

**AGREEMENT BETWEEN
THE CITY OF SAN JOSE
AND
OVERLAY LLC
FOR A BUILDING PERFORMANCE ORDINANCE SOLUTION**

This Agreement is entered into as the City’s execution date (“Effective Date”) between the City of San José, a municipal corporation (“City”), and Overlay LLC, a Colorado Limited Liability Company registered to conduct business in the State of California, (hereinafter “Contractor”). Each of City and Contractor are sometimes hereinafter referred to as a “Party” and collectively as the “Parties.”

WHEREAS, City has issued a Request for Proposal ("RFP") to acquire a Building Performance Ordinance Solution (the “Solution” or the “Software”) and professional services, including implementation, configuration, training, and ongoing maintenance and support (collectively the “Services”).

WHEREAS, Contractor has the necessary expertise and skills to provide such Solution and perform such Services, and Contractor's proposal demonstrates Contractor’s ability to meet the City's needs; and

WHEREAS, Contractor has a good understanding of City’s requirements through Contractor’s examination of the Request for Proposal documents and the exchange of information; and

WHEREAS, based on this in-depth understanding and combining it with Contractor’s knowledge and expertise with public organizations, Contractor warrants that the proposed Solution and Services will meet the City’s specifications and requirements as described in the Scope of Services; and

WHEREAS, the recitals are true and correct and are incorporated into this Agreement;

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1 AGREEMENT DOCUMENTS

The documents forming the entire Agreement between City and Contractor shall consist of this Agreement including:

- EXHIBIT A-1 - Scope of Services
- A-2 - Features and Functionality Requirements
- A-3 - Preliminary Project Implementation Schedule
- A-4 - Final Solution Acceptance Certificate
- EXHIBIT C - Insurance Requirements
- EXHIBIT D - Change Order Form
- EXHIBIT E - Notice of Option to Extend Agreement
- EXHIBIT F - Contractor’s Software License/Subscription Agreement
- EXHIBIT G - Information Technology and Security Requirements
- G-1 - Privacy and Disclosure Policy

In the event any discrepancies or inconsistencies between the provisions of this Agreement and any of the above-referenced documents arise, the provisions of this Agreement will prevail except that the terms of the Software License/Subscription Agreement (Exhibit F) shall control with respect to the terms of use of

the Software license/subscription. The provisions in the Exhibits shall prevail over conflicting terms in any Attachments to the Exhibits. Contractor and City hereby acknowledge that they have drafted and negotiated the Agreement jointly and that the Agreement will be construed neither against nor in favor of either, but rather in accordance with its fair meaning.

This Agreement and the Exhibits set forth above, contain all of the agreements, representations, and understandings of the Parties hereto, and supersede and replace any previous understandings, commitments, or agreements, whether oral or written. Any other terms or conditions included in any shrink-wrap or boot-screen license agreements, quotes, invoices, acknowledgments, bills of lading, or other forms utilized or exchanged by the Parties shall not be incorporated in this Agreement or be binding upon the Parties unless the Parties expressly agree in writing or unless otherwise provided for in this Agreement.

2 TERM OF AGREEMENT

2.1 Term

The term of this Agreement is from Effective Date to January 5, 2023 (“Initial Term”), inclusive, subject to the provisions of Section 14 TERMINATION and subsection 2.2 “Options to Extend.”

2.2 Options to Extend

After the Initial Term, the City reserves the right, at its sole discretion, to extend the term of this Agreement for eight (8) additional one-year terms (“Option Periods”) through January 5, 2031 for ongoing licensing, support, maintenance, and related professional services. City shall provide Contractor written notice in the form of Exhibit E of its intention to exercise its option prior to the end of the then current term.

2.3 No Waiver

City’s agreement to extend the term of this Agreement is not a waiver of the “time is of the essence” provision in Section 4.

Notwithstanding this Section, the Parties agree that the preliminary project schedule set forth in Exhibit A-3 and the ability of the Parties to provide and use the products and/or services under this Agreement may be limited if business activities are subject to local, state, or federal mandates and advisories for managing public health and safety related to the COVID-19 pandemic or other force majeure. The Parties agree that the provision of products and services and the payment for such products and services may be postponed or suspended following execution of this Agreement by the City and that the Parties are not required to act on this Agreement until the City issues a written notice to proceed.

3 SCOPE OF SERVICES

3.1 Scope of Work

Contractor shall implement the Solution and perform the Services as set forth in the Scope of Services (the “Scope of Services” or “Scope”) which is attached hereto as Exhibits A-1 through A-4 and incorporated as though fully set forth herein.

3.2 Notification

Contractor agrees to notify City promptly of any factor, occurrence, or event coming to its attention that may affect Contractor’s ability to meet the requirements of the Agreement or that is likely to occasion any material delay in completion of the projects contemplated by this Agreement. Such

notice shall be given in the event of any loss or reassignment of key employees, threat of strike, or major equipment failure.

3.3 Contractor's Software

The terms for the licensing of the Software, including subsequent releases licensed to the City, shall be as set forth in the Software License Agreement (Exhibit F).

3.4 Information Technology and Security Requirements

Contractor agrees to perform the work set forth in this Agreement in accordance with the City's Information Technology and Security Requirements, which are attached hereto as Exhibit G and incorporated herein.

3.4.1 Privacy and Disclosure Policy

Contractor agrees in the performance of the Services provided herein to comply with the City's Privacy and Disclosure Policy (the "Policy") as set forth in Exhibit G-1, which is attached hereto and incorporated herein. Contractor shall ensure that all webpages that it creates are consistent with this Policy. Contractor further agrees that it shall treat all information received through this Agreement in strict accordance with the Policy.

4 WAGE THEFT

- 4.1 **Definition:** For purposes of this provision, "Wage Theft" means a final judgement, order, or other determination of a federal or state court, or of a federal, state, or local administrative agency that a contractor or subcontractor failed to pay its workers in accordance with any applicable federal, state, or local wage and hour laws, regulations, or other requirements. A judgement, order, or other determination is "final" if the contractor or subcontractor has exhausted all appeals, and the time period to appeal has expired.
- 4.2 **Compliance with Wage and Hour Laws:** The Contractor must comply with all applicable federal, state, and local wage and hour laws, regulations, and policies, as required by City Council Policy 0-44 <https://www.sanjoseca.gov/home/showdocument?id=12945>. The Contractor must include this requirement in each of its subcontracts.
- 4.3 **Representations in Wage Theft Disclosure Certification Forms:** The City awarded this Agreement to the Contractor, in part, based on the representations made by the Contractor and its listed subcontractors in the Proposal Certification or Wage Theft Disclosure Certification Form that they completed as part of the of procurement process.
- 4.3.1 **Contractor Warranty:** By executing this Agreement, the Contractor affirms the accuracy of the representation it made in its Proposal Certification or Wage Theft Disclosure Certification Form. It is a material breach of this Agreement if the City determines that the Proposal Certification or Wage Theft Disclosure Certification Form contained any material inaccuracies.
- 4.3.2 **Listed Subcontractors:** The Contractor must include in the subcontract of all subcontractors that it listed during the procurement, a provision that does the following:
- 4.3.2.1 Requires the subcontractor to warrant the accuracy of the Proposal Certification or Wage Theft Disclosure Certification Form that it submitted during the procurement of this Agreement, and

- 4.3.2.2 Allows the Contractor to terminate the subcontract if the City or the Contractor determines that the Proposal Certification or Wage Theft Disclosure Certification Form contained any material inaccuracies.
- 4.3.3 **Termination of Subcontractor:** The Contractor must terminate a listed subcontractor if requested by the City based on the subcontractor's submittal of a materially inaccurate Proposal Certification or Wage Theft Disclosure Certification form.
- 4.4 **Subcontractors Not Listed:** Before contracting with a subcontractor not listed during the procurement process, the Contractor will require the subcontractor to complete a Wage Theft Disclosure Certification Form provided by the City's Office of Equality Assurance through their website at <https://www.sanjoseca.gov/home/showdocument?id=64354>. The Contractor must provide the completed certification form to the City within ten (10) calendar days of executing the subcontract.
 - 4.4.1 The Contractor cannot use any subcontractor that has one or more Wage Theft violations, or has one (1) outstanding, unpaid Wage Theft violation, within five (5) years before the date it certified the Wage Theft Disclosure Certification Form.
 - 4.4.2 The Contractor must include a provision in each subcontract allowing the Contractor to terminate the subcontract based on the subcontractor's submission of a materially inaccurate Wage Theft Disclosure Certification Form. The Contractor must terminate a subcontractor if requested by the City based on the subcontractor's submittal of a materially inaccurate Wage Theft Disclosure Certification Form.
- 4.5 **Occurrence or Discovery of Wage Theft:** The Contractor must notify, in writing, the City's Office of Equality Assurance no more than fifteen (15) calendar days after either of the following events: (1) any Wage Theft that occurs during the term of the Agreement involving the Contractor or a subcontractor, and (2) the Contractor becomes aware of Wage Theft by the Contractor or a subcontractor that should have been previously disclosed but was not.
 - 4.5.1 **Satisfaction by Contractor:** The Contractor must promptly satisfy and comply with a Wage Theft judgement, order, or other determination against it. The Contractor must provide the City's Office of Equality Assurance with documentary evidence that it satisfied and complied with the Wage Theft judgement, order, or other determination within five (5) calendar days of doing so.
 - 4.5.2 **Satisfaction by Subcontractor:** The Contractor must include appropriate provisions in each subcontract requiring the subcontractor to do the following: (a) promptly satisfy and comply with a Wage Theft judgement, order, or other determination against it and (b) provide the Contractor and the City's Office of Equality Assurance with documentary evidence that it satisfied and complied with the Wage Theft judgement, order or other determination within five (5) calendar days of doing so.
 - 4.5.3 **City's Right to Withhold Payment:** The City has the right to withhold any moneys owing the Contractor in the amount of the Wage Theft against the Contractor or a subcontractor.
- 4.6 **Material Breach:** Failure to comply with any part of this Section 4 constitutes a material breach of this Agreement. Such breach may serve as a basis for immediate termination of this Agreement and/or any other remedies available under this Agreement and/or law.
- 4.7 **Notice:** Notice provided to the Office of Equality Assurance as required under this Section 4 shall be addressed to: Office of Equality Assurance, 200 East Santa Clara Street, 5th Floor, San

José, CA 95113. The Notice provisions of this Section are separate from any other notice provisions in this Agreement and, accordingly, only notice provided to the above address satisfies the notice requirements in this Section.

5 PRELIMINARY PROJECT IMPLEMENTATION SCHEDULE

Contractor shall perform the Services according to the terms and provisions of the preliminary schedule set out in the attached Exhibit A-3, entitled "Preliminary Project Implementation Schedule." Time is expressly made of the essence with respect to each and every term and provision of this Agreement.

6 DATA AND FACILITIES

Contractor acknowledges that it has in its possession all applicable specifications and drawings and all other documents to which reference is made herein and/or which are matched hereto, and all such data are adequate to enable Contractor to fairly determine its ability to perform the work called for herein at the price and in accordance with the schedule set forth herein. Contractor represents that it now has or can readily procure, without assistance of City, all facilities, machinery, and equipment necessary for the performance of this Agreement.

7 STANDARDS OF SERVICE

In connection with the performance of any Services pursuant to this Agreement:

7.1 Number of Employees

Contractor warrants it will provide sufficient employees to complete the Services ordered within the applicable time frames established pursuant to this Agreement. Furthermore, Contractor shall, at its expense, supply all tools, equipment, and other materials necessary to perform the Services contemplated in this Agreement.

7.2 Skill of Employees

Contractor warrants that employees shall have sufficient skill, knowledge, and training to perform the Services and that the Services shall be performed in a professional and workmanlike manner.

7.3 Duty of Confidentiality

All data, documents, discussions, or other information developed or received by or for one Party in performance of this Agreement are confidential and must not be disclosed to any person except as authorized by the other Party or as required by law. The receiving Party warrants that all employees utilized by it in performing Services are under a written obligation to the receiving Party requiring the employee to maintain the confidentiality of information of the other Party to the extent permitted by law.

7.4 Security and Safety

Contractor shall require employees providing Services at a City location to comply with applicable City security and safety regulations and policies. City may require each employee providing Services to undergo a background investigation, including, but not limited to, a criminal records and fingerprint check. Contractor shall promptly replace any employee found to be unacceptable to City, in its sole discretion, on the basis of a significant infraction found in the background investigation.

7.5 Contractor's Obligations to Employees

Contractor shall provide for and pay the compensation of its employees and shall pay all taxes, contributions, and benefits (such as, but not limited to, workers' compensation benefits) which an employer is required to pay relating to the employment of employees. City shall not be liable to

Contractor or to any employee for Contractor's failure to perform its compensation, benefit, or tax obligations. Contractor shall indemnify, defend, and hold City harmless from and against all such taxes, contributions, and benefits and will comply with all associated governmental regulations, including the filing of all necessary reports and returns.

7.6 Contractor-Initiated Staffing Changes

The qualifications of the Contractor's staffing for this Agreement are material considerations to the City's selection and decision to enter into this Agreement. For this reason, the City Project Manager's approval is required for the Contractor to remove, replace, or add to any of Contractor's staffing identified in this provision.

7.7 City-Initiated Staffing Changes

The City reserves the right to request replacement of an employee or a proposed employee for reasonable cause, including, but not limited to, willful misconduct, inadequate performance or lack of skill, knowledge, or training. Contractor's replacement staff must be qualified to perform the Scope of Services and available to the City within five (5) working days of receipt of such request from City. If, within the first thirty (30) days after an employee's commencement of Services, City notifies Contractor (1) such employee's level of performance is unacceptable, (2) such employee has failed to perform as required, or (3) such employee, in City's sole opinion, lacks the skill, knowledge or training to perform at the required level, then Contractor will be required to review the work performed by said employee, confirm the quality of work, and correct any items the Contractor deems incorrect. If the City requests replacement of an employee and the Contractor has not replaced the employee within the thirty (30) day time period, City shall not be required to pay for, and shall be entitled to a refund of, any sums paid to Contractor for such employee's Services after the date of City's requested replacement of such employee.

8 CHANGE ORDER PROCEDURE AND AUTHORIZATION

8.1 Changes

Any changes to this Agreement after the Effective Date that relate to (i) deleting products or Services, (ii) adding products or Services, (iii) changing or modifying products or Services, or (iv) making other changes that materially alter the Scope of this Agreement or the deliverables required under this Agreement, including approval of all performance and/or payment schedules, shall be made by the Director of Finance in accordance with the procedures set forth below.

8.2 Contract Change Requests

Either Party hereto may, from time to time, and at any time during the term hereof, request a change, as defined in Section 8.1. Requests for changes shall be in writing and shall be addressed and delivered to the other Party as provided herein. Such writing shall be identified as a "Contract Change Request," shall carry a sequential number for ease of tracking, shall set forth in detail the nature of the change requested and the costs associated therewith, and shall identify the products, Services, deliverables, or schedules to be changed.

8.3 Procedures

As soon as practical after receipt by the notified Party of copies of the request, the Parties shall meet as necessary to discuss the change and to ascertain its cost and schedule impacts, if any.

8.4 Change Orders

If the Parties decide to implement a change request, a standard form Change Order ("CO") shall be prepared under the direction of the Director of Finance (or designee) in a form substantially similar to

the form attached hereto as Exhibit D, which CO shall describe the change, delineate the cost, schedule, and other impacts of the change, and include the payment terms for any price increase. Only the City's Director of Finance and Contractor's Authorized Representative shall have authority to execute COs to this Agreement. Execution of a CO by City's Director of Finance and Contractor's Authorized Representative shall constitute a modification hereof and shall be binding on both Parties hereto.

9 COMPENSATION

9.1 Contract Maximum

The total contract price in U.S. dollars shall not exceed One Hundred Fourteen Thousand Nine Hundred Nineteen Dollars (\$114,919) during the Initial Term (“Maximum Compensation”). The terms, rates, and schedule of payment are set forth in the attached Exhibit B, entitled “Compensation.” Contractor shall submit to City invoices at the completion of each milestone, but no more frequently than monthly, with a breakdown of Services as provided in Exhibit B. City will make payments to Contractor within thirty (30) days after the date of approval of each invoice. City will make payments when due in the form of a check, cashier’s check, or wire transfer drawn on a U.S. financial institution.

9.2 Non-Funding

Each payment obligation of City is conditioned upon the availability of state or local government funds which are apportioned or allocated for the payment of such an obligation. If the funds are not allocated and available for the continuance of the function performed by Contractor, the product or service directly or indirectly involved in the performance of that function may be terminated by City at the end of the period for which funds are available. City shall notify Contractor at the earliest possible time of any products or services which will or may be affected by a shortage of funds.

No penalty shall accrue for City in the event this provision is exercised, and City shall not be liable for any future payments due or for any damages as a result of termination under this Section 9.2. This provision shall not be construed so as to permit City to terminate this Agreement or any products or services in order to acquire similar equipment or service from another party. Contractor agrees to render any assistance which City may seek in affecting a transfer of any right of City in this Agreement, or any part hereof, that is required of City pursuant to the securing of financing hereunder. Despite the foregoing, the City shall pay Contractor for any Services performed or product delivered in accordance with this Agreement up to the date of termination.

10 TAXES AND CHARGES

Contractor shall be responsible for payment of all taxes, fees, contributions, or charges applicable to the conduct of Contractor's business.

11 FINAL SOLUTION ACCEPTANCE

Upon final delivery of the Solution, City and Contractor shall conduct acceptance tests. The criteria for the acceptance tests shall be mutually agreed upon by the Parties and in accordance with the Scope of Services. Final Solution Acceptance will occur upon successful completion of the acceptance tests. When Final Solution Acceptance occurs, the Parties will memorialize this event by promptly executing a Final Solution Acceptance Certificate (Exhibit A-4).

If, in the discretion of City, the Solution does not meet the requirements of the acceptance test specifications, City may (1) permit Contractor to repair or replace the Solution so that the same meets the acceptance test specifications in all material respects, all at no additional expense to City or (2) return the

Solution to Contractor, at Contractor's expense and without liability to City, and any amounts paid by City for the Solution shall be promptly refunded by Contractor to City. All warranties shall become effective and begin to run upon the successful completion of the acceptance tests and the date of Final Solution Acceptance.

Payment for any part or parts of the Solution or Services provided hereunder, or inspection or testing thereof, by City shall not constitute acceptance or relieve Contractor of its obligations under this Agreement. City may inspect the components of the Solution when delivered and reject upon notification to Contractor any and all of the Solution which does not conform to the specifications or other requirements of this Agreement. Components of the Solution which are rejected shall be promptly corrected, repaired, or replaced by Contractor in accordance with Contractor's warranty obligations under this Agreement, such that the Solution conforms to the warranties, specifications, and other requirements of this Agreement. If City receives components of the Solution with defects or nonconformities not reasonably apparent on inspection, then City reserves the right to require prompt correction, repair, or replacement by Contractor in accordance with Contractor's warranty obligations under this Agreement following the discovery of such defect or nonconformity.

12 CONTRACTOR REPRESENTATIONS AND WARRANTIES

12.1 Contractor Responsibility

Contractor understands and accepts full responsibility for all requirements and deliverables defined in this Agreement. Contractor warrants it:

- 12.1.1 Has read and agrees with the specifications contained in the Scope of Services;
- 12.1.2 Fully understands the facilities, difficulties, and restrictions attending performance of the Services; and
- 12.1.3 Agrees to inform the City of any unforeseen conditions which will materially affect performance of the work within 45 days of the execution of this Agreement and shall not proceed until written instructions are received from City.

12.2 Authority to Make Agreement

Contractor represents and warrants that Contractor has full right and authority to perform its obligations under this Agreement. City shall be entitled to use the Solution without disturbance.

12.3 Contractor Agreements with City Employees

Contractor agrees to not enter into a relationship that may result in a financial conflict of interest with any employee or agent of the City who participated in the making of governmental decisions related to this Agreement.

12.4 Warranty for Services and Software Customizations

Contractor warrants to City that Contractor shall render all Services and software customizations provided under this Agreement with reasonable care and skill. Contractor further warrants that the software customizations will function per the approved business requirements and design under ordinary use and operation in conformance with the specifications and documentation. Additionally, Contractor shall warrant its Services and software customizations for a period of one (1) year after Final Solution Acceptance ("Warranty Period"). During the Warranty Period, City will notify Contractor if any Services or software customizations do not conform to City's specifications as contained in the Scope of Services. Upon receipt of such notice, Contractor will investigate the warranty claim. If this investigation confirms a valid warranty claim, Contractor shall (at no additional cost to the City) repair the defective Services or software customizations. The Warranty

Period is reset for any repaired, replaced, or reformed item(s), beginning upon City acceptance of the repaired, replaced, reformed item(s). If despite its reasonable efforts, Contractor is unable to provide the City with Services or software customizations in compliance with the foregoing warranty, City may pursue its remedy at law to recover direct damages resulting from the breach of this warranty.

12.5 New Media

Media upon which any software customizations are delivered to City by Contractor:

- 12.5.1 Shall be new and free from defects in manufacture and materials;
- 12.5.2 Shall be manufactured in a good and workmanlike manner using a skilled staff fully qualified to perform their respective duties;
- 12.5.3 Shall, during the Warranty Period, function properly under ordinary use and operate in conformance with the specifications; and
- 12.5.4 In the event that media on which any Software Application, Customer Software, or Third Party Application Software is delivered is defective and cannot be read or utilized for its intended purpose by Contractor supplied or approved equipment, Contractor shall replace the defective media as soon as possible. Any delays occasioned by the failure of new media shall not be considered excusable delay.

13 WARRANTY AGAINST INFRINGEMENT

Contractor agrees to defend and indemnify City of all direct losses, costs, and damages resulting from a determination that the Services, Software, or software customizations supplied to City infringe any third party patent rights, copyrights, or trademarks provided that City (1) promptly notifies Contractor in writing upon City becoming aware of the existence of any such suit, action, proceeding threat; (2) allows Contractor sole control of the defense and/or settlement thereof; and (3) provides such reasonable cooperation as Contractor may require. In no event shall City consent to any judgment or decree or do any other act in compromise of any such claim without Contractor's express prior written consent. In no event will Contractor be liable for the payment of any amount agreed to in settlement without Contractor's express consent. In the event that City is enjoined from use of the Services, Software, or software customizations due to a proceeding based upon infringement of patent, copyright or trademark, Contractor shall, at its option, either:

- 13.1 Modify the infringing item(s) at Contractor's expense, so it becomes non-infringing; or
- 13.2 Replace the infringing item(s) with equal non-infringing item(s), at Contractor's expense; or
- 13.3 Procure, at Contractor's expense, the necessary licenses for the City to continue using the item(s); or
- 13.4 Remove the item(s) and refund the purchase price less a reasonable amount for depreciation.

14 TERMINATION

14.1 Termination for Convenience

City shall have the right to terminate this Agreement, without cause, by giving not less than thirty (30) days' written notice of termination.

14.2 Termination for Default

If Contractor fails to perform any of its material obligations under this Agreement, in addition to all other remedies provided by law, City may terminate this Agreement immediately upon written notice.

14.3 Termination Authority

The Director of Finance (“Director”) is empowered to terminate this Agreement on behalf of City.

14.4 Consequences of Termination

In the event of termination, Contractor shall deliver to City copies of all reports, documents, and other work performed by Contractor under this Agreement, and upon receipt thereof, City shall pay Contractor for services performed and reimbursable expenses incurred to the date of termination.

15 INDEMNIFICATION

Contractor shall defend, indemnify, and hold harmless City, its officers, employees, and agents against any claim, loss, damages, expenses, or liability that - directly or indirectly or in whole or in part – arise out of, pertain to, or result in any way from work performed under this Agreement due to the willful, reckless, or negligent acts (active or passive) or omissions by Contractor's officers, employees, agents, or subcontractors. The acceptance of said services and duties by City shall not operate as a waiver of such right of indemnification. This provision shall survive the termination of this Agreement.

16 INSURANCE REQUIREMENTS

Contractor agrees to have and maintain the policies set forth in Exhibit C, entitled "Insurance Requirements," which is attached hereto and incorporated herein. All certificantes and/or endorsements shall be subject to approval by the Risk Manager of the City of San José as to form and content. These requirements are subject to amendment or waiver if approved in writing by the Risk Manager. Contractor agrees to provide City with a copy of said certificates and/or endorsements before work commences under this Agreement.

17 WAIVER

Contractor agrees that City's waiver of any breach or violation of any provision of this Agreement shall not be deemed to be a waiver of any other provision or a waiver of any subsequent breach or violation of the same or any other provision. City's acceptance of the performance of any of Contractor's services will not be a waiver of any provision of this Agreement.

18 INDEPENDENT CONTRACTOR

Contractor, in the performance of this Agreement, is an independent contractor. Contractor shall maintain complete control over all of Contractor’s employees, any subcontracting subcontractors, and Contractor’s operations. Neither Contractor nor any person retained by Contractor may represent, act, or purport to act as the agent, representative or employee of City. Neither Contractor nor City is granted any right or authority to assume or create any obligation on behalf of the other.

19 COMPLIANCE WITH LAWS

Contractor shall comply with all applicable laws, ordinances, codes, and regulations (collectively, “laws”) of the federal, state, and local governments, including without limitation, any and all laws specified elsewhere in this Agreement.

20 CONFLICT OF INTEREST

Contractor shall avoid all conflict of interest or the appearance of conflict of interest in performance of this Agreement.

21 NONDISCRIMINATION

Contractor agrees that there shall be no discrimination against, or segregation of, any person, on account of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity, national origin, marital status, or family status, in connection with or related to the performance of this Agreement.

22 GIFTS

22.1 Prohibition on Gifts

Contractor acknowledges that Chapter 12.08 of the San José Municipal Code prohibits City's officers and designated employees from accepting gifts as defined in Chapter 12.08.

22.2 No Offer

Contractor agrees not to offer any City officer or designated employee any gift prohibited by Chapter 12.08.

22.3 Breach of Agreement

Contractor's offer or giving of any gift prohibited by Chapter 12.08 will constitute a material breach of this Agreement. In addition to any other remedies City may have in law or equity, City may terminate this Agreement for such breach as provided in Section 14 TERMINATION of this Agreement.

23 DISQUALIFICATION OF FORMER EMPLOYEES

Contractor is familiar with Chapter 12.10 of the San José Municipal Code ("Revolving Door Ordinance") relating to the disqualification of City's former officers and employees in matters which are connected with their former duties or official responsibilities. Contractor shall not utilize either directly or indirectly any officer, employee, or agent of Contractor to perform services under this Agreement, if in the performance of such services, the officer, employee, or agent would be in violation of the Revolving Door Ordinance.

24 CONFIDENTIAL AND PROPRIETARY INFORMATION

24.1 Confidentiality

All data and information generated, collected, developed, discovered or otherwise saved in the Solution exclusively for the City (collectively the "Data") by the Contractor in the performance of this Agreement are confidential and must not be disclosed to any person except as authorized by City, or as required by law.

24.2 Ownership of Materials

City and Contractor agree that Contractor shall own the entire right, title, and interest, including patents, copyrights, and other intellectual property rights, in and to all tangible materials, inventions, works of authorship, software, information and data solely conceived or developed by Contractor in the performance of the project, and developed using Contractor's facilities or personnel. City and Contractor agree that City shall own the entire right, title, and interest, including all patents, copyrights, and other intellectual property rights, in and to all tangible materials, inventions, works of authorship, software, information and data solely conceived or developed by City's facilities or personnel. Technology that is jointly developed using both City and Contractor personnel and facilities shall be jointly owned.

24.3 Ownership of Data

The City shall maintain ownership and control of the Data throughout the Agreement period and in perpetuity. Contractor shall have the right to use the Data solely to perform Services under the Agreement with the City. Contractor may not use the Data, a subset of the Data, and/or a summary of the Data, or, cause or permit the Data, a subset and/or a summary thereof, to be used by any third party, outside the scope of the Agreement without the express written consent of the City. Contractor shall provide City with a copy of the Data in a mutually agreed upon format at regular intervals and at such additional times as the City deems appropriate. Contractor warrants that throughout all operational and maintenance activities the accuracy of the Data will be preserved.

24.4 Security

Contractor shall maintain effective controls and security to protect the Data, including conducting daily and incremental backups to a redundant data storage location, providing redundant power, internet, site redundancy, and emergency recovery procedures.

24.5 Copies of Data/Exit Strategy

Upon request of the City or in the event this Agreement is terminated, Contractor shall work with the City to ensure a smooth transition of all Data and Software to the City's new environment. Additionally, upon request by the City and at no additional cost, Contractor shall provide City with a database export of the Data in a format acceptable to the City. At the termination of this Agreement, all Data at the Contractor's (or Contractor's subcontractor's) facilities shall be purged when the City confirms that it has received a satisfactory copy of the Data. Contractor shall provide written verification to the City once all City Data has been purged.

24.6 Enforcement

The City and Contractor agree that damages are not adequate and no adequate remedy at law exists for any threatened or actual disclosure or use of information by Contractor in violation of the provisions of this Agreement. Accordingly, Contractor consents to the entry of an injunction against threatened or actual disclosure or use of the information in violation of any provision of this Agreement.

25 CONTRACTOR'S BOOKS AND RECORDS

25.1 Maintenance during Term

Contractor shall maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other documents evidencing or relating to charges for services, or expenditures and disbursements charged to City for a minimum period of three (3) years, or for any longer period required by law, from the date of final payment to Contractor pursuant to this Agreement.

25.2 Maintenance after Term

Contractor shall maintain all documents which demonstrate performance under this Agreement for a minimum period of three (3) years, or for any longer period required by law, from the date of termination or completion of this Agreement.

25.3 Inspection

Any documents required to be maintained pursuant to this Agreement must be made available for inspection or audit, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Contractor shall provide copies of such documents to City for inspection at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records shall be available at Contractor's address indicated for receipt of notices in this Agreement.

25.4 Custody of Records

Where City has reason to believe that any of Contractor's documents relating to this Agreement may be lost or discarded due to dissolution, disbandment or termination of Contractor's business, City may, by written request by any of the above-named officers, require that custody of the Contractor's documents be given to City and that these documents be maintained in City Hall. City agrees to grant access to Contractor's documents to any party authorized by Contractor, Contractor's representatives, or Contractor's successor-in-interest.

26 ASSIGNABILITY

The parties agree that the expertise and experience of Contractor are material considerations for this Agreement. Unless specifically authorized by this Agreement, Contractor may not assign the performance of any obligation or interest under this Agreement without the prior written consent of City. Any attempt by Contractor to assign this Agreement, in violation of this Section 26, will be voidable at City's sole option.

27 SUBCONTRACTORS

27.1 Authorized Subcontractors

Notwithstanding Section 26 ASSIGNABILITY, Contractor may use designated subcontractors approved in advance by City in performing Contractor's Services. Contractor must obtain City's prior written consent in order to change or add subcontractors. Contractor shall be responsible for directing the work of the approved subcontractors and for any compensation due to subcontractors. City assumes no responsibility whatsoever concerning such compensation.

27.2 Compliance with Agreement

Contractor shall ensure that Contractor's subcontractors comply with this Agreement. At City's request, Contractor shall require any or all of Contractor's subcontractors to sign an agreement with Contractor requiring compliance with this Agreement.

28 GOVERNING LAW

This Agreement must be construed -- and its performance enforced--under California law.

29 JURISDICTION AND VENUE

In the event that suit is brought by either Party to this Agreement, the Parties agree that venue must be exclusively vested in the state courts of the County of Santa Clara, or where otherwise appropriate, exclusively in the United States District Court, Northern District of California, San José, California.

Contractor further agrees that in the event a lawsuit involving this Agreement is filed by City, Contractor will unconditionally accept the jurisdiction of a federal or state court located in Santa Clara County, California.

30 NOTICES

30.1 Manner of Giving Notice: All notices and other communications required by this Agreement must be in writing and must be made via e-mail, personal service, trackable delivery service, or United States mail, postage prepaid.

30.2 When Effective: A notice or other communication that is e-mailed is effective when sent provided the sender receives an acknowledgement from the intended recipient (e.g. return receipt, return e-mail, or other written acknowledgement). A notice or other communication

that is personally served is effective when personally delivered. A notice or other communication that is delivered by a trackable delivery service is effective when signed for. A notice or other communication that is mailed is effective three (3) business days after deposit in the United States mail.

- 30.3 To Whom Given: All notices and other communications between the Parties required or permitted to be given under this Agreement must be given to the individuals identified below:

To the City: City of San José
Attention: Director of Finance
200 East Santa Clara St., 13th Floor
San José, CA 95113
purchasing@sanjoseca.gov

To the Contractor: Overlay LLC dba Overlay Consulting
Attention: Jonathan Dierking
1635 Blake St., STE 200
Denver, CO 80202
720-961-8250
Jon.dierking@overlayconsulting.com

- 30.4 Changing Contact Information: Either Party may change its contact information for receiving written notices and communications regarding the Agreement by providing notice of such change to the other Party pursuant to Section 30.

31 OTHER PUBLIC AGENCY PURCHASES

This Agreement resulted from a competitive bid through RFP PUR-RFP2020.01.10003 for a Building Performance Ordinance Solution issued on January 17, 2020 pursuant to Chapter 4.12 of the San José Municipal Code. Other local and state government agencies may enter into agreement(s) based on the same material terms and conditions, and pricing. The local or state government agency shall accept sole responsibility for placing orders, arranging deliveries and/or services, and making payments to the Contractor. The City of San José will not be liable or responsible for any obligations, including but not limited to, financial responsibility in connection with these agreement(s) between the Contractor and other local and state government agency(ies).

32 MISCELLANEOUS

32.1 Survival of Provisions

If any part of this Agreement is for any reason found to be unenforceable, all other parts nevertheless remain enforceable.

32.2 Assignment

Subject to the provisions of Section 26 ASSIGNABILITY, this Agreement binds and inures to the benefit of the Parties and their respective successors and assigns.

32.3 Headings

The headings of the Sections and Exhibits of this Agreement are inserted for convenience only. They do not constitute part of this Agreement and are not to be used in its construction.

32.4 Counterparts

This Agreement may be executed in any number of counterparts and by each Party in separate counterparts, each of which when so executed and delivered shall be deemed to be an original and all of which taken together shall constitute one and the same instrument.

32.5 Use of Electronic Signatures

Unless otherwise prohibited by law or City policy, the Parties agree that an electronic copy of a signed contract, or an electronically signed contract, has the same force and legal effect as a contract executed with an original ink signature. The term “electronic copy of a signed contract” refers to a writing as set forth in Evidence Code Section 1550. The term “electronically signed contract” means a contract that is executed by applying an electronic signature using technology approved by the City.

City of San José
a municipal corporation

Overlay LLC dba Overlay Consulting
a Colorado Limited Liability Company
authorized to conduct business in California

By _____

By _____

Jennifer Cheng

Name: Jonathan Dierking

Deputy Director, Finance

Title: CEO & Owner

Date: _____

Date: _____

APPROVED AS TO FORM:

Rosa Tsongtaarii

Senior Deputy City Attorney

EXHIBIT A-1

SCOPE OF SERVICES

The following Scope of Services defines the principal activities and responsibilities of Contractor and the City for a Building Performance Ordinance Solution.

1 OVERVIEW

- 1.1 Contractor shall provide a Building Performance Ordinance Solution (“Solution”) that will allow the City to manage long-term implementation of the Energy and Water Building Performance Ordinance. The ordinance can be found at https://library.municode.com/ca/san_jose/codes/code_of_ordinances?nodeId=TIT17BUCO_CH17.85CISAJOENWABUPEOR.
- 1.2 The Solution shall encompass three primary functions:
 - 1.2.1 Act as a repository for building and contact data.
 - 1.2.2 Act as an ordinance compliance tracking tool.
 - 1.2.3 Act as a communications tracking system through which City staff can communicate with contacts and maintain a record of historical correspondence.

2 ASSUMPTIONS

- 2.1 Contractor shall assign a project manager to implement the Solution.
- 2.2 The City will provide a project manager and subject matter experts as follows:
 - 2.2.1 One subject matter expert/project manager dedicated to Solution development and implementation.
 - 2.2.2 One technical expert dedicated to solution development.
- 2.3 Both City and Contractor shall attend meetings, workshops, and discovery sessions as required.
- 2.4 Contractor shall be responsible for leading all configuration and implementation activities and shall work closely with the City.

3 PRODUCT / SERVICES REQUIREMENTS & SPECIFICATIONS

The Solution shall include the following:

- 3.1 A cloud-based Software as a Service accessible from a standard web browser, including, but not limited to, all currently supported versions of Microsoft Internet Explorer, Microsoft Edge, Google Chrome, Mozilla Firefox, and Apple Safari.
- 3.2 Contractor shall provide a Solution to house both existing and future data from internal and external sources (e.g. ENERGY STAR Portfolio Manager®).
- 3.3 Contractor shall work closely with City in the configuration of the Solution to ensure effective implementation and ongoing data management.
- 3.4 Contractor shall comply with the requirements as listed in Exhibit A-2, Features and Functionality Requirements.

4 IT SECURITY REQUIREMENTS

- 4.1 Contractor shall adhere to the National Institute of Standards and Technology (“NIST”) security standards.
- 4.2 Contractor shall incorporate security requirements in every aspect of the solution.
- 4.3 Contractor shall implement security controls in accordance with NIST Security Standards and shall follow NIST’s Cybersecurity Framework to assess the solution prior to first release and prior to any major improvement or enhancement.
- 4.4 Data must be stored at a secure facility in the United States.
- 4.5 Contractor shall adhere to all additional requirements as described in Exhibit G, Information Technology and Security Requirements.

5 IMPLEMENTATION PROCESS / REQUIREMENTS

- 5.1 Contactor shall implement the solution in a phased approach. Each phase must be accepted by the City in writing, as may be further documented in an acceptance certificate for the specific phase.
- 5.2 Phase 1: Planning and Analysis
 - 5.2.1 Contractor shall conduct a project kick-off meeting to include the following:
 - 5.2.1.1 Introduce project team members, including qualifications, project roles, and responsibilities.
 - 5.2.1.2 A high-level overview of the Solution.
 - 5.2.1.3 Deliver a preliminary project implementation schedule in a critical path format so that the timelines and milestones can be clearly identified and measured.
 - 5.2.1.4 Discuss and define notice to proceed procedures.
 - 5.2.1.5 Define processes for tracking project status.
 - 5.2.1.6 Define change control procedures.
 - 5.2.1.7 Define the deliverables and final Solution acceptance processes.
 - 5.2.1.8 Determine the format and protocol for periodic, ongoing meetings, reports, and communications.
 - 5.2.1.9 Review escalation management process, including but not limited to lines of communication and reporting relationships.
 - 5.2.1.10 Identify high-risk or problem areas and discuss resolution process.
 - 5.2.1.11 Finalize the project implementation schedule.
 - 5.2.2 Contractor shall conduct workshops, meetings, and discovery sessions as required to conduct a business assessment and shall provide a business process map to the City for review and approval.
 - 5.2.3 Contractor shall setup, configure, and implement the Solution in accordance with the City-approved business process map.
 - 5.2.4 Contractor shall submit progress reports bi-weekly. Reports shall include progress achieved compared to plan, percent of overall work completed, and budget status.

- 5.2.5 Contractor shall notify City immediately if there are any issues or risks that indicate the project timeline is in jeopardy.
- 5.3 Phase 2: Data Configuration and Implementation
 - 5.3.1 Contractor shall work closely with the City Project Manager in all implementation steps.
 - 5.3.2 Contractor shall coordinate with City for the import and export of data from multiple sources, including but not limited to ENERGYSTAR Portfolio Manager reports, Tax Assessor data, and other documents in formats such as Microsoft Excel and CSV for the Solution.
 - 5.3.3 Contractor shall ensure the integrity of imported data, and ensure that duplicate records, incomplete records, etc. are identified and can be easily resolved.
- 5.4 Phase 3: Testing and Refinement
 - 5.4.1 Contractor shall provide an online demonstration of the Solution to the City prior to go-live. The City will provide feedback on the Solution. When the City agrees the Solution is ready for go-live the City will indicate such in writing.
 - 5.4.2 Contractor shall provide staff for Solution go-live to assist City and troubleshoot as required.
 - 5.4.3 Contractor shall demonstrate that the Solution meets all requirements as stated in this Scope of Services and Requirements and as further defined in the business process map.
 - 5.4.4 Contractor shall prepare a test plan for each set of requirements to demonstrate that they are included and implemented in the Solution.
 - 5.4.5 Contractor shall provide guidance to the City during completion of the test plan to ensure that it is done in accordance with Contractor provided training and documentation. Training may be required for administrative users who will assist with testing.
 - 5.4.6 Following testing, the City and Contractor shall prepare a punch list of items required to properly complete Solution configuration and implementation.
 - 5.4.7 The respective party shall complete punch list items according to a mutually agreed upon schedule.
- 5.5 Phase 4: Training
 - 5.5.1 Contractor shall provide online/remote training and documentation as follows:
 - 5.5.1.1 Role-based training for identified City staff prior to go-live for all identified user types.
 - 5.5.1.2 Ongoing training as required for patches, updates, new features, and functionality, etc.
 - 5.5.1.3 Training manuals must be provided in electronic format.
- 5.6 Phase 5: Go Live and Full Acceptance
 - 5.6.1 Following completion of all punch list items and City's validation that the Solution meets requirements, both parties shall execute a Final Solution Acceptance Certificate (Exhibit A-4) to memorialize Solution acceptance.

5.6.2 Upon execution of the Final Solution Acceptance Certificate, the City agrees to pay Contractor any remaining and approved outstanding invoice(s) and any previously withheld retainage.

6 MAINTENANCE & SUPPORT

- 6.1 Contractor shall provide one-year post-implementation support to the City at a minimum Monday – Friday from 8:00 am to 5:00 pm Pacific Time, excluding City holidays. Post-implementation support shall include functionality and troubleshooting support for the Solution.
- 6.2 Contractor shall provide ongoing maintenance and support at a minimum Monday – Friday from 8:00 am to 5:00 pm Pacific Time, excluding City holidays.
- 6.3 Technical support shall include unlimited incidents.
- 6.4 Support shall be available both by email, telephone, and online.
- 6.5 Contractor shall have an online trouble reporting system that tracks open trouble tickets and includes automatic escalation and notification based on service level requirements and issue progress.
- 6.6 Technical support shall be provided within mutually acceptable response times based on issue severity.
- 6.7 Contractor shall develop and deploy patches/bug fixes as required based on a standard maintenance schedule communicated in advance to City.
- 6.8 Contractor shall notify the City at least three (3) days in advance of deploying any service-impacting modifications (excluding emergency patches/fixes).
- 6.9 Contractor shall notify the City at least five (5) business days in advance of its intent to release any major improvements or enhancements to the Solution and include a description of the intended improvements or enhancements.

7 PROJECT STAFF

7.1 City’s Project Manager

Name: Carol Boland	Phone No.: 408-975-2604
Department: ESD	E-mail: Carol.Boland@sanjoseca.gov
Address: 200 E Santa Clara St, 10 th Floor San Jose CA 95113	

7.2 Contractor’s Project Manager and Other Staffing

Identified below are the the Contractor’s project manager and subcontractor(s) and/or employee(s) of the Contractor who will be principally responsible for delivering the work set forth in this Scope of Services.

Contractor’s Project Manager	
Name: Jonathan Dierking	Phone No.: 720-961-8250
Address: 1635 Blake St., STE 200, Denver, CO 80202	E-mail: Jon.Dierking@overlayconsulting.com
Other Staffing	
Name	Assignment
1. Jamie Westhoven	Program Manager
2. Matt Klahn	Director of Energy Engineering
3. Andrew Carlson	Software Implementation Lead
4. Rob Harris	Software Implementation Support
5. Jessica Brown	Ordinance Integration

EXHIBIT A-2
FEATURES AND FUNCTIONALITY REQUIREMENTS

#	Importance	Features / Functionality	Capability (drop down selection)
General Functions and Features			
1	Preferred	No limit on the volume of data held or number of records that can be generated.	Off the Shelf / Configurable by City
2	Mandatory	Ability to import large file sizes (minimum of 25MB). State any limit on file size uploads.	Off the Shelf / Configurable by City
3	Highly Preferred	Ability to import at least 250 individual data fields per record.	Off the Shelf / Configurable by City
4	Mandatory	Ability to store building information such as building address, unique building ID, tax assessor parcel number, and building size.	Off the Shelf / Configurable by City
5	Mandatory	Ability to store basic “customer” contact information such as name, company, phone number, and email address.	Off the Shelf / Configurable by City
6	Highly Preferred	Ability to create up to 20 relationships between contact records and building records.	Off the Shelf / Configurable by City
7	Mandatory	Ability to maintain a parent-child hierarchy of buildings.	Off the Shelf / Configurable by City
8	Mandatory	Ability to perform automatic quality control functions (e.g. flagging errors in benchmarking reports or incomplete building records) on imported data.	Off the Shelf / Configurable by City
9	Highly Preferred	Ability to track supplementary compliance data (e.g. exemption and extension applications, building reporting fee payment and incidental non-compliance fine payments).	Off the Shelf / Configurable by City
10	Highly Preferred	Ability to track multiple deadlines (e.g reporting extension deadlines).	Off the Shelf / Configurable by City
11	Mandatory	Ability to import data from third party systems such as ENERGYSTAR Portfolio Manager®, City of San José Financial systems and Sharing and Enabling Environmental Data (SEED).	Off the Shelf / Configurable by City
12	Mandatory	Ability to match building records, contacts and benchmarking reports through custom building IDs, building addresses, or other user defined fields.	Off the Shelf / Configurable by City
13	Mandatory	Ability to merge historical records with future data without overwriting historical records, to create an ongoing compliance record.	Off the Shelf / Configurable by City
User Interface			
14	Mandatory	Standardize screen interface (hierarchical menus, tabs, window panes) with standard function keys and screen headers.	Off the Shelf / Configurable by City
15	Mandatory	Ability to track support and interactions associated with each contact and building record.	Off the Shelf / Configurable by City
16	Mandatory	Ability for ESD staff to edit all contact, building, and benchmarking report records manually.	Off the Shelf / Configurable by City

17	Mandatory	Ability for ESD staff to edit the relationships between all contact, building, and benchmarking report records manually.	Off the Shelf / Configurable by City
18	Mandatory	Ability for ESD staff to develop rules to define quality control checks on imported data.	Configurable by Vendor
19	Mandatory	Ability to display compliance status for each building record.	Off the Shelf / Configurable by City
20	Highly Preferred	Ability to provide notifications for overdue deadlines to platform users.	Configurable by Vendor
Dashboard and Reporting Analytics			
21	Highly Preferred	Ability to set a combination of filters as input parameters to a dashboard (e.g. outstanding support requests).	Configurable by Vendor
22	Highly Preferred	Outputs (reports, dashboard, and alerts) presented with common look and feel.	Off the Shelf / Configurable by City
23	Mandatory	Ability to generate ad hoc queries and summary reports on stored data.	Off the Shelf / Configurable by City
24	Highly Preferred	Ability to display report data through visualization tools, such as maps, charts, or graphs.	Off the Shelf / Configurable by City
25	Mandatory	Ability to retain data for historical reporting cycles and query as specified for any point(s) in time or defined time period.	Off the Shelf / Configurable by City
26	Mandatory	Ability to query and report by any field available.	Off the Shelf / Configurable by City
27	Mandatory	Ability to perform keyword searches.	Off the Shelf / Configurable by City
28	Mandatory	Ability to create a query by modifying an existing report or query.	Off the Shelf / Configurable by City
29	Mandatory	Ability to export the results of reports or queries in a variety of formats (.csv, .pdf, Excel). Specify formats supported.	Off the Shelf / Configurable by City
Security			
30	Mandatory	Provide secure log in credentials for administrators and users (ESD staff).	Off the Shelf / Configurable by City
31	Mandatory	Ensure Solution complies with Attachment E, Information Technology and Security Requirements.	Configurable by Vendor
32	Mandatory	Allow multiple users to access the Solution at one time.	Off the Shelf / Configurable by City
33	Mandatory	Hosted data must be maintained at a secure facility located within the US.	Off the Shelf / Configurable by City
Additional Features			
34	Preferred	Ability to create rule-based responses and send automatic email correspondences.	Configurable by Vendor
35	Preferred	Ability to send automated email notifications to external contacts for errors in submitted reports, expiration dates, etc.	Off the Shelf / Configurable by City
36	Preferred	Ability to send mass communications to stored contacts.	Off the Shelf / Configurable by City

**EXHIBIT A-3
PRELIMINARY PROJECT IMPLEMENTATION SCHEDULE**

Implementation of this project will proceed in accordance with the Preliminary Project Implementation Schedule set forth below in Table A1, except as may be modified into a Final Project Implementation Schedule that is approved by the City during project initiation, and shall reflect tasks in the appropriate order with estimated dates and based on elapsed time as approved by the City. The Final Project Implementation Schedule will become the governing project schedule incorporated into the Agreement. The Project Implementation Schedule is based upon work being accomplished Monday through Friday during normal business hours (defined as 8:00am to 5:00pm Pacific Time), with the exception of City holidays.

Table A1: Preliminary Project Implementation Schedule

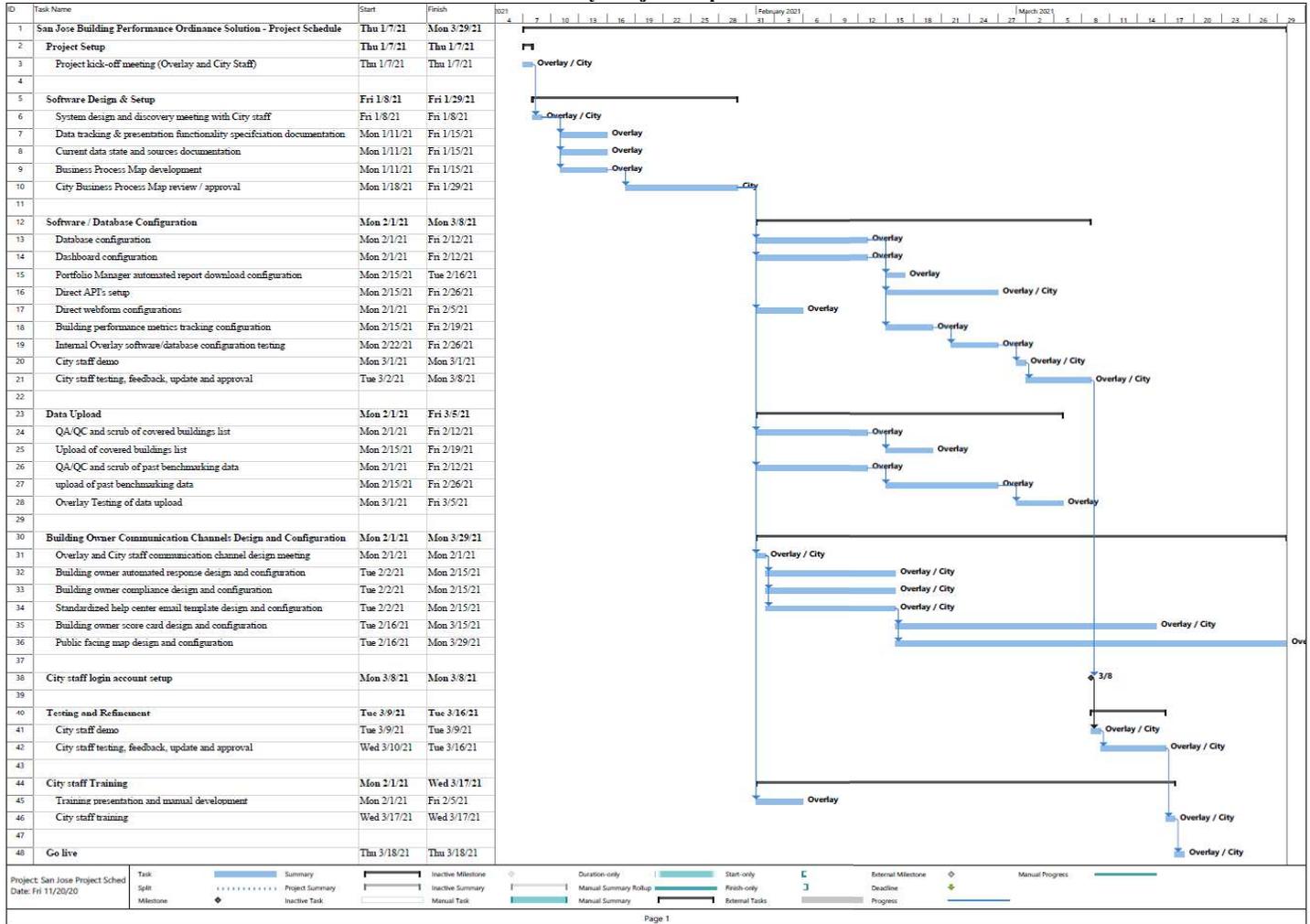


EXHIBIT A-4
FINAL SOLUTION ACCEPTANCE CERTIFICATE

After the City is satisfied with all test results and resolutions, the City will initiate execution of the Final Solution Acceptance Certificate.

FINAL SOLUTION ACCEPTANCE CERTIFICATE

Customer Name: City of San José (“City”)

Project Name: Building Performance Ordinance Solution

This Final Solution Acceptance Certificate memorializes the occurrence of Final Solution Acceptance.

Contractor and the City acknowledge that:

1. Contractor has delivered the Solution, Software, Services, and documentation promised under this Agreement.
2. The Solution is accepted, and all punch list items generated during testing have been complete.
3. By acknowledging the Final Acceptance of the Solution, the City agrees to pay any remaining and approved outstanding invoices to Contractor, including previously withheld retainage.

City of San José (“City”)

Overlay LLC (“Contractor”)

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

EXHIBIT B COMPENSATION

1 COMPENSATION AND PAYMENT TERMS

- 1.1 The maximum amount payable for all products and services provided under this Agreement shall not exceed One Hundred Fourteen Thousand Nine Hundred Nineteen Dollars (\$114,919) Dollars (\$114,919) during the Initial Term. Any additional services requested by the City that would exceed the preceding maximum amount will be addressed in accordance with the Change Order Procedures. No additional services will be performed unless both Parties execute a Change Order outlining the services requested and the compensation agreed for such services.
- 1.2 Progress payments shall be made to Contractor by City based on net thirty (30) days payment terms, following delivery and acceptance of designated milestones as shown below in Table B1: Payment Schedule. All payments are based upon City's acceptance of Contractor's performance as evidenced by successful completion of all of the deliverables as set forth for each milestone. City shall have no obligation to pay unless Contractor has successfully completed and City has approved the milestone for which payment is due.
- 1.3 Payment for any deliverable under this Agreement, or inspection or testing thereof by City, shall not constitute acceptance or relieve Contractor of its obligations under this Agreement. City may inspect each deliverable and reject upon notification to Contractor any that do not conform to the specifications or other requirements of this Agreement. Rejected deliverables shall be promptly corrected, repaired, or replaced by Contractor. If City receives deliverables with defects or nonconformities not reasonably apparent on inspection, the City reserves the right to require prompt correction, repair, or replacement by Contractor in accordance with Contractor's warranty obligations.

2 PROJECT PERFORMANCE AND PAYMENT SCHEDULE

- 2.1 Work shall commence within two weeks of Agreement execution. All timeline dates are understood to be close of business, 5:00 pm Pacific Time. If timeline dates fall on a weekend or City holiday, the date is understood to be the next business day.
- 2.2 Compensation and payments shall be made to Contractor by City based on Net Thirty (30) days payment terms.
- 2.3 Implementation Invoicing Procedure: Contractor will invoice the City upon completion of each milestone but not more frequently than monthly.
- 2.4 Ongoing Annual Services Invoicing Procedure: Contractor shall invoice the City annually for applicable ongoing services including subscription, technical support, maintenance, and hosting fees beginning on the date of final acceptance. City shall prepay a year in advance for applicable ongoing subscription, technical support, maintenance, and hosting services provided under the Agreement.
- 2.5 The City agrees to compensate Contractor for the Services performed and the Software and software customizations provided in accordance with the terms and conditions of this Agreement. Contractor shall invoice City in accordance with the Payment Schedule in Table B1 below:

Table B1: Payment Schedule

Milestone/Tasks	Deliverable(s)	Estimated Completion Date	Cost
1	Project Kick-Off / Project Management / Project Implementation Plan	1/15/21	\$8,000.00
2	Configuration and Implementation	3/1/21	22,896.00
3	Test Plans, Testing, and Project Documentation	3/16/21	9,180.00
4	Training	3/17/21	2,995.20
5	Go-Live	3/18/21	864.00
6	Final System Acceptance	3/19/21	10,983.80
MAXIMUM COMPENSATION (INITIAL TERM)			\$54,919.00

Table B2: Price List

One-Time Implementation Costs	Initial Term (Year 1)	Initial Term (Year 2)	Option 1 (Year 3)	Option 2 (Year 4)	Option 3 (Year 5)	Total Not to Exceed
1. Project Kick-Off / Project Management / Project Implementation Plan	\$8,000.00					\$8,000.00
2. Configuration and Implementation	22,896.00					22,896.00
3. Test Plans, Testing, and Project Documentation	9,180.00					9,180.00
4. Training	2,995.20					2,995.20
5. Go-Live	864.00					864.00
6. Final System Acceptance*	10,983.80					10,983.80
Subtotal Implementation	\$54,919.00					\$54,919.00
Ongoing Costs	Initial Term (Year 1)	Initial Term (Year 2)	Option 1 (Year 3)	Option 2 (Year 4)	Option 3 (Year 5)	Total Not to Exceed
7. Software Licenses/Subscriptions	\$18,750.00	\$37,500.00	\$37,500.00	\$37,500.00	\$37,500.00	\$168,750.00
8. Ongoing Software Technical Support and Maintenance	1,250.00	2,500.00	2,500.00	2,500.00	2,500.00	11,250.00
Subtotal Ongoing	\$20,000.00	\$40,000.00	\$40,000.00	\$40,000.00	\$40,000.00	\$180,000.00
MAXIMUM COMPENSATION NOT TO EXCEED	\$74,919.00	\$40,000.00	\$40,000.00	\$40,000.00	\$40,000.00	\$234,919.00

All amounts stated above are in United States Currency.

*The signed Final Solution Acceptance Certificate (Exhibit A-4) triggers payment of the 20% retainer.

3 RENEWAL PERIOD COMPENSATION

- 3.1 After the Initial Term, the City reserves the right to extend the term of this Agreement pursuant to Section 2.2 (“Options to Extend”) at the same rates as the Initial Term unless otherwise requested and agreed to in writing by the Parties.
- 3.2 Price Renegotiation. Contractor may request adjustments to compensation rates sixty (60) days prior to an option term after option term 3 (year 5). Contractor shall provide information justifying reasons for any increase, and City shall not unreasonably withhold approval of any increase provided the renewal quote for ongoing services does not increase by more than the Producer Price Index (PPI) final demand - WPUFD4 (<https://data.bls.gov/cgi-bin/surveymost?wp>) and does not exceed 3% over the previous year’s fees or unless otherwise negotiated.

3.3 City shall provide Contractor prior written notice in the form of Exhibit E of its intention to exercise its option for the next term prior to the end of the then current term. The City’s Director of Finance or designee is authorized to exercise options on behalf of the City.

4 ADDITIONAL SERVICES

4.1 In the event the City requires additional services, Contractor shall provide a written quotation, at no cost to the City, of the type of Additional Service requested and the time required to complete the requested work.

4.2 Supplemental professional service rates shall not exceed the following:

Additional Services	Hourly Rate
Project Management	\$130.00
Integration Services (API Development)	\$150.00
Custom Feature Development	\$150.00
Training	\$80.00
Custom Report(s) Generation	\$80.00
Future Software Enhancements (Additional Database Fields, etc.)	\$130.00

4.3 The City reserves the right to request a fixed priced quote in lieu of time and materials. Any fixed price quotes shall be consistent with or less than the agreed-upon additional service rates in Section 4.2 above and must be good for at least ninety (90) days.

4.4 Quotes must be approved by the City through an executed Change Order prior to any work being performed.

EXHIBIT C INSURANCE REQUIREMENTS

Contractor, at Contractor's sole cost and expense, shall procure and maintain for the duration of this AGREEMENT insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the services hereunder by Contractor, its agents, representatives, employees or subcontractors.

1 MINIMUM SCOPE OF INSURANCE

Coverage shall be at least as broad as:

- 1.1 The coverage provided by Insurance Services Office Commercial General Liability coverage (“occurrence”) Form Number CG 0001; and
- 1.2 The coverage provided by Insurance Services Office Form Number CA 0001 covering Automobile Liability. Coverage shall be included for all owned, non-owned and hired automobiles; and
- 1.3 Workers' Compensation insurance as required by the California Labor Code and Employers Liability insurance; and
- 1.4 Cyber & Technology Errors & Omission. Technology/professional liability insurance and data protection liability insurance covering liabilities for financial loss resulting or arising from acts, errors, or omissions, in rendering services including damages City associated with any security breach.

There shall be no endorsement reducing the scope of coverage required above unless approved by the City’s Risk Manager.

2 MINIMUM LIMITS OF INSURANCE

Contractor shall maintain limits no less than:

- 2.1 Commercial General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit; and
- 2.2 Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage; and
- 2.3 Workers' Compensation and Employers Liability: Workers' Compensation limits as required by the California Labor Code and Employers Liability limits of \$1,000,000 per accident; and
- 2.4 Cyber & Technology Errors & Omissions \$1,000,000 per claim/ aggregate limit.

3 DEDUCTIBLES AND SELF-INSURED RETENTIONS

Any deductibles or self-insured retentions must be declared to and approved by City's Risk Manager. At the option of City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City, its officers, employees, agents and contractors; or Contractor shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the City’s Risk Manager.

4 OTHER INSURANCE PROVISIONS

The policies are to contain, or be endorsed to contain, the following provisions:

4.1 Commercial General Liability and Automobile Liability Coverages

- 4.1.1 The City of San Jose, its officers, employees, agents and contractors are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, Contractor; products and completed operations of Contractor; premises owned, leased or used by Contractor; and automobiles owned, leased, hired or borrowed by Contractor. The coverage shall contain no special limitations on the scope of protection afforded to City, its officers, employees, agents and contractors.
- 4.1.2 Contractor's insurance coverage shall be primary insurance as respects City, its officers, employees, agents and contractors. Any insurance or self-insurance maintained by City, its officers, employees, agents or contractors shall be excess of Contractor's insurance and shall not contribute with it.
- 4.1.3 Any failure to comply with reporting provisions of the policies by Contractor shall not affect coverage provided City, its officers, employees, agents, or contractors.
- 4.1.4 Coverage shall state that Contractor's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- 4.1.5 Coverage shall contain a waiver of subrogation in favor of the City, its officers, employees, agents and contractors.

4.2 Workers' Compensation and Employers' Liability

Coverage shall contain waiver of subrogation in favor of the City of San Jose, its officers, employees, agents and contractors.

4.3 All Coverages

Each insurance policy required by this AGREEMENT shall be endorsed to state that coverage shall not be suspended, voided, cancelled, or reduced in limits except after thirty (30) days' prior written notice has been given to City, except that ten (10) days' prior written notice shall apply in the event of cancellation for nonpayment of premium.

5 ACCEPTABILITY OF INSURERS

Insurance is to be placed with insurers acceptable to City's Risk Manager.

6 VERIFICATION OF COVERAGE

Contractor shall furnish City with certificates of insurance and with original endorsements affecting coverage required by this AGREEMENT. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be either emailed in pdf format to: Riskmgmt@sanjoseca.gov

7 SUBCONTRACTORS

Contractor shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor.

EXHIBIT E
NOTICE OF EXERCISE OF OPTION TO EXTEND AGREEMENT

AGREEMENT TITLE:	
CONTRACTOR Name and Address:	
DATE:	

Pursuant to Section ____ of the Agreement referenced above, the City of San José hereby exercises its option to extend the term under the following provisions:

OPTION NO.	
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OPTION TERM

Begin date:	
End date:	

CHANGES IN RATE OF COMPENSATION

Percentage change in CPI upon which adjustment is based:	
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Pursuant to Section ____ of the Agreement the Rates of Compensation are hereby adjusted as follows:
 (use attachment if necessary)

MAXIMUM COMPENSATION for Option Term:	
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For the option term exercised by this Notice, City shall pay Contractor an amount not to exceed the maximum compensation set forth above for Contractor’s services and reimbursable expenses, if any. The undersigned signing on behalf of the City of San José hereby certifies that an unexpended appropriation and funds are available for the option term specified above.

<p>CITY OF SAN JOSE a municipal corporation</p> <p>By _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Date: _____</p>

EXHIBIT F CONTRACTORS SOFTWARE LICENSE/SUBSCRIPTION AGREEMENT

This Software License Addendum (“Software License Addendum”) is Exhibit F to the Agreement between the City of San José and Overlay LLC for a Building Performance Ordinance Solution (“Agreement”).

The term “Touchstone” in this Software License Addendum shall have the same meaning as “third party software” or “third party software provider” referenced in the Agreement.

The terms “Customer” in this Software License Addendum shall have the same meaning as “City” referenced in the Agreement.

SOFTWARE LICENSE ADDENDUM

This Software License Addendum (the “**Addendum**”), dated as of January 6, 2021 (the “**Effective Date**”), is by and between Touchstone Benchmarking, LLC, a Delaware limited liability company (“**Touchstone**”) and City of San Jose (“Customer”) and is part of and incorporated into that certain Agreement between the City of San José and Overlay LLC for a Building Performance Ordinance Solution dated as of January 6, 2021 (the “**Agreement**”).

1) Definitions. Capitalized terms not defined below have the meaning set forth in the Agreement.

“**Access Credentials**” means any username, identification number, password, or other security code or method used to verify an individual’s identity and authorization to access and use the Hosted Services.

“**Action**” has the meaning set forth in **Section 10)a)**.

“**Addendum**” has the meaning set forth in the preamble.

“**Affiliate**” of any Person means any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person. The term “control” (including the terms “controlled by” and “under common control with”) means the direct or indirect power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract, or otherwise/ownership of more than fifty percent (50%) of the voting securities of a Person.

“**Authorized User**” means each of the individuals authorized to use the Services pursuant to the terms and conditions of this Addendum.

“**Confidential Information**” has the meaning set forth in **Section 8)a)**.

“**Customer**” has the meaning set forth in the preamble.

“**Customer Data**” means information, data and other content, in any form or medium that is collected, downloaded, or otherwise received, directly or indirectly, from Customer or an Authorized User by or through the Hosted Services. For the avoidance of doubt, Customer Data does not include Resultant

Data or any other information reflecting the access or use of the Services by or on behalf of Customer or any Authorized User.

“**Customer Indemnitee**” has the meaning set forth in **Section 10)a**).

“**Customer Systems**” means the Customer’s information technology infrastructure, including computers, software, hardware, databases, electronic systems (including database management systems) and networks, whether operated directly by Customer or through the use of third-party services.

“**Disclosing Party**” has the meaning set forth in **Section 8)a**).

“**Documentation**” means any user manuals or instructions that Touchstone provides or makes available to Customer in any form or medium and which describe the functionality, components, features or requirements of the Services.

“**Effective Date**” has the meaning set forth in the preamble.

“**Force Majeure Event**” means any circumstances beyond either party’s reasonable control, including acts of God, flood, fire, earthquake or explosion, war, terrorism, invasion, riot or other civil unrest, embargoes or blockades in effect on or after the date of this Addendum, national or regional emergency, strikes, labor stoppages or slowdowns or other industrial disturbances, passage of Law or any action taken by a governmental or public authority, including imposing an embargo, export or import restriction, quota or other restriction or prohibition or any complete or partial government shutdown, national or regional shortage of adequate power or telecommunications or transportation, or local, state, or federal mandates and advisories for managing public health and safety related to the COVID-19 pandemic.

“**Harmful Code**” means any virus, worm, malware, or other malicious computer code.

“**Hosted Services**” means the software-as-a-service offering described in any statement of work issued pursuant to the Agreement, including to host, manage, operate and maintain the Software for remote electronic access and use by Customer and its Authorized Users.

“**Indemnitee**” has the meaning set forth in **Section 10)c**).

“**Indemnitor**” has the meaning set forth in **Section 10(c)**.

“**Intellectual Property Rights**” means any and all registered and unregistered rights granted, applied for or otherwise now or hereafter in existence under or related to any patent, copyright, trademark, trade secret, database protection or other intellectual property rights laws, and all similar or equivalent rights or forms of protection, in any part of the world.

“**Law**” means any statute, law, ordinance, regulation, rule, code, order, constitution, treaty, common law, judgment, decree or other requirement of any federal, state, local or foreign government or political subdivision thereof, or any arbitrator, court or tribunal of competent jurisdiction.

“**Losses**” means any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs or expenses of whatever kind, including reasonable attorneys’ fees and the costs of enforcing any right to indemnification hereunder and the cost of pursuing any insurance providers.

“**Person**” means an individual, corporation, partnership, joint venture, limited liability entity, governmental authority, unincorporated organization, trust, association or other entity.

“**Personal Information**” means information provided to Touchstone by or at the direction of Customer, information which is created or obtained by Touchstone on behalf of Customer, or information to which access was provided to Touchstone by or at the direction of Customer, in the course of Touchstone’s performance under this Agreement that: (i) identifies or can be used to identify an individual (including, without limitation, names, signatures, addresses, telephone numbers, email addresses, and other unique identifiers); or (ii) can be used to authenticate an individual (including, without limitation, employee identification numbers, government-issued identification numbers, passwords or personal identification numbers (“**PINs**”), user identification and account access credentials or passwords, financial account numbers, credit report information, student information, biometric, health, genetic, medical, or medical insurance data, answers to security questions, and other personal identifiers), in case of both subclauses (i) and (ii), including, without limitation, all Sensitive Personal Information. Customer’s business contact information is not by itself Personal Information. “**Receiving Party**” has the meaning set forth in **Section 8)a)**. Touchstone shall abide by all requirements as listed in Exhibit G-1 of the Agreement, Privacy and Disclosure Policy.

“**Representatives**” means, with respect to a party, that party’s employees, officers, directors, consultants, agents, independent contractors, service providers, sublicenses, Subcontractors and legal advisors.

“**Resultant Data**” means data and information related to Customer’s use of the Services that is used by Touchstone in an aggregate and anonymized manner, including to compile statistical and performance information related to the provision and operation of the Services.

“**Services**” means Hosted Services, as set forth in any statement of work issued pursuant to the Agreement.

“**Service Credits**” has the meaning set forth in **Schedule B**.

“**Sensitive Personal Information**” means an (i) individual’s government-issued identification number (including Social Security number, driver’s license number, or state-issued identification number); (ii) financial account number, credit card number, debit card number, or credit report information, with or without any required security code, access code, personal identification number, or password that would permit access to an individual’s financial account; or (iii) biometric, genetic, health, medical, or medical insurance data.

“**Software**” means the Touchstone software application or applications, and all new versions, updates, revisions, improvements and modifications of the foregoing, that Touchstone provides remote access to and use of as part of the Hosted Services.

“**Subcontractor**” has the meaning set forth in **Section 2)d)**.

“**Touchstone**” has the meaning set forth in the preamble.

“**Touchstone Indemnitee**” has the meaning set forth in **Section 10)b)**.

“**Touchstone Platform**” means the Software, Documentation and Touchstone Systems and any and all other information, data, documents, materials, works and other content, devices, methods, processes,

hardware, software and other technologies and inventions, that are directly provided or used by Touchstone or any Subcontractor in providing the Services.

“**Touchstone Personnel**” means all individuals involved in the performance of Services as employees, agents or independent contractors of Touchstone or any Subcontractor.

“**Touchstone Systems**” means the information technology infrastructure used by or on behalf of Touchstone in performing the Services, including all computers, software, hardware, databases, electronic systems (including database management systems) and networks, whether operated directly by Touchstone or through the use of third-party services.

“**Third Party Data**” means information, data and other content, in any form or medium that is collected, downloaded or otherwise received, directly or indirectly from a third party by or through the Hosted Services.

2) Hosted Services.

- a) Provision of Services. Touchstone shall provide Hosted Services to Customer according to the terms of this Addendum, during the term set forth in the statement(s) of work describing such services, in accordance with the terms of those statement(s) of work.
- b) Service and System Control. Except as otherwise expressly provided in this Addendum, as between the parties:
 - i) Touchstone has and will retain sole control over the operation, provision, maintenance and management of the Hosted Services and Touchstone Platform; and
 - ii) Customer has and will retain sole control over the operation, maintenance and management of, and all access to and use of, the Customer Systems, and sole responsibility for all access to and use of the Services and Touchstone Platform by any Person by or through the Customer Systems or any other means controlled by Customer or any Authorized User.
- c) Touchstone Changes. Touchstone reserves the right, in its sole discretion, to make any changes to the Services and Touchstone Platform that it deems necessary or useful to maintain or enhance the Services or Touchstone Platform or to comply with applicable Law.
- d) Subcontractors. Touchstone may from time to time in its discretion engage third parties to perform Services (each, a “**Subcontractor**”), provided that all Subcontractors are bound by confidentiality and data security obligations no less restrictive than those in this Addendum. Any breach of this Addendum by a Subcontractor shall be deemed to be a breach by Touchstone.

3) Reserved

4) Service Levels and Credits; Support Services.

- a) Service Levels and Credits. Subject to the terms and conditions of this Addendum, Touchstone will ensure the Hosted Services are reasonably available in accordance with the Service Level Exhibit set forth in **Schedule A to this Addendum.**

- b) In the event of a Service Level Failure, Touchstone shall issue a credit to Customer in the amount and as set forth in Schedule B to this Addendum, subject to the limitations therein.
- c) Support Services. The Hosted Services include Touchstone’s standard customer support services set forth in **Schedule B to this Addendum**.

5) Reservation of Rights and Customer Restrictions.

- a) Reservation of Rights. Nothing in this Addendum grants any right, title or interest in or to (including any license under) any Intellectual Property Rights in or relating to, the Services or Touchstone Platform, whether expressly, by implication, estoppel or otherwise. All right, title and interest in and to the Services and the Touchstone Platform are and will remain with Touchstone or the applicable third-party rights holder. Except for the limited licensed expressly provided in this Addendum grants Touchstone any right, title or interest in or to (including any license under) any Intellectual Property Rights in or relating to, Customer Data, whether expressly, by implication, estoppel or otherwise. All right, title and interest in and to the Customer Data are and will remain with Customer or the applicable third-party rights holder.
- b) Authorization Limitations and Restrictions. Customer shall not, and shall not permit any other Person to, access or use the Services or Touchstone Platform except as expressly permitted by this Addendum and, in the case of third-party materials, the applicable third-party license Addendum. Further, Customer shall not, except as this Addendum expressly permits:
 - i) copy, modify, or create derivative works or improvements of the Services or Touchstone Platform;
 - ii) rent, lease, lend, sell, sublicense, assign, distribute, publish, transfer, or otherwise make available any Services or Touchstone Platform to any Person, including on or in connection with the internet or any time-sharing, service bureau, software as a service, cloud, or other technology or service;
 - iii) reverse engineer, disassemble, decompile, decode, adapt, or otherwise attempt to derive or gain access to the object source code of the Services or Touchstone Platform, in whole or in part;
 - iv) access or use the Services or Touchstone Platform other than by an Authorized User through the use of his or her own then-valid Access Credentials, including through bypass or breach or any security device or protection used by the Services or Touchstone Platform
 - v) input, upload, transmit or otherwise provide to or through the Services or Touchstone Systems, any information or materials that are unlawful or injurious, or contain, transmit or activate any Harmful Code;
 - vi) damage, destroy, disrupt, disable, impair, interfere with or otherwise impede or harm in any manner the Services, Touchstone Systems or Touchstone’s provision of services to any third party, in whole or in part;

- vii) remove, delete, alter or obscure any trademarks, Documentation, warranties or disclaimers, or any copyright, trademark, patent or other intellectual property or proprietary rights notices from any Services or Touchstone Platform, including any copy thereof;
- viii) access or use the Services or Touchstone Platform for purposes of competitive analysis of the Services or Touchstone Platform, the development, provision or use of a competing software service or product or any other purpose that is to Touchstone's detriment or commercial disadvantage; or
- ix) upload or transmit any Personal Information to or through the Touchstone Platform.

6) Customer Obligations.

- a) Customer Systems and Cooperation. Customer shall: (a) set up, maintain and operate in good repair all Customer Systems on or through which the Services are accessed or used as set forth in Documentation; and (b) provide Touchstone Personnel with such access to Customer's premises and Customer Systems as is necessary for Touchstone to perform the Services.
- b) Responsibility for Users. Customer shall be responsible for any unauthorized creation, collection, receipt, transmission, access, storage, disposal, use, or disclosure of Personal Information uploaded to or transmitted through the Touchstone Platform.

7) Intellectual Property Rights.

- a) Services and Touchstone Platform. All right, title and interest in and to the Services and Touchstone Platform, including all Intellectual Property Rights therein, are and will remain with Touchstone and the respective rights holders in any third-party materials.
- b) Customer Data. As between Customer and Touchstone, Customer is and will remain the sole and exclusive owner of all Customer Data, subject to the rights granted in Section 10(c).
- c) Limited Consent to Use Customer Data. Customer hereby irrevocably grants all such rights and permissions in or relating to Customer Data as are necessary for Touchstone to perform and enforce this Agreement and exercise Touchstone's rights and perform Touchstone's obligations hereunder, including but not limited to the improvement of the Hosted Services, the Touchstone Platform and for the benefit of Customer.
- d) Feedback. If Customer or any of its employees, contractors, or Authorized Users sends or transmits any communications or materials to Touchstone by mail, email, telephone, or otherwise, suggesting or recommending changes to the Software or Documentation, including without limitation, new features or functionality relating thereto, or any comments, questions, suggestions, or the like ("**Feedback**"), Touchstone is free to use such Feedback irrespective of any other obligation or limitation between the parties governing such Feedback. Customer hereby assigns to Touchstone on Customer's behalf, and on behalf of its employees, contractors and/or agents, all right, title, and interest in, without any attribution or compensation to any party, any ideas, know-how, concepts, techniques, or other intellectual property rights contained in the Feedback, for any purpose whatsoever.

8) Confidentiality.

- a) Confidential Information. In connection with this Addendum each party (as the “**Disclosing Party**”) may disclose or make available Confidential Information to the other party (as the “**Receiving Party**”). Subject to **Section 8(b) (Exclusions)**, “**Confidential Information**” means information in any form or medium (whether oral, written, electronic or other) that the Disclosing Party considers confidential or proprietary, including information consisting of or relating to the Disclosing Party’s technology, trade secrets, know-how, business operations, plans, strategies, customers, and pricing, and information with respect to which the Disclosing Party has contractual or other confidentiality obligations, in each case whether or not marked, designated or otherwise identified as “confidential.” Without limiting the foregoing, all Touchstone Platform and the terms and existence of this Addendum are the Confidential Information of Touchstone. Customer Data is Confidential Information. Resulting Data is not Confidential Information.
- b) Exclusions. Confidential Information does not include information that the Receiving Party can demonstrate by written or other documentary records: (a) was rightfully known to the Receiving Party without restriction on use or disclosure prior to such information’s being disclosed or made available to the Receiving Party in connection with this Addendum; (b) was or becomes generally known by the public other than by the Receiving Party’s or any of its Representatives’ noncompliance with this Addendum; (c) was or is received by the Receiving Party on a non-confidential basis from a third party that was not or is not, at the time of such receipt, under any obligation to maintain its confidentiality; (d) the Receiving Party can demonstrate by written or other documentary records was or is independently developed by the Receiving Party without reference to or use of any Confidential Information; or (e) is subject to disclosure under the California Public Records Act (Cal. Govt. Code Section 62500 et seq.)
- c) Protection of Confidential Information. As a condition to being provided with any disclosure of or access to Confidential Information, the Receiving Party shall:
- i) not access or use Confidential Information other than as necessary to exercise its rights or perform its obligations under and in accordance with the Agreement or this Addendum;
 - ii) not disclose or permit access to Confidential Information *other than* to its Representatives who:
 - (i) need to know such Confidential Information for purposes of the Receiving Party’s exercise of its rights or performance of its obligations under and in accordance with this Addendum; (ii) have been informed of the confidential nature of the Confidential Information and the Receiving Party’s obligations under this **Section 8(c)**; and (iii) are bound by confidentiality and restricted use obligations at least as protective of the Confidential Information as the terms set forth in this **Section 8(c)**;
 - iii) safeguard the Confidential Information from unauthorized use, access or disclosure using at least the degree of care it uses to protect its own confidential information and in no event less than a reasonable degree of care; and
 - iv) ensure its Representatives’ compliance with, and be responsible and liable for, any of its Representatives’ non-compliance with, the terms of this **Section 8**.

d) Compelled Disclosures. If the Receiving Party or any of its Representatives is compelled by applicable Law to disclose any Confidential Information, then, to the extent permitted by applicable Law, the Receiving Party shall: (a) promptly, and prior to such disclosure, notify the Disclosing Party in writing of such requirement so that the Disclosing Party can seek a protective order or other remedy or waive its rights under **Section 8(c)**; and (b) provide reasonable assistance to the Disclosing Party, at the Disclosing Party's sole cost and expense, in opposing such disclosure or seeking a protective order or other limitations on disclosure. If the Disclosing Party waives compliance or, after providing the notice and assistance required under this **Section 8(d)**, the Receiving Party remains required by Law to disclose any Confidential Information, the Receiving Party shall disclose only that portion of the Confidential Information that, on the advice of the Receiving Party's outside legal counsel, the Receiving Party is legally required to disclose and, on the Disclosing Party's request, shall use commercially reasonable efforts to obtain assurances from the applicable court or other presiding authority that such Confidential Information will be afforded confidential treatment.

9) Representations and Warranties.

a) Mutual Representations and Warranties. Each party represents and warrants to the other party that:

- i) it is duly organized, validly existing and in good standing as a corporation or other entity under the Laws of the jurisdiction of its incorporation or other organization;
- ii) it has the full right, power and authority to enter into and perform its obligations and grant the rights, licenses, consents and authorizations it grants or is required to grant under this Addendum;
- iii) the execution of this Addendum by its representative whose signature is set forth at the end of this Addendum has been duly authorized by all necessary corporate or organizational action of such party; and
- iv) when executed and delivered by both parties, this Addendum will constitute the legal, valid and binding obligation of such party, enforceable against such party in accordance with its terms.

b) Additional Touchstone Representations and Warranties. Touchstone represents and warrants to Customer that Touchstone will perform the Services using personnel of required skill, experience and qualifications and in a professional and workmanlike manner, and that the Touchstone Systems will remain free of Harmful Code.

c) Additional Customer Representations and Warranties. Customer represents and warrants to Touchstone that Customer owns or otherwise has and will have the necessary rights to all Customer Data and all Third Party Data to permit Touchstone to conduct the Services.

d) DISCLAIMER OF WARRANTIES. EXCEPT FOR THE EXPRESS WARRANTIES SET FORTH IN **SECTION 9)a)**, **SECTION 9)b)** AND **SECTION 9)c)**, ALL SERVICES AND THE TOUCHSTONE PLATFORM ARE PROVIDED "AS-IS" AND TOUCHSTONE HEREBY DISCLAIMS ALL WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHER, AND TOUCHSTONE SPECIFICALLY DISCLAIMS ALL IMPLIED WARRANTIES

OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT, AND ALL WARRANTIES ARISING FROM COURSE OF DEALING, USAGE OR TRADE PRACTICE. WITHOUT LIMITING THE FOREGOING, TOUCHSTONE MAKES NO WARRANTY OF ANY KIND THAT THE SERVICES OR TOUCHSTONE PLATFORM, OR ANY PRODUCTS OR RESULTS OF THE USE THEREOF, WILL MEET CUSTOMER'S OR ANY OTHER PERSON'S REQUIREMENTS, OPERATE WITHOUT INTERRUPTION, ACHIEVE ANY INTENDED RESULT, BE COMPATIBLE OR WORK WITH ANY SOFTWARE, SYSTEM OR OTHER SERVICES, OR BE SECURE, ACCURATE, COMPLETE, OR ERROR FREE. ALL THIRD-PARTY MATERIALS ARE PROVIDED "AS-IS" AND ANY REPRESENTATION OR WARRANTY OF OR CONCERNING ANY THIRD-PARTY MATERIALS IS STRICTLY BETWEEN CUSTOMER AND THE THIRD-PARTY OWNER OR DISTRIBUTOR OF THE THIRD-PARTY MATERIALS. IN NO EVENT WILL TOUCHSTONE HAVE ANY LIABILITY FOR THE COMPLETENESS, ACCURACY, TIMELINESS OR RELIABILITY OF ANY THIRD-PARTY DATA.

10) Indemnification.

- a) Touchstone Indemnification. Touchstone shall defend Customer and its affiliates and their respective officers, directors, and employees and, agents, successors and assigns (each, a "**Customer Indemnitee**") from and against any and all Losses incurred by such Customer Indemnitee arising out of or relating to (i) any claim, suit, action or proceeding (each, an "**Action**") by a third party (other than an Affiliate of a Customer Indemnitee) to the extent that such Losses arise from any allegation in such Action that the use of the Hosted Service (excluding, for avoidance of doubt, Customer Data and Third Party Data) infringes an Intellectual Property Right; (ii) negligence or willful misconduct by Touchstone or any of its Representatives on behalf of Touchstone in connection with this Addendum. The foregoing obligation does not apply to any Action or Losses arising out of or relating to Losses arising from any modification of the Services or Touchstone Platform by any party other than authorized representatives of Touchstone Benchmarking, LLC.
- b) Indemnification Procedure. Customer shall promptly notify Touchstone in writing of any Action for which Customer believes it is entitled to be indemnified pursuant to **Section 10(a)** as the case may be. The Customer (the "**Indemnitee**") shall cooperate with Touchstone (the "**Indemnitor**") at the Indemnitor's sole cost and expense. The Indemnitor shall immediately take control of the defense and investigation of such Action and shall employ counsel reasonably acceptable to the Indemnitee to handle and defend the same, at the Indemnitor's sole cost and expense. The Indemnitee's failure to perform any obligations under this **Section 10(b)** will not relieve the Indemnitor of its obligations under this **Section 10** except to the extent that the Indemnitor can demonstrate that it has been prejudiced as a result of such failure. The Indemnitee may participate in and observe the proceedings at its own cost and expense with counsel of its own choosing.
- c) Mitigation. If any aspect of the Hosted Services is, or in Touchstone's opinion is likely to be, claimed to infringe, misappropriate or otherwise violate any third-party Intellectual Property Right, Touchstone may, at its option and sole cost and expense:
 - i) obtain the right for Customer to continue to use the Hosted Services materially as contemplated by this Addendum; or

- ii) modify or replace the Hosted Services, in whole or in part, to seek to make the Hosted Services non-infringing, while providing materially equivalent features and functionality.

11) Limitations of Liability.

- a) EXCLUSION OF DAMAGES. IN NO EVENT WILL TOUCHSTONE BE LIABLE IN CONNECTION WITH THIS ADDENDUM OR ITS SUBJECT MATTER, UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, EXEMPLARY, SPECIAL, ENHANCED OR PUNITIVE DAMAGES, REGARDLESS OF WHETHER SUCH PERSONS WERE ADVISED OF THE POSSIBILITY OF SUCH LOSSES OR DAMAGES OR SUCH LOSSES OR DAMAGES WERE OTHERWISE FORESEEABLE, AND NOTWITHSTANDING THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE.
- b) CAP ON MONETARY LIABILITY. IN NO EVENT WILL THE AGGREGATE LIABILITY OF TOUCHSTONE IN CONNECTION WITH THIS ADDENDUM OR ITS SUBJECT MATTER, UNDER ANY LEGAL OR EQUITABLE THEORY, INCLUDING BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY AND OTHERWISE, EXCEED ONE MILLION DOLLARS (\$1,000,000). THE FOREGOING LIMITATION APPLIES NOTWITHSTANDING THE FAILURE OF ANY AGREED OR OTHER REMEDY OF ITS ESSENTIAL PURPOSE.
- c) THIS LIMITATION OF LIABILITY DOES NOT LIMIT TOUCHSTONE LIABILITY FOR DAMAGES ARISING FROM DEATH, PERSONAL INJURY, OR PROPERTY DAMAGE TO THE EXTENT ARISING FROM ANY NEGLIGENT ACT OR OMISSION OR WILLFUL MISCONDUCT BY TOUCHSTONE, OR OUR DIRECTORS, OFFICERS, EMPLOYEES, OR AGENTS PERFORMING SERVICES WHILE ON CUSTOMER SITE.

12) Force Majeure.

- a) No Breach or Default. In no event will either party be liable or responsible to the other party, or be deemed to have defaulted under or breached this Addendum, for any failure or delay in fulfilling or performing any term of this Addendum, (except for any payment obligation), when and to the extent such failure or delay is caused by a Force Majeure Event. Either party may terminate this Addendum if a Force Majeure Event affecting the other party continues substantially uninterrupted for a period of thirty (30) days or more.
- b) Affected Party Obligations. In the event of any failure or delay caused by a Force Majeure Event, the party affected by such failure or delay shall give prompt written notice to the other party stating the period of time the occurrence is expected to continue and use commercially reasonable efforts to end the failure or delay and minimize the effects of such Force Majeure Event.

13) Miscellaneous.

- a) Further Assurances. Upon a party’s reasonable request, the other party shall, at the requesting party’s sole cost and expense, execute and deliver all such documents and instruments, and take all such further actions, necessary to give full effect to this Addendum.
- b) Relationship of the Parties. The relationship between the parties is that of independent contractors. Nothing contained in this Addendum shall be construed as creating any agency, partnership, joint venture or other form of joint enterprise, employment or fiduciary relationship between the parties, and neither party shall have authority to contract for or bind the other party in any manner whatsoever.
- c) Public Announcements. Neither party shall issue or release any announcement, statement, press release or other publicity or marketing materials relating to this Addendum or otherwise use the other party’s trademarks, service marks, trade names, logos, domain names or other indicia of source, affiliation or sponsorship, in each case, without the prior written consent of the other party, which consent shall not be unreasonably withheld, conditioned or delayed, provided, however, that Touchstone may include Customer’s name in its lists of Touchstone’s current or former customers of Touchstone in promotional and marketing materials.
- d) Unless otherwise provided for in the Agreement, all notices, requests, consents, claims, demands, waivers and other communications under this Addendum have binding legal effect only if in writing and addressed to a party as follows (or to such other address or such other person that such party may designate from time to time in accordance with this **Section 13)d**):

<p>If to Touchstone:</p> <p>Touchstone Benchmarking, LLC Attn: Jon Dierking jon.dierking@overlayconsulting.com Address: 1635 Blake St. STE 200 Denver, CO 80202</p>	<p>If to Customer:</p> <p>Name: _____. Attn: _____. Email: _____. Address: _____,</p>
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Notices sent in accordance with this **Section 13)d** will be deemed effectively given: (a) when received, if delivered by hand, with signed confirmation of receipt; (b) when received, if sent by a nationally recognized overnight courier, signature required; (c) [when sent, if by e-mail, (with confirmation of transmission), if sent during the addressee’s normal business hours, and on the next business day, if sent after the addressee’s normal business hours]; and (d) on three (3) days after the date mailed by certified or registered mail, return receipt requested, postage prepaid.

- e) Interpretation. For purposes of this Addendum the words “include,” “includes” and “including” are deemed to be followed by the words “without limitation”. The parties intend this Addendum to be construed without regard to any presumption or rule requiring construction or interpretation against the party drafting an instrument or causing any instrument to be drafted. The exhibits, schedules, attachments and appendices referred to herein are an integral part of this Addendum to the same extent as if they were set forth verbatim herein.

- f) Headings. The headings in this Addendum are for reference only and do not affect the interpretation of this Addendum.
- g) Order of Precedence. This Addendum shall control with respect to the terms of use of the Software license/subscription.
- h) Assignment. Neither party may assign the rights under the Agreement without the prior written consent of the other party, except that Touchstone may assign the Agreement to an entity that acquires all or substantially all of its business or assets of Touchstone, whether through merger, reorganization or otherwise, without consent of Customer. Any purported assignment, delegation or transfer in violation of this **Section 13h**) is void.
- i) No Third-party Beneficiaries. This Addendum is for the sole benefit of the parties hereto and their respective permitted successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any other Person any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Addendum.
- j) Amendment and Modification; Waiver. No amendment to or modification of this Addendum is effective unless it is in writing and signed by an authorized representative of each party. No waiver by any party of any of the provisions hereof shall be effective unless explicitly set forth in writing and signed by the party so waiving. Except as otherwise set forth in this Addendum, no failure to exercise, or delay in exercising, any rights, remedy, power or privilege arising from this Addendum shall operate or be construed as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or of any other right, remedy, power or privilege.
- k) Severability. If any provision of this Addendum is invalid, illegal or unenforceable in any jurisdiction, such invalidity, illegality or unenforceability shall not affect any other term or provision of this Addendum or invalidate or render unenforceable such term or provision in any other jurisdiction. Upon such determination that any term or other provision is invalid, illegal or unenforceable, the parties hereto shall negotiate in good faith to modify this Addendum so as to effect the original intent of the parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.
- l) Equitable Relief. Each party acknowledges and agrees that a breach or threatened breach by such party of any of its obligations under **Section 8** (Confidentiality) or, in the case of Customer, **Section 5(b)** (Use Restrictions) or **Section 6** (Customer Obligations), would cause the other party irreparable harm for which monetary damages would not be an adequate remedy and agrees that, in the event of such breach or threatened breach, the other party will be entitled to equitable relief, including a restraining order, an injunction, specific performance and any other relief that may be available from any court, without any requirement to post a bond or other security, or to prove actual damages or that monetary damages are not an adequate remedy. Such remedies are not exclusive and are in addition to all other remedies that may be available at law, in equity or otherwise.

**SCHEDULE A
TOUCHSTONE SERVICE LEVEL COMMITMENT**

1. Certain Definitions.

- a. “**Available**” means available for access and use by Customer and its Authorized Users over the Internet and operating in material accordance with the Documentation. Availability when expressed as a percentage means the percentage of time that the Hosted Services are Available in a given calendar month, and excludes time during a Scheduled Maintenance Period. “Availability” and “Unavailable” have correlative meanings.
- b. “**Scheduled Maintenance Period**” means the period from Sunday 2:00AM CST to Sunday 6:00AM CST, or such period otherwise agreed to in writing by Touchstone and Customer.
- c. “**Service Level Failure**” means a material failure of the Hosted Services to meet the Availability requirements set forth in this Service Level Agreement.
- d. “**Services Downtime**” means an inability to access the Hosted Services other than during the Scheduled Maintenance Period as verified by Touchstone.

2. In the event of Services Downtime, Customer shall be entitled to credits from Touchstone against amounts owed by Customer (“**Service Credits**”) as follows:

- a. If the total Availability of the Hosted Services in a calendar month is less than 99.99% but at least 98.0%, Touchstone will issue a credit to Customer in the amount equaling to 5% of that calendar month’s charges for the Hosted Services.
- b. If the total Availability of the Hosted Services in a calendar month is less than 98.0% but at least 95%, Touchstone will issue a credit to Customer in the amount equaling to 20% of that calendar month’s charges for the Hosted Services.
- c. If the total Availability of the Hosted Services provided by Touchstone in a calendar month is less than 95.0% but at least 90%, a credit for services will be issued to the Customer in the amount equaling to 30% of that month’s charges.

In addition to the foregoing, if the total Availability of the Hosted Services provided by Touchstone in two consecutive calendar months is less than 90%, such Availability shall be deemed to be a material breach giving rise to a right of Customer to terminate this Agreement.

3. The Hosted Services will not be considered Unavailable if the impaired ability of Customer or its Authorized Users to access or use the Hosted Services is due, in whole or in part, to any: (a) access to or use of the Hosted Services by Customer or any Authorized User, or using Customer’s or an Authorized User’s Access Credentials, that does not comply with this Agreement and the

Documentation; (b) any delay or failure of performance caused in whole or in part by Customer’s delay in performing, or failure to perform, any of its obligations under this Agreement; (c) Customer’s or its Authorized User’s Internet connectivity; (d) Force Majeure Event; (e) failure, interruption, outage or other problem with any software, hardware, system, network, facility or other matter not supplied by Touchstone pursuant to this Agreement; (f) disabling, suspension or termination of the Services as permitted by the Agreement.

4. Touchstone has no obligation to issue any Service Credit unless Customer reports the Service Level Failure to Touchstone promptly on becoming aware of it.

**SCHEDULE B
SUPPORT SERVICES**

- I. Touchstone’s standard support services include the following:

Function	Standard Support Offering
New User Setup	Included
New User Web Training	Included
Configuration Changes (within original project scope)	Included
Email Support	Included; unlimited
Incident Limit	Unlimited
Phone Support	Included during business hours, 9:00AM – 5:00 PM Mountain time
Incident Acknowledgement	Within 1 hour
Resolution Estimate	Severity Level 1: as quickly as possible, with updates every 6 hours Severity Level 2: As quickly as possible, with daily updates Severity Level 3: Correction with a maintenance release of the software Severity Level 4 or 5: None, unless escalated.

- II. A Touchstone customer service representative (“CSR”) will perform the following steps once the incident is reported by Customer:

- A. **Support Procedures:**

- 1) Obtain an adequate description of the issue, including requests for screen shots or system logs from the person reporting the issue or making the support request (the “Requestor”).

- 2) Provide a solution (if known) to the Requestor and close the incident. Requestor will receive an email confirmation.
- 3) If the incident is not so closed, assign a severity level and problem type that is appropriate for the Customer's business needs and Customer's support terms. If the incident is a Severity 1 or 2 as determined below, the CSR will work with the Requestor until the issue is resolved or until it is determined that an error in the Hosted Services exists.
- 4) If issue is not known, attempt to recreate the problem in a test environment and Requestor will receive an estimate of the resolution time via email.
- 5) Attempt to provide an acceptable work around, if available, to the Requestor
- 6) If no resolution is available, record the suspected error for development or second level to analyze, as appropriate.
- 7) Once resolution is made available from development or second level support, test resolution.
- 8) If resolution test is successful, correction will be provided to the Requestor.
- 9) Once resolution is implemented, email confirmation of the resolution is sent to the Requestor.
- 10) Issue is closed.

B. Problem Type:

- 1) Bug - documented instance when the Hosted Services do not produce the proper results, or a function works differently than stated in Documentation. A severity level will be logged and appropriate action taken.
- 3) User Error or Training - The Authorized User was improperly using the Hosted Services for the desired results.
- 2) Feature Request - A new feature or function desired by Requestor that currently is not delivered within the Hosted Services.

C. Severity Levels:

- 1) Severity 1 - Unable to use the Hosted Services. Hosted Services crash and/or machine hangs.
- 2) Severity 2 – Hosted Services are severely restricted due to a defect encountered for which there is no acceptable circumvention. Hosted Services do not function properly; there is an impediment to business use.
- 3) Severity 3 - Able to proceed with limited function which is not crucial to business use. Either the defect is serious, but an acceptable circumvention exists, or the defect is not serious, although no circumvention exists. Hosted Services do not function

properly, but there is a known work around, or no impediment to the business function.

- 4) Severity 4 - No immediate impact to business use or defects that are non-reproducible, but should be documented.
- 5) Severity 5 - Error due to Authorized User's lack of knowledge or invalid use of the Hosted Services.

D. Support Actions taken:

- 1) Severity 1 - Immediate assignment of development staff to diagnose and correct the problem. The fix will be tested and a new program template is created in order to replace the design of the defunct application code. Any agents necessary to correct data corruption will be included in the new program template, and instructions provided on the correction procedure. The CSR will schedule the implementation of the resolution with the Customer contact.
- 2) Severity 2 – If the CSR is unable to solve the incident or answer the request within the resolution estimate time per Customer's support terms, the incident is sent to the Product Development Manager and assigned to the appropriate development staff or second level support. The fix will be tested and a new program template created in order to replace the design of the defunct application code if necessary. Any agents necessary to correct data corruption will be included in the new program template, and instructions provided on the correction procedure. The CSR will schedule the implementation of the resolution with the Customer contact.
- 3) Severity 3 - The CSR should be able to provide an acceptable work around to the issue recorded and the issue resolved to the Customer's satisfaction.
- 4) Severity 4 - The CSR should be able to provide an acceptable work around. If further action is required, such as minor changes to the program, the issue will be logged for the development staff, and placed in a queue for implementation in a designated future release of the Hosted Services.
- 5) Severity 5 - The CSR should be able to provide an answer and the issue is logged, but not assigned to Development.

Customer shall not be charged for system failures.

EXHIBIT G

INFORMATION TECHNOLOGY AND SECURITY REQUIREMENTS

The requirements checked below define the City's Information Technology and Security Requirements as they pertain to this Agreement. Contractor shall comply with the following requirements in providing all Information Technology-related software, services, and equipment.

1 CONTRACTOR'S SOFTWARE

The terms for Contractor's Software licenses, including software accessed through a subscription service (Software), delivered pursuant to the Scope of Services, including subsequent Software updates licensed to the City, shall be as set forth in the Software License Agreement [Exhibit F].

2 PRIVACY AND DISCLOSURE

2.1 Contractor agrees in the performance of services to comply with City's Privacy and Disclosure Policy, [Exhibit G-1]. Contractor shall ensure that all webpages that it creates are consistent with the Policy. Contractor further agrees that it shall treat all information received through the performance of this Agreement in strict accordance with the Policy.

2.2 Personal identifying information, financial account information, and restricted City information, whether in electronic format or hard copy, must be secured and protected at all times to prevent unauthorized access. At a minimum, Contractor shall encrypt and password-protect electronic files, store and process City data only in North America, and adhere to any applicable security standards, including the National Institute for Standards and Technology CSF/800-14/800-53/800-82, International Organization for Standardization 15408/27001/27002, International Society for Automation ISA-62443 series, Payment Card Industry PCI-DSS, Underwriters Laboratory, Health Insurance Portability and Accountability Act, Federal Risk and Authorization Management Program FedRAMP, U.S. Department of Justice/Federal Bureau of Investigation Criminal Justice Information Services Security Policy, et al., as may be amended or updated. This includes data saved to host locations, computers, connected devices, and storage devices.

3 WARRANTY FOR SERVICES AND SOFTWARE CUSTOMIZATIONS

Contractor warrants to City that Contractor shall render all Services and software customizations provided under this Agreement with reasonable care and skill and warrants that they will function per the approved business requirements and design under ordinary use and operation in conformance with the specifications and documentation. Additionally, Contractor shall warrant its Services and software customizations for a period of one (1) year after Final System Acceptance [Exhibit A-4] ("Warranty Period"). During the Warranty Period, City will notify Contractor if any Services or software customizations do not conform to City's specifications as contained in the Scope of Services. Upon receipt of such notice, Contractor will investigate the warranty claim. If this investigation confirms a valid warranty claim, Contractor shall (at no additional cost to the City) repair the defective Services or software customizations. The one (1) Warranty Period is reset for any repaired or replaced item(s), beginning upon City acceptance of the repaired or replaced item(s). If despite its reasonable efforts, Contractor is unable to provide the City with Services or software customizations in compliance with the foregoing warranty, City may pursue its remedy at law to recover direct damages resulting from the breach of this warranty.

4 ☒ CONFIDENTIAL INFORMATION

4.1 Confidentiality

All data and information generated, collected, developed, discovered, or otherwise saved in the System exclusively for the City (collectively the “Data”) by the Contractor in the performance of this Agreement are confidential and must not be disclosed to any person except as authorized by City or as required by law.

4.2 Ownership of Materials

City and Contractor agree that Contractor shall own the entire right, title, and interest, including patents, copyrights, and other intellectual property rights, in and to all tangible materials, inventions, works of authorship, software, information, and data solely conceived or developed by Contractor in the performance of the project, and developed using Contractor’s facilities or personnel. City and Contractor agree that City shall own the entire right, title, and interest, including all patents, copyrights, and other intellectual property rights, in and to all tangible materials, inventions, works of authorship, software, information, and data solely conceived or developed by City’s facilities or personnel. Technology that is jointly developed using both City and Contractor personnel and facilities shall be jointly owned

4.3 Ownership of Data

The City shall maintain ownership and control of the Data throughout the Agreement period and in perpetuity. Contractor shall have the right to use the Data solely to perform Services under this Agreement with the City. Contractor may not use the Data, a subset of the Data, and/or a summary of the Data, or, cause or permit the Data, a subset and/or a summary thereof, to be used by any third party, outside the Scope of this Agreement without the express written consent of the City. Contractor shall provide City with a copy of the Data in a mutually agreed upon format at regular intervals and at such additional times as the City deems appropriate. Contractor warrants that throughout all operational and maintenance activities the accuracy of the Data will be preserved.

4.4 Security

Contractor shall maintain effective controls and security to protect the Data, including conducting daily and incremental backups to a redundant data storage location, providing redundant power, internet, site redundancy, and emergency recovery procedures.

4.5 Copies of Data/Exit Strategy

Upon request of the City or in the event this Agreement is terminated, Contractor shall work with the City to ensure a smooth transition of all Data and Software to the City’s new environment, including, but not limited to, providing the City with a copy of current source code, support materials, and sufficient time to effect the transition. City agrees to only use such code and materials to support the City’s use of the Software. Additionally, upon request by the City and at no additional cost, Contractor shall provide City with a database export of the Data in a format acceptable to the City. At the termination of this Agreement, all Data at the Contractor’s (or Contractor’s subcontractor’s) facilities shall be purged when the City confirms that it has received a satisfactory copy of the Data. Contractor shall provide written verification to the City once all City Data has been purged.

4.6 Enforcement

The City and Contractor agree that damages are not adequate and no adequate remedy at law exists for any threatened or actual disclosure or use of information by Contractor in violation of the provisions of this Agreement. Accordingly, Contractor consents to the entry of an injunction against threatened or actual disclosure or use of the information in violation of any provision of this Agreement.

5 ☒ SECURITY REQUIREMENTS

5.1 Privileged Information

Contractor shall provide any and all information systems security findings and recommendations under privileged access, or a similar level of protection, in order to guard against revealing potential security issues that put the City, citizens, and businesses at risk.

5.2 Secure Transmission

Contractor shall provide any and all information systems security findings, recommendations, and work materials via a secure file transfer method accessible by the City.

5.3 Secure Access

Contractor shall have all equipment, materials, and support necessary to remotely connect to the City servers and computers via a secure connection per City access protocols. The City will provide secure VPN access into the network to the Contractor as required. On-site access will also be provided as needed and as mutually agreed by the parties.

5.4 Security Policy and Standards

Contractor shall adhere to the City's *Information and System Security Policy* and *Information Security Standard Handbook* or any other similar standard such as NIST SP800-53, ISO 27005, CIS, or COBIT, in providing the services.

5.5 Security Controls

Contractor shall implement security controls in accordance with the City's Security Policy and Standards or any other acceptable standard to assess any solution prior to first release or release of any major improvement or enhancement. Contractor's solution must be audited by a third party at least once a year and results shall be share with City along with regular updates on risk mitigation.

5.6 City Data

All City Data provided to Contractor for the performance of the services specified herein is owned by the City and must be returned to the City upon contract termination.

5.7 Limited Access

If necessary for the fulfillment of the Agreement, City may provide Contractor with non-exclusive, limited access to the City's information technology infrastructure. Contractor shall abide by all City policies, standards, regulations, and restrictions regarding access and usage of City's information and communication technology resources. Contractor shall enforce all such policies, standards, regulations, and restrictions with all Contractor's employees, agents, and any tier of subcontractor granted access in the performance of this Agreement and shall only grant such access as may be necessary for the purpose of fulfilling the requirements of this Agreement.

5.8 Compromised Security

In the event that Data collected or obtained by the Contractor in connection with this Agreement is believed to have been compromised, Contractor shall notify the City immediately. Contractor agrees to reimburse the City for any costs it incurs to resolve potential breaches incurred due to the Contractor, including, where applicable, the cost of assisting individuals who may be impacted by the

5.9 Incident Response

Contractor shall develop and maintain an Incident Response plan for providing notification, containing, eradicating, and recovering from a significant incident that impacts the operations of the solution.

5.10 Contingency Planning

Contractor shall develop and maintain a Contingency Plan for providing resiliency and redundancy to the solution.

EXHIBIT G-1

PRIVACY AND DISCLOSURE POLICY

The purpose of this statement is to define the City of San José's policy with regard to the collection and use of personally identifiable information (PII). PII is any information relating to an identified or identifiable individual who is the subject of the information. Users of City systems should be informed of the following:

The City of San José collects two kinds of customer information: (1) anonymous and (2) personally identifiable information (PII).

1 ANONYMOUS INFORMATION

- 1.1 This type of information does not identify specific individuals and is automatically transmitted. This information consists of:
 - 1.1.1 The URL (Uniform Resource Locator or address) of the web page user previously visited.
 - 1.1.2 The domain names and/or IP addresses which are numbers that are automatically assigned to City computers whenever users are connected to the Internet or World Wide Web.
 - 1.1.3 The browser version users are using to access the site.
- 1.2 This information is used to help improve the City's systems. None of the information can be linked to an individual.

2 PERSONALLY IDENTIFIABLE INFORMATION (PII)

- 2.1 This type of information could include name, address, email address, telephone number, or credit/debit card information. The City will make every reasonable effort to protect City privacy. It restricts access to City personal identifiable information to those employees who will respond to City request. The City does not intentionally disclose any personal information about Contractor customers to any third parties or outside the City except as required by law or by the consent of the person providing the information.
- 2.2 The City only collects personally identifiable information that is required to provide service. User can decline to provide us with any personal information. However, if user should choose to withhold requested information, the City may not be able to provide user with the online services dependent upon the collection of that information.

3 ACCESS TO PERSONALLY IDENTIFIABLE INFORMATION

Access to personally identifiable information in public records at local levels of government in San José is controlled primarily by the California Public Records Act (Government Code Section 6250, et. seq.). Information that is generally available under the Public Records Act may be posted for electronic access through the City's Web Site. While the Public Records Act sets the general policies for access to City records, other sections of the California code as well as federal laws also deal with confidentiality issues.

4 EMAIL ADDRESSES

Email addresses obtained by the City will not be sold or given to other private companies for marketing purposes. The information collected is subject to the access and confidentiality provisions of the Public

Records Act, other applicable sections of the California code as well as Federal laws. Email or other information requests sent to the City may be maintained in order to respond to the request, forward that request to the appropriate City within the City, communicate updates to the City page that may be of interest to citizens, or to provide the City staff with valuable customer feedback to assist in improving the site. Individuals can cancel any communications regarding new service updates at any time.

5 USE OF “COOKIES”

- 5.1 Some City applications use “cookies”. A cookie is a small data file that certain web sites write to City hard drive when user visit them. A cookie file can contain information such as a user id that the site uses to track the pages user have visited. But the only personal information a cookie can contain is information supplied by user. A cookie is only a text file and cannot read data off user’s hard disk or read cookie files created by other sites. Cookies can track user traffic patterns, recognize users computer’s browser when user return, and could provide personalized content without requiring sign-in.
- 5.2 User can refuse cookies by turning them off in user browser. However, they may be required to use some of the web applications on the City’s Web Site.

6 SECURITY

The City of San José is committed to data security and the data quality of personally identifiable information that is either available from or collected by City’s systems and has taken reasonable precautions to protect such information from loss, misuse, or alteration.

7 CONTRACTUAL SERVICES FOR THE CITY’S SYSTEMS

To ensure that contractors who have access to or provide contractual services for the City are not allowed to re-sell or in any way share or convey to another party or use it for another purpose any information that they may have access to in the course of doing business for the City; all City contracts regarding such services should contain a requirement that the Contractor must comply with the City’s IT and Security Policies, to include PII and any other sensitive data.

8 ELECTRONIC SIGNATURES AND PAYMENTS

The City of San José is committed to data security and the data quality of personally identifiable information that is either available from or collected by Contractor web site and has taken reasonable precautions to protect such information from loss, misuse, or alteration. When a City application accepts credit cards or any other particularly sensitive information for any of its services, it encrypts all ordering information, such as the customer's name and credit card number, in order to protect its confidentiality.

9 DISCLAIMER

City systems should contain a disclaimer substantially containing the following information:

- 9.1 The City of San José is neither responsible nor liable for any delays, inaccuracies, errors, or omissions arising out of user’s use of City systems or with respect to the material contained, including without limitation, any material posted on the Site nor for any viruses or other contamination of user’s system. City systems and all materials contained on it are distributed and transmitted “as is” without warranties of any kind, either express or implied, including without limitations, warranties of title or implied warranties of merchantability or fitness for a particular purpose. The City of San José is not responsible for any special, indirect, incidental, or consequential damages that may arise from the use of, or the inability to use, the City systems and/or the materials contained on the City systems whether the materials contained on

the City systems are provided by the City of San José or a third party. The City of San José is neither responsible nor liable for any viruses or other contamination of user's system.

9.2 Access to Information

Unless otherwise prohibited by state or federal law, rule or regulation, user will be granted the ability to access and correct any personally identifiable information. The City will take reasonable steps to verify user's identity before granting such access. Each City service that collects personally identifiable information will allow or review and update of that information.

9.3 Non-City Systems

Non-City systems may be linked through City systems. Many Non-City systems may or may not be subject to the Public Records Act and may or may not be subject to other sections of the California code or federal law. Visitors to such sites are advised to check the privacy statements of such sites and to be cautious about providing personally identifiable information without a clear understanding of how the information will be used.

9.4 The City is not responsible for, and accepts no liability for, the availability of these outside resources. Linked systems are not under the control of, nor maintained by, the City, and the City is not responsible for the content of these systems, which can and do change frequently. In addition, inclusion of the linked systems does not constitute an endorsement or promotion by the City of any persons or organizations sponsoring the linked systems.