and/or the Trakstar software does not conform to the warranted specifications. When replacement of service is not possible, Promantek, Inc.’s entire, cumulative liability for money shall be limited to that portion of the subscription license fees paid when the Promantek, Inc. Application Server and/or Trakstar software does not conform to the warranted specifications.

## Warranty Disclaimers

Except for the Operational Warranty and any other representations and warranties provided in this Agreement, Promantek, Inc., does not make any warranty of any kind, express or implied, and Promantek, Inc., specifically disclaims the implied warranties of title, noninfringement, merchantability, fitness for a particular purpose, systems integration, and data accuracy. Some states do not allow disclaimers so the above limitation may not apply. Customer acknowledges that no representations other than those contained in this agreement have been made respecting the Trakstar software system or services to be provided in this Agreement, and that the Customer has not relied on any representation not expressly set out in this Agreement. Further, Customer acknowledges and agrees that the Internet is not established or maintained by Promantek, Inc., that Promantek, Inc. has no control over the Internet, that Promantek, Inc., is not liable for the content or loss of any data transferred either to or from Customer via the Internet or stored by the Customer and that Promantek, Inc., is not liable for the discontinuance of the operation of any portion of the Internet or possible regulation of the Internet which might restrict or prohibit the operation of the Trakstar software system.

# Damages

## Limitation of Damages

Promantek, Inc.’s entire, cumulative liability for money arising out of this agreement shall be limited to that portion of the subscription license fees paid when the Trakstar software system does not conform to the specifications during the material breach of this Agreement by Promantek, Inc.

## **Disclaimer of Incidental and Consequential Damages**

In no event shall either Party be liable to the other under any theory including contract and tort (including negligence and strict products liability) for any indirect, special or incidental or consequential damages, even if the party causing such damages has been advised of the possibility of such damages. Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply.

## **Arbitration**

### **Process**

Except for the actions to protect Proprietary Rights and to enforce the arbitrator's decision hereunder, all disputes, controversies, or claims arising out of or relating to this Agreement or a breach thereof shall be submitted to and finally resolved by arbitration under the rules of the American Arbitration Association ("AAA") then in effect. There shall be one arbitrator, and such arbitrator shall be chosen by mutual agreement of the parties in accordance with AAA rules. The arbitration shall take place in Denver, CO. The arbitrator shall apply the laws of the State of Colorado to all issues in dispute. The findings of the arbitrator shall be final and binding on the parties, and may be entered in any court of competent jurisdiction for enforcement.

## **Notice**

### **Contact**

All notices and communications to Promantek, Inc. shall be directed to:

Promantek, Inc. c/o System Six Bookkeeping P.O. Box 70259 Seattle, WA 98127.

### **Notices by Personal Delivery and Postal Mail**

All notices given in writing shall be effective when either served by personal delivery or by certified or registered mail. To be effective, all such notices shall be addressed to the contact persons of the parties at their respective addresses or to such other addresses as either party may later specify by written notice.

### **Notices by E-mail**

Notwithstanding the above provisions regarding notices by personal delivery, postal delivery, and electronic transmission, an electronic mail message sent by one party to the other shall be deemed to constitute an effective notice hereunder only if (1) the electronic mail message notice prominently states that it is being given under this Agreement and requests an e-mail response acknowledging receipt; and (2) the responding electronic e-mail message (a) clearly refers to the specific e-mail message to which it is responding, and (b) includes a copy of such text of such message. Further, to be effective, all such notices shall be addressed to the contact persons of the parties at their respective e-mail addresses or to such other e-mail address as either party may later specify by written notice.

## **Governing Law**

### **State**

This Agreement shall be construed under the laws of the State of Colorado without regard to its principles of conflicts of law.

## **Assignment**

### **Customer Assignment**

Customer shall not assign this Agreement or any right of interest under this Agreement, nor delegate any work or obligation to be performed under this Agreement, without Promantek, Inc.'s prior written consent. Any attempted assignment or delegation in contravention of this Section shall be void and ineffective.

### **Promantek, Inc. Assignment**

Promantek, Inc.'s rights under this Agreement may be assigned as part of a sale or transfer of Promantek, Inc.'s business or assets without the Customer's prior approval.

## **Enforcement**

The failure of either party to enforce at any time any of the provisions hereof shall not be a waiver of such provision, or any other provision, or of the right of such party hereafter to enforce any provision hereof.

## **Entire Agreement**

### **Understanding**

This Agreement constitutes the entire understanding of the parties with respect to the subject matter of this Agreement and merges all prior communications, understandings, and agreements. This Agreement may be modified only by written agreement signed by the Parties.

## **Force Majeure**

### **Web Services**

Neither Party shall be liable for any delays or failure to perform any obligation under this Agreement caused by war, fire, flood, accident, act of God, strikes, or other differences beyond the reasonable control of the Parties. In the event that either Party is unable, due to any of the foregoing contingencies, to fulfill its obligations under this Agreement, such party shall be excused for 30 days from performing same to the extent such contingency exists and will use commercially reasonable efforts to remedy any such contingency.