

STATE OF TEXAS	§	INTERLOCAL AGREEMENT FOR
	§	DIGITAL KIOSK INSTALLATION,
COUNTY OF BEXAR	§	OPERATION, AND MAINTENANCE

This INTERLOCAL AGREEMENT FOR DIGITAL KIOSK INSTALLATION, OPERATION AND MAINTENANCE (the "Agreement") is entered into as of the Effective Date provided on the signature page by and between the CITY OF SAN ANTONIO, TEXAS, a Texas municipal corporation (the "City"), and VIA METROPOLITAN TRANSIT, a metropolitan rapid transit authority created under Article 1118x of the Texas Revised Civil Statutes, Annotated, as amended by S.B. 971, 74th Legislature and now codified as Chapter 451, Texas Transportation Code, ("VIA"). The City and VIA may sometimes be referred to herein individually as a "Party" and collectively as the "Parties."

RECITALS

WHEREAS, on December 14, 2017, the San Antonio City Council considered ordinance 2017-12-14-1017 entitled “Authorizing the Execution of a Professional Services Agreement for an Initial Five-Year Term With IKE Smart City, LLC, to Install, Operate and Maintain 25 Digital Community Kiosks With an Agreement that IKE Smart City, LLC Will Pay the City the Greater Of 21.5% of Gross Revenue for Each IKE Kiosk or a Minimum Annual Guarantee of \$937,080.00 for the Initial Five-Year Term” which was passed and approved; and

WHEREAS, this ordinance authorized an agreement for an initial five-year term with IKE Smart City, LLC (“IKE”) to install, operate and maintain 25 digital community kiosks (“Digital Kiosks”) which would provide services such as hyper-local information on way-finding, public transit, b-cycle, events, local businesses and park programs to visitors, tourists and residents; and

WHEREAS, the City wishes to place these Digital Kiosks at various locations throughout the City to maximize exposure and coverage of the services provided by these Digital Kiosks; and

WHEREAS, in addition to the Digital Kiosks placed on City locations, the City and VIA wish to place Digital Kiosks on VIA facilities; and

WHEREAS, pursuant to Chapter 791 of the Texas Government Code, VIA and the City are authorized to enter into this Interlocal Agreement; and

NOW, THEREFORE, for and in consideration of the mutual covenants, agreements, and benefits to the parties herein named, it is agreed as follows:

I. DEFINITIONS

1.1 Specific Terms. As used in this Agreement, the following terms shall have meanings as set out below:

- a. “City” is defined in the preamble to this Agreement and includes its successors and assigns.
- b. “VIA” is defined in the preamble to this Agreement and includes its successors and assigns.
- c. “IKE” shall mean IKE Smart City LLP, the company the City has contracted with to install, operate and maintain Digital Kiosks.
- d. “VIA Facilities” shall mean any real property, structures, improvements, systems or other property under the jurisdiction of VIA and shall include, but not be limited to, roadways, pavements, alleys, curbs, signage, and water and wastewater lines.
- e. “Digital Kiosks” shall mean the interactive computer terminals installed by IKE featuring specialized hardware and software that provides access to information and applications for communication, commerce, entertainment, or education.
- f. “Director” is the Director of the City’s Office of Innovation or such other person as the Director may designate.
- g. “Project” shall mean the work associated with the agreement between the City and IKE to install, operate and maintain a minimum of 25 digital community kiosks (“Digital Kiosks”) which would provide services such as hyper-local information on way-finding, public transit, b-cycle, events, local businesses and park programs to visitors, tourists and residents.
- h. “Work” shall mean the design, construction, implementation and maintenance of the Project as provided herein.
- i. “Ordinance” shall mean City of San Antonio ordinance 2017-12-14-1017 entitled “Authorizing the Execution of a Professional Services Agreement for an Initial Five-Year Term with IKE Smart City, LLC, to Install, Operate and Maintain 25 Digital Community Kiosks With an Agreement that IKE Smart City, LLC Will Pay the City the Greater Of 21.5% of Gross Revenue for Each IKE Kiosk or a Minimum Annual Guarantee of \$937,080.00 for the Initial Five-Year Term”
- j. “IKE Agreement” shall mean the contract between the City of San Antonio and IKE Smart City, LLC authorized under City of San Antonio ordinance 2017-12-14-1017.

1.2 General. Any other term to which meaning is expressly given in this Agreement shall have such meaning.

1.3 Gender and Number, Other Terms. When the context permits, the singular shall include the plural, the plural the singular, and the masculine shall include the neuter and feminine.

II. PURPOSE

2.1 The purpose of this Agreement is to establish procedures for the City to use its current agreement with IKE to install, operate, and maintain Digital Kiosks on VIA property under the City's current agreement with IKE. The IKE Agreement is attached hereto and incorporated by reference for all purposes as Exhibit 1.

2.2 VIA, for all Digital Kiosks installed on VIA Facilities, shall abide by all requirements imposed by the IKE Agreement upon the City to the extent they are applicable to VIA.

2.3 VIA and the City agree that the Project is not a joint enterprise, joint venture or any other type of joint undertaking between VIA and the City.

2.4 Notwithstanding Section 2.2 above, VIA and City will cooperate to ensure Project implementation, operation, and maintenance in keeping with City's Agreement with IKE.

III. LOCATIONS

3.1 The following VIA owned facilities, located in the City of San Antonio, Bexar County, Texas, shall initially be used as Digital Kiosk locations under the City's Agreement with IKE:

1. Centro Plaza
2. Five Points
3. Medical Center Transit Center
4. Kel-Lac Transit Center
5. Randolph Park & Ride
6. Ingram Transit Center
7. Deco District - Mary Louise

3.2 During the term of this Agreement, the Parties agree and understand that the number of Digital Kiosk locations may expand beyond the initial seven identified in Section 3.1 to include locations at VIA owned Facilities and within the City right of way in close proximity to VIA owned facilities, including but not limited to, bus stops and shelters. This expansion shall be upon the mutual written consent of the Parties.

IV. TERM

4.1 Term. The term of this Agreement (the "Term") shall commence upon execution by the Parties and, unless sooner terminated in accordance with the provisions of this Agreement, terminate upon the expiration of the agreement between the City and IKE.

V. CONSENT TO ACCESS AND USE VIA PROPERTY

5.1 Duration. Subject to Section 5.2 below, VIA consents to allow access to VIA Facilities at the locations set out under Article III of this Agreement by City and IKE for the installation, construction, maintenance, repair and operation of the Digital Kiosks, such consent shall be effective for the duration of the Project unless terminated sooner.

5.2 The City shall provide VIA no less than three (3) business day written notice and agrees to coordinate with VIA regarding the entry onto VIA's Property to minimize disruption to the transit function of the location. The foregoing notwithstanding, in the event an emergency situation arises requiring prompt attention, access to the location is immediately permissible provided the City or IKE sends a notice to VIA as soon as possible pertaining to the need for the incursion including a description of the emergency involved, the date and time of the emergency, the results of the actions taken and any other pertinent information.

VI. REVENUE SHARING

6.1 Under the IKE Agreement, IKE Smart City, LLC will pay the City the greater of 21.5% of gross revenue for each IKE Kiosk or a Minimum Annual Guarantee of \$937,080.00 for the initial five-year term. City and VIA agree to share the revenue for all Kiosks located on VIA property as follows after the City achieves the Minimum Annual Guarantee amount:

- a. Kiosks located on property at a VIA owned facility, revenue shall be shared evenly between the City and VIA;
- b. Kiosks located in the City right of way to VIA owned facilities including, but not limited to, bus stops and shelters, such placement being mutually agreed on by the Parties, revenue shall be shared on a 60/40 split with the City receiving the larger share.

6.2 City shall pay VIA within thirty (30) days of receipt of the Minimum Annual Guarantee and payment from IKE.

VII. PROJECT MANAGEMENT

7.1 Project Management. IKE will manage, oversee, administer and carry out all of the activities and services required for construction of the Project. VIA will use its best efforts to ensure that the its Facilities are safe and accessible.

7.2 VIA Messaging. The Parties agree and understand that VIA has the right to access and shall be allowed to place advertising and other messaging content in rotation at each Kiosk. At a minimum, VIA may have at least one (1) item of its choosing in rotation at all times. VIA, the City and by and through the City, IKE, shall cooperate and work together to timely provide VIA's desired content and its placement in the rotation, including but not limited to developing a schedule for the periodic development and delivery of content. VIA shall be solely responsible for the content it provides. VIA agrees to provide City messaging content in rotation at each Kiosk in times of emergency, with such times to be determined solely by City.

7.3 Timely Performance. VIA and City herein acknowledge that the Project has time performance requirements. VIA and City will work together in good faith and cooperation to carry out the work expeditiously and to timely perform their respective duties.

VIII. TERMINATION

8.1 Right of Either Party to Terminate for Breach or Default

- a. Upon a breach of this Agreement, the non-breaching Party may terminate this Agreement upon the issuance of a written notice of breach (citing this paragraph) and a declaration that the other Party is in breach along with a statement describing the breach in the notice. Upon receipt of such notice, the breaching Party shall have thirty (30) calendar days to cure the breach.
- b. This Agreement may also be terminated for default by either Party if there is a substantial failure to perform by either Party (through no fault of the terminating Party). In order to terminate for default, the non-defaulting Party must issue a written notice of default (citing this paragraph) and a declaration that the other Party is in default along with a statement describing the default in the notice. Upon receipt of such notice, the Parties may agree to a thirty (30) calendar day period to cure the default.

8.2 Nonwaiver. 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 of relinquishment for the future of such covenant or option. 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; provided that it is expressly agreed that neither Party shall have the right to seek consequential, special or punitive damages against the other for any default under this Agreement.

IX. FISCAL MANAGEMENT AND AUDIT RIGHTS

9.1 Access to Records. VIA will provide City's staff, including internal and external auditors and other persons as designated by City, such as independent public accountants and representatives of the federal or state government, access during regular business hours, as deemed necessary by City for the purposes of auditing, monitoring, evaluating, coordinating, investigating and making excerpts and/or copies of any and all of VIA's books, records and files related to the Project.

9.1.1 All such records shall continue to be available for inspection and audit for a

period of three (3) years after the termination date hereof. However, if during the course of this three-year period, an audit or investigation of VIA commences, then VIA is required to maintain said records until such time as the audit or investigation is concluded.

9.1.2 The submission of falsified information or the failure to timely submit to City such records, reports and financial statements as requested by City pursuant to this Article IX may constitute a breach of this Agreement and grounds for termination under Article VIII above.

9.2 Use of Current Funds. The Parties agree to allocate sufficient funds for the Agreement. Although not anticipated or expected, this Agreement shall terminate in the event sufficient funds are not appropriated by the Parties to meet their obligations herein in any subsequent fiscal year. It is agreed and understood that payment for the performance of governmental functions or services under this Agreement must only be made from current revenues available to the paying Party. If this Agreement is terminated under this paragraph, each Party agrees to give the other Party sixty (60) days written notice prior to termination.

X. DOCUMENTS

10.1 Records Retention. VIA and the City shall retain any and all documents produced as a result of the Work performed under this Agreement for a period of three (3) years from the date of Project completion or termination (the Retention Period). If, at the end of the Retention Period, there is litigation or other questions arising from, involving or concerning this documentation or the work performed hereunder, VIA and the City shall retain the records until the resolution of such litigation or other such questions. VIA and the City acknowledge and agree that both the City and VIA shall have access to any and all such documents at any and all times, as deemed necessary by the Parties, during the Retention Period.

XI. INSURANCE

11.1 Letter. VIA is self-insured and will provide City with a letter of self-insurance.

11.2 The City will require and shall be responsible for ensuring VIA is named as an additional insured on any and all policies required of IKE under the IKE Agreement, as applicable. Upon request, the City agrees to provide copies to VIA of any and all insurance policies and endorsements.

XII. INDEMNIFICATION PROVISIONS

12.1 General Indemnification

VIA AND THE CITY ACKNOWLEDGE THEY ARE POLITICAL SUBDIVISIONS OF THE STATE OF TEXAS AND THAT THEY ARE SUBJECT TO AND SHALL COMPLY WITH

THE APPLICABLE PROVISIONS OF THE TEXAS TORT CLAIMS ACT, AS SET OUT IN CIVIL PRACTICES AND REMEDIES CODE, SECTION 101.001 et seq., INCLUDING BUT NOT LIMITED TO THE REMEDIES AUTHORIZED THEREIN REGARDING CLAIMS OR CAUSES OF ACTION THAT MAY BE ASSERTED BY THIRD PARTIES FOR ACIDENT, INJURY OR DEATH.

12.2 IKE Indemnification of VIA.

The City will ensure and provide assurances to VIA that IKE, under the IKE Agreement, covenants and agrees to **FULLY INDEMNIFY, HOLD HARMLESS and DEFEND**, VIA and the Board of Trustees, employees, officers and representatives of VIA, individually or collectively, to the same extent IKE is indemnifying the City in the IKE Agreement.

XIII. NOTICES

13.1 Formal Notice. Any notice, demand, or other communication required to be given or to be served upon any Party under this Agreement shall be in writing and delivered to the person to whom the notice is directed, either: (i) in person with confirmation; (ii) by United States Mail, as a registered or certified item with return receipt required; (iii) delivered by delivery service (including any express mail or overnight delivery service); or (iv) by confirmed facsimile, notices, demands, or other communications delivered by mail shall be deemed given and received when deposited in a post office or other depository under the care or custody of the United States Postal Service, enclosed in a wrapper, addressed properly, with proper postage affixed. Any notice, demand, or other communication given other than by certified or registered mail, return receipt requested, shall be deemed to have been given and received when delivered to the address of the Party to whom it is addressed as stated below:

To City at: City of San Antonio
Office of Innovation
P.O. Box 839966
San Antonio, Texas 78283-3966
Attn: Jose De La Cruz

with a copy to: City of San Antonio
City Attorney
P.O. Box 839966
San Antonio, Texas 78225
Attn: Andrew Segovia

To VIA at: VIA
Main Administrative Office 800
W. Myrtle
San Antonio, TX 78212
Attn: Jeff Arndt

13.2 Changes. A change of address or other contact information for any Party may be given by written notice as provided above.

XIV. MISCELLANEOUS

14.1 Recitals. The recitals are incorporated herein as matters of contract and not mere recitals.

14.2 Assignment. Except as herein provided, neither Party may assign its rights or obligations under this Agreement without the prior written consent of the other Party. Any such assignment, whether voluntary or involuntary, by operation of law, under legal process or proceedings, by receivership, in bankruptcy or otherwise, without the prior written consent shall be of no force and effect whatsoever. Any consent to any such assignment or transfer shall not constitute a waiver of any of the restrictions of this section, and the provisions of this section shall apply to each successive assignment or other transfer hereunder, if any. Notwithstanding the above, VIA may assign this Agreement without obtaining the City's consent to (i) one or more of its affiliates, if any, or (ii) an entity which acquires fee title to a portion of the impacted real property from VIA or one of its affiliates.

14.3 Force Majeure. In the event VIA or the City is unable in whole or in part by force majeure to carry out any covenant, agreement, obligation or undertaking to be kept or performed under this Agreement, the time for the performance of such covenant, agreement, obligation or undertaking so delayed shall be extended for the period of such delay. The Party claiming force majeure will make reasonable attempts to remedy the effects of the force majeure and continue performance under this Agreement with all reasonable dispatch. The term "force majeure" as employed in this section shall include acts of God, acts of terrorism, strikes, lockouts, or other industrial disturbances, acts of a public enemy, war, blockades, riots, epidemics, earthquakes, explosions, accidents, or repairs to machinery or pipes, the delays of carriers, or inability by reason of governmental regulation to obtain materials, acts of public authorities, or other causes, whether or not of the same kind as specifically enumerated, not within the control of the Party claiming suspension and which by the exercise of due diligence such Party is unable to overcome. If Contractor suffers any event of force majeure, such even shall likewise constitute force majeure with respect to VIA.

14.4 Entire Agreement. This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes any prior oral or written agreement. Any alterations, additions or deletions to the provisions herein shall only be by amendment in writing executed by both Parties.

14.5 Binding Agreement. 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.

14.6 No Joint Venture; No Partnership. Nothing contained in this Agreement is intended by the Parties to create any form of joint venture or partnership, and any implication to the contrary is hereby expressly disavowed by both Parties. It is understood and agreed that this Agreement

does not create a joint enterprise of any kind.

14.7 Independent Contractor. It is expressly understood and agreed that IKE is and shall be deemed to be an independent contractor and operator. Neither the City nor VIA is responsible for any acts or omissions of IKE.

14.8 Third Party Beneficiaries. There shall be no third-party beneficiaries to this Agreement.

14.9 Governing Law; Venue. This Agreement will be governed by and construed in accordance with the laws of the State of Texas. Proper venue for any dispute or litigation shall be only in Bexar County, Texas.

14.10 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.

14.11 Invalid Provisions. If any clause or provision of this Agreement is held invalid, illegal or unenforceable, then it is the intention of the Parties that such invalidity, illegality or unenforceability shall not affect any other clause or provision herein and that the remainder of this Agreement shall be construed as valid.

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14.12 Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed an original, all of which taken together shall constitute one single Agreement among the Parties.

This Agreement is executed to be effective as of the ____ day of _____, 2018 (the

“Effective Date”).

CITY:
CITY OF SAN ANTONIO

A Municipal Corporation

VIA:
**VIA METROPOLITAN
TRANSIT:**

A Transit Authority

Jose De La Cruz
Director, Office of Innovation

Name:
Title:

ATTEST:

Leticia Vacek
City Clerk

Approved as to Form:

Andrew Segovia
City Attorney

DRAFT