

**SOFTWARE AS A SERVICE AGREEMENT**

**FOR**

**DHS UTILITY SERVICE APPLICATION**

STATE OF TEXAS           §  
  §  
COUNTY OF BEXAR       §

This Software as a Service Agreement (Agreement) is entered into by and between the City of San Antonio, a Texas Municipal Corporation ("City") and Kinetech Cloud, LLC by and through Michael Guido, its Chief Executive Officer ("Kinetech"), both of which may be referred to herein collectively as the "Parties".

The Parties hereto severally and collectively agree, and by the execution hereof are bound, to the mutual obligations herein contained and to the performance and accomplishment of the tasks hereinafter described.

**I. DEFINITIONS**

As used in this Agreement, the following terms have meanings as set out below:

- 1.1 "Application Software" means the DHS Utility Service Application Software and user interfaces made available to City by Kinetech as part of the Service, including upgrades and enhancements later added. Application Software may contain third-party components licensed to Kinetech.
- 1.2 "Base Components" means the hardware and hosting environment that Kinetech makes available for use by City as part of the Service.
- 1.3 "Bug Fixes" are corrections to the code that are necessary to make the System operate in accordance with the technical specifications contained in this Agreement, Minimum Functional Requirements, Upgrades and Enhancements.
- 1.4 "City" is defined in the preamble of this Agreement and includes its successors and assigns.
- 1.5 "Cloud Hosting" means the provision of products and services in a hosted, virtualized environment, accessible via the internet.
- 1.6 "Director" shall mean the director of City's Finance Department, or said director's designee.
- 1.7 "Enhancements" means changes to the System that add functionality at City's request that was not in the original specifications or Minimum Functional Requirements.
- 1.8 "Infrastructure Support Services" shall mean the support provided by Kinetech for the maintenance and stability of the Base Components.
- 1.9 "Kinetech" is defined in the preamble of this Agreement and includes its successors and assigns.
- 1.10 "Maintenance" means Support and Bug Fixes to the System. Maintenance does not include Enhancements.
- 1.11 "Residents" are City clients who will use the Service to apply to the City for utility credit assistance.

- 1.12 "Service" or "Services" means the combined Cloud Hosting, Application Software, Infrastructure, Infrastructure Support Services, Maintenance and Support services provided by Kinetech to City primarily via an Internet site or another designated IP address.
- 1.13 "Service Materials" means the written materials relating to the operation and use of the Application Software, including, but not limited to, user manuals, user guides, technical manuals, release notes, and online help files regarding use of the Application Software provided as part of the Service, and any other materials prepared in connection with any Kinetech Application Software modification, correction, or Enhancement, and shall include any updated versions of Service Materials as may be provided by Kinetech from time to time (1) in the course of providing the Service; and (2) as part of an online tutorial or help files provided with the Service, if any.
- 1.14 "Support" means assistance provided by Kinetech to City by telephone or e-mail during City's regular business hours to answer questions regarding the use of the System.
- 1.15 "System" means the DHS Utility Service Application Software, consisting of the Application Software and related Infrastructure referred to in this Agreement.
- 1.16 "Upgrades" means changes to the System that become necessary to maintain security and performance.
- 1.17 "User(s)" means City's employees, representatives, consultants, contractors or agents who are authorized to use the Service and have been supplied user identifications and passwords by City or on City's behalf.

## **II. TERM**

- 2.1 Unless sooner terminated in accordance with the provisions of this Agreement, the term of this Agreement shall commence on November 21, 2018 ("Effective Date") and terminate on November 20, 2019 (Original License Term).
- 2.2 At City's option, this Agreement may be renewed and extended beyond the date stated above under the same terms and conditions for 1 additional 3 year period (Renewal Period One). Renewal Period One shall be in writing and provided to Kinetech no less than 60 days prior to the commencement of Renewal Period One and requires City Council approval by passage of an ordinance therefore. Thereafter, at City's option, this Agreement may be renewed and extended under the same terms and conditions for 2 additional 1 year periods (Renewal Periods Two and Three). The City's intent to renew for Renewal Periods Two and Three shall be in writing and provided to Kinetech no less than 60 days prior to the commencement of each respective renewal period and signed by Director, and shall not require additional City Council approval, provided sufficient funds are appropriated for the expenditures contemplated herein.
- 2.3 If funding for the entire Agreement is not appropriated at the time this Agreement is entered into, City retains the right to terminate this Agreement at the expiration of each of City's budget periods, and any additional contract period beyond the Original License Term is subject to and contingent upon subsequent appropriation.

## **III. LICENSE AND SCOPE OF SERVICES**

- 3.1 Kinetech agrees to provide the licenses and Services as defined in this Agreement and further described in this Article III Scope of Services in exchange for the compensation described in Article IV Compensation. Kinetech shall provide the licenses and Services to City throughout the term of this Agreement, and any renewals hereof.

3.2 All work performed by Kinetech hereunder shall be performed to the satisfaction of Director. The determination made by Director shall be final, binding and conclusive on all Parties hereto. In accordance with the cure provisions of this contract, Kinetech shall remedy the unsatisfactory work upon receipt of notice specifying the nature of the work performance determined to be unsatisfactory. Upon receipt of such notice from City, Kinetech shall promptly correct the unsatisfactory work to City's reasonable satisfaction. City shall be under no obligation to pay for any work performed by Kinetech, which is not satisfactory to Director. City shall have the right to terminate this Agreement, in accordance with Article VII. Termination, in whole or in part, should Kinetech's work not be satisfactory to Director; however, City shall have no obligation to terminate and may withhold payment for any unsatisfactory work, as stated herein, even should City elect not to terminate. City shall notify Kinetech in writing of any decision to withhold payment.

3.3 License. Kinetech grants City a paid-up, non-exclusive, non-transferable license for the DHS Utility Service Application Software and to use of the Service for the Original License Term, and for the Renewal Period(s) if exercised by City, for 100 City Users and unlimited Residents.

3.4 DHS Utility Service Application Software.

3.4.1 Background. On an annual basis, the City's Department of Human Services (DHS) provides over 8,000 households with emergency electric and water assistance. This is accomplished by determining client eligibility and then pledging utility credits to customer utility accounts to help bring accounts current and/or avoid disconnection of utilities. Low income families across the City face utility service disconnection, with peaks for assistance occurring during the extreme summer heat. Currently, residents requesting assistance are able to mail in or drop off paper applications with required documentation at a central location. However, the volume of paper applications received requires staff to sort through each application to determine program eligibility, and contact the customer via telephone to request missing information and to notify of status of application. Automating this process would dramatically enhance the customer experience with this service.

3.4.2 Technology Need. DHS requested Kinetech's assistance to create an electronic application that would allow a resident to: 1) apply for utility program assistance and attach required eligibility documentation; 2) automatically pre-screen for income and program eligibility; 3) provide updates on application status, including notifications if a document were missing; and 4) provide a final case summary upon completion. This portal would then transfer client data to a central database and allow a caseworker to easily process the pre-approved application for utility credit pledging.

3.4.3 Minimum Functional Requirements. Kinetech has designed the Application Software to meet City's Technology Need. Specifically, Parties agree that the Application Software shall meet the following Minimum Functional Requirements as of the effective date of this Agreement:

- Applicants shall be able to electronically submit the application and attach all supporting documentation specific to their application requirements, includes SAWS and CPS utility credits, in addition to Laterals to People (LTP), Plumbers to People (PTP), and Affordability Discount Program (ADP);
- Applicants shall receive automated notifications as their applications move through the approval process by program administrators;
- Applicants shall be able to electronically appeal the decision if their applications are rejected;
- Program administrators shall be able to electronically review applications for completeness, and make a decision, and respond to appeals;
- Applications will integrate with City's REST / JSON web service for address verification, census tract, and City Council District;

- The Application Software shall work across device types, including desktop computers, smart phones and tablets (mobile devices), including, but not limited to those using Android or Apple operating systems;
- The Application Software will provide basic reporting, including the number of applications submitted per month, the status of those applications, the average number processed / funds credited.

3.4.4 Not Included in Minimum Functional Requirements. Parties acknowledge that the following is not included in the Minimum Functional Requirements at this time:

- Meeting the Americans with Disabilities Act (ADA) Guidelines;
- Additional Reporting Functionality. City intends to continue to support paper processes, so, to the extent that City does so, any Application Software reports will be incomplete.

3.4.5 Additional Functional Requirements. Kinotech shall provide the additional Minimum Functional Requirements stated below within one month of the effective date of this Agreement, or as provided per the specific requirement below, whichever shall occur first. If no time period for compliance is stated, Kinotech shall provide a demonstration that the Application Software meets the Additional Functional Requirements stated below within one month of the effective date of this Agreement, unless otherwise mutually agreed by the Parties, and make the new functionality available for use within one business day thereafter.

3.4.5.1 Spanish Language Version. City requires that the System be usable by Spanish speaking Residents. In order to facilitate programming to achieve this objective, Kinotech will provide City with an export of all system text from the application within one week of the effective date of this Agreement. City will provide the Spanish equivalent directly next to the text. Kinotech shall complete all programming required to create the Spanish language version of the Application Software within one week of receiving City's translations. Kinotech shall provide a demonstration of the Spanish language version no later than two weeks thereafter, unless a different period is mutually agreed to by both Parties. Within one business day of a satisfactory demonstration, Kinotech will make the Spanish language version available to Residents.

3.4.5.2 Allow Client Service Specialist (CSS) ability to update application (e.g. edit fields such as Social Security Number and correct misspellings)

3.4.5.3 Allow Client Service Specialist (CSS) ability to upload additional documents to Client's application

3.4.5.4 Allow Resident ability to upload multiple documents for any required document (CPS, SAWS, etc). Currently only supported for proof of income.

3.4.5.5 Update workflow validation when income is stated. Previously, the validation did not work for a situation where a person submitted more documents than people or had no documents to submit because they had no income.

3.4.5.6 Add ability to download PDF for approved/rejected/needs more information at any time.

3.4.5.7 Add Rejection comments to PDF. Previously only had rejection reason.

3.4.5.8 Add ability for COSA / DHS users to change their passwords.

3.4.5.9 Add ability for assigner to view all applications, how many are unassigned and include a tab for unassigned applications.

3.4.5.10 Require SAWS bill for PTP/LTP/ADP rather than only AUGA.

3.5 Infrastructure. In conjunction with the licensed Application Software, Kinetech shall provide sufficient Infrastructure to support the anticipated requirements of the System. The anticipated requirements are based on an estimate of 10,000 annual applications. Kinetech represents that the following Infrastructure, which it shall provide, is sufficient to meet City's needs based on the estimated quantity of annual applications:

- 1 Large Application Container
- 4 GB of RAM
- 4 GB Database RAM
- 2 Core Database CPU
- 20 GB Database Storage
- 20 GB File Storage
- 40 GB Backup
- Unlimited Network

Kinetech will notify City if increases in the Application usage demands additional resources. In such event, Kinetech will provide a quote for the cost of the additional resources, which City may purchase at its discretion, either through an amendment to this contract or independently. Kinetech hereby represents that no additional resources will be needed if the usage stays within 15,000 annual applications.

3.6 Services.

3.6.1 Cloud Hosting. Kinetech shall provide Cloud Hosting services to City throughout the Original License Term. If City elects to renew this Agreement, Kinetech shall provide Cloud Hosting services throughout the Renewal Period(s). All Services shall be provided in compliance with Attachment 1 – System Security Plan for Cloud Computing v2 6-26-18 and Attachment 2 – Cloud Security Assessment Guide v2 5-20-18, and all representations made therein. All data shall be encrypted and secured using industry best practices and in conformance with these Attachments.

3.6.2 Maintenance, Support and Infrastructure Support. Kinetech shall provide Maintenance, Support and Infrastructure Support Services throughout the Original License Term as provided in Attachment – 3 Service Level Agreement (SLA) at the Gold level and for each of the renewal terms at the Standard level, unless City purchases an upgrade to the Gold SLA level. If City elects to renew this Agreement, Kinetech shall provide Maintenance, Support and Infrastructure Support Services throughout the Renewal Period(s).

3.6.3 Enhancements. Kinetech shall provide Enhancements as requested by the City for the fees specified in Article IV.

3.6.4 Warranty. Kinetech warrants and represents that the System furnished pursuant to this Agreement is fit for the particular purposes described in this Agreement.

3.6.5 Return of Data. Within 20 days of termination or expiration of this agreement, Kinetech shall return City's data by providing the data electronically using an open source SQL database or CSV format. Data includes the information requested by DHS to process applications & supporting documentation.

3.6.6 Force Majeure. Neither Party shall be bound to fulfil any obligation under this Agreement if prevented from doing so by force majeure. Insofar as not already included, force majeure shall mean instances of strikes, company sit-ins, blockades, embargoes, government measures, war, revolution and/or any similar state, power failures, faults in

electronic communication lines, cable breaks, fires, explosions, water damage, lightning damage, natural disasters, flooding and/or earthquake.

#### IV. COMPENSATION TO KINETECH

##### 4.1 License and Service Fees.

4.1.1 Original License Term. City shall pay Kinetech a fee in the amount of \$48,500.00 for the Original License Term.

4.1.2 Renewal Period One. If City elects to renew this Agreement for Renewal Period One, City shall pay Kinetech a fee in the amount of \$30,500.00 per year for each year during Renewal Period One.

4.1.3 Renewal Period Two. If City elects to renew this Agreement for Renewal Period Two, City shall pay Kinetech a fee in the amount of \$33,500.00 for Renewal Period Two.

4.1.4 Renewal Period Three. If City elects to renew this Agreement for Renewal Period Three, City shall pay Kinetech a fee in the amount of \$33,500.00 for Renewal Period Three.

4.2 Hourly Rates for Enhancements. Enhancements done by Kinetech will be completed on a time and materials basis. City shall pay Kinetech at the rate of \$135.000 per hour for Enhancements requested by City. Should City request Enhancements, Kinetech will provide a deliverables-based statement of work with a stated maximum cost, based upon the hourly rate and the projected number of hours it will take to complete the work, quoted as a "not to exceed" fee.

##### 4.3 Invoicing.

4.3.1 Address for Invoices. Kinetech shall submit invoices to City, in a form acceptable to City, which City shall pay within 30 days of receipt and approval by Director. Invoices shall be submitted to: City of San Antonio, Accounts Payable, P.O. Box 839976, San Antonio, Texas 78283-3976, with a copy to City of San Antonio, ITSD, P.O. Box 839966, San Antonio, Texas 78283-3966. Alternatively, Kinetech may email invoices to [Accounts.payable@sanantonio.gov](mailto:Accounts.payable@sanantonio.gov).

##### 4.3.2 Invoices for License and Service Fees.

4.3.2.1 Original License Term. Kinetech shall submit an invoice for the fee stated in 4.1.1 no earlier than on the effective date of this Agreement.

4.3.2.2 Renewal Period One. Kinetech shall submit an invoice each year for the amount of the annual fee during Renewal Period One no earlier than on November 21<sup>st</sup> of each year during Renewal Period One, if renewed.

4.3.2.3 Renewal Periods Two and Three. Kinetech shall submit an invoice for each year during Renewal Periods Two and Three no earlier than on each renewal date of this Agreement, if renewed.

4.3.3 Invoices for Enhancements. Invoices for Enhancements shall be submitted no earlier than upon satisfactory completion of Acceptance Testing for the applicable Enhancement.

4.3.4 Interest on Late Payment. Kinetech may assess Interest on late payment in accordance with Government Code Sec. 2251.025. INTEREST ON OVERDUE PAYMENT.

- 4.4 No additional fees or expenses of Kinetech shall be charged by Kinetech nor be payable by City. The parties hereby agree that all compensable expenses of Kinetech have been provided for in the total payment to Kinetech as specified in section 4.1. Total payments to Kinetech cannot exceed that amount set forth in section 4.1 above, without prior approval and agreement of all parties, evidenced in writing and approved by Director. Parties acknowledge that the total sum payable to Kinetech under this Agreement cannot exceed \$50,000 without the prior approval of the San Antonio City Council reflected by passage of an ordinance therefore.
- 4.5 Final acceptance of work products and services require written approval by City. The approving official shall be Director. Payment will be made to Kinetech following written approval of the final work products and services by Director. City shall not be obligated or liable under this Agreement to any party, other than Kinetech, for the payment of any monies or the provision of any goods or services.
- 4.6 Parties acknowledge that Kinetech granted City a 90 day period of free use, ending November 20, 2018, as a trial period.

**V. OWNERSHIP & CONFIDENTIAL INFORMATION**

- 5.1 Intellectual Property Rights – Ownership by Kinetech. Kinetech shall be the sole and exclusive owner of all Application Software, subject only to the ownership rights of Kinetech's third party licensors, and of the Service Materials and of all copyright in such Service Materials. Ownership of the intellectual property rights in the Service Materials will inure to the benefit of Kinetech from the date of creation or of fixation in a tangible medium of expression, as applicable, of such Service Materials. Kinetech retains all right, title and interest in and to, and shall maintain control of this Application, which includes, without limitation, the Mendix Application model, user interfaces and the pages, web forms and microflows as well as any other intellectual property required in the development of the Application and any and all other intellectual property owned by Kinetech, including without limitation trademarks, copyrights, and patents.
- 5.2 Property of City. Nothing herein shall be construed to grant any right or license to Kinetech in or to any material provided to Kinetech hereunder by City or Residents, including, but not limited to any data, designs, business plans, financial information, user data, Resident data or information and, other than the right to use such material solely on behalf of City in accordance with the terms hereof. All of the foregoing materials, including, but not limited to, any and all copyrights, trademarks, service marks, and trade names related thereto, are and shall remain the property of City. City shall own all right, title and interest in and to City's data, as well as any data that is derived from City's data and provided to City as part of the Services, including, but not limited to all data created or transmitted through the System.
- 5.3 Kinetech represents that it has valid rights for the sale, resale, licensing, use and distribution of all Application Software and third party software proposed and/or used in the System.
- 5.4 Kinetech agrees that City may use the System in executing City business processes. This right includes, but is not limited to, use by third parties necessary to complete City's business. Third parties may include Residents, citizens, customers, auditors, consultants and City organization units, including, but not limited to, agencies, boards and commissions, and quasi City entities, such as City Public Service and San Antonio Water System.
- 5.5 Kinetech permits City to copy and duplicate Kinetech's Service Materials, in whole or in part, for demonstration, training and user documentation purposes without restriction or additional compensation. City grants to Kinetech the right to list or publicize City as a customer of Kinetech in any marketing materials, so long as City has an active contract with Kinetech, or if this Agreement is terminated or not renewed for any reason other than the failure of Kinetech to deliver the Services as described herein.

- 5.6 As stated in the SLA, Kinetech will keep the City's application within the current Mendix major release and the 2 prior major releases of the App Platform. Kinetech warrants that Mendix shall (a) at least support any major release for a minimum period of 24 months from its release date, and (b) not cease to support any major release prior to expiration of said twenty-four months and after Mendix has released at least 2 newer major releases.
- 5.7 Confidentiality. Each party (the "Receiving Party") understands that the other party (the "Disclosing Party") has or may disclose business, technical or financial information relating to the Disclosing Party's business (hereinafter referred to as "Proprietary Information" of the Disclosing Party). Proprietary Information of Kinetech includes non-public information regarding features, functionality and performance of the Services. Proprietary Information of Kinetech does not include the features and functionality of the Application Software that has heretofore been publicly released, nor does it include pricing information. Proprietary Information of City includes nonpublic data provided by City to Kinetech to enable the provision of the Services ("City Data"). The Receiving Party agrees: (i) to take reasonable precautions to protect such Proprietary Information, and (ii) not to use (except in performance of the Services or as otherwise permitted herein) or divulge to any third person any such Proprietary Information. Proprietary Information does not include any information that the Receiving Party can document (a) is or becomes generally available to the public, or (b) was in its possession or known by it prior to receipt from the Disclosing Party, or (c) was rightfully disclosed to it without restriction by a third party, or (d) was independently developed without use of any Proprietary Information of the Disclosing Party, or (e) is required to be disclosed by law.

## VI. RECORDS RETENTION

- 6.1 Kinetech and its subcontractors, if any, shall properly, accurately and completely maintain all documents, papers, and records, and other evidence pertaining to the services rendered hereunder (hereafter referred to as "documents"), and shall make such materials available to the City at their respective offices, at all reasonable times and as often as City may deem necessary during the Agreement period, including any extension or renewal hereof, and the record retention period established herein, for purposes of audit, inspection, examination, and making excerpts or copies of same by City and any of its authorized representatives. This provision shall not be interpreted to require Kinetech to release its source code or object code to City.
- 6.2 Kinetech shall retain any and all documents produced as a result of services provided hereunder for a period of four (4) years (hereafter referred to as "retention period") from the date of termination of the Agreement. If, at the end of the retention period, there is litigation or other questions arising from, involving or concerning this documentation or the services provided hereunder, Kinetech shall retain the records until the resolution of such litigation or other such questions. Kinetech acknowledges and agrees that City shall have access to any and all such documents at any and all times, as deemed necessary by City, during said retention period. City may, at its election, require Kinetech to return the documents to City at Kinetech's expense prior to or at the conclusion of the retention period. In such event, Kinetech may retain a copy of the documents at its sole cost and expense.
- 6.3 Kinetech shall notify City, immediately, in the event Kinetech receives any requests for information from a third party, which pertain to the documentation and records referenced herein. Kinetech understands and agrees that City will process and handle all such requests.

## VII. TERMINATION

- 7.1 Breach; Remedies.

- 7.1.1 If Kinetech fails to perform any of its material obligations under this Agreement, and if such failure is not corrected within 30 days of notification of its failure to perform ("cure period"), Kinetech shall be in material breach of this Agreement. If Kinetech is in material breach of this Agreement (including breach of any applicable cure period), City shall have the option(s) to avail itself of any remedy or remedies provided herein or at law. Pursuit of one remedy shall not constitute a waiver of any other remedy available to City. In addition, City shall specifically have the right to terminate this Agreement in whole or in part, recover any sums paid to Kinetech, and, if operationally necessary for the public health or safety, to seek cover at Kinetech's expense.
- 7.1.2 If City fails to perform any of its material obligations under this Agreement and if such failure is not corrected within 90 days of notification of its failure to perform, Kinetech shall have the options to cease performance or avail itself of any remedy or remedies provided herein or at law. Pursuit of one remedy shall not constitute a waiver of any other remedy available to Kinetech. Notwithstanding the foregoing, HOWEVER, because of the public health and safety implications involved in the discontinuation of the System, in no event shall Kinetech be allowed to unilaterally disable the System, or any of its components or functions without permission of Director or through due process of law, for failure to timely pay for an Enhancement, though Kinetech shall be entitled to disable the Enhancement for which it has not been paid.
- 7.1.3 Further, the decision of the City to discontinue any Enhancements that are in progress shall not terminate any rights City has previously obtained for which acceptance and payment have been completed.
- 7.2 For purposes of this Agreement, "termination" of this Agreement shall mean termination by expiration of the Agreement term as stated in Article II. Term, or earlier termination pursuant to any of the provisions hereof.
- 7.3 Termination Without Cause. This Agreement may be terminated by City without cause upon 30 calendar days' written notice, which notice shall be provided in accordance with Article VIII. Notice. All fees paid by City to Kinetech or owed pursuant to a completed statement of work for Enhancements requested by City shall be considered earned and will not be refundable where the Agreement is terminated without cause.
- 7.4 Termination For Cause. Upon written notice, which notice shall be provided in accordance with Article VIII. Notice, City may terminate this Agreement for Material Breach as of the date provided in the notice, in whole or in part, for failure to cure a Material Breach after properly provided notice and expiration of the 30 day cure period.
- 7.5 Termination By Law. If any state or federal law or regulation is enacted or promulgated which prohibits the performance of any of the duties herein, or, if any law is interpreted to prohibit such performance, this Agreement shall automatically terminate as of the effective date of such prohibition.
- 7.6 Orderly Transition. Regardless of how this Agreement is terminated, Kinetech shall effect an orderly transfer to City or to such person(s) or firm(s) as the City may designate, at no additional cost to City, all completed or partially completed documents, papers, records, charts, reports, and any other materials or information produced as a result of or pertaining to the services rendered by Kinetech, or provided to Kinetech, hereunder, regardless of storage medium, if so requested by City, or shall otherwise be retained by Kinetech in accordance with Article VI. Records Retention. Any record transfer shall be completed within 30 calendar days of a written request by City and shall be completed at Kinetech's sole cost and expense. Payment of compensation due or to become due to Kinetech is conditioned upon delivery of all such documents, if requested by City.

- 7.7 Submission of Claims After Termination. Within 45 calendar days of the effective date of completion, or termination or expiration of this Agreement, Kinetech shall submit to City its claims, in detail, for the monies owed by City for services performed under this Agreement through the effective date of termination. Failure by Kinetech to submit its claims within said 45 calendar days shall negate any liability on the part of City and constitute a **Waiver** by Kinetech of any and all right or claims to collect moneys that Kinetech may rightfully be otherwise entitled to for services performed pursuant to this Agreement.
- 7.8 Cessation of Work. Upon the effective date of expiration or termination of this Agreement, Kinetech shall cease all operations of work being performed by Kinetech or any of its subcontractors pursuant to this Agreement.
- 7.9 Termination not sole remedy. In no event shall City's action of terminating this Agreement, whether for cause or otherwise, be deemed an election of City's remedies, nor shall such termination limit, in any way, at law or at equity, City's right to seek damages from or otherwise pursue Kinetech for any default hereunder or other action.
- 7.10 Dispute Resolution. Prior to filing any lawsuit regarding any dispute arising out of or related to this Agreement, City and Kinetech shall meet and confer in good faith regarding possible alternative dispute resolution methods such as mediation or binding arbitration before a neutral mediator/arbitrator agreed upon by the Parties. The venue for any mediation, arbitration, or lawsuit shall be conducted in San Antonio, Texas unless the Parties agree in writing to a different venue.

**VIII. NOTICE**

Except where the terms of this Agreement expressly provide otherwise, any election, notice or communication required or permitted to be given under this Agreement shall be in writing and deemed to have been duly given if and when delivered personally (with receipt acknowledged), or three (3) days after depositing same in the U.S. mail, first class, with proper postage prepaid, or upon receipt if sending the same by certified mail, return receipt requested, or upon receipt when sent by a commercial courier service (such as Federal Express or DHL Worldwide Express) for expedited delivery to be confirmed in writing by such courier, at the addresses set forth below or to such other address as either party may from time to time designate in writing.

If intended for City, to:

City of San Antonio  
Director, Finance Department  
P.O. Box 839966  
San Antonio, TX 78283-9966

If intended for Kinetech, to:

Kinetech Cloud, LLC  
Michael Guido, Chief Executive Officer  
110 E. Houston St.  
San Antonio, TX 78205

**IX. NON-DISCRIMINATION**

Non-Discrimination. As a party to this contract, Kinetech understands and agrees to comply with the Non-Discrimination Policy of the City of San Antonio contained in Chapter 2, Article X. of the City Code and further, shall not discriminate on the basis of race, color, religion, national origin, sex, sexual orientation, gender identity, veteran status, age or disability, unless exempted by state or federal law, or as otherwise established herein.

**X. INSURANCE**

- 10.1 Prior to the commencement of any work under this Agreement, Kinetech shall furnish copies of all required endorsements and completed Certificate(s) of Insurance to the City's Finance Department, which shall be clearly labeled "DHS Utility Service Application Software License Agreement" in the Description of Operations block of the Certificate. The Certificate(s) shall be completed by an agent and signed by a person authorized by that insurer to bind coverage on its behalf. The City will not accept a Memorandum of Insurance or Binder as proof of insurance. The certificate(s) must have the agent's signature and phone number, and be mailed, with copies of all applicable endorsements, directly from the insurer's authorized representative to the City. The City shall have no duty to pay or perform under this Agreement until such certificate and endorsements have been received and approved by the City's Finance Department. No officer or employee, other than the City's Risk Manager, shall have authority to waive this requirement.
- 10.2 The City reserves the right to review the insurance requirements of this Article during the effective period of this Agreement and any extension or renewal hereof and to modify insurance coverages and their limits when deemed necessary and prudent by City's Risk Manager based upon changes in statutory law, court decisions, or circumstances surrounding this Agreement. In no instance will City allow modification whereby City may incur increased risk.
- 10.3 Kinetech's financial integrity is of interest to the City; therefore, subject to Kinetech's right to maintain reasonable deductibles in such amounts as are approved by the City, Kinetech shall obtain and maintain in full force and effect for the duration of this Agreement, and any extension hereof, at Kinetech's sole expense, insurance coverage written on an occurrence basis, unless otherwise indicated, by companies authorized to do business in the State of Texas and with an A.M Best's rating of no less than A- (VII), in the following types and for an amount not less than the amount listed below:

TYPE	AMOUNTS
1. Workers' Compensation	Statutory
2. Employers' Liability	\$1,000,000/\$1,000,000/\$1,000,000
3. Commercial General Liability Insurance to include coverage for the following: a. Premises/Operations b. Products/Completed Operations c. Personal/Advertising Injury	For Bodily Injury and Property Damage of \$1,000,000 per occurrence; \$2,000,000 General Aggregate, or its equivalent in Umbrella or Excess Liability Coverage
4. Cyber Liability Insurance	\$1,000,000 per occurrence

- 10.4 Kinetech agrees to require, by written contract, that all subcontractors providing goods or services hereunder obtain the same insurance coverages required of Kinetech herein, and provide a certificate of insurance and endorsement that names the Kinetech and the City as additional insureds. Kinetech shall provide the City with said certificate and endorsement prior to the commencement of any work by the subcontractor. This provision may be modified by City's Risk Manager, without subsequent City Council approval, when deemed necessary and prudent, based upon changes in statutory law, court decisions, or circumstances surrounding this agreement. Such modification may be enacted by letter signed by City's Risk Manager, which shall become a part of the contract for all purposes.
- 10.5 As they apply to the limits required by the City, the City shall be entitled, upon request and without expense, to receive copies of the policies, declaration page, and all endorsements thereto and may require the deletion, revision, or modification of particular policy terms, conditions, limitations, or exclusions (except where policy provisions are established by law or regulation binding upon either of the parties hereto or the underwriter of any such policies). Kinetech shall be required to comply with any such requests and shall submit a copy of the replacement certificate of insurance to City at the address provided below within 10 days of the requested change. Kinetech shall pay any costs incurred resulting from said changes.

City of San Antonio  
Attn: Finance Department  
P.O. Box 839966  
San Antonio, Texas 78283-3966

- 10.6 Kinetech agrees that with respect to the above required insurance, all insurance policies are to contain or be endorsed to contain the following provisions:
- Name the City, its officers, officials, employees, volunteers, and elected representatives as additional insureds by endorsement, as respects operations and activities of, or on behalf of, the named insured performed under contract with the City, with the exception of the workers' compensation and professional liability policies;
  - Provide for an endorsement that the "other insurance" clause shall not apply to the City of San Antonio where the City is an additional insured shown on the policy;
  - Workers' compensation, employers' liability, general liability and automobile liability policies will provide a waiver of subrogation in favor of the City.
  - Provide advance written notice directly to City of any suspension, cancellation, non-renewal or material change in coverage, and not less than 10 calendar days advance notice for nonpayment of premium.
- 10.7 Within 5 calendar days of a suspension, cancellation or non-renewal of coverage, Kinetech shall provide a replacement Certificate of Insurance and applicable endorsements to City. City shall have the option to suspend Kinetech's performance should there be a lapse in coverage at any time during this Agreement. Failure to provide and to maintain the required insurance shall constitute a material breach of this Agreement.
- 10.8 In addition to any other remedies the City may have upon Kinetech's failure to provide and maintain any insurance or policy endorsements to the extent and within the time herein required, the City shall have the right to order Kinetech to stop work hereunder, and/or withhold any payment(s) which become due to Kinetech hereunder until Kinetech demonstrates compliance with the requirements hereof.
- 10.9 Nothing herein contained shall be construed as limiting in any way the extent to which Kinetech may be held responsible for payments of damages to persons or property resulting from Kinetech's or its subcontractors' performance of the work covered under this Agreement.
- 10.10 It is agreed that Kinetech's insurance shall be deemed primary and non-contributory with respect to any insurance or self-insurance carried by the City of San Antonio for liability arising out of operations under this Agreement.
- 10.11 It is understood and agreed that the insurance required is in addition to and separate from any other obligation contained in this Agreement and that no claim or action by or on behalf of the City shall be limited to insurance coverage provided.
- 10.12 Kinetech and any subcontractors are responsible for all damage to their own equipment and/or property.

## XI. INDEMNIFICATION

- 11.1 **KINETECH covenants and agrees to FULLY INDEMNIFY, DEFEND and HOLD HARMLESS, the CITY and the elected officials, employees, officers, directors, volunteers and**

representatives of the CITY, individually and collectively, from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal or bodily injury, death and property damage, made upon the CITY directly or indirectly arising out of, resulting from or related to KINETECH'S activities under this Agreement, including any acts or omissions of KINETECH, any agent, officer, director, representative, employee, consultant or subcontractor of KINETECH, and their respective officers, agents employees, directors and representatives while in the exercise of the rights or performance of the duties under this Agreement. The indemnity provided for in this paragraph shall not apply to any liability resulting from the negligence of CITY, its officers or employees, or Residents in instances where such negligence causes unauthorized access to non-public personal information of a Resident or Residents, personal injury, death, or property damage. IN THE EVENT KINETECH AND CITY ARE FOUND JOINTLY LIABLE BY A COURT OF COMPETENT JURISDICTION, LIABILITY SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS FOR THE STATE OF TEXAS, WITHOUT, HOWEVER, WAIVING ANY GOVERNMENTAL IMMUNITY AVAILABLE TO THE CITY UNDER TEXAS LAW AND WITHOUT WAIVING ANY DEFENSES OF THE PARTIES UNDER TEXAS LAW.

- 11.2 KINETECH will indemnify CITY and will hold CITY harmless from any and all claims that the System or any part thereof infringes upon the intellectual property rights of any third party. KINETECH will promptly secure the necessary rights for the CITY to continue the lawful use of the System and defend, at its expense, any action brought in a United States court of law against CITY which alleges that work(s) supplied by KINETECH hereunder infringe any trademark or duly issued patent or copyright and shall pay all damages and costs finally awarded against CITY which are directly attributable to such infringement. CITY shall give KINETECH prompt written notice of such claim, and promptly furnish a copy of all communications, notices and other acts relating to such claim. CITY shall give KINETECH reasonable assistance (at KINETECH 'S expense) necessary to defend or settle such claim; *provided, however*, that CITY shall have the right to participate in the defense of any resulting suit or proceeding at its expense and through counsel of its choosing.
- 11.3 The provisions of this INDEMNITY are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any other person or entity. KINETECH shall advise the CITY in writing within 24 hours of any claim or demand against the CITY or KINETECH known to KINETECH related to or arising out of KINETECH's activities under this AGREEMENT and shall see to the investigation and defense of such claim or demand at KINETECH's cost. The CITY shall have the right, at its option and at its own expense, to participate in such defense without relieving KINETECH of any of its obligations under this paragraph.
- 11.4 Defense Counsel - City shall have the right to select or to approve defense counsel to be retained by KINETECH in fulfilling its obligation hereunder to defend and indemnify City, unless such right is expressly waived by City in writing. KINETECH shall retain City approved defense counsel within seven (7) business days of City's written notice that City is invoking its right to indemnification under this Agreement. If KINETECH fails to retain Counsel within such time period, City shall have the right to retain defense counsel on its own behalf, and KINETECH shall be liable for all costs incurred by City. City shall also have the right, at its option, to be represented by advisory counsel of its own selection and at its own expense, without waiving the foregoing.
- 11.5 Employee Litigation – In any and all claims against any party indemnified hereunder by any employee of KINETECH, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation herein provided shall not be limited in any way by any limitation on the amount or type of damages,

compensation or benefits payable by or for KINETECH or any subcontractor under worker's compensation or other employee benefit acts.

## **XII. ASSIGNMENT AND SUBCONTRACTING**

- 12.1 Kinetech shall supply qualified personnel as may be necessary to complete the work to be performed under this Agreement. Persons retained to perform work pursuant to this Agreement shall be the employees or subcontractors of Kinetech. Kinetech, its employees or its subcontractors shall perform all necessary work.
- 12.2 It is City's understanding and this Agreement is made in reliance thereon, that Kinetech intends to use the following subcontractors in the performance of this Agreement: None. Any deviation from this subcontractor list, whether in the form of deletions, additions or substitutions shall be approved by Director, prior to the provision of any services by said subcontractor.
- 12.3 Any work or services approved for subcontracting hereunder shall be subcontracted only by written contract and, unless specific waiver is granted in writing by the City, shall be subject by its terms to each and every provision of this Agreement. Compliance by subcontractors with this Agreement shall be the responsibility of Kinetech. City shall in no event be obligated to any third party, including any subcontractor of Kinetech, for performance of services or payment of fees. Any references in this Agreement to an assignee, transferee, or subcontractor, indicate only such an entity as has been approved by Director.
- 12.4 Except as otherwise stated herein, Kinetech may not sell, assign, pledge, transfer or convey any interest in this Agreement, nor delegate the performance of any duties hereunder, by transfer, by subcontracting or any other means, without the consent of Director. As a condition of such consent, if such consent is granted, Kinetech shall remain liable for completion of the services outlined in this Agreement in the event of default by the successor Kinetech, assignee, transferee or subcontractor.
- 12.5 Any attempt to transfer, pledge or otherwise assign this Agreement without said written approval, shall be void ab initio and shall confer no rights upon any third person. Should Kinetech assign, transfer, convey, delegate, or otherwise dispose of any part of all or any part of its right, title or interest in this Agreement, City may, at its option, cancel this Agreement and all rights, titles and interest of Kinetech shall thereupon cease and terminate, in accordance with Article VII. Termination, notwithstanding any other remedy available to City under this Agreement. The violation of this provision by Kinetech shall in no event release Kinetech from any obligation under the terms of this Agreement, nor shall it relieve or release Kinetech from the payment of any damages to City, which City sustains as a result of such violation.

## **XIII. INDEPENDENT CONTRACTOR**

Kinetech covenants and agrees that he or she is an independent contractor and not an officer, agent, servant or employee of City; that Kinetech shall have exclusive control of and exclusive right to control the details of the work performed hereunder and all persons performing same, and shall be responsible for the acts and omissions of its officers, agents, employees, contractors, subcontractors and consultants; that the doctrine of "respondeat superior" shall not apply as between City and Kinetech, its officers, agents, employees, contractors, subcontractors and consultants, and nothing herein shall be construed as creating the relationship of employer-employee, principal-agent, partners or joint venturers between City and Kinetech. The parties hereto understand and agree that the City shall not be liable for any claims which may be asserted by any third party occurring in connection with the services to be performed by the Kinetech under this Agreement and that the Kinetech has no authority to bind the City.

#### **XIV. UNDISCLOSED FEATURES**

Kinetech warrants that the Application Software and Services provided to the City of San Antonio under this agreement do not contain any undisclosed features or functions that would impair or might impair the City's use of the Application Software or Services, or any software used by and hosted by City or by Residents who use the Service. Specifically, but without limiting the previous representation, Kinetech warrants there is no "Trojan Horse", "lock", "time bomb", "backdoor" or similar functionality. This Agreement shall not now, nor will it hereafter, be subject to the self-help provisions of the Uniform Computer Information Transactions Act or any similar law. Kinetech specifically disclaims any unilateral self-help remedies.

#### **XV. CONFLICT OF INTEREST**

15.1 The Charter of the City of San Antonio and the City of San Antonio Code of Ethics prohibit a City officer or employee, as those terms are defined in Section 2-52 of the Code of Ethics, from having a direct or indirect financial interest in any contract with the City. An officer or employee has a "prohibited financial interest" in a contract with the City or in the sale to the City of land, materials, supplies or service, if any of the following individual(s) or entities is a party to the contract or sale:

- a City officer or employee; his or her spouse, sibling, parent, child or other family member within the first degree of consanguinity or affinity;
- an entity in which the officer or employee, or his or her parent, child or spouse directly or indirectly owns (i) 10 percent or more of the voting stock or shares of the entity, or (ii) 10 percent or more of the fair market value of the entity; or
- an entity in which any individual or entity listed above is (i) a subcontractor on a City contract, (ii) a partner or (iii) a parent or subsidiary entity.

15.2 Pursuant to the subsection above, Kinetech warrants and certifies, and this Agreement is made in reliance thereon, that by contracting with the City, Kinetech does not cause a City employee or officer to have a prohibited financial interest in the Contract. Kinetech further warrants and certifies that it has tendered to the City a Contracts Disclosure Statement in compliance with the City's Ethics Code.

#### **XVI. AMENDMENTS**

Except where the terms of this Agreement expressly provide otherwise, any alterations, additions, or deletions to the terms hereof, shall be effected by amendment, in writing, executed by both City and Kinetech. Except as otherwise provided in Section 2.2 or elsewhere herein, Director shall have authority to execute amendments on behalf of the City without further action by the San Antonio City Council, subject to and contingent upon appropriation of funds for any increase in expenditures by the City.

#### **XVII. SEVERABILITY**

If any clause or provision of this Agreement is held invalid, illegal or unenforceable under present or future federal, state or local laws, including but not limited to the City Charter, City Code, or ordinances of the City of San Antonio, Texas, then and in that event it is the intention of the parties hereto that such invalidity, illegality or unenforceability shall not affect any other clause or provision hereof and that the remainder of this Agreement shall be construed as if such invalid, illegal or unenforceable clause or provision was never contained herein; it is also the intention of the parties hereto that in lieu of each clause or provision of this Agreement that is invalid, illegal, or unenforceable, there be added as a part of the Agreement a clause or provision as similar in terms to such invalid, illegal or unenforceable clause or provision as may be possible, legal, valid and enforceable.

**XVIII. LICENSES/CERTIFICATIONS**

Kinetech warrants and certifies that Kinetech and any other person designated to provide services hereunder has the requisite training, license and/or certification to provide said services, and meets all competence standards promulgated by all other authoritative bodies, as applicable to the services provided herein.

**XIX. COMPLIANCE**

Kinetech shall provide and perform all services required under this Agreement in compliance with all applicable federal, state and local laws, rules and regulations.

**XX. NONWAIVER OF PERFORMANCE**

Unless otherwise specifically provided for in this Agreement, a waiver by either Party of a breach of any of the terms, conditions, covenants or guarantees of this Agreement shall not be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, condition, covenant or guarantee herein contained. Further, any failure of either Party to insist in any one or more cases upon the strict performance of any of the covenants of this Agreement, or to exercise any option herein contained, shall in no event be construed as a waiver or relinquishment for the future of such covenant or option. In fact, no waiver, change, modification or discharge by either party hereto of any provision of this Agreement shall be deemed to have been made or shall be effective unless expressed in writing and signed by the party to be charged. In case of City, such changes must be approved by the City Council, as described in Article XVI. Amendments. No act or omission by a Party shall in any manner impair or prejudice any right, power, privilege, or remedy available to that Party hereunder or by law or in equity, such rights, powers, privileges, or remedies to be always specifically preserved hereby.

**XXI. LAW APPLICABLE & LEGAL FEES**

- 21.1 **THIS AGREEMENT SHALL BE CONSTRUED UNDER AND IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS AND ALL OBLIGATIONS OF THE PARTIES CREATED HEREUNDER ARE PERFORMABLE IN BEXAR COUNTY, TEXAS.**
- 21.2 Any legal action or proceeding brought or maintained, directly or indirectly, as a result of this Agreement shall be heard and determined in the City of San Antonio, Bexar County, Texas.
- 21.3 The Parties hereto expressly agree that, in the event of litigation, each party hereby waives its right to payment of attorneys' fees.

**XXII. LEGAL AUTHORITY**

- 22.1 The signer of this Agreement for Kinetech represents, warrants, assures and guarantees that he has full legal authority to execute this Agreement on behalf of Kinetech and to bind Kinetech to all of the terms, conditions, provisions and obligations herein contained.
- 22.2 City and Kinetech each agree that this transaction may be conducted by electronic means, as authorized by Chapter 322, Texas Business & Commerce Code, known as the Electronic Transactions Act.

### **XXIII. PARTIES BOUND**

This Agreement shall be binding on and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, and successors and assigns, except as otherwise expressly provided for herein.

### **XXIV. CAPTIONS**

The captions contained in this Agreement are for convenience of reference only, and in no way limit or enlarge the terms and/or conditions of this Agreement.

### **XXV. INCORPORATION OF ATTACHMENTS**

Each of the attachments listed below is an essential part of the Agreement, which governs the rights and duties of the parties, and shall be interpreted in the order of priority as appears below, with this document taking priority over all attachments:

- Attachment 1 – System Security Plan for Cloud Computing v2 6-26-18
- Attachment 2 – Cloud Security Assessment Guide v2 5-20-18
- Attachment 3 – Service Level Agreement 2018

### **XXVI. ENTIRE AGREEMENT**

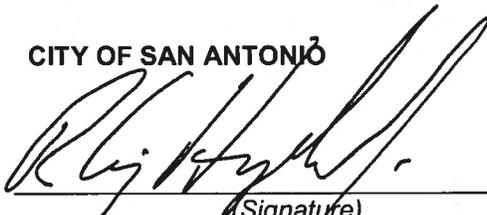
This Agreement, together with its authorizing ordinance and its exhibits, if any, constitute the final and entire agreement between the parties hereto and contain all of the terms and conditions agreed upon. No other agreements, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind the parties hereto, unless same be in writing, dated subsequent to the date hereto, and duly executed by the parties, in accordance with Article XVI. Amendments.

### **XXVII. PROHIBITION ON CONTRACTS WITH COMPANIES BOYCOTTING ISRAEL**

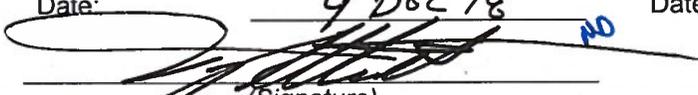
- 27.1 Texas Government Code §2270.002 provides that a governmental entity may not enter into a contract with a company for goods or services, unless the contract contains a written verification from the company that it:
  - (1) does not boycott Israel; and
  - (2) will not boycott Israel during the term of the contract.
- 27.2 "Boycott Israel" means refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory, but does not include an action made for ordinary business purposes.
- 27.3 "Company" means a for-profit sole proprietorship, organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, or limited liability company, including a wholly owned subsidiary, majority-owned subsidiary, parent company, or affiliate of those entities or business associations that exists to make a profit.
- 27.4 By submitting an offer to or executing contract documents with the City of San Antonio, Company hereby verifies that it does not boycott Israel, and will not boycott Israel during the term of the contract. City's hereby relies on Company's verification. If found to be false, City may terminate the contract for material breach.

EXECUTED and AGREED to as of the dates indicated below.

CITY OF SAN ANTONIO

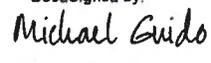
  
\_\_\_\_\_  
(Signature)

Printed Name: Craig Hopkins  
Title: Chief Information Officer  
Date: 4 DEC 18

  
\_\_\_\_\_  
(Signature)

Printed Name: Troy Elliott  
Title: Deputy Chief Financial Officer  
Date: 12/4/18

KINETECH CLOUD, LLC

DocuSigned by:  
  
\_\_\_\_\_  
DEA939D88A384A4 (Signature)

Printed Name: Michael Guido  
Title: Chief Executive Officer  
Date: 12/4/2018

Approved as to Form:

Lauren O'Connor  
Digitally signed by Lauren O'Connor  
DN: cn=Lauren O'Connor, o=City of San Antonio,  
ou=City Attorney's Office,  
email=lauren.oconnor@sanantonio.gov, c=US  
Date: 2018.12.04 16:18:50 -0600  
\_\_\_\_\_  
Assistant City Attorney