AGREEMENT BETWEEN THE CITY OF SAN LEANDRO AND TRAFFIC TECHNOLOGY SERVICES, INC. FOR ACCESS TO CITY TRAFFIC DATA

This is an agreement between the City of San Leandro, a California charter city ("City"), and Traffic Technology Services, Inc. ("TTS"). City and TTS are each sometimes referred in the agreement as "Party" and both the City and TTS are sometimes referred in this Agreement together as "Parties"

Whereas, through its normal course of operations, City collects and maintains certain traffic signal data ("City Traffic Data"); and;

Whereas, TTS is in the business of developing technologies, strategies, and systems for use in maximizing the efficiency of transportation end users and thus the overall capacity of existing transportation networks and, as such, has a significant business interest to access City Traffic Data as the input into its proprietary and patent pending processes; and

Whereas, pursuant to a Consulting Services Agreement between City and Trafficware Group, Inc., City has licensed from Cubic ITS, Inc. ("Cubic") the ATMS.com software, including the TidalWave service, a cloud-based platform that aggregates data from multiple sources; and

Whereas, through the TidalWave Service, Cubic makes available these data to its subscribers, and TTS is a subscriber; and

Whereas, TTS desires permission from City to obtain access to the City Traffic Data through the TidalWave Service; and

Whereas, these Data do not contain any personally identifiable information ("PII"), are not confidential, nor can be used to identify any transportation end user specifically in any manner; and

Whereas, City Traffic Data are public records under the California Public Records Act (Gov. Code §§ 6250, *et seq.*); and

Whereas, TTS agrees to provide City with related inventories, signal performance metrics, and other formatted reports suitable for publication online (e.g. open data portals), in both print and machine-readable formats; and

Whereas, City agrees to make available to TTS City Traffic Data subject to the terms and conditions in this Agreement.

Now therefore, TTS and the City agree as follows:

Section 1.   Definitions

"City Traffic Data" means collectively, the data that the City makes available to Cubic to make available in real-time through the TidalWave Service, as well as other data such as

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as-built intersection design, traffic signal plans, signal control plans, or other documents that identify the time-of -day plans that are requested by and provided to TTS by City, either directly or indirectly through the TidalWave Service, under this Agreement.

"TidalWave Service" means the provided by Cubic that allows users to obtain live, real time traffic streaming information through an online subscription service.

"Trafficware System" means the automated traffic management system software called ATMS.now utilized by the City and under a maintenance contract pursuant to the Trafficware Group Agreement.

"Personally Identifiable Information Data (PII)" is any data that can be used to identify a specific individual, including but not limited to Social Security numbers, credit card numbers, mailing or email addresses, phone numbers, license plate numbers, as well as IP and MAC addresses, login IDs, and any other unique system IDs.

Section 2.   Authorized Representatives

TBD is designated by City as an authorized representative (City Agent).

Kiel Ova are designated by TTS as an authorized representative (TTS Agent).

Section 3.   Purpose and Scope. TTS desires access to the City Traffic Data. TTS will use these data in proprietary processes to produce data products for use by TTS customers and other interested parties. The main product is Personal Signal Assistant, with related products marketed under same name. TTS sells this data to the automotive industry, commercial fleets, telematics integrators, and other transportation service providers.

Section 4.   Access to City Traffic Data. City hereby grants TTS non-exclusive, non-transferable, non-sub licensable, limited access to obtain and utilize City Traffic Data. TTS shall have the right to use the data in any manner it deems appropriate in furtherance of its business purposes, including without limitation providing the derivatives of the data to third parties, so long as such use complies with the terms of this Agreement. City reserves the right to make available City Traffic Data to any other parties that request access.

Section 5.   Fees. TTS agrees to pay to City a one-time Processing Fee of $1,500.00 due upon execution of the Agreement. This fee is understood to reimburse City for direct costs incurred by both executing the Agreement and making City Traffic Data available. TTS also agrees to obtain a customer number and business license from the Finance Department and, in addition, to reimburse the City for any other staff time arising out of this Agreement. TTS will be responsible for any vendor costs associated with accessing the data, such as subscription fees required by Cubic.

Section 6.   Ownership of and Rights to Data. City retains all rights to and ownership of City Traffic Data. TTS shall own all rights to any formatted, predictive, or derivative data generated from the raw data.

Section 7.   Availability of City Traffic Data. TTS acknowledges that City will make best efforts to ensure City Traffic Data is available, but does not guarantee access will be available through the TidalWave Service and, further, that for any reason, at any time, City may require to make data unavailable for system maintenance and related reasons. If access to City Traffic Data sufficiently impacts TTS's business operations, TTS may request a waiver of the Access Fee for time period, in monthly increments, as defined in Section 2.3.

Section 8.   Non-Interference with City Operations. TTS shall not access, interfere with, impede, alter, or otherwise adversely impact the Trafficware System, and/or City's other traffic and transportation systems (or those of related partner Agencies, such as AC Transit), or attempt in any way to do so, in a manner that is not consistent with the Access Rights described herein. TTS shall not manipulate, alter, or modify in any way City Traffic Data in a manner that would effect the integrity, reliability, accuracy, or substantive content of the City Traffic Data, without express written permission from the City.

Section 9.   Reporting. TTS shall provide City with periodic reports (e.g., monthly or quarterly) of signal performance metrics, as data become available. Reports shall be provided in both machine-readable (e.g., CSV) and print (e.g., PDF) format with the understanding that City may publish reports in its open data portal on the City website or elsewhere.

Section 10.   Indemnification. TTS will indemnify, defend, save, and hold harmless the City and its elected officials, employees, and agents from any and all claims of every nature arising out of or in connection with: (i) TTS performance of this Agreement or its failure to comply with any of its obligations contained in this Agreement (ii) a breach of TTS' representations and warranties, (iii) any personal injury, death or property damage caused by any alleged act, omission, error, fault, mistake or negligence of TTS, its employees, agents, or representatives in connection with or incident to TTS' performance under or related to this Agreement, regardless of any concurrent negligence of City; and (iv) the infringement of any patent, copyright, trademark, trade secret or other proprietary right of any third party by TTS' use of the City Data provided under this Agreement.

Section 11.   Representations and Warranties. City makes no warranty or representation as to the accuracy, quality, or timeliness of City Traffic Data or the operation, functionality, or content of the TidalWave Service. City Traffic Data is provided as-is, with all faults, and without warranty of any kind. City does not warrant that it will be able to continuously provide the City Data without interruption and expressly reserves the right to discontinue the data stream immediately upon written notice to TTS of its intent to do so. Except as expressly provided for herein, City makes no other representations or warranties.

Section 12.   Security and Privacy. TTS shall implement and maintain appropriate cyber and physical security protections and safeguards in order to maintain the integrity and confidentiality of TTS's access to and storage of City Traffic Data, including to the TidalWave Service, such as restricting access to only those who need it and preventing unauthorized access to related accounts and credentials. TTS shall also protect the privacy of any persons contained in the Data and under no circumstances will it sell, market, publicize, or otherwise make available in any way whatsoever PII data.

Section 13.   Term. Unless terminated earlier in accordance with Section 15, this Agreement will

begin on the latest date of the authorized agent signature (the Effective Date) and continue for five (5) years (the Initial Term). This Agreement may be renewed for additional terms (Renewal Terms) upon agreement of the Parties. The "Term" will consist of the Initial Term and all Renewal Terms, if any.

Section 14.   Limitation of Liability. Nothing in this Agreement excludes or limits either Party's liability for: (a) fraud or fraudulent misrepresentation; (b) breach of confidentiality; (c) indemnification obligations under Section 8 above; (d) claims for personal injury, including death, or damage to real property or tangible personal property arising from the negligence, reckless conduct or intentional acts of a Party, its officers, employees or agents; or (e) matters that cannot be excluded or limited under applicable law.

Section 15.   Termination. TTS shall have the right to terminate this Agreement, with or without cause, by providing City with thirty (30) days' written notice, unless identified otherwise in this Agreement. City shall have the right to terminate this Agreement, with or without cause, at any time with written notice.

Section 16.   Data Destruction and Equipment Removal. Upon termination of this Agreement, TTS shall destroy all raw data whatever form or medium, including all copies thereof. TTS shall destroy the data no later than thirty (30) days following termination of this Agreement. In addition, TTS shall be required to remove all installed equipment, if any, including hardware and software, from the City's server environment upon termination of this Agreement.

Section 17.   Notices

Absent notice to the contrary in writing, all communications to TTS shall be sent to:

Traffic Technology Services, Inc.
Attn: Contracts & Agreements
1500 NW Bethany Blvd, Suite 285
Beaverton, OR 97006

or email: suppliers@traffictechserivces.com

Absent notice to the contrary in writing, all communications to the City shall be sent to:

City of San Leandro
Attn: TBD Tony Batalla
835 E. 14th Street
San Leandro CA 94578

or at any other address as any Party may, from time to time, designate by notice given in compliance with this Section.

Section 18.   Assignment. Neither Party shall assign, transfer, subcontract, or delegate all or any part of this Agreement, or any interest therein, without the other Party's prior written consent, which shall not be unreasonably withheld.

Section 19.   Agreement Binding. This Agreement shall be binding upon the successors of City Agent, TTS Agent, TTS, or City and assigns of the Parties hereto.

Section 20.   Personal Liability. Nothing in this Agreement may be construed to create any personal liability on the part of any officer or agent of either Party to this Agreement.

Section 21.   Choice of Law. This Agreement shall be governed in all respects by and construed under the laws of the State of California.

Section 22.   Choice of Forum. In the event that either Party brings any action against the other under this Agreement, the Parties agree that trial of such action shall be vested exclusively in the state courts of California in the County of Alameda or in the United States District Court for the Northern District of California. TTS hereby consents to the personal jurisdiction of these courts, waives any objection to venue in these courts, and waives any claim that either of these courts is an inconvenient forum. In no way may this section or any other term of this Agreement be construed as a waiver by the City of any form of defense or immunity, whether it is sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the Constitution of the United States, or otherwise, from any Claim or from the jurisdiction of any court.

Section 23.   Waiver. Any waiver of any breach of any condition or covenant herein contained to be kept and performed by either Party shall not be deemed or considered as a continuing waiver, and shall not operate to bar or prevent the non-breaching Party from declaring a default for any succeeding breach, either of the same condition or covenant or otherwise.

Section 24.   Severability. If any term (or part of a term) of this Agreement is invalid, illegal, or unenforceable, the rest of the agreement will remain in effect.

Section 25.   Interpretation of the Agreement. The Parties acknowledge that each of the Parties have participated in the drafting of this Agreement. No Party shall be considered to be the drafter of this Agreement for the purposes of interpretation.

Section 26.   Parties in Interest. Nothing herein shall be construed to be to the benefit of any third party, nor is it intended that any provision shall be for the benefit of any third party.

Section 27.   Force Majeure. Neither Party will be liable for failure or delay in performance to the extent caused by circumstances beyond reasonable control.

Section 28.   Insurance Requirements. Before fully executing this Agreement, TTS, at its own cost and expense, unless otherwise specified below, shall procure the types and amounts of insurance listed below against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the work hereunder by the TTS and its agents, representatives, employees, and subcontractors. Consistent with the following provisions, TTS shall provide proof satisfactory to City of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects, and that such insurance is in effect prior to beginning work. TTS shall maintain the insurance policies required by this section throughout the term of this Agreement. The cost of such insurance shall be

included in TTS's bid or proposal. TTS shall not allow any subcontractor to commence work on any subcontract until TTS has obtained all insurance required herein for the subcontractor(s) and provided evidence to City that such insurance is in effect. VERIFICATION OF THE REQUIRED INSURANCE SHALL BE SUBMITTED AND MADE PART OF THIS AGREEMENT PRIOR TO EXECUTION. TTS shall maintain all required insurance listed herein for the duration of this Agreement.

28.1   Workers' Compensation.

28.1.1   General Requirements. TTS shall, at its sole cost and expense, maintain Statutory Workers' Compensation Insurance and Employer's Liability Insurance for any and all persons employed directly or indirectly by TTS. The Statutory Workers' Compensation Insurance and Employer's Liability Insurance shall be provided with limits of not less than $1,000,000.00 per accident. In the alternative, TTS may rely on a self-insurance program to meet these requirements, but only if the program of self-insurance complies fully with the provisions of the California Labor Code. Determination of whether a self-insurance program meets the standards of the California Labor Code shall be solely in the discretion of the Contract Administrator.

The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the entity for all work performed by the TTS, its employees, agents, and subcontractors.

28.1.2   Submittal Requirements. To comply with Subsection 28.1, TTS shall submit the following:

a.   Certificate of Liability Insurance in the amounts specified in the section; and

b.   Waiver of Subrogation Endorsement as required by the section.

28.2   Commercial General Insurance.

28.2.1   General Requirements.

TTS, at its own cost and expense, shall maintain commercial general liability insurance for the term of this Agreement in an amount not less than $1,000,000.00 per occurrence, combined single limit coverage for risks associated with the work contemplated by this Agreement. If a Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this Agreement.

28.2.2 <u>**Minimum Scope of Coverage**</u>**.** Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (most recent edition) covering comprehensive General Liability on an "occurrence" basis. No endorsement shall be attached limiting the coverage.

28.2.3 <u>**Additional Requirements**</u>**.** Each of the following shall be included in the insurance coverage or added as a certified endorsement to the policy:

a. The Insurance shall cover on an occurrence or an accident basis, and not on a claims-made basis.

b. City, its officers, officials, employees, and volunteers are to be covered as additional insureds as respects: liability arising out of work or operations performed by or on behalf of the TTS.

c. TTS hereby agrees to waive subrogation which any insurer or contractor may require from vendor by virtue of the payment of any loss. TTS agrees to obtain any endorsements that may be necessary to effect this waiver of subrogation.

d. For any claims related to this Agreement or the work hereunder, the TTS's insurance coverage shall be primary insurance as respects the City, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, or volunteers shall be excess of the TTS's insurance and shall not contribute with it.

28.2.4 <u>**Submittal Requirements**</u>**.** To comply with <u>Subsection 28.2</u>, TTS shall submit the following:

a. Certificate of Liability Insurance in the amounts specified in the section;

b. Additional Insured Endorsement as required by the section;

c. Waiver of Subrogation Endorsement as required by the section; and

d. Primary Insurance Endorsement as required by the section.

28.3 <u>**Errors and Omissions Insurance**</u>**.**

28.3.1 <u>**General Requirements**</u>**.** TTS, at its own cost and expense, shall maintain for the period covered by this Agreement errors and omissions liability insurance for performing work pursuant to this Agreement in an amount not less than $1,000,000.00 covering the licensed professionals' errors and omissions. Any

deductible or self-insured retention shall not exceed $150,000 per claim.

28.3.2 **Claims-Made Limitations.** The following provisions shall apply if the errors and omissions liability coverage is written on a claims-made form:

a.   The retroactive date of the policy must be shown and must be before the date of the Agreement.

b.   Insurance must be maintained and evidence of insurance must be provided for at least 5 years after completion of the Agreement or the work, so long as commercially available at reasonable rates.

c.   If coverage is canceled or not renewed and it is not replaced with another claims-made policy form with a retroactive date that precedes the date of this Agreement, TTS shall purchase an extended period coverage for a minimum of 5 years after completion of work under this Agreement.

d.   A copy of the claim reporting requirements must be submitted to the City for review prior to the commencement of any work under this Agreement.

28.3.3 **Submittal Requirements.** To comply with Subsection 28.3, TTS shall submit the Certificate of Liability Insurance in the amounts specified in the section.

28.4 **Cyber Liability Insurance.**

28.4.1 **General Requirements.** TTS, at its own cost and expense, shall maintain cyber liability insurance for the term of this Agreement in an amount not less than $1,000,000.00 per occurrence / aggregate. Coverage shall be sufficiently broad to respond to the duties and obligations as is undertaken by TTS in this Agreement and shall include, but not be limited to, claims involving infringement of intellectual property, including but not limited to infringement of copyright, trademark, trade dress, invasion of privacy violations, information theft, damage to or destruction of electronic information, release of private information, alteration of electronic information, extortion and network security. The policy shall provide coverage for liabilities for financial loss resulting or arising from acts, errors, or omissions, in rendering technology services:

- Violation or infringement of any right of privacy, including breach of security and breach of security/privacy laws, rules or regulations globally, now or hereinafter constituted or amended;
- Data theft, damage, unauthorized disclosure, destructions, or corruption, including without limitation, unauthorized access, unauthorized use, identity theft, theft of personally identifiable information or confidential City information in whatever form, transmission of a computer virus or other type of malicious code; and participation in a denial of service attack on third party computer systems;
- Loss or denial of service;

- No cyber terrorism exclusion;

Such coverage must include technology/professional liability including breach of contract, privacy and security liability, privacy regulatory defense and payment of civil fines, payment of credit card provider penalties, and breach response costs, including without limitation, notification costs, forensics, credit protection services, call center services, identity theft protection services, and crisis management/public relations services.

28.4.2 **Claims-Made Limitations.** The following provisions shall apply if the cyber liability coverage is written on a claims-made form:

a. The retroactive date of the policy must be shown and must be before the date of the Agreement.

b. Insurance must be maintained and evidence of insurance must be provided for at least 5 years after completion of the Agreement or the work, so long as commercially available at reasonable rates.

c. If coverage is canceled or not renewed and it is not replaced with another claims-made policy form with a retroactive date that precedes the date of this Agreement, TTS shall purchase an extended period coverage for a minimum of 5 years after completion of work under this Agreement.

d. A copy of the claim reporting requirements must be submitted to the City for review prior to the commencement of any work under this Agreement.

28.4.3 **Additional Requirements.** A certified endorsement to include contractual liability shall be included in the policy.

28.4.4 **Submittal Requirements.** To comply with Subsection 28.4, TTS shall submit the Certificate of Liability Insurance in the amounts specified in the section.

Section 29. **Entire Agreement.** This Agreement constitutes the entire agreement between the Parties. This Agreement supersedes all proposals and oral and written agreements between the Parties on this subject. No modifications, alterations, changes, or waiver to this Agreement or any of its terms shall be valid or binding unless accomplished by a written amendment signed by both Parties.

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IN WITNESS OF THIS, the Parties hereby execute this Agreement through their authorized representatives.

CITY OF SAN LEANDRO

DocuSigned by:

Jeff Kay

Jeff Kay, City Manager

Attest:

DocuSigned by:

Leticia I Miguel

Leticia I. Miguel, City Clerk

Approved as to form:

DS

SEAL

DocuSigned by:

Richard Pio Roda

Richard Pio Roda, City Attorney

2946896.1

TTS

DocuSigned by:

Kirk R. Olson

Authorized Signature

Budget Approved:
Approved as to Fiscal Authority:

DocuSigned by:

Chui Munn (Susan) Hsieh

Susan Hsieh

Finance Director

688-3518

Account Number

DocuSigned by:

Tony Batalla

Chief Technology Officer