

Funding Agreement Between the City of San Jose and East Side Union High School District Relating to the Expansion of the Community Wireless Network in the District

This Agreement dated December 16, 2021, is entered into by and between the East Side Union High School District (“District”), a political subdivision of the State of California, and the City of San Jose (“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

- A. The Parties share the common goal of providing greater access to the internet for students and staff within the District and for non-students in San Jose (“District Community Wireless Project” or “Project”).
- B. The City and District entered into that certain agreement entitled “Funding Agreement Between the City of San Jose and East Side Union High School District Relating to Installation of a Community Wireless Network in the District” dated October 28, 2016 as amended on October 22, 2019 and June 30, 2020.
- C. As a result of the positive impact from the installation of the Community Wireless Network pursuant to the agreement listed above, the District and City desire to pursue expansion of the network to add high school sites, including Independence High School, Oak Grove High School, Andrew P. Hill High School, Mt. Pleasant High School, and Silver Creek High School. If additional schools are in need of community wireless network the Parties will negotiate in good faith an amendment to this Agreement or a new agreement for the same.
- D. The City will incur certain expenses pursuant to this Agreement relating to: (i) the design, installation, operations, monitoring and maintaining of equipment for the purpose of establishing wireless access points at various City facilities such as light poles, traffic signals, towers, community centers and other City owned structures to modernize, integrate and enhance existing District technological equipment and facilities and to support and enhance District user (e.g., students and staff) access to the internet; (ii) management of the installation; and (iii) maintenance of the integrated wireless network.
- D. The expansion project is currently in the design phase, however the District agrees to support this Project for the above-stated purposes by funding the cost of the project as it proceeds, including the design, installation of wireless access points and startup, utility costs, and ongoing operations and maintenance of integrated wireless network, including a technical refresh of the equipment 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, as set forth in greater detail in this agreement.

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

- A. City: The Director of Public Works, 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 Directors.
- B. 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.
- C. District may recommend locations for installation of Project equipment. However City retains the discretion to determine the final locations based on need and existing infrastructure.

2. Term of the Agreement

- A. The term of this Agreement shall commence on the date this Agreement is fully executed by the Parties (“Execution Date”) through January 31, 2026 or the fifth (5th) anniversary of the Execution Date, whichever is later, unless renewed or sooner terminated in accordance with the terms of this Agreement. The District may renew this Agreement for a term through January 31, 2028. The City and District may jointly agree to renew the term of the Agreement in four (4) separate one-year increments (each an “Option Period”) through January 31, 2032.
- B. City’s funding shall be on a fiscal year basis (July 1 to June 30) and is subject to annual appropriations by San José City Council. Accordingly, the parties agree that exercising any option to renew is contingent upon appropriation of funds by the City.
- C. District may terminate this Agreement by providing thirty (30) days written notice to the City. City may terminate this Agreement during any Option Period by providing thirty (30) days written notice to District; provided that in the event City provides notice of termination and such termination is based on City’s failure or

inability to appropriate or budget funds for the Project during any Option Period, then District shall have the option to notify City within sixty (60) days thereafter of District's election to pay such funds, in which case this Agreement may not be terminated due to District funding deficiency.

- D. In the event that City determines the funding amount set forth in 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 either 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. In the event that District declines to provide additional funding to address the funding deficiency, either Party may terminate this Agreement upon written notice to the other Party.
- E. 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.
- F. If either Party wishes to renew this Agreement for an Option Period, a request to renew this Agreement along with a Revised Scope of Work and Services (**Exhibit A**), if necessary, should be submitted to the other Party no less than sixty (60) days prior to the end of the term, or Option Period then in effect. A renewal must be set forth in a written amendment to this Agreement, signed by authorized representatives of each Party. Nothing herein commits or binds either Party to renew this Agreement which shall be at the sole discretion of each Party.
- G. 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

The Parties intend to design, install, operate and maintain an integrated wireless network within the geographic boundaries of the District in San Jose 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. The Parties agree to the scope of services as specified in the agreement between the City and the City contractor, SmartWave, Inifinity Communications & Consulting, and Studio 151 or similarly qualified contractor (substantially in the form of agreement attached hereto as **Exhibit B**) for design and installation of the wireless networks for up to five (5) District high school attendance areas. The Project attendance areas are: Independence High

School, Oak Grove High School, Andrew Hill High School, Mt. Pleasant High School and Silver Creek High School.

The anticipated design, construction bidding and build out schedule is attached as **Exhibit C**.

The Parties agree to negotiate in good faith on amendments to this and related agreements once the construction contract has been awarded for the construction of the integrated wireless network.

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

- A. 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.
- B. Any and all pupil records accessed or transmitted by District authorized users of the integrated wireless networks, 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.
- C. In the event of a breach of City's integrated wireless network, City shall report such breach to District within one (1) business day.
- D. 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

- A. The District agrees to remit to the City \$5,936,935 for the work and services to be provided hereunder. Once this agreement is fully executed, the District agrees to remit payment to the City, within thirty (30) days of receipt of an invoice, for the work and services as they are provided hereunder.
- B. The District funds will be used by City to pay for equipment and contractor services, including design, installation, operation and maintenance, a technical refresh, and Pacific Gas & Electric costs to power the Wi-Fi. In addition, District funds will be used to pay for City staff cost to provide technical assistance,

project management, procurement assistance, and contract management in connection with the performance of the work. The schedule of payment for City staff cost shall be in accordance with **Exhibit D** entitled "City Estimated Cost/ESUHSD Community Wi-Fi Expansion City's Resources Estimate."

- C. **Exhibit E** entitled "Estimated Project Cost" details how the funding from the District will be allocated.
- D. 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.
- E. The Parties agree that the Funding described in Section 5 will not serve as precedent for any future commitment by either Party related to the development of other City or District projects.
- F. City shall comply with all public and procurement bidding laws in connection with the contracting and performance of the work hereunder.

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

- A. 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.
- B. 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.
- C. In the event that 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

- A. 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 to the installation, refresh and maintenance 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 with regard to 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.

- B. The City shall maintain for a period of not less than three (3) 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 in the course of such inspection by District and/or its auditors or other authorized contractors.

9. Disputes

- A. The Parties agree that they will work together in good faith to achieve the intent of this Agreement. In the event that 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 in order to arrive at a resolution of the dispute.
- B. 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

Any and 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 address or such other address as is provided by either Party in writing, and shall be deemed effective as of the third (3d) business day after mailing:

City: City of San Jose
City Manager's Office, Civic Innovation
Attention: Broadband Manager, Abigail Shull
200 E. Santa Clara Street, 17th Floor
San Jose, CA 95113

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

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

With a copy to: East Side Union High School District
Attention: Assoc. Superintendent of Business Services
830 North Capital Avenue
San Jose, 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 is in compliance with 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 of time 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 and every term and condition of this Agreement.

17. Governing Law and Venue

- A. 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.
- B. In the event that 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 Jose, California.

18. Counterparts

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

19. 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.

IN WITNESS WHEREOF, District and City have executed this Agreement as of the date and year first above written.

CITY OF SAN JOSE, a municipal corporation


Sarah Zarate (12/16/2021)
Email: sarah.zarate@sanjoseca.gov

SARAH ZARATE
Director of Office of Administration,
Policy and Intergovernmental
Relations

APPROVED AS TO FORM:


Diana Yuan (12/16/2021)
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DIANA YUAN
Deputy City Attorney

EAST SIDE UNION HIGH SCHOOL DISTRICT,
a political subdivision of the State of California


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GLENN VANDER ZEE
Superintendent

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District

EXHIBIT A
Scope of Work and Services

In consideration of funding from East Side Union High School District (“ESUHSD”), City of San José (hereinafter “City”) shall undertake the design services to create construction bid documents in order expand the Community WiFi Deployments (the “Project”) in the five following attendance areas of ESUHSD: Independence High School, Oak Grove High School, Andrew P. Hill High School, Mr. Pleasant High School and Silver Creek High School upon the terms specified in the agreement between the City and the City contractor, SmartWave, Infinity Communications and Consulting, Inc., Studio 151, LLC. or similarly qualified contractor, substantially in the form of agreement attached hereto as **Exhibit B**.

City shall be responsible for the following:

- a. Project Management such as, but not limited to, procuring and overseeing the work of the City contractor for the design, installation, operation and maintenance, and technical refresh of the project.
- b. Project feasibility such as reviewing the scope, scheduling, project development, environmental review, permits and fees.
- c. Planning and design such as engineering support services and field investigation.
- d. Project installation such as construction management and inspection.
- e. Notify District of any material changes in the installation or design.

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.

District shall be responsible for the following:

- a. Render payment to the City in the amount specified in the City’s invoice no later than 30 days after receipt of the invoice.

- b. Promptly arrange access to District facilities to support project goals such as installation and maintenance.
- c. Participate in partnership building with the City to help contain network cost and facilitate deployment.

EXHIBIT B
CONTRACTOR FORM AGREEMENT

The scope of network design services shall be based on the agreement between the City and the City contractor, SmartWave, Infinity Communications & Consulting, and Studio 151, LLC or similarly qualified contractor, substantially in the form of agreement attached hereto.

EXHIBIT C

COMMUNITY WIFI PROJECT SCHEDULE

Attendance Area	Procurement	Preliminary Design (Task 1)	Design (Tasks 2-7)	Construction	Open for Public Use
Independence	Nov. 2020	Dec. 2020	Jan. 2021	Nov. 2021	Feb. 2022
Andrew Hill	Nov. 2020	Jan. 2021	Feb. 2021	Jan. 2022	Apr. 2022
Oak Grove	Nov. 2020	Feb. 2021	Jun. 2021	Mar. 2022	Jun. 2022
Silver Creek	Completed	11 to 12 months from issuance of Service Order			
Mt Pleasant	Completed	11 to 12 months from issuance of Service Order			

Network Maintenance is for five (5) years following open for public use

“Service Order” is a document that describes the services and deliverables the City’s consultant must provide, the time limit within which the consultant must complete the services and the compensation for the services. Service Orders are issued pursuant to the City’s agreement with the consultant it has retained to perform the specified work.

**EXHIBIT D
CITY STAFF COSTS**

EXHIBIT E
ESTIMATED TOTAL PROJECT COST ALLOCATION

COMMUNITY WIFI PROJECT COST: ALL ATTENDANCE AREAS									
Attendance Area	Total One-Time Installation Cost	Project Delivery Cost	Operations and Maintenance Ongoing (varies)	Equipment Refresh Costs & Permit costs	PGE fees	Fiber installation	Total funded by ESUHSD		
Independence	\$1,000,000	\$250,000	\$200,000*	\$450,000*	\$7,385*	*	\$ 657,385		
Oak Grove	\$1,000,000	\$250,000	\$200,000*	\$450,000*	\$7,385*	*	\$ 657,385		
Andrew Hill	\$1,000,000	\$250,000	\$200,000*	\$450,000*	\$7,385*	*	\$ 657,385		
Silver Creek	\$1,000,000*	\$250,000*	\$200,000*	\$450,000*	\$7,385*	*	\$1,907,385		
Mt Pleasant	\$1,000,000*	\$250,000*	\$200,000*	\$450,000*	\$7,385*	City \$150,000/ ESUHSD \$150,000*	\$2,057,385		
Total funded by ESUHSD (*)	\$2,000,000*	\$500,000*	\$1,000,000*	\$2,250,000*	\$36,925*	\$150,000*	\$5,936,925		
TOTAL	\$5,000,000	\$1,250,000	\$1,000,000	\$2,250,000	\$36,925*	\$300,000	\$9,836,925		

* Funded by ESUHSD