

**GENERAL MEETING OF THE BOARD OF DIRECTORS
OF THE
CENTRAL TEXAS REGIONAL MOBILITY AUTHORITY**

RESOLUTION NO. 22-016

**APPROVING A SETTLEMENT AGREEMENT WITH
KAPSCH TRAFFICCOM USA, INC.**

WHEREAS, the Central Texas Regional Mobility Authority (Mobility Authority) and Kapsch TrafficCom USA, Inc. (Kapsch) entered into an Amended and Restated Maintenance Services Contract for the Central Texas Regional Mobility Authority Toll Collection System dated December 1, 2019 (Maintenance Contract) related to the CTRMA Turnpike System; and

WHEREAS, the Maintenance Contract allows CTRMA to assess liquidated damages and to recover lost revenue and other direct damages due to Kapsch maintenance performance failures; and


WHEREAS, the Executive Director and Kapsch have negotiated a settlement agreement to address damages assessed by the Mobility Authority during the period of March 2021 – October 2021; and

WHEREAS, the Executive Director recommends that the Board approve the settlement agreement in the form attached hereto as Exhibit A.

NOW, THEREFORE, BE IT RESOLVED that the Board approves the settlement agreement and hereby authorizes the Executive Director to finalize and execute the settlement agreement on behalf of the Mobility Authority in the form or substantially the same form attached hereto as Exhibit A.

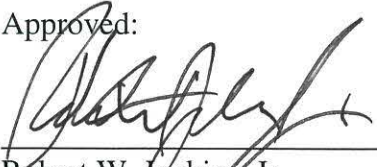
Adopted by the Board of Directors of the Central Texas Regional Mobility Authority on the 30th day of March 2022.

Submitted and reviewed by:



James M. Bass
Executive Director

Approved:



Robert W. Jenkins, Jr.
Chairman, Board of Directors

Exhibit A

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is made and entered into between the Central Texas Regional Mobility Authority (CTRMA) and Kapsch TrafficCom USA, Inc. (Kapsch). Within this Agreement, CTRMA and Kapsch may each be called a “Party” or may be collectively referred to as the “Parties.”

RECITALS

WHEREAS CTRMA and Kapsch entered into an Amended and Restated Maintenance Services Contract for the Central Texas Regional Mobility Authority Toll Collection System dated December 1, 2019 (the “Maintenance Contract”) related to the CTRMA Turnpike System;

WHEREAS, the Maintenance Contract allows CTRMA to assess liquidated damages in the amount of \$18,475,145.19 and to recover \$420,353.82 in lost revenue and other direct damages due to Kapsch maintenance performance failures during the period of March 2021 – October 2021;

WHEREAS Kapsch submitted monthly invoices to CTRMA totaling \$3,231,241.60 bearing Maintenance Invoice Nos. 486022SI00569, 486022SI00570, 486022SI00655, 486022SI00944, 486022SI00945, 486022SI01128, 486022SI01303, and 486022SI01563 for all Maintenance Services performed during the period of March 2021 – October 2021;

WHEREAS the Maintenance Contract allows CTRMA to set off any amounts payable by Kapsch to CTRMA against amounts payable by CTRMA to Kapsch; and

WHEREAS the Parties wish to resolve the outstanding balances due for liquidated damages, lost revenue and other direct damages, and Maintenance Services and bring all payments under the Maintenance Contract current through October 2021.

NOW, THEREFORE, in consideration of the mutual promises set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties, intending to be legally bound, hereby agree as follows:

TERMS OF AGREEMENT

1. **Recitals Incorporated.** The above Recitals are considered substantive terms and conditions of this Agreement, not mere recitals in the interpretation of this Agreement, and are incorporated into the body of this Agreement as if set forth at length herein.

2. **Effective Date.** By completing and signing this Agreement, the Parties agree to be bound by its terms once it is signed by all Parties hereto (the “Effective Date”).

3. **Defined Terms.** All capitalized terms used herein, unless otherwise defined in this Agreement, shall have the meanings set forth in the Maintenance Contract.

4. **Lost Revenue Payment.** Kapsch shall reimburse CTRMA for lost revenue and direct damages by making payment to CTRMA through delivery of a check in the amount of \$420,353.82 within three (3) business days of the Effective Date.

5. **Maintenance Services Set Offs.** The outstanding balance for Maintenance Services performed from March 2021 – October 2021 shall be set off by a total amount of \$745,250.05 against the liquidated damages due to CTRMA, with the reduction to be applied as follows:

- (a) Maintenance Invoice Nos. 486022SI00569, 486022SI00570, 486022SI00655, and 486022SI00944 shall be collectively reduced by \$545,250.05; and
- (b) Maintenance Invoice Nos. 486022SI00945, 486022SI01128, 486022SI01303, and 486022SI01563 shall collectively be reduced by \$200,000.00.

For the avoidance of doubt, Kapsch agrees to accept \$1,046,490.39 with respect to the invoices identified in 4(a), above, and \$1,439,501.16 with respect to the invoices identified in 4(b), above, subject to the payment and retainage requirements set forth in Section 9, below.

6. **Liquidated Damages Set Offs.** A portion of the outstanding balance of liquidated damages for the period of March 2021 – October 2021 in the total amount of \$17,729,895.14 (after application of Maintenance Services Set Offs above) shall be set off against Kapsch's timely completion of each task identified in Attachment A to the satisfaction of CTRMA by January 31, 2023. Kapsch shall earn a credit against the liquidated damages balance upon the completion of each task in an amount determined by multiplying the percentage provided in the "LD % Waived" column in Attachment A by \$17,729,895.14. In no event shall any portion of the \$17,729,895.14 in liquidated damages for the period of March 2021 – October 2021 remaining after application of Maintenance Services Set Offs (whether further set off against Kapsch's timely completion of some or all of the tasks identified in Attachment A or not) be deducted from the liability cap provided in Section 9 of the Maintenance Contract.

7. **Task Completion and Retainage.** Kapsch agrees to complete all nine (9) tasks identified in Attachment A to the satisfaction of CTRMA by no later than January 31, 2023. CTRMA shall be entitled to retain the sum of the \$503,825.41 retainage assessed for July – October 2021 maintenance invoices plus 25% of all monthly maintenance invoices submitted by Kapsch under the Maintenance Contract beginning with the November 2021 invoice and continuing through the January 2023 invoice.

8. **Disposition of Retainage.** CTRMA agrees to release the retainage to Kapsch upon Kapsch's timely completion of all nine (9) tasks identified in Attachment A to the satisfaction of CTRMA. Should Kapsch fail to complete all nine (9) tasks identified in Attachment A to the satisfaction of CTRMA by January 31, 2023, then agree that:

- (a) Kapsch shall forfeit all rights to the retainage referenced in Section 7 above and agrees to accept payment in full for the Maintenance Services performed from July 2021 through January 2023 as full satisfaction of any amounts owed by CTRMA under the Maintenance Contract; and
- (b) All of the retained amounts shall automatically and irrevocably without any other actions being taken become the sole property and assets of CTRMA.

9. **Invoice Payment and Retainage.** CTRMA shall pay to Kapsch \$1,982,166.14 within ten (10) business days of CTRMA's receipt of the payment provided in Section 4, above, in full satisfaction of the outstanding balance for Maintenance Services net of \$503,825.41 to be held as retainage subject to release on satisfaction of the condition set forth in Section 7. For the avoidance of doubt, CTRMA's payment obligation under this Section 9 is conditioned on its receipt of the payment identified in Section 4, above, and under no circumstances will CTRMA set off the amount to be paid under this Section 9 by the amount owed to CTRMA under Section 4, above.

10. **Mutual Release.** Upon fulfillment and satisfaction of their obligations to each other hereunder, the Parties, on behalf of themselves and their current and former shareholders, officers, directors, employees, insurers, subsidiaries, partners, members, attorneys, heirs, executors, administrators, successors, and assignees, each hereby irrevocably and unconditionally releases and forever discharges the other Party and its insurers, successors, assigns, employees, directors, board members, attorneys, and administrators, from any and all liability, actions, claims, demands, costs, expenses, damages, causes of action, suits or obligations of any nature, whether at law, equity or otherwise, whether based upon statute, contract, tort, or otherwise, whether known or unknown, foreseen or unforeseen that have accrued from the beginning of time through the Effective Date, that each Party has or may have regarding Maintenance Invoice Nos. 486022SI00569, 486022SI00570, 486022SI00655, 486022SI00944, 486022SI00945, 486022SI01128, 486022SI01303, and/or 486022SI01563, including any pass-through claim by a Kapsch subcontractor, known, unknown, or that could have been known, including any claim or assertion that liquidated damages at issue hereunder asserted against Kapsch are a penalty.

11. **Maintenance Contract Remains in Effect.** Except as revised by the Agreement, the Maintenance Contract remains in effect.

12. **Potential Amendments.** The Parties agree that following CTRMA's implementation of a new data platform system that will assume transaction processing responsibilities, they will meet to discuss any potential amendments to the Maintenance Contract that may be appropriate at that time, including potential revisions to timelines associated with manual image review and transaction processing.

13. **Attorney Fees.** The Parties understand and agree that each Party shall bear its own attorneys' fees and costs in connection with the drafting of this Agreement. If any action is brought to enforce this Agreement or is brought in connection with any dispute arising out of this Agreement or the claims which are the subject of this Agreement, the prevailing Party shall be entitled to recover its reasonably and necessarily incurred attorney fees and other costs incurred in such litigation in addition to any other relief to which that Party may be entitled by law.

14. **Advice of Counsel.** By its execution of this Agreement, each Party hereby expressly acknowledges that it has executed the same freely and voluntarily and that it has had the opportunity to seek and obtain advice of counsel, accountants and financial advisors of its choice, regarding the effect of the execution and delivery of this Agreement. Each Party agrees that it has had adequate opportunity to investigate and assess all of the facts and circumstances relevant to the decision to enter into this Agreement and is not relying on any express or implied

representation, warranty or promise, except only as expressly contained in this Agreement to the contrary.

15. **Governing Law and Venue.** The Agreement shall be governed by the laws of the State of Texas, as applied to agreements executed and services performed entirely in Texas. In any legal action relating to this Agreement, the Party seeking the benefit of any of the provisions hereof agree and consent to the exercise of and submits to the jurisdiction of the state District Court of Travis County, Texas. Exclusive venue shall be the state District Court of Travis County, Texas.

16. **Construction of Agreement.** This Agreement shall be construed as if the Parties prepared it jointly, and any uncertainty or ambiguity herein shall not be interpreted for or against either Party.

17. **Severability.** The provisions of this Agreement are severable. If any portion, provision, or part of this Agreement is held, determined, or adjudicated to be invalid, unenforceable or void for any reason whatsoever, each such portion, provision or part shall be severed from the remaining portions, provisions or parts of this Agreement and shall not affect the validity or enforceability of any remaining portions, provisions or parts.

18. **Amendment and Waiver.** This Agreement shall not be altered, amended, or modified by oral representation made before or after the execution of this Agreement. All modifications must be in writing and duly executed by both Parties. The waiver of any breach of this Agreement shall not operate nor be construed as a waiver of any similar or prior or subsequent breach of this Agreement.

19. **Representations and Warranties.** Kapsch represents and warrants that it is the sole and lawful owner of all right, title and interest in and to every claim and other matter which it releases in this Agreement and that it has not previously assigned or transferred, or purported to do so, to any person or other entity any right, title or interest in any such claim or other matter.

20. **Binding on Successors.** This Agreement shall be binding on the Parties and their respective agents, representatives, successors, and assignees, and shall inure to the benefit of the Parties and their respective agents, subcontractors, suppliers, sub-consultants, representatives, successors, assignees, insurers, excess insurers, and sureties.

21. **Integration.** This Agreement constitutes a single, integrated, written contract expressing the entire understanding and agreement between the Parties regarding the resolution of the issues discussed herein, and the terms of the Agreement are contractual and not merely recitals. Other than the Maintenance Contract, there is no other agreement, written or oral, expressed or implied, between the Parties with respect to the issues addressed by this Agreement.

22. **No Reliance.** In signing this Agreement, no Party has relied on or been induced to execute this Agreement by any statement, representations, agreements or promises, oral or written, made by any other Party, their agents, employees, or attorneys, other than the statements set forth in this Agreement.


23. **Authority to Execute.** The individuals whose signatures are affixed to this Agreement in a representative capacity represent and warrant that they are authorized to execute the Agreement on behalf of and to bind the entity on whose behalf the signature is affixed.

24. **Further Assurances.** Each Party shall execute and deliver, at the reasonable request of the other Party hereto, such additional documents, instruments, conveyances, and assurances and take such further actions as such other party may reasonably request to carry out the provisions hereof and give effect to the transactions contemplated by this Agreement.

25. **Counterparts.** This Agreement may be executed in counterpart facsimile signatures and all such counterparts shall constitute a single form of this Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date specified below.

KAPSCH: KAPSCH TRAFFICOM USA, INC.

By:  _____
Name: JB Kendrick
Title: President

Date: Mar 15, 2022

CTRMA: CENTRAL TEXAS REGIONAL MOBILITY AUTHORITY

By: _____
Name: James M. Bass
Title: Executive Director

Date: _____

Attachment A

ATTACHMENT A

Settlement Agreement Completion Items

Revised January 18, 2022

COMPLETION ITEM		% of LDs WAIVED	EXIT CRITERIA
1	Complete interface to CTRMA's Data Platform	50	<ul style="list-style-type: none"> • Successful completion of parallel operations test
2	Provide read-only access to the Toll Host database for CTRMA's use with their BI tool	5	<i>COMPLETED</i>
3	Complete MMR documentation for accurate performance measurement	15	<ul style="list-style-type: none"> • Approval of KPI RAMP Document
4	Complete CTRMA inventory audit and inventory controls documentation	5	<ul style="list-style-type: none"> • Inventory Management Process defined and documented (<i>Maintenance Plan</i>) • All installed assets to be tracked and updated in ROMS (<i>verification to be conducted through a coordinated TBD site visit with CTRMA</i>) • All spare assets to be tracked and updated in ROMS (<i>verification to be conducted through coordinated spot check of spare inventory at TIM Center</i>) • All retired assets inventoried and moved to CTRMA provided storage
5	Perform end-to-end audit of ROMS ticketing system	5	<ul style="list-style-type: none"> • Core detectors (ROMS)/services (Nagios) identified and active (<i>i.e., ping for all devices; spurious tags for all lanes; disc space for all servers</i>) • Kapsch provide list of typical ROMS lane detectors and provide CTRMA gap analysis • All monitored components (ROMS)/hosts (Nagios) identified and active (<i>i.e., all cameras, ZCs, readers, etc.</i>)
6	Add additional ROMS monitoring for end-to-end transaction processing workflow, both in file transmissions and in historical trend analysis	5	<ul style="list-style-type: none"> • Kapsch provide list of typical ROMS lane detectors and provide CTRMA gap analysis
7	Perform Nagios cleanup	5	<ul style="list-style-type: none"> • Host Groups for all plazas, major components, servers, etc. • Historical logs accessible from Nagios XI
8	Review Giles ML classification issues and propose resolution	5	<ul style="list-style-type: none"> • Provide analysis and recommendation for degraded classification performance
9	Finalize solution for Brushy Creek reclassification issues	5	<ul style="list-style-type: none"> • Provide analysis and recommendation for degraded classification performance • Enable axle-based classification