

PROFESSIONAL SERVICES AGREEMENT

bergankDV

EMPOWERING PEOPLE and CREATING A WOW EXPERIENCE FOR OUR CLIENTS.

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PROFESSIONAL SERVICES AGREEMENT S&D_001.

This Professional Services Agreement (the “**Agreement**”) is made and entered into as of April 1, 2022 by and between the following parties:

“Service Provider:”

BerganKDV, Ltd.
220 Park Avenue South
P.O. Box 1304
St. Cloud, MN 56301
email: nick.taintor@bergankdv.com

“Client:”

Lewiston-Altura ISD 857
100 County Rd 25
Lewiston, MN 55952
Email - gcarman@lewalt.k12.mn.us

Recitals

The Client desires that Service Provider provide certain services, consultancy, and/or training for Client pursuant to the terms and provisions of this Agreement, and the Service Provider desires to perform such services pursuant to the terms and provisions of this Agreement.

Agreement

In consideration of the recitals above and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties to this Agreement agree as follows

1. Definitions.

The following terms shall have the meaning given below when used in this Agreement.

“Affiliate” means any subsidiary companies of BerganKDV.

“Agreement” means as defined in the preface of this Agreement, and also includes all exhibits, attachments, and worksheets attached hereto, as well as all Service Schedules.

“Client” means as defined in the beginning of this Agreement.

“Confidential Information” means (i) either party’s business or financial information and plans, documents, works in progress, work processes, trade secrets, or other secret or confidential matter related to either party’s business or projects and/or their affiliated or subsidiary companies, including, without limitation, Client’s customer information; and (ii) any other information that either party designates as confidential, or which, under the circumstances of disclosure, should be treated as confidential.

“Intellectual Property Rights” means copyrights, trade and service marks, trade names, rights in logos and get-up, inventions, confidential information, trade secrets, registered designs, design rights, patents, all rights of whatsoever nature in computer software and data, database rights, all rights of privacy and all intangible rights and privileges of a nature similar to any of the foregoing, in every case in any part of the world and whether or not registered, and including all granted registrations and all applications for registration in respect of any of the same.

“Network” means as defined in Section 6.2.

“Service Provider” means as defined in the beginning of this Agreement on page 1.

“Service Provider Materials” means (i) any property of Service Provider including, without limitation, computer hardware or software programs, products, materials or methodologies and reports, studies, data, diagrams, charts, specifications, gateways, bridges and integrations with third party code; (ii) any modifications to Service Provider’ pre-existing software produced on behalf of Client; (iii) works or materials created and developed by Service Provider prior to or independently of the Services; and (iv) residual knowledge and know-how of general applicability resulting from performance of the Services.

“Services” means the work product and services to be provided by Service Provider pursuant to this Agreement and the Service Schedule(s).

“Service Schedule” and **“Service Schedules”** mean as such are discussed and defined in Section 2.

“Term” means as defined in Section 4.1.

Other terms may be defined throughout this Agreement.

2. Services.

2.1. Service Schedules. Services to be performed by Service Provider for Client shall be done according to Service Schedules that the parties may agree to from time to time in writing. All such Service Schedules are to contain, in combination with other terms and provisions of this Agreement, all the terms and provisions pursuant to the performance of the Services addressed in the Service Schedule. A Service Schedule under this Agreement is any document, agreed to in writing by the parties, that discusses the terms and provisions of the Services to be rendered, and need not necessarily be labeled “Service Schedule.” No Services will be rendered by Service Provider that are not subject to the terms and provisions of this Agreement.

2.2. Conflicts between Agreement and Service Schedule. If there is a conflict of terms and provisions between a Service Schedule and the other terms and provisions of this Agreement, the terms and provisions of the Service Schedule shall control with respect to the conflicting terms and provisions, unless the Service Schedule conflicts with Section 5 or 6 of this Agreement, in which case Sections 5 and 6 of this Agreement shall control with respect to the conflicting terms.

2.3. Performance by Affiliates. Service Provider reserves the right to have one or more of its affiliates perform the Services.

2.4. Services Modifications. The Services to be provided shall not be modified or changed without the written permission to a change signed by the parties to this Agreement.

3. Payment for Services.

3.1. Payment Terms for Services Fees. Fees, rates, expenses, and payment terms for Services are to be set forth in the Services applicable Service Schedule and elsewhere in this Agreement. Payments owed for Services and other expenses and charges pursuant to this Agreement will be invoiced monthly, unless stated to the contrary in the Service Schedule. All payments shall be due

within fifteen (15) days of receipt of invoice. Service Provider hereby reserves the right to change all fees, rates, expenses, and payment terms in any Service Schedule by giving at least 90 days prior written notice to Client with respect to the changes that are to be made.

3.2. **Interest on Past Due Amounts.** If an invoice is not paid by its due date, Service Provider will charge Client and Client will pay an interest charge of one percent (1%) per month on the unpaid balance of an invoice.

3.3. **Certain Remedies for Nonpayment.** If Client fails to pay to Service Provider, within 10 days after Service Provider makes written demand therefor, any past-due amount payable under this Agreement (including interest thereon), then, in addition to all other rights and remedies which Service Provider may have at law or in equity, Service Provider may, in its sole discretion, decide to suspend Client's access to the Services until all undisputed past due amounts are paid in full. Additionally, upon initial notice of payment required, Service Provider shall have the right to place a No Service Hold for support on Client's account. Any withholding of Services or support due to an undisputed failure by Client to pay does not relieve Client from its obligation to pay for the Services during the time the Services and/or support are withheld.

3.4. **Taxes.** Client shall, in addition to the payments required under this Agreement, be responsible for and pay all sales, use, excise, or other taxes, whether state or local, however designated, which are levied or imposed by reason of the transactions contemplated by this Agreement, excluding however, income or franchise or other taxes imposed upon Service Provider.

4. **Term of Agreement.**

4.1. **Term.** Unless set forth to the contrary in any Service Schedule or unless terminated earlier pursuant to the terms and provisions of this Agreement, the term for the provision of Services pursuant to this Agreement (the "**Term**") shall end upon termination pursuant to Section 4.3.

4.2. **Services Performed After end of Term.** In the event that the Services are provided after a scheduled end of the Term, Client will continue to pay Service Provider for Services rendered after the end of the Term pursuant to this Agreement.

4.3. **Termination.** The Term may be terminated pursuant to the terms and provisions of this Section 4.3 below.

- (a) Service Provider may terminate the Term for any reason by giving Client 90 days' prior written notice.
- (b) Client may terminate the Term for any reason by giving Service Provider 90 days' prior written notice. However, in lieu of providing the advanced written notice, Client may terminate the Term immediately upon written notice if it pays Service Provider an amount equal to the charges for two months of Services that would have been charged under this Agreement with the notice of termination.

4.4. **Enforceability Post-Termination.** Upon the end of the Term, the provision of Services is to stop. All other terms and provisions of this Agreement (i.e., all those that are not for the provision of Services) shall remain in full force and effect after the end of the Term.

4.5. **Procedures Upon Termination.** Upon the end of the Term, Service Provider shall prepare final invoices for Services and provide them to Client, and Client shall pay the same pursuant to the invoice terms.

5. Confidentiality and Certain Restrictive Covenants.

5.1. **Confidentiality.** Each party shall protect the other party's Confidential Information with the same degree of care that it applies to its own similar Confidential Information, but in no event less than a reasonable degree of care, given the nature of the information disclosed. Each party may disclose the Confidential Information to its affiliates, provided that they are bound by the obligations set forth herein. The prior Confidentiality restrictions shall not apply to (a) information generally available to the public; (b) information released by disclosing party generally without restriction; (c) information independently developed or acquired by receiving party without reliance in any way on the protected information of disclosing party; or (d) information approved for the use and disclosure of receiving party by the disclosing party, in writing. Either party may use or disclose the other party's Confidential Information if required by any request or order of any government authority, or otherwise as required by law, or as necessary to establish and enforce that party's rights under this Agreement. Before disclosing the other party's Confidential Information for such purpose, reasonable efforts must be made to notify the other party of the circumstances, if legally allowed, and the parties shall cooperate with each other, at disclosing party's expense, to obtain protection for the confidentiality thereof to the extent available or contest and avoid such disclosure.

5.2. **Non-solicitation of Employees.** Client shall not offer employment to or employ any personnel of Service Provider or its affiliates for a period of one (1) year after the date that provision of Services by Service Provider under this Agreement ends.

6. Warranties and Limitations.

6.1. **General Warranty.** Service Provider warrants that all Services will be provided in a professional and workmanlike manner in accordance with industry standards.

6.2. **Network.** Client understands that the general reliability of the private wide-area-networks, network computers, servers and related systems and the Internet, and of connections to and from the network, (collectively the "**Network**"), may be controlled by factors beyond the control of Service Provider. Because of this it is impossible for Service Provider to guaranty the provision of the Services will be uninterrupted, that the Client will be able to properly access and use the Services or that the Services will be provided without error. Service Provider shall have no obligation to remedy any such interruptions, inabilities or errors.

6.3. **All Obligations Set Forth in This Agreement.** Service Provider shall not be responsible for any delays and Services unavailability of any kind, regardless of cause, except as provided in this Agreement. Client expressly waives any claims against Service Provider for loss, injury, or damage of any kind, directly or indirectly, resulting from Client's use of the Services or from any defects therein, except as otherwise expressly provided in this Agreement.

6.4. **Warranty Limitation.** EXCEPT FOR THE EXPRESS WARRANTIES STATED IN THIS AGREEMENT, SERVICE PROVIDER DISCLAIMS ALL WARRANTIES ON SERVICES FURNISHED UNDER THIS AGREEMENT INCLUDING WITHOUT LIMITATION, ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE; AND THE STATED EXPRESS WARRANTIES ARE IN LIEU OF ALL OBLIGATIONS OR LIABILITIES ON THE PART OF SERVICE PROVIDER ARISING OUT OF OR IN CONNECTION WITH THE PERFORMANCE OF SERVICE PROVIDER UNDER THIS AGREEMENT.

6.5. **Third Party Matters.** Notwithstanding anything herein to the contrary, Service Provider makes no warranties or guarantees regarding (a) the Services that are to be provided by third parties that are not a party to this Agreement, or (b) any Services use and utilize the assets, software, or intellectual property of third parties that Service Provider has a contractual right or license to use (the foregoing Services are referred to herein as the “**Third Party Services**”). In the event of a Service issue or failure with respect to any Third Party Services (a) the parties will work together, each at their own cost and expense, to attempt to either solve the matter or obtain a reasonable solution for the parties (to the extent one is available) from the third party; and (b) if Client desires to pursue a claim against the third party in a court of law, and such claim has a reasonable possibility of success, and Service Provider does not desire to participate in such claim, then Client will be permitted to seek such a claim in a court of law at its own cost and expense, and Service Provider will assign any rights it may have with respect to the third party related to the claim. However, Client hereby acknowledges that taking legal action against any such third party may subject it to indemnification obligations pursuant to the immediately following sentence. Client hereby agrees to indemnify, defend, and hold harmless Service Provider from any and all losses, claims, damages, judgments, expenses, and costs that any third party provider of Third Party Services may claim or receive from Services Provider arising from or due, in any way whatsoever, to the action, inaction, or negligence of Client (or its employees or agents). Client acknowledges and agrees that Services Provider will enter into contracts or licenses with third parties from time to time related to the Third Party Services. Service Provider will provide copies of any such contracts or licenses related to the Third Party Services within five days of Client’s written request for the same. Service Provider shall have the right to enter into, amend, rework, or modify any contract or license related to any Third Party Services as it determines from time to time at its sole discretion and without the consent of or notification to Client.

6.6. **Quality Inputs.** Notwithstanding anything herein to the contrary, Client agrees and acknowledges that it assumes all risk, loss, and damage that arises from Client either inputting or providing incorrect data, information, dates, or formulas to Service Provider that are used by Service Provider in the provision of Services. Service Provider makes no representation or warranty with respect to the accuracy or validity of information provided pursuant to the Services that may be based upon faulty or incorrect data, information, dates, or formulas provided by Client. Client hereby agrees that it will immediately notify Service Provider when it becomes aware that it has provided or input incorrect or faulty data, information, dates, or formulas with respect to the Services so that Service Provider can address the matter. Client hereby agrees to indemnify, defend, and hold harmless Service Provider from any and all losses, claims, damages, judgments, expenses, and costs it incurs because Client (or its employees or agents) has provided or input incorrect or faulty data, information, dates, or formulas to Service Provider with respect to the Services.

6.7. **Limitation on Damages.** Notwithstanding anything herein to the contrary, Client acknowledges and agrees that the maximum amount that it can collect from Service Provider or its affiliates for any breach of this Agreement or otherwise, whether pursuant to this Agreement or otherwise under the law, shall be limited to the average monthly amount invoiced under this Agreement during the Term.

6.8. **Waiver of Consequential Damages.** Notwithstanding anything herein to the contrary, in no event shall either party be liable for indirect, special, incidental, or consequential damages, loss or profits, loss of use of data or interruption of business, whether such alleged damages are alleged in tort, contract, or indemnity, even if such party has been advised of the possibility of such damages.

7. Security of Information.

7.1. **Passwords – Client Responsibility.** Client and its employees and agents will protect and keep confidential any passwords related to the Services. If any such password is stolen, acquired, or used by a third party pursuant to the actions, inactions, or negligence of Client or its employees and agents, then, (a) Client assumes all risk of loss with respect to such matter, and (b) Client will indemnify, defend, and hold harmless Service Provider from any and all losses, claims, damages, judgments, expenses, and costs it incurs because Client (or its employees or agents) has breached the terms and provisions of this Section 7.1.

7.2. **General Security.** Service Provider will take reasonable steps consistent with industry standards to protect and secure any personal information of Client and its employees that may be provided pursuant to the provision of the Services. Notwithstanding the foregoing, Client shall be liable and responsible for (and Service Provider has no liability or responsibility for) the security of any personal information of Client and its employees that may be provided pursuant to the provision of the Services (a) that is acquired by some third party through Client's hardware or equipment, or (b) that is acquired by some third party due some action, inaction, or negligence of Client (or employee or agent) that is not consistent with the reasonable actions of an employer that desires to keep such data confidential.

7.3. **HIPAA.** Notwithstanding anything herein to the contrary, (a) Client retains the responsibility for being compliant with any applicable HIPAA laws and regulations that may apply to information provided by Client pursuant to the Services, and (b) Service Provider makes no representation or warranty that the operation of the Services and security of Client information (including employee information) with respect to the Services is compliant with any applicable HIPAA laws and regulations.

8. Intellectual Property Rights and Ownership.

8.1. **Ownership.** Service Provider shall own all Intellectual Property Rights with respect to the Service Provider Materials, and the ownership of such will not transfer to Client.

8.2. **License.** If any Service Provider Materials are delivered to Client as part of the Services, Client shall have a royalty-free, non-exclusive worldwide license to use, copy, modify and distribute internally such Service Provider Materials during the Term.

9. Miscellaneous.

9.1. **Notification.** All notices, requests, demands and other communications which are required or may be given under this Agreement will be in writing and will be deemed to have been duly given when received if personally delivered; when transmitted if transmitted by confirmed facsimile, electronic or digital transmission method; the day after it is sent, if sent for next day delivery to a domestic address by recognized overnight delivery service (e.g., Federal Express); and upon receipt, if sent by certified or registered mail, return receipt requested. In each case notice will be sent pursuant to the addresses and notice information for each party on page 1 of this Agreement, provided, however, that any party may change such party's notice information by notice to the other given as set forth above, and such change will be effective when received pursuant to the prior provisions.

9.2. **Force Majeure.** Either party shall be excused from delays in performing or from its failure to perform pursuant to this Agreement to the extent that such delays or failures result from causes beyond the reasonable control of such party; provided that, in order to be excused from delay or failure to perform, such party must act diligently to remedy the cause of such delay or failure. to the extent possible.

9.3. **No Agency.** Service Provider is acting solely as an independent contractor in rendering performance under this Agreement. In no way is Service Provider to be construed as the agent or acting as the agent of Client in any respect.

9.4. **Assignment.** This Agreement may not be assigned by either party without the express written consent of the other party, except that either party may assign or transfer this Agreement, in whole or in part, to any of its affiliates or to any successors to substantially all of that part of Service Provider' business to which this Agreement relates. Subject to the foregoing, any assignee under this Agreement shall be subject to all of the terms, conditions and provisions of this Agreement.

9.5. **Invalidity.** If any provision of this Agreement is held to be invalid, the other provisions will not be affected to the greatest extent possible consistent with the parties' intent.

9.6. **Compliance with Laws.** Each party agrees to comply with all applicable laws, regulations, and ordinances relating to their performance under this Agreement.

9.7. **Waiver.** A waiver by either of the parties of any of the covenants, conditions, or agreements to be performed by the other shall not be construed to be a waiver of any succeeding breach thereof or of any covenant, condition, or agreement herein contained.



9.8. **Governing Law.** This Agreement shall be governed by the laws of Minnesota, without regard to its conflict of law provisions. The federal and state courts in the State of Minnesota shall have exclusive jurisdiction to settle any disputes in connection with this Agreement.

9.9. **Counterparts.** This Agreement may be executed and delivered by original signature, facsimile, or other image capturing technology, and in one or more counterparts, each of which will be deemed to be an original copy of this Agreement and all of which, when taken together, will be deemed to constitute one and the same agreement.

9.10. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties in relation to the matters addressed in this Agreement and supersedes all prior written or oral communications and representations with respect to the matters addressed in this Agreement.

[Signature Page Follows]

The parties have caused this Agreement to be signed and delivered as of the date set forth in the preface of this Agreement.

BerganKDV, Ltd.	
signature:	
name:	Nick Taintot
title:	Director of School Services
date:	4/5/2022
Client Name: Lewiston-Altura ISD 857	
signature:	
name:	Gwen Carman
title:	Superintendent
date:	3-28-2022