

## **SECOND AMENDMENT TO THE FDM SOFTWARE SUPPORT AND MAINTENANCE AGREEMENT**

This Second Amendment to the FDM Software Support And Maintenance Agreement (the "Second Amendment") is made and entered into by and between the City of Lee's Summit, Missouri, a municipal corporation organized and existing under the Constitution and laws of the State of Missouri ("City") and FDM Software, Ltd., a British Columbia corporation, ("FDM"). The City and FDM may be referred as the "Party" in their individual capacity and the "Parties" collectively. Capitalized terms not otherwise defined in this Second Amendment shall have the meanings ascribed to them in the Original Agreement, as defined below. This Second Amendment shall take effect on July 1, 2019 (the "Effective Date").

### **RECITALS**

WHEREAS, City and FDM entered into a Support and Maintenance Agreement dated April 7, 2014 (the "Original Agreement") which governed the provision of City Support and Maintenance Services by FDM to City; and,

WHEREAS, Schedule B of the Original Agreement identifies the software Modules that are covered by the Original Agreement; and,

WHEREAS, Schedule C of the Original Agreement identifies the costs imposed upon City for provision of the City Support and Maintenance Services provided by FDM for the Software Modules identified in Schedule B of the Original Agreement; and,

WHEREAS, City and FDM amended the Original Agreement by executing the First Amended and Restated Software Support and Maintenance Agreement dated July 31, 2017 (the "First Amendment") to add the Automatic Vehicle Location (AVL) and Closest Unit Recommendation (CUR) modules to the list of Modules available to the City as set forth in Schedule B of the Original Agreement; and,

WHEREAS, the City desires to remove the Asset Management Module from the list of Modules available to the City as set forth in Schedule B of the Original Agreement; and,

WHEREAS, as technology has evolved, FDM has developed mobile applications that correspond with FDM's modules. The City desires to amend Schedule B of the Original Agreement to add the Mobile Inspections App to the list of Modules available to the City; and,

WHEREAS, City will require continued City Support and Maintenance Services for the Modules it currently uses and the new Mobile Inspections App, and, in response to this need, City and FDM have negotiated terms and conditions for future support and maintenance which require modification of the language contained in Schedule C to the Original Agreement; and,

WHEREAS, City and FDM desire to amend and update other provisions of the Original Agreement; and,

WHEREAS, City and FDM wish to modify the terms and conditions of the Original Agreement, as amended by the First Amendment following a six month temporary extension; and,

WHEREAS, FDM is the only qualified entity able to provide City Support and Maintenance Services due to the proprietary nature of the products that are licensed to City.

**NOW, THEREFORE**, in consideration of the mutual covenants and considerations set forth in this Second Amendment, the Parties agree as follows:

**Section 1:** As of the Effective Date, Schedule B of the Original Agreement is amended to (i) remove and decommission the “Asset Management” module (“Decommissioned Software”) from the list of Licensed Modules set forth in Schedule B and (ii) add “Mobile Inspections App” to the list of Licensed Modules set forth in Schedule B. For clarity purposes, the revised Schedule B is attached to this Second Amendment as Exhibit “A” and incorporated by reference.

The Parties agree that City will not now, or in the future, be charged a decommission fee for the removal of the Asset Management Module. As of the Effective Date, the City shall no longer have a license to the Decommissioned Software, and FDM will no longer be required to provide the City with maintenance, support, or services for the Decommissioned Software. On or before the Effective Date, the City shall (i) cease all uses of the Decommissioned Software; (ii) return or destroy all copies of the Decommissioned Software; and (iii) provide FDM with written notice that it has returned or destroyed all copies of the Decommissioned Software. Notwithstanding the foregoing, the City shall retain access to any existing data created using the decommissioned Software for the duration of the Agreement.

**Section 2:** That Schedule C of the Original Agreement, as amended by the First Amendment, is amended to read as follows:

Fixed Annual Support Year	Annual Support Fee	
July 1, 2019	\$84,023.11  (Please deduct \$6,000 from this total until the INS App is implemented)	This includes \$6,000 for the Mobile INS App not yet implemented. Upon project implementation, the cost will be pro-rated for the remainder of 2019
July 1, 2020	\$86,536.57	This includes \$6,000 for 10 x Mobile INS App Plus an additional 10 Licenses for the SignOn Module
July 1, 2021	\$88,267.30	As above
July 1, 2022	\$90,032.65	As above
July 1, 2023	\$91,833.30	As above

**Section 3:** Section 8 “Insurance” of the Original Agreement is deleted in its entirety and replaced, with the following:

**8.1 General.**

A. Insurer Qualifications. Without limiting any obligations or liabilities of FDM, FDM shall purchase and maintain, at its own expense, hereinafter stipulated minimum insurance with insurance companies authorized to do business in the State of Missouri, with an AM Best, Inc. rating of A- or above with policies and forms satisfactory to the City. Failure to maintain insurance as specified herein may result in termination of this Agreement at the City’s option.

B. No Representation of Coverage Adequacy. By requiring insurance herein, the City does not represent that coverage and limits will be adequate to protect FDM. The Customer reserves the right to review any and all of the insurance policies and/or endorsements cited in this Agreement, but has no obligation to do so. Failure to demand such evidence of full compliance with the insurance requirements set forth in this Agreement or failure to identify any insurance deficiency shall not relieve FDM from, nor be construed or deemed a waiver of, its obligation to maintain the required insurance at all times during the performance of this Agreement.

C. Additional Insured. All insurance coverage, except Workers' Compensation insurance and Professional Liability insurance, if applicable, shall include, to the fullest extent permitted by law for claims arising out of the performance of this Agreement, the City, its agents, representatives, officers, directors, officials, volunteers and employees as Additional Insured as specified under the respective coverage sections of this Agreement.

D. Coverage Term. All insurance required herein shall be maintained in full force and effect until all work or services required to be performed under the terms of this Agreement are satisfactorily performed, completed and formally accepted by the City, unless specified otherwise in this Agreement.

E. Primary Insurance. FDM's insurance shall be, or endorsed to be, primary, non-contributory insurance with respect to performance of this Agreement and in the protection of the City as an Additional Insured.

F. Waiver. All policies, except for Professional Liability, including Workers' Compensation insurance, shall contain a waiver of rights of recovery (subrogation) against the City, its agents, representatives, officials, officers, volunteers, and employees for any claims arising out of the work or services of FDM. FDM shall arrange to have such subrogation waivers incorporated into each policy via formal written endorsement thereto.

G. Use of Subcontractors. If any work or services under this Agreement is subcontracted in any way, FDM shall execute written agreements with its subcontractors containing the indemnification provisions set forth in this Section and insurance requirements set forth herein protecting the City and FDM. FDM shall be responsible for executing any agreements with its subcontractors and obtaining certificates of insurance verifying the insurance requirements.

H. Policy Deductibles and/or Self-Insured Retentions. The policies set forth in these requirements may provide coverage that contains deductibles or self-insured retention amounts. Such deductibles or self-insured retention shall not be applicable with respect to the policy limits provided to the City. FDM shall be solely responsible for any such deductible or self-insured retention amount.

I. Evidence of Insurance. Prior to commencing any work or services under this Agreement, FDM will provide the City with suitable evidence of insurance in the form of certificates of insurance and a copy of the declaration page(s) of the insurance policies as required by this Agreement, issued by FDM's insurance insurer(s) as evidence that policies are placed with acceptable insurers as specified herein and provide the required coverages, conditions

and limits of coverage specified in this Agreement and that such coverage and provisions are in full force and effect. Confidential information such as the policy premium may be redacted from the declaration page(s) of each insurance policy, provided that such redactions do not alter any of the information required by this Agreement. The City shall reasonably rely upon the certificates of insurance and declaration page(s) of the insurance policies as evidence of coverage but such acceptance and reliance shall not waive or alter in any way the insurance requirements or obligations of this Agreement.

If any of the policies required by this Agreement expire during the life of this Agreement, it shall be FDM's responsibility to forward renewal certificates and declaration page(s) to the City 30 days prior to the expiration date. Certificates of insurance and declaration page(s) shall specifically include the following provisions:

(1) The City, its agents, representatives, officers, directors, officials and employees are Additional Insureds as follows:

(a) Commercial General Liability – Under Insurance Services Office, Inc., (“ISO”) Form CG 20 10 03 97 or equivalent.

(b) Auto Liability – Under ISO Form CA 20 48 or equivalent.

(c) Excess Liability – Follow Form to underlying insurance.

(2) FDM's insurance shall be primary insurance with respect to performance of this Agreement.

(3) All policies, except for Professional Liability, including Workers' Compensation, waive rights of recovery (subrogation) against City, its agents, representatives, officers, officials and employees for any claims arising out of work or services performed by FDM under this Agreement.

(4) ACORD certificate of insurance form 25 (2014/01) is preferred. If ACORD certificate of insurance form 25 (2001/08) is used, the phrases in the cancellation provision “endeavor to” and “but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives” shall be deleted. Certificate forms other than ACORD form shall have similar restrictive language deleted.

## 8.2 Required Insurance Coverage.

A. Commercial General Liability. FDM shall maintain “occurrence” form Commercial General Liability insurance with an unimpaired limit of not less than \$1,000,000 for each occurrence, \$2,000,000 Products and Completed Operations Annual Aggregate and a \$2,000,000 General Aggregate Limit. The policy shall cover liability arising from premises, operations, independent contractors, products completed operations, personal injury and advertising injury. Coverage under the policy will be at least as broad as ISO policy form CG 00 01 10 93 or equivalent thereof, including but not limited to, separation of insured's clause. To the fullest extent allowed by law, for claims arising out of the performance of this Agreement, the City, its agents, representatives, officers, officials and employees shall be include as an Additional Insured under ISO, Commercial General

Liability Additional Insured Endorsement form CG 20 10 03 97, or equivalent. If any Excess insurance is utilized to fulfill the requirements of this subsection, such Excess insurance shall be “follow form” equal or broader in coverage scope than underlying insurance.

**B. Vehicle Liability.** FDM shall maintain Business Automobile Liability insurance with a limit of \$1,000,000 each occurrence on FDM’s owned, hired and non-owned vehicles assigned to or used in the performance of the FDM’s work or services under this Agreement. Coverage will be at least as broad as ISO coverage code “1” “any auto” policy form CA 00 01 12 93 or equivalent thereof. To the fullest extent allowed by law, for claims arising out of the performance of this Agreement, the City, its agents, representatives, officers, directors, officials and employees shall be included as an Additional Insured under ISO Business Auto policy Designated Insured Endorsement form CA 20 48 or equivalent. If any Excess insurance is utilized to fulfill the requirements of this subsection, such Excess insurance shall be “follow form” equal or broader in coverage scope than underlying insurance.

**C. Professional Liability.** If this Agreement is the subject of any professional services or work, or if the FDM engages in any professional services or work in any way related to performing the work under this Agreement, the FDM shall maintain Professional Liability insurance covering negligent errors and omissions arising out of the Services performed by the FDM, or anyone employed by the FDM, or anyone for whose negligent acts, mistakes, errors and omissions the FDM is legally liable, with an liability insurance limit of \$5,000,000 each claim and \$5,000,000 annual aggregate.

The Policy shall include, or be endorsed to include, property damage liability coverage for damage to, alteration of, loss of, or destruction of electronic data and/or information “property” of the City in the care, custody, or control of FDM.

**D. Cyber Liability Insurance.** FDM shall carry cyber liability insurance with limits not less than \$2,000,000 per occurrence or claim, \$2,000,000 aggregate. Coverage shall be sufficiently broad to respond to the duties and obligations as is undertaken by FDM in this agreement and shall include, but not be limited to, claims involving infringement of intellectual property, including but not limited to infringement of copyright, trademark, trade dress, invasion of privacy violations, 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 breach response costs as well as regulatory fines and penalties as well as credit monitoring expenses with limits sufficient to respond to these obligations.

**E. Workers’ Compensation Insurance.** FDM understands and agrees that FDM’s employees, agents, and directors, are not serving as employee of the City in any manner and therefore are not entitled to any of the City’s industrial benefit coverages, including Workers’ Compensation coverages. FDM acknowledges that any injury its employees sustain in the performance of this Agreement will be not be eligible for industrial benefits and any necessary treatment will be FDM, or FDM’ insurer’s, sole responsibility. FDM shall notify its insurance carrier that FDM has waived subrogation against the City, and

its employees, agents, officers, and officials with regard to Worker's Compensation and Employers' Liability.

In addition FDM's other indemnification responsibilities, if FDM's workers' compensation insurer subrogates or attempts to subrogate against the City, FDM shall defend, indemnify and hold harmless (including all court costs and attorneys fees) the City and its officials, officers, directors, and employees for, from, and against any damages, demands, claims, fines, penalties, injuries, liabilities, or judgments (collectively "Claims"), to which they may become subject, to the extent to which a Claim may result from or arise out of such workers' compensation claim. The obligations under this paragraph shall not be subject to the liability limitations set forth in Section 6 of this Agreement.

8.3 Cancellation and Expiration Notice. Insurance required herein shall not expire or be canceled, or the limits are reduced without 30 days' prior written notice to the City.

Section 4: The subsection titled "General Limitations" of Section 6, titled "Limitation of Liability", of the Original Agreement is amended to read, in its entirety, as follows:

Neither party will be liable to the other party for any indirect, incidental, special, consequential or exemplary damages, including but not limited to, damages for loss or revenues, profits, goodwill, use, data, failure to realize expected savings.

FDM will defend, indemnify and hold harmless (including all court costs and attorneys fees) the City for any damages, claims, fines, penalties, injuries, liabilities, or judgments, whatsoever in nature to the extent they may arise from the negligence or willful misconduct of FDM or any of its agents, employees, directors, officials or attorneys.

Notwithstanding any other provision herein, FDM shall defend, hold harmless and indemnify Customer (including its elected officials, officers, representatives, agents, employees, volunteers and affiliates) against all claims, demands, losses, suits, damages, fees, fines, royalties, liability and expenses (including reasonable lawyer's fees) arising out of any suit, claim, or action relating to FDM's actual or alleged direct or contributory infringement of, or inducement to infringe, any Intellectual Property right relating to the Software or the Documentation.

**LIMITED LIABILITY OF FDM. FDM's LIABILITY IN CONNECTION WITH THE SERVICES, IMPROVEMENTS OR ANY OTHER MATTER RELATING TO THE AGREEMENT WILL NOT EXCEED FEES THAT CUSTOMER ACTUALLY PAID TO FDM IN THE PREVIOUS TWENTY-FOUR MONTHS PRECEDING THE ACTIONS LEADING TO WHEN SUCH LIABILITY AROSE. IN ANY EVENT, FDM SHALL NOT BE LIABLE FOR ANY LOSSES RESULTING FROM THE CRIMINAL ACTS OF THIRD PARTIES.**


Section 5: That all other provisions of the Original Agreement, as amended by the First Amendment, not inconsistent with the modifications contained in this Second Amendment, shall remain in full force and effect.

Section 6: This Second Amendment shall be binding on the Parties thereto only after it has been approved and duly executed by the City and the FDM.

City of Lee's Summit

FDM Software, Ltd.

\_\_\_\_\_  
Stephen A. Arbo, City Manager

  
\_\_\_\_\_  
[INSERT NAME, TITLE]  
Brad Sarwansky  
CFO  
Date: 6/5/19

Date: \_\_\_\_\_

Date: \_\_\_\_\_

ATTEST

\_\_\_\_\_  
Trisha Fowler Arcuri

APPROVED AS TO FORM

\_\_\_\_\_  
Office of the City Attorney

# Exhibit “A” to the Second Amendment

## SCHEDULE “B”

### Licensed Modules:

- |   |                                  |
|---|----------------------------------|
| ▪ CAD Modules:                            | <u># of Licenses</u>             |
| ○ Computer Aided Dispatch System (CAD)    | (6) (includes ESRI® Arc Engine)  |
| ○ ANI/ALI Services                        | (1)                              |
| ○ CAD Mapping                             | (1)                              |
| ○ Mobile CAD                              | (23) (includes ESRI® Arc Engine) |
| ○ CAD Active Monitor                      | (8)                              |
| ○ Automated Vehicle Location Server (AVL) | (1)                              |
| ○ Closest Unit Recommendation (CUR)       | (1)                              |
| ○ Email Gateway                           | (1)                              |
| ▪ RMS Modules:                            | <u># of Licenses</u>             |
| ○ Properties                              | (10)                             |
| ○ Personnel                               | (10)                             |
| ○ Incident Reporting (Fire & EMS)         | (10)                             |
| ○ Training                                | (10)                             |
| ○ Inspection                              | (10)                             |
| ○ Permits                                 | (10)                             |
| ○ SignOn                                  | (10)                             |
| ▪ Application Modules:                    | <u># of Licenses</u>             |
| ○ Mobile Inspections App                  | (10)                             |

### Third Party Software:

- |   |                        |      |
|---|------------------------|------|
| ▪ ESRI® Arc Engine  | (Built In – see above) | (29) |
| ○ NOTE: ESRI® Arc Engine licenses is included in the CAD System and CAD Mapping modules as noted above. |                        |      |