

**FUNDING AGREEMENT BETWEEN THE CITY OF SAN JOSE AND
EAST SIDE UNION HIGH SCHOOL DISTRICT RELATING TO
MAINTENANCE AND TECHNOLOGY REFRESH OF THE
COMMUNITY WIRELESS NETWORK IN THE DISTRICT**

This Agreement dated December 17, 2021 is entered into by and between the East Side Union High School District (“District” or “ESUHSD”), a political subdivision of the State of California, and the City of San José (“City”), a municipal corporation of the State of California. District and City are referred to herein individually as a “Party” and collectively as the “Parties.”

RECITALS

WHEREAS the Parties share the common goal of providing greater access to the internet for students and residents within the boundaries of the District in San José (“District Community Wireless Project” or “Project”); and

WHEREAS the District’s purpose in supporting the Project is to advance student academic achievement, provide opportunities for students to research career and university possibilities, and to foster student safety during out of school time by equipping and enhancing the District’s school facilities technological resources in connection with the construction, reconstruction, rehabilitation, and replacement of the District’s school facilities; and

WHEREAS, the City and the District have completed deployment of the Project within the James Lick, William C. Overfelt, and Yerba Buena High School attendance areas; and

WHEREAS the City will incur certain expenses pursuant to this Agreement relating to: (i) management of the installation, (ii) maintenance and support of the integrated wireless network, (iii) technical refresh, and (iv) Pacific Gas & Electric costs to power the Wi-Fi; and

WHEREAS, the District agrees to support this Project for the above-stated purposes by funding the cost of technology refreshes, Pacific Gas & Electric costs to power the Wi-Fi, costs for ongoing maintenance, support, and operation of the wireless network at mutually agreed upon City facilities including, but not limited to, light poles, traffic signals, towers, community centers, and other City-owned structures, in connection with the modernization and equipping of existing District school facilities;

NOW, THEREFORE, in consideration of the mutual agreements, covenants, and conditions contained herein, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, District and City agree as follows:

1 Project Coordination

- 1.1 City: The Chief Information Officer, or his or her designee, shall be the City officials responsible for the program and shall render overall supervision of the progress and

performance of this Agreement by City. All obligations agreed to be performed by City shall be under the overall direction of the Chief Information Officer.

- 1.2 District: The Chief Technology Officer or his or her designee shall be the District official responsible for the program and shall render overall supervision of the progress and performance of this Agreement by District. All obligations agreed to be performed by District shall be under the overall direction of the Chief Technology Officer.

2 **Term of the Agreement**

- 2.1 The term of this Agreement shall commence on January 1, 2022 through December 31, 2026, inclusive, unless sooner terminated in accordance with the terms of this Agreement.
- 2.2 Either Party may terminate this Agreement by providing thirty (30) days written notice to the other Party.
- 2.3 If this Agreement is terminated prior to its expiration, the City shall return any remaining balance of District funds and all uninstalled equipment purchased with District funds to the District within sixty (60) days of the effective date of termination of this Agreement.
- 2.4 Following termination of this Agreement, title to all equipment shall remain with City; provided that, in the event of termination not due to breach or default of District, then District shall have the right to remove and obtain title to all equipment installed in connection with this Agreement (such removal to be at District's sole cost and expense), and City shall cooperate with District in the removal of the equipment and shall execute such documents as are reasonably necessary to transfer title to such equipment to the District.

3 **Scope of Services**

- 3.1 The Parties have agreed to conduct technology refreshes of the equipment and continue to maintain and support a wireless network within the geographic boundaries of the District in San José to modernize and enhance District facilities and technological equipment and resources for the benefit of and access by District students, staff, and other District authorized users.
- 3.2 The Parties agree to the scope and performance of the technology refreshes and system maintenance and support services for the Project at the James Lick High School, William C. Overfelt High School, and Yerba Buena High School attendance areas as specified in the agreement between the City and the City's contractor, SmartWAVE Technologies, LLC ("SmartWAVE"), which is attached hereto as **Exhibit C**.
- 3.3 The anticipated cost to conduct technology refresh, provide ongoing network maintenance and technical support, and cover Pacific Gas & Electric (PG&E) costs to power the wireless community network for the three attendance areas through December 31, 2026 is attached hereto as **Exhibit B**. The Parties agree to negotiate in good faith on an amendment to this and related agreements if additional funding is required.

- 3.4 City shall perform all Project work hereunder in accordance with applicable public bidding laws and requirements under the Public Contract Code and/or Government Code.

4 Confidentiality of Data and Information

- 4.1 In connection with the work and services to be provided in this Agreement, City and its contractors and subcontractors shall not gather or maintain in its records any information obtained from social media or other internet use or searches of any District authorized users of the wireless access and services to be made available under this Agreement.
- 4.2 All pupil records accessed or transmitted by District authorized users, including District students and staff, using the wireless services to be provided hereunder shall continue to be the property of and under the control of District and shall not be gathered, stored, accessed, or maintained by City in any form or format.
- 4.3 In the event of a breach of City's network, City shall report such breach to District within one (1) business day.
- 4.4 City and its contractors and subcontractors shall not access or use any information in a pupil record for any purpose without the prior written consent of the District.

5 Funding

- 5.1 The District agrees to remit to the City, within thirty (30) days after this Agreement is fully executed an amount not to exceed **Two Million Two Hundred Eighty-One Thousand Nine Hundred Sixty-Five Dollars (\$2,281,965)** for the work and services to be provided hereunder.
- 5.2 The District funds will be used by City to pay for equipment, maintenance and support, applicable PG&E costs, and contractor services in connection with the serviceability, operability, optimization, and performance of the wireless community network.
- 5.3 The City and District are both subject to laws and policies which limit their ability to incur debt in future years. Nothing in this Agreement shall constitute an obligation of future legislative bodies of the City or District to appropriate funds for the purposes of this Agreement.
- 5.4 The Parties agree that the Funding described in this Section 5 will not serve as a precedent for any future commitment by either Party related to the development of other City or District projects.
- 5.5 City shall comply with all public and procurement bidding laws in connection with the contracting and performance of the work hereunder.
- 5.6 If City determines the funding amount set forth in this Section 5 is insufficient to pay the cost to the City to perform the Scope of Services, City staff shall have the right to cease work and direct City's contractor to stop work upon thirty (30) days prior written notice to District. In such event, City will notify District of the funding deficiency, and the Parties will confer on whether District will provide additional funding to address the funding deficiency. If District declines to provide additional

funding to address the funding deficiency, either Party may terminate this Agreement upon written notice to the other Party in accordance with the provisions of Section 2.

6 Payment to Subcontractor

City is responsible for reviewing and paying all invoices from its subcontractor performing the Scope of Work and Services, and for monitoring progress of the subcontractor's work, as well as resolving any billing disputes that the City has with its subcontractor for the services performed.

7 Proof of Payment

- 7.1 The City will provide District a copy of the payments City makes to its subcontractor based on its subcontractor's periodic invoice to the City.
- 7.2 The proof of payment from the City to the District will include: (i) a copy of its subcontractor's invoices to and as approved by the City showing the amount of subcontractor's invoice to City.
- 7.3 If District disputes the amount of any payment, District will seek resolution of such dispute through the dispute resolution processes set forth in Section 9 of this Agreement. In such event, City shall have the right to suspend work and to direct subcontractor to cease work until the dispute is resolved.

8 Records Retention; Audit; Network Verification

- 8.1 The City agrees to make available for examination and copying by the District and its authorized agents, auditors, officers, or employees, subject to limitations established by state law, any and all ledgers, books of accounts, invoices, vouchers, cancelled checks, and other records or documents of City and its contractors and subcontractors evidencing or relating to the expenditures and disbursements charged to District and the technology refreshes, maintenance and support, and operational costs of the integrated wireless network. City shall also furnish to the District and its authorized agents, officers, or employees such other evidence or information as the District may require about any such expenditure or disbursement charged by City and as reasonably needed to validate and verify the performance of the work and the functionality of the integrated wireless network in accordance with the Project plans and specifications.
- 8.2 The City shall maintain for a period of not less than four (4) years after the expiration or earlier termination of this Agreement full and adequate records to document the actual costs it incurs which are subject to funding by District pursuant to this Agreement. City shall provide such assistance as may reasonably be required during such inspection by District and/or its auditors or other authorized contractors.

9 Disputes

- 9.1 The Parties agree that they will work together in good faith to achieve the intent of this Agreement. If a dispute arises as to the proper interpretation of the respective obligations and responsibilities of the Parties as described herein, or as to any other aspect of this Agreement, the District and the City agree that they each will assign the appropriate individuals to meet and make good faith efforts to negotiate to arrive at a resolution of the dispute.

- 9.2 If, after employing this informal resolution process, either City or District may request an independent, mutually agreed upon mediator to facilitate further negotiation with the costs shared equally between each Party. However, nothing herein will prevent either City or District from exercising any rights it may have to enforce the terms of this Agreement at law or in equity.

10 Notices

All notices required to be given to a Party hereunder shall be deemed to have been delivered upon deposit in the United States mail, postage prepaid, addressed to either of the Parties at the following addresses or such other addresses as is provided by either Party in writing, and shall be deemed effective as of the third (3rd) business day after mailing:

City: City of San José
Information Technology Department
Attention: Rob Lloyd, Chief Information Officer
200 E. Santa Clara Street, 11th Floor
San José, CA 95113

City of San José
San José Public Library
Attention: Ann Grabowski, Chief of Staff
150 E. San Fernando Street
San José, CA 95112

District: East Side Union High School District
Attention: Chief Technology Officer
830 North Capital Avenue
San José, CA 95133

With a copy to: East Side Union High School District
Attention: Assoc. Superintendent of Business Services
830 North Capital Avenue
San José, CA 95133

11 Severability

If a court of competent jurisdiction holds any provision of this Agreement to be illegal, unenforceable, or invalid in whole or in part for any reason, the validity and enforceability of the remaining provisions, or portions of them, will not be affected, unless an essential purpose of this Agreement would be defeated by the loss of the illegal, unenforceable, or invalid provision.

12 Assignment

District agrees that City may use a subcontractor to be selected at the City's sole discretion to assist the City in performing the Scope of Work and Services as set forth in **Exhibit A**, provided such selection follows all public bidding laws. Neither Party may otherwise assign any of its rights or delegate any of its obligations under this Agreement to any individual or entity without

the prior written consent of the other Party, which consent may be given or withheld in each Party's sole discretion.

13 **Construction**

Every covenant, term, and provision of this Agreement shall be construed simply according to its fair meaning and not strictly for or against any Party. All pronouns and variations thereof shall be deemed to refer to the masculine, feminine, or neuter, singular or plural, as the context may require.

14 **Headings**

Section, paragraph, and other headings contained in this Agreement are for reference purposes only and shall not be used to describe, interpret, define, or limit the scope, extent, or intent of this Agreement or any provision hereof.

15 **Entire Agreement**

This Agreement constitutes the entire agreement between the Parties hereto with respect to the subject matter hereof and supersedes all prior and contemporaneous agreements, understandings, negotiations, and discussions, whether oral or written, of the Parties with respect thereto.

16 **No Waiver**

The failure of any Party to enforce at any time or for any period any one or more of the terms or conditions of this Agreement shall not be a waiver of such terms or conditions or of that Party's right thereafter to enforce each term and condition of this Agreement.

17 **Governing Law and Venue**

17.1 This Agreement and the respective rights and obligations of the Parties hereto shall be construed and interpreted in accordance with the laws of the State of California, without reference to its conflict of laws provisions.

17.2 If suit is brought by any Party to this Agreement, the Parties agree that venue will be exclusively vested in the state courts of the County of Santa Clara, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San José, California.

18 **Counterparts**

This Agreement may be executed in one or more counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument.

19 **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.

20 Non-Discrimination

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

WITNESS THE EXECUTION HEREOF on the day and year set forth beneath the respective names below.

City of San José

a municipal corporation of the State of California

× Sarah Zarate
Sarah Zarate (12/17/2021)
Email: sarah.zarate@sanjoseca.gov

SARAH ZARATE

Director of Office of Administration, Policy,
and Intergovernmental Relations

Date: _____

East Side Union High School District

a political subdivision of the State of California

× Glenn Vander Zee
vanderzee@esuhsd.org (12/16/2021)
Email: vanderzee@esuhsd.org

GLENN VANDER ZEE

Superintendent

Date: _____

APPROVED AS TO FORM:

× Rosa Tsongtaatarii
Rosa Tsongtaatarii (12/16/2021)
Email: rosa.tsongtaatarii@sanjoseca.gov

ROSA TSONGTAATARII

Senior Deputy City Attorney

APPROVED AS TO FORM:

× Rogelio M. Ruiz
rruiz@rehonroberts.com (12/9/2021)
Email: rruiz@rehonroberts.com

ROGELIO RUIZ

Rehon & Roberts, APC

Attorneys for the East Side Union High School District

EXHIBIT A SCOPE OF WORK AND SERVICES

In consideration of funding from East Side Union High School District (“District” or “ESUHSD”), City of San José (hereinafter “City”) shall maintain the Community Wi-Fi Deployments (the “Project”) in the three following attendance areas of ESUHSD: James Lick High School, William C. Overfelt High School, and Yerba Buena High School based on the terms specified in the agreement between the City and the City contractor, SmartWAVE Technologies LLC (“SmartWAVE”), attached hereto as **Exhibit C**.

- 1 City shall be responsible for the following:
 - 1.1 Project Management such as, but not limited to, overseeing the work of the City contractor;
 - 1.2 Project feasibility such as reviewing the scope, scheduling, project development, environmental review, permits, and fees;
 - 1.3 Planning and design such as engineering support services and field investigation;
 - 1.4 Truck rolls, equipment replacement, signal optimization, and inspection;
 - 1.5 Reviewing and validating updated project documentation such as heatmaps, optimized coverage areas, and topology diagrams; and
 - 1.6 Validating and maintaining asset inventory for installed equipment.
 - 1.7 Notifying the District of any material changes in the installation or design.
- 2 The Parties acknowledge that City is only providing connectivity to the Project through City contractor, and City and City’s contractors and subcontractors will not host, process, download, store, monitor, or access data received by District users. The City is informed that District will encrypt their student user access and authorization process to protect the identity of the students. The City agrees not to gather, download, store, access, or monitor, or allow any third party to download, store, access, gather, or monitor, any information of District users for the purpose of engaging in targeted advertising or for any other purpose.
- 3 District shall be responsible for the following:
 - 3.1 Providing the City with **Two Million Two Hundred Eighty-One Thousand Nine Hundred Sixty-Five Dollars (\$2,281,965)** to support Project cost within 30 days of the execution of this Agreement;
 - 3.2 Promptly arranging access to District facilities to support project goals such as installation and maintenance; and
 - 3.3 Participating in partnership with the City to help contain network costs and facilitate technology refreshes and ongoing maintenance, support, and operations.

EXHIBIT B PROJECT COSTS AND ALLOCATIONS

Following is estimated costs for technology refreshes and ongoing maintenance, support, and operations for the community wireless network at the James Lick, William C. Overfelt (Overfelt), and Yerba Buena attendance areas.

TECHNOLOGY REFRESH COST ESTIMATES

	James Lick	Overfelt	Yerba Buena
Technology Refresh Estimated Schedule	1/2022 – 6/2022	1/2023 – 6/2023	1/2024 – 6/2024
SmartWAVE Estimated Costs			
-Materials & Equipment (including tax)	\$343,781	\$298,458	\$298,877
-Professional Services	149,423	143,448	143,448
Subtotal	\$493,204	\$441,906	\$442,325
SmartWAVE Supplemental Services*		\$50,000	
TECHNOLOGY REFRESHES TOTAL NOT TO EXCEED		\$1,427,435	

*SmartWAVE Supplemental Services provision is for a maximum not to exceed of \$50,000 for all three (3) attendance areas combined to cover any unanticipated scope-related work such as voltage drop calculations and structural analysis drawings.

ONGOING MAINTENANCE, SUPPORT, AND PG&E COSTS

	Maintenance and Support		PG&E	
	Per Year	Total 5-Year Term	Per Year	Total 5-Year Term
James Lick Attendance Area	\$49,551	\$247,755	\$7,385	\$36,925
Overfelt Attendance Area	49,600	248,000	\$7,385	\$36,925
James Lick Attendance Area	49,600	248,000	\$7,385	\$36,925
TOTAL NOT TO EXCEED	\$148,751	\$743,755	\$22,155	\$110,775
MAINTENANCE, SUPPORT, AND PG&E COSTS NOT TO EXCEED FOR THE 5-YEAR TERM			\$854,530	

FUNDING SUMMARY

	Total
Technology Refreshes	\$1,427,435
Maintenance and Support (1/1/22-12/31/26)	743,755
PG&E Costs (1/1/22-12/31/26)	110,775
TOTAL NOT TO EXCEED 5-YEAR TERM	\$2,281,965*

*Excludes City Information Technology Department staff time that is provided to the District at no charge.

EXHIBIT C
AGREEMENT FOR EAST SIDE UNION HIGH SCHOOL DISTRICT COMMUNITY
WIFI DEPLOYMENT BETWEEN THE CITY OF SAN JOSE AND SMARTWAVE
TECHNOLOGIES, LLC