

AUG 23 2021

Approved

**REQUEST FOR AGENDA PLACEMENT FORM**

Submission Deadline - Tuesday, 12:00 PM before Court Dates

**SUBMITTED BY:** David R. Lloyd

**TODAY'S DATE:** August 17, 2021

**DEPARTMENT:** District Clerk

**SIGNATURE OF DEPARTMENT HEAD:** \_\_\_\_\_



**REQUESTED AGENDA DATE:** ASAP

**SPECIFIC AGENDA WORDING:** SpitFire Dialer Conditions of Purchase ("Agreement")

**PERSON(S) TO PRESENT ITEM:** David R. Lloyd

**SUPPORT MATERIAL:** SpitFire Dialer Conditions of Purchase ("Agreement")

**TIME:** 5 minutes

(Anticipated number of minutes needed to discuss item)

**ACTION ITEM:** X

**WORKSHOP:** \_\_\_\_\_

**CONSENT:** \_\_\_\_\_

**EXECUTIVE:** \_\_\_\_\_

**STAFF NOTICE:**

**COUNTY ATTORNEY:** X

**IT DEPARTMENT:** X

**AUDITOR:** X

**PURCHASING DEPARTMENT:** X

**PERSONNEL:** \_\_\_\_\_

**PUBLIC WORKS:** \_\_\_\_\_

**BUDGET COORDINATOR:** X

**OTHER:** \_\_\_\_\_

\*\*\*\*\* This Section to be Completed by County Judge's Office \*\*\*\*\*

ASSIGNED AGENDA DATE: \_\_\_\_\_

REQUEST RECEIVED BY COUNTY JUDGE'S OFFICE: \_\_\_\_\_

COURT MEMBER APPROVAL: \_\_\_\_\_ DATE: \_\_\_\_\_

### SpitFire Enterprise Conditions of Purchase

These SpitFire Dialer Conditions of Purchase ("Agreement") constitute a binding contract made by and between OPC MARKETING, INC., and Purchaser ("Purchaser") Jackson County, Texas on \_\_\_\_\_, OPC MARKETING, INC. and Purchaser hereby agree to the following terms and conditions:

1. **Non-Exclusive Software License:** Upon receipt of the purchase price from Purchaser, Purchaser will own the software on a non-exclusive basis and OPC MARKETING, INC hereby grants Purchaser a limited, non-exclusive license to use the software described on Purchaser's invoice in perpetuity. Purchaser alone is the authorized user of the software and Purchaser may not allow any other person or entity ("Unauthorized Users") to make any use of the software. Purchaser must immediately report to OPC MARKETING, INC. any use or attempted use of the software by any Unauthorized Users. Purchaser may not, at any time, resell or re-license the software to any Unauthorized User. Upon termination by either party, this license shall immediately terminate and Purchaser shall make no further use of the software. Except as otherwise specifically permitted in this Agreement, Purchaser may not: (a) modify or create any derivative works of any software, service or documentation, including translation or localization (code written to published APIs (application programming interfaces) for the software shall not be deemed derivative works); (b) sublicense or permit simultaneous use of the software by more than one user; (c) reverse engineer, decompile, or disassemble or otherwise attempt to derive the source code for any software related to the software (except to the extent applicable laws specifically prohibit such restriction); (d) redistribute, encumber, sell, rent, lease, sublicense, use the software in a timesharing or service bureau arrangement, or otherwise transfer rights to any software; (e) remove or alter any trademark, logo, copyright or other proprietary notices, legends, symbols or labels in the software; (f) publish any results of benchmark tests run on any software to a third party without prior express written consent from OPC MARKETING, INC. Details of the SOFTWARE LICENSE are included in the "License Info" link on the Manager App. OPC MARKETING, INC. software is protected with a security key or dongle. Purchaser is responsible for the dongle. In the case of a lost dongle, Purchaser is responsible for replacement at actual cost. The software license shall immediately and automatically be suspended if at any time, Purchaser defaults under its obligations under this Agreement or nonpayment according to the invoice.
2. **Optional Domain Hosting Service.** Purchaser may prepay an additional, monthly, mutually agreed upon amount, as reflected by invoice amount, for OPC MARKETING, INC.'s optional domain hosting service, subject to these terms, and then may cancel this service only on 30 days' prior written notice. Pricing may be changed from time to time on advance written notice to Purchaser. OPC MARKETING, INC. shall assign to Purchaser an appropriate spitfire.com sub ("wild card") domain name (example: [your company name].spitfireagent.com). OPC MARKETING, INC. shall provide the hosting in a commercially reasonable manner, but otherwise disclaims all warranties and representations regarding the same. OPC MARKETING, INC. cannot guarantee the reliability of its third-party providers/suppliers related to the domains, or that the hosting services shall be available at all times or free from isolated errors. Reasonable hosting down time may occur, including without limitation for provider outages, system upgrades, maintenance, repairs, and acts of god/nature. OPC MARKETING, INC. assumes no legal responsibility or liability for Purchaser's use of the domain. Purchaser must operate in full compliance with all laws and regulations and must not use the assigned domain for any other purpose not contemplated herein. Purchaser understands that if OPC MARKETING, INC. receives a court order, subpoena, civil investigative demand or other legal notice that OPC MARKETING, INC. deems in its discretion to be valid, OPC MARKETING, INC. may be required to either suspend or terminate the hosting. OPC MARKETING, INC may also be required to provide information about Purchaser as the user of the domain, to the requesting party. OPC MARKETING, INC. may suspend or terminate the hosting at any time in the event it reasonably believes Purchaser has violated the law, or subjected OPC MARKETING, INC. to unreasonable legal exposure.
3. **Refund Policy:** This product is not refundable.
4. **Compliance with Law:** Purchaser is required to use the software in full compliance with all applicable laws and regulations, including without limitation, all state, federal and international: (1) Do-Not-Call



- (“DNC”) list prohibitions; (2) telemarketer licensing and bonding requirements; (3) consumer cancellation rights; (4) mandatory disclosures; (5) cell phone restrictions; (6) auto dialer and pre-recorded message restrictions; (7) internal DNC/opt-out rules; (8) recording of any calls or information, including but not limited to calls or information pertaining to or in any way related to the use of the software; and (9) all other applicable laws and regulations. OPC MARKETING, INC. shall in no way or manner be liable for any matter involving or relating to the recording of any calls or information. Additionally, should the software or any item sold to Purchaser by OPC MARKETING, INC. fail to record any calls or information for any reason whatsoever, OPC MARKETING, INC. shall not be liable to Purchaser or any other party for any damages or matters caused by such failure to record. By making any use of the software, Purchaser expressly warrants to us that Purchaser is and shall continue to act in full compliance with the law. All OPC MARKETING, INC. offers are void where prohibited by law. Purchaser agrees that they have read and understand the FTC’s Telemarketing Sales Rule (“TSR”) and the FCC’s Telephone Consumer Protection Act (“TCPA”), and all other applicable laws and regulations. Purchaser should review these rules with Purchaser’s own legal counsel to ensure that Purchaser understands and is fully compliant. OPC MARKETING, INC. does not assume responsibility for ensuring that Purchaser’s marketing campaigns meet applicable legal requirements. OPC MARKETING, INC. will not assume any liability if Purchaser is ever held guilty or liable for any law violation. Notwithstanding the foregoing, Purchaser acknowledges that OPC MARKETING, INC. has and is taking active steps to ensure the compliance of its customers, including by having Purchaser agree to these terms.
5. **SAN Numbers:** Purchaser acknowledges that sellers and telemarketers may be required to purchase their own Subscription Account Number (“SAN”) from the FCC, including all area codes into which they call or transmit messages. Therefore, Purchaser agrees, if applicable, that Purchaser will obtain Purchaser’s own SAN (or “exempt” SAN if applicable) and purchase all applicable area codes as required by law. Even if Purchaser is exempt from DNC rules, Purchaser may be required to obtain an “exempt” SAN if Purchaser chooses to voluntarily scrub against the DNC list. If applicable, Purchaser also agrees to purchase and scrub against any applicable state DNC lists. OPC MARKETING, INC. cannot and shall not maintain any SAN number for the Purchaser or obtain one on Purchaser’s behalf.
  6. **Call Abandonment Rate/Drop Rate:** Purchaser understands and agrees that among other things, telemarketers who use automated dialers to initiate outbound calls are prohibited from abandoning (failing to connect to live operator within 2 seconds of the answer) more than 3% of all outgoing calls as measured on a successive 30-day basis per individual calling campaign. Purchaser is responsible (not OPC MARKETING INC.) for ensuring that Purchaser’s abandonment rate does not exceed the maximum amount allowed by law. Purchaser is required to actively monitor Purchaser’s abandonment rate and to scale back call volumes or cease calling as necessary in order to comply. Purchaser also understands that certain disclosures are required by the FCC for all abandoned calls and Purchaser agrees to comply with the same.
  7. **Cell Phones:** Purchaser understands and acknowledges that it is generally a violation of the recently amended TCPA to make calls with any device capable of automated dialing to a cell phone without prior express written consent. Purchaser will be responsible for ensuring that Purchaser does not call cell numbers with any device capable of automated dialing without the appropriate consent. If Purchaser does not have appropriate cell consent leads to call, Purchaser will purchase and timely scrub against a national list of wireless numbers and numbers ported from landlines to cell phones. OPC MARKETING, INC. is not responsible for ensuring that Purchaser does not call cell phones in violation of the consent rules.
  8. **Safe Harbor:** Purchasers who purchase OPC MARKETING, INC.’s software agree to create and enforce their own internal safe harbor and DNC policies and procedures in full compliance with the law. Federal regulations provide for a limited “safe harbor” defense to certain DNC violations. Some of the elements of the safe harbor defense are: (1) establish and implement written procedures to comply with DNC restrictions; (2) train personnel, and any entity assisting in compliance, in the written procedures; (3) monitor and enforce compliance with the written procedures; (4) maintain an entity-specific DNC/opt-out list; (5) use a process to prevent telemarketing calls to numbers on the national, state (if applicable), and entity-specific internal DNC lists. A good safe harbor program and DNC policy is not a complete solution to telemarketing compliance; they are only one component of telemarketing compliance. Purchaser will remain responsible to maintain, follow, and enforce good DNC procedures.



9. **No Legal, Financial or Tax Advice Provided:** No financial, legal, or tax advice or counsel is given, or shall be deemed to have been given by OPC MARKETING, INC. or its affiliates and contractors, or by the software.
10. **Indemnification:** Purchaser shall assume, pay, indemnify, hold harmless, and reimburse OPC MARKETING, INC. and its owners, employees, agents, affiliates, contractors, successors and assigns for any and all liabilities, damages, claims, suits, settlements, judgments, costs, and expenses (including reasonable attorney's fees and court costs) directly or indirectly incurred by OPC MARKETING, INC. to the extent the same are related in any way to Purchaser's use of the software or which are primarily attributable to the negligence or intentional acts or omissions by Purchaser, Purchaser's owners, officers, employees, agents and representatives, including any authorized or unauthorized users. Notwithstanding the foregoing, nothing contained herein shall release OPC MARKETING, INC. from any liability for its own gross negligence, except as allowed by law. *The indemnification provision is subject to limitation by Texas Law applicable to Political subdivisions of the State of Texas.*
11. **Limitation of Liability:** Neither party shall be liable for any consequential, incidental, special, or indirect damages (including, but not limited to, loss of profits, goodwill, use, data, or other intangible items) even if the other party has been advised of the possibility of such damages or losses. OPC MARKETING, INC. is not responsible for any failure of a DNC or wireless list provider to deliver its data accurately, completely, or in a timely way. OPC MARKETING, INC. is not responsible for damages resulting from improper or incomplete use by Purchaser of OPC MARKETING, INC.'s products and services. With respect to any other damages, OPC MARKETING, INC.'s liability hereunder shall in no event exceed an amount equal to the amount actually paid by Purchaser to OPC MARKETING, INC. in the month prior to a claim being made, regardless of the basis for the claim. Purchaser understands that this is a significant limitation on Purchaser's right to sue OPC MARKETING, INC. and Purchaser should not proceed if Purchaser does not agree. OPC MARKETING, INC. shall not be bound by any typographical or other error or misprint in its marketing materials or online purchase websites, so long as OPC MARKETING, INC. provides prompt notice of any such error and corrects the same.
12. **Warranties:** Except as otherwise provided herein, THE SERVICES ARE PROVIDED "AS IS" WITHOUT ANY EXPRESS OR IMPLIED WARRANTY OF ANY KIND INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE. IN NO EVENT SHALL OPC MARKETING, INC. OR ITS SUPPLIERS BE LIABLE FOR ANY DAMAGES WHATSOEVER (INCLUDING, WITHOUT LIMITATION, DAMAGES FOR LOSS OF PROFITS, BUSINESS INTERRUPTION, OR LOSS OF INFORMATION) ARISING OUT OF THE USE OF OR INABILITY TO USE THE SOFTWARE, EVEN IF OPC MARKETING, INC. HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. Computers, if purchased from OPC MARKETING, INC., are warranted for one (1) year from date of purchase, provided there has been no abuse or misuse. OPC MARKETING, INC. warrants that its software and hardware will be free of any significant defect. OPC MARKETING, INC. will correct or replace defective materials. This warranty is not valid if a surge protector and/or a battery backup (uninterruptible power supply) are not used to protect the system. OPC MARKETING, INC. cannot be held responsible for any kind of physical damages, including lightning, to the hardware or software. Any contamination of the system by viruses will void this warranty. OPC MARKETING, INC. cannot be responsible if Purchaser makes changes, misuses, or tampers with the software or hardware after Purchaser receives them. Any installation of other software or changes by Purchaser may void the warranty; any tech support required because of virus contamination will be at Purchaser's expense at the rate of \$150.00 per hour. This warranty and the obligations and liabilities of OPC MARKETING, INC. are in lieu of, and Purchaser waives, all other warranties, guarantees, conditions, or liabilities, expressed or implied, arising by law or otherwise, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, and further including without limitation consequential damages, whether or not caused by OPC MARKETING, INC.'s negligence. This warranty shall not be extended, altered, or varied except by a written agreement signed by OPC MARKETING, INC. and Purchaser.
13. **Intellectual Property:** "OPC MARKETING," "SpitFire," "SpitFire Dialer," "SpitFire 10", "SpitFire X", "SpitFire Hybrid", "SpitFire Enterprise" and "SpitFire Software" and all related trade and service marks are and shall remain the exclusive intellectual property of OPC MARKETING, INC. OPC MARKETING, INC. and Purchaser specifically acknowledge that this Agreement does not confer upon the other party any interest in or right to use any trademark or service mark of the other party or its affiliates, unless the party

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- wishing to use a trademark or service mark receives the prior written consent of the owning party, which the owning party may grant or withhold in its sole discretion. Purchaser acknowledges that the software is protected by state, federal, and international copyright laws and treaties, and Purchaser hereby prospectively waives any challenges to the existence, ownership and enforceability of the same.
14. **Legal Relationship:** By this Agreement, no partnership, joint venture, independent contractor, or ownership relationship is formed beyond that of a product Purchaser and Seller, and that of a software licensor and licensee.
  15. **Choice of Law:** This Agreement shall be governed by and construed according to the laws of the State of Texas, without giving effect to normal choice-of-law and conflict-of-law principles. Except for a suit by OPC MARKETING, INC. to collect the purchase price or other fees owed by Purchaser pursuant to the Agreement, the parties agree that a party asserting any claim or dispute regarding this Agreement shall file and litigate such claim/dispute only in a court in Dallas County, State of Texas.
  16. **Other Important Disclaimers:** Purchaser is not purchasing a "franchise", "business opportunity", "strategic or targeted marketing plan", or "exclusive territory" from OPC MARKETING, INC. Purchaser understands that computers and telecommunications are complex, and that it may take time, effort, and skill to install, understand, and operate these products. Purchaser must allow ample time to receive, set up, test, and understand his or her system before advertising or going on-line to the public. Purchaser is aware that there is a wide variety of computer hardware and software, as well as telephone companies and equipment. For this reason, OPC MARKETING, INC. does not warrant that its products will function in every environment. It is the Purchaser's responsibility to obtain the necessary computer equipment to operate these products. It is the Purchaser's responsibility to become aware of the cost and availability of telephone and electrical requirements. Purchaser is responsible for any business and miscellaneous expenses necessary to operate these products, including telephone service, advertising, computers, etc. OPC MARKETING, INC. will not be liable for these expenses for any reason. Even though Purchaser's system may be designed to operate 24 hours a day, Purchaser should be aware that the system may be out of service periodically for backups, maintenance, improvements, or difficulties such as power outages, telephone line problems, hardware/software malfunctions, etc. OPC MARKETING, INC. will not be liable for any lost revenue, lost profits, advertising, or additional expenses due to loss of data, hardware/software problems, or for any reason. Purchaser will pay the shipping costs of returning any items for repair or replacement. Purchaser is aware there will be limitations as to the size of the software applications and to the number of telephone lines that can be used, due to hardware and software limitations. OPC MARKETING, INC. does not make any claims or guarantees that Purchaser will bring in any revenue or operate any profitable services or businesses by using the software or hardware sold by OPC MARKETING, INC. The suggestions, ideas, and techniques offered by OPC MARKETING, INC. are not guaranteed to bring success. The success of the Purchaser will be affected by many factors, including, but not limited to, his or her efforts and competence. Purchaser is responsible for the security of the system and for obtaining property and liability insurance. Purchaser assumes total responsibility pertaining to the above regulations and holds OPC MARKETING, INC. harmless from any litigation or claims against Purchaser or OPC MARKETING, INC. whatsoever. Purchaser is responsible for adherence to all laws pertaining to the National and State (if applicable) Do Not Call Registry at all times while system in use.
  17. **Minimum Requirements:** Bandwidth required per port is a minimum of 100 Kilobits per second (Kbps) upload and download, when the system uses the G.711 codec. Purchaser must provide high-speed internet connection for training, updates, and technical support. If agent stations are outside the network, a VPN connection to the network in which the Predictive Dialer is hosted is required. The Purchaser is responsible for Network Configuration, Antivirus, VPN, Router and Firewall, Installation, Configuration, and Setup. Agent IP information is required so the Dialer knows which IP address to dial when the agent logs on. SIP Carrier testing is required. Minimum Requirements are subject to change at any time.
  18. **Minimum Requirements for Dialer Server:** No Laptops. Specific Server requirements vary depending on the configuration of the dialer. Purchaser is responsible for network configuration and antivirus protection. Surge protector and/or battery backup is required. Dot net (.NET) 4.0 Framework is required for Enterprise software. Spitfire Enterprise comes with SQL Server 2008 R2 Express edition. This edition supports database sizes up to 10GB. If more storage capacity is required, Purchaser must purchase a SQL Standard edition. Additional requirements can be found on OPC MARKETING, INC.'s website <http://www.spitfiredialers.com/index.php/resources.html>. Server Requirements are subject to change at any



- time. Updates to this agreement will be posted on OPC MARKETING, INC.'s website on the Terms & Conditions page.
19. **Minimum Requirements for Agent Stations:** Agent station requirements can be found on OPC MARKETING, INC.'s website <http://www.spitfiredialers.com/index.php/resources.html>.
  20. Terminal software / Thin Clients are allowed. Terminal Server must run Dot.net (.NET) 4.0 and have sufficient capacity to run all services, including Dialer. Terminal software cannot run in a "standalone" configuration. It must be integrated to a Phone System.
  21. **Technical Support:** Technical support is available Monday through Friday from 9 am to 6 p.m., CT. These times are subject to change only upon reasonable advance notice to Purchaser, as posted on the then-current customer support web page. OPC MARKETING, INC. will make every reasonable effort to resolve questions and problems on a timely basis, within the times listed above; however, OPC MARKETING, INC. may not always be able to resolve every problem, nor respond to every call immediately. OPC MARKETING, INC. and Purchaser each agree to pay for their own long-distance calls placed to the other party for any assistance.
  22. **Support Contract:** One (1) year of technical support is included with the SpitFire Predictive Dialer purchase price. Thereafter, technical support is \$200 per agent per year, and applies to Purchaser's total number of agents at the time of any annual tech support renewal. If Purchaser's technical support has expired or has been depleted, it will be necessary to purchase additional technical support at the then current rate. Purchaser may terminate the then support at any time by ceasing payment; OPC MARKETING, INC. may terminate tech support services at the end of any annual tech support period.
  23. **Particular Software to be provided to Purchaser:** See invoice for detailed equipment description.
  24. **SIP Service:** OPC MARKETING, INC. is not responsible for any service fees provided by 3<sup>rd</sup> party SIP Providers. Purchaser is responsible for determining the cost of installation and the monthly rates of the necessary SIP service.
  25. **Shipping, Damage and Malfunctions:** OPC MARKETING, INC. cannot be responsible for delays in shipping caused by the carrier, weather conditions, or strikes. Purchaser must cooperate with carrier for any insurance claims and is responsible for noting any damage to shipment at time of delivery. Purchaser agrees to pay all shipping and insurance costs. On occasion, shipping may cause damage to the products. In addition, products occasionally become defective after working properly. OPC MARKETING, INC. will repair or replace damaged or malfunctioning hardware and software at no charge, if within the warranty time limit and if there have been no modifications or misuse by the Purchaser. Purchaser must return any defective products prior to OPC MARKETING, INC. shipping a replacement, or Purchaser must give a credit card number authorizing a charge if the defective product is not returned to OPC MARKETING, INC. within 7 days.
  26. **Changes To System:** OPC MARKETING, INC. cannot be responsible if Purchaser makes changes, misuses, or tampers with the software or hardware after Purchaser receives them. Any installation of other software or changes by Purchaser may void the warranty and Purchaser will be charged a \$250.00 reconfiguration fee. Static IP addresses are required for all SIP systems, and any IP address changes after initial setup will incur a \$100 reconfiguration fee.
  27. **Backups:** Purchaser is responsible for making frequent backups of his or her system to protect against any loss of valuable data. OPC MARKETING, INC. cannot be responsible for loss of data for any reason whatsoever.
  28. **Payment Made By Check:** OPC MARKETING, INC. reserves the right to electronically convert payments made via check. Checks must be drawn from a bank in the United States.
  29. **Returned Banking Instrument:** Declined credit card payments will incur a late fee of \$35.00 after the third attempt to collect payment.
  30. **Non-Payment:** Purchaser is responsible for paying all fees and applicable taxes associated with the system purchase in a timely manner with a valid payment method. If Purchaser's payment method fails or account is past due, OPC MARKETING, INC. may collect fees owed using other payment methods on file and adding a reconnect fee of \$295 per system for non-payment of equipment or services. Any systems with outstanding balances on equipment or services will become the property of OPC MARKETING, INC. after 60 days. If at any time Purchaser defaults under this agreement for non-payment or otherwise, the software license shall immediately and automatically terminate until such time as Purchaser's account is current.



31. Updates to this agreement will be posted: <http://www.spitfiredialers.com/index.php/terms.html>.  
 CONSENT FOR MARKETING-RELATED CONTACT: Further, Purchaser understands that by signing below, Purchaser is giving OPC MARKETING, INC. and their employees permission to contact Purchaser at the telephone number and email address Purchaser has provided, regardless of any registration with state or national DNC lists. This includes through the use of automated telemarketing systems, SMS technology, emails, as well as prerecorded messages. Communications will be used for marketing and telemarketing purposes. The content will be relative to all products and services in which OPC MARKETING, INC. sells or services. The information Purchaser supplies will not be sold to any third party. Purchaser further acknowledges and accepts that data and messaging rates may apply from Purchaser's cellular carrier. By signing below, Purchaser expressly and affirmatively consents to receive such contact.

*Agreement will be binding on Purchaser unless such change is approved in writing and upon a vote of the Commissioners Court of Johnson County, Texas*

Purchaser Information:

Company Name: Johnson County  
 Print Name: Roger Harmon Title: County Judge  
 Telephone number: 817-556-6360 Email: countyjudge@johnson  
 Authorized Signature: [Signature] Date: 8-23-21 countytx.org

OPC Marketing, Inc.  
 Manufacturer of SpitFire Dialers ®  
 By: Michael Henochowicz  
 President & CEO

Authorized Signature: Michael Henochowicz