

**AGREEMENT
FOR THE USE OF OPTICOM -- SIGNAL PREEMPTION
CITY OF BELLINGHAM – WHATCOM TRANSPORTATION AUTHORITY**

The **CITY OF BELLINGHAM**, a first-class municipal corporation of the State of Washington, located at City Hall, 210 Lottie Street, Bellingham, Washington, 98225 (hereinafter the “City”), and the **WHATCOM TRANSPORTATION AUTHORITY**, a municipal corporation located at 4111 Bakerview Spur Road, Bellingham, Washington 98226, (hereinafter the “WTA”), in consideration of the mutual covenants herein, agree as follows (this “Agreement”):

I. OBJECTIVE

The objective of this Agreement is to set forth the terms and conditions under which the City will provide signal preemption services to the WTA (hereinafter the “Project”).

II. RESPONSIBLE OFFICERS

- A. The City designates Clark Williams as its Project Manager for the Project. The Project Manager is the City’s liaison officer to the WTA for the purposes in carrying out the Project.
- B. The WTA designates Operations Supervisor Chuck Boyle as its Representative for the Project. The WTA’s Representative is its liaison officer to the City for all purposes in carrying out the Project.

III. SCOPE OF SERVICES

The scope and cost of services is as provided in Exhibit A of this agreement, which is attached and incorporated herein, as may be amended from time to time.

IV. PAYMENT

- A. The City agrees to provide the services outlined in Exhibit A at those rates as identified, as may be amended from time to time.

Upon receipt of an invoice from the City, the WTA shall remit the above amount on a monthly basis to the City of Bellingham Finance Department, 210 Lottie Street, Bellingham, WA 98225 for the duration of the Term of this Agreement.

- B. In addition to the above services, the WTA shall reimburse the City for those one-time costs as identified in Exhibit A.

- C. The cost records and accounts pertaining to this Agreement are to be kept available for inspection by representatives of either party or any other governmental agency with jurisdiction for a period of three (3) years after any given payment.

V. CHANGES AND ADDITIONAL WORK

If the WTA and the City agree to revisions in the scope of services, an equitable cost and/or completion time adjustment shall be made, and this Agreement shall be modified in writing accordingly.

VI. INFORMATION AND WORK PROVIDED BY THE WTA

Such data as is possessed by the WTA and is useful or necessary to the City in order to carry out the Project shall be turned over to the City at a time and place mutually convenient. The City is entitled to rely on the data provided.

VII. ACCESS TO CITY FACILITIES

The parties hereto acknowledge that the WTA may, at times, need to access the City facility in order to perform any required maintenance. Whenever the WTA requires such access, it shall arrange for such access by giving prior notice to the City's Project Manager who will authorize the time and manner of access on a commercially reasonable basis and will arrange to escort WTA personnel/agents into the City facility.

VIII. TERMS OF AGREEMENT

This Agreement shall be in effect from the date of execution by both parties until terminated in accordance with Article XII hereof (the "Term"). This Agreement will renew automatically on an annual basis until or unless terminated as provided herein or so modified by mutual agreement of both parties.

IX. RELATIONSHIP OF THE PARTIES: SUBCONTRACTING

- A. The parties reciprocally warrant that they have not employed or retained any company or person, other than a bona fide employee working solely for the respective party, to solicit or secure this Agreement; and that neither has paid or agreed to pay any company or person, other than a bona fide employee working solely for the respective party, any fee, commission, percentage, gift or any other consideration contingent upon or resulting from the award or making of this Agreement. For breach or violation of this warranty, the non-breaching party shall have the right to annul this Agreement without liability or in its discretion to deduct from the Agreement price or consideration or otherwise recover the full amount of such fee, commission, percentage, gift or contingent fee.
- B. Any and all employees of either party while engaged in the performance of any obligation required under this Agreement shall be considered

employees of the party so employing said person and not of the other party. Any and all claims that may or might arise under the Workers Compensation Act on behalf of said employees while so engaged on any of the work or services to be rendered herein shall be the sole obligation and responsibility of the party employing the person in question.

- C. None of the services covered by this Agreement shall be subcontracted by the City without the prior, written consent of the WTA.

X. CONFLICT OF INTEREST

The parties hereto covenant that they presently have no pecuniary or proprietary interest and shall not acquire any such interests, direct or indirect, which conflict in any manner or degree with the performance of services required under this Agreement.

XI. DISPUTE RESOLUTION, ATTORNEYS' FEES, AND APPLICABLE LAW

- A. The City and the WTA shall give each other prompt notice of any development either observes or becomes aware of which affects the scope, timing, or performance of the Project or involves any defect in the work or services to be performed hereunder. In the event of material disagreements between the parties arising out of this Agreement, the issue shall be addressed at meetings between the parties, which shall in such case also include at least the Project Manager and the WTA's Representative (or equivalent), all of whom shall use their best efforts to timely resolve the dispute.
- B. In the event of litigation to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees and costs.
- C. This Agreement and all provisions hereof shall be interpreted in accordance with the laws of the State of Washington in effect on the date of execution of this Agreement without recourse to any principles of Conflicts of Laws. The Superior Court of Whatcom County, Washington shall have exclusive jurisdiction and venue over any legal action arising under this Agreement.

XII. TERMINATION

- A. Either party hereto may terminate this Agreement without fault, cause or other justification, by giving the other party sixty (60) days' advance written notice of its intent to so terminate.
- B. In addition to the foregoing, should either party believe that the other has failed to substantially perform all or a material part of its obligations under the Agreement, it shall deliver written notice to that effect to the other, specifying the alleged default and giving the other party fifteen (15) days to cure such default. Thereafter, should the default not be remedied to the

satisfaction of the non-defaulting party, this Agreement may be terminated upon seven (7) days written notice (delivered by certified mail). In the event of termination under this subparagraph, the City shall be paid all outstanding amounts for services (and equipment costs, if any owing), prorated to the date of termination. In no event shall the WTA be entitled to consequential damages.

- C. Termination of this Agreement shall not prevent either party from invoking those provisions therein necessary to protect or enforce its rights hereunder, which provisions shall survive termination.

XIII. LEGAL RELATIONS AND INSURANCE

- A. The parties hereto shall comply, and shall ensure that any of their consultants, employees or agents complies, with all City ordinances and resolutions, and federal and state grant agreements and local laws, regulations and ordinances applicable to the work and services to be performed under this Agreement.
- B. The parties hereto shall defend, indemnify and hold each other harmless together with their respective officers, employees, principals and agents from any and all injury or damage to the other or the other's property arising from this Agreement and from all claims, demands, causes of action, or suits of any kind that arise directly or indirectly out of, are incident to or are due to any actual or alleged negligence, intentional act, or breach of duty by the other party, its agents, employees, representatives or subcontractors in performing work and services under this Agreement. In the event of any claim against the City or against both the City and the WTA involving an allegation of negligence, intentional act, or breach of duty on the part of the WTA, the WTA shall be responsible for promptly providing a defense to the City. In the event of an ultimate finding of sole negligence by the City, its officers, employees, principals, or agents, the City shall reimburse the WTA for its defense costs and shall satisfy any judgment against it. In the event of an ultimate finding of concurrent negligence by the WTA and the City, the WTA's and the City's responsibility for defense costs and for satisfying any judgment shall be proportionate to the percentage of each party's negligence or that of its agents, employees, representatives and subcontractors. In the event of an ultimate finding of no negligence by the City, the WTA shall have total responsibility for defense costs and for satisfying any judgment.
- C. The WTA specifically agrees to defend and indemnify the City from claims or suits brought by WTA's own employees against the City. For this purpose, WTA specifically and expressly waives any immunity that may be granted it under the Washington State Industrial Insurance Act, Title 51 RCW. Further, the indemnification obligation under this Agreement shall not be limited in any way by any limitation on benefits payable to or for any

third party under the workers' compensation acts. This waiver has been mutually negotiated by the parties.

- D. The City specifically agrees to defend and indemnify the WTA from claims or suits brought by City's own employees against the WTA. For this purpose, City specifically and expressly waives any immunity that may be granted it under the Washington State Industrial Insurance Act, Title 51 RCW. Further, the indemnification obligation under this Agreement shall not be limited in any way by any limitation on benefits payable to or for any third party under the workers' compensation acts. This waiver has been mutually negotiated by the parties.
- E. The City's rights and remedies in this Agreement are in addition to any other rights and remedies provided by law.
- F. Prior to execution of the Agreement, the WTA shall file with the City appropriate evidence of insurance from insurer(s) certifying to the coverage of all insurance required herein and which will be subject to approval by the City. In the event that the WTA is unable, through no fault or neglect, to maintain such insurance, the City shall have the right to terminate the Agreement pursuant to paragraph XII after giving the WTA a reasonable opportunity to find alternate insurance coverage acceptable to the City. All insurance policies shall be endorsed to require the insurer to provide thirty (30) days' notice of cancellation.
- G. The WTA shall require that all authorized subcontractors obtain and maintain comprehensive general liability, professional liability and workers compensation insurance appropriate and applicable to the scope of work and services to be performed by such subcontractors, if any. It shall be the responsibility of the WTA to initially determine the appropriate and applicable insurance coverage which will be submitted to the City for approval. The WTA shall furnish to the City insurance certificates for all subcontractors.
- H. The WTA shall obtain and maintain the minimum limits of liability insurance set forth below. By requiring such minimum limits, the City shall not be deemed to have assessed the risks that may be applicable to the WTA under this Agreement. The WTA shall assess its own risks and, if it deems it appropriate and prudent, maintain greater limits. The insurance of the WTA shall be the primary insurance with respect to those matters indemnified pursuant to paragraphs B and C above. The City and its officials and employees shall be named as additional insureds on all liability insurance policies, except professional liability insurance. Said insurance shall apply separately to each insured against who claim is made or suit is brought, except with respect to the limits of the insurer's liability. Such

policies shall provide the coverage required as follows for any and all occurrences arising out of the WTA's performance under this Agreement:

1. Broad form Comprehensive General Liability, affording limits of liability of \$1,000,000 as a combined single limit per occurrence for bodily injury, personal injury, and property damage and \$1,000,000 aggregate.
2. Automobile liability affording limits of liability of \$1,000,000 as a combined single limit per accident for bodily injury and property damage and \$1,000,000 aggregate.
3. Professional liability insurance, affording limits of liability of \$1,000,000 in the aggregate covering all professional activities, if any, performed under this Agreement. If the insurance maintained by the WTA is maintained on a "claims made" basis rather than an occurrence basis, said insurance shall be continued by the WTA until at least five years after the date of the completion of the Project.
4. Workers Compensation coverage as required by the laws of the State of Washington. The insurer shall waive all rights of subrogation against the City of its agents for losses arising from work performed by the WTA.

The WTA, as a municipal corporation of the State of Washington, may self-insure for appropriate coverage's listed above, so long as the WTA's plan of self-insurance enables it to compensate for losses covered by the ranges set forth above at all times.

- I. The City represents that it is self-insured for purposes of its activities and obligations hereunder and that its plan of self-insurance enable it to compensate for any reasonable liabilities incident hereto.

XIV. ASSIGNMENT

The WTA shall not sublet or assign any of its benefits or burdens covered by this Agreement without the express written consent of the City.

XV. EQUAL EMPLOYMENT OPPORTUNITY RESPONSIBILITIES

The WTA agrees that it will comply with all State and local non-discrimination laws and regulations in effect at the time this Agreement is executed to the extent such are applicable to this Agreement. The WTA shall comply with all Federal non-discrimination laws and regulations if any of this Agreement is financed with Federal funds.

XVI. COMPLIANCE WITH LOCAL LAWS

The WTA shall be duly licensed and shall comply with all applicable laws, ordinances, and codes of the State and local governments.

XVII. ACCOUNTING AND AUDIT

The WTA agrees to keep records of all financial matters pertaining to this Agreement in accordance with generally accepted accounting principles. The financial records shall be made available to representatives of the City or any other governmental agency with jurisdiction for audit, at such reasonable times and places as the City shall designate.

XVIII. NOTICE

Any notice required to be given under the terms of this Agreement or requests for assistance hereunder shall be directed to the party at the address set forth herein below:

City: City of Bellingham Public Works
Attn: Clark Williams
2221 Pacific Street
Bellingham, WA 98229

Tel: 360-676-6850

WTA: Whatcom Transportation Authority
Attn: Steve Clancy
4111 Bakerview Spur Road
Bellingham, WA 98226

Tel: 360-738-4582

XIX. ENTIRE AGREEMENT

This Agreement constitutes the entire Agreement between the parties hereto and supersedes all other prior written or oral understandings. This Agreement may only be emended, supplemented, modified, or cancelled by a duly executed document in writing pursuant to this Agreement.

DATED this 22nd day of September, 2006.

WHATCOM TRANSPORTATION
AUTHORITY, a municipal corporation

By Richard G. Walsh *By same*
Richard G. Walsh, General Manager

Attest:

Vicki G. Esser
Clerk of the WTA Board

Approved as to Form:

Richard J. Langabeer
Richard J. Langabeer, Legal Counsel
to the WTA

DATED this 4th day of October, 2006.

Mark Asmundson
Mark Asmundson, Mayor

ATTEST:

Therese Hol
Finance Director

Approved as to Form:

Chs Co. Resendez
Office of the City Attorney
Departmental Approval:

Richard E. McKinley *CRW*
Department Head

RECEIVED

RECEIVED

PROCUREMENT

PROCUREMENT

Exhibit A

Bellingham ITS Implementation Costs (Per Intersection)

<u>Equipment</u>	<u>Quantity</u>	<u>Cost</u>	<u>Total</u>
Ethernet Switch	1	\$2,090.67	\$2,090.67
Signal Controller	1	\$2,710.00	\$2,710.00
Preemption Phase Selector	1	\$1,675.00	\$1,675.00
Icons Traffic Management System		\$98,850.00	\$941.43
Fiber Optic Cable		\$0.50	\$200.00
Fiber Patch Panel/Misc Material	1	\$238.00	\$238.00
Labor/Equipment	12 hours	\$62.00	\$744.00
		Sub-total	\$8,599.10
		Tax	\$713.73
		TOTAL	\$9,312.83

The City and the WTA have agreed to a cost sharing formula of 50% of the total cost per intersection less tax. The WTA's flat rate cost per intersection is \$4,299.55.