



**CITY OF ELK GROVE
CITY COUNCIL STAFF REPORT**

AGENDA TITLE: Adopt resolution dispensing with the formal request for proposal procedure pursuant to Elk Grove Municipal Code Section 3.42.140(b)(3) and authorizing the City Manager to execute the Second Amendment to the Master Services Agreement with OpenCounter Enterprises, Incorporated to subscribe to and maintain a web-based platform for zoning, permit, and fee information for an additional two years and \$80,000, or other such amount as may be directed by the City Council, for a total compensation amount not to exceed \$160,000 over a four-year period

MEETING DATE: June 26, 2024

PREPARED BY: Tishiana Mann-Scott, Economic Development Analyst

DEPARTMENT HEAD: Darrell Doan, Economic Development Director

RECOMMENDED ACTION:

Staff recommends the City Council adopt a resolution dispensing with the formal request for proposal procedure pursuant to Elk Grove Municipal Code Section 3.42.140(b)(3) and authorizing the City Manager to execute the Second Amendment to the Master Services Agreement with OpenCounter Enterprises, Incorporated to subscribe to and maintain a web-based platform for zoning, permit, and fee information for an additional two years and \$80,000, for a total compensation amount not to exceed \$160,000 over a four-year period.

BACKGROUND INFORMATION:

OpenCounter Enterprises, Incorporated (“OpenCounter”) is a Boston-based technology company that develops web-based tools to help cities support local economic development activities.

OpenCounter has developed a web-based platform, or portal, that allows the public, developers, and businesses to access key zoning, permit, and fee information related to their proposed project. By providing this service, prospective businesses and developers have 24/7 access to a virtual building and planning department allowing the user to check zoning and develop a customized permit and fee roadmap providing process and cost certainty.

From June 1, 2022, to June 1, 2024, there have been 978 zoning lookups, 684 commercial building permit fee estimates, and 473 business scoping questions answered through the OpenCounter portal. From Placer County to the City of Miami, Florida, numerous local jurisdictions rely on this software, which is considered the leading solution in its class.

ANALYSIS:

Under an agreement with OpenCounter, the platform was developed and launched in 2016. In 2019 and again in 2022, the City executed subsequent agreements for subscription and maintenance services. The current two-year contract was entered into in 2022 in the amount of \$80,000 and expires on June 30, 2024. The current contract was amended in 2023 to exercise a one-year extension option in the amount of \$40,000. Staff recommends executing the Second Amendment to the contract to add an additional two years and \$80,000. All other terms of the contract will remain the same.

In the process of preparing the amendment, staff obtained proposals and pricing from several alternative vendors and determined that OpenCounter is best able to provide the services and the cost thereof is fair and reasonable.

ALTERNATIVE ACTIONS:

The City Council could choose not to approve the resolution, in which case the current contract would expire, and the services would no longer be available.

FISCAL IMPACT:

Funds for these services in the amount of \$40,000 are available in the proposed FY 2024-25 Budget, and \$40,000 will be included in the FY 2025-26 Budget to cover the second year of the amendment.

ATTACHMENTS:

1. Resolution
2. Second Amendment to Master Services Agreement
3. Master Services Agreement
4. First Amendment to Master Services Agreement

ATTACHMENT 1

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ELK GROVE
DISPENSING WITH THE FORMAL REQUEST FOR PROPOSAL PROCEDURE
PURSUANT TO ELK GROVE MUNICIPAL CODE SECTION 3.42.140(B)(3) AND
AUTHORIZING THE CITY MANAGER TO EXECUTE THE SECOND AMENDMENT
TO THE MASTER SERVICES AGREEMENT WITH OPENCOUNTER ENTERPRISES,
INCORPORATED TO SUBSCRIBE TO AND MAINTAIN A WEB-BASED PLATFORM
FOR ZONING, PERMIT, AND FEE INFORMATION FOR AN ADDITIONAL TWO
YEARS AND \$80,000 FOR A TOTAL COMPENSATION AMOUNT NOT TO EXCEED
\$160,000 OVER A FOUR-YEAR PERIOD**

WHEREAS, economic development efforts are critical for the City of Elk Grove to ensure a vibrant, healthy, and diverse local economy; and

WHEREAS, a web-based platform that allows the public, developers, and businesses to obtain reliable and timely information about zoning, permits, and fees greatly enhances the City's economic development efforts; and

WHEREAS, starting in 2016, OpenCounter Enterprises, Incorporated developed and customized such a platform for the City and is willing to continue to license and maintain the platform for the City's and public's use; and

WHEREAS, in 2022, the City entered into the current contract with OpenCounter Enterprises, Incorporated, as amended, which contract is set to expire on June 30, 2024, and which contract the City desires to extend as indicated herein; and

WHEREAS, in the process of preparing the amendment, staff obtained proposals and pricing from several alternative vendors and determined that OpenCounter is best able to provide the services and the cost thereof is fair and reasonable; and

WHEREAS, for the reasons presented, issuance of a formal request for proposals for the services under the proposed contract is not in the best interest of the City.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Elk Grove hereby dispenses with the formal request for proposals process pursuant to Elk Grove Municipal Code Section 3.42.140(B)(3) and authorizes the City Manager to execute the Second Amendment to the Master Services Agreement with OpenCounter Enterprises, Incorporated, in substantially the form presented, to subscribe to and maintain a web-based platform for zoning, permit, and fee information for an additional two years and \$80,000, for a total contract amount not to exceed \$160,000.

PASSED AND ADOPTED by the City Council of the City of Elk Grove this 26th day of June 2024

BOBBIE SINGH-ALLEN, MAYOR of the
CITY OF ELK GROVE

ATTACHMENT 1

ATTEST:

APPROVED AS TO FORM:

JASON LINDGREN, CITY CLERK

JONATHAN P. HOBBS
CITY ATTORNEY



SECOND AMENDMENT TO MASTER SERVICES AGREEMENT

OPEN COUNTER ENTERPRISES, INC.

THIS SECOND AMENDMENT TO MASTER SERVICES AGREEMENT (“Second Amendment”) is made and entered into between City of Elk Grove, a California municipal corporation (“City”) and Open Counter Enterprises Inc., a Delaware corporation (“Open Counter” or “Consultant”), and hereby amends the agreement entered into between the parties on December 14, 2022, as contract number C-22-730 (“Agreement” or “Contract”) and the First Amendment entered into between the parties on June 14, 2023, as contract number C-23-309 (“First Amendment”).

NOW, THEREFORE, in consideration of the mutual promises set forth herein, City and Consultant agree to as follows:

1. It is the intent of the City and Consultant to continue to be bound by all terms and conditions of the Contract, and the First Amendment all of which are expressly incorporated into this Second Amendment by this reference, except as expressly changed by this Second Amendment.
2. The Contract termination date shall be extended from June 30, 2023, and shall terminate at 11:59 p.m. on June 30, 2026, unless terminated earlier pursuant to 3.ii., iii., or iv. (Termination for Cause, Termination for Non-Appropriation, and Termination for Convenience) of the Contract.
3. City and Consultant agree that compensation to Consultant shall be paid pursuant to the Contract except that the total compensation payable to Consultant under the Contract, as amended herein, is hereby increased by Eighty Thousand Dollars (\$80,000.00); in no event shall



the total compensation to Consultant under the Contract and any amendments thereto exceed One Hundred Sixty Thousand Dollars (\$160,000.00), without the City's prior written approval.

4. The person or persons executing this Second Amendment on behalf of the Consultant warrant and represent that they have the authority to execute this Second Amendment on behalf of their agency and further warrant and represent that they have the authority to bind Consultant to the performance of its obligations hereunder.

5. The Contract, First Amendment, and this Second Amendment constitute the entire agreement between City and Consultant concerning the subject matter hereof and supersedes any and all prior oral and written communications between the Parties regarding the subject matter hereof.


6. Consultant and City agree and acknowledge that the provisions of this Second Amendment have been arrived at through negotiation and that each party has had a full and fair opportunity to revise the provisions of this Second Amendment and to have such provisions reviewed by legal counsel. Therefore, any ambiguities in construing or interpreting this Second Amendment shall not be resolved against the drafting party.

AGREED to this _____ day of _____, 2024, by the parties as follows.

Approved as to form:

By: 
Attorney for Consultant

CONSULTANT

By: 
Nick Thermenos (Jun 20, 2024 13:59 EDT)
Nick Thermenos, CRO

Approved as to form:

By: _____
Jonathan P. Hobbs, City Attorney

CITY OF ELK GROVE

By: _____
Jason Behrmann, City Manager

Attest:

By: _____
Jason Lindgren, City Clerk









2-Second Amendment to Open Counter (003)

Final Audit Report

2024-06-20

Created:	2024-06-20
By:	Brenna Lenchak (Brenna.Lenchak@eunasolutions.com)
Status:	Signed
Transaction ID:	CBJCHBCAABAwaHb0wnAPsuZk7D2SIL1z8wJ5XDTxgo7

"2-Second Amendment to Open Counter (003)" History

-  Document created by Brenna Lenchak (Brenna.Lenchak@eunasolutions.com)
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-  Document emailed to Nick Thermenos (nick.thermenos@eunasolutions.com) for signature
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-  Document emailed to Brenna Lenchak (Brenna.Lenchak@eunasolutions.com) for signature
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-  Email viewed by Brenna Lenchak (Brenna.Lenchak@eunasolutions.com)
2024-06-20 - 5:56:55 PM GMT
-  Document e-signed by Brenna Lenchak (Brenna.Lenchak@eunasolutions.com)
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-  Email viewed by Nick Thermenos (nick.thermenos@eunasolutions.com)
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-  Document e-signed by Nick Thermenos (nick.thermenos@eunasolutions.com)
Signature Date: 2024-06-20 - 5:59:01 PM GMT - Time Source: server
-  Agreement completed.
2024-06-20 - 5:59:01 PM GMT



OPENCOUNTER ENTERPRISES, INC.

MASTER SERVICES AGREEMENT

December 14, 2022

This Master Services Agreement (“Agreement” or “Contract”) is entered into as of November ____, 2022 (the “Effective Date”) by and between Open Counter Enterprises, Inc., a Delaware corporation, with principal offices at 131 Dartmouth Street, Boston, MA 02116 (“OpenCounter” or “Consultant”) and the City of Elk Grove, California with its principal offices at 8401 Laguna Palms Way, Elk Grove, CA 95758 (“City”). The parties may be referred to individually herein as a “party” and collectively as the “parties.”

Recitals

Whereas, City is a municipal corporation organized and existing under the laws of the State of California and wishes to be supplied by OpenCounter with access to certain software-based services provided by OpenCounter and accessed via the Internet (the “Hosted Service”, as further described and defined in section 1 of this Agreement) for its own use and that of the general public in the process of applying for or potentially applying for one or more permits the issuance of which is within the jurisdiction of City (“Permit Applicant(s)”) or related outside agencies, or for checking zoning for a particular parcel of land; and

Whereas, OpenCounter is willing and able to provide to City the Hosted Service subject to the terms and subject to the conditions of this Agreement.

Now, Therefore, in consideration of the foregoing and the mutual promises made herein, the parties hereto, intending to be legally bound, agree as follows:

1. Hosted Service

- i. “Hosted Service” means those components of the OpenCounter hosted services consisting of the Zoning Portal and Business Portal software systems, which have been pre-populated with the City’s and City-selected Outside Agency zoning, permit, permit fee, impact fee, and required actions to obtain permit information and which City has requested access to and paid a fee for said access, as further described and summarized in the attached Exhibit A.
- ii. Right to Use the Hosted Service. OpenCounter hereby grants to City, during the Term of this Agreement, a non-exclusive, non-transferable (except as otherwise provided for herein), right and license to access and use the Hosted Service, and copy and use the Documentation in connection with such use of the Hosted Service.
- iii. Restrictions on Resale. The foregoing license does not permit City to, and City hereby agrees not to, resell, relicense, re-syndicate or otherwise sublicense the Hosted Service to any third-party, except as may be expressly set forth herein.
- iv. Use of Hosted Service by Permit Applicants. OpenCounter hereby agrees to allow Permit Applicants to use the Hosted Service, solely to the extent necessary to provide information to City regarding zoning or applications or potential applications for permits, the issuance of which are within City’s jurisdiction or related outside agencies, provided that Permit Applicants shall be required to consent

to OpenCounter's Terms of Service presented to Permit Applicants when using the Hosted Service ("Terms of Service"). City understands and agrees that if any Permit Applicant declines to agree to the Terms of Service, OpenCounter has no obligation to permit such Permit Applicant to access or use the Hosted Service.

- v. Use Restrictions. City shall not: (i) access and/or use the Hosted Service in order to design, create or build a service or product that is competitive with the Hosted Service, or which uses ideas, features or functions that are similar to the Hosted Service; (ii) license, sublicense, sell, resell, transfer, assign, distribute or otherwise commercially exploit or make available to any third party the Hosted Service, except as expressly permitted herein; (iii) modify or make derivative works based upon the Hosted Service or any part thereof, or directly or indirectly disassemble, decompile, or otherwise reverse engineer the Hosted Service or any portion thereof.
- vi. Suspension of Access to Hosted Service. OpenCounter may suspend City's access to the Hosted Service at any time in order to: (i) prevent damages to, or degradation of, OpenCounter's network integrity; (ii) comply with any law, regulation, court order, or other governmental request or order which requires immediate action; or (iii) otherwise protect OpenCounter from potential legal liability; provided, however, OpenCounter will use commercially reasonable efforts to provide City with a minimum of seven (7) calendar days' prior written notice of any such suspension. In addition, if City fails to pay, within fourteen (14) calendar days of receiving written notice, when due any amounts owed hereunder, OpenCounter may suspend City's access to the Hosted Service. If suspended, OpenCounter will promptly restore use of the Hosted Service to the City after the event giving rise to the suspension has been resolved to OpenCounter' reasonable satisfaction.
- vii. Proprietary Rights. The Hosted Service, including all Intellectual Property Rights therein and thereto, and any modification thereof, are and shall remain the exclusive property of OpenCounter. City shall not take any action that jeopardizes the proprietary rights of OpenCounter or its licensors or acquire any right in the Hosted Service or OpenCounter Confidential Information, except the limited rights expressly granted in this Agreement.
- viii. Internet and Telecommunications Connections. City shall be responsible for obtaining any and all Internet and/or telecommunication connections used by City to access the Hosted Service. OpenCounter shall have no responsibility or liability for any interruption or delay in accessing or using the Hosted Service arising out of such Internet or telecommunications connections.
- ix. Licenses to OpenCounter:
 - a) City Content. City hereby grants to OpenCounter a limited right and license, without the right to grant or authorize sub-licenses, during the Term of this Agreement to use and reproduce City Content, solely for the purpose of facilitating the performance of OpenCounter's obligations under this Agreement.
 - b) Data Captured by the Hosted Service. City agrees that, subject to OpenCounter's confidentiality obligations below, OpenCounter may aggregate data captured by the Hosted Service in connection with the use of the Hosted Service by City and Permit Applicants ("Captured Data") with data captured by the Hosted Service from its use by other parties (collectively, "Aggregated Data").
 - c) City agrees that solely as part of the Aggregated Data, OpenCounter may use, reproduce, distribute, prepare derivative works from the Captured Data, provided that under no circumstances will OpenCounter use the Captured Data in a way that identifies City or individual Permit Applicants as the source of the data. The license granted in this Section 1.ix. (c) Shall survive any termination or expiration of this Agreement.

- x. City Data. In the event this Agreement expires or is terminated, OpenCounter will make available to the City all applicant data and all city-supplied configured content, in a format mutually agreed upon by the parties, within sixty (60) calendar days of such termination or expiration if the City so requests at the time of termination or expiration. Upon termination for cause, OpenCounter shall have no obligation to maintain or to forward to City any City Content after sixty (60)) calendar days of the effective date of such termination.
- xi. Updates and Analytics. OpenCounter will provide City with periodic updates to its Hosted Services whenever OpenCounter updates its underlying technology and features or its public facing functionality and features. OpenCounter agrees to provide City with unaggregated data and analytics about users of the Hosted Service upon request by City.
- xii. Data Updates. OpenCounter shall periodically, but not later than thirty (30) calendar days following City's request, update City and Outside Agency zoning, permit, permit fees, impact fee, and required actions to obtain permits information that the City provides, and make necessary updates to Hosted Services to insure its functionality and accuracy for Permit Applicants use.

2. Fees, Payments and Taxes

- i. Fees. Fees for use of the Hosted Service and the provision of Professional Services are set forth in Exhibit C, and unless otherwise set forth therein are due and payable within thirty (30) calendar days of receipt of an invoice by City.
- ii. Suspension of Services for Nonpayment. After notification by OpenCounter to City, accounts more than sixty (60) calendar days past due will be subject to suspension of Support Services until payment is received.
- iii. Taxes. No taxes apply.

3. Term and Termination

- i. Term. This Agreement shall be effective as of the date executed by the Parties and cover the period from July 1, 2022, and shall terminate on June 30, 2023, with the option by City, in City's sole discretion, to extend the Agreement for one (1) year term commencing on July 1, 2023, unless earlier terminated as set forth in Exhibit B. Notwithstanding any other provision of this Agreement, the City Manager shall be authorized to extend the termination date of this Agreement (including, as necessary, modification of the Scope of Work and/or Schedule of Performance as to time of performance) by a writing signed by the City Manager and the Consultant prior to the initial termination or any extended termination date.
- ii. Termination for Cause. Either party may terminate this Agreement for a breach by the other party of any of its material terms, provided the non-breaching party provides to the breaching party thirty (30) calendar days written notice describing such breach and offering the breaching party an opportunity to cure. Failure to cure a material breach within the notice period shall result in automatic termination of this Agreement. In the event of termination by the City pursuant to this section, OpenCounter shall refund to the City an amount representing the proportion of services paid for, but not yet delivered.
- iii. Termination for Non-Appropriation. This Agreement will terminate without any penalty at the end of any fiscal year in the event that funds are not appropriated for the following fiscal year.

- iv. Termination for Convenience. The City may terminate this Agreement, without cause, and without penalty, by providing Consultant not less than thirty (30) calendar days' written notice of termination. In the event of termination by the City pursuant to this section, the Consultant shall refund to the City an amount representing the proportion of services paid for, but not yet delivered, if any, and the City shall pay to Consultant, if not already paid, an amount based on the proportion of services rendered, if any, as compared to the total work required under this Agreement.

4. Indemnification and Insurance

- i. Indemnity. Consultant agrees to: (a) indemnify, defend, and hold harmless the City, its officers, agents, and employees from and against any and all claims, demands, actions, damages, or judgments, including associated costs of investigation and defense arising in any manner from Consultant's negligence, recklessness, or willful misconduct, each as they pertain to the performance of this Agreement, and (b) at its expense, defend, or at its option, with the City's consent, which shall not be unreasonably withheld, settle, any claim brought against City by an unaffiliated third party alleging that City's authorized use of the Hosted Service during the Term infringed such party's patent registered as of the Effective Date in the United States or any copyright or trademark of such party, or made intentional, unlawful use of such party's trade secret (each, an "Infringement Claim"); and pay any settlement of such Infringement Claim consented to by Consultant or any damages finally awarded by a court of competent jurisdiction to such third party as relief or remedy in such Infringement Claim.
- ii. Exclusions. Consultant will have no obligation to City to the extent any Infringement Claim or resulting award is based upon or results from: (a) the combination, operation, or use of the Hosted Service with any other products, services or equipment not provided by Consultant, which combination results in the Infringement Claim; (b) access and use of the Hosted Service other than in accordance with the terms and conditions of this Agreement; (c) damages attributable to the value of the use of any non-Consultant product or service; or (d) any third party software.
- iii. Certain Remedies. If the Hosted Service is, or in Consultant's reasonable opinion are likely to become, the subject of an Infringement Claim and/or an injunction as the result of an Infringement Claim, Consultant may, at its expense and option: (i) obtain the right for City to continue to access and use the Hosted Service; (ii) modify the Hosted Service to make it non-infringing, but substantially functionally equivalent; or (iii) in the event that neither (i) or (ii) are, in Consultant's reasonable judgment, commercially reasonable options, terminate City's right to use the Hosted Service and refund to City, on a pro-rated basis, any unused pre-paid fees paid by City for the Hosted Service.
- iv. Conditions. The obligations of Consultant in this Article 4 are conditioned upon City (a) notifying Consultant promptly in writing of any threatened or pending Infringement Claim, provided that failure to provide such notice will only relieve Consultant of its obligations under this Article 4 to the extent its ability to defend or settle an applicable Infringement Claim is materially prejudiced by such failure to provide notice, (b) giving Consultant, at Consultant's expense, reasonable assistance and information requested by Consultant in connection with the defense and/or settlement of the Infringement Claim and (c) tendering to Consultant sole control over the defense and settlement of the Infringement Claim. City's counsel will have the right to participate in the defense of the Infringement Claim, at City's own expense. City will not, without the prior written consent of Consultant, make any admission or prejudicial statement, settle, compromise or consent to the entry of any judgment with respect to any pending or threatened Infringement Claim.
- v. Exclusive Remedy. THE FOREGOING PROVISIONS OF THIS ARTICLE 4 STATE THE ENTIRE LIABILITY AND OBLIGATIONS OF CONSULTANT, AND THE EXCLUSIVE REMEDY OF CITY, WITH RESPECT TO ANY ACTUAL OR ALLEGED INFRINGEMENT OF ANY PATENT,

COPYRIGHT, TRADE SECRET, TRADEMARK OR OTHER INTELLECTUAL PROPERTY RIGHT BY THE HOSTED SERVICE.

- vi. Insurance. Prior to commencement of any work under this Agreement, Consultant shall provide and maintain in effect during the term of this Agreement evidence of insurance coverage as set forth in Exhibit D. Furthermore, Consultant shall certify its compliance with Labor Code Section 3700 in the form attached hereto and incorporated by reference, as Exhibit E.

5. Confidential Information

- i. Restrictions on Use and Disclosure of Confidential Information. To the extent permitted by law, the parties agree to maintain the confidentiality of each other's Confidential Information and not use such information except in furtherance of this Agreement during the term of the Agreement and for a period of three (3) years after the termination of this Agreement.
- ii. Exceptions. The parties agree that, unless required by law, they will not make each other's Confidential Information available in any form to any third party, or use each other's Confidential Information for any purpose other than the performance of this Agreement.

6. Representations, Warranties and Service Level Agreement

- i. Mutual Warranties. Each party represents and warrants the following to the other party: (i) such party has the full corporate right, power, and authority to enter into this Agreement, to perform the acts required of it hereunder; (ii) the execution of this Agreement by such party, and the performance by such party of its obligations and duties hereunder, do not and will not violate any agreement to which such party is a party or by which it is otherwise bound; and (iii) when executed and delivered by such party, this Agreement will constitute the legal, valid and binding obligation of such party, enforceable against such party in accordance with its terms. Each party warrants that it will comply with all laws and regulations applicable to its provision, or use, of the Hosted Service.
- ii. Warranties. OpenCounter shall provide the Hosted Service with the degree of care and skill ordinarily exercised by members of the same business, industry, trade or profession providing similar services. The Hosted Service shall materially conform to the specifications set forth in the applicable documentation as agreed by the parties. All goods, articles, materials, and/or work provided hereunder shall be of good quality and free from all material defects, shall be merchantable and fit for the purpose for which it was provided, and shall be at all times subject to the City's reasonable inspection, provided, however, that the City's inspection or failure to inspect shall not relieve the provider of any obligation hereunder. If, in the City's reasonable discretion, any goods, articles, materials, and/or work provided fail to materially conform to the City's specification or are otherwise defective, at the City's discretion, OpenCounter shall either refund any payment by the City or replace same at OpenCounter's sole expense. Payment by City shall not constitute a waiver of the foregoing. Nothing herein shall exclude, limit, or impair any manufacturer warranty or any other express warranties. OpenCounter warrants that the information and documentation provided to it by City necessary to develop and configure the Hosted Service will be input accurately and free of errors. City warrants that it will provide accurate information and documentation to Consultant for its use in developing and configuring the Hosted Service. Should a portion or portions of the Hosted Service fail to function properly as a result of the City having provided inaccurate information (for example an outdated fee schedule, or an incorrect section of municipal code), Consultant shall not be liable for functionality of that portion of the Hosted Service impacted by the inaccurate information provided by

City, but shall upon notice by City and after being provided updated accurate information, promptly correct the functionality of the Hosted Service.

- iii. Service Level Standards. The Hosted Services are subject to the Service Level Standards contained in this section. OpenCounter will provide technical support for the duration of this Agreement utilizing the following Service Level Standards for remediation of errors / bugs and inconsistencies:
- a. Critical: The defect affects critical functionality or critical data. It does not have a workaround. Example: Unsuccessful installation, complete failure of a feature. A plan for full resolution will be provided within twelve (12) hours of the notification.
 - b. Major: The defect affects major functionality or major data. It has a workaround but is not obvious and is difficult. A plan for full resolution will be provided within two (2) calendar days of the report.
 - c. Minor: The defect affects minor functionality or non-critical data. A plan for full resolution will be provided within five (5) calendar days of the first report.
 - d. Trivial: The defect does not affect functionality or data. It does not even need a workaround. It does not impact productivity or efficiency. It is merely an inconvenience. Example: Petty layout discrepancies, spelling/grammatical errors. Full resolution will be provided within five (5) calendar days of the first report.
- iv. Limitation of Warranties. THE WARRANTIES AND LIMITATIONS SET FORTH IN THIS AGREEMENT STATE OPENCOUNTER'S EXCLUSIVE WARRANTIES TO CITY CONCERNING THE HOSTED SERVICE AND SET FORTH OPENCOUNTER'S ONLY OBLIGATIONS FOR BREACH OF ANY SUCH WARRANTIES. EXCEPT AS OTHERWISE EXPRESSLY SET FORTH HEREIN, OPENCOUNTER MAKES NO, AND HEREBY EXPRESSLY DISCLAIMS (TO THE GREATEST EXTENT PERMISSIBLE UNDER APPLICABLE LAW) ALL OTHER WARRANTIES, EXPRESS, IMPLIED OR OTHERWISE, ARISING FROM COURSE OF DEALING OR USAGE OF TRADE, OR STATUTE, AS TO THE HOSTED SERVICE, THE PROFESSIONAL SERVICES OR ANY MATTER WHATSOEVER. IN PARTICULAR, AND EXCEPT AS SET FORTH IN THIS AGREEMENT, ANY AND ALL WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT ARE EXPRESSLY EXCLUDED. CITY ASSUMES ALL RISK OF DELAYS OR INTERRUPTIONS IN ACCESS TO OR USE OF THE HOSTED SERVICE RESULTING FROM USE OF THE INTERNET AND/OR TELECOMMUNICATIONS TO ACCESS THE HOSTED SERVICE, AND OPENCOUNTER SHALL HAVE NO LIABILITY FOR ANY SUCH DELAYS OR INTERRUPTION.

7. Limited Liability

- i. UNDER NO CIRCUMSTANCES SHALL EITHER PARTY BE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES OF ANY KIND OR NATURE WHATSOEVER, OR FOR ANY COST OF COVER OR FOR COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES ARISING OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT. SUCH LIMITATION ON DAMAGES INCLUDES, BUT IS NOT LIMITED TO, LOST GOODWILL, LOST PROFITS, LOSS OF DATA OR SOFTWARE OR WORK STOPPAGE, REGARDLESS OF THE LEGAL THEORY ON WHICH THE CLAIM IS BROUGHT, EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE OR IF SUCH DAMAGE COULD HAVE BEEN REASONABLY FORESEEN, AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY EXCLUSIVE REMEDY PROVIDED IN THIS AGREEMENT. OPENCOUNTER'S MAXIMUM LIABILITY FOR ANY DAMAGES ARISING OUT OF OR RELATED TO THIS AGREEMENT OR ANY PRODUCT OR SERVICE, WHETHER BASED ON CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, SHALL BE LIMITED TO THE AMOUNT OF THE FEES CITY HAS PAID TO OPENCOUNTER UNDER THIS AGREEMENT IN THE PREVIOUS TWELVE (12) MONTHS, AND IF SUCH DAMAGES RESULT

FROM OR RELATE TO CITY'S USE OR INABILITY TO USE THE HOSTED SERVICE, SUCH LIABILITY SHALL BE LIMITED TO THE FEES PAID BY CITY FOR THE COMPONENT OF THE HOSTED SERVICE GIVING RISE TO THE CLAIM IN THE TWELVE (12) MONTHS IMMEDIATELY PRIOR TO THE EVENT GIVING RISE TO THE CLAIM. THE FOREGOING LIMITATION OF LIABILITY IS INDEPENDENT OF, AND SHALL NOT BE DEEMED TO MODIFY OPENCOUNTER'S OBLIGATION UNDER, ANY EXCLUSIVE REMEDIES FOR BREACH OF WARRANTY SET FORTH IN THIS AGREEMENT.

8. Miscellaneous

- i. Entire Agreement. This Agreement, together with any Exhibits, completely and exclusively states the entire agreement of the parties regarding its subject matter, and supersedes, and its terms govern, all prior proposals, agreements, or other communications between the parties, oral or written, regarding such subject matter.
- ii. Assignment. Neither this Agreement nor any rights or obligations of City hereunder may be assigned by City in whole or in part without the prior written consent of OpenCounter. Any assignment in violation of this Section will be null and void. OpenCounter may assign this Agreement in its entirety to a successor in interest in connection with a merger, acquisition or sale of all or substantially all of its assets with the prior written consent of the City, which shall not be unreasonably withheld.
- iii. Force Majeure. Neither party shall be liable hereunder by reason of any failure or delay in the performance of its obligations hereunder (except for the payment of money) on account of strikes, shortages, riots, insurrection, fires, flood, storm, explosions, acts of God, war, governmental action, labor conditions, earthquakes, material shortages or any other cause that is beyond the reasonable control of such party.
- iv. Governing Law; Jurisdiction and Venue. This Agreement and all matters arising under or related to its formation or performance whether sounding in contract, tort, or otherwise shall be governed in all respects by the laws of the of the State of California, without reference to conflict of laws principles and under the federal laws of the United States, as such may apply. If Federal jurisdiction exists, the parties hereby consent to exclusive venue and jurisdiction in the United States District Court, Eastern District of California, Sacramento Division. If no Federal jurisdiction exists, the parties consent to exclusive venue and jurisdiction in the State Courts of Sacramento County, California.
- v. Headings. The section headings appearing in this Agreement are inserted only as a matter of convenience and in no way define, limit, construe, or describe the scope or extent of such section or in any way affect this Agreement.
- vi. Precedence of Terms. In the event of any conflict between the terms of this Agreement and the terms of any purchase order or acknowledgement, the terms of this Agreement shall control. Acceptance by OpenCounter of any purchase order placed by City is conditioned on City's assent to the terms set forth herein. OpenCounter's fulfillment of any purchase order shall not imply OpenCounter's acceptance of any pre-printed terms on such purchase order. Any such conflicting terms shall be of no force or effect.
- vii. No Agency. Nothing contained herein shall be construed as creating any agency, partnership, or other form of joint enterprise between the parties.
- viii. Notices. All notices or reports permitted or required under this Agreement shall be in writing and shall be delivered by personal delivery or by certified or registered mail, return receipt requested, and shall be deemed given upon personal delivery or seven (7) calendar days after deposit in the mail. Notices

shall be sent to the parties at the addresses set forth above or such other address as either party may designate for itself in writing.

- ix. Severability. In the event that any provision of this Agreement shall be unenforceable or invalid under any applicable law or be so held by applicable court decision, such un-enforceability or invalidity shall not render this Agreement unenforceable or invalid as a whole, and, in such event, such provision shall be changed and interpreted so as to best accomplish the objectives of such unenforceable or invalid provision within the limits of applicable law or applicable court decisions.
- x. Waiver and Modification. The failure of either party to require performance by the other party of any provision hereof shall not affect the full right to require such performance at any time thereafter; nor shall the waiver by either party of a breach of any provision hereof be taken or held to be a waiver of the provision itself. This Agreement shall not be modified except by a subsequently dated written amendment signed on behalf of OpenCounter and City by their duly authorized representatives.
- xi. Waiver of Rule of Construction. Each of the parties and their counsel have carefully reviewed this Agreement, and, accordingly, the normal rule of construction to the effect that any ambiguities in this Agreement are to be construed against the drafting party shall not apply in the interpretation of this Agreement.



9. Definitions

- i. “Confidential Information” means any information disclosed by one party to the other, which, if in written, graphic, machine-readable or other tangible form is marked as “Confidential” or “Proprietary”, if disclosed orally or by demonstration, is identified at the time of initial disclosure as confidential and reduced to a writing marked “Confidential” and delivered to the receiving party within thirty (30) calendar days of such disclosure, or which because of its nature should have reasonably been understood by the receiving party to be confidential even in the absence of actual notification of such status. Confidential Information shall include, without limitation, information regarding party’s business plans, finances, pricing, products or services, investors, research and development and City information. Confidential Information may also include information disclosed to a disclosing party by third parties. The Hosted Service and all features and functions therein shall be the Confidential Information of OpenCounter. “Confidential Information” shall not include any information subject to disclosure under the California Public Records Act, whether such information is designated as Confidential or not.
- ii. “City Content” means any information or data related to City, whether supplied by City or a Permit Applicant, that is input into the Hosted Service by City or a Permit Applicant, provided by City or a Permit Applicant to OpenCounter in connection with use of the Hosted Service by City and/or Permit Applicants.
- iii. “Documentation” means the information made generally available by OpenCounter to its customers that describes the form, features and/or operation of the Hosted Service, whether contained in a tangible medium, such as written format, tape, magnetic or other media, or made available in an electronic format. Documentation shall include any updates of Documentation that OpenCounter may make available to City pursuant to this Agreement.
- iv. “Intellectual Property Rights” means any and all (by whatever name or term known or designated) tangible and intangible and now known or hereafter existing (i) rights associated with works of authorship throughout the universe, including, but not limited to, all exclusive exploitation rights,

copyrights, neighboring rights, moral rights and mask-works, (ii) trademark, trade dress, and trade name rights and similar rights, (iii) trade secret rights, (iv) patents, designs, algorithms and other industrial property rights, (v) all other intellectual and industrial property and proprietary rights (of every kind and nature throughout the universe and however designated), whether arising by operation of law, contract, license or otherwise, and (vi) all registrations, applications, renewals, extensions, continuations, divisions or reissues thereof now or hereafter in force throughout the universe.

- v. "Permit Applicant" means a third-party individual or entity seeking to obtain information from the Hosted Service.
- vi. "Outside Agency" means a non-City government or special district entity that administers or provides services within the City's jurisdiction and that require permits to be issued and permit fees to be paid.
- vii. "Zoning Portal" means the on-line portal where Permit Applicants can access zoning information for a particular parcel of land using an on-line mapping function to determine if a particular type of business or construction project is allowed within a particular zone within the City.
- viii. "Business Portal" means the on-line portal that guides Permit Applicants through an on-screen interview process to determine which City and outside agency permits, fees, and actions are required to proceed with a particular business or commercial construction project.

In Witness Whereof, the parties have executed this Agreement by their duly authorized representatives.

For	OpenCounter Enterprises	City of Elk Grove
By	 11/7/2022 10:24 AM PST	 12/15/2022 2:42 PM PST
Name	David Farrell	Jason Behrmann
Title	COO, GTY Technology	City Manager
Address	131 Dartmouth Street Boston, MA 02116	8401 Laguna Palms Way, Elk Grove, CA 95758
Approved as to Form	 City Attorney	11/7/2022 12:06 PM PST 8401 Laguna Palms Way Elk Grove, CA 95758

Attest:



Jason Lindgren, City Clerk

Dated:

12/15/2022 | 2:46 PM PST

Exhibit A

SCOPE OF WORK

Consultant shall provide the following services and undertake the following activities and all other services and activities specified in the Agreement:

- Provide City continuous 24/7 access to Consultant's Hosted Services including its Business Permit and Zoning Portal software systems for City internal use and the use of the public as specified in Section 1.i of the Agreement.
- Conduct periodic updates to its underlying technology and features or its public facing functionality and features as specified in Section 1.xi. of the Agreement.
- Provide City unaggregated data and analytics about users of Hosted Services upon request by the City as specified in Section 1.xi of the Agreement.
- Periodically update City and Outside Agency zoning, impact fees, permits, and required actions to obtain permit information that the City provides, and make necessary updates to Hosted Services to ensure its functionality and accuracy as specified in Section 1.xii of the Agreement

Exhibit B

SCHEDULE OF PERFORMANCE

Consultant will provide the City the Services and undertake the activities outlined in the Scope of Work and in the Agreement on the following Schedule:

Year 1 Services: To commence upon execution of this Agreement by all Parties, and cover the period from July 1, 2022 and continuing until June 30, 2023.

Year 2 Services: To commence July 1, 2023 and continuing until June 30, 2024, provided that City exercises the one (1) year extension in writing, as provided in Section 2 of the Agreement and Exhibit C hereto.

Exhibit C**COMPENSATION AND METHOD OF PAYMENT**

Consultant shall provide the Services to the City and undertake the activities outlined in the Scope of Work and the Agreement and shall be compensated according to the terms of the Agreement and the schedule outlined below. Compensation to the Consultant shall be on an annual basis in the amounts below for a maximum of two (2) years, not to exceed \$80,000.

Payment Schedule:

			Payment Due Date
Year 1	Annual Services and Activities	\$40,000	Within 30 days of execution of Agreement
Year 2 (optional)	Annual Services and Activities	\$40,000	Within 30 days of execution of extension of Agreement
Total		\$80,000	

Years 2 is optional and shall be exercised in writing by City, in its sole discretion. If City does not exercise said options, then the Contract shall terminate on June 30, 2023 at 11:59 p.m.

Under no circumstances shall the aggregate amount paid under this Contract exceed the amount specified in Section 4A of the Agreement and if the Contract is approved by the City Manager, all compensation paid to Consultant each year shall meet the cost limitation set forth in City of Elk Grove Municipal Code Chapter 3.42.

Exhibit D
Insurance Requirements

Prior to commencement of any work under this Contract, Consultant shall provide to the City proof of, and maintain in full force and effect at all times during the term of the Contract, at its sole cost and expense, policies of insurance as set forth herein:

1. General Liability:
 - a. Comprehensive general liability insurance including, but not limited to, protection for claims of bodily injury and property damage liability and personal and advertising injury liability.
 - b. Coverage shall be at least as broad as Insurance Services Office Commercial General Liability coverage form CG 0001 (occurrence).
 - c. Claims-made coverage is not acceptable.
 - d. The limits of liability shall not be less than:

Each occurrence:	One Million Dollars (\$1,000,000)
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 - e. The City, its officials, employees, agents and authorized volunteers shall be covered and specifically named as additional insured as respects liability arising out of activities performed by or on behalf of the Consultant, products and completed operations of the Consultant, premises owned, occupied, or used by the Consultant, or automobiles leased, hired, or borrowed by the Consultant on a separate endorsement acceptable to the City.
 - f. The policy shall contain no special limitations on the scope of coverage afforded to the City, its officials, employees, agents, or authorized volunteers.
 - g. Provision or endorsement stating that for any claims related to this contract, the Consultant's insurance coverage shall be primary insurance as respects the City, its officials, employees, agents, and authorized volunteers to the extent the City is an additional insured. Any insurance or self-insurance maintained by the City, its officials, employees, agents, or authorized volunteers shall be in excess of the Consultant's insurance and shall not contribute with it, to the payment or satisfaction of any defense expenses, loss or judgment.
 - h. Any failure to comply with reporting or other provisions of the policies on the part of the Consultant, including breaches of warranties, shall not affect Consultant's requirement to provide coverage to the City, its officials, employees, agents, or authorized volunteers.
2. Automobile Liability:
 - a. Automobile liability insurance providing protection against claims of bodily injury and property damage arising out of ownership, operation, maintenance, or use of automobiles.
 - b. Non-commercial policies are acceptable.
3. Worker's Compensation:
 - a. Worker's Compensation Insurance, with coverage as required by the State of California (unless the Consultant is a qualified self-insurer with the State of California), and

Employers Liability coverage. The Consultant shall execute a certificate in compliance with Labor Code Section 1861, on the form provided in Exhibit D.

- b. Employer's Liability Coverage shall not be less than the statutory requirements.
 - c. If an injury occurs to any employee of the Consultant for which the employee or his dependents, in the event of his death, may be entitled to compensation from the City under the provisions of the Acts, for which compensation is claimed from the City, there will be retained out of the sums due the Consultant under this Contract, an amount sufficient to cover such compensation as fixed by the Acts, until such compensation is paid or it is determined that no compensation is due. If the City is required to pay such compensation, the amount so paid will be deducted and retained from such sums due, or to become due to the Consultant.
 - d. The insurer shall agree to waive all rights of subrogation against the City, its officials, employees, agents, and authorized volunteers for losses arising from work performed by the Consultant.
4. Errors and Omissions; Malpractice; Professional Liability:
- a. Errors and omissions, malpractice, or professional liability insurance with coverage of not less than \$1,000,000 per occurrence. Upon termination of this Contract, the same insurance requirements in Section 4 of this Exhibit will apply for a one (1) year period following such termination. A "tail" policy may be purchased as an alternative to satisfy this requirement.
5. Cyber Liability:
- a. Cyber liability insurance with limits of not less than \$1,000,000 per occurrence or claim. Coverage shall be sufficiently broad to respond to the duties and obligations as is undertaken by Consultant in this Contract and shall include, but not be limited to, information theft, damage to or destruction of electronic information, release of private information, alteration of electronic information, extortion, and network security. The policy shall provide coverage for third-party liability (claims against Consultant and the City). Upon termination of this Contract, the same insurance requirements in Section 5 of this Exhibit will apply for a one (1) year period following such termination. A "tail" policy may be purchased as an alternative to satisfy this requirement. Cyber Liability coverage may be provided under the professional liability coverage described in Section 4 of this Exhibit, but must meet all requirements as stated in Section 5 of this Exhibit.
6. Other Insurance Provisions: The general liability and cyber liability coverage shall contain the following provisions and endorsements:
- a. The City, its officials, employees, agents and authorized volunteers shall be covered and specifically named as additional insured as respects liability arising out of activities performed by or on behalf of the Consultant, products and completed operations of the Consultant, premises owned, occupied, or used by the Consultant, or automobiles leased, hired, or borrowed by the Consultant on a separate endorsement acceptable to the City.
 - b. The policy shall contain no special limitations on the scope of coverage afforded to the City, its officials, employees, agents, or authorized volunteers.
 - c. Provision or endorsement stating that for any claims related to this contract, the Consultant's insurance coverage shall be primary insurance as respects the City, its

officials, employees, agents, and authorized volunteers to the extent the City is an additional insured. Any insurance or self-insurance maintained by the City, its officials, employees, agents, or authorized volunteers shall be in excess of the Consultant's insurance and shall not contribute with it, to the payment or satisfaction of any defense expenses, loss or judgment.

- d. Any failure to comply with reporting or other provisions of the policies on the part of the Consultant, including breaches of warranties, shall not affect Consultant's requirement to provide coverage to the City, its officials, employees, agents, or authorized volunteers.
7. Acceptability of Insurers: Insurance is to be placed with insurers with a Bests' rating of no less than A:VII.
8. Any deductibles, aggregate limits, pending claims or lawsuits that may diminish the aggregate limits, or self-insured retention(s), must be declared to, and approved by, the City.
9. The Consultant shall furnish the City with certificates of insurance and original endorsements or insurance binders, signed by a person authorized by the insurer to bind coverage on its behalf, evidencing the coverage required by this Contract. At the written request of the City, Consultant agrees to furnish a duplicate original or certified copy of each required policy including the declaration pages, conditions, provisions, endorsements, and exclusions.
10. The City, at its discretion, may increase the amounts and types of insurance coverage required hereunder at any time during the term of the contract by giving 30 days written notice.
11. The Consultant shall serve the City notice, in writing by certified mail, within 2 days of any notices received from any insurance carriers providing insurance coverage under this Agreement that concern the suspension, voidance, cancellation, termination, reduction in coverage or limits, non-renewal, or material changes of coverage proposed or otherwise.
12. If the Consultant fails to procure or maintain insurance as required by this section, and any Supplementary Conditions, or fails to furnish the City with proof of such insurance, the City, at its discretion, may procure any or all such insurance. Premiums for such insurance procured by the City shall be deducted and retained from any sums due the Consultant under the contract.
13. Failure of the City to obtain such insurance shall in no way relieve the Consultant from any of its responsibilities under the contract.
14. The making of progress payments to the Consultant shall not be construed as relieving the Consultant or its Sub-Consultants or agents of responsibility for loss or direct physical loss, damage, or destruction occurring prior to final acceptance by the City.

15. The failure of the City to enforce in a timely manner any of the provisions of this section shall not act as a waiver to enforcement of any of these provisions at any time during the term of the contract.
16. The requirement as to types, limits, and the City's approval of insurance coverage to be maintained by Consultant are not intended to, and shall not in any manner, limit or qualify the liabilities and obligations assumed by Consultant under the Contract.

EXHIBIT E

Certificate of Compliance With Labor Code § 3700, Release and Indemnification

The undersigned, on behalf of and as the duly certified representative of Consultant, certifies as follows:

1. Consultant is aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and Consultant has complied or will comply with such provisions before commencing the performance of the work of this contract. (Cal. Labor Code §§1860, 1861.)
2. Should Consultant fail to secure Workers' Compensation coverage as required by the State of California, Consultant shall release, hold harmless, defend and indemnify the City of Elk Grove from and against any damage, liability, claim, cause of action and any other loss, including without limitation, court costs, reasonable attorney's fees and costs resulting from any failure to take and/or maintain Workers' Compensation insurance as required by law. The provisions of this Exhibit shall survive termination, suspension and/or completion of this Contract. It is further understood and agreed that this release and assumption of risk is to be binding on Consultant's successors, heirs and assigns.

CONSULTANT

By: David Farrell
Date: 11/7/2022 | 10:24 AM PST
Name: David Farrell
Title: Chief operating officer

C-23-309
refer to
C-22-730



FIRST AMENDMENT TO MASTER SERVICES AGREEMENT

OPEN COUNTER ENTERPRISES, INC.

THIS FIRST AMENDMENT TO MASTER SERVICES AGREEMENT (“First Amendment”) is made and entered into between City of Elk Grove, a California municipal corporation (“City”) and Open Counter Enterprises, Inc., a Delaware corporation, registered with the California Secretary of State (“Open Counter” or “Consultant”), and hereby amends the agreement entered into between the parties on December 14, 2022 as contract number C-22-730 (“Agreement” or “Contract”).

NOW, THEREFORE, in consideration of the mutual promises set forth herein, City and Consultant agree to as follows:

1. It is the intent of the City and Consultant to continue to be bound by all terms and conditions of the Contract, all of which are expressly incorporated into this First Amendment by this reference, except as expressly changed by this First Amendment.
2. The Contract termination date shall be extended from June 30, 2023, and shall terminate at 11:59 p.m. on June 30, 2024, unless terminated earlier pursuant to 3.ii., iii., or iv. (Termination for Cause, Termination for Non-Appropriation, and Termination for Convenience) of the Contract.
3. The person or persons executing this First Amendment on behalf of the Consultant warrant and represent that they have the authority to execute this First Amendment on behalf of their agency and further warrant and represent that they have the authority to bind Consultant to the performance of its obligations hereunder.



City of Elk Grove
Open Counter Enterprises, Inc.
Re: Master Services Agreement

4. The Contract and this First Amendment constitute the entire agreement between City and Consultant concerning the subject matter hereof and supersedes any and all prior oral and written communications between the Parties regarding the subject matter hereof.

5. Consultant and City agree and acknowledge that the provisions of this First Amendment have been arrived at through negotiation and that each party has had a full and fair opportunity to revise the provisions of this First Amendment and to have such provisions reviewed by legal counsel. Therefore, any ambiguities in construing or interpreting this First Amendment shall not be resolved against the drafting party.

AGREED to this 14.00 day of June, 2023, by the parties as follows.

Approved as to form:

CONSULTANT

6/14/2023 | 10:52 AM PDT

By: _____
Attorney for Consultant

By: TJ Parass
TJ Parass, ~~Manager~~ Chief Product and Technology Officer

Approved as to form: 6/14/2023 | 10:58 AM PDT

CITY OF ELK GROVE

6/14/2023 | 11:44 AM PDT

By: Jonathan P. Hobbs
Jc _____ Attorney

By: [Signature]
_____ Manager

Attest:

By: [Signature]
J. _____ Clerk

Dated: 6/14/2023 | 12:02 PM PDT