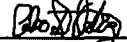


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FILED  
OFFICE OF THE CITY CLERK  
OAKLAND

APPROVED AS TO FORM AND LEGALITY

  
Celso Ortiz (Nov 22, 2022, 16:33 PST)

CITY ATTORNEY'S OFFICE

## OAKLAND CITY COUNCIL

ORDINANCE NO. **13713** C.M.S.

**ORDINANCE: (A) GRANTING A NON-EXCLUSIVE FRANCHISE TO IKE SMART CITY LLC FOR DIGITAL ADVERTISING KIOSKS WITH WAYFINDING CAPABILITIES WITHIN THE PUBLIC RIGHT-OF-WAY CONTINGENT UPON EXECUTION OF A FRANCHISE AGREEMENT; (B) AUTHORIZING THE CITY ADMINISTRATOR NEGOTIATE AND EXECUTE A FRANCHISE AGREEMENT WITH IKE SMART CITY LLC; AND (C) ADOPTING APPROPRIATE CALIFORNIA ENVIRONMENTAL QUALITY ACT FINDINGS**

**WHEREAS**, the Oakland Department of Transportation is tasked with improving transportation choices and minimizing parking demand, congestion, and pollution, such as through transportation demand management programs; and

**WHEREAS**, IKE Smart City, LLC (“IKE” or “Grantee”), an advertising agency, provided an unsolicited proposal to install fifty (50) digital advertising and wayfinding kiosks in Oakland’s right-of-way; and

**WHEREAS**, the proposed kiosks feature a large, interactive digital display that either shows advertising or allows for touch-based interaction about a range of topics, including transit information, wayfinding, local business directories and more. The kiosks also provide a free Wi-Fi hotspot that allows anyone with a Wi-Fi-enabled device to access the Internet with limited speeds; and

**WHEREAS**, the City Council directed staff to negotiate the terms of a non-exclusive Franchise Agreement with IKE, including terms related to funding city staff time by IKE and how and when funding is distributed, equitable distribution of kiosks, maintenance of the kiosks by IKE including response time, the number and in-kind slides to the city, privacy concerns including not utilizing the cameras, IP address tagging and any other privacy concerns and to bring back to the City Council the terms of agreement and any other needed legislation for approval; and

**WHEREAS**, in order to facilitate and expedite the implementation of the digital advertising and wayfinding kiosk program in Oakland, the City Council desires to delegate authority to the City Administrator, or their designee, to issue Major Encroachment Permits to Grantee for the proposed fifty (50) Kiosks in the Public Right of Way pursuant to Oakland Municipal Code Chapter 12.08 and section 12.08.030 et seq.;

**WHEREAS**, the City has independently reviewed and considered the IKE digital advertising and wayfinding kiosks program and finds and determines that that the project is exempt from the California Environmental Quality Act (CEQA) pursuant to the following CEQA exemptions, which each independently and collectively serve as a basis for CEQA compliance: CEQA Guidelines Sections 15268 (Ministerial Projects), 15183 (Projects Consistent with a Community Plan, General Plan or Zoning), 15301(c) (Existing Facilities, Highways and Streets), 15302 (Replacement or Reconstruction), 15303 (Small Structures), 15304 (h) (minor alterations to land, and/or 15061 (b)(3) (No significant Effect on the Environment); and

**WHEREAS**, staff negotiated these terms and prepared a proposed Franchise Agreement (See **Exhibit A**);

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:**

**SECTION 1. Public Purpose of Franchise.** The Council does hereby find and declare that the above recitals are true and correct and that the granting of a non-exclusive franchise to IKE to install and operate Smart City Digital Advertising Kiosks With Wayfinding Capabilities within the public right-of-way is for a proper public purpose.

**SECTION 2. California Environmental Quality Act.** The City Council has independently reviewed and considered the IKE digital advertising and wayfinding kiosks program and finds and determines that that the project is exempt from the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines Sections 15268 (Ministerial Projects), 15183 (Projects Consistent with a Community Plan, General Plan or Zoning), 15301(c) (Existing Facilities, Highways and Streets), 15302 (Replacement or Reconstruction), 15303 (Small Structures), 15304 (h) (minor alterations to land, and/or 15061 (b) (3) (No significant Effect on the Environment); each of the aforementioned provides a separate and independent basis for CEQA compliance. As such, the City Council directs the City's Environmental Review Officer to file a Notice of Exemption with the Alameda County Clerk's Office and appropriate agencies.

**SECTION 3. Franchise Grant/Term.** The City Council hereby grants to IKE, contingent upon its execution of a Digital Advertising Kiosks With Wayfinding Capabilities Non-Exclusive Franchise Agreement (Agreement), a non-exclusive franchise to install and operate fifty (50) Digital Advertising Kiosks With Wayfinding Capabilities within the public right-of-way under the terms and conditions, including locations, to be specified in the Franchise Agreement. The term of this franchise is from November 1, 2022 to October 31, 2032.

- (A) The term of the Agreement shall automatically renew for 2 additional terms of 5 years each (each a "Renewal Term" and together the "Renewal Terms") upon the expiration of the Initial Term or then current Renewal Term, as applicable, so long as Grantee meets the following criteria ("Performance Standards"): (a) Grantee shall have deployed monthly software updates, including security screening, bug fixes, and user experience improvements to the operating software for the Kiosks over the initial term; (b) Grantee shall

have complied with all maintenance, repair, and replacements obligations for the Digital Wayfinding Kiosks throughout the Initial Term of the Agreement; (c) Grantee shall have electronically monitored the Kiosks twenty-four hours per day, seven days per week to ensure that all operating software is operable and malfunctions to the operating software have been repaired within a reasonably practicable time period; (d) Grantee has refreshed the internal networking components for the Digital Wayfinding Kiosks at least one time during the Initial Term; (e) Grantee will have complied with all revenue payment provisions of this Agreement; and (f) Grantee is not in default of the Agreement. Grantee shall provide all necessary data to assess compliance with the Performance Standards in the form of an Annual Report. The Annual Report will be delivered to City staff within sixty days of the end of each Calendar year during the Term of the Agreement.

- (B) The term “Term Year” shall mean (a) for the first Term Year, the period starting on the date on which the last Kiosk is installed and operational and ending on December 31st of the first (1st) full consecutive calendar year after the final Kiosk is installed and (b) for each Term Year following the first Term Year, each period of 12 successive and consecutive months during the Term, with the Term Year commencing on the first day of the Term Year, January 1st, and ending the last day of the 12th consecutive full calendar month, December 31st thereafter.

**SECTION 4. Franchise Pre-Payment/Oversight Costs/Advertising Revenue Payment.** In consideration of the special non-exclusive franchise right granted by the City to IKE to transact advertising business, provide services, use the public street and/or other public places, and to install and operate IKE Smart City Digital Advertising Kiosks With Wayfinding Capabilities in the public right-of-way, IKE Smart City shall remit to City:

- (A) Grantee Pre-Payment To City. \$250,000 at the execution of the Agreement, to be recouped by Grantee out of advertising revenues above the Minimum Annual Guarantee;
- (B) Annual Payment For City Staff Oversight. \$65,000 annually to the Department of Transportation to fund staff oversight of this Agreement, such amount being equal to 25% of the annual time of a Transportation Planner II position. The initial payment to be made when the first Kiosk is installed and is operational, pro-rated based on the operational date of such kiosk relative to the calendar year of installation. The payments to the Department of Transportation shall increase annually at the same rate that Department of Transportation Planner II staff compensation is increased, in order to fund 25% of the annual total compensation for Transportation Planner oversight. Payments will be made annually for the duration of the Agreement;
- (C) Public Benefit Payment. From and after the date on which the first Kiosk is installed and operational until the end of the Term, and subject to fulfillment of Grantee receiving the Reimbursement Share in full, Grantee shall pay to

the City a payment (the “Public Benefit Payment”) equal to the greater of: (i) 35% of annual Net Revenue earned by Grantee with respect to the operational Kiosks (the “Revenue Share”) or (ii) the Minimum Annual Guarantee of \$10,000.00 per commissioned kiosk..

**SECTION 5: Equitable Allocation of Kiosks.** Fifteen percent (15%) of the Kiosks, or 8 out of the 50 planned Kiosks, will be located in districts identified by the City as communities of opportunity.

**SECTION 6. New Technologies.** Grantee is committed to exploring new functionalities and new technologies to improve the Kiosks and shall regularly consult with the City on such matters, including but not limited to new and improved additional Kiosk applications and ancillary hardware experiences such as curbside electrical vehicle charging. In the event the parties elect to pursue such additional technologies or program enhancements, the parties shall work together in good faith to amend this Agreement to reflect such enhancements.

**SECTION 7. Curbside EV Charging.** Should the City desire to implement curbside electric vehicle (EV) charging in the public right-of-way at a location where IKE has installed or plans to install a Kiosk, IKE shall have the right of first refusal to come to an agreement within 90 days with the City provide such EV charging. If no such agreement is reached, the City may solicit another entity to provide charging at that location, including charging that may be partially or totally supported by advertising subject to the radius limitations contained in Section 4.I above.

**SECTION 8. Annual Report.** Grantee shall provide an Annual Report which includes, at a minimum, the following information:

- (A) number of monthly software updates, including security screening, bug fixes, and user experience improvements to the operating software for the Kiosks;
- (B) Logs of maintenance, repair, and replacements of the Kiosks;
- (C) Records of any Kiosk outages or malfunction periods;
- (D) Any replacement or refresh of the internal networking components for the Kiosks;
- (E) All revenue payments;
- (F) Total amount of slide content given or offered to the City.

The Annual Report will be delivered to City staff within sixty days of the end of each Calendar year during the Term of the Agreement.

**SECTION 9. City Administrator Authority To Negotiate Agreement/Amendments/ Issue Major Encroachments For Kiosks.** The City Administrator is authorized to conduct all negotiations and execute all documents including but not limited to amendments, modifications,

notices, and related actions (including advertising rate revenue adjustments as to be specified in the Agreement and issuing Major Encroachments For Kiosks) which may be necessary and consistent with the basic intent and purpose of this Ordinance.

**SECTION 10. Severability.** If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of the Chapter. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, clause or phrase thereof irrespective of the fact that one or more other sections, subsections, clauses or phrases may be declared invalid or unconstitutional.

**SECTION 11. Effective Date.** This ordinance shall become effective immediately on final adoption if it receives six or more affirmative votes; otherwise it shall become effective upon the seventh day after final adoption.

IN COUNCIL, OAKLAND, CALIFORNIA,

DEC 20 2022

PASSED BY THE FOLLOWING VOTE:

AYES – FIFE, GALLO, KALB, KAPLAN, ~~WATSON~~ TAYLOR, THAO AND  
PRESIDENT FORTUNATO BAS — 7

NOES – 0

ABSENT – 0

ABSTENTION – 0

1 Excused - Reed

ATTEST:



ASHA REED

City Clerk and Clerk of the Council of the  
City of Oakland, California

Introduction Date

DEC 06 2022

Date of Attestation: December 22, 2022

## NOTICE AND DIGEST

### **ORDINANCE GRANTING AN EXCLUSIVE FRANCHISE TO IKE SMART CITY (IKE) FOR DIGITAL ADVERTISING KIOSKS WITH WAYFINDING CAPABILITIES WITHIN THE PUBLIC RIGHT-OF-WAY CONTINGENT UPON IKE'S EXECUTION OF A FRANCHISE AGREEMENT; AUTHORIZING THE CITY ADMINISTRATOR OR DESIGNEE TO NEGOTIATE AND EXECUTE A FRANCHISE AGREEMENT WITH IKE; AND ADOPTING APPROPRIATE CALIFORNIA ENVIRONMENTAL QUALITY ACT FINDINGS**

This Ordinance serves to grant IKE Smart City, contingent upon its execution of a Digital Advertising Kiosks With Wayfinding Capabilities Non-Exclusive Franchise Agreement (Agreement), a non-exclusive franchise to install and operate fifty (50) Digital Advertising Kiosks With Wayfinding Capabilities within the public right-of-way under the terms and conditions, including locations, to be specified in a Franchise Agreement to be negotiated and executed by the City Administrator or their designee. The term of this franchise from November 1, 2022 to October 31, 2032. The City Council also made certain California Environmental Quality Act (CEQA) exemption findings in finding that the action complies with CEQA.

**IKE SMART CITY LLC FRANCHISE AGREEMENT****SUMMARY OF KEY TERMS**

1. **Date of Agreement** \_\_\_\_\_, 2022
2. **Kiosk Program** City selects IKE Smart City LLC (Grantee) as the non-exclusive digital information kiosk franchisee in the City. Grantee may install and operate up to (50) digital information kiosks offering wayfinding and other value-added functions (Kiosks). Grantee may elect to install additional Kiosks upon mutual agreement of Grantee and the City.
3. **Franchise Prepayment** Grantee shall pay to the City \$250,000 at execution of this Agreement, to be recouped by Grantee out of advertising revenues above the Minimum Annual Guarantee.
4. **Transportation Staff Payment** Grantee shall pay \$65,000 annually to the Department of Transportation to fund staff oversight of this Agreement, such amount being equal to 25% of the annual time of a Transportation Planner II position. The initial payment to be made when the first Kiosk is installed and is operational, pro-rated based on the operational date of such kiosk relative to the calendar year of installation. The payments to the Department of Transportation shall increase annually at the same rate that Department of Transportation Planner II staff compensation is increased, in order to fund 25% of the annual total compensation for Transportation Planner oversight. Payments will be made annually for the duration of the agreement.

**5. Public Benefit Payment**

Each year, Grantee shall pay to the City the greater of (i) the Minimum Annual Guarantee or (ii) 35% of annual Net Revenues from the sale of advertising

**6. Net Revenue**

“Net Revenue” shall mean total revenue earned from the sale of advertisements on the Kiosks, less the amount of any uncollected or bad debts and the following out-of-pocket costs and expenses incurred by Grantee: (i) utility services, including electric and data service; (ii) insurance premiums with respect to insurance which is carried by Grantee; (iii) repairs and maintenance to the Kiosks ; (iv) personal property taxes assessed on the Kiosks; (v) sales and management expenses equal to 12.5% of the total revenue; (vi) any taxes, permitting fees, use fees or other fees as may be assessed by a governmental or quasi-governmental agency; and (vii) an amount equal to the annual amortized portion of the cost to fabricate, acquire, install and replace the Kiosks, amortized on a straight-line basis over a seven (7) year period.

**7. Minimum Annual Guarantee**

The term “Minimum Annual Guaranty” means \$10,000.00 per operational Kiosk per annum (\$833.33 per operational Kiosk per month) during the first full calendar year of each Term Year and 10 years thereafter. Kiosks are deemed operational once installed and commissioned and until removed.

**8. Term**

10 full calendar years commencing on the Effective Date and expiring on December 31<sup>st</sup> of the 10<sup>th</sup> full calendar year following the earlier of (a) the date on which the final Kiosk is installed and (b) the date that is thirty-six (36) months following the Effective Date.



**9. Renewal Terms**

This Agreement shall renew for 2 additional terms of 5 years each upon the expiration of the initial term so long as Grantee meets certain Performance Standards, as detailed in Annual Reports provided by Grantee to the City, which shall be reviewed by the City to determine whether the Performance Standards have been achieved.

**10. Capital Costs**

Grantee shall bear all costs and expenses associated with obtaining any and all required approvals and permits.

**11. Equity Allocation & Content**

Fifteen percent (15%) of the Kiosks, or 7 out of the 50 planned Kiosks, will be located in "highest priority and high priority neighborhoods" as designated by the City's Geographic Equity Toolbox. In addition, Grantee will cooperate with the City Office of Economic & Workforce Development to develop localized content in the form of digital public art from local City-based artists and arts organizations, community and neighborhood-specific content and information content about local non-profit organizations, at no cost to the City.

**12. Advertising Restriction**

All Kiosk slides shall not display any advertisements that: (a) are contrary to any law, ordinance, rule or regulation of the City of Oakland, including the City Sign Code, or the State of California, (b) that promotes or advertises tobacco products, (c) promotes or advertises adult bookstores, adult cinemas or adult live entertainment venues, or (d) promotes a candidate for public office.

**13. City Content**

The City shall have the right to have City Directed Content at no cost to the City on twelve and a half percent (12.5%) of the Kiosks, or 1 out of every 8 slides, on all Kiosks. In addition, Grantee shall provide

any unsold Spots on the remaining 7 slots to the City for City Directed Content so that the City Directed Content shall equal 20% of all screen time on an annual basis.

#### **14. Maintenance**

Maintenance. Grantee shall maintain the Kiosks in good and operable condition, reasonable wear and tear excepted. Grantee shall promptly and adequately repair all damage to the Kiosks and replace the Kiosks as reasonably necessary throughout the Term to ensure the same are capable of operating for their intended purposes. Grantee shall promptly respond to any maintenance requests within 24 hours of notice and shall begin all work necessary to repair any damage as soon as reasonably practicable and in any event within 48 hours after receipt of notice. If any Kiosk requires replacement, Grantee shall remove the same within 24 hours after determining that replacement is necessary and will cap off all utilities until such time as a replacement Kiosk can be installed.

## **IKE SMART CITY LLC FRANCHISE AGREEMENT**

**THIS agreement** is made and entered into this \_\_\_ day of \_\_\_\_\_, 2022 (the “Effective Date”) by and between the City of Oakland, a municipal corporation (“City”), and IKE SMART CITY LLC, an Ohio limited liability company (“Grantee”).

**WHEREAS**, pursuant to Article X of the City Charter, Grantee has applied to City for a Franchise (“Franchise”) to install digital information and wayfinding kiosks with other value-added functions (hereinafter referred to as “Kiosks”) in right of ways in the City of Oakland; and

**WHEREAS**, the City Council held discussions and sought public comment on the granting and implementation of the Franchise; and

**WHEREAS**, the City Council has determined that the grant of such Franchise to Grantee is in the public interest; and

**WHEREAS**, City and Grantee desire to enter into a Franchise Agreement (“Agreement”) in order that Grantee may provide Kiosks in the City of Oakland;

**NOW, THEREFORE**, City and Grantee do hereby agree as follows:

### **1. GRANT OF FRANCHISE**

Pursuant to Article X, Section 1000 of the City Charter, City grants to Grantee a non-exclusive Franchise authorizing Grantee to install Kiosks in the City of Oakland and to use the public rights of way for such purpose. Grantee acknowledges that this Franchise is subject to the terms and conditions specified in the City Charter and the terms and conditions of this Agreement.

### **2. TERM OF FRANCHISE**

- A. Subject to Section 11 of this Agreement, the Franchise shall commence on the Effective Date and expire on December 31<sup>st</sup> of the 10<sup>th</sup> full calendar year following the earlier of (a) the date on which the final Kiosk is installed and (b) the date that is thirty-six (36) months following the Effective Date (the “Initial Term”). This Agreement shall automatically renew for 2 additional terms of 5 years each (each a “Renewal Term” and together the “Renewal Terms”) upon the expiration of the Initial Term or then current Renewal Term, as applicable, so long as Grantee meets the following criteria (“Performance Standards”): (a) Grantee shall have deployed monthly software updates, including security screening, bug fixes, and user experience improvements to the operating software for the Kiosks over the initial term; (b) Grantee shall have complied with all maintenance, repair, and replacements obligations for the Digital Wayfinding Kiosks throughout the Initial Term of the Agreement pursuant to the obligations provided in Section 4(H) below, including all maintenance request response times; (c)

Grantee shall have electronically monitored the Kiosks twenty-four hours per day, seven days per week to ensure that all operating software is operable and malfunctions to the operating software have been repaired within a reasonably practicable time period; (d) Grantee has refreshed the internal networking components for the Digital Wayfinding Kiosks at least one time during the Initial Term; (e) Grantee will provide Kiosk usage statistics and analytics; (f) Grantee will have complied with all revenue payment provisions of this Agreement; and (g) Grantee is not in default of the Agreement. Grantee shall provide all necessary data to assess compliance with these Performance Standards in the form of Annual Reports, as provided for in Section 4(N) below, which shall be reviewed by the City to determine whether the Performance Standards have been achieved. The Annual Reports will be delivered to City staff within sixty days of the end of each Calendar year during the Term of the Agreement.

- B. The term "Term Year" shall mean (a) for the first Term Year, the period starting on the date on which the last Kiosk is installed and operational and ending on December 31st of the first (1st) full consecutive calendar year after the final Kiosk is installed and (b) for each Term Year following the first Term Year, each period of 12 successive and consecutive months during the Term, with the Term Year commencing on the first day of the Term Year, January 1st, and ending the last day of the 12th consecutive full calendar month, December 31st thereafter.

### **3. RELATIONSHIP OF GRANTEE TO CITY**

- A. Grantee shall be deemed at all times to be a franchisee and shall be wholly responsible for the manner in which Grantee performs the services required of Grantee by the terms of this Agreement. Grantee shall be liable for the acts and omissions of it, its employees and its agents. Nothing contained herein shall be construed as creating an employment or agency relationship between City and Grantee.
- B. Terms in this Agreement referring to direction from City shall be construed as providing for direction as to policy and the result of Grantee's services only and not to the means by which such a result is obtained.
- C. Nothing in this Agreement shall operate to confer rights or benefits on persons or entities not party to this Agreement.

### **4. COVENANTS OF GRANTEE AND CITY**

- A. Franchise Prepayment. Upon Execution of this Agreement, Grantee will pay City a lump sum of Two Hundred Fifty Thousand Dollars (\$250,000) ("Franchise Prepayment"), which amount Grantee may deduct from any Net Revenues above the minimum guarantee payable to the City until reimbursed in full ("Reimbursement Share"). If this payable is never met

during the full term of the Agreement, then the prepayment shall be deemed forgiven.

- B. Department of Transportation Payment. Upon installation and operation of the first Kiosk, Grantee shall make an initial payment of the pro-rated portion of the greater of \$65,000 or 25% of the cost of the total compensation of a Transportation Planner II at salary step 3 within the Department of Transportation ("Transportation Payment Cap"). Grantee will make this payment annually to fund Department of Transportation oversight of this Agreement. Once the Transportation Payment Cap is reached, Grantee has no further Department of Transportation Payment requirement.
- C. Public Benefit Payment. From and after the date on which the first Kiosk is installed and operational until the end of the Term, and subject to fulfillment of Grantee receiving the Reimbursement Share in full, Grantee shall pay to the City a payment (the "Public Benefit Payment") equal to the greater of: (i) 35% of annual Net Revenue earned by Grantee with respect to the operational Kiosks (the "Revenue Share") or (ii) the Minimum Annual Guarantee (as defined below).
- D. Net Revenue. The term "Net Revenue" means total revenue earned from the sale of advertisements on the Kiosks, less the amount of any uncollected or bad debts and the following out-of-pocket costs and expenses incurred by Grantee: (i) utility services, including electric and data service (as incurred); (ii) insurance premiums (as incurred) with respect to insurance which is carried by Grantee; (iii) repairs and maintenance to the kiosks (as incurred); (iv) personal property taxes assessed on the kiosks; (v) sales and management expenses equal to 12.5% of the total revenue; (vi) any taxes, permitting fees, use fees or other fees as may be assessed by a governmental or quasi-governmental agency; and (vii) an amount equal to the annual amortized portion of the cost to fabricate, acquire, install and replace the Kiosks, amortized on a straight-line basis over a ten (10) year period.
- E. Minimum Annual Guarantee. The term "Minimum Annual Guarantee" means: (i) \$10,000.00 per operational Kiosk per annum each Term Year during the Initial Term (Term Years 1-10); (ii) \$11,000 per operational Kiosk per annum each Term Year during the first Renewal Term (Term Years 11-15); and (iii) \$12,100 per operational Kiosk per annum each Term Year during the second Renewal Term (Term Years 16-20). Kiosks are deemed operational once installed and commissioned and until permanently removed.
- F. Timing. The Public Benefit Payment and Department of Transportation Payment shall be paid in quarterly installments due on the fifteenth (15th) day after the completion of each calendar quarter. Grantee shall provide the City, simultaneously with the payment of the Public Benefit Payment, a

statement of Revenue Share and Net Revenue for the immediately preceding calendar quarter. Additionally, on or before January 15th of each calendar year, Grantee shall provide the City a statement of Net Revenue for the immediately preceding calendar year ("Reconciliation Statement"). If a Reconciliation Statement shows that the amount of the Public Benefit Payment paid during any calendar year exceeded the amount actually due and owing by Grantee, Grantee shall credit such overage against the Revenue Share payments next coming due until reimbursed in full; provided, however, that for the last calendar year of the Term, City shall reimburse Grantee for the amount of any overpayment within thirty (30) days after receipt of the Reconciliation Statement. If a Reconciliation Statement shows that the amount of the Public Benefit Payment paid during any calendar year was less than the amount actually due and owing by Grantee for such year, then Grantee shall pay such shortfall within thirty (30) days after submission of the Reconciliation Statement. The Department of Transportation Payment shall be paid quarterly but the sum of all payments shall not exceed \$65,000 annually as provided in Section 4.B. of this Agreement.

- G. Advertising Restrictions. Grantee shall not display any advertisements on the Kiosks that: (a) are contrary to any law, ordinance, rule or regulation, of the City of Oakland, including the City Sign Code, or the State of California, (b) promotes or advertises tobacco products, (c) promotes or advertises adult bookstores, adult cinemas or adult live entertainment venues, or (d) promotes a candidate for public office.
- H. Maintenance. Grantee shall maintain the Kiosks in good and operable condition, reasonable wear and tear excepted. Grantee shall promptly and adequately repair all damage to the Kiosks and replace the Kiosks as reasonably necessary throughout the Term to ensure the same are capable of operating for their intended purposes. Grantee shall promptly respond to any maintenance requests within 24 hours of notice and shall begin all work necessary to repair any damage as soon as reasonably practicable and in any event within 48 hours after receipt of notice. If any Kiosk requires replacement, Grantee shall remove the same within 24 hours after determining that replacement is necessary and will cap off all utilities until such time as a replacement Kiosk can be installed.
- I. Advertising Radius. The City hereby covenants and agrees that from and after the Effective Date through the expiration of the Term it will not engage any other person or entity to install and operate any free-standing kiosks or structures within the public right-of-way hosting commercial advertisements or commercial sponsorships within 300 feet of any Kiosk. Notwithstanding the foregoing, any kiosks or structures existing within the right of way and hosting commercial advertisements or sponsorships as of the date of this Agreement shall be permitted to remain in the right of way and relocation, expansion or increase in the number of any such structures shall be

permitted within 300 feet of any Kiosks provided that the City uses good faith efforts to avoid any obstruction to the visibility or viewshed of already installed Kiosks.

- J. Utility Assistance. The City shall make good faith efforts to provide Utility Assistance to Grantee at no cost to the City. "Utility Assistance" means working with local power and data providers and other local entities to: (a) minimize or eliminate connection fees by obtaining City rates or other exemptions from standard rates; (b) allow and minimize the need for new trenching, long power runs and street closures; and (c) assist with identifying and obtaining all relevant permits. Grantee shall pay all costs associated with bringing utility services and telecommunications services to each Kiosk.
- K. City Directed Content. During any period in which a user is not actively engaging a Kiosk, the City shall have the right to have City Directed Content appear: (a) on 1 out of every 8 Spots on the Kiosk; and (b) on any unsold Spots. The term "City Directed Content" means any content provided to Grantee by the City for display on the Kiosks. The City shall ensure that all City Directed Content is provided to Grantee in a format and condition capable of display on the Kiosks. City Directed Content shall equal 20% of all screen time on an annual basis. The term "Spot" means a discrete unit of time when content may be displayed on the Kiosk screens. All Spots will be of equal duration.
- L. New Technologies. Grantee is committed to exploring new functionalities and new technologies to improve the Kiosks and shall regularly consult with the City on such matters, including but not limited to new and improved additional Kiosk applications and ancillary hardware experiences such as curbside electrical vehicle charging. In the event the parties elect to pursue such additional technologies or program enhancements, the parties shall work together in good faith to amend this Agreement to reflect such enhancements.
- M. Curbside EV charging. Should the City desire to implement curbside electric vehicle (EV) charging in the public right-of-way at a location where IKE has installed or plans to install a Kiosk, IKE shall have the right of first refusal to come to an agreement within 90 days with the City provide such EV charging. If no such agreement is reached, the City may solicit another entity to provide charging at that location, including charging that may be partially or totally supported by advertising subject to the radius limitations contained in Section 4.I above.
- N. Annual Report. Grantee shall provide an Annual Report which includes, at a minimum, the following information:

(a) number of monthly software updates, including security screening, bug fixes, and user experience improvements to the operating software for the Kiosks; (b) Logs of maintenance, repair, and replacements of the Kiosks; (c) Records of any Kiosk outages or malfunction periods; (d) A summary of Kiosk usage statistics and analytics; (e) Any replacement or refresh of the internal networking components for the Kiosks; (f) All revenue payments; (g) Total amount of slide content given or offered to the City.

The Annual Report will be delivered to City staff within sixty days of the end of each Calendar year during the Term of the Agreement.

## **5. AUDIT REQUIREMENT**

All such books of account and other records shall be subject to inspection and/or audit at Grantee's place of business during normal business hours upon request or demand of the City Administrator, City Auditor, City Attorney, or other City officer, employee or consultant authorized by any of these officers. The purpose of such inspection and/or audit shall be for verification of any revenues, fees or penalties paid by Grantee, and the accuracy thereof, as well as compliance with the terms and conditions of this Agreement.

In the event any audit conducted by City or by City's representative discloses that Grantee has made any misrepresentation with respect to the fees, penalties, or any other payments due to City, or discloses that Grantee has underpaid fees, penalties, or any other payments due to City in an amount greater than Three Thousand Dollars (\$3,000), then in addition to any other remedies available to City, Grantee shall reimburse City for City's reasonable costs incurred in the performance of the audit, including any legal fees or expenses incurred. Such reimbursement shall be paid by Grantee within thirty (30) days of the date City notifies Grantee of the amount of City's costs.

## **6. INDEMNIFICATION**

- A. Grantee shall protect, defend (with counsel acceptable to City), indemnify, and hold harmless City and its current and former councilmembers, officers, employees and agents (each, an "Indemnified Party"; and collectively, "Indemnified Parties") from and against any and all liabilities, claims, demands, causes of action, proceedings or lawsuits brought by third-parties ("Claims"), and all losses, damages, liabilities, penalties, fines, forfeitures, debts, liens, judgments, obligations, administrative or regulatory fines or penalties, actions, costs and expenses arising from or incidental to any Claims (including attorneys' fees and other costs of defense) (collectively, with Claims, "Liabilities"), caused by or arising out of Grantee breach of any term or condition of this Agreement, and damage to property or injury to or death of persons arising out of or resulting from the negligence, intentional act or omission, or strict liability of Grantee, its officers, employees, subcontractors or agents, including without limitation, those Liabilities resulting from, or arising from, the operation of the Kiosk Program and the provision of services, whether such operation or services is performed or



provided by Grantee or by Grantee's subcontractors or any other person acting for or on behalf of Grantee. Grantee acknowledges and agrees that it has an immediate and independent obligation to defend and indemnify Indemnified Parties from any Liabilities which potentially falls within this indemnification provision, which obligation shall arise at the time such claim is tendered to Grantee by City and continues at all times thereafter, without regard to any alleged or actual comparative or contributory negligence of any Indemnified Party. All of Grantee's obligations under this section shall: (a) apply to the fullest extent permitted by law and shall survive the expiration or sooner termination of this Agreement and (b) not be limited to the City's applicable insurance requirements in Schedule Q or by any other provision of this Order.

- B. Notwithstanding the foregoing, the following shall be excluded from Grantee's indemnification and defense obligations contained in the preceding paragraph:
1. Any Liabilities to the extent resulting from, or arising out of:
    - a. the gross negligence or willful misconduct of any Indemnified Party;
    - b. Grantee complying with the written directives or written requirements of City, if Grantee has previously objected to such written directives or requirements in writing, with respect to (A) the location or configuration of any Kiosk in relation to the street or right of way on which such Kiosk is located or to which it adjoins, or (B) a City's standards for alteration or maintenance of right of ways; or
    - c. the condition of any public property outside of the perimeter of a Kiosk and not otherwise controlled by Grantee (and expressly excluding from this clause (c) the condition of the Kiosks).
- C. If any Claim against Grantee includes claims that are covered by clause (B)(1)(c) above then each party shall be responsible for its own defense against such Claims.
- D. City Approvals. To the maximum extent permitted by law, Grantee shall defend, indemnify, and hold harmless Indemnified Party from any liability, damages, claim, judgement, action, loss (direct or indirect), or proceeding (including legal costs and attorney's fees, expert witness or consultant fees, City Attorney or staff time, expenses or costs) (Collectively called "Action") against the City of Oakland to attack, set aside, void or annul, an approval adopted concurrently herewith or any subsequent approval or the implementation of the same based upon an allegation that the by the City of Oakland, the Office of Planning and Building, Planning Commission, or City Council, failed to comply with any laws, rules, codes, or regulations

including, without limitation, the California Environmental Quality Act. The City shall promptly notify Grantee of any claim, action or proceeding and the City shall cooperate fully in such defense. The City may elect, in its sole discretion, to participate in the defense of said claim, action, or proceeding. Within ten (10) calendar days of the filing of any Action as specified in the preceding paragraph, Grantee shall execute a Joint Defense Letter Agreement with the City, acceptable to the Office of the City Attorney, which memorializes the above obligations. These obligations and the Joint Defense Letter of Agreement shall survive termination, extinguishment, or invalidation of City approval or any subsequent approval requested by Grantee. Failure to timely execute the Letter Agreement does not relieve the Grantee of any of the obligations contained in this section or other requirements or terms, conditions of approval, or other obligations imposed by the City.

- E. Upon receipt by any Indemnified Party of actual notice of a Claim to which such Indemnified Party is entitled to indemnification in accordance with this Section 6, such Indemnified Party shall give prompt notice of such Claim to Grantee. Grantee shall assume and prosecute the defense of such Claim at the sole cost and expense of Grantee. Grantee may settle any such Claim in its discretion so long as such settlement includes an unconditional release of the Indemnified Party.
- F. Nothing in this Agreement shall constitute a waiver or limitation of any rights which City may have under applicable law. All rights and remedies of City, whether under this Agreement or other applicable law, shall be cumulative.

## **7. INSURANCE REQUIREMENTS**

- A. Grantee shall comply with the City's Insurance Requirements set forth in Schedule Q which is attached and incorporated herein by reference.
- B. Acceptable Insurers. All policies will be issued by insurers qualified to do business in California and with a Best's Rating of A-VIII or better.
- C. Deductibles and Retentions. Grantee shall be responsible for payment of any deductible or retention on Grantee's policies without right of contribution from City. Deductible and retention provisions shall not contain any restrictions as to how or by whom the deductible or retention is paid. Any deductible or retention provision limiting payment to the Named Insured is unacceptable.
- D. Additional Insured. In the event that City is entitled to coverage as an additional insured under any Grantee insurance policy that contains a deductible or self-insured retention, Grantee shall satisfy such deductible or self-insured retention to the extent; of loss covered by such policy, for any lawsuit arising from or connected with any alleged act of Grantee,

subconsultant, subcontractor, or any of their employees, officers or directors, even if Grantee or subconsultant is not a named defendant in the lawsuit.

- E. Claims Made Coverage. If any insurance specified above is written on a "Claims-Made" (rather than an "occurrence") basis, then in addition to the coverage requirements above, Grantee shall:
1. Ensure that the Retroactive Date is shown on the policy, and such date must be before the date of this Agreement or the beginning of any work under this Agreement;
  2. Maintain and provide evidence of similar insurance for at least three (3) years following the expiration or termination of this Agreement, including the requirement of adding all additional insureds; and
  3. If insurance is cancelled or non-renewed, and not replaced with another claims-made policy form with a retroactive date prior to the commencement of any work hereunder, Operator shall purchase "extended reporting" coverage for a minimum of three (3) years after the expiration or termination of this Agreement.
- F. Failure to Maintain Insurance. All insurance specified above shall remain in force until the expiration or termination of this Agreement. Grantee must notify City if any of the above required coverages are non-renewed or cancelled! The failure to procure or maintain required insurance and/or an adequately funded self-insurance program will constitute a material breach of this Agreement.
- G. Certificates of Insurance. Prior to commencement of any work hereunder, Grantee shall deliver to City Certificates of Insurance verifying the aforementioned coverages. Such certificates shall make reference to all provisions and endorsements referred to above and shall be signed on behalf of the insurer by an authorized representative thereof.
- H. Disclaimer. The foregoing requirements as to the types and limits of insurance coverage to be maintained by Grantee are not intended to and shall not in any manner limit or qualify the liabilities and obligations otherwise assumed by Grantee.

## 8. KIOSKS

- A. Grantee may install and operate up to fifty (50) Kiosks in rights of way in Oakland. Grantee may elect to install additional Kiosks in excess of fifty (50) upon mutual agreement of Grantee and the City Administrator.

B. Permitting process.

1. The City hereby acknowledges and agrees that the City's Departments of Transportation, Public Works, and Building and Planning will review permit submittals for the approvals necessary to install and operate the Kiosks. The City further agrees that all permits for the installation and operation of the Kiosks shall be issued in the name of Grantee or Grantee's designee.
2. Grantee shall consult with business improvement districts within the City of Oakland in making its determination on the most suitable locations for the Kiosks within each business improvement district.
3. Grantee covenants that fifteen percent (15%) of the Kiosks (or 7 out of 50 Kiosks) will be located in "highest priority and high priority neighborhoods" designated by the Department of Transportation Geographic Equity Toolbox with installation of these Kiosks to generally occur on the same schedule as installation of Kiosks in other areas of the City. As an example, if 50 Kiosks are installed City-wide, seven (7) shall be installed in the "highest priority and high priority neighborhoods" as designated by the Department of Transportation Geographic Equity Toolbox. A minimum of one (1) kiosk shall be installed in such "highest priority and high priority neighborhoods" for every six (6) installed in other areas, before further Kiosks are installed in non-"highest priority and priority neighborhoods." In addition, Grantee will cooperate with the City Office of Economic & Workforce Development to develop localized content in the form of digital public art from local City-based artists and arts organizations, community and neighborhood-specific content and information content about local non-profit organizations, at no cost to the City.
4. In no event may Kiosks be located in front of single-family residences or K-12 schools.

C. Construction Period Requirements.

1. Construction shall be coordinated with utility companies and other persons with rights to install or maintain infrastructure in the public right-of-way.
2. Construction shall be scheduled and conducted so as to minimize interference with public use of the right-of-way including access to the right-of-way from private property.
3. Noise-producing site preparation and construction activities shall only occur on weekdays between the hours of 8 am to 5 pm in residential areas and between the hours of 7 am to 7 pm in

commercial areas, or as designated on permit notes or attachments. Construction in residential areas shall be limited to installation of utilities in support of a Kiosk.

4. All trucks and equipment shall use the best available noise control techniques and equipment including improved mufflers, intake silencers, ducts, engine enclosures, and noise-reducing shields or shrouds.
  5. Impact tools such as jackhammers, pavement breakers, and noise drills shall be hydraulically or electrically powered wherever feasible to avoid noise associated with compressed air exhaust from pneumatically powered tools. When the use of pneumatic tools is unavoidable, an exhaust muffler shall be used on the compressed air exhaust to lower noise levels.
  6. External jackets shall be used on tools where feasible to achieve noise reductions. To the extent possible, quieter procedures should be used, such as drilling instead of jack hammering.
  7. Stationary noise sources involved in construction should be located as far as possible from sensitive receptors. If location within 20 feet of homes, schools, neighborhood parks, and retail businesses is necessary, stationary sources should be muffled and enclosed with temporary sheds.
  8. Trucks and other vehicles should not be permitted to idle when waiting at or near the construction site.
  9. Affected streets and right of ways should be swept, if possible with water sweepers using reclaimed water, at the end of each workday if soil, sand, or other material has been carried onto them.
  10. When trenching is necessary, all trenches shall be covered at the end of each workday.
- D. Kiosks shall be installed, operated, maintained and removed in compliance with this agreement. No Kiosk shall be installed or operated without documented conformance with Section 8(B) of this agreement.
1. The Kiosk display shall not display light that is of such intensity or brilliance to cause glare or otherwise impair the vision of a driver. No Kiosk display shall display light of such intensity that interferes with the effectiveness of an official traffic sign, signal or device. Any violation of this section will result in the City requiring the Kiosk display to turn off the display or show a "full black" image until the display can be brought into compliance.

2. The Grantee shall have six (6) hours to turn off the display or show a "full black" image after a malfunction is reported to the Grantee.
- E. Grantee will keep the Kiosk technology in operable condition by regularly maintaining the software operating systems and programs, including providing periodic software updates.
- F. Grantee shall deploy the Kiosks pursuant to an installation and deployment schedule created by Grantee and approved by the City, which approval shall not be unreasonably withheld, conditioned, or delayed.
- G. Permanent Relocation and/or removal of Kiosks.

After a Kiosk has been installed, the City may require that it be removed for any of the following reasons: (a) due to construction or excavation work being undertaken by the City that impacts a Kiosk; (b) due to the existence of a condition creating an imminent danger to public health, safety or welfare or (c) at the request of private landowners and developers in connection with permitted construction work that requires the temporary relocation or removal of a Kiosk. The City shall provide reasonable advance written notice to Grantee of the need for the removal and shall cooperate with Grantee to find a reasonably suitable alternative location for the Kiosk being removed. If the removal is due to a unilateral request of the City or in connection with a request from a private landowner or developer, Grantee shall have the right to abate all Minimum Annual Guarantee payments otherwise payable with the respect to the removed Kiosk during the period of removal. If Grantee desires to reinstall the removed Kiosk, the City shall cooperate with Grantee to either (a) permit Grantee to reinstall the removed Kiosk on its former location as soon as reasonable possible following its removal, or (b) permit Grantee to install the removed Kiosk on a new location acceptable to Grantee. In the event Grantee is required to temporarily relocate or remove any Kiosk in connection with a request from a private landowner or developer, Grantee shall be entitled to reimbursement from such party of Grantee's reasonable costs and expense for such removal or relocation, including but not limited to construction, permitting, sidewalk repair and storage costs.

- H. Upon the expiration or earlier termination of this Agreement or upon any relocation of a Kiosk pursuant to the terms of this section 8, Grantee shall remove the Kiosks and restore the area upon which each such Kiosk was located as close as reasonably practicable to the condition the same as it was immediately preceding the installation of the Kiosk thereon, subject to reasonable wear and tear and shall do all such work as is reasonably necessary to cap off the utilities serving such Kiosks.

- I. Prevailing Wages. Grantee certifies and agrees that it and its contractors and subcontractors will comply with the requirement to pay its employees prevailing wages as set forth in City Resolution No. 57103 C.M.S.
  1. Grantee shall cause its Contractor(s) and Subcontractors to pay prevailing wages in the construction and installation of the Kiosks as those wages are determined pursuant to Labor Code Sections 1720 *et seq.*, and Sections 1774 and 1775, to employ apprentices as required by Labor Code Sections 1777.5 *et seq.*, and the implementing regulations of the Department of Industrial Relations (the "DIR") relating thereto. Grantee shall cause the Contractor(s) and Subcontractors to comply with the other applicable provisions of Labor Code Sections 1720 *et seq.*, 1774, 1775, and 1777.5 *et seq.*, and applicable implementing regulations of the DIR. Grantee shall ensure that Contractor(s), and any of Contractor's Subcontractors, are registered with the DIR pursuant to Labor Code section 1725.5.
  2. Grantee shall cause the Contractor(s) and Subcontractors to keep and retain such records as are necessary to determine if such prevailing wages have been paid as required pursuant to Labor Code Sections 1720 *et seq.*, Sections 1774 and 1775, and apprentices have been employed as required by Labor Code Sections 1777.5 *et seq.* Copies of the currently applicable per diem prevailing wages are available from DIR. During the construction of the Kiosk work, Grantee shall cause its Contractor(s) to post at the job site the applicable prevailing rates of per diem wages. Grantee is hereby notified that the construction and installation of the Kiosks under this Agreement is subject to compliance monitoring and enforcement by the DIR.
  3. In accordance with Labor Code section 1776, Grantee shall cause the Contractor(s) and Subcontractors to provide Grantee a copy of all payrolls for work subject to this Agreement upon completion of the installation of the Kiosks. Payrolls shall contain the full name of each employee, his/her classification, rate of pay, and daily and weekly number of hours worked. The documentation shall also indicate apprentices and ratio of apprentices to journeymen.
  4. This provision in no way creates any contractual or third-party beneficiary relationship between any of Contractor's employees and the City, nor does it create any liability or duty on the City for Grantee's or Contractor's failure to make timely or appropriate payments to its employees, on behalf of its employees.
  5. The requirements in this Section shall survive the termination of this Agreement.

- J. Stop Orders. “Stop Orders” means the notice and claim procedures for payment available in California Civil Code section 9000, *et seq.*, to laborers, subcontractors, suppliers, materialmen and other parties identified in California Civil Code 9100 that provide labor or materials to a public project. Grantee and its Contractor are knowledgeable of the Stop Order Notice and the claim procedures for payment available in California Civil Code section 9000, *et seq.*, to laborers, subcontractors, suppliers, materialmen and other parties identified in California Civil Code 9100 that provide labor or materials to a public project. Grantee agrees to handle all Stop Orders received by the City or Grantee with respect to the installation of the Kiosks. Grantee will make all required withholdings on behalf of the City from its contractor’s progress payments that are necessary to satisfy any Stop Order notice demand for payment on the Project (“Withheld Funds”). Grantee agrees to continue to hold Contractor’s Withheld Funds for each claim until one of the following events occurs: i) a claimant submits an unconditional release on the City’s release form to be attached and labeled “Attachment 2” to this Agreement; or, ii) Contractor submits a surety bond to secure the full amount of the claim plus twenty five percent (25%) that names the City as an additional covered party; or, iii) the parties enter into a written settlement agreement that specifies terms or payment and release of the Withheld Funds; or, iv) the time for filing a lawsuit to enforce the Stop Order notice expires and Contractor or the City requests that Withheld Funds be released to Contractor. Alternatively, Grantee may convey all Withheld Funds to the City for withhold and disposition to Contractor or claimant upon one of the above-described events.
- K. Bonds. Grantee shall cause its Contractor and subcontractor to provide a good and sufficient performance and payment surety bonds, which name the City of Oakland as insured. The payment and performance bonds shall, each, be for One Hundred percent (100%) of the Kiosk work to guarantee faithful payment to subcontractors, material suppliers, and laborers. Grantee shall cause Contractor to maintain the bonds in full force and effect until the Kiosk work is completed accepted by the Grantee and as required by applicable California law, and until all claims for material and labor are paid including, without limitation, any Stop Orders or Prevailing Wage claims, and shall otherwise comply with the California Civil Code.
- L. Oakland Minimum Wage. Oakland employers are subject to Oakland’s Minimum Wage Law whereby Oakland employees must be paid the current minimum wage. Employers must notify employees of the annually adjusted rates by each December 15<sup>th</sup> and prominently display notices at the job site. The law requires paid sick leave for employees and payment of service charges collected for their services. For further information, please refer to: <http://www2.oaklandnet.com/Government/o/CityAdministration/d/MinimumWage/OAK051451>



**9. COMPLIANCE WITH LAW**

Grantee shall perform, implement and manage the installation, operation, maintenance and removal of its Kiosks in accordance with applicable state, and local law, in accordance with all regulations promulgated under such laws, and in accordance with the terms and conditions of this Agreement.

**10. PERMITS AND LICENSES**

Grantee shall obtain and maintain, at Grantee's sole cost and expense, all permits and licenses applicable to Grantee's operations under this Franchise, which are required of Grantee by any governmental agency.

**11. TERMINATION OF FRANCHISE**

- A. If at any time City believes Grantee may not be adequately performing its obligations under this Agreement, City may request from Grantee written assurances of performance and a written plan to correct observed deficiencies in Grantee's performance if written notice of the same is provided by City. Failure to provide written assurances constitutes a separate ground to declare a default under this Agreement.
- B. Grantee shall be in default of this Agreement and City may, in addition to any other legal or equitable remedies available to City, terminate the Grantee's right to perform under the Franchise:
  - 1. Should Grantee make a general assignment for the benefit of creditors, admit in writing its inability to pay its debts as they become due, file a voluntary petition in bankruptcy, be adjudged bankrupt or insolvent, file a petition or answer seeking for itself any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any present or future statute, law, or regulation, filing any answer admitting or not contesting the material allegations of a petition filed against Grantee in any such proceeding, or seek, consent to, or acquiesce in, the appointment of any trustee, receiver, custodian or liquidator of Grantee or of all or any substantial part of the properties of Grantee, or if Grantee, its directors or shareholders, take action to dissolve or liquidate Grantee; or
  - 2. Should Grantee commit a material breach of this Agreement and not cure such breach within thirty (30) calendar days of the date of notice from City to Grantee demanding such cure; or, if such failure is curable but not curable within such thirty (30) day period, within such period of time as is reasonably necessary to accomplish such cure. (In order for Grantee to avail itself of this time period in excess of 30 calendar days, Grantee must provide City within the 30 day period a

written plan acceptable to City to cure said breach, and then diligently commence and continue such cure according to the written plan); or

3. Should Grantee violate or allow a violation of any valid law, statute, regulation, rule, ordinance, permit, license or order of the City of Oakland or State of California applicable to the Franchise and does not cure such violation within thirty (30) days of the date of the notice from City to Grantee demanding such cure; or, if such failure is curable but not curable within such thirty (30) day period, within such period of time as is reasonably necessary to accomplish such cure. (In order for Grantee to avail itself of this time period in excess of 30 calendar days, Grantee must provide City within the 30 day period a written plan to cure said violation acceptable to City, and then diligently commence and continue performance of such cure according to the written plan.)

## **12. COMPLIANCE WITH AMERICANS WITH DISABILITIES ACT**

Grantee acknowledges that, pursuant to the Americans with Disabilities Act ("ADA"), programs, services and other activities provided by a public entity to the public, whether directly or through a contractor, must be accessible to persons with disabilities. Grantee shall provide the services specified in this Agreement in a manner that complies with the ADA and any and all other applicable federal, state and local disability rights laws. Grantee will not be responsible for ADA matters which are in the control of City. Grantee agrees not to discriminate against persons with disabilities in the provision of services, benefits or activities provided under this Agreement and further agrees that any violation of this prohibition against discrimination on the part of Grantee, its employees, agents or assigns shall constitute a material breach of this Agreement.

## **13. NON-DISCRIMINATION**

In order to minimize the probability of a claim being filed against the City, in the performance of this Agreement, Grantee shall not discriminate against any employee or applicant for employment because of race, color, religion, ancestry, national origin, age (over 40), sex, pregnancy, marital status, disability, sexual orientation or AIDS.

## **14. CITY BUSINESS LICENSE. PAYMENT OF TAXES. TAX I.D. NUMBER**

Grantee has obtained a City business license as required by \_\_\_\_\_, and its license number is written below; or, Grantee is exempt from the provisions of \_\_\_\_\_ and has written below the specific section under which it is exempt. Grantee shall pay all state and federal income taxes and any other taxes due. Grantee certifies under penalty of perjury that the taxpayer identification number written below is correct.

## **15. RECEIPT OF NOTICES**

A written notice is deemed served when a party sends the notice in an envelope addressed to the other party to this Agreement and deposits it with the U.S. Postal

Service, first class mail, postage prepaid. For purposes of this Agreement, all notices to City shall be addressed as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

For purposes of this Agreement, all notices to Grantee shall be addressed as follows:

Adam Borchers  
IKE SMART CITY LLC  
250 N. Hartford Avenue  
Columbus, OH 43222

**16. GOVERNING LAW/VENUE**

This Agreement shall be deemed executed in the County of Alameda and governed by California law. Venue for any dispute arising under this Agreement shall be in the County of Alameda.

**17. CONFIDENTIALITY; PRIVACY**

A. Grantee acknowledges and agrees that City is a public entity subject to the provisions of the Public Records Act (Cal. Gov. C. 6250 *et seq.*) Except as otherwise required by law, including the Charter of the City of Oakland and the Oakland Municipal Code, City will not disclose trade secrets or proprietary financial information received from Grantee. Any such trade secrets or proprietary financial information which Grantee believes should be exempted from disclosure shall be specifically identified and marked as such. Blanket-type identification by designating whole pages or sections shall not be permitted and shall be invalid. The specific information must be clearly identified as such.

B. Duty to Defend:

Upon a request for records regarding this Agreement, City will immediately notify Grantee and specify a time when the records will be made available for inspection. If the Grantee, in a timely manner, identifies any proprietary, trade secret, or confidential commercial or financial information which Grantee determines is not subject to public disclosure, the Grantee will be required to fully defend (including all attorney's fees and costs), in all forums, the City's refusal to produce such information; otherwise, City will make such information available to the extent required by law. To the maximum extent permitted by law, Grantee shall indemnify and hold harmless City from any and all judgments, liabilities, fines or penalties imposed as a result of City's refusal, at Grantee's request, to disclose records regarding this Agreement.

C. Privacy:

The Kiosks shall not be equipped with any cameras and shall not employ any form of facial recognition technology or similar surveillance tools. Grantee may not activate the optional "Photobooth" camera feature (which allows users to voluntarily take their own self-portraits which are not stored following transmission to the user) unless authorized by action of City Council and with any required approvals by the City's privacy commission, if applicable. Grantee may activate and use the kiosks' pedestrian counting feature which operates by reading anonymized MAC addresses from wi-fi enabled devices within a specified radius of each Kiosk. Grantee shall not share any personally identifiable information of any Kiosk user with any third party unless approved in writing by the City Administrator or his or her designee.

**18. AMENDMENTS**

The terms and conditions of this Agreement shall not be altered or otherwise modified except by a written amendment to this Agreement executed by City and Grantee.

**19. ENTIRE CONTRACT**

The terms and conditions of this Agreement, all exhibits attached and any documents expressly incorporated by reference represent the entire agreement between the parties with respect to the subject matter of this Agreement. This Agreement shall supersede any and all prior contracts, oral or written, regarding the subject matter between City and Grantee. No other contract, statement, or promise relating to the subject matter of this Agreement shall be valid or binding except by a written amendment to this Agreement.

**20. SEVERABILITY**

If any part of this Agreement or the application thereof is declared invalid for any reason, such invalidity shall not affect the other provisions of this Agreement which can be given effect without the invalid provision or application, and to this end the provisions of this Agreement are declared to be severable.

**21. WAIVER**

Failure of City to insist on strict performance shall not constitute a waiver of any of the provisions of this Agreement or a waiver of any other default of Grantee.

**22. ASSIGNMENT**

Except as otherwise provided herein, neither this Agreement nor any rights or obligations hereunder may be assigned by either party without the prior consent of the other party, which consent shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, in the event (i) that substantially all operations of the Grantee are being transferred to (a) another entity by way of merger, consolidation or sale of substantially

all of the stock therein or assets thereof, or (b) any person or entity which, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the Grantee, or (ii) there is a transfer of outstanding capital stock or other listed equity interests in and to the Grantee through the "over-the-counter" market or any recognized national or international securities exchange, the consent of City shall not be required. Notwithstanding anything contained in this Agreement to the contrary, the consent of City shall not be required for a collateral or conditional assignment of this Agreement to a lender of the City, nor shall City consent or approval be required in connection with the Grantee's entering into any equipment financing or equipment leasing with respect to, or the granting of a security interest in and to, the Kiosks.

**23. SECTION HEADINGS**

The sections and other headings of this Agreement are for convenience of reference only and shall be disregarded in the interpretation of this Agreement.

**WITNESS** THE EXECUTION OF this agreement ON THE DATE WRITTEN BELOW EACH SIGNATURE:

CITY OF OAKLAND

By: \_\_\_\_\_  
City Administrator

Countersigned by:

\_\_\_\_\_

CITY AUDITOR

Attest:

\_\_\_\_\_

City Clerk

Approved as to Form:

\_\_\_\_\_

Deputy City Attorney

GRANTEE

\_\_\_\_\_  
Grantee Representative Name (printed or typed)

By: \_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed name and title of signatory, if different from Grantee Representative name

Tax Identification No. \_\_\_\_\_

Berkeley Business License No \_\_\_\_\_

Incorporated: Yes \_\_\_\_\_ No\_\_

Certified Woman Business Enterprise: Yes\_\_ No\_\_

Certified Minority Business Enterprise: Yes\_\_ No\_\_

If yes, state ethnicity: \_\_\_\_\_

Certified Disadvantaged Business Enterprise: Yes\_\_ No\_\_