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TOWN OF ANDOVER

CONTRACT

ORIGINAL

DATE: 8/8/16

This Contract is entered into on, or as of, this date by and between the Town of Andover (the "Town"), and

Kapsch TrafficCom USA, Inc.  
["Contractor"]

2855 Premiere Parkway  
Duluth, Georgia 30097  
[Address of the Contractor]

678-473-6400  
[Telephone Number]

david.hernandez2@kapsch.net  
[E-Mail]

1. This is a Contract for the procurement of the following: To service and maintain the DYNAC SCADA System at the Andover Water Treatment Plant, as stated in Town of Andover IFB No. 042/04-16/301.
2. The Contract price to be paid to the Contractor by the Town of Andover is: TWENTY FOUR THOUSAND SEVEN HUNDRED AND FIVE DOLLARS AND ZERO CENTS (\$24,705.00) for Year One of the Contract (July 1, 2016 – June 30, 2017); TWENTY SIX THOUSAND NINETY THREE DOLLARS AND ZERO CENTS (\$26,093.00) for Year Two (July 1, 2017 – June 30, 2018) of the Contract, and; TWENTY SEVEN THOUSAND FIVE HUNDRED AND SIXTY DOLLARS AND ZERO CENTS (\$27,560.00) for Year Three (July 1, 2018 – June 30, 2019) of the Contract. Thus, resulting in a total contract price of \$78,358.00.
3. Payment will be made as follows: Within thirty (30) days upon receipt of a reasonably detailed invoice.
4. Definitions:
  - 4.1 Acceptance: All Contracts require proper acceptance of the described goods or services by the Town of Andover. Proper acceptance shall be understood to include inspection of goods and certification of acceptable performance for services by authorized representatives of the Town to insure that the goods or services are complete and are as specified in the Contract.

- 4.2 Contract Documents: All documents relative to the Contract including (where used) Instructions to Bidders, Proposal Form, General Conditions, Supplementary General Conditions, General Specifications, Other Specifications included in Project Manual, Drawings, and all Addenda issued during the bidding period. The Contract documents are complementary, and what is called for by any one shall be as binding as if called for by all. The intention of the document is to include all labor and materials, equipment and transportation necessary for the proper performance of the Contract.
- 4.3 The Contractor: The “other party” to any Contract with the Town. This term shall (as the sense and particular Contract so require) include Vendor, Contractor, Engineer, or other label used to identify the other party in the particular Contract. Use of the term “Contractor” shall be understood to refer to any other such label used.
- 4.4 Date of Substantial Performance: The date when the work is sufficiently complete, the services are performed, or the goods delivered, in accordance with Contract documents, as modified by approved Amendments and Change Orders.
- 4.5 Goods: Goods, Supplies or Materials.
- 4.6 SubContractor: Those having a direct Contract with the Contractor. The term includes one who furnished material worked to a special design according to the Drawings or Specifications of this work, but does not include one who merely furnishes material not so worked.
- 4.7 Work: The services or materials contracted for, or both.

5. Term of Contract and Time for Performance:

This Contract shall begin on July 1, 2016 and be fully performed by the Contractor in accordance with the provisions of the Contract Documents on June 30, 2019, unless extended pursuant to a provision for extension contained in the Contract documents at the sole discretion of the Town, and not subject to assent by the Contractor, and subject to the availability and appropriation of funds as certified by the Town Accountant. The time limits stated in the Contract documents are of the essence of the Contract.

6. Subject to Appropriation:

Notwithstanding anything in the Contract documents to the contrary, any and all payments which the Town is required to make under this Contract shall be subject to appropriation or other availability of funds as certified by the Town Accountant. In the absence of appropriation, this Contract shall be immediately terminated without liability for damages, penalties or other charges.

7. Permits and Approvals:

Permits, Licenses, Approvals and all other legal or administrative prerequisites to its performance of the Contract shall be secured and paid for by the Contractor.

8. Termination and Default:

8.1 Without Cause. The Town may terminate this Contract on seven (7) calendar days notice when in the best interests of the Town by providing notice to the Contractor, which shall be in writing and shall be deemed delivered and received when given in person to the Contractor, or when received by fax,

express mail, certified mail return receipt requested, regular mail postage prepaid or delivered by any other appropriate method evidencing actual receipt by the Contractor. Upon termination without cause, Contractor will be paid for services rendered to the date of termination.

8.2 For Cause. If the Contractor is determined by the Town to be in default of any term or condition of this Contract, the Town may terminate this Contract on seven (7) days notice by providing notice to the Contractor, which shall be in writing and shall be deemed delivered and received when given in person to the Contractor, or when received by fax, express mail, certified mail return receipt requested, regular mail postage prepaid or delivered by any other appropriate method evidencing actual receipt by the Contractor.

8.3 Default. The following shall constitute events of a default under the Contract:

- 1) any material misrepresentation made by the Contractor to the Town; 2) any failure to perform any of its obligations under this Contract including, but not limited to the following: (i) failure to commence performance of this Contract at the time specified in this Contract due to a reason or circumstance within the Contractor's reasonable control, (ii) failure to perform this Contract with sufficient personnel and equipment or with sufficient material to ensure the completion of this Contract within the specified time due to a reason or circumstance within the Contractor's reasonable control, (iii) failure to perform this Contract in a manner reasonably satisfactory to the Town, (iv) failure to promptly re-perform within a reasonable time the services that were rejected by the Town as unsatisfactory, or erroneous, (v) discontinuance of the services for reasons not beyond the Contractor's reasonable control, (vi) failure to comply with a material term of this Contract, including, but not limited to, the provision of insurance and non-discrimination, (vii) any other acts specifically and expressly stated in this Contract as constituting a basis for termination of this Contract, and (viii) failure to comply with any and all requirements of state law and/or regulations, and Town bylaw and/or regulations.

9. The Contractor's Breach and the Town's Remedies:

Failure of the Contractor to comply with any of the terms or conditions of this Contract shall be deemed a material breach of this Contract, and the Town of Andover shall have all the rights and remedies provided in the Contract documents, the right to cancel, terminate, or suspend the Contract in whole or in part, the right to maintain any and all actions at law or in equity or other proceedings with respect to a breach of this Contract, including damages and specific performance, and the right to select among the remedies available to it by all of the above.

From any sums due to the Contractor for services, the Town may keep the whole or any part of the amount for expenses, losses and damages incurred by the Town as a consequence of procuring services as a result of any failure, omission or mistake of the Contractor in providing services as provided in this Contract.

10. Statutory Compliance:

10.1 This Contract will be construed and governed by the provisions of applicable federal, state and local laws and regulations; and wherever any provision of the Contract or Contract documents shall conflict with any provision or requirement of federal, state or local law or regulation, then the provisions of law and regulation shall control. Where applicable to the Contract, the provisions of the General Laws are incorporated by reference into this Contract, including, but not limited to, the following:

General Laws Chapter 30B – Procurement of Goods and Services.

General Laws Chapter 30, Sec. 39, *et seq*: - Public Works Contracts.

General Laws Chapter 149, Section 44A, *et seq*: Public Buildings Contracts.

- 10.2 Wherever applicable law mandates the inclusion of any term and provision into a municipal contract, this Section shall be understood to import such term or provision into this Contract. To whatever extent any provision of this Contract shall be inconsistent with any law or regulation limiting the power or liability of cities and towns, such law or regulation shall control.
- 10.3 The Contractor shall give all notices and comply with all laws and regulations bearing on the performance of the Contract. If the Contractor performs the Contract in violation of any applicable law or regulation, the Contractor shall bear all costs arising therefrom.
- 10.4 The Contractor shall keep itself fully informed of all existing and future State and National Laws and Municipal By-laws and Regulations and of all orders and decrees of any bodies or tribunals having jurisdiction in any manner affecting those engaged or employed in the work, of the materials used in the work or in any way affecting the conduct of the work. If any discrepancy or inconsistency is discovered in the Drawings, Specifications or Contract for this work in violation of any such law, by-law, regulation, order or decree, it shall forthwith report the same in writing to the Town. It shall, at all times, itself observe and comply with all such existing and future laws, by-laws, regulations, orders and decrees; and shall protect and indemnify the Town of Andover, and its duly appointed agents against any claim or liability arising from or based on any violation whether by him or its agents, employees or subcontractors of any such law, by-law, regulation or decree.
11. Conflict of Interest:  
Both the Town and the Contractor acknowledge the provisions of the State Conflict of Interest Law (General Laws Chapter 268A), and this Contract expressly prohibits any activity which shall constitute a violation of that law. The Contractor shall be deemed to have investigated the application of M.G.L. c. 268A to the performance of this Contract; and by executing the Contract documents the Contractor certifies to the Town that neither it nor its agents, employees, or subcontractors are thereby in violation of General Laws Chapter 268A.
12. Certification of Tax Compliance  
This Contract must include a certification of tax compliance by the Contractor, as required by General Laws Chapter 62C, Section 49A (Requirement of Tax Compliance by All Contractors Providing Goods, Services, or Real Estate Space to the Commonwealth or Subdivision).
13. Discrimination  
The Contractor will carry out the obligations of this Contract in full compliance with all of the requirements imposed by or pursuant to General Laws Chapter 151B (Law Against Discrimination) and any executive orders, rules, regulations, and requirements of the Commonwealth of Massachusetts as they may from time to time be amended.

14. Assignment:  
Assignment of this Contract is prohibited, unless and only to the extent that assignment is provided for expressly in the Contract documents.
15. Condition of Enforceability Against the Town:  
This Contract is only binding upon, and enforceable against, the Town if: (1) the Contract is signed by the Town Manager or its designee; and (2) endorsed with approval by the Town Accountant as to appropriation or availability of funds; and (3) endorsed with approval by the Town Counsel as to form.
16. Corporate Contractor:  
If the Contractor is a corporation, it shall endorse upon this Contract (or attach hereto) its Clerk's Certificate certifying the corporate capacity and authority of the party signing this Contract for the corporation. Such certificate shall be accompanied by a letter or other instrument stating that such authority continues in full force and effect as of the date the Contract is executed by the Contractor. This Contract shall not be enforceable against the Town of Andover unless and until the Contractor complies with this section.
- The Contractor, if a foreign corporation, shall comply with the provisions of the General Laws, Chapter 181, Sections 3 and 5, and any Acts and Amendments thereof, and in addition thereto, relating to the appointment of the Commissioner of Corporations as its attorney, shall file with the Commissioner of Corporations a Power of Attorney and duly authenticated copies of its Charter or Certificate of Incorporation; and said Contractor shall comply with all the laws of the Commonwealth.
17. Liability of Public Officials:  
To the full extent permitted by law, no official, employee, agent or representative of the Town of Andover shall be individually or personally liable on any obligation of the Town under this Contract.
18. Indemnification:  
The Contractor shall indemnify, defend and save harmless the Town, the Town's officers, agents and employees, from and against any and all damages, liabilities, actions, suits, proceedings, claims, demands, losses, costs, expenses, recoveries and judgments of every nature and description (including reasonable attorneys' fees) that may arise in whole or in part out of or in connection with the work being performed or to be performed, or out of any act or omission by the Contractor, its employees, agents, subcontractors, material men, and anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by any party indemnified hereunder. The Contractor further agrees to reimburse the Town for damage to its property caused by the Contractor, its employees, agents, subcontractors or material men, and anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, including damages caused by his, its or their use of faulty, defective, or unsuitable material or equipment, unless the damage is caused by the Town's gross negligence or willful misconduct. The existence of insurance shall in no way limit the scope of the Contractor's indemnification under this contract.
19. Workers Compensation Insurance:  
The Contractor shall provide by insurance for the payment of compensation and the furnishing of other benefits under Chapter 152 of the General Laws of Massachusetts (The Worker's Compensation Act) to

all employees of the Contractor who are subject to the provisions of Chapter 152 of the General Laws of Massachusetts.

Failure to provide and continue in force such insurance during the period of this Contract shall be deemed a material breach of this Contract, shall operate as an immediate termination thereof, and Contractor shall indemnify the Town for all losses, claims, and actions resulting from the failure to provide the insurance required by this Article.

The Contractor shall furnish to the Town evidence of such insurance prior to the execution of this Contract before the same shall be binding on the parties thereto, except if specifically waived by the Town.

20. Documents, Materials, Etc.

Any materials, reports, information, data, etc. given to or prepared or assembled by the Contractor under this Contract are to be kept confidential and shall not be made available to any individual or organization by the Contractor (except agents, servants, or employees of the Contractor) without the prior written approval of the Town, except as otherwise required by law. The Contractor shall comply with the provisions Chapter 66A of the General Laws of Massachusetts as it relates to public documents, and all other state and federal laws and regulations relating to confidentiality, security, privacy and use of confidential data.

Any materials produced in whole or in part under this Contract shall not be subject to copyright, except by the Town, in the United States or any other country. The Town shall have unrestricted authority to, without payment of any royalty, commission, or additional fee of any type or nature, publicly disclose, reproduce, distribute and otherwise use, and authorize others to use, in whole or in part, any reports, data or other materials prepared under this Contract.

All data, reports, programs, software, equipment, furnishings, and any other documentation or product paid for by the Town shall vest in the Town at the termination of this Contract. The Contractor shall at all times, during or after termination of this Contract, obtain the prior written approval of the Town before making any statement bearing on the work performed or data collected under this Contract to the press or issues any material for publication through any medium.

21. Audit, Inspection and Recordkeeping

At any time during normal business hours, and as often as the Town may deem it reasonably necessary, there shall be available in the office of the Contractor for the purpose of audit, examination, and/or to make excerpts or transcript all records, contracts, invoices, materials, payrolls, records of personnel, conditions of employment and other data relating to all matters covered by this Agreement.

22. Payment

The Town agrees to make all reasonable efforts to pay to the Contractor the sum set forth in the Contractor's bid or proposal within thirty (30) days of receipt of an invoice detailing the work completed and acceptance from the Town of the work completed.

23. Waiver and Amendment

Amendments, or waivers of any additional term, condition, covenant, duty or obligation contained in this Contract may be made only by written amendment executed by all signatories to the original Agreement, prior to the effective date of the amendment.

To the extent allowed by law, any conditions, duties, and obligations contained in this Contract may be waived only by written Agreement by both parties.

Forbearance or indulgence in any form or manner by a party shall not be construed as a waiver, nor in any manner limit the legal or equitable remedies available to that party. No waiver by either party of any default or breach shall constitute a waiver of any subsequent default or breach of a similar or different matter.

24. Forum and Choice of Law

This Contract and any performance herein shall be governed by and be construed in accordance with the laws of the Commonwealth. Any and all proceedings or actions relating to subject matter herein shall be brought and maintained in the courts of the Commonwealth or the federal district court sitting in the Commonwealth, which shall have exclusive jurisdiction thereof. This paragraph shall not be construed to limit any other legal rights of the parties.

25. Notices

Any notice permitted or required under the provisions of this Contract to be given or served by either of the parties hereto upon the other party hereto shall be in writing and signed in the name or on the behalf of the party giving or serving the same. Notice shall be deemed to have been received at the time of actual service or three (3) business days after the date of a certified or registered mailing properly addressed. Notice to the Contractor shall be deemed sufficient if sent to the address set forth in the Contract and to the Town of Andover by being sent to the Town Manager, Town Hall, 36 Bartlet Street, Andover, Massachusetts 01810.

26. Binding on Successors:

This Contract shall be binding upon the Contractor, its assigns, transferees, and/or successors in interest (and where not corporate, the heirs and estate of the Contractor).

27. Complete Contract:

This instrument, together with its endorsed supplements, and the other components of the contract documents, constitutes the entire contract between the parties, with no agreements other than those incorporated herein.

28. Supplemental Conditions:

The foregoing provisions apply to all contracts to which the Town of Andover shall be a party. One of the following "Supplements" *must* be "checked" as applicable to this Contract, shall be attached hereto, and shall in any event apply as the nature of the Contract requires. The Supplement contains additional terms governing the Contract:

[ ] GOODS

SUPPLEMENT "G" - Applicable to Contracts for the procurement of Goods (governed by the provisions of General Laws Chapter 30B)

[ X ] SERVICES

SUPPLEMENT "S" - Applicable to Contracts for the procurement of Services (governed by the provisions of General Laws Chapter 30B)

[ ] CONSTRUCTION

SUPPLEMENT "C" - Applicable to Contracts for Construction

IN WITNESS WHEREOF the parties have hereto and to two other identical instruments set forth their hands the day and year first above written.

THE TOWN

THE CONTRACTOR

Abdina Karamantz  
Division/Department Head  
Contract Manager

Kapsch TrafficCom USA Inc  
Company Name

Andrew P. Flanagan 8/8/16  
Town Manager Date  
Andrew P. Flanagan

Mark Thompson 6/30/16  
Signature Date

Mark Thompson SVP  
Print Name & Title

APPROVED AS TO FORM:

Thomas J. Ambros 7/29/16  
Town Counsel Date

CERTIFICATION AS TO AVAILABILITY OF FUNDS:

71002-5285

Theresa M. Mocco 8/12/16  
Town Accountant Date



## SUPPLEMENT "S"

This form supplements the general provisions of the Contract between the Town of Andover, and Kapsch TrafficCom USA, Inc., which Contract is a contract for the procurement of services.

"Services" shall mean furnishing of labor, time, or effort by the Contractor. This term shall not include employment agreements, collective bargaining agreements, or grant agreements.

### Change Orders:

Change orders for contracts subject to Massachusetts General laws Chapter 30B may not increase the quantity of services by more than twenty-five (25%) per cent, in compliance with General Laws Chapter 30B, §13.

### Minimum Wage/Prevailing Wage:

The Contractor will carry out the obligations of this Contract in full compliance with all of the requirements imposed by or pursuant to General Laws Chapter 151, §1, *et seq.* (Minimum Wage Law) and any executive orders, rules, regulations, and requirements of the Commonwealth of Massachusetts as they may from time to time be amended. The Contractor will at all times comply with the wage rates as determined by the Commissioner of the Department of Labor and Industries, under the provisions of General Laws Chapter 149, 26 to 27D (Prevailing Wage), as shall be in force and as amended.

### Insurance:

The Contractor shall obtain and maintain the following insurance:

- 5.1 Workers Compensation Insurance of the scope and amount required by the laws of the Commonwealth of Massachusetts.
- 5.2 Broad Form Commercial General Liability coverage with limits of at least \$1 Million per occurrence and \$2 Million aggregate, and which shall cover bodily injury, death, or property damage arising out of the work.
- 5.3 Automobile Liability Coverage, including coverage for owned, hired, or borrowed vehicles with limits of Bodily Injury and Property Damage in the amount of \$1 Million each person/each occurrence or a combined single limit of \$1 Million.
- 5.4 An Excess Umbrella Liability Policy in the amount of \$1 Million adding coverage to all above policies.
- 5.5 The intent of the Specifications regarding insurance is to specify minimum coverage and minimum limits of liability acceptable under the Contract. However, it shall be the Contractor's responsibility to purchase and maintain insurance of such character and in such amounts as will adequately protect it and the Town from and against all claims, damages, losses and expenses resulting from exposure to any casualty liability in the performance of the work.
- 5.6 All required insurance shall be certified by a duly authorized representative of the insurers on the "MIA" or "ACORD" Certificate of Insurance form incorporated into and made a part of this agreement. Properly executed certificates signifying adequate coverage in effect for the duration

of the contract with renewal certificates issued not less than 30 days prior to expiration of a policy period, must be submitted to the Town prior to commencement of this Agreement.

5.7 The Town shall be named as an additional insured on the above referenced liability policies, and the Contractor's insurance shall be the primary coverage. The cost of such insurance, including required endorsements or amendments, shall be the sole responsibility of the Contractor.

6. Indemnification:

*negligent MT*

The Contractor shall indemnify, defend and save harmless the Town, its officers, agents and employees from and against any and all damages, liabilities, actions, suits, proceedings, claims, demands, losses, costs, expenses, recoveries and judgments of every nature and description (including reasonable attorneys' fees) brought or recovered against them that may arise in whole or in part out of or in connection with the work being performed or to be performed, or out of any act or omission by the Contractor, its employees, agents, subcontractors, material men, and anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by any party indemnified hereunder. The Contractor further agrees to reimburse the Town for damage to its property caused by Contractor, its employees, agents, subcontractors or material men, and anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, including damages caused by his, its or their use of faulty, defective or unsuitable material or equipment, unless the damage is caused by the Town's gross negligence or willful misconduct. The existence of insurance shall in no way limit the scope of this indemnification.

APPROVED AS TO FORM ONLY:

Thomas J. Urlich 7/29/16  
Town Counsel *CU*

TOWN OF ANDOVER  
[Signature]  
Town Manager  
Andrew P. Planagan

I CERTIFY THAT FUNDS ARE AVAILABLE  
IN ACCOUNT NO 71002-5285:

[Signature]  
Department/Division Head

Theodore K. Mace 8/4/16  
Town Accountant

THE CONTRACTOR:

Mark Thompson SUP  
Mark Thompson

Date: 6/30/16

**CORPORATE VOTE**

At a duly authorized meeting of the Board of Directors of Kapsch TrafficCon USA, Inc  
held on 11/12/15 at which all the Directors were  
present or waived notice, it was voted that Mark Thompson,  
Sr. VP of this company, be and he/she hereby is authorized to execute contracts and  
bonds in the name and behalf of said company, and affix its Corporate Seal thereto, and such execution of any  
contract or obligation in this company's name on its behalf by Mark Thompson,  
shall be binding upon this company.

A TRUE COPY ATTEST:

Paul Vancutty  
~~Clerk~~, Controller

Date of this Contract

6/30/16  
Controller

I hereby certify that I am the ~~Clerk~~ of Kapsch TrafficCon USA, Inc, that  
Mark Thompson is duly elected SVP of said company, and  
the above vote has not been amended or rescinded and remains in full force and  
effect as of the date of this contract.

Paul Vancutty  
~~Clerk~~ Controller Corporate Seal

SWORN TO AND SUBSCRIBED BEFORE ME THIS 30 DAY OF June 2016

NOTARY PUBLIC, FORSYTH COUNTY, GA  
MY COMMISSION EXPIRES 30-JUN-2018

Michelle June Nenzel  
Notary Public

If a corporation, complete above or attach to each signed copy of the bid/written request/quotation, a notarized  
copy of vote of corporation authorizing the signatory to sign this bid/written request/quotation form. If attesting  
clerk is the same person as the individual executing this contract, have signature notarized above.

**CERTIFICATION OF GOOD FAITH & NON-COLLUSION**

The undersigned certifies under pains and penalties of perjury that this bid has been made and submitted in good faith and without collusion or fraud with any other person. As used in this certification, the word "person" shall mean any natural person, business, partnership, corporation, union, committee, club, or other organization, entity, or group of individuals.

**CERTIFICATE OF STATE TAX COMPLIANCE**

Pursuant to M.G.L. c. 62C, §49A, I certify under the penalties of perjury that, to the best of my knowledge and belief, I am in compliance with all laws of the Commonwealth relating to taxes, reporting of employees and contractors, and withholding and remitting child support.



Signature of authorized individual submitting bid/proposal

Mark Thompson

Printed Name



Name of Business (if applicable)



Social Security or Federal Tax Identification Number

AD YTHUOD HTV200F, OUBU9 VHT0M  
8105-MUL-00 2819XS H00281900 1M