

**INFORMATION TECHNOLOGY SERVICES AGREEMENT  
BETWEEN  
THE EAST BAY MUNICIPAL UTILITY DISTRICT  
AND  
[CONTRACTOR]**

This Information Technology Services Agreement (“Agreement”), effective as of [DATE] (the “Effective Date”), is by and between the East Bay Municipal Utility District (“District”), a public entity, and [Contractor Name], a [State of Organization] [Entity Type] (“Contractor”). The District and Contractor may be referred to herein collectively as the “Parties” or individually as a “Party.”

**RECITALS**

1. The District requires [*briefly describe services*], defined as the “Services” below.
2. Contractor has submitted a proposal to provide the Services and Contractor represents that it has the experience, licenses, qualifications, staff and expertise to provide the Services in a professional and competent manner.
3. The District’s Board of Directors has authorized this Agreement by Motion Number \_\_\_\_\_.
4. In consideration of the mutual covenants, terms, and conditions set forth below, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

**AGREEMENT**

It is agreed that the District retains Contractor to provide the Services, and Contractor accepts this engagement based on the requirements described in this Agreement and the following Exhibits, all of which are incorporated into this Agreement by reference:

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|-----------|---|
| Exhibit A | Scope of Services   |
| Exhibit B | Payment Terms and Procedures [IF NECESSARY - i.e. describe phased project/payment plans, amounts to be paid upon approved submittals, etc.] |
| Exhibit C | Insurance Requirements  |
| Exhibit D | Bond Requirements [IF NECESSARY, Performance and Payment.]  |
| Exhibit E | Public Works Forms [IF NECESSARY i.e. <b>completed</b> Declaration of Noncollusion, Eligibility to Work on Public Works Project.]           |

**1. DEFINITIONS**

- 1.1. “Authorized Employees” means Contractor’s employees who have a need to know or otherwise access Protected Information to enable Contractor to perform its obligations under this Agreement.

- 1.2. "Authorized Persons" means Authorized Employees and Contractor's agents and contractors who have a need to know or otherwise access Protected Information to enable Contractor to perform its obligations under this Agreement.
- 1.3. "Change Order" A Change Order is a written instrument used for modifying this Agreement with regards to the scope of Services, Agreement sum, and/or Agreement Time. An approved Change Order is a Change Order signed by the District Project Manager. An executed Change Order is a Change Order signed by both the District Project Manager and Contractor Project Manager.
- 1.4. "Customer Information" means the name, address, phone number, account number and water usage data of any water or wastewater customer of the District.
- 1.5. "Days" shall mean calendar days.
- 1.6. "Delay Event" shall mean any act, occurrence or omission causing a delay in the completion of the Services within the time limits set forth in this Agreement.
  - 1.6.1. "Compensable Delay Event" shall mean a Delay Event that could not be avoided by Contractor mitigation, caused directly and solely by the District or by causes within the exclusive control of the District, and which were not concurrent with any other type of Delay Event.
  - 1.6.2. "Concurrent Delay Event" shall mean two or more independent Delay Events where the Delay Events occur at the same time during all or a portion of the delay period being considered, and where each of the Delay Events would have caused delay to Contractor even in the absence of any of the other Delay Events.
  - 1.6.3. "Excusable Delay Event" shall mean a Delay Event directly caused by events beyond the control of both Contractor and the District, including Force Majeure events, which is not concurrent with an Inexcusable Delay Event and which could not have been avoided by Contractor through reasonable mitigation measures.
  - 1.6.4. "Inexcusable Delay Event" shall mean a Delay Event caused by circumstances within the control of Contractor, its subcontractors or suppliers of any tier.
- 1.7. "District Information" means all data to be handled by Contractor pursuant to the Services, including but not limited to Customer Information, Employee Information, Facilities Information and Personal Information.
- 1.8. "Employee Information" means an employee identification number, personnel records and any Personal Information of a District employee.
- 1.9. "Facilities Information" means any data or records that could reveal details of critical

District infrastructure or operations, including, but not limited to, reports, maps, drawings, databases, models, GIS information, and plans and schematics containing detailed information about the District's water and wastewater infrastructure that, if released, could compromise the safety, integrity, and operations of the public water and wastewater system. Examples include the locations of security systems and security devices, services, pipelines, interceptors, aqueducts, valves, pressure zones, or details about major facilities (i.e., wet weather processing, treatment plants, pumping plants, and storage structures).

1.10. "Force Majeure" means any act of God, war, earthquake, fire, flood, storm, civil disobedience, court order, labor dispute, or other cause beyond a Party's reasonable control Any acts of domestic or foreign hacking or cyberwarfare are specifically excluded from this definition of Force Majeure and do not excuse Contractor from performance.

1.11. "Highly-Sensitive Personal Information" means an individual's:

1.11.1. Government-issued identification numbers (including Social Security number, partial Social Security number, driver's license number, or state-issued identification number);

1.11.2. Financial account numbers, credit card numbers, debit card numbers, or credit report information, with or without any required security codes, access codes, personal identification numbers, or passwords that would permit access to an individual's financial accounts; or

1.11.3. Biometric, genetic, health, medical, or medical insurance data.

1.12. "Personal Information" means information provided to Contractor by or at the direction of the District, information which is created or obtained by Contractor on behalf of the District, or information to which access was provided to Contractor by or at the direction of the District, in the course of Contractor's performance under this Agreement, that is:

1.12.1. Information that identifies or can be used to identify an individual (including, without limitation, names, signatures, addresses, telephone numbers, email addresses, and other unique identifiers);

1.12.2. Information that can be used to authenticate an individual (including, without limitation, employee identification numbers, government-issued identification numbers, passwords or PINs, user identification and account access credentials or passwords, financial account numbers, credit or debit card numbers, credit report information, medical insurance data, answers to security questions, and other personal identifiers); and

- 1.12.3. All Highly-Sensitive Personal Information.
- 1.13. “Protected Information” means the following:
  - 1.13.1. Customer Information.
  - 1.13.2. Employee Information.
  - 1.13.3. Facilities Information.
  - 1.13.4. Personal Information.
  - 1.13.5. *[Modify this definition as necessary, adding and deleting relevant categories of information to be protected]*.
- 1.14. “Security Breach” means any act or omission that gives rise to the reasonable belief of a **[material]** compromise to the security, confidentiality, or integrity of Protected Information or the physical, technical, administrative, or organizational safeguards put in place by Contractor or any Authorized Persons, or by the District should Contractor have access to the District’s systems in the performance of the Services, that relate to the protection of the security, confidentiality, or integrity of Protected Information. Without limiting the foregoing, a **[material]** compromise shall include any unauthorized access to or disclosure or acquisition of Protected Information.
- 1.15. “Services” means those services described in Paragraph 2 and on Exhibit A to this Agreement.

## **2. SERVICES TO BE PROVIDED**

- 2.1. Contractor agrees to furnish the Services as described in Exhibit A, Scope of Services, attached to and incorporated in this Agreement.
- 2.2. The Services shall be completed and submitted in accordance with the standards specified and the schedule listed in Exhibit A. The completion dates specified may be modified by mutual agreement between the District and Contractor, provided that the District’s Project Manager notifies Contractor of modified completion dates by letter. Contractor agrees to diligently perform the Services. In the performance of this Agreement, time is of the essence.
- 2.3. To the extent any Service performance standards or requirements as described in this Agreement conflict with any performance standards or requirements included in any license or terms and conditions document provided by Contractor or Contractor’s, partners, contractors or agents to the District in support of the Services, whether included as an exhibit to this Agreement or not, the requirements as stated in this Agreement shall govern.

- 2.4. It is understood and agreed that Contractor has the professional skills necessary to perform the Services and that the District relies upon the professional skills of Contractor to perform the Services in a skillful and professional manner. Contractor represents that it has all the necessary licenses to perform the Services and shall maintain them during the term of this Agreement. Contractor agrees that the Services shall follow practices usual and customary to the [*state type - for example "software engineering"*] profession. Acceptance by the District of the Services does not operate as a release of Contractor from such professional responsibility for the work performed.
- 2.5. Contractor agrees to maintain in confidence and not disclose to any person or entity, without the District's prior written consent, any District Information or, trade secret, confidential information or knowledge or data relating to the products, process, or operation of the District. Contractor further agrees to maintain in confidence and not to disclose to any person or entity, any District Information, data, information, technology, or material developed or obtained by Contractor during the term of this Agreement. The covenants contained in this Paragraph shall survive the termination of this Agreement for whatever cause.
- 2.6. The originals of all computations, drawings, designs, graphics, studies, reports, manuals, photographs, videotapes, data, computer files, and other documents prepared or caused to be prepared by Contractor or its subconsultants in connection with the Services shall be delivered to and shall become the exclusive property of the District. The District is licensed to utilize these documents for the District applications on other projects or extensions of this project, at its own risk. Contractor and its subconsultants may retain and use copies of such documents, with written approval of the District.
- 2.7. Contractor is an independent contractor and not an employee of the District. Contractor expressly warrants that it will not represent that it is an employee or servant of the District.
- 2.8. Contractor is retained to provide the Services only and all payments made are compensation solely for provision of the Services and recommendations it may make in performing the Services.
- 2.9. It is further understood and agreed by the Parties that Contractor, in the performance of its obligations under this Agreement, is subject to the control or direction of the District as to the designation of tasks to be performed and the results to be accomplished, and not the means, methods, or sequence used by Contractor for accomplishing the results, unless otherwise specified in Exhibit A.
- 2.10. If any third persons are employed by Contractor in the performance of this agreement, such persons shall be entirely and exclusively under the direction, supervision, and control of Contractor. All terms of employment, including hours,

wages, working conditions, discipline, hiring, and discharging, or any other terms of employment or requirements of law shall be determined by Contractor, and the District shall have no right or authority over such persons or their terms of employment.

- 2.11. It is further understood and agreed that as an independent contractor, neither Contractor nor Contractor's assigned personnel shall have any entitlement as a District employee, right to act on behalf of the District in any capacity whatsoever as an agent, nor to bind the District to any obligation whatsoever. Contractor shall not be covered by the District's worker's compensation insurance; nor shall Contractor be entitled to compensated sick leave, vacation leave, retirement entitlements, participation in group health, dental, life or other insurance programs, or entitled to other fringe benefits payable by the District to employees of the District.

### 3. TERM OF AGREEMENT

- 3.1. Unless earlier terminated pursuant to Paragraph 8, this Agreement shall commence on the Effective Date and shall continue in effect until [number in words (number) year[s]/months] from such date (the "[Initial] Term").
- 3.2. *[Use if the Board has authorized option periods.]* Following expiration of the Initial Term, the District may renew this Agreement for additional successive terms of [number] year[s] by providing Contractor with written notice for up to [number] additional successive terms (each a "Renewal Term" and, collectively, together with the Initial Term, the "Term").

### 4. COMPENSATION

- 4.1. For the Services described in Paragraph 2, the District agrees to pay Contractor in accordance with the method and amounts described in Exhibit B, attached hereto and incorporated herein. Total compensation under the Agreement shall not exceed a Maximum Agreement Ceiling of \$(dollars).
- 4.2. *[Use this paragraph only if the service involves installation of physical infrastructure, such as installing computer racks (rare).]* Contractor acknowledges that construction work on public works projects requires DIR registration and is subject to prevailing wage rates and includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work. Contractor certifies that the proposed cost and pricing data used herein reflect the payment of prevailing wage rates where applicable and are complete, current, and accurate.
- 4.3. In case of changes affecting the scope of Services resulting from new findings, unanticipated conditions, or other conflicts or discrepancies, Contractor shall promptly notify the District of the identified changes and advise the District of the

recommended solution. Work shall not be performed on such changes without prior written authorization of the District.

## 5. NOTICE TO PROCEED

- 5.1. This Agreement shall become effective upon execution of the second signature. Contractor shall commence work upon receipt of the District's Notice to Proceed, which shall be in the form of a letter signed by the District's Project Manager, as specified in Paragraph 11.1 herein. The District's Notice to Proceed will authorize the Services described in Exhibit A with ceiling prices described in Paragraph 4. No work shall commence until the Notice to Proceed is issued.
- 5.2. *[Include this paragraph only if your scope of services includes Optional Services.]* The District may at its option issue a Notice to Proceed for some or all of the Optional Services described in Exhibit A. Compensation for Optional Services shall be in accordance with the method and amounts described in Exhibit B.

## 6. SECURITY OF PROTECTED INFORMATION

- 6.1. Standard of Care.
  - 6.1.1. Contractor acknowledges and agrees that, in the course of providing the Services, Contractor may create, receive, or have access to Protected Information. Contractor shall comply with the terms and conditions set forth in this Agreement in its creation, collection, receipt, transmission, storage, disposal, use, and disclosure of Protected Information and be responsible for any unauthorized creation, collection, receipt, transmission, access, storage, disposal, use, or disclosure of Protected Information under its control or in its possession by all Authorized Persons. Protected Information is deemed to be the property of the District and is not the property of Contractor.
  - 6.1.2. In recognition of the foregoing, Contractor agrees and covenants that it shall:
    - 6.1.2.1. Keep and maintain all Protected Information in strict confidence, using such degree of care as is appropriate to avoid unauthorized access, use, or disclosure;
    - 6.1.2.2. Not create, collect, receive, access, or use Protected Information in violation of law, including state, federal, and international law;
    - 6.1.2.3. Use and disclose Protected Information solely and exclusively for the purposes for which the Protected Information, or access to it, is provided by the District to Contractor pursuant to the terms and conditions of this Agreement, and not use, sell, rent, transfer, distribute, or otherwise disclose or make available Protected Information for Contractor's own purposes or for the benefit of

anyone other than the District; and

6.1.2.4. Not, directly or indirectly, disclose Protected Information to any person other than Authorized Persons.

6.2. Information Security.

6.2.1. Contractor represents and warrants that its creation, collection, receipt, access, use, storage, disposal, and disclosure of Protected Information does and will comply with all applicable federal, state and international privacy and data protection laws, as well as all other applicable regulations and directives. Contractor will remain aware at all times of changes to all applicable federal, state and international privacy and data protection laws and promptly implement all procedures and practices as may be necessary to remain in compliance with the laws, in each case, at Contractor's sole cost and expense.

6.2.2. Contractor shall implement and maintain a written information security program including appropriate policies, procedures and risk assessments to safeguard data security and privacy that are reviewed by Contractor at least annually.

6.2.3. Without limiting Contractor's obligations under Paragraph 6.2.1, Contractor shall implement administrative, physical, and technical safeguards to protect Protected Information from unauthorized access, acquisition, or disclosure, destruction, alteration, accidental loss, misuse, or damage that are no less rigorous than accepted industry best practices, the International Organization for Standardization's standards: ISO/IEC 27001 – Information Security Management Systems – Requirements and ISO/IEC 27002 – Code of Practice for Information Security Management, the National Institute of Standards and Technology (NIST) Cybersecurity Framework or Center for Internet Security, Critical Security Controls (CSC-20), and shall ensure that all such safeguards, including the manner in which Protected Information is created, collected, accessed, received, used, stored, processed, disposed of, and disclosed, comply with applicable data protection and privacy laws, as well as the terms and conditions of this Agreement.

6.2.4. *[Use this paragraph if Contractor will have access to or will collect, access, use, store, process, dispose of, or disclose credit, debit, or other payment cardholder information.]* Contractor shall at all times remain in compliance with the Payment Card Industry Data Security Standard ("PCI DSS") requirements, including remaining aware at all times of changes to the PCI DSS and promptly implementing all procedures and practices as may be necessary to remain in compliance with the PCI DSS, in each case, at Contractor's sole cost and expense.



- 6.2.5. At a minimum, Contractor's safeguards for the protection of Protected Information shall include: (i) limiting access of Personal Information to Authorized Persons; (ii) securing, both physically and technologically, business facilities, data centers, paper files, servers, backup systems, and computing equipment, including, but not limited to, all mobile devices and other equipment with information storage capability; (iii) implementing network, application, database, and platform security; (iv) securing information transmission, storage, and disposal; (v) implementing authentication and access controls within media, applications, operating systems, and equipment; (vi) encrypting Highly-Sensitive Personal Information stored on any media; (vii) encrypting Highly-Sensitive Personal Information transmitted over public or wireless networks; (viii) strictly segregating Protected Information from information of Contractor or its other customers so that Protected Information is not commingled with any other types of information; (ix) conducting risk assessments, penetration testing, and vulnerability scans and promptly implementing, at Contractor's sole cost and expense, a corrective action plan to correct any issues that are reported as a result of the testing; (x) implementing appropriate personnel security and integrity procedures and practices, including, but not limited to, conducting background checks consistent with applicable law; and (xi) providing appropriate privacy and information security training to Contractor's employees.
- 6.2.6. During the term of each Authorized Person's employment or retention through subcontract by Contractor, Contractor shall at all times cause such Authorized Persons to abide strictly by Contractor's obligations under this Agreement. Contractor further agrees that it shall maintain a disciplinary process to address any unauthorized access, use, or disclosure of Protected Information by any of Contractor's officers, partners, principals, employees, agents, or contractors.
- 6.2.7. Within 15 days of making any material changes to Contractor's security program or administrative, physical, or technical safeguards to protect Protected Information from unauthorized access, disclosure, or use under Paragraphs 6.2.2 and 6.2.3 of this Agreement, Contractor shall notify the District of the change in writing.
- 6.2.8. Upon the District's written request, Contractor shall provide the District with a network diagram that outlines Contractor's information technology network infrastructure and all equipment used in relation to fulfilling its obligations under this Agreement, including, without limitation: (i) connectivity to the District and all third parties who may access Contractor's network to the extent the network contains Protected Information; (ii) all network connections, including remote access services and wireless

connectivity; (iii) all access control measures (for example, firewalls, packet filters, intrusion detection and prevention services, and access-list-controlled routers); (iv) all backup or redundant servers; and (v) permitted access through each network connection.

### 6.3. Security Breach Procedures.

#### 6.3.1. Contractor shall:

6.3.1.1. Upon execution of this agreement, provide the District with the name and contact information for an employee of Contractor who shall serve as the District's primary security contact and shall be available to assist the District twenty-four (24) hours per day, seven (7) days per week as a contact in resolving obligations associated with a Security Breach;

6.3.1.2. Notify the District of a suspected Security Breach as soon as practicable, but no later than twenty-four (24) hours after Contractor becomes aware of it; and

6.3.1.3. Notify the District of any suspected Security Breaches by reporting via email to [itsecurity@ebmud.com](mailto:itsecurity@ebmud.com). Once a suspected Security Breach has been confirmed, written notice should be provided to the District within twenty-four (24) hours of confirmation that a breach occurred.

6.3.2. Immediately following Contractor's notification to the District of a Security Breach, the parties shall coordinate with each other to investigate the Security Breach. Contractor agrees to fully cooperate with the District in the District's handling of the matter, including, without limitation: (i) assisting with any investigation; (ii) providing the District with physical access to the facilities and operations affected; (iii) facilitating interviews with Contractor's employees, agents and others involved in the matter; and (iv) making available all relevant records, logs, files, data reporting, and other materials required to comply with applicable law, regulation, industry standards, or as otherwise required by the District.

6.3.3. Contractor shall, at its own expense, use best efforts to immediately contain and remedy any Security Breach and prevent any further Security Breach, including, but not limited to taking any and all action necessary to comply with applicable data security and privacy rights, laws, regulations, and standards. Contractor shall reimburse the District for all actual costs incurred by the District in responding to, and mitigating damages caused by, any Security Breach, including all costs of notice and/or remediation.

- 6.3.4. Contractor agrees that it shall not inform any third party of any Security Breach involving Protected Information without first obtaining the District's prior written consent, other than to inform a complaining District customer that the matter has been forwarded to the District. Further, Contractor agrees that the District shall have the sole right to determine: (i) whether notice of the Security Breach is to be provided to any individuals, regulators, law enforcement agencies, consumer reporting agencies, or others as required by law or regulation, or otherwise in the District's discretion; and (ii) the contents of such notice, whether any type of remediation may be offered to affected persons, and the nature and extent of any such remediation.
- 6.3.5. Contractor agrees to maintain and preserve all documents, records, and other data related to any Security Breach.
- 6.3.6. Contractor agrees to reasonably cooperate with the District in any litigation, investigation, or other action deemed necessary by the District to protect its rights relating to the use, disclosure, protection, and maintenance of the Protected Information.

#### 6.4. Oversight of Security Compliance.

Upon the District's written request, to confirm Contractor's compliance with this Agreement, as well as any applicable laws, regulations, and industry standards, Contractor grants the District or a third party working on behalf of the District permission to perform an assessment, audit, examination, or review of all controls in Contractor's physical and/or technical environment in relation to all Protected Information being handled by Contractor pursuant to this Agreement. Contractor shall fully cooperate with such assessment by providing access to knowledgeable personnel, physical premises, documentation, infrastructure, and application software that processes, stores, or transports Protected Information for the District pursuant to this Agreement. In addition, upon the District's written request, Contractor shall provide the District with the results of any audit by or on behalf of Contractor performed that assesses the effectiveness of Contractor's information security program as relevant to the security and confidentiality of Protected Information shared under this Agreement.

#### 6.5. Return or Destruction of Protected Information.

At any time during the term of this Agreement at the District's written request or upon the termination or expiration of this Agreement for any reason, at the District's direction Contractor shall, and shall instruct all Authorized Persons to, promptly return to the District all copies, whether in written, electronic, or other form or media, of Protected Information in its possession or the possession of such

Authorized Persons, or securely dispose of all such copies, and certify in writing to the District that such Protected Information has been returned to the District or disposed of securely. Contractor shall comply with all directions provided by the District with respect to the return or disposal of Protected Information.

- 6.6. Contractor acknowledges that any breach of its covenants or obligations set forth in Paragraph 6 may cause the District irreparable harm for which monetary damages would not be adequate compensation and agrees that, in the event of such breach or threatened breach, the District is entitled to seek equitable relief, including a restraining order, injunctive relief, specific performance, and any other relief that may be available from any court, in addition to any other remedy to which the District may be entitled at law or in equity. Such remedies shall not be deemed to be exclusive but shall be in addition to all other remedies available at law or in equity, subject to any express exclusions or limitations in this Agreement to the contrary.

## **7. BREACH OF AGREEMENT**

- 7.1. The following shall be considered a material breach of this Agreement:
- 7.1.1. Contractor's failure to comply with any of the security requirements of Paragraph 6.
  - 7.1.2. The failure of the Services to comply with the technical specifications of Exhibit A.
  - 7.1.3. Contractor's failure to implement the Services in accordance with the schedule provided in Exhibit A.
  - 7.1.4. Contractor's failure to comply with any warranty provision of Paragraph 14.
  - 7.1.5. Contractor's failure to supply skilled supervisory personnel, an adequate number of properly skilled workers, proper materials, or necessary equipment to prosecute the Services in accordance with this Agreement.
  - 7.1.6. Contractor's failure to provide the District with a written plan to cure a District identified default as specified in Paragraph 7.2, or the District's reasonable refusal to accept Contractor's plan for curing its breach; or Contractor does not fully carry out an accepted plan to cure.
  - 7.1.7. Contractor's abandonment of the Services. Abandonment is conclusively presumed when the District requests a written plan to cure a breach and Contractor does not submit the plan within five (5) business days of the District's request.
  - 7.1.8. Contractor's insolvency or filing for relief under the bankruptcy laws of the United States.

- 7.1.9. Contractor's general assignment of this Agreement for the benefit of its creditors or failure to pay its debts as the same become due.
  - 7.1.10. Appointment of a receiver to take charge of Contractor's property.
  - 7.1.11. Contractor's disregard of legal requirements of agencies having jurisdiction over the Services, Contractor, or the District.
  - 7.1.12. Contractor's breach of any other material obligation under this Agreement.
- 7.2. If the nature of any of the breaches identified in Paragraphs 7.1.1 through 7.1.12 is such that the breach may be cured, the breach shall not be considered a material breach if, after written notice from the District, the District is presented with a satisfactory plan to cure the breach within five (5) days and the breach is cured within thirty (30) days, except that any failures related to Contractor's information security obligations under Paragraph 6 shall be cured within five (5) days.
- 7.3. Upon any material breach of this Agreement, the District shall have the following remedies, at its option:
- 7.3.1. The District may terminate the Agreement immediately in writing for cause under Paragraph 8.1.
  - 7.3.2. The District may provide notice in writing to Contractor of its intent to terminate this Agreement for cause, with the notice providing an effective termination date. The time between the date of the notice and the effective date of termination shall be the "Notice Period."
  - 7.3.3. During any Notice Period:
    - 7.3.3.1. Contractor shall continue to retain the District Information, or solely such specific databases or other collections or articles of District Information as the District may allow;
    - 7.3.3.2. Contractor shall continue to provide the Services as though this Agreement was still in force;
    - 7.3.3.3. The District shall pay in full all undisputed compensation due Contractor as of the notice date and shall pay monthly compensation to Contractor for retention of the Services, in accordance with the Agreement;
    - 7.3.3.4. Contractor will fully cooperate with the District so as to enable the District to transition the District Information and the Services to a District platform or a platform provided by a third party.

7.3.4. The District shall have the right, through written notice to Contractor, to extend the Notice Period or terminate the Agreement earlier than the Notice Period.

7.4. The remedies in this Paragraph 7 shall not be deemed to be exclusive but shall be in addition to all other remedies available in this Agreement or at law or in equity.

## **8. TERMINATION OF AGREEMENT**

8.1. Termination by the District for Cause:

8.1.1. District may terminate Contractor's right to proceed under this Agreement, in whole or in part, for cause at any time after the occurrence of any material breach under Paragraph 7.

8.2. Termination by the District for Convenience:

8.2.1. The District may, at its option, and for its convenience, terminate this Agreement at any time by giving a minimum 30 day written notice to Contractor specifying the effective date of termination. Upon such termination, Contractor agrees to comply with the notice and further agrees to waive any claims for damages, including loss of anticipated profits, on account of the termination; and, as the sole right and remedy of Contractor, the District shall pay Contractor as set forth below.

8.2.2. Upon receipt of a notice of termination for convenience, Contractor shall, unless the District directs otherwise, do the following:

8.2.2.1. Immediately discontinue its performance of the Agreement to the extent specified in the notice.

8.2.2.2. Place no further orders or subcontracts for equipment, services or software, except as may be necessary for completion of a portion of the Services that is not discontinued or that is necessary for an orderly cessation of the Services.

8.2.2.3. Promptly cancel, on the most favorable terms reasonably possible, all subcontracts to the extent they relate to the performance of the discontinued portion of the Services, except for any subcontracts for which the District has requested assignment.

8.2.2.4. Thereafter, perform only such Services as may be necessary to preserve and protect work done in furtherance of the Services already in progress.

8.3. Effect of Termination:

- 8.3.1. Upon termination, the obligations of the Agreement shall continue as to portions of the Services already performed and, subject to Contractor's obligations under Paragraph 8.2.2, as to bona fide obligations assumed by Contractor prior to the date of termination.
- 8.3.2. Upon termination of this Agreement the District may, at its election and by notice to Contractor, accept the assignment of any or all of Contractor's subcontracts and then complete the Services by any method the District may deem expedient.
- 8.3.3. If requested by the District, Contractor shall remove any part or all of Contractor's materials, supplies, equipment, tools, and machinery from the site of the Services within seven days of such request; and, if Contractor fails to do so, the District may remove or store, and after 90 days sell, any of the same at Contractor's expense.
- 8.3.4. If this Agreement is terminated, Contractor shall be entitled to compensation for services satisfactorily performed up to the effective date of termination; provided however, that the District may condition payment of such compensation upon Contractor's delivery to the District of any and all District Information, documents, photographs, computer software, digital files, and other materials provided to Contractor or prepared by Contractor for the District under this Agreement. Payment by the District for the services satisfactorily performed to the effective date of termination shall be the sole and exclusive remedy to which Contractor is entitled in the event of termination of the Agreement and Contractor shall be entitled to no other compensation or damages and expressly waives same.
- 8.3.5. Termination of this Agreement shall not relieve Contractor of any warranty obligations under Paragraph 14.
- 8.3.6. No termination or action taken by the District after termination shall prejudice any other rights or remedies of the District provided by law or by this Agreement.
- 8.3.7. If, after termination for other than convenience, it is determined that Contractor was not in material breach of this Agreement, or that the material breach was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for convenience pursuant to Paragraph 8.2.

## **9. CHANGES**

- 9.1. Changes in the Services can only be made by way of an approved Change Order. The District Project Manager shall have authority to approve the Change Order. If the

change causes an increase or decrease in the Maximum Cost Ceiling a change in the time for performance under the Agreement, or other substantial modifications to the Services, the District Project Manager shall memorialize these changes as an amendment to the Agreement.

- 9.2. The District reserves the right to make changes in the Services specified in Exhibit A or to omit any item or portion of the Services, as may be deemed by the District Project Manager to be necessary or advisable and to order such extra work as may be determined by the District Project Manager to be required for the proper execution and completion of the Services. Any such changes will be ordered in writing by the District Project Manager. The determination of the District Project Manager on all questions relating to changes, including extra work, shall be conclusive and binding.
- 9.3. If Contractor agrees with the terms and conditions of the approved Change Order, Contractor shall indicate its acceptance by signing the original copy and returning it to the District Project Manager with reasonable promptness and in such sequence as to not delay the Services or activities of the District or of separate contractors, whichever is sooner. Payment in accordance with the terms and conditions set forth in the executed Change Order shall constitute full compensation for all Services included in the Change Order and the District will be released from any and all claims for direct, indirect, and impact expenses and additional time impact resulting from the Services.
- 9.4. If Contractor disagrees with the terms and conditions of the approved Change Order, Contractor shall indicate specific areas of disagreement and return the approved Change Order to the District Project Manager with a detailed written dispute. No payment will be made on the disputed work until the approved Change Order is returned to the District Project Manager. However, whether or not Contractor agrees with the terms and conditions of an approved Change Order, Contractor shall immediately revise its sequence of operations as required to facilitate timely completion of the changed work and shall proceed with the revised work sequence.

## **10. DELAYS**

- 10.1. Contractor shall take reasonable precautions to foresee and prevent Delay Events in execution of the Services.

- 10.1.1. When Contractor foresees a Delay Event, and upon the occurrence of a Delay Event, Contractor shall immediately notify the District Project Manager of the probability or the actual occurrence of a delay, and its cause. Within 15 days from the identification of a Delay Event, Contractor shall provide the District Project Manager with a detailed written description of the delay, its cause, its impact on the Services and the project schedule, and Contractor's mitigation plans. Failure to provide the notification required above shall operate as a waiver of Contractor's right to any additional time or



compensation resulting from the Delay Event for whatever cause.

- 10.1.2. The District Project Manager will investigate the facts and ascertain the extent of the Delay Event, and the District Project Manager's findings regarding the Delay Event shall be final and conclusive, except in the case of gross error on the part of the District Project Manager. An extension of time must be approved by the District Project Manager to be effective.
- 10.1.3. The granting, or acceptance, of extensions of time to complete the Services will not operate as a release of Contractor or the surety on Contractor's faithful performance bond.
- 10.1.4. With respect to all Delay Events (Compensable, Excusable, or Inexcusable), Contractor shall reschedule the Services and revise its operations, to the extent possible, to mitigate the effects of the Delay Event.
- 10.2. For Inexcusable Delay Events, Contractor shall not be entitled to an extension of time or additional compensation for any loss, cost, damage, expense or liability resulting directly or indirectly from the Inexcusable Delay Event.
- 10.3. For Excusable Delay Events, the District Project Manager will grant Contractor an extension of the time to perform under the Agreement, but Contractor shall not be entitled to any additional compensation for any loss, costs, damages, expenses or liability resulting directly or indirectly from the Excusable Delay Event.
- 10.4. For Compensable Delay Events, the District Project Manager will grant Contractor an extension of the time to perform under the Agreement and compensation in an amount that represents Contractor's actual direct costs incurred as a direct result of the compensable delay. Contractor may recover its direct costs only and may not recover (and waives) all other types of indirect, consequential, special and incidental damages.
- 10.5. For Concurrent Delay Events, the following rules apply:
  - 10.5.1. If one or more of the Concurrent Delay Events are Excusable or Compensable, the period of concurrent delay will be treated as an Excusable Delay Event.
  - 10.5.2. If all of the Concurrent Delay Events are Inexcusable, the period of concurrent delay will be treated as an Inexcusable Delay Event.

## **11. PROJECT MANAGERS**

- 11.1. The District designates [District Project Manager's name] as its Project Manager, who shall be responsible for administering and interpreting the terms and conditions of

this Agreement, for matters relating to Contractor's performance under this Agreement, and for liaison and coordination between the District and Contractor. Contractor may be requested to assist in such coordinating activities as necessary as part of the services. In the event the District wishes to make a change in the District's representative, the District will notify Contractor of the change in writing.

- 11.2. Contractor designates [Contractor's Project Manager's name] as its Project Manager, who shall have immediate responsibility for the performance of the work and for all matters relating to performance under this Agreement. Any change in Contractor-designated personnel or subconsultants shall be subject to approval by the District's Project Manager. Contractor hereby commits an average of [1 to 100] percent of [Contractor's Project Manager's name] time on this project for the duration of the project.

## 12. INSURANCE

- 12.1. Required Coverage. The Contractor shall take out and maintain during the life of the Agreement all insurance required as described in Exhibit C, attached hereto and incorporated herein.
- 12.2. Non-Waiver. This Paragraph 12 is not intended to and shall not be construed in any manner as to waive, restrict, or limit the liability of Contractor for any obligations under this Agreement (including Contractor's obligation to indemnify, defend and hold harmless the District).

## 13. INDEMNIFICATION

- 13.1. General Indemnification. Contractor expressly agrees to defend, indemnify, and hold harmless the District and its Directors, officers, agents and employees from and against any and all loss, liability, expense, claims, suits, and damages, including attorneys' fees, arising out of or pertaining or relating to Contractor's, its associates', employees', subcontractors', or other agents' negligence, recklessness, or willful misconduct, in the operation and/or performance under this Agreement.
- 13.2. Security Breach Indemnification. Contractor expressly agrees to defend, indemnify, and hold harmless the District and its Directors, officers, agents and employees from and against any and all loss, liability, expense, claims, suits, and damages, including attorneys' fees, arising out of or pertaining or relating to Contractor's, its associates', employees', subconsultants', or other agents' failure to comply with any of the Security provisions of Paragraph 6 of this Agreement.

## 14. WARRANTIES AND REMEDIES

- 14.1. Contractor warrants [*a limited period is optional when providing standalone software rather than ongoing hosting: for a period of [number in words (number) years]*] that

the Services:

- 14.1.1. Will conform to and perform in accordance with the requirements of this Agreement, including the Security provisions of Paragraph 6, and any specifications set forth in Exhibit A;
  - 14.1.2. Will be performed in a professional and workmanlike manner in accordance with industry standards and practices for similar services, using personnel with the requisite skill, experience, and qualifications, devoting adequate resources to meet its obligations under this Agreement;
  - 14.1.3. Will be provided free from harmful or malicious code;
  - 14.1.4. Will be provided in compliance with all applicable laws; and
  - 14.1.5. Will not infringe, misappropriate, or otherwise violate any Intellectual Property Right or other right of any third party.
- 14.2. In the event of any Security Breach or if the Services fail to comply with the warranties as stated in Paragraph 14, in addition to any equitable remedies provided in Paragraphs 6 and 7, the District shall be entitled to any resulting direct and indirect damages.
- 14.3. The limitations on liability in Paragraph 14.2 shall not apply to:
- 14.3.1. Losses resulting from Contractor's failure to comply with its obligations under Paragraph 6;
  - 14.3.2. Losses resulting from Contractor's failure to comply with disaster recovery obligations in Exhibit A;
  - 14.3.3. Losses resulting from any claim that the Services infringe, misappropriate, or otherwise violate any Intellectual Property Right or other right of any third party.
  - 14.3.4. Contractor's indemnification obligations under Paragraph 13;
  - 14.3.5. Losses resulting from Contractor's unauthorized or intentional suspension, termination, or disabling of the Services in breach of this Agreement;
  - 14.3.6. Losses resulting from Contractor's gross negligence or more culpable conduct, including any willful misconduct or intentional wrongful acts;
  - 14.3.7. Losses resulting from death, bodily injury, or damage to real or tangible personal property arising out of or relating to Contractor's negligent or more culpable acts or omissions; or

14.3.8. Losses resulting from Contractor's violation of any law.

14.4. Except for the express warranties provided in this Paragraph 14, each Party hereby disclaims all warranties, whether express, implied, statutory, or otherwise under or in connection with this Agreement or any subject matter hereof.

14.5. To the extent the provisions of this Paragraph 14 conflict with any warranties, disclaimers, limitations of liability or exclusions of remedies included in any license or terms and conditions document provided to the District by Contractor or Contractor's, partners, contractor's or agents in support of the Services, the provisions of this Paragraph 14 shall govern.

## 15. NOTICES

15.1. Any notice that the District may desire or is required at any time to give or serve Contractor may be delivered personally, or be sent by United States mail, postage prepaid, addressed to:

[Contractor's firm's name]

[address]

Attention: [contact, usually Contractor's project manager],

or at such other address as shall have been last furnished in writing by Contractor to the District.

15.2. Any notice which Contractor may desire or is required at any time to give or serve upon the District may be delivered personally at EBMUD, 375 11th Street, Oakland, CA 94607-4240, or be sent by United States mail, postage prepaid, addressed to:

[District position, not a specific name]

P.O. Box 24055, MS [mailstop]

Oakland, CA 94623-1055

or at such other address as shall have been last furnished in writing by the District to Contractor.

15.3. Such personal delivery or mailing in such manner shall constitute a good, sufficient and lawful notice and service thereof in all such cases.

## 16. CONTRACT EQUITY PROGRAM COMPLIANCE

16.1. Contractor expressly agrees that this Agreement is subject to the District's Contract Equity Program ("CEP"). Contractor is familiar with the District's CEP and Equal Opportunity Guidelines, and has read and understood all of the program requirements. Contractor understands and agrees to comply with the CEP and all requirements therein, including each of the Good Faith Efforts. Contractor further

understands and agrees that non-compliance with the CEP requirements may result in termination of this Agreement.

- 16.2. *[This paragraph should be used when there are subcontracting/subconsulting opportunities. Consult with CEP office for details.]* Designated CEP compliance for the duration of this Agreement is listed in Exhibit C, which is attached hereto and incorporated herein. Contractor shall maintain records of the total amount actually paid to each subconsultant. Any change of Contractor's listed subconsultants shall be subject to approval by the District's Project Manager.

## 17. NONDISCRIMINATION

- 17.1. There shall be no discrimination in the performance of this Agreement, against any person, or group of persons, on account of race, color, religion, creed, national origin, ancestry, gender including gender identity or expression, age, marital or domestic partnership status, mental disability, physical disability (including HIV and AIDS), medical condition (including genetic characteristics or cancer), veteran or military status, family or medical leave status, genetic information, or sexual orientation. Contractor shall not establish or permit any such practice(s) of discrimination with reference to the Agreement or any part. Contractors determined to be in violation of this Paragraph shall be deemed to be in material breach of this Agreement.
- 17.2. **Contractor shall abide by the requirements of 41 CFR §§ 60-1.4(a), 60-300.5(a) and 60-741.5(a). These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex, sexual orientation, gender identity, or national origin in the performance of this Agreement. Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, national origin, protected veteran status or disability.**
- 17.3. Contractor shall include the two nondiscrimination provisions above in all subcontracts.

## 18. GENERAL PROVISIONS

- 18.1. Contractor affirms that it does not have any financial interest or conflict of interest that would prevent Contractor from providing unbiased, impartial service to the District under this Agreement.
- 18.2. This Agreement represents the entire understanding of the District and Contractor as to those matters contained within it. No prior oral or written understanding shall be of any force or effect with respect to those matters covered under this Agreement. This Agreement may only be modified by amendment in writing signed by each party.

- 18.3. This Agreement is for the sole benefit of the Parties and their respective successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any other person or entity any legal or equitable right, benefit, or remedy of any nature whatsoever, under or by reason of this Agreement.
- 18.4. This Agreement is to be binding on the successors and assigns of the Parties. The services to be provided under this Agreement are deemed unique and Contractor shall not assign, transfer or otherwise substitute its interest in this Agreement or any of its obligations hereunder without the prior written consent of the District.
- 18.5. Should any part of this Agreement be declared by a final decision by a court or tribunal of competent jurisdiction to be unconstitutional, invalid or beyond the authority of either party to enter into or carry out, such decision shall not affect the validity of the remainder of this Agreement, which shall continue in full force and effect, provided that the remainder of this Agreement can be interpreted to give effect to the intentions of the Parties.
- 18.6. In the event that any action, suit, or other legal or administrative proceeding is instituted or commenced by either Party against the other Party arising out of this Agreement, the prevailing Party shall be entitled to recover its reasonable attorneys' fees and court costs from the non-prevailing Party.
- 18.7. Multiple copies of this Agreement may be executed by the Parties and the Parties agree that the Agreement on file at the District is the version of the Agreement that shall take precedence should any differences exist among counterparts of the Agreement.
- 18.8. This Agreement and all matters relating to it shall be governed by the laws of the State of California.
- 18.9. Contractor, its employees, subcontractors, and agents shall not refer to the District, or use any logos, images, or photographs of the District for any commercial purpose, including, but not limited to, advertising, promotion, or public relations, without the District's prior written consent. Such written consent shall not be required for the inclusion of the District's name on a customer list.
- 18.10. The District's waiver of the performance of any covenant, condition, obligation, representation, warranty or promise in this agreement shall not invalidate this Agreement or be deemed a waiver of any other covenant, condition, obligation, representation, warranty or promise. The District's waiver of the time for performing any act or condition hereunder does not constitute a waiver of the act or condition itself.
- 18.11. The rights and remedies of the District provided herein shall not be exclusive and are in addition to any other rights and remedies provided by law or under the

Agreement.

18.12. The provisions of Paragraphs 2.5, 13 and 14 shall survive any termination of this Agreement.

IN WITNESS WHEREOF, the parties hereto each herewith subscribe the same in duplicate.

**EAST BAY MUNICIPAL UTILITY DISTRICT**

By: \_\_\_\_\_ Date \_\_\_\_\_  
*(Name),*  
*(Insert title - Director of Engineering and Construction or Manager of Support Services)*

Approved As To Form

By: \_\_\_\_\_  
for the Office of the General Counsel

***(CONSULTING FIRM'S NAME, ALL CAPS & BOLD)***

By: \_\_\_\_\_ Date \_\_\_\_\_  
*(Name),*  
*(Title)*