

**CITY OF WILSONVILLE
PROFESSIONAL GOODS AND SERVICES AGREEMENT**

**SMART
TRANSIT SYSTEM
INTEGRATED TECHNOLOGY PROJECT**

This Professional Goods and Services Agreement (“Agreement”) is made and entered into on this ____ day of _____, 2015 (“Effective Date”) by and between the **City of Wilsonville**, a municipal corporation of the State of Oregon (hereinafter referred to as the “City”), and **ETA Phi Systems, Inc.**, a Florida corporation, doing business as **ETA Transit Systems** (hereinafter referred to as “ETA”).

RECITALS

WHEREAS, the City requires certain technology and related goods and services which ETA is capable of providing, under terms and conditions hereinafter described; and

WHEREAS, ETA represents that ETA is qualified to supply materials and perform the services described herein on the basis of specialized experience and technical expertise; and

WHEREAS, ETA is prepared to provide such services as the City does hereinafter require.

NOW, THEREFORE, in consideration of these mutual promises and the terms and conditions set forth herein, the parties agree as follows:

AGREEMENT

Section 1. Definitions

The following definitions apply to this Agreement:

1.1. “Hardware” means the ETA Transit Systems GPS Tracking Devices, antennas, cables, and mounting, RFID reader, magnetic card scanner, signs (exterior or interior), PA System, Controllers, Vehicle Operator Display Unit, Automatic Passenger Counters, modem, and other devices comprising the system identified in ETA’s proposal submitted in response to the City’s Request for Proposals, dated January 22, 2015 (“Proposal”).

1.2. “Intellectual Property” means copyrights, trademarks, and service marks (whether registered or unregistered), trade secrets, patents, patent applications, contract rights, know-how, and other proprietary rights.

1.3. “Software” means all software provided to ETA or ETA’s subcontractor, Engraph, including firmware, Spatial Positioning On Transit (SPOT®) Console Software, SPOT Server software, and any other associated computer code.

1.4. “Data” means all data stored in the database partitioned for the City, all generated data, including but not limited to the City’s customer information, driver logs, inspection reports, messages, and telematics data.

1.5. “Subscription Fee” means the annual service fee for the right to access and use the system provided by ETA, as set forth in the Scope of Services, attached hereto as **Exhibit A** and incorporated by reference herein, and as set forth in the attached Quotation/Purchase Order.

1.6. “Terms of Use” shall mean all rules, terms, and conditions set forth in this Agreement regarding permissible or impermissible uses of, or activities related to, the System.

1.7. “System” means the integrated technology system provided by ETA and its subcontractor pursuant to this Agreement.

1.8. “Force Majeure” shall mean an extraordinary event of nature that was not caused by and could not be controlled by ETA or the City. Examples include extreme events like earthquakes, severe flooding or fire; war; terrorist attack or other catastrophic event that causes all other similar businesses to suffer like delay or damage consequences.

Section 2. Term

The term of this Agreement shall be from the Effective Date until all services required to be performed hereunder (“Services”) are completed and accepted, unless earlier terminated in accordance herewith. ETA shall diligently perform the Services according to the requirements and deliverable dates identified in the Scope of Services, attached hereto as **Exhibit A** and incorporated by reference herein. Except in the event of an extension of time, agreed to in writing by the City, all Services, excluding ongoing support services set forth in the Scope of Services, must be completed no later than January 14, 2016 (“Completion Deadline”).

Section 3. ETA’s Services

3.1. ETA will perform the Scope of Services and supply all goods and materials needed to perform the Scope of Services, as more particularly described on **Exhibit A** and in ETA’s Proposal for SMART’s Transit System Integrated Technology Project (“Project”); which is incorporated by reference herein. If any term or provision of the Scope of Services or the Proposal conflict, the City shall be entitled to select which provision shall be followed. SMART is the acronym for the City’s public transportation system, as more particularly described in the Request for Proposal, on which this contract is based.

3.2. All written documents, drawings, programming, and other work product prepared or submitted by ETA in conjunction with the Services shall bear the signature, stamp, or initials of ETA’s authorized Project Manager. Interpretation of plans and answers to questions regarding the Services or Scope of Services given by ETA’s Project Manager may be verbal or in writing, and may be relied upon by the City, whether given verbally or in writing.

If requested by the City to be in writing, ETA's Project Manager will provide such written documentation.

3.3. The existence of this Agreement between the City and ETA shall not be construed as the City's promise or assurance that ETA will be retained for future services beyond the Scope of Services described herein.

3.4. ETA shall maintain the confidentiality of any confidential information that is exempt from disclosure under state or federal law to which ETA may have access by reason of this Agreement. ETA warrants that ETA's employees assigned to work on the Services provided in this Agreement shall be clearly instructed to maintain this confidentiality. All agreements with respect to confidentiality shall survive the termination or expiration of this Agreement.

3.5. All Services will be provided in strict compliance with all laws and regulations, including all laws related to technology, licensing, intellectual property, and copyright and trademark regulations.

Section 4. Compensation

4.1. Except as otherwise set forth in this **Section 4**, the City agrees to pay ETA an all-inclusive fixed fee of TWO HUNDRED EIGHTY-FIVE THOUSAND NINE HUNDRED NINETY-NINE DOLLARS (\$285,999.00), for performance of this Agreement ("Compensation Amount"), including the annual system license and user fees ("Annual Fee") for the term of this Agreement, in accordance with the payment/milestone schedule set forth on **Exhibit A**. Any compensation in excess of the Compensation Amount will require an express written Change Order to be executed between the City and ETA. If this Agreement is terminated early, in accordance with the terms of this Agreement, the City will not be required to continue to pay the Annual Fee beyond the termination date and the Annual Fee payment due or paid at the time of early termination will be prorated accordingly.

4.2. Except for amounts withheld by the City pursuant to this Agreement, ETA will be paid for Services for which an itemized invoice is received by the City within thirty (30) days of receipt, unless the City disputes such invoice. In that instance, the undisputed portion of the invoice will be paid by the City within the above timeframe. The City will set forth its reasons for the disputed claim amount and make good faith efforts to resolve the invoice dispute with ETA as promptly as is reasonably possible.

4.3. ETA's Compensation Amount is all inclusive and includes, but is not limited to, all work-related expenses, salaries or wages plus fringe benefits and contributions, including payroll taxes, workers compensation insurance, liability insurance, profit, pension benefits and similar contributions and benefits, technology and/or software charges, office expenses, and all other indirect and overhead charges.

Section 5. Prevailing Wages

This contract is for a federally funded Project and state prevailing wages also apply. Therefore, not less than the higher of the current applicable state prevailing wage or federal wage must be paid on this Project. State wage rates for this Project are those published by BOLI effective July 1, 2014, and all subsequent amendments. The Bureau of Labor and Industries (BOLI) prevailing wage rate for public works contracts can be found at the following web address: http://www.oregon.gov/boli/WHD/PWR/Pages/pwr_oregon_2014.aspx. Because this contract is subject to payment of prevailing wages, each worker in each trade or occupation employed in the performance of the Services subject to the prevailing wage rate, either by ETA, a subcontractor, or other person doing or contracting to do, or contracting for the whole or any part of the Services, must be paid not less than the applicable state prevailing wage for an hour's work in the same trade or occupation in the locality where such labor is performed, in accordance with ORS 279C.838 and 279C.840, if applicable. In addition, this Agreement is also covered by the federal Davis-Bacon Act (40 USC § 3141 et seq.). Therefore, ETA and subcontractors shall pay workers or others performing Services contemplated by this Agreement who are subject to payment of prevailing wages the higher of the State of Oregon or the federal Davis-Bacon prevailing rate of wage, as determined by the Commissioner of the Bureau of Labor and Industries, in accordance with ORS 279C. ETA must comply with all public contracting wages required by law. ETA and any subcontractor, or their sureties, shall file a certificate of rate of wage as required by ORS 279C.845. If the City determines at any time that the prevailing rate of wages has not been or is not being paid as required herein, it may retain from the moneys due to ETA an amount sufficient to make up the difference between the wages actually paid and the prevailing rate of wages, and may also cancel the contract for breach. ETA shall be liable to the workers affected for failure to pay the required rate of wage, including all fringe benefits under ORS 279C.840(5). ETA shall include a contract provision in compliance with this paragraph in every subcontract and shall require each subcontractor to include it in subcontract(s).

Section 6. City's Responsibilities

The scope of the City's responsibilities, including those of the City's Project Manager, are also set forth in the Scope of Services. The City has designated a Project Manager and an outside consultant Assistant Project Manager to facilitate day-to-day communication between ETA and the City, including timely receipt and processing of invoices, requests for information, and general coordination of City staff to support the Project.

Section 7. City's Project Manager

The City's Project Manager is Stephan Lashbrook. The City's outside consultant and Assistant Project Manager is Patty Fink. The City shall give ETA prompt written notice of any re-designation of its Project Manager. Although ETA may seek clarification or communicate through the Assistant Project Manager, any modifications to this contract requiring written approval by the City may be approved only by the Project Manager.

Section 8. ETA's Project Managers

ETA's Project Manager is John Maglio and back-up Project Manager is James Warren. In the event that ETA's designated Project Manager is changed, ETA shall give the City prompt written notification of such re-designation. Recognizing the need for consistency and knowledge in the administration of the Project, ETA's Project Manager will not be changed without the written consent of the City, which consent shall not be unreasonably withheld. In the event the City receives any communication from ETA that is not from ETA's designated Project Manager, the City may request verification by ETA's Project Manager, which verification must be promptly furnished. Contact telephone numbers for the Project Managers named above are as follows during regular business hours: (561) 314-5660 and (561) 322-0878, respectively. The after-hours emergency call-in number is: (561) 322-0878.

Section 9. Project Information and Data Release

Except for confidential information designated by the City as information not to be shared, ETA agrees to share Project information with, and to fully cooperate with, those corporations, firms, contractors, public utilities, governmental entities, and persons involved in or associated with the Project. No information, news, or press releases related to the Project, whether made to representatives of newspapers, magazines, or television and radio stations, shall be made without the written authorization of the City's Project Manager. ETA will immediately notify the City upon receipt of any third party request for Data related to the City and will not release it without the City's prior written approval.

Section 10. Duty to Inform

If, at any time during the performance of this Agreement or any future phase of this Agreement for which ETA has been retained, ETA becomes aware of actual or potential problems, faults, or defects in the Project or Scope of Services, or any portion thereof; or of any nonconformance with federal, state, or local laws, rules, or regulations; or if ETA has any objection to any decision or order made by the City with respect to such laws, rules, or regulations, ETA shall give prompt written notice thereof to the City's Project Manager. Any delay or failure on the part of the City to provide a written response to ETA shall neither constitute agreement with nor acquiescence to ETA's statement or claim, nor constitute a waiver of any of the City's rights.

Section 11. Subcontractors and Assignments

11.1. Services may be performed by persons other than ETA, provided ETA advises the City of the names of such subcontractors and the Services which they intend to perform, and the City's Project Manager specifically agrees, in writing, to such subcontracting. The City hereby agrees that ETA will subcontract with Engraph to provide its ParaPlan Software, which is a critical part of this Agreement. ETA agrees it will use no other subcontractor to provide the Dial-a-Ride software, without the prior written approval of the City, which may be granted or denied in the City's sole discretion. No other subcontractors have been approved by the City as of the date of this Agreement. ETA acknowledges such Services will be provided to the City

pursuant to a subcontract(s) between ETA and subcontractor(s) and no privity of contract exists between the City and the subcontractor(s). Unless otherwise specifically provided by this Agreement, the City incurs no liability to third persons for payment of any compensation provided herein to ETA. Any attempted assignment of this Agreement without the written consent of the City shall be void. Except as otherwise specifically agreed, all costs for Services performed by others on behalf of ETA shall not be subject to additional reimbursement by the City.

11.2. The City shall have the right to enter into other agreements for the Project, to be coordinated with this Agreement. ETA shall cooperate with the City and other firms, engineers or subcontractors on the Project so that all portions of the Project may be completed in the least possible time and within normal working hours. ETA shall furnish other engineers, subcontractors and affected public utilities, whose designs are fitted into ETA's design, detail drawings giving full information so that conflicts can be avoided.

Section 12. ETA Is Independent Contractor

12.1. ETA is an independent contractor for all purposes and shall be entitled to no compensation other than the Compensation Amount provided for under **Section 4** of this Agreement. ETA will be solely responsible for determining the manner and means of accomplishing the end result of ETA's Services. The City does not have the right to control or interfere with the manner or method of accomplishing said Services. The City, however, will have the right to specify and control the results of ETA's Services so such Services meet the requirements of the Project.

12.2. ETA may request that some consulting Services be performed on the Project by persons or firms other than ETA, through a subcontract with ETA. ETA acknowledges that if such Services are provided to the City pursuant to a subcontract(s) between ETA and those who provide such services, ETA may not utilize any subcontractor(s), or in any way assign its responsibility under this Agreement, without first obtaining the express written consent of the City, which consent may be given or denied in the City's sole discretion. In all cases, processing and payment of billings from subcontractors is solely the responsibility of ETA.

12.3. ETA shall be responsible for, and defend, indemnify, and hold the City harmless against, any liability, cost, or damage arising out of ETA's use of such subcontractor(s) and subcontractor's negligent acts, errors, or omissions. Unless otherwise agreed to, in writing, by the City, ETA shall require that all of ETA's subcontractors also comply with and be subject to the provisions of this **Section 12** and meet the same insurance requirements of ETA under this Agreement, unless approved in writing by the City and ETA.

Section 13. ETA General Responsibilities

13.1. ETA shall make prompt payment for any claims for labor, materials, or services furnished to ETA by any person in connection with this Agreement, as such claims become due. ETA shall not permit any liens or claims to be filed or prosecuted against the City on account of any labor or material furnished to or on behalf of ETA. If ETA fails, neglects, or

refuses to make prompt payment of any such claim, the City may, but shall not be obligated to, pay such claim to the subcontractor furnishing the labor, materials, or services and offset the amount of the payment against funds due or to become due to ETA under this Agreement. The City may also recover any such amounts directly from ETA.

13.2. ETA must comply with all applicable Oregon and federal wage and hour laws, including BOLI and Davis-Bacon wage requirements. ETA shall make all required workers compensation and medical care payments on time. ETA shall be fully responsible for payment of all employee withholdings required by law, including but not limited to taxes, including payroll, income, Social Security (FICA), and Medicaid. ETA shall also be fully responsible for payment of salaries, benefits, taxes, Industrial Accident Fund contributions, and all other charges on account of any employees. ETA shall pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.167. All costs incident to the hiring of assistants or employees shall be ETA's responsibility. ETA shall defend, indemnify, and hold the City harmless from claims for payment of all such expenses. Unless otherwise expressly set forth on **Exhibit A** as a reimbursable expense item, specific costs associated with items set forth in this subsection shall be deemed as fully and conclusively included in the Compensation Amount.

13.3. No person shall be discriminated against by ETA or any subcontractor in the performance of this Agreement on the grounds of sex, gender, race, color, creed, religion, marital status, age, disability, sexual orientation, gender identity, or national origin. Any violation of this provision shall be grounds for cancellation, termination, or suspension of the Agreement, in whole or in part, by the City.

13.4. Because this Agreement is funded, in part, by federal finds, ETA must comply with all Required Federal Provisions, as set forth in **Section 14**, below, some of which may overlap with those stated in this Section. Should a conflict exist, the stricter provision shall apply unless otherwise specifically pre-empted by federal law.

Section 14. Required Federal Provisions

This Agreement is funded, in whole or in part, with Federal funds. ETA must therefore comply with all of the following, in addition to the provisions listed above:

14.1. **Energy Conservation.** ETA agrees to comply with mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act.

14.2. **Clean Water.** ETA agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 USC 1251 *et seq.* ETA agrees to report each violation to the City and understands and agrees that the City will, in turn, report each violation as required to assure notification to the FTA and the appropriate EPA Regional Office. ETA also agrees to include these requirements in each subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by the FTA.

14.3. **Clean Air.** ETA agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 USC §§ 7401 *et seq.* ETA agrees to report each violation to the City and understands and agrees that the City will, in turn, report each violation as required to assure notification to the FTA and the appropriate EPA Regional Office. ETA also agrees to include these requirements in each subcontract exceeding \$100,000 financed in whole or in part with Federal assistance provided by the FTA.

14.4. **Recovered Materials.** ETA agrees to comply with all the requirements of Section 6002 of the Resource Conservation and Recovery Act (RCRA), as amended (42 USC § 6962), including but not limited to the regulatory provisions of 40 CFR Part 247, and Executive Order 12873, as they apply to the procurement of the items designated in Subpart B of 40 CFR Part 247.

14.5. **Byrd Anti-Lobbying Amendment.** Consultants who apply or bid for an award of \$100,000 or more shall file the certification required by 49 CFR Part 20, "New Restrictions on Lobbying." Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 USC § 1352. Each tier shall also disclose the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on its behalf with non-Federal funds with respect to that Federal contract, grant or award covered by 31 USC § 1352. Such disclosures are forwarded from tier to tier up to the recipient.

14.6. **Access to Records.** The following federal access to records requirements apply to this Agreement:

14.6.1. ETA agrees to provide the City, SMART, the FTA Administrator, the Comptroller General of the United States, or any of their duly authorized representatives, access to any books, documents, papers, and records of ETA which are directly pertinent to this Agreement for the purposes of making audits, examinations, excerpts, and transcriptions. ETA also agrees, pursuant to 49 CFR 633.17 to provide the FTA Administrator or his/her authorized representatives, including any PMO contractor, access to ETA's records and construction sites pertaining to a major capital project, defined at 49 USC § 5302(a)1, which is receiving federal financial assistance through the programs described at 49 USC § 5307, 5309 or 5311. ETA also agrees to permit any of the foregoing parties (at their costs) to reproduce by any means whatsoever any excerpts and transcriptions as reasonably needed, and to permit said parties to interview ETA's employees during work hours on the job.

14.6.2. ETA agrees to maintain all books, records, accounts, and reports required under this Agreement for a period of not less than three (3) years after the date of termination or expiration of this Agreement, except in the event of litigation or settlement of claims arising from the performance of this Agreement, in which case ETA agrees to maintain same until the City, the FTA Administrator, the Comptroller

General, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims, or exceptions related thereto. Reference 49 CFR 18.39(i)(11).

14.7. Contracts Involving Federal Privacy Act Requirements. The following requirements apply to ETA and its employees that administer any system of records on behalf of the Federal Government under any contract:

14.7.1. ETA agrees to comply with, and assures the compliance of its employees with, the information restrictions and other applicable requirements of the Privacy Act of 1974, 5 USC § 552a. ETA agrees to obtain the express consent of the Federal Government before ETA or its employees operate a system of records on behalf of the Federal Government. ETA understands that the requirements of the Privacy Act, including the civil and criminal penalties for violation of that Act, apply to those individuals involved and that failure to comply with the terms of the Privacy Act may result in termination of this Agreement.

14.7.2. ETA also agrees to include these requirements in each subcontract to administer any system of records on behalf of the Federal Government financed in whole or in part with Federal assistance provided by the FTA.

14.8. Contract Work Hours and Safety Standards.

14.8.1. **Overtime Requirements.** ETA agrees that if any part of the Scope of Services involves the employment of laborers or mechanics, by either ETA or its subcontractor, ETA shall not require or permit any such laborer or mechanic to work in excess of forty hours in any work week unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such work week.

14.8.2. **Violation; Liability for Unpaid Wages; Liquidated Damages.** In the event of any violation of the clause set forth in **Section 14.8.1**, ETA and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such ETA and subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in **Section 14.8.1**, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard work week of forty hours without payment of the overtime wages required by the clause set forth in **Section 14.8.1**.

14.8.3. **Withholding for Unpaid Wages and Liquidated Damages.** The City shall, upon its own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from any moneys payable on account of work performed by ETA or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted

contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in **Section 14.8.2**.

14.8.4. **Subcontracts.** ETA or any subcontractor shall insert in any subcontracts the clauses set forth in **Sections 14.8.1 through 14.8.4** and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in **Sections 14.8.1 through 14.8.4**.

14.9. **Civil Rights Requirements.**

14.9.1. Nondiscrimination. In accordance with Title VI of the Civil Rights Act of 1964, as amended (42 USC § 2000d), Section 303 of the Age Discrimination Act of 1975, as amended (42 USC § 6102), Section 202 of the Americans with Disabilities Act of 1990, as amended (42 USC § 12132), and Federal transit law at 49 USC § 5332, ETA agrees that it will not discriminate against any employee or applicant for employment because of race, color, creed, national origin, sex, marital status, age, or disability. In addition, ETA agrees to comply with applicable Federal implementing regulations and other implementing requirements the FTA may issue.

14.9.2. Equal Employment Opportunity. The following equal employment opportunity requirements apply to this Agreement:

(a) Race, Color, Creed, National Origin, Sex. In accordance with Title VII of the Civil Rights Act, as amended (42 USC § 2000e), and Federal transit law at 49 USC § 5332, ETA agrees to comply with all applicable equal employment opportunity requirements of the U.S. Department of Labor (U.S. DOL) regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 CFR Parts 60 *et seq.*, and with any applicable Federal statutes, executive orders, regulations, and Federal policies that may in the future affect construction activities undertaken in the course of this Project. ETA agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, creed, national origin, sex, marital status, or age. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, ETA agrees to comply with any implementing requirements the FTA may issue.

(b) Age. In accordance with Section 4 of the Age Discrimination in Employment Act of 1967, as amended (29 USC § 623), and Federal transit law at 49 USC § 5332, ETA agrees to refrain from discrimination against present

and prospective employees for reason of age. In addition, ETA agrees to comply with any implementing requirements the FTA may issue.

(c) Disabilities. In accordance with Section 102 of the Americans with Disabilities Act, as amended (42 USC § 12112), ETA agrees that it will comply with the requirements of the U.S. Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 CFR Part 1630, pertaining to employment of persons with disabilities. In addition, ETA agrees to comply with any implementing requirements the FTA may issue.

14.9.3. ETA agrees to include these requirements in each subcontract financed in whole or in part with Federal assistance provided by the FTA, modified only if necessary to identify the affected parties.

14.10. Disadvantaged Business Enterprises.

14.10.1. This Agreement is subject to the requirements of Title 49, Code of Federal Regulations, Part 26, *Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs*. The national goal for participation of Disadvantaged Business Enterprises (DBE) is 10%. SMART's overall goal for DBE participation is 11.8%. ETA will be required to report its DBE participation obtained through race-neutral means throughout the period of performance.

14.10.2. ETA shall not discriminate on the basis of race, color, sexual orientation, gender identity, national origin, or sex in the performance of this Agreement. ETA shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of this DOT-assisted contract. Failure by ETA to carry out these requirements is a material breach of this Agreement, which may result in the termination of this Agreement or such other remedy as the City deems appropriate. Each subcontract ETA signs with a subcontractor must include the assurance in this paragraph (see 49 CFR 26.13(b)).

14.10.3. ETA is required to pay its subcontractors performing work related to this Agreement for satisfactory performance of that work no later than 30 days after ETA's receipt of payment for that work from the City. In addition, ETA may not hold retainage from its subcontractors.

14.10.4. ETA must promptly notify the City whenever a DBE subcontractor performing work related to this Agreement is terminated or fails to complete its work, and must make good faith efforts to engage another DBE subcontractor to perform at least the same amount of work. ETA may not terminate any DBE subcontractor and perform that work through its own forces or those of an affiliate without the prior written consent of the City.

14.11. Program Fraud and False or Fraudulent Statements or Related Acts.

14.11.1. ETA acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 USC § 3801 *et seq.*, and U.S. Department of Transportation (DOT) regulations, "Program Fraud Civil Remedies," 49 CFR Part 31, apply to its actions pertaining to this Project. Upon execution of this Agreement, ETA certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or causes to be made, pertaining to this Agreement or the FTA assisted Project for which the attached Scope of Services is being performed. In addition to other penalties that may be applicable, ETA further acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification, the Federal Government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986 on ETA to the extent the Federal Government deems appropriate.

14.11.2. ETA also acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification to the Federal Government under a contract connected with a project that is financed in whole or in part with Federal assistance originally awarded by the FTA under the authority of 49 USC § 5307, the Government reserves the right to impose the penalties of 18 USC § 1001 and 49 USC § 5307(n)(1) on ETA, to the extent the Federal Government deems appropriate.

14.11.3. ETA agrees to include the above two clauses in each subcontract financed in whole or in part with Federal assistance provided by the FTA. It is further agreed that the clauses shall not be modified, except to identify the subcontractor who will be subject to the provisions.

14.12. **Suspension and Debarment.** This Agreement is a covered transaction for purposes of 49 CFR Part 29. As such, ETA is required to verify that none of ETA, its principals, as defined at 49 CFR 29.995, or affiliates, as defined at 49 CFR 29.905, are excluded or disqualified as defined at 49 CFR 29.940 and 29.945. ETA is required to comply with 49 CFR 29, Subpart C, and must include the requirement to comply with 49 CFR 29, Subpart C, in any lower tier covered transaction it enters into. By signing and submitting its bid or proposal, ETA certifies as follows:

The certification in this clause is a material representation of fact relied upon by the City. If it is later determined that ETA knowingly rendered an erroneous certification, in addition to remedies available to the City, the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment. ETA agrees to comply with the requirements of 49 CFR 29, Subpart C, while this offer is valid and throughout the period of any contract that may arise from this offer. ETA further agrees to include a provision requiring such compliance in its lower tier covered transactions.

14.13. **Federal Changes.** ETA shall at all times comply with all applicable FTA regulations, policies, procedures, and directives, including without limitation those listed directly or by reference in any Master Agreement between the City and the FTA, as they may be amended or promulgated from time to time during the term of this Agreement. ETA's failure to so comply shall constitute a material breach of this Agreement.

14.14. **Breaches and Disputes.**

14.14.1. **Disputes.** Except as otherwise provided in the Service Level Agreement, as provided in **Section 15**, disputes arising in the performance of this Agreement which are not resolved by agreement of the parties shall be decided in writing by the City's City Manager. This decision shall be final and conclusive unless within ten (10) days from the date of receipt of its copy, ETA mails or otherwise furnishes a written appeal to the City Manager. In connection with any such appeal, ETA shall be afforded an opportunity to be heard and to offer evidence in support of its position. The decision of the City Manager shall be binding upon the ETA and the ETA shall abide by the decision. Unless otherwise directed by the City, ETA shall continue performance under this Agreement while matters in dispute are being resolved.

14.14.2. **Claims for Damages.** Should either party to this Agreement suffer injury or damage to person or property because of any act or omission of the other party or of any of its employees, agents, or others for whose acts it is legally liable, a claim for damages therefor shall be made in writing to such other party within a reasonable time after the first observance of such injury of damage.

14.14.3. **Remedies.** If not resolved pursuant to **Section 14.14.1**, and except as provided in **Section 17** for Warranty disputes and in the Service Level Agreement (**Exhibit B**) for disputes, all claims, counterclaims, disputes, and other matters in question between the City and ETA arising out of or relating to this Agreement or its breach may be mediated, if the parties agree upon a time, place, and manner for mediation, or suit may be filed in the Clackamas County Circuit Court in the State of Oregon. Remedies shall include all available for breach of contract at law or in equity, including but not limited to damages, termination, specific performance, or injunctive relief.

14.15. **Termination.** The termination clause for this contract can be found in **Section 19**, below.

14.16. **No Obligation by the Federal Government.**

14.16.1. The City and ETA acknowledge and agree that, notwithstanding any concurrence by the Federal Government in or approval of the solicitation or award of this Agreement, absent the express written consent by the Federal Government, the Federal Government is not a party to this Agreement and shall not be subject to any obligations or liabilities to the City, ETA, or any other party (whether or not a party to this Agreement) pertaining to any matter resulting from this Agreement.

14.16.2. ETA agrees to include the above clause in each subcontract financed in whole or in part with Federal assistance provided by the FTA. It is further agreed that the clause shall not be modified, except to identify the subcontractor who will be subject to its provisions.

14.17. **Incorporation of Federal Transit Administration (FTA) Terms.** The preceding provisions include, in part, certain Standard Terms and Conditions required by the DOT, whether or not expressly set forth in the preceding contract provisions. All applicable contractual provisions required by the DOT, as set forth in FTA Circular 4220.1E, are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all FTA mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Agreement. ETA shall not perform any act, fail to perform any act, or refuse to comply with any City requests which would cause the City to be in violation of the FTA terms and conditions.

Section 15. ETA Service Level Agreement and Security Protocol

A Service Level Agreement, which includes security and security breach protocol, is attached hereto as **Exhibit B** and is incorporated by reference herein. Should any provision of the Service Level Agreement directly conflict with any other provision of this Agreement, including the Scope of Services or the Proposal, the Service Level Agreement shall control.

Section 16. Indemnity and Insurance

16.1. ETA acknowledges responsibility for liability arising out of the performance of this Agreement, and shall defend, indemnify, and hold the City harmless from any and all liability, settlements, loss, costs, and expenses in connection with any action, suit, or claim resulting or allegedly resulting from ETA's negligent acts, omissions, errors, or willful or reckless misconduct pursuant to this Agreement, or from ETA's failure to perform its responsibilities as set forth in this Agreement. The review, approval, or acceptance by the City, its Project Manager, or any City employee of documents or other Services performed, prepared, or submitted by ETA shall not be considered a negligent act, error, omission, or willful misconduct on the part of the City, and none of the foregoing shall relieve ETA of its responsibility to perform in full conformity with the City's requirements, as set forth in this Agreement, and to indemnify the City as provided above and to reimburse the City for any and all costs and damages suffered by the City as a result of ETA's negligent performance of this Agreement, failure of performance hereunder, violation of state or federal laws, or failure to adhere to the standards of performance and care described in **Subsection 16.2**. ETA shall defend the City (using legal counsel reasonably acceptable to the City) against any claim that alleges negligent acts, omissions, errors, or willful or reckless misconduct by ETA.

16.2. ETA's Standard of Care and Insurance Requirements.

16.2.1. Standard of Care: In the performance of professional services, ETA agrees to use at least that degree of care and skill exercised under similar circumstances

by reputable members of ETA's profession practicing in the Portland metropolitan area. ETA will re-perform any Services not meeting this standard without additional compensation. ETA's re-performance of any Services, even if done at the City's request, shall not be considered as a limitation or waiver by the City of any other remedies or claims it may have arising out of ETA's failure to perform in accordance with the applicable standard of care of this Agreement and within the prescribed timeframe.

16.2.2. Insurance Requirements: ETA shall maintain insurance coverage acceptable to the City in full force and effect throughout the term of this Agreement. Such insurance shall cover all risks arising directly or indirectly out of ETA's activities or Services hereunder. The amount of insurance carried is in no way a limitation on ETA's liability hereunder. The policy or policies of insurance maintained by ETA shall provide at least the following minimum limits and coverages at all times during performance under this Agreement:

16.2.2.1. Commercial General Liability Insurance. ETA shall obtain, at ETA's expense, and keep in effect during the term of this Agreement, comprehensive Commercial General Liability Insurance covering Bodily Injury and Property Damage, written on an "occurrence" form policy. This coverage shall include broad form Contractual Liability insurance for the indemnities provided under this Agreement and shall be for the following minimum insurance coverage amounts: The coverage shall be in the amount of **\$2,000,000** for each occurrence and **\$3,000,000** general aggregate and shall include Products-Completed Operations Aggregate in the minimum amount of **\$2,000,000** per occurrence, Fire Damage (any one fire) in the minimum amount of **\$50,000**, and Medical Expense (any one person) in the minimum amount of **\$10,000**. All of the foregoing coverages must be carried and maintained at all times during this Agreement.

16.2.2.2. Professional Errors and Omissions Coverage. ETA agrees to carry Professional Errors and Omissions Liability insurance on a policy form appropriate to the professionals providing the Services hereunder with a limit of no less than **\$2,000,000** per claim. ETA shall maintain this insurance for damages alleged to be as a result of errors, omissions, or negligent acts of ETA. Such policy shall have a retroactive date effective before the commencement of any work by ETA on the Services covered by this Agreement, and coverage will remain in force for a period of at least three (3) years thereafter.

16.2.2.3. Business Automobile Liability Insurance. If ETA will be using a motor vehicle in the performance of the Services herein, ETA shall provide the City a certificate indicating that ETA has business automobile liability coverage for all owned, hired, and non-owned vehicles. The Combined Single Limit per occurrence shall not be less than **\$2,000,000**.

16.2.2.4. Workers Compensation Insurance. ETA and all employers providing work, labor, or materials under this Agreement that are subject employers under the Oregon Workers Compensation Law shall comply with ORS 656.017, which requires them to provide workers compensation coverage that satisfies Oregon law for all their subject workers under ORS 656.126. Out-of-state employers must provide Oregon workers compensation coverage for their workers who work at a single location within Oregon for more than thirty (30) days in a calendar year. Consultants who perform work without the assistance or labor of any employee need not obtain such coverage. This shall include Employer's Liability Insurance with coverage limits of not less than **\$500,000** each accident.

16.2.2.5. Insurance Carrier Rating. Coverages provided by ETA must be underwritten by an insurance company deemed acceptable by the City with an AM Best Rating of A or better. The City reserves the right to reject all or any insurance carrier(s) with a financial rating that is unacceptable to the City.

16.2.2.6. Additional Insured and Termination Endorsements. Additional Insured coverage under ETA's Commercial General Liability, Pollution Liability and Excess Liability Policy(ies), as applicable, will be provided by endorsement. Additional insured coverage shall be for both on-going operations via ISO Form CG 2010 or its equivalent, and products and completed operations via ISO Form CG 2037 or its equivalent. Coverage shall be Primary and Non-Contributory. Waiver of Subrogation endorsement via ISO form CG 2404 or its equivalent shall be provided. The following is included as additional insured: The City of Wilsonville, its elected and appointed officials, officers, agents, employees, and volunteers. An endorsement shall also be provided requiring the insurance carrier to give the City at least thirty (30) days' written notification of any termination or major modification of the insurance policies required hereunder.

16.2.2.7. Certificates of Insurance. As evidence of the insurance coverage required by this Agreement, ETA shall furnish a Certificate of Insurance to the City. This Agreement shall not be effective until the required certificates and the Additional Insured Endorsements have been received and approved by the City. ETA agrees that it will not terminate or change its coverage during the term of this Agreement without giving the City at least thirty (30) days' prior advance notice and ETA will obtain an endorsement from its insurance carrier, in favor of the City, requiring the carrier to notify the City of any termination or change in insurance coverage, as provided above.

16.2.3. The coverage provided by these policies shall be primary, and any other insurance carried by the City is excess. ETA shall be responsible for any deductible amounts payable under all policies of insurance. In the event a dispute arises between the City and ETA for which ETA has obtained insurance, the maximum amount that may be withheld by the City for all such claims shall be no more than the amount of the

applicable insurance deductible. If insurance policies are “Claims Made” policies, ETA will be required to maintain such policies in full force and effect throughout any warranty period.

Section 17. Intellectual Property Representations, Warranties, and Ownership

17.1. ETA warrants it has full intellectual property rights to all software technology it uses to design and service the City’s Project and has the legal right to utilize all hardware as outlined in the Scope of Services. ETA will defend, indemnify, and hold the City harmless from any claim of unauthorized use of intellectual property with respect to the Scope of Services performed by ETA hereunder. This warranty is perpetual for as long as the City operates the system and maintains the required licenses that ETA advises the City to maintain, as provided below. ETA further warrants that its subcontractor, Engraph, has full legal right and authority to provide all hardware and software it is to provide for use of the City, as outlined in the Scope of Services.

17.2. ETA will advise the City of any hardware or software that the City will need to purchase or as to any license(s) the City will need to acquire in order to maintain the accuracy, quality, integrity, legality, reliability, appropriateness, and intellectual property ownership of any products it causes to be incorporated into the Scope of Services.

17.3. The City acknowledges and agrees that the City’s rights with respect to software are limited to the right to use the same with the system as provided by ETA. The software contains trade secrets, know-how, and other intellectual property rights belonging to ETA. Under no circumstances shall the City sell or transfer any property rights to another party in purchased software to which ETA holds intellectual property rights. ETA warrants to the City that it holds all intellectual property rights to the software products being sold to the City by this Agreement and has the right to sell the Hardware to the City for use in conjunction therewith and that it will defend, indemnify, and hold harmless the City from any claim to the contrary and that it will be responsible for any actual damages suffered by the City in the event any such claim is upheld. ETA has full right and authority to provide Engraph hardware and software for the City’s use and benefit. Upon termination of this Agreement, for whatever reason, ETA will be responsible for removal of its software from the City’s system, as more particularly described in the Level of Service Agreement.

Section 18. Performance Warranty

18.1. In addition to the ongoing intellectual property warranties of unlimited duration, as set forth in **Section 17**, ETA shall fully warranty all products and Services for a period of one (1) from the date of written acceptance by the City of the Base System Integration, Test and Commissioning (Steps 43-46) on the Implementation Schedule (now scheduled to be December 4, 2015).

18.2. In addition to, and not in lieu of, any other warranties provided by various manufacturers and suppliers, ETA fully warrants the product hardware and software will be free from defects in material or workmanship under normal operation, and the product

firmware will perform in accordance with the product documentation provided by ETA. ETA further warrants that the product hardware and software will be compatible with all existing systems on the bus at the time of testing and acceptance. Except as otherwise provided by ETA in its Proposal, ETA Transit Systems does not warrant that (a) the product hardware or firmware will meet the City's requirements if not specified in the Scope of Services; or (c) the product, when integrated in, or combined with, other hardware or software not supplied by ETA Transit Systems or its contractors or distributors after the date of final acceptance by the City, will continue to perform substantially in accordance with the product documentation. This warranty is for the benefit of the City and is not transferable. ETA warrants that the product hardware will be error-free when installed and used in accordance with direction and for its intended use and that down-time, though not completely avoidable, will be limited and is subject to the performance guarantees set forth in this Agreement. Additionally, over time, certain system errors may occur and be unavoidable but such system errors shall be limited and corrected as set forth in the Performance Guarantee Section below. The warranty shall be valid for a period of one (1) year from the date of written acceptance of the System by the City. During this warranty period, ETA shall make all necessary repairs and replacements to remedy, in a manner satisfactory to the City's Project Manager and at no cost to the City, any and all defects, breaks, or failures of the products or Services. Repair of damage or disturbances to other improvements under, within, or adjacent to the products or Services, when such damage or disturbance is caused, in whole or in part, from activities of ETA in performing its duties and obligations under this Agreement, is also covered by the warranty when such defects or damage occur within the warranty period. Thus, the one (1) year warranty period shall, with relation to such required repair, be extended one (1) years from the date of completion of such repair.

18.3. During the warranty period, ETA, at its sole expense, will repair the product, or replace the product with a corresponding or equivalent product, if it is determined to have a covered defect, provided that the City first notifies ETA Transit Systems of any such defect, furnishes ETA Transit Systems with a proof of purchase (if required), requests and obtains a return merchandise authorization (RMA) number from ETA Transit Systems, and returns the product under that RMA to ETA Transit Systems with the shipping charges being prepaid by ETA. The issuance of the RMA shall be deemed ETA's preliminary determination that the problem is covered by the warranty. If, however, upon actual examination of the returned product, ETA determines that the defect is not covered under this limited warranty, ETA Transit Systems will notify the City of its findings and provide the City with a detailed explanation of why the product is not covered by the warranty, despite the initial finding that it was. If actually not covered by the warranty, ETA will not be required to repair or replace the product, but may instead reship the product to the City or fix the product and charge the City for doing so, provided that the City has authorized such unwarranted repair, in writing. If the City elects not to have ETA repair the product, ETA will promptly insure and ship the product back to the City free of charge. In the event ETA Transit Systems repairs or replaces a defective product covered by this limited warranty, the repaired or replacement product will be covered under this limited warranty for the full warranty period measured from the date of completion of repair of the defective product. If ETA Transit Systems is unable to repair or replace a defective product covered by this limited warranty, ETA Transit Systems will reimburse the City the cost of finding a part that will work with the system purchased from ETA so that the system properly functions and, if that cannot occur, ETA will refund the City

for the entire cost of the system if the system cannot properly function due to loss of the part which cannot be repaired.

18.4. In the event there is a dispute between ETA and the City concerning whether or not a product is covered by this warranty, or in the event of a dispute as to what is required to repair the product in order to make the purchased system work, the parties will work together in good faith to resolve the dispute. If, however, the parties are unable to resolve between them within seven (7) business days, then the parties will retain an arbitrator who has an information technology background to hear the dispute and decide how it will be resolved. The arbitration will be scheduled to occur within fourteen (14) days from the date impasse is declared and, if the parties cannot agree on the arbitrator with seven (7) days, a Clackamas County Circuit Court judge will appoint the arbitrator. Time is of the essence in resolving any such dispute. This dispute resolution and arbitration provision applies only to disputes with respect to product warranty or part replacement or repair and the parties agree that for this limited purpose, this provision will not be deemed to conflict with the default and dispute resolution terms of the Contract.

18.5. ETA Transit Systems shall have no obligation under this limited warranty for (a) normal wear and tear or (b) any defect that is (i) discovered by the City during the warranty period but for which the City does not request an RMA number from ETA Transit Systems, as required above, until after the end of the warranty period, (ii) caused by any accident, misuse, abuse, or improper installation by a party other than ETA or its contractors, or unauthorized repair or modification of the product by anyone other than ETA or its contractors, (iii) caused by use of any materials not supplied by ETA Transit Systems and that were not already on the bus at the time of testing and acceptance, or by use of the product other than in accordance with its documentation, or (iv) the result of electrical surge, fire, flood or similar causes. ETA agrees that the City is authorized to routinely remove, replace, re-install or reconnect hardware without voiding the warranty but that the City is not authorized to reconfigure the hardware itself, unless otherwise instructed by ETA.

18.6. If ETA, after written notice, fails within **ten (10) days** to proceed to comply with the terms of this Section, the City may have the defects corrected, and ETA and ETA's surety shall be liable for all expense incurred. In case of an emergency where, in the opinion of the City's Project Manager, delay would cause serious loss or damage, repairs may be made without notice being given to ETA, and ETA or ETA's surety shall pay the cost of repairs. Failure of the City's Project Manager to act in case of an emergency shall not relieve ETA or ETA's surety from liability and payment of all such costs.

18.7. Current State Law (ORS 12.135) provides for a ten (10) year period from the Completion Deadline for the City to file a claim for repairs of defective materials or Services due to ETA's improper use of materials and/or workmanship, and ETA agrees it is bound thereby.

Section 19. Early Termination; Default

19.1. This Agreement may be terminated prior to the expiration of the agreed upon terms:

19.1.1. By mutual written consent of the parties;

19.1.2. By the City, for any reason, and within its sole discretion, effective as described in the Level of Service Agreement; and

19.1.3. By ETA, effective upon notice as described in the Level of Service Agreement, in the event of substantial failure by the City to perform in accordance with the terms through no fault of ETA, where such default is not cured within the seven (7) day period by the City. Withholding of disputed payment is not a default by the City.

19.2. If the City terminates this Agreement, in whole or in part, due to default or failure of ETA to perform Services in accordance with this Agreement or for violation of any laws, including intellectual property laws, the City may procure, upon reasonable terms and in a reasonable manner, services similar to those so terminated. In addition to any other remedies the City may have, both at law and in equity, for breach of contract, ETA shall be liable for all costs, damages, claims, or fines incurred by the City as a result of the default by ETA, including, but not limited to all costs incurred by the City in procuring services from others as needed to complete this Agreement or in defending against violations of intellectual property laws and payment of any resulting fines or license fees. This Agreement shall be in full force to the extent not terminated by written notice from the City to ETA. In the event of a default, except as otherwise provided in **Exhibit B**, which sets forth the cure period for certain breaches, which shall control, in all other cases the City will provide ETA with written notice of the default and a period of ten (10) days to cure the default. If ETA notifies the City that it wishes to cure the default but cannot, in good faith, do so within the ten (10) day cure period provided, then the City may elect, in its sole discretion, to extend the cure period to an agreed upon time period, or the City may elect to terminate this Agreement and seek remedies for the default, as provided above.

19.3. If the City terminates this Agreement for its own convenience not due to any default by ETA, payment of ETA shall be prorated to, and include the day of, termination and shall be in full satisfaction of all claims by ETA against the City under this Agreement.

19.4. Termination under any provision of this section shall not affect any right, obligation, or liability of ETA or the City that accrued prior to such termination. ETA shall surrender to the City items of work or portions thereof, referred to in **Section 24**, for which ETA has received payment or the City has made payment. The City retains the right to elect whether or not to proceed with actual construction of the Project.

19.5. Remedies for default or termination are as set forth in **Section 14.14**.

Section 20. Suspension of Services

The City may suspend, delay, or interrupt all or any part of the Services for such time as the City deems appropriate for its own convenience by giving written notice thereof to ETA. An adjustment in the time of performance or method of compensation shall be allowed as a result of such delay or suspension unless the reason for the delay is within ETA's control. The City shall not be responsible for Services performed by any subcontractors after notice of suspension is given by the City to ETA. Should the City suspend, delay, or interrupt the Services and the suspension is not within ETA's control, then the City shall extend the time of completion by the length of the delay.

Section 21. Liquidated Damages

21.1. The City and ETA recognize that time is of the essence of this Agreement and that the City will suffer financial loss and public detriment if the Services are not completed by the Completion Deadline, plus any extensions thereof granted, in writing, by the City. Both parties also recognize the delays, expenses, and difficulties involved in proving in a legal proceeding the actual loss suffered by the City if the Services are not completed on time. Accordingly, instead of requiring any such proof, the City and ETA agree that, as Liquidated Damages for delay (but not as a penalty), ETA shall pay the City the amounts listed below for each and every day that expires after the time specified for as the Completion Deadline.

21.2. Liquidated Damages shall apply against ETA and accrue to the City at the rate of One Hundred Dollars (\$100) for each day that expires after the time specified as the Completion Deadline.

21.3. The parties agree that this amount of Liquidated Damages is a reasonable forecast of just compensation for the harm caused by any breach and that this harm is one which is impossible or very difficult to estimate.

Section 22. Modification/Change Orders

Any modification of the provisions of this Agreement shall not be enforceable unless reduced to writing and signed by both the City and ETA. A modification is a written document, contemporaneously executed by the City and ETA, which increases or decreases the cost to the City over the agreed Compensation Amount in **Section 4** of this Agreement, or changes or modifies the Scope of Services or the time for performance. No modification shall be binding or effective until executed, in writing, by both ETA and the City. In the event ETA receives any communication of whatsoever nature from the City, which communication ETA contends gives rise to any modification of this Agreement, ETA shall, within five (5) days after receipt, make a written request for modification to the City's Project Manager in the form of a Change Order. ETA's failure to submit such written request for modification in the form of a Change Order shall be the basis for refusal by the City to treat said communication as a basis for modification or to allow such modification. In connection with any modification to this Agreement affecting any change in price, ETA shall submit a complete breakdown of labor, material, equipment, and other costs. If ETA incurs additional costs or devotes additional time

on Project tasks, the City shall be responsible for payment of only those additional costs for which it has agreed to pay under a signed Change Order. To be enforceable, the Change Order must describe with particularity the nature of the change, any delay in time the Change Order will cause, or any increase or decrease in the Compensation Amount. The Change Order must be signed and dated by both ETA and the City before the Change Order may be implemented.

Section 23. Access to Records

The City shall have access, upon request, to such books, documents, receipts, papers, and records of ETA as are directly pertinent to this Agreement for the purpose of making audit, examination, excerpts, and transcripts for a period of four (4) years, unless within that time the City specifically requests an extension. This clause shall survive the expiration, completion, or termination of this Agreement.

Section 24. Property of the City

Originals or certified copies of the original work forms, including but not limited to documents, programs, plans, and systems, performed or produced by ETA under this Agreement shall be the exclusive property of the City and shall be delivered to the City prior to final payment. Any statutory or common law rights to such property held by ETA as creator of such work shall be conveyed to the City upon request without additional compensation. Upon the City's approval, and provided the City is identified in connection therewith, ETA may include ETA's work in its promotional materials.

Section 25. Adherence to Law

In the performance of this Agreement, ETA shall adhere to all applicable federal, state, and local laws (including the Wilsonville Code and Public Works Standards), including but not limited to laws, rules, regulations, and policies concerning employer and employee relationships, workers compensation, and minimum and prevailing wage requirements. Any certificates, licenses, or permits that ETA is required by law to obtain or maintain in order to perform the Services described on **Exhibit A**, shall be obtained and maintained throughout the term of this Agreement.

Section 26. Governing Law

This Agreement shall be governed by the laws of the State of Oregon. All contractual provisions required by ORS Chapters 279A and 279C to be included in public agreements are hereby incorporated by reference and shall become a part of this Agreement as if fully set forth herein.

Section 27. Notices

Any notice required or permitted under this Agreement shall be in writing and shall be given when actually delivered in person or forty-eight (48) hours after having been deposited in the

United States mail as certified or registered mail, addressed to the addresses set forth below, or to such other address as one party may indicate by written notice to the other party.

To City: City of Wilsonville
Attn: Stephan Lashbrook
29799 SW Town Center Loop East
Wilsonville, OR 97070

To ETA: ETA Transit Systems, Inc.
Attn: John P. Maglio
7700 Congress Avenue, Suite 3200
Boca Raton, FL 33487

Section 28. Miscellaneous Provisions

28.1. Integration. This Agreement, including all exhibits attached hereto, contains the entire and integrated agreement between the parties and supersedes all prior written or oral discussions, representations, or agreements. In case of conflict among these documents, the provisions of this Agreement shall control.

28.2. Legal Effect and Assignment. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors, and assigns. This Agreement may be enforced by an action at law or in equity.

28.3. No Assignment. ETA may not assign this Agreement, nor the performance of any obligations hereunder, unless agreed to in advance and in writing by the City.

28.4. Jurisdiction. Venue for any dispute will be in Clackamas County Circuit Court.

28.5. Legal Action/Attorney Fees. If a suit, action, or other proceeding of any nature whatsoever (including any proceeding under the U.S. Bankruptcy Code) is instituted in connection with any controversy arising out of this Agreement or to interpret or enforce any rights or obligations hereunder, the prevailing party shall be entitled to recover attorney, paralegal, accountant, and other expert fees and all other fees, costs, and expenses actually incurred and reasonably necessary in connection therewith, as determined by the court or body at trial or on any appeal or review, in addition to all other amounts provided by law. If the City is required to seek legal assistance to enforce any term of this Agreement, such fees shall include all of the above fees, whether or not a proceeding is initiated. Payment of all such fees shall also apply to any administrative proceeding, trial, and/or any appeal or petition for review.

28.6. Nonwaiver. Failure by either party at any time to require performance by the other party of any of the provisions of this Agreement shall in no way affect the party's rights hereunder to enforce the same, nor shall any waiver by the party of the breach hereof be held to be a waiver of any succeeding breach or a waiver of this nonwaiver clause.

28.7. Severability. If any provision of this Agreement is found to be void or unenforceable to any extent, it is the intent of the parties that the rest of the Agreement shall remain in full force and effect, to the greatest extent allowed by law.

28.8. Modification. This Agreement may not be modified except by written instrument executed by ETA and the City.

28.9. Time of the Essence. Time is expressly made of the essence in the performance of this Agreement.

28.10. Calculation of Time. Except where the reference is to business days, all periods of time referred to herein shall include Saturdays, Sundays, and legal holidays in the State of Oregon, except that if the last day of any period falls on any Saturday, Sunday, or legal holiday observed by the City, the period shall be extended to include the next day which is not a Saturday, Sunday, or legal holiday. Where the reference is to business days, periods of time referred to herein shall exclude Saturdays, Sundays, and legal holidays observed by the City. Whenever a time period is set forth in days in this Agreement, the first day from which the designated period of time begins to run shall not be included.

28.11. Headings. Any titles of the sections of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.

28.12. Number, Gender and Captions. In construing this Agreement, it is understood that, if the context so requires, the singular pronoun shall be taken to mean and include the plural, the masculine, the feminine and the neuter, and that, generally, all grammatical changes shall be made, assumed, and implied to individuals and/or corporations and partnerships. All captions and paragraph headings used herein are intended solely for convenience of reference and shall in no way limit any of the provisions of this Agreement.

28.13. Good Faith and Reasonableness. The Parties intend that the obligations of good faith and fair dealing apply to this Agreement generally and that no negative inferences be drawn by the absence of an explicit obligation to be reasonable in any portion of this Agreement. The obligation to be reasonable shall only be negated if arbitrariness is clearly and explicitly permitted as to the specific item in question, such as in the case of where this Agreement gives the City “sole discretion” or the City is allowed to make a decision in its “sole judgment.”

28.14. Other Necessary Acts. Each party shall execute and deliver to the other all such further instruments and documents as may be reasonably necessary to carry out this Agreement in order to provide and secure to the other parties the full and complete enjoyment of rights and privileges hereunder.

28.15. Interpretation. As a further condition of this Agreement, the City and ETA acknowledge that this Agreement shall be deemed and construed to have been prepared mutually by each party and it shall be expressly agreed that any uncertainty or ambiguity

existing therein shall not be construed against any party. In the event that any party shall take an action, whether judicial or otherwise, to enforce or interpret any of the terms of the Agreement, the prevailing party shall be entitled to recover from the other party all expenses which it may reasonably incur in taking such action, including attorneys' fees and costs, whether incurred in a court of law or otherwise.

28.16. Entire Agreement. This Agreement and all documents attached to this Agreement represent the entire agreement between the parties.

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

28.18. Authority. Each party signing on behalf of ETA and the City hereby warrants actual authority to bind their respective party.

The ETA and the City hereby agree to all provisions of this Agreement.

CONSULTANT:

CITY:

ETA PHI SYSTEMS, INC.,
dba ETA Transit Systems, Inc.

CITY OF WILSONVILLE

By: _____
John P. Maglio
As Its: President

By: _____
Bryan Cosgrove
As Its: City Manager

Employer I.D. No. _____

APPROVED AS TO FORM:

ATTESTED TO:

Barbara A. Jacobson, Assistant City Attorney
City of Wilsonville, Oregon

Sandra C. King, MMC, City Recorder
City of Wilsonville, Oregon

Exhibit A: ETA Scope of Services

This Scope of Services incorporates by reference as if fully set forth herein the ETA Proposal (“Proposal”).

1. HARDWARE AND SOFTWARE

ETA will provide the hardware and software for the implementation of the City of Wilsonville’s South Metro Area Regional Transit (SMART) System Integrated Technology Project as outlined beginning on **page 5 through page 9** in the ETA Request for Proposal response under the heading **System Description (hardware and software)**.

2. SYSTEM FUNCTION

ETA will activate and grant the City 24/7 access to ETA’s SPOT® (Fleet Management Web Application), Engraph’s ParaPlan (Dial-A-Ride Management Software Web Application), email and phone support, software upgrades, daily account monitoring, and all associated wireless data charges – which together will provide the City with the system functionality described beginning on **page 9 through page 17** of the ETA Request for Proposal response under the heading **Central Office Systems**.

The City has opted not to contract for the optional items outlined on **page 17** of the ETA Request for Proposal response under the heading **Optional Items**.

3. RELIABILITY REQUIREMENTS

The City and ETA recognize that no system will run perfectly all the time but that the system must be reliable and when there are failures or delays those issues must be addressed promptly. The parties, therefore, have agreed to the reliability requirements and performance guarantees outlined in the Service Level Agreement, attached to the Agreement as **Exhibit B**.

4. SECURITY AND ACCESS OBLIGATIONS

The City and ETA acknowledge that security is a mutual responsibility and that each party has an important role and responsibility in ensuring the ETA system can be accessed and is secure for all users and data. The Agreement, including the Service Level Agreement (Exhibit B), sets forth the security requirements and responsibilities of ETA and the City.

5. SUPPORTABILITY REQUIREMENTS

The ETA system will meet the following minimum supportability requirements:

- Data can be downloaded into a format that is compatible with the current and prior Microsoft Office spreadsheet, Word, or other related office format or its successor program.
- 100% compliant with the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which includes meeting the required physical, network, data, and process security measures to handle Protected Health Information (PHI).
- Data will be stored in “live” database tables as outlined in the ***Service Level Agreement, Exhibit B*** of the Agreement.

6. IMPLEMENTATION AND SCHEDULE

Implementation will occur as set forth in **pages 18 through 22** of the initial ETA Request for Proposal response beginning with the heading **Roles and Responsibilities**.

The Implementation Schedule, including milestone and testing dates, is outlined in the table on page 4 of this Exhibit.

ETA will provide any maintenance updates to the system that ETA/Engraph may release to improve or maintain the stability of the system at no charge for the life of the Agreement.

7. COST

All parties have agreed to the Base System Costs of \$285,999.00. All fees and charges, including the annual system license and user fee, are fixed for the term of the Agreement. The City agrees that invoices shall be submitted based on the Milestone Schedule outlined below. ETA understands that the City is using federal funds and cannot make advance payment. All invoices must include a documentation of actual costs incurred with a not-to-exceed amount per milestone. (Incurred costs are expenses that have been incurred during the course of business in the implementation of the Project, and are a liability until paid. Materials purchased and hours worked, etcetera, would all qualify as incurred costs.)

8. IMPLEMENTATION TIMELINE AND PAYMENT SCHEDULE

Key milestone dates and the associated payment schedules are shown on page 3 of this Exhibit.

A milestone will not be considered complete and payment will not be made until a formal (in writing) notice of acceptance for that milestone has been provided by the City’s Project Manager. The City agrees to review and test the system for acceptance as outlined in the Implementation Schedule on page 4 of this Exhibit. Acceptance of a milestone will not be unreasonably withheld.

MILESTONE PAYMENT SCHEDULE TABLE

Milestone	Description	Line #	Amount	Estimated Milestone
1	NTP, 100% of Hardware and SPOT	1, 2, 13	\$ 33,000.00	9/10/15
2	DAR Dispatch Site License and Paperless Log Module	7, 12	\$ 38,500.00	9/15/15
3	Installation, Installation Travel, and Shipping	10, 11, 22	\$ 31,000.00	10/29/15
4	CAD/AVL Site License	13	\$ 35,000.00	11/13/15
5	Automatic On Board Announcements	9	\$ 29,999.00	12/7/15
6	Annual System License and User Fee: <ul style="list-style-type: none"> DAR dispatch software annual maintenance; \$2,500.00 Annual rider alerts integration; \$5,000.00 CAD/AVL dispatch software annual maintenance; \$16,200.00 	23, 24, 25	\$ 23,700.00	Billed Monthly; \$1,975.00 DAR dispatch: \$2,500 x 12 mos. = \$208.33 Annual Rider Alerts: \$5,000 x 12 mos. = \$416.66 CAD/AVL monthly recurrings: \$16,200 x 12 mos. = \$1,350.00
7	Annual System License and User Fee: <ul style="list-style-type: none"> DAR dispatch software annual maintenance; \$2,500.00 Annual rider alerts integration; \$5,000.00 CAD/AVL dispatch software annual maintenance; \$16,200.00 	23, 24, 25	\$ 23,700.00	Billed Monthly; \$1,975.00 DAR dispatch: \$2,500 x 12 mos. = \$208.33 Annual Rider Alerts: \$5,000 x 12 mos. = \$416.66 CAD/AVL monthly recurrings: \$16,200 x 12 mos. = \$1,350.00
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		Total	\$ 285,999.00	

IMPLEMENTATION SCHEDULE

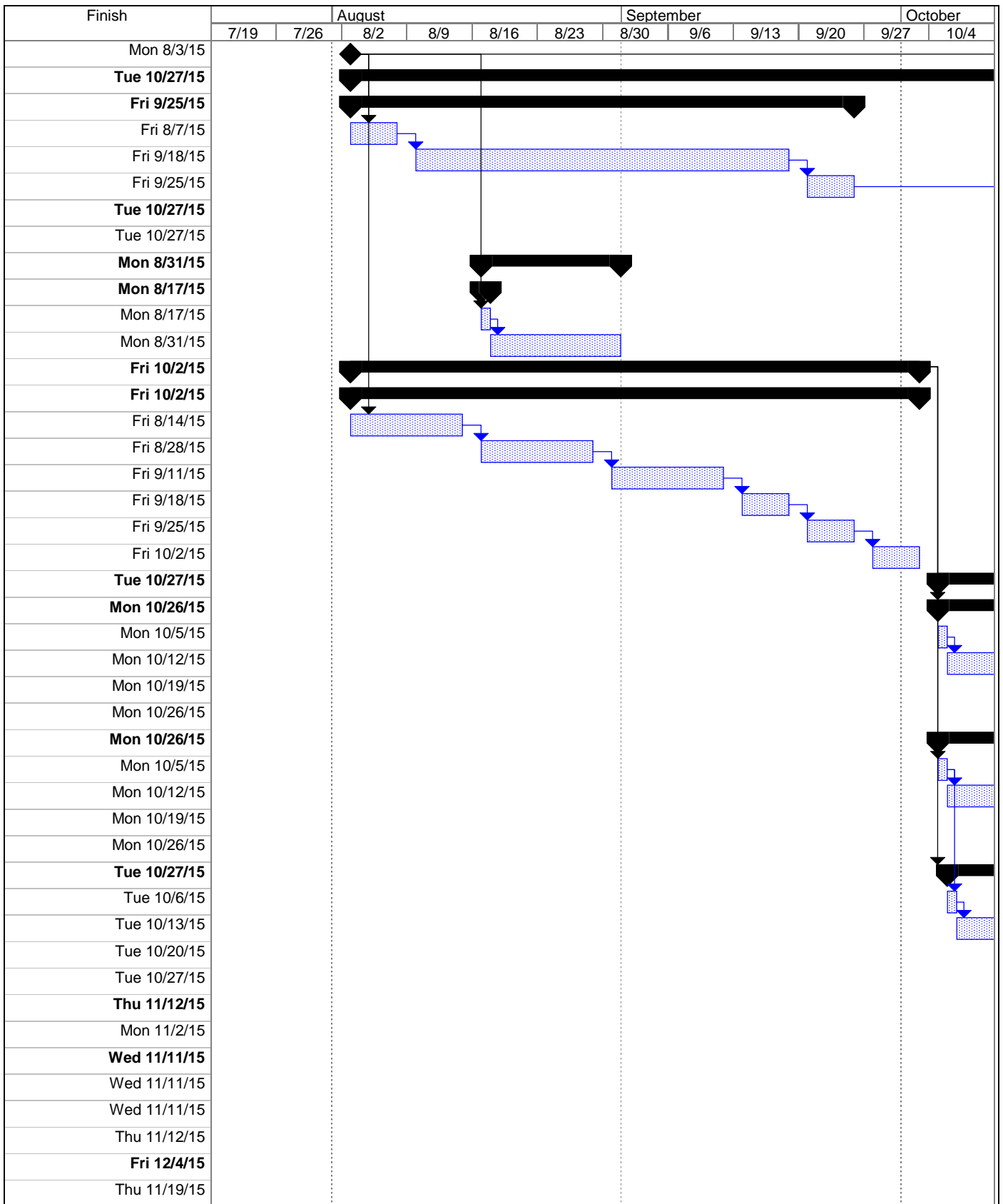
ID	Task Name	Duration	Start
1	NOTICE TO PROCEED	0 days	Mon 8/3/15
2	MATERIAL	62 days	Mon 8/3/15
3	Vehicle Logic Unit (VLU) / Mobile Data Terminal (MDT)	40 days	Mon 8/3/15
4	Order VLUs/MDTs from supplier	5 days	Mon 8/3/15
5	MDTs received from supplier	30 days	Mon 8/10/15
6	Incoming Inspection of VLUs/MDTs	5 days	Mon 9/21/15
7	Kit/Ship Material to Customer	2 days	Mon 10/26/15
8	Kit/ship VLU/MDTs to customer	2 days	Mon 10/26/15
9	CONFIGURE FIXED BUS ROUTES	11 days	Mon 8/17/15
10	Customer-Furnished Information	1 day	Mon 8/17/15
11	Turn-by-turn directions for each route	1 day	Mon 8/17/15
12	Configure All Fixed Bus Routes	10 days	Tue 8/18/15
13	SOFTWARE DEVELOPMENT (BASE SYSTEM)	45 days	Mon 8/3/15
14	Software Configuration, Base System	45 days	Mon 8/3/15
15	MDT Software	10 days	Mon 8/3/15
16	Import Back Office System Requirements	10 days	Mon 8/17/15
17	Paratransit Scheduling Software	10 days	Mon 8/31/15
18	Fixed Route CAD/AVL Software	5 days	Mon 9/14/15
19	Traveler Information System - Web Site	5 days	Mon 9/21/15
20	Traveler Information System - Smartphone App	5 days	Mon 9/28/15
21	SYSTEM DOCUMENTATION	17 days	Mon 10/5/15
22	System Design Document (SDD)	16 days	Mon 10/5/15
23	Submit SDD for review and approval	1 day	Mon 10/5/15
24	Customer review of SDD	5 days	Tue 10/6/15
25	Revise and resubmit SDD	5 days	Tue 10/13/15
26	Customer approval of SDD	5 days	Tue 10/20/15
27	System Acceptance Test Plan (SATP)	16 days	Mon 10/5/15
28	Submit SATP for review and approval	1 day	Mon 10/5/15
29	Customer review of SATP	5 days	Tue 10/6/15
30	Revise and resubmit SATP	5 days	Tue 10/13/15
31	Customer approval of SATP	5 days	Tue 10/20/15
32	Installation and Test Plan (ITP)	16 days	Tue 10/6/15
33	Submit ITP for review and approval	1 day	Tue 10/6/15
34	Customer review of ITP	5 days	Wed 10/7/15
35	Revised and resubmit ITP	5 days	Wed 10/14/15
36	Customer approval of ITP	5 days	Wed 10/21/15
37	INSTALL AND TEST MATERIAL AND CORE SYSTEM SOFTWARE	11 days	Thu 10/29/15
38	Configure Local Computers for Software Access	3 days	Thu 10/29/15
39	Bus Installation and Test	10 days	Thu 10/29/15
40	Physical Installation	10 days	Thu 10/29/15
41	Static Testing	10 days	Thu 10/29/15
42	Installation Complete	1 day	Thu 11/12/15
43	BASE SYSTEM INTEGRATION, TEST AND COMMISSIONING	16 days	Fri 11/13/15
44	Operations and Maintenance Training	5 days	Fri 11/13/15

Project: ETA_SMART Schedule 2015 Date: Mon 6/29/15	Task		Rolled Up Progress	
	Progress		Split	
	Milestone		External Tasks	
	Summary		Project Summary	
	Rolled Up Task		Group By Summary	
	Rolled Up Milestone		Deadline	

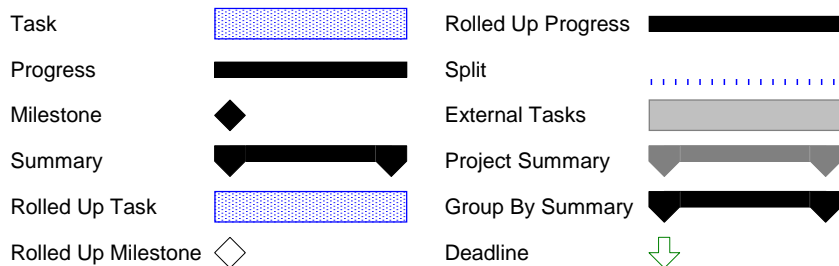
ID	Task Name	Duration	Start
45	Dynamic vehicle testing	15 days	Fri 11/13/15
46	Begin Operation of Integrated System	1 day	Fri 12/4/15
47			
48	PHASE II - OBA & Customization	33 days	Mon 12/7/15
49	On-board Announcements	33 days	Mon 12/7/15
50	Provide Recording Guidelines to City	1 day	Mon 12/7/15
51	Record Sample Audio	5 days	Tue 12/8/15
52	Review Sample Audio	5 days	Tue 12/15/15
53	Record Entire Audio Suite	20 days	Tue 12/22/15
54	Configure Audio Trigger Zones	5 days	Tue 12/8/15
55	Configure OBA Route Configuration Module	10 days	Tue 12/15/15
56	Configure Ad-hoc Announcements Module	10 days	Tue 12/29/15
57	Deploy Files to VLU	2 days	Tue 1/12/16
58	Remote Testing (with local support from City)	5 days	Thu 1/14/16
59	Website / Social Media Integration Customization	11 days	Mon 12/7/15
60	Review Requirements Document with City	1 day	Mon 12/7/15
61	Develop Customizations	2 wks	Tue 12/8/15
62	System Testing (lab)	3 days	Mon 12/7/15
63	Remote Testing (with local support from City)	3 days	Thu 12/10/15
64	Final Deployment	3 days	Tue 12/15/15
65	Electronic Passenger Counting Module (EPC) Customization	31 days	Mon 12/7/15
66	Review Requirements Document with City	1 day	Mon 12/7/15
67	Update Database	3 days	Tue 12/8/15
68	Update MDT Software	20 days	Tue 12/8/15
69	System Testing (lab)	3 days	Tue 1/5/16
70	Deployment (to a few buses)	1 day	Fri 1/8/16
71	Remote Testing (with local support from City)	3 days	Mon 1/11/16
72	Final Deployment	3 days	Thu 1/14/16

Project: ETA_SMART Schedule 2015
Date: Mon 6/29/15

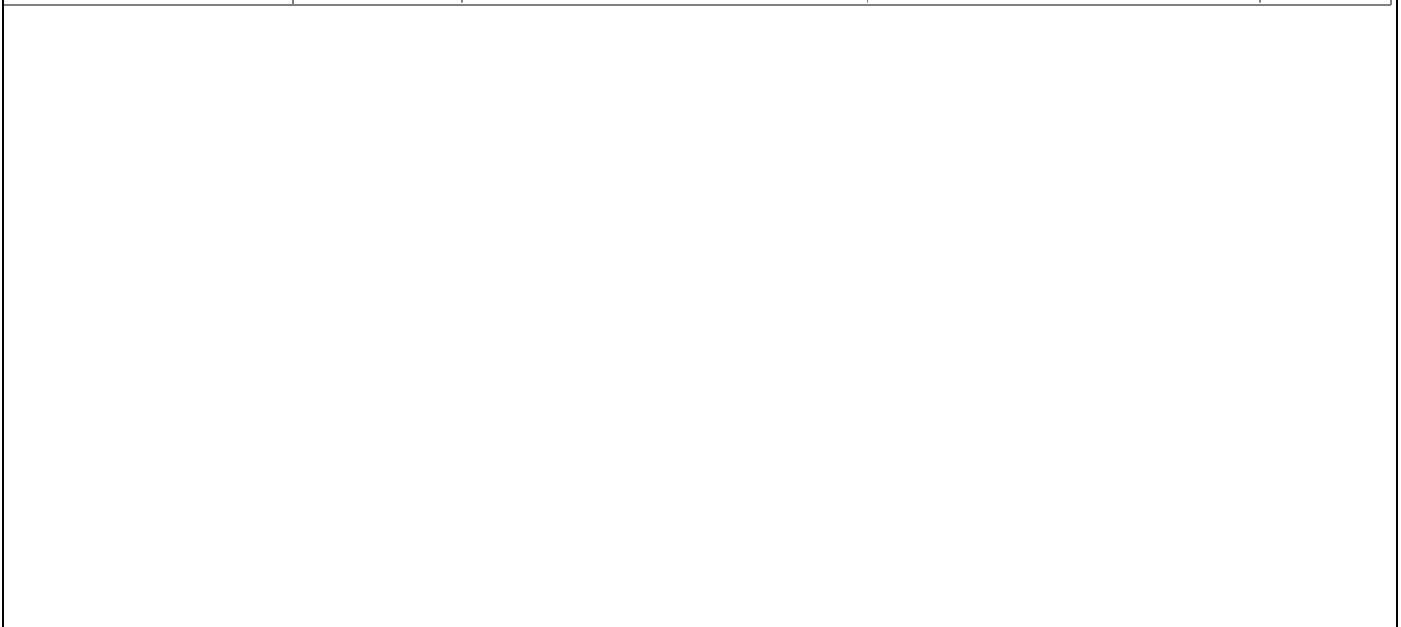
Task		Rolled Up Progress	
Progress		Split	
Milestone		External Tasks	
Summary		Project Summary	
Rolled Up Task		Group By Summary	
Rolled Up Milestone		Deadline	



Project: ETA_SMART Schedule 2015
Date: Mon 6/29/15



Finish	August						September					October
	7/19	7/26	8/2	8/9	8/16	8/23	8/30	9/6	9/13	9/20	9/27	10/4
Thu 12/3/15												
Fri 12/4/15												
Wed 1/20/16												
Wed 1/20/16												
Mon 12/7/15												
Mon 12/14/15												
Mon 12/21/15												
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Mon 1/18/16												



Project: ETA_SMART Schedule 2015 Date: Mon 6/29/15	Task		Rolled Up Progress	
	Progress		Split	
	Milestone		External Tasks	
	Summary		Project Summary	
	Rolled Up Task		Group By Summary	
	Rolled Up Milestone		Deadline	

Exhibit B: Service Level Agreement (SLA)

1. INTRODUCTION

This Service Level Agreement (SLA) describes the levels of service that the City will receive from ETA and ETA's subcontractor, EnGraph.

2. PURPOSE

The City's South Metro Area Regional Transit (SMART) Department depends on equipment, software, and services (together the "System") that are provided, maintained, and supported by ETA/EnGraph. Some of these items are of critical importance to the City.

This SLA sets out what levels of availability and support the client is guaranteed to receive for the System as well as defining the services and support that are not ETA's responsibility. It also explains what penalties will be applied to ETA should it fail to meet the required service levels.

3. DATES AND REVIEWS

The Agreement begins at notice to proceed and will run for the duration of the Agreement to which this SLA is attached. It may be reviewed and modified, at any point, by mutual written agreement.

4. RESPONSIBILITIES

GENERAL RESPONSIBILITIES – ETA

ETA will provide and maintain the System. Additionally, ETA will:

- (a) Ensure relevant software, services, and equipment are available to the City in line with the uptime levels listed in the Agreement.
- (b) Respond to support requests within the response times listed in this SLA.
- (c) Take steps to escalate and resolve issues in an appropriate, timely manner.
- (d) Maintain good communication with the City at all times.

GENERAL RESPONSIBILITIES – THE CITY

The City will use the ETA-provided System as intended. Additionally, the City will:

- (a) Notify ETA of issues or problems in a timely manner.
- (b) Provide ETA with access to equipment, software, and services for the purposes of maintenance, updates, and fault prevention.
- (c) Maintain good communication with ETA at all times.
- (d) Assist ETA with troubleshooting and on-site installation and configuration as reasonably requested by ETA.
- (e) Adequately maintain on-board equipment by performing routine inspections and basic maintenance to keep the physical hardware and cabling in good working order.

5. SECURITY AND ACCESS OBLIGATIONS

The parties acknowledge that security is a mutual responsibility and that each party has an important role and responsibility in ensuring the ETA System can be accessed and is secure for all users and data. As such the two parties have agreed to the following:

THE CITY

- a) The City is responsible for acquiring Internet access via an Internet Service Provider in order to access ETA's online SPOT Server.
- b) The City is responsible for the security of the City's computer system and for making a reasonable and good faith effort to ensure that only authorized persons have access to the ETA System from the City's computer system.
- c) The City is responsible for ensuring that the City's password and all other means and methods of access to the System are kept absolutely confidential.
- d) The City is responsible for ensuring that any telephone numbers or any information relating to the System, the security of the System, the encryption methods used and all or any other security features are kept absolutely confidential.
- e) The City is responsible for ensuring that the use of the System by the City is under the control and authority of only proper and adequately trained employees.
- f) SMART will install, use, maintain, and remove the hardware according to ETA's specifications. City staff or its contractors may remove, replace, reinstall, or reconnect hardware but will not alter or reconfigure the hardware itself during the term of the Agreement. The City agrees and understands that unauthorized tampering with hardware may void all warranties, unless otherwise agreed by ETA. Except for ordinary wear and tear and defects covered by the limited warranty, the City is responsible for all hardware damaged, destroyed, lost, or stolen while in the City's possession.

ETA

- a) ETA is responsible for ensuring that the System is working properly and in accordance with the performance guarantees agreed to in this SLA.
- b) ETA is responsible for ensuring access to and security of the City's data in the System, both during the term of the Agreement and until disposition of the data, in accordance with the requirements set forth for data storage and retention at termination of the Agreement.
- c) In the event of a System breach, ETA will abide by the notification and remediation procedures established by HIPAA and Oregon Revised Statute 646A.604 Notice of Breach of Security to Consumer. Where there is a conflict, the more stringent in favor of the consumer will prevail. ETA will notify the City by the most expedient communication method available, and also in writing, of any security breach no more than 72 hours after ETA's discovery of the breach.

6. EQUIPMENT, SOFTWARE, AND SERVICES

ETA will provide hardware and software for the implementation of the System as outlined in the initial ETA Proposal under the **System Description** (hardware and software) section. This will include 24/7 access to ETA's SPOT® (Fleet Management Web Application), mobile data terminal, and GPS location software integrated with SPOT, Android, and iOS versions of the SPOT mobile

rider application and EnGraph’s ParaPlan software. ETA will further provide bug fixes, firmware updates, upgrades, and new releases of all applications, as set forth in the ETA proposal.

ETA will provide the City with installation, activation, training, access to ETA’s SPOT® (Fleet Management Web Application) and EnGraph’s ParaPlan application, email and phone support, software upgrades, daily account monitoring, and all associated wireless cellular data service, provided the City is not in breach of any obligation under the Agreement.

7. RELIABILITY REQUIREMENTS / PERFORMANCE GUARANTEES

The parties recognize that no system will run perfectly at all times but that the System must be reliable and, when there are failures or delays, those issues must be addressed promptly. The parties, therefore, agree that the following are reasonable reliability requirements and performance guarantees and, if not met, the remedies set forth herein are fair and reasonable to address such failures.

8. GUARANTEED UPTIME

SERVER UPTIME LEVELS

In order to enable the City to do business effectively; ETA guarantees that certain items will be available for a certain percentage of time. These uptime levels apply to **software and services (System)** in the Agreement. The level of guaranteed uptime depends on the priority level of each item and the severity of the outage.

ETA warrants that the System will be accessible for use at all times, except during the agreed upon maintenance windows shown in Table 1 and emergency repairs, as outlined in the Measurement section below. No more than three (3) hours of downtime will be allowed in any given month during the term of the Agreement. If the System inaccessibility is greater than three (3) hours in any month, ETA shall provide the City with a credit calculated as a percentage of a month’s worth of subscription fee, in accordance with Table 2.

TABLE 1

Approved maintenance hour windows are as follows (PST):

12am to 4am Tuesday – Saturday
8pm Saturday to 4am Monday
Published SMART holidays – all days

These times are subject to change, based on changes to SMART’s operating schedule, with 30 days’ written notice from the City.

TABLE 2

Minutes of Downtime	Percentage of Credit
181 - 240	5
241 - 300	10
301 - 360	20
361 - 420	30
Greater than 420	40

MEASUREMENT

Uptime is defined as the server being accessible and operational, over each calendar month. It is calculated to the nearest minute.

ETA and the City agree that software defects are not a measure of uptime calculations and shall not be used as a measure to calculate any credit due to the City except in such cases where a software defect is so impactful that it causes the administrative console (for both fixed route and dial-a-ride ParaPlan software) and/or public tracking website and/or mobile phone application to be substantially inoperable.

Uptime measurements exclude periods of routine maintenance conducted during the approved maintenance windows. The City and ETA agree that ETA can and will utilize the approved maintenance windows to maintain the System without express permission from the City. The City and ETA also agree that extenuating circumstances may arise whereby ETA will need to perform emergency maintenance outside maintenance window times. ETA will notify the City if the resolution of such an event is likely to impact System accessibility for greater than thirty (30) minutes, and such emergency events will be counted as downtime if they occur more than three (3) times in a month. It is the City's expectation that ETA has implemented basic fault tolerance and server replication measures to mitigate the impact of emergency maintenance.

9. GUARANTEED RESPONSE TIMES

When the City raises a support issue with ETA, ETA promises to respond in a timely fashion. ETA is deemed to have responded when it has replied to the City's initial request. This may be in the form of an email and, optionally, a telephone call, to either provide a solution or request further information.

Guaranteed response times depend on the severity of the issue and apply during SMART's working hours only. Guaranteed response times are shown in Table 3:

TABLE 3

Severity Level	Response Time
Fatal	90 minutes
Severe	120 minutes
Medium	1 day
Minor	3 days

SEVERITY LEVELS

The severity levels shown in Table 3 and 4 are defined below. For the purposes of these definitions, Dial-a-ride system functionality is considered critical to business operation.

- **Fatal:** Complete degradation — **all users and critical functions affected.** Item or service completely unavailable, including but not limited to:
 - Administrative console server (for both fixed route and dial-a-ride ParaPlan software) is unreachable by all SMART users.
 - The administrative console software (for both fixed route and dial-a-ride ParaPlan software) is accessible, but there is no telematics data being presented to the user.
- **Severe:** Significant degradation — **large percentage of users or critical functions affected,** including but not limited to:
 - Public website and/or mobile/native app is unreachable or does not render the map and/or routes.
- **Medium:** Limited degradation — **limited number of users or non-critical functions affected.** Business processes can continue. These may include but are not limited to the following:
 - Non-functioning Mobile Data Terminal (MDT).
 - Non-functioning MDT software module.
- **Minor:** Small degradation — **one user affected.** Business processes can continue.
 - Any software defect that does not drastically impact critical business functions.

MEASUREMENT AND PENALTIES

Response times are calculated by the elapsed time between when an issue is submitted (example: originating email time stamp) to the time that ETA acknowledges receipt of the submission (example: email reply time stamp or time of telephone call).

The City and ETA agree that issues shall be formally submitted via email to support@etatransit.com and, in addition, optionally, a telephone call to ETA’s Assistant Project Manager, Mr. James Warren, at 561-322-0878. The City can, at its discretion, also contact ETA’s Project Manager, Mr. John Maglio, at 561 314 5660, or Mr. Stephen Gunning.

ETA's reply must include, at a minimum, a phone call to the submitter of the issue and/or an email to the submitter of the issue and the City's project manager. This acknowledgement must be made by ETA staff; auto-replies shall not be accepted.

Response times are measured during SMART's working hours only. For instance, if an issue is reported at the end of SMART's workday, with a response time of sixty (60) minutes, ETA has until an hour after SMART's opening of business the following day to respond.

If ETA fails to meet a guaranteed response, except in cases of a Force Majeure event, a penalty will be applied in the form of a credit for the City to the annual subscription fee.

The level of penalty will be calculated depending on the number of hours by which ETA missed the response time, minus the downtime permitted by the SLA. Response time penalties in any month are capped at 50% of the total monthly fee.

TABLE 4

Severity level	Penalty per hour (Pro-rated to nearest minute)
Fatal	5% of total monthly fee
Severe	2% of total monthly fee
Medium	1% of total monthly fee

10. RESOLUTION TIMES

ETA will always endeavor to resolve problems as swiftly as possible. ETA recognizes that the System is key to the City's business and that downtime can cost money. The City and ETA agree that ETA is unable to guarantee resolution times, as the nature and causes of issues can vary greatly.

Additionally, at times, ETA will depend on support from the City to resolve issues, requesting the City's Fleet maintenance personnel to participate in troubleshooting and equipment re-installation.

In all cases, ETA will make its best effort to resolve problems as quickly as possible and will also provide frequent progress reports to the City. ETA understands that, excluding a Force Majeure event, failure to resolve a Fatal issue within 72 hours of notification by the City, or a Severe issue within 120 hours, may constitute a Default under the Agreement. If the parties cannot come to an agreement with respect to the severity of the issue, the amount of resulting downtime to be credited to the City, or whether the failure constitutes a Default, the parties will employ the dispute resolution process set forth in the Agreement at Section 14.14.

11. DATA STORAGE

The City has a duty to retain data for the duration of Oregon Public Records Law requirements, but the City also understands that data retention and storage can be costly for the System provider. The data storage requirements below reflect the City's desire to find a workable and equitable balance for both the City and ETA.

- (a) The City understands that unless the City purchases data retention services, ETA will have the right to purge all data submitted by the City on a schedule not less than two hundred (200) days.
- (b) The City shall be solely responsible for printing data and inspection reports for vehicles involved in an accident.
- (c) ETA will provide, at no additional charge, the ability for the City to download and store the data, in whatever increment (day, week, month, 90 days, etc.) the City requires, so long as that data currently resides in the “live” database, to a format that will allow the City to view and analyze the data in the same manner in which it can be viewed, analyzed, and reported on from the “live” database.
- (d) ETA will honor any litigation holds that the City notifies them of, and provide up to thirty (30) days of additional storage to assist the City in complying with the issued hold.

12. WIRELESS DATA POLICIES

- (a) The City understands and agrees that the City will have no contractual relationship with the wireless carrier selected by ETA for this System.
- (b) ETA agrees that it will only procure a wireless carrier for the System after physical testing by ETA and the City of the wireless carrier coverage to ensure that the carrier selected provides adequate service in the SMART operating areas (Wilsonville to Salem and Wilsonville to Portland).
- (c) Although the City understands and agrees that the underlying wireless carrier will be a subcontractor of ETA and does not have a contractual relationship with the City, if there are problems with service, the City and ETA will communicate with the wireless carrier to resolve the problem and, if the problem cannot be resolved to the reasonable satisfaction of the City, ETA agrees that it will take prompt action to find another more reliable wireless service provider. As long as ETA diligently works inclusively with the City to find another wireless service provider, ETA shall not be liable to the City and shall not be deemed in Default of the Agreement. When a wireless carrier is found that is acceptable to the City, recognizing there will be some cost involved in changing carriers, the City and ETA agree to share equally in both the equipment cost and the monthly service fee, but with the City’s contribution capped at Ten Thousand Dollars (\$10,000) and ETA being responsible for all costs in excess of that amount.
- (d) Subject to FCC Number portability rules, the City has no property or other rights in any Number assigned to it and the City understands that any such Number can be changed from time to time.
- (e) The City agrees that ETA and/or the wireless carrier shall not be responsible for interruption of service due to any outage or action caused by the City or caused by a Force Majeure event.
- (f) The City understands and agrees that the liability and obligation of ETA to the City for services may be controlled and limited by a wireless carrier’s tariff, if any, and the laws, rules, and regulations of the Federal Communications Commission and other United States or foreign governmental authorities which from time to time have jurisdiction.

- (g) In no event shall ETA and/or the wireless carrier be liable for the failure or incompatibility of any equipment utilized by the City in connection with service unless it was installed as a part of the System by ETA or deemed compatible by ETA at the time of installation.

13. DATA OWNERSHIP

Except for data subject to HIPAA, which must be protected in strict accordance with all HIPAA laws, the City grants ETA the right to other data submitted to the System for any lawful purpose and to create compilations of such data as long as ETA will not identify the data source as being from the City nor portray the data in such a manner as to identify the City or convey any personally identifying information of the City customers or personnel. The City agrees that ETA shall own all above-referenced compilations of the data created by or for ETA.

All data created in the course of the City's use of the System is subject to Oregon Public Records Laws and Disclosures and is owned exclusively by the City, excluding the above-referenced compilations created by ETA.

14. EXCLUSIONS

This SLA is written in a spirit of partnership. ETA will always do everything possible to rectify every issue in a timely manner. However, there are a few exclusions. This SLA does not apply to software, equipment, or services not purchased via or managed by ETA.

Additionally, this SLA does not apply when:

- (a) A problem has been caused by using equipment, software, or service(s) in a way that is not recommended.
- (b) The City has made unauthorized changes to the configuration or set up of affected equipment, software, or services.
- (c) The City has prevented ETA from performing required maintenance and updated tasks.
- (d) An issue has been caused by unsupported equipment, software, or other services.
- (e) The City is in breach of its contract with ETA for any reason (e.g., late payment of fees).

15. TERMINATION PROCEDURES

Upon termination of the Agreement, whether by natural contract completion or due to cause, the following will apply:

- (a) Notice of termination of the Agreement must be given by the City or ETA no less than ninety (90) days prior to the Agreement expiration, unless termination is due to Default.
- (b) Ninety (90) days prior to the termination of the Agreement, ETA agrees to assist the City in extracting and/or transitioning all data from the "live databases" into the format determined by the City.
- (c) Upon termination, ETA agrees to removal of the System software from City-owned hardware, such as the mobile data terminals, to enable the City to reuse the hardware in a replacement system.
- (d) ETA agrees to retain the City's data no less than ninety (90) days after termination of the Agreement and to guarantee erasure of the City's data within one hundred twenty (120) days after Agreement termination. ETA will provide the City with a written statement confirming the erasure of the City's data within thirty (30) days from the date of erasure.