

**AGREEMENT FOR ADAPTIVE TRAFFIC CONTROL SYSTEM
BETWEEN
THE CITY OF SAN JOSE
AND
KIMLEY-HORN AND ASSOCIATES, INC.**

This Agreement is entered into as of the City’s execution date (“Effective Date”) between the City of San José, a municipal corporation (hereinafter “City”), and Kimley-Horn and Associates, Inc., a North Carolina corporation 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.”

RECITALS

WHEREAS, City has issued a Request for Proposal (“RFP”) 15-16-24 for the purchase of an Adaptive Traffic Control System (“System” or “Software”) and professional services to implement and support the System (“Services”); and

WHEREAS, City and Contractor executed an Agreement for the purchase and implementation of the System at seventeen (17) signalized intersections along the Saratoga Avenue corridor and at eighteen (18) signalized intersections along the Tully Road corridor on August 31, 2017; and

WHEREAS, City and Contractor executed an Agreement for the purchase and implementation of the System at four (4) signalized intersections along the Blossom Hill corridor, nine (9) signalized intersections along the Brokaw Road/Murphy Ave/Hostetter Rd corridor, four (4) signalized intersections along the King Rd corridor, eight (8) signalized intersections along the Story Rd corridor, seven (7) signalized intersections along Stevens Creek Blvd corridor, and eight (8) signalized intersections along Winchester Blvd on January 8, 2019; and

WHEREAS, VTA is providing funding to City to implement the System with detection analysis enhancements at twelve (12) signalized intersections along Coleman Avenue, eighteen (18) signalized intersections along Senter Road, nine (9) signalized intersections along Cottle Avenue, and fifteen (15) signalized intersections along White Road; and

WHEREAS, Contractor has a good understanding of City’s requirements through Contractor’s examination of the Request for Proposal documents, software demonstrations, and exchange of information leading up to this Agreement; and

WHEREAS, Contractor has the necessary expertise and skills to provide the System and perform related services; and

WHEREAS, based on Contractor’s understanding of the City’s requirements and the Contractor’s knowledge and experience with other municipal organizations, Contractor warrants that the System and related 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 the following:

- Exhibit A – Scope of Services
 - Appendix A1 – Solution Overview
 - Appendix A2 – Preliminary Project Implementation Schedule
 - Appendix A3 – Final System Acceptance Certificate
 - Appendix A4 – Price List
- Exhibit B – Compensation and Payment Schedule
- Exhibit C – Insurance Requirements
- Exhibit D – Change Order Form
- Exhibit E – Software License Agreement Between the City of San José and Kimley-Horn and Associates, Inc

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 Agreement (EXHIBIT E) shall control with respect to the terms of use of the Software delivered pursuant to this Agreement. 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 December 31, 2023 inclusive, subject to the provisions of Section 14 “Termination.”

2.2 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 5.

Notwithstanding this Section, the Parties agree that the preliminary project schedule set forth in Appendix A2 to Exhibit A 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 agrees to provide the Software and perform the Services as set forth in the Scope of Services, which is attached as Exhibit A hereto and incorporated as though fully set forth herein (the “Scope of Services”).

3.2 Contractor’s Software

The terms for the use of Contractor’s Software delivered pursuant to the Scope of Services, including subsequent software upgrades, updates, customizations or enhancements thereto, shall be as set forth in the Software License Agreement (EXHIBIT E), which is attached hereto and incorporated herein.

3.3 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.

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 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 4.3.1 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: Notices provided to the Office of Equality Assurance as required under this Section 4 shall be addressed to the 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 PERFORMANCE

Contractor shall perform the Services according to the preliminary schedule set out in the attached Appendix A2, entitled "Preliminary Project Implementation Schedule." Time is expressly made of the essence with respect to each and every term and provision of this Agreement. Contractor shall not be liable for any delay in the performance of this Agreement for the period that such delay is beyond the reasonable control of the Contractor, materially affects the performance of its obligations under the Agreement and could not reasonably have been foreseen or provided against. However, Contractor delay resulting from only general economic conditions or other general market effects will not be excused.

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 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 Replacement of Employees

During the course of performance of Services, City may request replacement of an employee or a proposed employee, provided that there is reasonable cause. In such event, Contractor shall, within five (5) working days of receipt of such request from City, provide a substitute employee of sufficient skill, knowledge, and training to perform the applicable Services. 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 City requests replacement of an employee for the above-referenced reasons after such thirty (30) day time period, or at any time for a reason other than the reasons indicated above. 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 that relate to (i) the deletion of Products or Services, (ii) adding additional 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 the above section. The Party requesting the change is hereinafter referred to as the "Requesting Party." 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, as necessary, meet 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 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 the payment terms for any price increase. Only City's Director of Finance and Contractor's Authorized Representative shall have authority to execute CO's 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

The total contract price in U.S. dollars shall not exceed **Three Hundred Twenty-five Thousand Two Hundred Fifty Dollars (\$325,250)** during the term of this Agreement ("Maximum Compensation"). The terms, rate, and schedule of payment are set forth in the attached

EXHIBIT **B**, entitled "Compensation and Payment Schedule."

10 NON-FUNDING

City's funding of this Agreement shall be on a fiscal year basis (July 1 to June 30) and is subject to annual appropriations. Contractor acknowledges that City, a municipal corporation, is precluded by the California State Constitution and other laws from entering into obligations that

financially bind future governing bodies, and that, therefore, nothing in this Agreement shall constitute an obligation of future legislative bodies of the City to appropriate funds for purposes of this Agreement. This Agreement will terminate immediately if funds necessary to continue the Agreement are not appropriated. Despite the foregoing, the City shall pay Contractor for any Services performed in accordance with this Agreement up to the date of termination.

11 TAXES AND CHARGES

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

12 FINAL SYSTEM ACCEPTANCE

Upon final completion of each component of the System, City and Contractor shall conduct an Acceptance Test. The criteria for the Acceptance Test shall be as set forth in Exhibit A - Scope of Services. Final System Acceptance will occur upon successful completion of the Acceptance Test. When System Acceptance occurs, the Parties will memorialize the event by promptly executing the Final System Acceptance Certificate (APPENDIX A3 to Exhibit A).

If the delivered System or Services do not meet the requirements of the acceptance test specifications, City will permit Contractor to repair the deficient System or Services so that the same meets the acceptance test specifications in all material respects, all at no additional expense to City. All warranties shall be effective during the term of this Agreement.

Payment for any part or parts of the System 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/deliverables and reject upon notification to Contractor any and all which do not conform to the specifications or other requirements of this Agreement. Deliverables which are rejected shall be promptly corrected or repaired by Contractor in accordance with Contractor's warranty obligations under this Agreement, such that the deliverables conform to the warranties, specifications, and the other requirements of this Agreement. If City receives deliverables with defects or nonconformities not reasonably apparent on inspection, then City reserves the right to require prompt correction or repair by Contractor in accordance with Contractor's warranty obligations under this Agreement following the discovery of such defect or nonconformity.

13 REPRESENTATIONS AND WARRANTIES

13.1 Contractor Responsibility

- 13.1.1 Contractor understands and accepts full responsibility for all requirements and deliverables defined in this Agreement. Contractor warrants it:
- 13.1.2 Has read and agrees with the specifications contained in Exhibit A - Scope of Services;
- 13.1.3 Fully understands the information provided by the City with respect to facilities, difficulties, and restrictions attending performance of the Services;
- 13.1.4 Acknowledges the obligation to complete due diligence required under Exhibit A, Scope of Services, to confirm and request any missing information before performing additional work; and
- 13.1.5 Contractor agrees to inform 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.

13.2 Warranty for Services

Contractor warrants to City that Contractor shall render all Services provided under this Agreement with reasonable care and skill. Additionally, Contractor shall warrant its Services for a period of thirty (30) days after Final System Acceptance. If City notifies Contractor within the warranty period of a breach of the foregoing warranty, Contractor shall re-perform such Services, at no cost to the City, in compliance with the foregoing warranty. If despite its reasonable efforts, Contractor is unable to provide the City with Services in compliance with the foregoing warranty, City may pursue its remedy at law to recover direct damages resulting from the breach of this warranty.

13.3 Warranty Against Infringement

13.3.1 Contractor agrees to defend and indemnify City of all direct losses, costs and damages resulting from a determination that the System as supplied to City infringes any Canadian or United States patent rights, copyrights or trademarks provided that: City promptly notifies Contractor in writing upon City becoming aware of the existence of any such suit, action, proceeding or threat; allows Contractor sole control of the defense and/or settlement thereof; and 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 its express consent. In the event that City is enjoined from use of the System due to a proceeding based upon the infringement of patent, copyright or trademark in the United States or Canada, Contractor shall, at its option, either:

13.3.1.1 Modify the System, at Contractor's expense, so it becomes non-infringing; or

13.3.1.2 Replace the infringing System with equal non-infringing System, at Contractor's expense; or

13.3.1.3 Procure, at Contractor's expense, the necessary licenses for the City to continue using the System; or

13.3.1.4 Remove the System and refund the purchase price and transportation costs thereof, less a reasonable amount for depreciation.

13.3.2 Contractor shall have no liability in respect of any claim based upon:

13.3.2.1 Use, operation or combination of the System with software, hardware, data, or other material not supplied by Contractor if such infringement would have been avoided but for such use, operation or combination; or

13.3.2.2 Use of the System other than in accordance with Contractor's specifications if such infringement would have been avoided but for

use of the System not in accordance with Contractor's specifications;
or

- 13.3.2.3 System that has been modified by any party other than Contractor if such infringement would have been avoided but for such modification.

13.4 Software Warranty

13.4.1 Unless otherwise stated in the Software License Agreement, Contractor warrants the Software for one (1) year from the date of Final System Acceptance in accordance with the terms of the Software License Agreement (EXHIBIT E) and the provisions of this Section 13 applicable to the Contractor Software.

13.4.2 Contractor warrants that the Software will be delivered to the City malware free and does not contain any timers, counters, or preprogrammed devices that will cause the Software to become erased, inoperable, or incapable of processing in the manner as documented in the contract documents specified. Contractor agrees to maintain the Software to operate on all compatible upgrades of the hardware product line and operations system used by City and specified in the Software License Agreement.

13.4.3 The Software shall during the Warranty Period function properly under ordinary use and operate in conformance with its specifications and documentation. During the Warranty Period, Contractor will provide warranty service to City at no additional cost and will include all services necessary to enable Contractor to comply with the foregoing warranty.

13.5 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 System without disturbance.

13.6 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.

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, the City will notify the Contractor in writing of such purported breach. Contractor shall be given a thirty (30) day cure period in which to correct this breach. If after this period Contractor is

unable to provide an acceptable remedy, City, in addition to other remedies provided by law, may terminate this Agreement immediately upon written notification.

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. In addition, in the event of termination, City will relinquish all software licenses owned by Contractor and discontinue use of Contractor’s network.

15 INDEMNIFICATION

Contractor shall defend, indemnify, and hold harmless City and VTA, its officers, employees, and agents against any claim, loss, or liability arising out of or resulting in any way from work performed under this Agreement due to willful misconduct or negligent acts (active or passive) or omissions by Contractor's officers, employees or agents. 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 policies, endorsements, certificates and/or binders 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 so approved in writing by the Risk Manager. Contractor agrees to provide City with a copy of said policies, certificates and/or endorsements before work commences under this Agreement.

Contractor shall name VTA as an additional insured on its insurance policy.

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 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 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.

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, or 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 and 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 warrants that throughout all operational and maintenance activities the accuracy of the Data will be preserved.

24.4 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.

24.5 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.

24.6 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.

25 CONTRACTOR'S BOOKS AND RECORDS

25.1 Maintenance during Implementation

25.1.1 Contractor shall maintain employee time sheets documenting those hourly

labor costs incurred in implementation, including both administrative and implementation costs, or to establish an alternative method to document staff costs.

- 25.1.2 Contractor shall maintain all financial and implementation records necessary to demonstrate compliance with the Santa Clara County's Transportation Fund for Clean Air Program. Such records must include documentation that demonstrates significant progress made for those project(s) seeking extensions to the completion date.

25.2 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 five (5) years, or for any longer period required by law, from the date of final payment to Contractor pursuant to this Agreement.

25.3 Maintenance after Term

Contractor shall maintain all documents, which demonstrate performance under this Agreement for a minimum period of five (5) years, or for any longer period required by law, from the date of termination or completion of this Agreement.

25.4 Inspection

Any documents required to be maintained pursuant to this Agreement must be made available for inspection or audit at no cost to the City and 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.

VTA and Air District may participate with the City in any inspection or audit of Contractor's records.

25.5 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

- 26.1 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 which consent will not

unreasonably be withheld. Any attempt by Contractor to assign this Agreement, in violation of this Section, will be voidable at City's sole option.

27 SUBCONTRACTORS

27.1 Authorized Subcontractors

Notwithstanding Section 26 (Assignability) above, 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.

30 NOTICES

All notices and other communications required or permitted to be given under this Agreement must be in writing and must be personally served, or mailed, postage prepaid via U. S. mail, or sent via courier service, addressed to the respective Parties as follows:

To City:

City of San José
Attention: Director of Finance
200 E. Santa Clara St., 13th Floor
San José, CA 95113

To Contractor: Kimley-Horn and Associates, Inc.
Attention: Douglas Gettman, Ph.D.
7740 N. 16th St., Suite 300
Phoenix, AZ 85020

Notice will be effective on the date personally delivered or if sent by courier service, on the date of receipt. If mailed, notice will be effective three (3) days after deposit in the mail. The Parties may change their respective addresses in accordance with the provisions of this Section.

31 MISCELLANEOUS

31.1 Survival of Provisions

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

31.2 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.

31.3 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.

31.4 Authority of City Manager

Where this Agreement requires or permits City to act and no officer of the City is specified, City's Manager or the designated representative of City's Manager has the authority to act on City's behalf.

31.5 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.

31.6 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.

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

City of San José

a municipal corporation



Jennifer Cheng

Deputy Director, Finance

Date: Apr 14, 2022

Kimley-Horn and Associates, Inc.

a North Carolina corporation

authorized to conduct business in California



Michael J. Hermann

Senior Vice President

Date: Apr 13, 2022

APPROVED AS TO FORM:



Diana Yuan

Deputy City Attorney



Brian Smalkoski

Mountain Region Marketing Manager

Date: Apr 13, 2022

EXHIBIT A SCOPE OF SERVICES

This Scope of Services describes the deliverables to be furnished to the City and the tasks to be performed by Contractor to implement the Adaptive Traffic Control System and provide related services for the term of this Agreement.

1 GENERAL

- 1.1 Contractor shall deploy an Adaptive Traffic Control System with detection analysis enhancements (“ATCS” or “System”) at twelve (12) signalized intersections along Coleman Avenue, eighteen (18) signalized intersections along Senter Road, nine (9) signalized intersections along Cottle Avenue, and fifteen (15) signalized intersections along White Road (collectively, the “Project”).
- 1.2 Contractor shall provide the following for complete deployment of the System:
 - 1.2.1 Kadence Adaptive Traffic Control Software
 - 1.2.2 Kadence Detection Analysis Enhancements
 - 1.2.3 KITS Traffic Management Software
 - 1.2.4 All professional services for implementation
 - 1.2.5 Additional services as required
- 1.3 This Exhibit A contains the following Appendices:
 - 1.3.1 Appendix A1 – Solution Overview
 - 1.3.2 Appendix A2 – Preliminary Project Implementation Schedule
 - 1.3.3 Appendix A3 – Final System Acceptance Certificate
 - 1.3.4 Appendix A4 – Price List

Appendices to this Exhibit A describe general functionality, and in case of a conflict between the Exhibit A and its appendices, the terms of the Exhibit shall prevail.
- 1.4 To the extent not inconsistent with this Agreement between the City and Contractor including this Scope of Services, the City’s RFP 15-16-24 and Contractor’s proposal response dated September 6, 2016 are hereby incorporated by reference herein, and shall supplement this scope of services and be subject to the terms and conditions of the Agreement.

2 SYSTEM REQUIREMENTS

Contractor shall provide a System that meets the technical and functional requirements described herein and in Appendix A-1, Solution Overview.

3 IMPLEMENTATION TASKS

This section defines the principal activities and responsibilities of Contractor and the City for the deployment of the System.

3.1 Contractor Responsibilities

- 3.1.1 Contractor shall assign a Project Manager (“PM”) to lead the tasks for the implementation. The PM shall be the primary person communicating with the City and keeping City fully apprised on the status and progress of the Project. The PM shall also be responsible for adherence to project scheduling, Kadence ATCS configuration, fine-tuning, support, and general project coordination.
- 3.1.2 Contractor agrees to work closely with City staff in the performance of services and shall be available to City’s staff, stakeholders, and other staff at all reasonable times.

3.2 City Responsibilities

- 3.2.1 City shall provide oversight for the entire project, but Contractor must provide overall project management for all tasks in the scope of this contract.
- 3.2.2 City shall assign a project manager who shall work closely with Contractor to facilitate the successful completion of the implementation process and who shall be responsible for supervising the staff of the City and their co-operation with and participation in such process. The City’s Project Manager shall maintain project communications with Contractor’s Project Manager.
- 3.2.3 City shall provide Contractor information required to configure the System.
- 3.2.4 The City acknowledges that the success and timeliness of the implementation process shall require the active participation and collaboration of the City and its staff, and agrees to act reasonably and cooperate fully with Contractor to achieve the completion of the Project.
- 3.2.5 The City shall be responsible for establishing and maintaining field communication to all project locations.
- 3.2.6 The City will furnish the labor for the installation of all hardware related to the System. If the City has not properly installed the required hardware, Contractor shall have the right to suspend the Project and the related scheduled time frames until these issues have been dealt with by City sufficiently and to Contractor's reasonable satisfaction.

3.3 Project Schedule

- 3.3.1 The System implementation schedule is detailed in Appendix A2 – Preliminary Project Implementation Schedule (“Project Schedule”), which lists the tasks, corresponding project deliverables (“Deliverables”), and dates and durations assigned to each task.
- 3.3.2 It is the City’s expectation that the Contractor shall meet all the project deliverables and dates in accordance to the Project Schedule. Any changes to the Project Schedule which will impact the completion date of each deliverable must be mutually agreed to and incorporated into a revised Project Schedule.
- 3.3.3 Any additional time and resources that may be required to meet the project scope as defined in this exhibit shall not constitute justification for any future change orders. Any changes to scope as discovered after the Scope of Services

may result in a future change order.

3.3.4 Contractor shall implement the System according to Task 1 through Task 3 as detailed in the following sections.

3.3.5 Hardware and Software Responsibilities

The purpose of the table below is to provide a general summary of the hardware and software requirements and respective responsibilities for their provision, installation, and implementation.

Item	Description	Responsibility
KITS	Traffic Management Software	Contractor shall provide and install according to the provisions of this Scope of Services. Software installation shall include the server and all required client and/or browser components.
Kadence	Adaptive Traffic Control Software	Contractor shall provide and install according to the provisions of this Scope of Services. Contractor shall perform all necessary configuration and tests required for the Kadence module.

3.4 Task 1: Configure and Tune System

3.4.1 Contractor will assist City with configuration of Kadence parameters as follows:

3.4.1.1 Upload configuration data from each field controller, including:

- Time-of-Day (TOD) schedule;
- Detector to phase assignments;
- Coordination patterns (cycle, splits, offset, sequence, etc.); and
- Phase timings (min green, yellow, red, walk, etc.).

3.4.1.2 Determine which detectors are used for which type of algorithms and where they are located (stop bar, advance), and which links.

3.4.1.3 Determine which algorithms to use on each location and setup their configuration parameters.

3.4.1.4 Put the system in “monitoring” mode to verify configuration is correct.

3.4.1.5 Enable system in adaptive mode.

3.4.1.6 Tune as desired by City based on field operation feedback.

3.4.2 Contractor will assist with initial tuning remotely and will make at least one (1) site visit.

3.5 Task 2: Kadence Licenses

Contractor will provide fifty-four (54) licenses to use Kadence on signals in the City of San

José.

3.6 Task 3: Kadence Maintenance Services

Existing coverage will be expanded to cover the additional fifty-four (54) intersection locations starting October 1, 2022 for two (2) years.

3.7 Task 4: Kadence System Detector Analysis Enhancements

3.7.1 Contractor will enhance the Kadence System Detector logic to no longer require system detectors to be configured and for Kadence to calculate all system detector data automatically from the same raw controller data used for other Kadence calculations.

3.7.2 Contractor will enhance the Kadence Detector Failure logic to detect both ‘Stuck On’ and ‘Stuck Off’ conditions based on user defined system thresholds from the raw controller data used for other Kadence calculations. When these failures occur, they will be identified in the System Detector Log and on the Kadence Section Dashboard, the latter of which will indicate both the detector and the affected phase.

3.7.3 Contractor will enhance the Kadence Alert Viewer and User Email Alerts to support the new detector ‘Stuck On’ and ‘Stuck Off’ logic defined above.

3.8 Task 5: Final System Acceptance

3.8.1 Successful completion of Tasks 1, 2, 3, and 4 for all project locations will constitute final system acceptance.

3.8.2 By executing the Final System Acceptance Certificate for system acceptance, the City agrees to pay Contractor any remaining and approved outstanding invoices. City will assume ownership and responsibility of the System. The System will be considered accepted upon the Final System Acceptance of all corridors.

4 ADDITIONAL SERVICES

Upon request of the City, Contractor shall perform certain additional services in connection with and directly related to the Project and reimbursed at the rates set forth in Exhibit B, Compensation and Payment Schedule, or lump sum. Additional services require an executed Change Order as defined in Section 8 of the Agreement.

APPENDIX A-1 SOLUTION OVERVIEW

1 SOLUTION OVERVIEW

- 1.1 Kadence is a commercial-off-the-shelf (COTS), open-architecture system which supports D4 field devices using standards-based communications. Kadence meets the following City's objectives:
 - 1.1.1 Maximize throughput on a coordinated route
 - 1.1.2 Provide smooth flow on a coordinated route
 - 1.1.3 Provide access equity for all phases at an intersection
 - 1.1.4 Manage the length of queues
 - 1.1.5 Optimize operation to minimize phase failures
- 1.2 As part of the project, the City will receive the core features of KITS for traffic signal management in addition to Kadence. No additional license fees will be required to bring the twelve (12) signals along Coleman Avenue, eighteen (18) signals along Senter Road, nine (9) signals along Cottle Avenue, eight (8) signals on Story Rd, and fifteen (15) signals along White Road in the adaptive project under KITS.
- 1.3 Kadence software will also be enhanced with robust detector analysis and failure recognition features.

SYSTEM REQUIREMENTS

- 1.4 There are no field hardware components to install or maintain for the operation of Kadence as long as there is working detection and the signal controllers are running the D4 controller firmware or any other firmware supported by Kadence. If a Kadence algorithm fails, controllers will return to their normal TOD operation. In addition, Kadence can be turned ON or OFF from central and scheduled to run on a TOD, day-of-week schedule. When Kadence is OFF, the controller will return to their regular non-adaptive operation as programmed in the controller (time based coordination (TBC) coordination or free, as configured).
- 1.5 Kadence is dependent on a central server that is connected on an IP communications network to each field controller.

2 ALGORITHMS

- 2.1 Kadence is comprised of five principal algorithms for tuning (1) signal splits, (2) offsets, (3) cycle time, (4) phase sequence, and (5) time-of-day (TOD schedule). Second-by-second phase timing and detector data is polled from the controller, and new signal timing parameters are downloaded to field controllers every 3-4 cycles (minimum number of cycles is configurable by the user). The field controller then begins operating in an actuated-coordinated mode with the new settings.
- 2.2 All controller features operate normally including pedestrians, transit priority, and preemption. Kadence does not send hold or force-off commands to controllers, or

suppress phase calls, so there is no risk of a controller getting stuck in a certain phase. Kadence can run alongside an existing central system on an IP network using NTCIP or AB3418 protocols, depending on what is supported by the field device.

- 2.3 Kadence detects the presence of queues by measuring the average occupancy on a queue detector. When the level of occupancy is consistently high (a user-configurable threshold of occupancy) for several minutes (a user-configurable threshold of time), IF...THEN logic conditions can be configured to put Kadence into a variety of congestion management modes by selecting a new response coordination pattern with associated configuration parameters for Kadence to begin metering, increase cycle time, or change the coordination flow pattern.
- 2.4 All pedestrian functions are handled by the local controller. Kadence can be configured to allow split tuning to make the split lower than the pedestrian clearance times on a phase-by-phase basis, which results in a transition event if a pedestrian push button is activated, or can be configured to only allow splits that are larger than the pedestrian clearance time. Advance walk, delay walk, and all other pedestrian settings are handled by the field controller.
- 2.5 Kadence has a variety of configurable parameters to tailor the operation to the expectations of the City. Certain adjustments can be disallowed and some phases can be excluded from optimization by pattern. Configurable parameters include:
 - 2.5.1 Exclude any phase from split tuning by pattern
 - 2.5.2 Exclude or allow any lead-lag sequence by pattern
 - 2.5.3 Exclude or allow cycle tuning by pattern
 - 2.5.4 Exclude or allow offset tuning by pattern
 - 2.5.5 Configure maximum deviation of splits from pattern values
 - 2.5.6 Configure maximum deviation of offsets from pattern values
 - 2.5.7 Configure minimum and maximum cycle time
 - 2.5.8 Set phase minimum and maximum bounds by pattern, by phase
 - 2.5.9 Exclude or allow cycle selection
 - 2.5.10 Select any phases for biasing, by pattern
 - 2.5.11 Configure operation by TOD and Pattern

3 SECURITY

- 3.1 Kadence leverages existing City's field communications network, including IP protocols, port numbers, and firewall rules currently in place.
- 3.2 Kadence will be located in the City's secured DMZ, requiring defined and centralized access control currently provided and monitored by the City's Information Technology Department. System will run in a Windows Server environment. Access to Kadence will be managed by Windows Authentication.
- 3.3 City will provide Contractor remote access via the City's secure Virtual Private

Network (VPN), where activity will be logged for future audits if required.

- 3.4 Ancillary field components, which the Contractor is not responsible for, such as the traffic signal controllers and switches, are housed in road side cabinets physically secured by locks and only accessible by authorized City personnel and vendors.

**APPENDIX A-2
PRELIMINARY PROJECT IMPLEMENTATION SCHEDULE**

Implementation of this project will proceed in accordance with this Preliminary Project Implementation Schedule set forth below, except as may be modified into a Final Project Implementation Schedule that is 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 8:00 AM to 5:00 PM), with the exception of City holidays. However, the Contractor may work on extended hours and weekends with prior authorization from the City at no additional cost to the City.

Task	Deliverable	Estimated Start Date	Estimated End Date
Task 1 (Configure and Tune System)	Tuning complete	April 1, 2022	October 1, 2022
Task 2 (Issuing Licenses)	Issuing 54 licenses	May 1, 2022	May 1, 2022
Task 3 (Maintenance Services)	Maintenance coverage for two (2) years	October 1, 2022	October 1, 2022
Task 4 (Detector Analysis Enhancements)	New Kadence version with enhancements.	April 1, 2022	October 1, 2022
Task 5 (Final System Acceptance)	Completion of Tasks 1-4 for all project locations	N/A	October 1, 2022

**APPENDIX A3
FINAL SYSTEM ACCEPTANCE CERTIFICATE**

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

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

Project Name: **Adaptive Traffic Control System twelve (12) signalized intersections along Coleman Avenue, eighteen (18) signalized intersections along Senter Road, nine (9) signalized intersections along Cottle Avenue, and fifteen (15) signalized intersections along White Road.**

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

Contractor and the City acknowledge that:

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

**City of San José (“City”)
 (“Customer”)**

**Kimley-Horn and Associates, Inc.
 (“Contractor”)**

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

APPENDIX A4 PRICE LIST

1 FIRM FIXED PROJECT

Pricing shall be firm fixed. The prices in the tables below include all costs, including but not limited to, labor, materials, travel, overhead, profit, insurance, applicable sales tax, etc.

Table A4-1: Configuration and System Tuning

Configuration and System Tuning Cost	U/M	Unit Price	Qty	Total
1. Coleman Avenue Corridor	per intersection	\$2,000	12	\$24,000
2. Senter Road Corridor	per intersection	2,000	18	36,000
3. Cottle Avenue Corridor	per intersection	2,000	9	18,000
4. White Road Corridor	per intersection	2,000	15	30,000
SUBTOTAL				\$108,000

Table A4-2: Software License

Software License Cost	U/M	Unit Price	Qty	Total
1. Initial 25 Kadence Licenses	per license	\$2,750	25	\$68,750
2. Subsequent Kadence Licenses	per license	1,500	29	43,500
SUBTOTAL				\$112,250

Table A4-3: Kadence Maintenance Services

Kadence Maintenance Services	U/M	Unit Price	Qty	Total
1. Two (2) Year Maintenance Services	lump sum (54 locations)	\$30,000	1	\$30,000
SUBTOTAL				\$30,000

Table A4-4: Kadence Detector Analysis Enhancements

Kadence Detector Analysis Enhancements	U/M	Unit Price	Qty	Total
1. Kadence Detector Enhancements	N/A	\$75,000	1	\$75,000
SUBTOTAL				\$75,000

TOTAL IMPLEMENTATION MAXIMUM COMPENSATION				\$325,250
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EXHIBIT B COMPENSATION AND PAYMENT SCHEDULE

1 MAXIMUM COMPENSATION

The maximum amount payable for all products and services provided under this Agreement shall not exceed **Three Hundred Twenty-Five Thousand Two Hundred Fifty Dollars (\$325,250)**. Any additional services or products 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.

2 PAYMENT AND PERFORMANCE SCHEDULE

- 2.1 Work shall commence immediately upon execution of the Agreement. All timeline dates are understood to be close of business, 5:00 p.m. Pacific Time. If timeline dates fall on a weekend or City holiday, the date is understood to be the next business day.
- 2.2 Progress payments shall be made to Contractor by City based on net thirty (30) days payment terms, following acceptance of designated deliverables as shown in Table B-1. All payments are based upon City's acceptance of Contractor's performance as evidenced by successful completion of the deliverables. City shall have no obligation to pay unless Contractor has successfully completed and City has approved the deliverable for which payment is due.
- 2.3 Payment for any part or parts of the System 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 System when delivered and reject upon notification to Contractor any and all the System, which does not conform to the specifications or other requirements of this Agreement. Components of the System, which are rejected shall be promptly corrected or repaired by Contractor. If City receives components of the System with defects or nonconformities not reasonably apparent on inspection, then City reserves the right to require prompt correction or repair by Contractor in accordance with Contractor's warranty obligations.

3 INVOICING AND PAYMENT PROCEDURE

- 3.1 City will make payments to Contractor within thirty (30) days after the date of approval of each invoice.
- 3.2 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.
- 3.3 The City agrees to compensate Contractor for the Services performed and the Software provided in accordance with the terms and conditions of this Agreement. Contractor shall invoice City in accordance with the following payment schedule, which may be requested by City at any time to comply with its quarterly funding requirements.

Table B-1: Payment Schedule

Milestone	Deliverable	Estimated Completion Date	Payment
Task 1 (Configure and Tune System)	Tuning complete	October 1, 2022	\$108,000
Task 2 (Kadence Licenses)	Issue 54 licenses	May 1, 2022	112,250
Task 3 (Maintenance Services)	Maintenance coverage for two (2) years	Oct 1, 2022	30,000
Task 4 (Detector Analysis Enhancements)	New Kadence version with enhancements	Oct 1, 2022	75,000
Task 5 (Final Solution Acceptance)	Final Solution Acceptance Certificate	Oct 1, 2022	N/A
Total Maximum Compensation			\$325,250

4 ADDITIONAL SERVICES

Additional services shall be separately negotiated to paid on a lump sum or time and material basis. Any lump sum quotes shall be consistent with the service rates set forth below. No additional services will be performed unless both Parties execute a Change Order outlining the services requested and the compensation agreed for such services.

Additional Services	Unit of Measurement	Rate
Senior Professional I	per hour	\$285
Senior Professional II	per hour	\$260
Professional	per hour	\$190
Senior Technical Support	per hour	\$180
Analyst	per hour	\$150

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 the Contractor, its agents, representatives, employees or subcontractors or suppliers. The cost of such insurance shall be included in the Contractor’s bid.

1 Minimum Scope and Limit of Insurance

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

Type of Insurance	Minimum Limit
<p>1. Commercial General Liability</p> <p>The coverage provided by Insurance Services Office “occurrence” form CG 0001, including coverages for contractual liability, personal injury, broadform property damage, independent contractors, products and completed operations.</p>	<p>\$2,000,000 per occurrence for bodily injury, personal injury and property damage or \$2,000,000 annual aggregate.</p>
<p>2. Automobile Liability</p> <p>The coverage provided by Insurance Services Office form number CA 0001. Coverage shall be included for all owned, non-owned and hired automobiles.</p>	<p>\$1,000,000 combined single limit per accident for bodily injury and property damage.</p>
<p>3. Workers’ Compensation and Employer Liability</p> <p>As required by the Labor Code of the State of California.</p>	<p>\$1,000,000 combined single limit per accident for bodily injury and property damage.</p>
<p>4. Professional Liability/Errors and Omissions</p> <p>Including coverages for negligent acts, errors or omissions arising from professional services provided under this contract, with any deductible not to exceed \$25,000 each claim</p>	<p>Not less than \$1,000,000 each claim and annual aggregate</p>

2 Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to, and approved by, the City’s Risk Manager. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officials, employees, agents and contractors; or the 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.

3 Other Insurance Provisions

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

3.1 General Liability and Automobile Liability Coverages

3.1.1 The City and VTA, its officials, employees, and agents are to be covered as additional insureds as respects: liability arising out of activities performed by, or on behalf of, the Contractor; products and completed operations of the Contractor; premises owned, leased or used by the Contractor; or automobiles owned, leased, hired or borrowed by the Contractor. The coverage shall contain no special limitations on the scope of protection afforded to the City and VTA, its officials, employees, and agents.

3.1.2 The Contractor's insurance coverage shall be primary insurance as respects the City, its officials, employees, and agents. Any insurance or self-insurance maintained by the City, its officials, employees, and agents shall be excess of the contractor's insurance and shall not contribute with it.

3.1.3 Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officials, employees, or agents.

3.1.4 Coverage shall state that the 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.

3.1.5 Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, and agents.

3.2 Workers' Compensation and Employers Liability

Coverage shall be endorsed to state carrier waives its rights of subrogation against the City, its officials, and agents.

3.3 All Coverages

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

4 Acceptability of Insurance

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

5 Verification of Coverage

5.1 Contractor shall furnish the City with certificates of insurance and with original endorsements affecting coverage required by this clause. 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.

5.2 Copies of all the required ENDORSEMENTS shall be attached to the CERTIFICATE OF INSURANCE which shall be provided by the Contractor's insurance company as

evidence of the stipulated coverages.

- 5.3 Proof of insurance shall be either emailed in pdf format to: Riskmgmt@sanjoseca.gov, or mailed to the following postal address (or any subsequent email or postal address as may be directed in writing by the Risk Manager):

City of San José – Finance Department
Risk & Insurance
200 East Santa Clara St., 14th Floor
San José, CA 95113-1905

6 Subcontractors

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

EXHIBIT D CHANGE ORDER FORM

CHANGE ORDER #

Pursuant to Section of the Agreement for the System between and the City of San José, the Agreement is hereby amended as follows:

(The following language is provided as an example of how to complete this form.)

1. Contractor shall provide the following additional services at the costs indicated below:

TOTAL	

2. The following services, products or deliverables are hereby deleted and the associated costs in amounts set forth below are also deleted.

TOTAL	

3. Exhibit is hereby amended to read as set forth in the Revised Exhibit which is attached hereto.

4. All of the terms and conditions of the Agreement not modified by Change Order shall remain in full force and effect.

	Total Cost of Change	
	Total Credit of Change	
	Previous Amendments and/or Change Orders	
	Original Contract	

<p>ACCEPTANCE</p> <p>Contractor hereby agrees to accept the amount set forth herein as payment in full of the work described and further agrees that Contractor is entitled to no additional time or compensation for such work other than as set forth herein.</p> <p>Contractor</p> <p>_____</p> <p style="text-align: right;">Date</p>	<p>APPROVED AS TO FORM</p> <p>_____</p> <p>Name Title</p> <p>City of San José</p> <p>_____</p> <p>Name Title</p> <p style="text-align: right;">Date</p>
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EXHIBIT E
SOFTWARE LICENSE AGREEMENT BETWEEN THE CITY OF SAN JOSE AND
KIMLEY-HORN AND ASSOCIATES, INC.

This Software License Agreement is entered into as of the City's execution date ("Effective Date") between the City of San José, a municipal corporation (hereinafter "City"), and Kimley-Horn and Associates, Inc., a North Carolina corporation 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."

This license applies to all software components, developed by Contractor, which comprise the Kadence/KITS software ("Software"). Software shall include any documentation, upgrades, updates, customizations or enhancements thereto.

- 1. Use** – The Software may be installed and used by the City and its employees for an unlimited amount of time at locations up to the total number of location licenses currently paid for by City. This permanent license will cover all Kadence functionality installed including the following modules: Real-time traffic adaptive control, Congestion manager, Time of day tuner, Scheduler, Alert Manager, and Time Synchronization. The City will not be required to pay additional license fees for future upgrades to these Kadence modules while under a current, paid-up maintenance agreement. Principal elements of KITS are provided as they support Kadence. Additional KITS modules can be licensed separately for additional fee upon request (e.g. Bluetooth sensor support, CCTV, DMS, asset management, etc.). KITS can be licensed separately for other signals not running Kadence for additional fee upon request.
- 2. Distribution** – The Software may not be used by or distributed to outside entities without the expressed written permission of the Contractor.
- 3. Restrictions** – The City may not provide, in any way, any portion of the program to another person or entity without the expressed written permission of the Contractor. This applies to the Software in object form as well as the software documentation.
- 4. Copyright** – All intellectual property rights in the Software and user documentation are owned by the Contractor and are protected by US copyright laws, other applicable copyright laws, and International treaty provisions. The Contractor retains all rights not expressly granted.
- 5. Limited Warranty** – Except as specifically provided herein, the Contractor makes no warranty, representation, promise or guarantee, expressed or implied, statutory or otherwise, with respect to the Software, user documentation or related technical support, including their quality, performance or fitness for a particular purpose. The Contractor will in no way be responsible for any ramification resulting from modification to the Software or hardware configuration by the City.
- 6. Government Restricted Rights** – The Software and/or user documentation are provided with RESTRICTED AND LIMITED RIGHTS. Use, duplication or disclosure by the City is subject to restrictions as set forth in FAR 52.227-14 (June 1987) Alternate III(g)(3) (June

1987), FAR 52.227-19 (June 1987), as applicable. Contractor is Kimley-Horn and Associates, Inc., 7740 N. 16th Street Suite 300, Phoenix, Arizona 85020.

7. Term and Termination

- 7.1. **Term** – This Software License Agreement is legally binding as of the Effective Date and shall continue unless terminated as provided for herein.
- 7.2. **Termination for Default** – If Contractor fails to perform any of its material obligations under this Software License Agreement, the City will notify the Contractor in writing of such purported breach. Contractor shall be given a thirty (30) day cure period in which to correct this breach. If after this period Contractor is unable to provide an acceptable remedy, City, in addition to other remedies provided by law, may terminate this Software License Agreement immediately upon written notification.
- 7.3. **Termination Without Cause** – Client may terminate this Software License Agreement without cause by providing written notification to the other party at least thirty (30) days prior to such termination.
- 7.4. **Termination Authority** – The Director of Finance (“Director”) is empowered to terminate this Software License Agreement on behalf of City.

8. Confidential and Proprietary Information

- 8.1. **Confidentiality** – All data and information generated, collected, developed, discovered or otherwise saved in the Software exclusively for the City (collectively the “Data”) by the Contractor in the performance of this Software License Agreement are confidential and must not be disclosed to any person except as authorized by City, or as required by law.
- 8.2. **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, or 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 and developed by City’s facilities or personnel. Technology that is jointly developed using both City and Contractor personnel and facilities shall be jointly owned.
- 8.3. **Ownership of Data** – The City shall maintain ownership and control of the Data throughout the Software License 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 Software License Agreement without the express written consent of the City. Contractor warrants that throughout all operational and maintenance activities the accuracy of the Data will be preserved.

8.4. 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 Software License 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 Software License Agreement.

9. Representation and Warranties

9.1. Each Party represents and warrants to the other Party as of the Effective Date that:

9.1.1. it has the power and authority and the legal right to enter into this Software License Agreement free from any conflicting right owed to a third party and to perform its obligations hereunder;

9.1.2. it has taken all necessary action on its part to authorize the execution and delivery of this Software License Agreement and the performance of its obligations hereunder and that this Software License Agreement has been duly executed and delivered on behalf of each Party, and constitutes a legal, valid, binding obligation, enforceable against such Party in accordance with its terms;

9.1.3. all necessary consents, approvals and authorizations of all applicable competent authorities and other persons required to be obtained by such Party in order to execute this Software License Agreement on behalf of such Party have been obtained; and

9.1.4. the execution and delivery of this Software License Agreement and the performance of such Party's obligations do not constitute a default or require any consent under any other contractual obligation of such Party.

9.2. Contractor represents and warrants to City that:

9.2.1. it is the lawful licensee or owner of the Software and has all the necessary rights therein to grant the licenses described herein;

9.2.2. to the best of Contractor's knowledge, the Software conforms in all material respects to the specifications, functions, descriptions, standards, and criteria set forth in this Software License Agreement and the Agreement;

9.2.3. all Software provided to City under this Software License Agreement is rendered with reasonable care and skill; and

9.2.4. all Software will be delivered to City malware free and does not contain any timers, counters, or preprogrammed devices that will cause the Software to become erased, inoperable, or incapable of processing in the manner as documented in the contract documents specified.

10. Indemnification - Contractor shall defend, indemnify and hold harmless City and VTA, its officers, employees and agents against any claim, loss or liability arising out of or resulting in any way from performance of this Software License Agreement due to willful misconduct or negligent acts (active or passive) or omissions by Contractor's officers, employees or agents. 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 Software License Agreement.

11. Warranty Against Infringement

11.1. Contractor agrees to defend and indemnify City of all direct losses, costs and damages resulting from a determination that the Software as supplied to City infringes any Canadian or United States patent rights, copyrights or trademarks provided that: City promptly notifies Contractor in writing upon City becoming aware of the existence of any such suit, action, proceeding or threat; allows Contractor sole control of the defense and/or settlement thereof; and 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 its express consent. In the event that City is enjoined from use of the Software due to a proceeding based upon the infringement of patent, copyright or trademark in the United States or Canada, Contractor shall, at its option, either:

11.1.1. Modify the Software, at Contractor's expense, so it becomes non-infringing; or

11.1.2. Replace the infringing Software with equal non-infringing Software, at Contractor's expense; or

11.1.3. Procure, at Contractor's expense, the necessary licenses for the City to continue using the Software; or

11.1.4. Remove the Software and refund the purchase price and transportation costs thereof, less a reasonable amount for depreciation.

11.2. Contractor shall have no liability in respect of any claim based upon:

11.2.1. Use, operation or combination of the Software with software, hardware, data, or other material not supplied by Contractor if such infringement would have been avoided but for such use, operation or combination; or

11.2.2. Use of the Software other than in accordance with Contractor's specifications if such infringement would have been avoided but for use of the Software not in accordance with Contractor's specifications; or

11.2.3. Software that has been modified by any party other than Contractor if such infringement would have been avoided but for such modification.

12. Assignability – Unless specifically preauthorized in writing by City, such authorization not to be unreasonably withheld, Contractor may not assign the performance of any obligation or interest under this Software License Agreement. Any attempt by Contractor to assign this Software License Agreement, in violation of this Section, will be voidable at City's sole option.

13. Governing Law – This Software License Agreement shall be governed by and construed in accordance with the laws of the State of California and the federal laws of the United States of America.

14. Venue – In the event that suit is brought by either Party to this Software License 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.

15. Miscellaneous

15.1. Survival of Provisions – If any part of this Software License Agreement is for any reason found to be unenforceable, all other parts nevertheless remain enforceable.

15.2. Assignment – Subject to the provisions of Section 12 (Assignability), this Software License Agreement binds and inures to the benefit of the Parties and their respective successors and assigns.

15.3. Headings – The headings of the sections and exhibits of this Software License Agreement are inserted for convenience only. They do not constitute part of this Software License Agreement and are not to be used in its construction.

15.4. Authority of City Manager – Where this Software License Agreement requires or permits City to act and no officer of the City is specified, City’s Manager or the designated representative of City’s Manager has the authority to act on City’s behalf.

City of San José
a municipal corporation



Jennifer Cheng
Deputy Director, Finance
Date: Apr 14, 2022

APPROVED AS TO FORM:



Diana Yuan
Deputy City Attorney

Kimley-Horn and Associates, Inc.
a North Carolina corporation
authorized to conduct business in California



Michael J. Hermann
Senior Vice President
Date: Apr 13, 2022



Brian Smalkoski
Mountain Region Marketing Manager
Date: Apr 13, 2022