

RESOLUTION NO. \_\_\_\_\_

A RESOLUTION AUTHORIZING THE RENEWAL OF A SOFTWARE SERVICES AGREEMENT WITH OPENGOV, INC. FOR ITS CARTEGRAPH ASSET MANAGEMENT SYSTEM, AND AUTHORIZING THE MAYOR TO EXECUTE THE AGREEMENT AND ALL OTHER DOCUMENTS NECESSARY AND PROPER TO EFFECTUATE THE PURPOSE OF THE AGREEMENT

WHEREAS, in May 2014, by Resolution No. 2014-180, the city entered into an agreement with OpenGov, Inc. for use of Cartegraph Asset Management System, the agreement provided for renewal options in 3-year increments, the most recent of which was authorized in 2020 pursuant to Resolution No. 2020-193;

WHEREAS, the city would like to sign another three year agreement with OpenGov, Inc. for continued utilization of the Cartegraph Asset Management System; and

WHEREAS, the total cost for this agreement is \$323,136.38 for the three year agreement with the cost being distributed over a three year period in annual installments, the first installment due August 1, 2023, for \$104,550.00, second installment due August 1, 2024, for \$106,627.50, and third (final) installment due August 1, 2025, for \$111,958.88; and

WHEREAS, the funding is available and identified from various operating accounts.

Now therefore,

BE IT RESOLVED BY THE BOARD OF MAYOR AND ALDERMEN AS FOLLOWS:

SECTION I. That an agreement with OpenGov, Inc. for utilization of the software Cartegraph Asset Management System is approved, and payment to OpenGov, Inc. shall be submitted in three installments with the first installment due August 1, 2023, for \$104,550.00, second installment due August 1, 2024, for \$106,627.50, and third (final) installment due August 1, 2025, for \$111,958.88 for a total of \$323,136.38.

SECTION II. That the mayor, or in his absence, incapacity, or failure to act, the vice-mayor, is authorized and directed to execute, in a form approved by the city attorney and subject to the requirements of Article X, Section 10 of the Charter of the City of Kingsport, an agreement with OpenGov, Inc. for the software Cartegraph Asset Management System and all documents necessary and proper to effectuate the purpose of the agreement or this resolution, said agreement being as follows:

**OPENGOV SOFTWARE SERVICES AGREEMENT**

This Software Services Agreement (this "**Agreement**") is entered into by OpenGov, Inc., a Delaware corporation with a principal place of business at 6525 Crown Blvd #41340, San Jose, CA 95160 ("**OpenGov**") and the customer listed on the signature block below ("**Customer**" and "City"), as of the date of last signature below (the "**Effective Date**"). This Agreement sets forth the terms under which Customer will be permitted to use OpenGov's hosted software services.

**1. DEFINITIONS**

"Customer Data" means data that is provided by Customer to OpenGov pursuant to this Agreement (for example, by email or through Customer's software systems of record). Customer Data shall not include any confidential personally identifiable information.

"Documentation" means the documentation for the Software Services at the Customer Resource Center page found at <https://opengov.zendesk.com>.

"Feedback" means suggestions, comments, improvements, ideas, or other feedback or material regarding the Software Services provided by Customer to OpenGov, including feedback provided through online developer community forums.

"Initial Term" means the initial license term specified in number of years on the Order Form, commencing on the Effective Date.

"Intellectual Property Rights" means all intellectual property rights including all past, present, and future rights associated with works of authorship, including exclusive exploitation rights, copyrights, and moral rights, trademark and trade name rights and similar rights, trade secret rights, patent rights, and any other proprietary rights in intellectual property of every kind and nature.

"Order Form" means OpenGov's Software Services order form that: (a) specifies the Software Services provided by OpenGov; (b) references this Agreement; and (c) is signed by authorized representatives of both parties.

"Renewal Term" means each additional renewal period, which shall be for a period of equal duration as the Initial Term, for which this Agreement is extended pursuant to Section 7.2.

## **2. SOFTWARE SERVICES, SUPPORT, AND PROFESSIONAL SERVICES**

**2.1 Software Services.** Subject to the terms and conditions of this Agreement, OpenGov will use commercially reasonable efforts to perform the software services identified in the applicable Order Form entered into by OpenGov and Customer ("**Software Services**").

**2.2 Support & Service Levels.** Customer support is available by email to [support@opengov.com](mailto:support@opengov.com) or by using the chat messaging functionality of the Software Services, both of which are available during OpenGov's standard business hours. Customer may report issues any time. However, OpenGov will address issues during business hours. OpenGov will provide support for the Software Services in accordance with the Support and Software Service Levels found at <https://opengov.com/service-sla>, as long as Customer is entitled to receive support under the applicable Order Form and this Agreement.

### **2.3 Professional Services.**

**(a)** If OpenGov or its authorized independent contractors provides professional services to Customer, such as implementation services, then these professional services will be described in a statement of work ("**SOW**") agreed to by the parties (the "**Professional Services**"). Unless otherwise specified in the SOW, any pre-paid Professional Services Fees must be utilized within one (1) year from the Effective Date. Any unused pre-paid Professional Services Fees shall be forfeited.

**(b)** Unless the SOW provides otherwise, all reasonable travel expenses, pre-approved by Customer and incurred by OpenGov in performing the professional services will be reimbursed by Customer. Travel expenses include cost of coach airfare travel round trip from the individual's location to Customer's location, reasonable hotel accommodations, ground transportation and meals.

## **3. RESTRICTIONS AND RESPONSIBILITIES**

**3.1 Restrictions.** Customer may not use the Software Services in any manner or for any purpose other than as expressly permitted by the Agreement. Customer shall not, and shall not permit or enable any third party to: (a) use or access any of the Software Services to build a competitive product or service; (b) modify, disassemble, decompile, reverse engineer or otherwise make any derivative use of the Software Services (except to the extent applicable laws specifically prohibit such restriction); (c) sell, license, rent, lease, assign, distribute, display, host, disclose, outsource, copy or otherwise commercially exploit the Software Services; (d) perform or disclose any benchmarking or performance testing of the Software Services; (e) remove any proprietary notices included with the Software Services; (f) use the Software Services in violation of applicable law; or (g) transfer any confidential personally identifiable information to OpenGov or the Software Services platform.

**3.2 Responsibilities.** Customer shall be responsible for obtaining and maintaining computers and third-party software systems of record (such as Customer's ERP systems) needed to connect to, access or otherwise use the Software Services. Customer also shall be responsible for: (a) ensuring that such equipment is compatible with the Software Services, (b) maintaining the security of such equipment, user accounts, passwords and files, and (c) all uses of Customer user accounts by any party other than OpenGov.

## **4. INTELLECTUAL PROPERTY RIGHTS; LICENSE GRANTS; ACCESS TO CUSTOMER DATA**

**4.1 Software Services.** OpenGov retains all right, title, and interest in the Software Services and all Intellectual Property Rights in the Software Services. The look and feel of the Software

Services, including any custom fonts, graphics and button icons, are the property of OpenGov and Customer may not copy, imitate, or use them, in whole or in part, without OpenGov's prior written consent. Subject to Customer's obligations under this Agreement, OpenGov hereby grants to Customer a non-exclusive, royalty-free license during the Term to use the Software Services.

**4.2 Customer Data.** Customer retains all right, title, and interest in the Customer Data and all Intellectual Property Rights therein. Customer hereby grants to OpenGov a non-exclusive, royalty-free license to, and permit its partners (which include, without limitation the hosting providers of the Software Services) to, use, store, edit and reformat the Customer Data, and to use Customer Data for purposes of sales, marketing, business development, product enhancement, customer service, or for analyzing such data and publicly disclosing such analysis ("**Insights**"), provided that in all such uses Customer Data is rendered anonymous such that Customer is no longer identifiable.

**4.3 Access to Customer Data.** may download the Customer Data from the Software Services at any time during the Term, other than during routine software maintenance periods. OpenGov has no obligation to return Customer Data to Customer.

**4.4 Feedback.** Customer hereby grants to OpenGov a non-exclusive, royalty-free, irrevocable, perpetual, worldwide license to use and incorporate into the Software Services and Documentation Customer's Feedback. OpenGov will exclusively own any improvements or modifications to the Software Services and Documentation based on or derived from any of Customer's Feedback including all Intellectual Property Rights in and to the improvements and modifications.

## **5. CONFIDENTIALITY**

**5.1** Each party (the "**Receiving Party**") agrees not to disclose any Confidential Information of the other party (the "**Disclosing Party**") without the Disclosing Party's prior written consent, except as provided below. The Receiving Party further agrees: (a) to use and disclose the Confidential Information only in connection with this Agreement; and (b) to protect such Confidential Information using the measures that Receiving Party employs with respect to its own Confidential Information of a similar nature, but in no event with less than reasonable care. Notwithstanding the above, the Receiving Party may disclose Confidential Information to the extent required by law or court order, provided that prior written notice of such required disclosure and an opportunity to oppose or limit disclosure is given to the Disclosing Party.

**5.2 "Confidential Information"** means all confidential business, technical, and financial information of the disclosing party that is marked as "Confidential" or an equivalent designation or that should reasonably be understood to be confidential given the nature of the information and/or the circumstances surrounding the disclosure. OpenGov's Confidential Information includes, without limitation, the software underlying the Software Services and all Documentation.

**5.3** The Agreement is a public record, and it, along with all documents or materials, in any format, including, but not limited to, paper, electronic, or virtual, that are public records pursuant to the Tennessee Open Records Act, set out in Tenn. Code Ann. §10-7-503 *et seq.*, are not confidential and are subject to disclosure in whole or in part, without regard to any provision contained in the Agreement declaring information confidential. Additionally, City must, upon proper request, release public documents and records as defined by Tenn. Code Ann. §10-7-503 *et seq.*, including, but not limited to, the Agreement and all records created and maintained related to the Agreement, without any requirement to disclose such request to OpenGov or provide OpenGov with notice or the time to obtain a protective order.

**5.4** Notwithstanding the foregoing, "Confidential Information" does not include: (a) "**Public Data**," which is data that the Customer has previously released to the public, would be required to release to the public, upon request, according to applicable federal, state, or local public records laws, or Customer requests OpenGov make available to the public in conjunction with the Software Services. Confidential Information does not include (b) information that has become publicly known through no breach by the receiving party; (c) information that was rightfully received by the Receiving Party from a third party without restriction on use or disclosure; or (d) information independently developed by the Receiving Party without access to the Disclosing Party's Confidential Information.

## **6. PAYMENT OF FEES**

### **6.1 Fees; Invoicing; Payment; Expenses.**

**(a) Fees.** The fees for the Software Services for the Initial Term and any Renewal Term ("**Software Services Fees**") and the fees for Professional Services ("**Professional Services Fees**") are set forth in the applicable Order Form. Software Services Fees and Professional

Services Fees shall hereafter be referred to as "**Fees**". Except to the extent otherwise expressly stated in this Agreement or in an Order Form, (i) all obligations to pay Fees are non-cancelable and all payments are non-refundable, (ii) Customer must pay all Fees due under all Order Forms and SOW within thirty (30) days after Customer receives each invoice (invoices are deemed received when OpenGov emails them to Customer's designated billing contact); (iii) the Software Service Fee shall be due annually in advance, and (iv) Customer must make all payments without setoffs, withholdings or deductions of any kind.

**(b) Annual Software Maintenance Price Adjustment.** OpenGov shall increase the Fees payable for the Software Services during any Renewal Term by 5% each year of the Renewal Term.

**(c) Invoicing and Payment.** OpenGov will invoice the Customer according to the Billing Frequency listed on the Order Form. Customer shall pay all invoices according to the Payment Terms listed on the Order Form.

**(d) Travel Expenses.** Unless the SOW provides otherwise, OpenGov will invoice Customer for travel expenses, pre-approved by the Customer, incurred in connection with each SOW as they are incurred. Customer shall pay all such valid invoices within thirty (30) days of receipt of invoice. Each invoice shall include receipts for the travel expenses listed on the invoice.

**(e) Customer Delays: On Hold Fee.**

**I. On Hold Notice.** Excluding delays caused by Force Majeure as described in Section 10.5, if OpenGov determines that Customer's personnel or contractors are not completing Customer's responsibilities described in the applicable SOW timely or accurately, OpenGov shall promptly, but in no event more than thirty (30) days from the date of such determination deliver to Customer a notice (an "**On Hold Notice**") that (A) designates the Professional Services to be provided to the Customer as "**On Hold**", (B) detail Customer's obligations and responsibilities necessary for OpenGov to continue performing the Professional Services, and (C) specify the Customer shall be invoiced for lost time in production (e.g. delayed or lost revenue resulting from rescheduling work on other projects, delay in receiving milestone payments from Customer, equipment, hosting providers and human resources idle) for a fee equal to 10% of the first year Software Service Fee (the "**On Hold Fee**").

**II. Effects of On Hold Notice.** Upon issuing an On Hold Notice, OpenGov shall be entitled, without penalty, to (A) reallocate resources otherwise reserved for the performance of the Professional Services, and (B) stop or caused to be stopped the Professional Services to be provided to the Customer until the Customer has fulfilled its obligations as set forth in the On Hold Notice. OpenGov shall remove the "On Hold" status, only upon Customer's fulfillment of its obligations set out in the On Hold Notice, including payment of the On Hold Fee. Upon Customer's fulfillment of its obligations in the On Hold Notice, OpenGov may, in its sole discretion, extend the timeline to complete certain Professional Services up to six (6) weeks, depending on the availability of qualified team resources (OpenGov cannot guarantee that these team resources will be the same as those who were working on the project prior to it being placed On Hold). OpenGov shall bear no liability or otherwise be responsible for delays in the provision of the Professional Services occasioned by Customer's failure to complete Customer's responsibilities or adhere to a Customer schedule which were brought to the attention of the Customer on a timely basis, unless such delays result, directly or indirectly from the failure of OpenGov or its authorized independent contractors to perform the Professional Services in accordance with this Agreement or applicable SOW.

**6.2 Consequences of Non-Payment.** If Customer fails to make any payments required under any Order Form or SOW, then in addition to any other rights OpenGov may have under this Agreement or applicable law, (a) Customer will owe late interest penalty of 1.5% of the outstanding balance per month, or the maximum rate permitted by law, whichever is lower and (b) If Customer's account remains delinquent (with respect to payment of a valid invoice) for thirty (30) days after receipt of a delinquency notice from OpenGov, which may be provided via email to Customer's designated billing contact, OpenGov may temporarily suspend Customer's access to the Software Service for up to ninety (90) days to pursue good faith negotiations before pursuing termination in accordance with Section 7. Customer will continue to incur and owe all applicable Fees irrespective of any such Service suspension based on such Customer delinquency

**6.3 Taxes.** All Fees under this Agreement are exclusive of any applicable sales, value-added, use or other taxes ("**Sales Taxes**"). Customer is solely responsible for any and all Sales Taxes, not including taxes based solely on OpenGov's net income. If any Sales Taxes related to the Fees under this Agreement are found at any time to be payable, the amount may be billed by OpenGov to, and shall be paid by, Customer. If Customer fails to pay any

Sales Taxes, then Customer will be liable for any related penalties or interest, and will indemnify OpenGov for any liability or expense incurred in connection with such Sales Taxes. In the event Customer or the transactions contemplated by the Agreement are exempt from Sales Taxes, Customer agrees to provide OpenGov, as evidence of such tax exempt status, its Sales and Use Tax Certificate or other documentation acceptable to OpenGov.

## **7. TERM & TERMINATION**

**7.1 Term.** Subject to compliance with all terms and conditions, the term of this Agreement shall commence on the Effective Date and shall continue until the Subscription End Date specified on the Order Form (the "**Initial Term**") unless sooner terminated pursuant to Section 7.3 below.

**7.2 Renewal.** This Agreement shall automatically renew for another period of the same duration as the Initial Term (the "**Renewal Term**" and together with the Initial Term, the "**Term**"), unless either party notifies the other party of its intent not to renew this Agreement in writing no less than thirty (30) days before the end of the Initial Term.

**7.3 Termination.** Neither party shall have the right to terminate this Agreement without a legally valid cause. If either party materially breaches any term of this Agreement and fails to cure such breach within thirty (30) days after notice by the non-breaching party (ten (10) days in the case of non-payment), the non-breaching party may terminate this Agreement. Additionally, Customer may terminate this Agreement, upon providing at least ninety (90) days notice prior to the annual anniversary date of the Agreement ("**Anniversary Date**") upon the occurrence of an Event of Nonappropriation as defined below. An "**Event of Nonappropriation**" occurs when prior to each Anniversary Date: a) Customer uses all efforts that are lawful and within Customer's official power, to secure the appropriate funds for the next year's Fees, including indicating the Software Services serve an essential purpose to Customer; and b) Customer has not acquired, used or issued a proposal for similar products or services during this period or has not hired any third party or allowed its own employees to use other services in place of the Software Services. Customer shall permit OpenGov to assist with the efforts in a) above, including providing OpenGov with direct access to Customer's applicable appropriations team.

### **7.4 Effect of Termination.**

**(a) In General.** Upon termination pursuant to Section 7.3 or expiration of this Agreement pursuant to Section 7.1: (a) Customer shall pay in full for all Software Services and Professional Services performed up to and including the effective date of termination or expiration; (b) all Software Services provided to Customer hereunder shall immediately terminate; and (c) each party shall return to the other party or, at the other party's option, destroy all Confidential Information of the other party in its possession.

**(b) Deletion of Customer Data.** Unless otherwise requested pursuant to this Section 7.4(b), upon the expiration or termination of this Agreement the Customer Data, excluding any Insights, shall be deleted pursuant to OpenGov's standard data deletion and retention practices. Upon written request, Customer may request deletion of Customer Data, excluding any Insights, prior to the date of termination or expiration of this Agreement. Such request must be addressed to "OpenGov Vice President, Customer Success" at OpenGov's address for notice described at Section 10.

**7.5 Survival.** The following sections of this Agreement shall survive termination: Section 5 (Confidentiality), Section 6 (Payment of Fees), Section 7.4(b) (Deletion of Customer Data), Section 8.3 (Warranty Disclaimer), Section 9 (Limitation of Liability) and Section 10 (Miscellaneous).

## **8. REPRESENTATIONS AND WARRANTIES; DISCLAIMER**

### **8.1 By OpenGov.**

**(a) General Warranty.** OpenGov represents and warrants that: (i) it has all right and authority necessary to enter into and perform this Agreement; and (ii) the Professional Services, if any, will be performed in a professional and workmanlike manner in accordance with the related statement of work and generally prevailing industry standards. For any breach of the Professional Services warranty, Customer's exclusive remedy and OpenGov's entire liability will be the re-performance of the applicable services. If OpenGov is unable to re-perform all such work as warranted, Customer will be entitled to recover all fees paid to OpenGov for the deficient work. Customer must make any claim under the foregoing warranty to OpenGov in writing within ninety (90) days of performance of such work in order to receive such warranty remedies.

**(b) Software Services Warranty.** OpenGov further represents and warrants that for a period of ninety (90) days, the Software Services will perform in all material respects in accordance with the Documentation. The foregoing warranty does not apply to any Software Services

that have been used in a manner other than as set forth in the Documentation and authorized under this Agreement. OpenGov does not warrant that the Software Services will be uninterrupted or error-free. Any claim submitted under this Section 8.1(b) must be submitted in writing to OpenGov during the Term. OpenGov's entire liability for any breach of the foregoing warranty is to repair or replace any nonconforming Software Services so that the affected portion of the Software Services operates as warranted or, if OpenGov is unable to do so, terminate the license for such Software Services and refund the pre-paid, unused portion of the Fee for such Software Services.

**8.2 By Customer.** Customer represents and warrants that (i) it has all right and authority necessary to enter into and perform this Agreement; and (ii) OpenGov's use of the Customer Data pursuant to this Agreement will not infringe, violate or misappropriate the Intellectual Property Rights of any third party.

**8.3 Disclaimer.** OPENGOV DOES NOT WARRANT THAT THE SOFTWARE SERVICES WILL BE UNINTERRUPTED OR ERROR FREE; NOR DOES IT MAKE ANY WARRANTY AS TO THE RESULTS THAT MAY BE OBTAINED FROM USE OF THE SOFTWARE SERVICES. EXCEPT AS SET FORTH IN THIS SECTION 8, THE SOFTWARE SERVICES ARE PROVIDED "AS IS" AND OPENGOV DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY, TITLE, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT.

## **9. LIMITATION OF LIABILITY**

**9.1 By Type.** NEITHER PARTY, NOR ITS SUPPLIERS, OFFICERS, AFFILIATES, REPRESENTATIVES, CONTRACTORS OR EMPLOYEES, SHALL BE RESPONSIBLE OR LIABLE WITH RESPECT TO ANY SUBJECT MATTER OF THIS AGREEMENT UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY, OR OTHER THEORY: (A) FOR ERROR OR INTERRUPTION OF USE OR FOR LOSS OR INACCURACY OF DATA OR COST OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES OR LOSS OF BUSINESS; (B) FOR ANY INDIRECT, EXEMPLARY, PUNITIVE, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES; OR (C) FOR ANY MATTER BEYOND SUCH PARTY'S REASONABLE CONTROL, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGE.

**9.2 By Amount.** IN NO EVENT SHALL EITHER PARTY'S AGGREGATE, CUMULATIVE LIABILITY FOR ANY CLAIMS ARISING OUT OF OR IN ANY WAY RELATED TO THIS AGREEMENT EXCEED THE FEES PAID BY CUSTOMER TO OPENGOV (OR, IN THE CASE OF CUSTOMER, PAYABLE) FOR THE SOFTWARE SERVICES UNDER THIS AGREEMENT IN THE 24 MONTHS PRIOR TO THE ACT THAT GAVE RISE TO THE LIABILITY.

**9.3 Limitation of Liability Exclusions.** The limitations of liability set forth in Sections 9.1 and 9.2 above do not apply to, and each party accepts liability to the other for: (a) claims based on either party's intentional breach of its obligations set forth in Section 5 (Confidentiality), (b) claims arising out of fraud or willful misconduct by either party and (c) either party's unauthorized use, distribution, or disclosure of the other party's intellectual property.

**9.4 No Limitation of Liability by Law.** Because some jurisdictions do not allow liability or damages to be limited to the extent set forth above, some of the above limitations may not apply to Customer.

## **10. MISCELLANEOUS**

**10.1 Logo Use.** Customer does not consent to the use of its name or logo, including the name or logo of its Kingsport City Schools in any advertising or promotional material or distributions or other commercial use by OpenGov. Additionally, Customer does not waive any moral right to the use of the name submitted to OpenGov.

**10.2 Notice.** Ordinary day-to-day operational communications may be conducted by email, live chat or telephone communications. However, for notices, including legal notices, required by the Agreement (in Sections where the word "notice" appears) the parties must communicate more formally in a writing given by personal delivery, by pre-paid first-class mail or by overnight courier to the address specified below (or such other address as may be specified in writing in accordance with this Section). Any notices contemplated by the agreement shall be sent via certified mail, return receipt requested and addressed to:

**City Manager**

City of Kingsport

415 Broad Street

Kingsport, TN 37660

**City Attorney**

City of Kingsport  
415 Broad Street  
Kingsport, TN 37660

**10.3 Anti-Corruption.** OpenGov has not offered or provided any bribe, kickback, illegal or improper payment, gift, or thing of value to any Customer personnel in connection with the Agreement, other than reasonable gifts and entertainment provided Customer in the ordinary course of business. If OpenGov becomes aware of any violation of the above restriction then OpenGov shall promptly notify Customer.

**10.4 Injunctive Relief.** The parties acknowledge that any breach of the confidentiality provisions or the unauthorized use of a party's intellectual property may result in serious and irreparable injury to the aggrieved party for which damages may not adequately compensate the aggrieved party. The parties agree, therefore, that, in addition to any other remedy that the aggrieved party may have, it shall be entitled to seek equitable injunctive relief without being required to post a bond or other surety or to prove either actual damages or that damages would be an inadequate remedy.

**10.5 Force Majeure.** Neither party shall be held responsible or liable for any losses arising out of any delay or failure in performance of any part of this Agreement, other than payment obligations, due to any act of god, act of governmental authority, or due to war, riot, labor difficulty, failure of performance by any third-party service, utilities, or equipment provider, or any other cause beyond the reasonable control of the party delayed or prevented from performing.

**10.6 Severability; Waiver.** If any provision of this Agreement is found to be unenforceable or invalid, that provision will be limited or eliminated to the minimum extent necessary so that this Agreement will otherwise remain in full force and effect and enforceable. Any express waiver or failure to exercise promptly any right under this Agreement will not create a continuing waiver or any expectation of non-enforcement. There are no third-party beneficiaries to this Agreement.

**10.7 Assignment.** Except as set forth in this Section, neither party shall assign, delegate, or otherwise transfer this Agreement or any of its rights or obligations to a third party without the other party's prior written consent, which consent shall not be unreasonably withheld, conditioned, or delayed. Either party may assign, without such consent but upon written notice, its rights and obligations under this Agreement to: (i) its corporate affiliate; or (ii) any entity that acquires all or substantially all of its capital stock or its assets related to this Agreement, through purchase, merger, consolidation, or otherwise. Any other attempted assignment shall be void. This Agreement shall inure to the benefit of and bind each party's permitted assigns and successors.

**10.8 Independent Contractors.** No agency, partnership, joint venture, or employment is created as a result of this Agreement and neither party has any authority of any kind to bind the other party in any respect.

**10.9 Attorney's Fees.** In any action or proceeding to enforce rights under this Agreement, the prevailing party will be entitled to recover costs and attorneys' fees.

**10.10 Governing Law and Jurisdiction.** This Agreement shall be governed by the laws of the State of Tennessee without regard to its conflict of laws provisions. Pursuant to the Constitution and Laws of the State of Tennessee, City is a sovereign entity subject only to those courts with jurisdiction over City. Therefore, any reference to the resolution of disputes through arbitration is expressly stricken from the Agreement and City expressly refuses to arbitrate any dispute. If a dispute arises between the parties concerning any aspect of the Agreement, and it cannot be resolved by mutual agreement, any party may resort to resolution of the dispute by litigation in the state courts in Kingsport, Tennessee or the Federal court for the Eastern District of Tennessee, Northeastern Division. However, neither party shall be obligated to provide any type of pre-suit notice before initiating a cause of action. The parties waive their right to a jury trial. The parties hereby consent to the mandatory and exclusive venue and jurisdiction of the state court located in Kingsport, Tennessee, or the Federal court for the Eastern District of Tennessee. Service of process shall comply with the Tennessee Rules of Civil Procedure or if applicable the Federal Rules of Civil Procedure, and City does not agree to any other service of process procedure. In the event of litigation between City and OpenGov each party shall be solely and exclusively responsible for the payment of litigation costs, expenses and attorney's fees excepting those costs which may be awarded by a court of competent jurisdiction as specified by Tennessee law or applicable rules of civil procedure.

**10.11 No Liability of City Officials and Employees.** No member, official, or employee of City shall be personally liable to OpenGov or any other person or entity, including a third party

beneficiary, in the event any provision of the Agreement is unenforceable, there is any default or breach by City, for any amount which may become due and the Agreement, or on any obligations under the terms of the Agreement.

**10.12 Indemnity and Disclaimer of Warranty.** Article II, Section 29 of the Tennessee Constitution prohibits cities from lending their credit to private entities and, therefore, prohibits an agreement by City to indemnify a third party. Any indemnity or hold harmless provision contained in the Agreement requiring City to indemnify or hold harmless OpenGov or any other person or entity is deleted. No provision of this Agreement shall act or be deemed a waiver by City of any immunity, including its rights or privileges or of any provision of the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101 *et seq.*

**10.13 Accessibility.** OpenGov warrants that the software conforms to the accessibility guidelines as outlined below. Notwithstanding the foregoing, City acknowledges and understands the legal and practical distinction between 'software' and 'content,' and further agrees that City, not OpenGov, shall have sole responsibility for WCAG 2.2 and Section 508 compliance as it relates to content. OpenGov is committed to making accessible the Software Services while delivering compelling services to our customer communities aligned with current accessibility standards. OpenGov's intention is to:

- Develop and maintain the OpenGov Open Data Software Services in accordance to the recognized requirements of Section 508 while meeting WCAG 2.1 Level AA Standards
- Assure any new functional enhancements to the OpenGov CIT Software Service public portal will align with the accessibility requirements above
- Prioritize for 2023 improvements in the OpenGov Open Data Software Service Public Portal, followed by the OpenGov Open Data S Employee Application
- Conduct regular conformance assessments per the above standards

OpenGov's current Voluntary Product Accessibility Template (VPAT) rates the OpenGov Open Data S Software Services Public Portal as "good" per accessibility standards, but more work will be required into 2023 to more fully align to Section 508 requirements and further improve accessibility. If Customer is interested in further details of the work underway, the findings of OpenGov's VPAT and short to medium-term improvements planned, OpenGov welcomes a short update call to provide that information.

**10.14 No Presumption Against Drafter.** This Agreement shall not be construed for or against any party because that party or that party's legal representative drafted any of its provisions. Accordingly, this Agreement shall be construed without regard to the rule that ambiguities in a document are to be construed against the draftsman. No inferences shall be drawn from the fact that the final, duly executed Agreement differs in any respect from any previous draft hereof.

**10.15 Counterparts.** This Agreement may be executed in one or more counterparts by City and OpenGov. If so executed, the signer shall deliver an original to the other party and the collective counterparts shall be treated as the fully executed document.

**10.16 Complete Agreement.** This Agreement is the complete and exclusive statement of the mutual understanding of the parties and supersedes and cancels all previous written and oral agreements, communications, and other understandings relating to the subject matter of this Agreement. No modification of this Agreement will be binding, unless in writing and signed by an authorized representative of each party.

[Acknowledgements Deleted for Inclusion in this Resolution]

SECTION III. That the mayor is further authorized to make such changes approved by the mayor and the city attorney to the agreement that do not substantially alter the material provisions of the agreement, and the execution thereof by the mayor and the city attorney is conclusive evidence of the approval of such changes.

SECTION IV. That the board finds that the actions authorized by this resolution are for a public purpose and will promote the health, comfort, and prosperity of the citizens of the city.

SECTION V. That this resolution shall take effect from and after its adoption, the public welfare requiring it.

ADOPTED this the 6th day of June, 2023.



\_\_\_\_\_  
PATRICK W. SHULL, MAYOR

ATTEST:

\_\_\_\_\_  
ANGELA MARSHALL, DEPUTY CITY RECORDER

APPROVED AS TO FORM:

\_\_\_\_\_  
RODNEY B. ROWLETT, III, CITY ATTORNEY