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Teaching Effectively - Learning Successfully

Alex Ayers, Ed.D.
Superintendent of Schools

Dennis Holmes
Associate Superintendent
for Instructional Support

Carl Fox
Purchasing Manager

June 7, 2022

To: Board of Trustees

From: Dennis Holmes *Dennis Holmes*
Associate Superintendent for Instructional Support

Re: **Contract Approval for US SDS Inc Software**

This is for access to the online binder for Safety Data Sheets for the District.

Funding Source: General Fund.

Recommendation:

Award contract for SDS Online Software to US SDS Inc. Contract will be for three years beginning October 19, 2022.

US SDS SaaS Agreement

This US SDS SaaS Agreement (hereinafter the “Agreement”) is made and entered into on this date of August 18, 2021, by and between US SDS INC (hereinafter “US SDS” or “Party”) a Florida corporation, and Campbell County School District (hereinafter “CCSD” or “Customer” or “Client” or “Subscriber” or “Party”), with its principal place of business at 1000 West Eighth Street, Gillette, WY 82717-3033.

BACKGROUND

- A. US SDS and its partners operate www.usds.com, a platform that enables Customers to search Safety Data Sheet (hereinafter “SDS”) documents along with other SDS and health and safety functions and activities (hereinafter the “Service”).
- B. Customer wishes to subscribe to the US SDS Service and US SDS agrees to provide Customer access to the Service on the terms and conditions of this Agreement.
- C. Customer understands that its subscription to the US SDS Service is non-exclusive. Nothing in the Agreement prevents US SDS from providing the Service to any other person or party.

The Parties hereto agree as follows:

1. Contract Period

This Agreement is effective when signed by Customer and US SDS representatives (hereinafter the “Effective Date”). Initial Term of this Agreement is three (3) years starting from October 19, 2022. CCSD will be able to use the Service free of charge between the effective date and the start of the initial term of this Agreement.

2. Billing and Payment

The Service is billed in advance on a yearly basis and is non-refundable for the full term of the Agreement. There will be no refunds or credits for setup fees, partial months of service, upgrade/downgrade refunds, or refunds for unused months. All fees are exclusive of all taxes, levies, or duties imposed by taxing authorities, and Customer shall be responsible for payment of all such taxes, levies, or duties. If a payment in a billing cycle is missed for any reason whatsoever, US SDS will notify Customer of such non-payment and Customer will have ten (10) business days to make a payment. If such payment is not made within ten (10) business days, access to the system will be suspended.

The fees for use of the Service are set forth in Appendix A.

3. Representations and Warranties

General. Each Party represents and warrants that it has the right and authority to enter into this Agreement, and that by entering into this Agreement, it will not violate, conflict with or cause a material default under any other contract, agreement, indenture, decree, judgment, undertaking, conveyance, lien or encumbrance to which it is a party or by which it or any of its property is or may become subject or bound.

Compliance with the Laws. Each Party represents and warrants that no consent, approval or authorization of or designation, declaration or filing with any governmental authority is required in connection with the valid execution, delivery, and performance of this Agreement. Each Party shall, at its

own expense, comply with all laws, regulations and other legal requirements that apply to it and this Agreement, including copyright, privacy and communications decency laws.

Acceptable Use. Customer is solely responsible for the content of any postings, data, or transmissions using the Services, or any other use of the Services by Customer or by any person or entity Customer permits to access the Services. Customer represents and warrants that it will: (a) not use the Services in a manner that: (i) is prohibited by any law or regulation, or to facilitate the violation of any law or regulation; or (ii) that infringes any 3rd party's copyright including patents, trademarks or any other intellectual property right; or (iii) will disrupt a third parties' similar use; (b) not violate or tamper with the security of any US SDS computer equipment or program including but not limited to attempting to manipulate or circumvent the Service or use loopholes in the Service. If US SDS has reasonable grounds to believe that Customer is utilizing the Services for any such illegal or disruptive purpose US SDS may suspend the Services immediately with or without notice to Customer. US SDS may terminate the Agreement as contemplated in Section 11 if Customer in fact fails to adhere to the foregoing acceptable use standards.

DISCLAIMER. THE WARRANTIES SET FORTH IN THIS SECTION 3 ARE THE ONLY WARRANTIES MADE BY US SDS. US SDS AND ITS PARTNERS MAKES NO OTHER WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, WITH RESPECT TO THE SERVICES, ANY RELATED SERVICE OR SOFTWARE. TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE SERVICE IS PROVIDED "AS IS" AND "AS AVAILABLE", WITH ALL FAULTS AND WITHOUT WARRANTY OF ANY KIND, AND US SDS HEREBY EXPRESSLY DISCLAIMS ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, OR IMPLIED WARRANTIES ARISING FROM A COURSE OF DEALING OR COURSE OF PERFORMANCE. US SDS DOES NOT WARRANT THAT THE FUNCTIONS CONTAINED IN OR PERFORMED OR PROVIDED BY THE SERVICE WILL MEET YOUR REQUIREMENTS, THAT THE OPERATION OF THE SERVICES WILL BE UNINTERRUPTED OR ERROR-FREE, OR THAT DEFECTS IN THE SERVICES WILL BE CORRECTED. NO ORAL OR WRITTEN INFORMATION GIVEN BY US SDS, ITS PARTNERS, EMPLOYEES, LICENSORS, OR THE LIKE WILL CREATE A WARRANTY.

4. Limitation of Liability

UNDER NO CIRCUMSTANCES WILL US SDS OR ANYONE ELSE INVOLVED IN ADMINISTERING, DISTRIBUTING OR PROVIDING THE SERVICES, BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES THAT RESULT FROM THE USE OF OR INABILITY TO USE THE SERVICES, INCLUDING BUT NOT LIMITED TO LOSS OF REVENUE OR LOST PROFITS, OR DAMAGES THAT RESULT FROM MISTAKES, OMISSIONS, INTERRUPTIONS, DELETION OF FILES OR EMAIL, ERRORS, DEFECTS, VIRUSES, DELAYS IN OPERATION OR TRANSMISSION, FAILURE OF PERFORMANCE, THEFT , DESTRUCTION OR UNAUTHORIZED ACCESS TO US SDS'S RECORDS, PROGRAMS OR SERVICES, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN THE EVENT OF ANY BREACH BY US SDS OF THIS AGREEMENT, US SDS'S LIABILITY TO CUSTOMER WILL NOT EXCEED THE AMOUNT PAID TO US SDS BY CUSTOMER DURING THE PREVIOUS THREE MONTHS. THE FOREGOING LIMITATIONS WILL APPLY EVEN IF THE ABOVE-STATED REMEDY FAILS OF ITS ESSENTIAL PURPOSE.

5. Confidential Information

Definition. For purposes of this Agreement “Confidential Information” shall mean information including, without limitation, all Customer data, computer programs, code, algorithms, names and expertise of employees and consultants, know-how, formulas, processes, ideas, inventions (whether patentable or not), schematics and other technical, business, financial and product development plans, forecasts, strategies and information marked “Confidential”, or if disclosed verbally, is identified as confidential at the time of disclosure. In addition to the foregoing, Confidential Information shall include third party software, if any, that may be provided to Customer under this Agreement, including any related source or object codes, technical data, data output of such software, documentation, or correspondence owned by the applicable licensor. Confidential Information excludes information that: (i) was or becomes publicly known through no fault of the receiving Party; (ii) was rightfully known or becomes rightfully known to the receiving Party without confidential or proprietary restriction from a source other than the disclosing Party; (iii) is independently developed by the receiving Party without the participation of individuals who have had access to the Confidential Information; (iv) is approved by the disclosing Party for disclosure without restriction in a written document which is signed by a duly authorized officer of such disclosing Party; and (v) the receiving Party is legally compelled to disclose; provided, however, that prior to any such compelled disclosure, the receiving Party will (a) assert the privileged and confidential nature of the Confidential Information against the third party seeking disclosure and (b) cooperate fully with the disclosing Party in protecting against any such disclosure and/or obtaining a protective order narrowing the scope of such disclosure and/or use of the Confidential Information. In the event that such protection against disclosure is not obtained, the receiving Party will be entitled to disclose the Confidential Information, but only as, and to the extent, necessary to legally comply with such compelled disclosure.

Nondisclosure. During the term of this Agreement and for a period of two (2) years thereafter, each Party agrees to maintain all Confidential Information in confidence to the same extent that it protects its own similar Confidential Information, but in no event using less than reasonable care, and to use such Confidential Information only as permitted under this Agreement; Each Party agrees to only disclose the other Party’s Confidential Information to its employees: (a) with a need to know to further permitted uses of such information; and (b) who are informed of the nondisclosure/ non-use obligations imposed by this Section 5. Both parties shall take steps each determines appropriate to implement and enforce such non-disclosure/non-use obligations.

Terms of Agreement Confidential. Each of the Parties agrees not to disclose to any third party the terms of this Agreement, including pricing; however, CCSO is a governmental entity and is subject to the Public Records Act W.S. 16-4-201, and this Agreement and information related thereto may be subject to disclosure to the public pursuant to said Act.

Injunctive Relief. In the event of an actual or threatened breach of the above confidentiality provisions, the non-breaching Party will have no adequate remedy at law and will be entitled to immediate injunctive and other equitable relief, without bond and without the necessity of showing actual money damages.

6. Customer Responsibility

All content posted on the Service must comply with copyright law. Customer shall be solely responsible for securing and paying for all digital rights licenses and any other licenses from copyright owners (or their agents) if required in connection to all content provided for use in connection with Customer’s use of the Service. US SDS claims no intellectual property rights over the material Customer provides for use in the Service. All materials uploaded remain property of the Customer or its original creator. US SDS does not pre-screen content, but reserves the right (but not the obligation) in their sole discretion to refuse or remove any content that is available via the Service. The SDS information provided by the Service is in good faith and believed to be accurate as of the effective date shown on the SDS. The SDS documents

entered in to the system are from chemical manufacturers who are considered technically reliable. However, no warranty, express or implied, as to the accuracy of the information is given. US SDS and its partners shall not be liable for any error, inaccuracy, or omission. The Customer acknowledges that the original manufacturer's SDS is the de-facto source of SDS information which the Customer must rely upon and not any other views of the data presented by the Service. Regulatory requirements are subject to change and may differ between various locations. It is the Customer's responsibility to ensure its activities comply with all federal, state, or local laws. The SDS information presented by the Service pertains only to the product as shipped. Since conditions for use of the product are not under the control of the manufacturer or US SDS, it is the Customer's duty to determine the conditions necessary for the safe use of the product.

Customer shall defend, indemnify and hold harmless US SDS from and against all liabilities and costs (including reasonable attorneys' fees) arising from any and all third-party claims by any person based upon or concerning Customer's actual or alleged violation(s) of this Agreement or Customer's actual or attempted use(s) of or access to the Service, or its information.

Customer is not permitted to resell the Services.

Customer shall use the Services only for lawful purposes. To the extent deemed necessary by Customer, Customer shall implement security procedures necessary to limit access to the Services to Customer's authorized users and shall maintain a procedure external to the Services for reconstruction of lost or altered files, data or programs.

Customer is responsible for establishing designated points of contact to interface with US SDS.

7. Intellectual Property

Ownership.

(a) Subject to clause (b) below, Title to, and all Intellectual Property Rights in, the Service, the Website, and all Underlying Systems is and remains the property of US SDS and its licensors or partners. Customer must not dispute that ownership.

(b) Title to, and all Intellectual Property Rights in, the Customer data (as between the parties) remains the property of the Customer. Customer grants US SDS a worldwide, non-exclusive, fully paid up, transferable, irrevocable license to use, store, copy, modify, make available and communicate the data for any purpose in connection with the exercise of its rights and performance of its obligations in accordance with the Agreement.

Know How. To the extent not owned by US SDS, Customer grants US SDS a royalty-free, transferable, irrevocable and perpetual license to use for US SDS's own business purposes any know how, techniques, ideas, methodologies, and similar Intellectual Property used by US SDS in the provision of the Service.

Feedback. If Customer provides US SDS with ideas, comments or suggestions relating to the Service or Underlying Systems (together feedback):

(a) All Intellectual Property Rights in that feedback, and anything created as a result of that feedback (including new material, enhancements, modifications or derivative works), are owned solely by US SDS; and

(b) US SDS may use or disclose the feedback for any purpose.

Third Party Sites and Material. Customer acknowledges that the Service may link to third party websites or feeds that are connected or relevant to the Service. Any link from the Service does not imply any US SDS endorsement, approval or recommendation of, or responsibility for, those websites or feeds or their content or operators. To the maximum extent permitted by law, US SDS excludes all responsibility or liability for those websites or feeds.

Third Party Intellectual Property Rights Indemnity.

(a) US SDS indemnifies Customer against any claim or proceeding brought against Customer to the extent that claim or proceeding alleges that the Customer's use of the Service in accordance with the Agreement constitutes an infringement of a third party's Intellectual Property Rights (IP Claim). The indemnity is subject to the Customer:

- (i) promptly notifying US SDS in writing of the IP Claim;
- (ii) making no admission of liability and not otherwise prejudicing or settling the IP Claim, without US SDS's prior written consent; and
- (iii) giving US SDS complete authority and information required for US SDS to conduct and/or settle the negotiations and litigation relating to the IP Claim. The costs incurred or recovered are for US SDS's account.

(b) The indemnity in the clause (a) above does not apply to the extent that an IP Claim arises from or in connection with:

- (i) the Customer's breach of the Agreement;
- (ii) use of the Service in a manner or for a purpose not reasonably contemplated by the Agreement or otherwise not authorized in writing by US SDS; or
- (iii) any third party data or any SDS data.

(c) If at any time an IP Claim is made, or in US SDS's reasonable opinion is likely to be made, then in defence or settlement of the IP Claim, US SDS may (at US SDS's option):

- (i) obtain for the Customer the right to continue using the items which are the subject of the IP Claim; or
- (ii) modify, re-perform or replace the items which are the subject of the IP Claim so they become non-infringing.

8. Customer Data

All data provided by Customer or inputted by Customer is owned by Customer and is to be strictly held as confidential. US SDS will delete and destroy all copies of the data once the Agreement is terminated with or without default. Customer has the option to receive a backup of the data prior to deletion per section 10.

All right, title and interest in and to any material, and all copyrights, patents, trademarks, service marks or other intellectual property or proprietary rights relating thereto, belong exclusively to US SDS. Any modification to the Service performed by US SDS on behalf of the Customer directly or indirectly extending the current capabilities shall be the property of US SDS and all copyrights and other rights are hereby assigned to US SDS.

9. Availability

US SDS will use reasonable efforts to ensure the Service is available on a 24/7 basis. However, it is possible that on occasion the Service may be unavailable to permit maintenance or other development activity to take place, or in the event of Force Majeure. US SDS will use reasonable efforts to publish on the US SDS website advance details of any unavailability.

Through the use of web services and APIs, the Service may interoperate with a range of third party service features. US SDS does not make any warranty or representation on the availability of those features. Without limiting the previous sentence, if a third party feature provider ceases to provide that feature or ceases to make that feature available on reasonable terms, US SDS may cease to make available that feature to the Client. To avoid doubt, if US SDS exercises its right to cease the availability of a third party feature, the Client is not entitled to any refund, discount or other compensation.

10. Back-up of Data

While US SDS will take standard industry measures to back up all data stored using the Service, the Customer agrees to keep a separate back-up copy of all data uploaded into the Service. All data and backups are stored in US facilities.

11. Termination

If a Party fails to perform or observe any material term or condition of this Agreement and the failure continues unremedied for thirty (30) days after receipt of written notice, the other Party may terminate this agreement; provided, however, that where the breach is the failure of payment by Customer of any charge when due, US SDS, may, at its option, terminate or suspend Services if Customer does not cure said breach within ten (10) days following notice to Customer of the delinquency.

This Agreement may be terminated immediately upon written notice by either Party if the other Party becomes insolvent or involved in a liquidation or termination of business, files a bankruptcy petition, has an involuntary bankruptcy petition filed against it (if not dismissed within thirty days of filing), becomes adjudicated bankrupt, or becomes involved in an assignment for the benefit of its creditors.

Customer shall be responsible for payment of all charges under a terminated Agreement incurred as of the effective date of termination. If a Customer breach is the cause of the termination then Customer is responsible for all charges incurred for the full term of the Agreement.

12. General Provisions & Force Majeure

(a) The US SDS privacy policy contained on the US SDS website is incorporated by reference into this Agreement and any dispute arising from this privacy policy or otherwise will be resolved exclusively in accordance with the terms contained in this Agreement.

(b) This Agreement, including the US SDS privacy policy, any amendments, appendixes, and attachments hereto that are incorporated herein, constitute the entire agreement between the parties and shall be binding on the parties when accepted by Customer. No modification, termination or waiver of any provisions of this Agreement shall be binding upon a Party unless in writing signed by an authorized officer of the relevant Party(ies). No provision of any purchase order or other document issued by Customer, which purports to alter, vary, modify or add to the provisions of this Agreement, shall be

binding upon US SDS or effective for any purpose, unless accepted by US SDS in writing. It is further expressly understood and agreed that, there being no expectations to the contrary between the parties, no usage of trade or other regular practice or method of dealing either within the computer software industry, US SDS's industry or between the parties shall be used to modify, interpret, supplement, or alter in any manner the express terms of this Agreement or any part thereof.

(c) Nothing contained in this Agreement shall be construed as creating a joint venture, partnership, or employment relationship between the parties, nor shall either Party have the right, power, or authority to create any obligation or duty, express or implied, on behalf of the other.

(d) Neither party may assign or delegate its rights or obligations pursuant to this Agreement without the prior written consent of the other. Such consent shall not be unreasonably withheld. However, no consent is required for an assignment that occurs (a) to an entity in which the transferring party owns more than 50% of the assets, or (b) as part of a transfer of all or substantially all of the assets of the transferring party to any party. Any assignment or delegation in violation of this section shall be void.

(e) If any provision or provisions of this Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

(f) No delay or failure of US SDS or Customer in exercising any right herein and no partial or single exercise thereof shall be deemed of itself to constitute a waiver of such right or any other rights herein. Any waiver by US SDS or Customer of any breach of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent or other breach.

(g) In the event that either Party is unable to perform any of its obligations under this Agreement or to enjoy any of its benefits because of natural disaster, terrorism, fire, explosion, power blackout, earthquake, flood, the elements, strike, embargo, labor disputes, acts of civil or military authority, war, acts of god, acts or omissions of carriers or suppliers, acts of regulatory or governmental agencies, actions or decrees of governmental bodies or communication line failure not the fault of the affected Party or other causes beyond such Party's reasonable control (a "Force Majeure Event") the Party who has been so affected shall immediately give notice to the other Party and shall do everything possible to resume performance. Upon receipt of such notice, all obligations under this Agreement shall be immediately suspended. If the period of nonperformance exceeds seven (7) days from the receipt of notice of the Force Majeure Event, the Party whose ability to perform has not been so affected may by giving written notice immediately terminate this Agreement as provided in Section 11.

(h) This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, and each of which together shall constitute a single instrument.

(i) This Agreement and all questions of interpretation, construction and enforcement hereof, and all controversies hereunder shall be governed by the laws of the State of Wyoming without regard to conflict of law rules or principles that could result in the application of the laws of any other jurisdiction.

Signature below by your authorized representative is your consent to the terms and conditions of this agreement

CCSD:

By: _____

Print: _____

Title: _____

US SDS:

By:  _____

Print: Gary Toste _____

Title: Director _____

APPENDIX A

Licensing of the SDS Management module:

- Yearly subscription fee: US\$2,500 (two thousand five hundred US dollars).