

## **Agreement for Using Hong Kong eTransport Kiosk Software Package**

**IMPORTANT - READ CAREFULLY:** This Agreement is a legal agreement between the Applicant and the Government pursuant to which the Package applied for by the Applicant in the Form signed and submitted by the Applicant, to which this Agreement is attached. The Government is to release the Package to the Applicant on condition that the Applicant accepts all the terms and conditions in this Agreement, and that the Applicant shall procure that any Contractor shall provide an undertaking in favor of the Government in the form appearing in the appendix to this Agreement if and when any Contractor is appointed by the Applicant during the term of this Agreement. By signing and submitting the Form and collecting the Package from the Government, the Applicant consents to and is bound by the terms and conditions of this Agreement.

This is an agreement between the Applicant and the Government. This Agreement gives the Applicant certain limited rights to access the HKeT API server for transportation route searching and displaying real time traffic information via the Applicant's use of the Package in accordance with the terms and conditions of this Agreement. All rights not specifically granted in this Agreement are reserved to the Government.

1. In this Agreement, unless the context otherwise requires, the following expressions have the following meanings:

“Agreement”	means this Agreement and includes the Form and the appendix;
“API”	means Application Program Interface;
“Applicant”	means the person who applies for and is granted the right to use the Package on the terms and conditions set out in this Agreement;
“Contractor”	means any persons appointed by the Applicant for the development, implementation and maintenance of the Kiosk(s);
“Form”	means in relation to an Applicant, the application form filled in and completed by that Applicant to apply for the Package for use at the Kiosk(s) on the terms and conditions set out in this Agreement;
“Government”	means the Government of the Hong Kong Special Administrative Region as represented by the Chief Engineer of Traffic and Transport Survey Division of the Transport Department;
“Government Representative”	means the Commissioner for Transport or any person duly authorized by him to act for and on his behalf under this Agreement;

“HKeT”	means Hong Kong eTransport;
“Hong Kong”	means the Hong Kong Special Administrative Region of the People’s Republic of China;
“Intellectual Property Rights”	means patents, trademarks, service marks, trade names, design rights, copyright, domain names, database rights, rights in know-how, new inventions, designs or processes and other intellectual property rights whether now known or created in future (of whatever nature and wherever arising) and in each case whether registered or unregistered and including applications for the grant of any such rights;
“Kiosk(s)”	means the kiosk(s) as set out in the Form;
“Licence”	has the meaning ascribed to it under clause 10.2 of this Agreement;
“Materials”	the contents or search results to be displayed at the Kiosk(s) via the use of the Package including without limitation the visual images, sounds and other information or a combination of them provided by internet means to users of the Kiosk(s) through the use of the Package;
“Package”	means the HKeT kiosk software package produced and owned by the Government and supplied to the Applicant in accordance with the terms and conditions of this Agreement, which may include any updates of the Package in accordance with clause 13.6 of this Agreement;
“Premises”	means the location(s) in the Form at which the Kiosk(s) is/ are situated; and
“Purpose”	means the purpose of applying for the Package by the Applicant as set out in the Form.

2. Each gender includes the others and vice versa.
3. The singular includes the plural and vice versa.
4. Words denoting persons shall include bodies’ corporate and unincorporated, associations of persons and vice versa.
5. References to clauses and appendix are references to clauses of and appendix to this Agreement; and
6. Clause and appendix headings of this Agreement are inserted for convenience of reference only and shall not in any way vary, limit or extend the interpretation of this Agreement.

7. In consideration of the mutual covenants contained in this Agreement, the parties to this Agreement agree to the terms and conditions for the Government's supply of the Package for the Applicant's use at the Kiosk(s) in accordance with this Agreement.

#### **8. Reservation of ownership**

For the avoidance of doubt, upon Government's release of the Package to the Applicant in accordance with the terms and conditions of this Agreement, the Government still retains the exclusive ownership of the Package, the API and the Materials. The Applicant shall only be granted by the Government a personal, non-exclusive, non-transferable right to use the Package for accessing the API server at the Kiosk(s) for obtaining interactive enquiry service on and subject to the terms and conditions of this Agreement. Without prejudice to clause 11 of this Agreement, the Applicant shall protect the Package, the API and the Materials from unauthorized use, reproduction, distribution or publication.

#### **9. Ownership of the Intellectual Property Rights**

The Applicant agrees and confirms that the Intellectual Property Rights subsisting in the Package, the API and the Materials are vested and shall remain vested in the Government upon creation

#### **10. Uses permitted**

10.1 For the Purpose only, the Applicant may install the Package into the Kiosk(s) located at the Premises.

10.2 The Government hereby grants for the benefits of the Applicant, its authorized users and Contractor a non-exclusive, revocable, non-transferrable, non-sub-licensable and royalty-free licence ("**Licence**") to use, during the term of this Agreement, the Package, the API and the Materials in accordance with and for the purpose contemplated by this Agreement (including the Purpose and (if any) the integration of the Package to the existing program(s) in the Kiosk(s) as set out in the Form). Pursuant to the Licence granted under this clause, the Applicant may make one copy of the Package for backup purposes. For the avoidance of doubt, the Licence shall not entitle the Applicant to make any modification to the Package, the API and the Materials unless with the prior written approval by the Government in accordance with clause 11 of this Agreement.

#### **11. Uses prohibited**

11.1 Unless with the prior written approval by the Government or otherwise in accordance with the terms and conditions of this Agreement, neither the Package as a whole nor any part of the aforesaid shall be released to any person whomsoever; and the Applicant shall not disclose to any person, disseminate to the public, copy, alter, modify, merge, reproduce, and/or create derivative works or products of the Package.

11.2 The Applicant shall not sell, rent, lease, sub-license, lend, assign, time-share, or transfer, in whole

or in part, provide unlicensed or unauthorized third parties access to the Package, or any updates, or the Applicant's rights under this Agreement.

11.3 The Applicant shall not remarket, resell and/or redistribute the Package or any derived portion(s) of the Package to third parties not licensed or authorized by the Government to use the Package.

11.4 The Applicant shall not remove or obscure any Government's Intellectual Property Rights or proprietary notices in the Package.

11.5 The Applicant shall not excessively and/or improperly use the server capacity or bandwidth of the server or use automatic program or other means to search the route through API server for frequent searching action which may result in deterioration in API server traffic and response. The Government has the absolute discretion to determine whether any deterioration has arisen as a result of the aforesaid excessive and/or improper use by the Applicant.

11.6 The Applicant shall preserve the look and feel of the display output by using the Package, that is, the Applicant shall not modify the display format, inputting methods, aspect ratio of the display file and the legend, the map with map data and icons of the Package. Unless with the written approval by the Government, the Applicant shall not modify the source code of the Package which may change the look-and-feel of the graph user interface display for the Package integrated to the Kiosk(s).

## **12. Duration**

This Agreement is effective from the date the Applicant collects the Package from the Government and thereafter shall continue unless and until automatically terminated in the manner mentioned in clause 16, 18 or 21 below. Notwithstanding anything herein to the contrary, the Government may at any time and from time to time during the term of this Agreement, at its option and without cause, terminate this Agreement by giving three months' prior written notice to the Applicant of such termination.

## **13. No Warranty from the Government**

13.1 The Package is not warranted and the Applicant acknowledges that the Package may contain some non-conformities, defects or errors.

13.2 The Government does not warrant that the Package will meet the needs or expectations of the Applicant or the Purpose, that the use of the Package will be uninterrupted, or that all non-conformities, defects or errors can or will be corrected.

13.3 The Government is not inviting reliance on the Package, and the Applicant should always on its own verify the accuracy and completeness of the Package.

13.4 The Package is provided “AS IS” without warranty of any kind, either express or implied.

13.5 Upon installing the Package to the Kiosk(s), the Package may call a floor plan file (in PNG format) to be used in the “Nearby Traffic Facilities” module in the Package. Such floor plan file shall be created, implemented, modified and maintained by the Applicant. The Government shall not be obliged to provide any technical advice to the creation, implementation, modification and maintenance of the said floor plan file.

13.6 While the Government may extend, enhance, or otherwise modify the Package or services in connection with the Package at any time without notice, the Government may, but is not obliged to, notify the Applicant about the updates of the Package, if any. If the Government notifies the Applicant about the availability of any updates of the Package, the terms of this Agreement shall govern such update as if such update forms part of the Package. The Government shall not be obliged to provide any maintenance, technical or other support for the Package or services in connection with the Package. The Applicant acknowledges that the Government has no express or implied obligation to announce or make available any update for the Package.

#### **14. Limitation of Liability**

In no event shall the Government be liable for costs of procurement of substitute goods or services, lost profits, lost sales, lost business opportunities or business expenditures, investments, or commitments in connection with any business, loss of any goodwill, or for any indirect, special, incidental, exemplary, or consequential damages, or any other cost, expenses or other liabilities arising out of this Agreement or use of the Package, however caused, on any theory of liability, and whether or not the Government has been advised of the possibility of the aforesaid.

#### **15. Liability concerning the Applicant’s development in connection with the integration of the Package**

For the Applicant who has indicated in the Form an intention to integrate the Package with the existing program(s) in the Kiosk(s) or will arrange such integration during the term of this Agreement, the Applicant concerned shall be solely responsible for developing applications for such integration; and shall ensure that the applications so developed are safe, free of defects in design and operation, and comply with all applicable laws and regulations. The Applicant concerned shall also be solely responsible for any documentation and end user customer support and warranty of the Applicant’s application.

#### **16. Warranty and acknowledgment by the Applicant**

The Package under this Agreement is supplied to the Applicant on the basis of the particulars and information provided by the Applicant in the Form and on the warranty and undertaking from the Applicant that such particulars and information so provided are true, accurate and complete. Without prejudice to the foregoing, the Applicant shall notify the Government Representative in writing any changes to the status of the Kiosk(s), the number of Kiosk(s) and Premises as specified in the Form

prior to making such changes. Failure to notify as set out herein shall entitle the Government to treat this Agreement as automatically terminated forthwith without notice.

#### **17. Access to the Premises and the Kiosk(s)**

The Applicant shall allow the Government Representative, with no less than one day's prior notice, to have access to the Premises for the purpose of verifying the Kiosk(s) in which the Package is installed, used or displayed for the Purpose and in the manner and on such number of Kiosk(s) as specified in the Form by the Applicant. For necessary requirement for security audit and/or program enhancement, the Government Representative may request the Applicant to provide the flowchart, compiled software or source code of the Applicant's program at its Kiosk(s) for checking and/or debugging. The Applicant shall provide all necessary information and assistance upon such request by the Government at no charge.

#### **18. Termination Consequences**

If the Applicant fails to comply with any provision of this Agreement, this Agreement will be automatically terminated forthwith without notice. Upon termination of this Agreement for whatever reason (including the automatic termination pursuant to this clause, clause 16 or clause 21), the Applicant shall immediately cease using the Package and shall erase and destroy the Package and copies thereof in its possession or control. In addition, the Applicant shall certify to the Government Representative in writing within fourteen (14) days of the termination that it is no longer in possession or control of the Package or any part thereof or any copy thereof in any medium or in any form, and that the same has been permanently erased and destroyed. The Government Representative shall be entitled to enter the Premises to inspect the Kiosk(s) and to take such related steps to ensure that the certification so given by the Applicant is true, complete and accurate. The termination of this Agreement under whatsoever circumstances shall be without prejudice to any accrued rights or obligations of the Government under this Agreement (including those arising from any antecedent breaches of this Agreement by the Applicant); and provisions which shall continue in force notwithstanding such termination (including clauses 14 and 15, this clause 18, clauses 19, 21 and 23).

#### **19. Warranty and Indemnity**

19.1 The Applicant shall indemnify the Government and keep the Government indemnified fully and effectively from and against all claims, proceedings, liabilities, losses, damages, demands, charges, costs and expenses on a full indemnity basis arising out of or in relation to any default, negligence or willful misconduct of the Applicant (including its officers, employees, agents and Contractors) or any breach of this Agreement by the Applicant. The Applicant shall not be relieved from any of its obligations under this Agreement by entering into any contracts with any Contractors for the performance of any part of the Agreement. All acts, omission and defaults of any Contractors shall be deemed as those of the Applicant.

19.2 The Applicant warrants to the Government that:

- (a) the Applicant has the full capacity power and authority to enter into this Agreement;
- (b) the exercise by the Government, its authorized users assigns and successors-in-title of any of the rights granted under this Agreement will not infringe any Intellectual Property Rights of any person;
- (c) it shall comply with the terms, scope and restrictions/ prohibitions on use of the Licence granted by the Government under clause 10.2 of this Agreement and shall not infringe the Intellectual Property Rights of any person; and
- (d) in respect of any materials used by the Applicant in the performance of this Agreement and in respect of which any Intellectual Property Right is vested in a third party, prior to the use of the said materials, the Applicant shall have obtained the grant of all necessary clearances for itself and for the Government, its authorized users, assigns and successors-in-title authorizing the use of such materials for any of the purposes contemplated by this Agreement (including the Purpose and (if any) the integration of the Package to the existing program(s) in the Kiosk(s) as set out in the Form).

19.3 The Applicant shall indemnify the Government and keep the Government fully and effectively indemnified against all actions costs claims demands damages expenses (including without limitation the fees and disbursements of lawyers agents and expert witnesses) and any awards and costs which may be agreed to be paid in settlement of any proceedings (where that settlement has first been proposed or approved in writing by/on behalf of the Applicant) and liabilities of whatsoever nature arising out of or in connection with any allegation and/or claim that the design, development, use, possession or operation of the Package, the API and/or the Materials infringes any Intellectual Property Rights of any person.

19.4 The provisions of this clause 19 shall survive the expiry or termination of this Agreement (howsoever occasioned) and shall continue in full force and effect notwithstanding such expiry or termination.

## **20. Implied waivers**

No failure or delay by the Government in enforcing any right or remedy under this Agreement shall be construed as a waiver of any future or other exercise of such right or remedy.

## **21. Entire Agreement and amendment**

This Agreement together with the Form submitted by the Applicant shall constitute the whole agreement between the Government and the Applicant and may only be modified by the Government whether by the Government's written amendments or by the Government issuing a revised set out of terms and conditions and as notified to the Applicant, which modifications shall take effect upon the

Applicant's having continued to use the Package for seven days after the notification. If the Applicant does not agree to such modifications, it shall immediately cease using the Package and notify the Government in writing, and this Agreement shall be deemed automatically terminated in accordance with clause 18 of this Agreement, without further claim or recourse against the Government. The Applicant acknowledges that it has not relied on any statement, warranty, or representation given or made by the Government before agreeing to the use of Package on the terms and conditions set out in this Agreement.

## **22. Severability**

If any provision(s) of this Agreement shall be deemed unlawful, void or for any reason unenforceable, that provision shall be deemed severed from, and shall in no way affect the validity or enforceability of the remaining provisions.

## **23. Notices**

23.1 All notices and other communications given or made under this Agreement shall be in writing and delivered or sent to the Applicant at its address or fax number set out in the Form (or such other address or fax number as the Applicant has by five days' prior written notice specified to the Government Representative). Notices and other communications given or made under this Agreement by the Applicant to the Government shall be in writing and delivered or sent to the Government Representative at Room 3908, 39th floor Immigration Tower, 7 Gloucester Road, Wan Chai Hong Kong or fax number 2845 7489.

23.2 The notices and other communications under clause 23.1 shall be deemed to have been duly given or made as follows:

- (a) if sent by personal delivery, upon delivery at the address of the relevant party;
- (b) if sent by post, two days after the date of posting; and
- (c) if sent by fax, when despatched with confirmed receipt as evidenced by the transmission report generated at the end of the transmission of such fax by the fax machine used for such transmission.

## **24. Governing law and jurisdiction**

This Agreement shall be construed and enforced in accordance with and be governed by the laws of Hong Kong. The parties hereby consent to the jurisdiction of the courts of Hong Kong.

**<< End of Agreement >>**



## Appendix

### Form of Contractor undertaking

**The Government reserves the right to make further modifications to this form when relevant information about the Contractor is available**

#### **Agreement for Using Hong Kong eTransport Kiosk Software Package – Contract-out by the Applicant**

**THIS UNDERTAKING** is made on the \_\_\_\_\_ (date)

BY \_\_\_\_\_ (name of the Contractor) of / whose registered office is at

\_\_\_\_\_  
[address/ registered office of the Applicant] (“**Contractor**”)

IN FAVOUR OF

The Government of the Hong Kong Special Administrative Region of the People’s Republic of China (“**Government**”)

#### WHEREAS

- (A) By an agreement dated \_\_\_\_\_ (“**Agreement**”) made between (1) the Government and (2) \_\_\_\_\_ (“**Applicant**”), the Government has agreed to provide the Package to the Applicant on and subject to the terms and conditions contained in the Agreement.
- (B) For the purpose of complying with its obligations under the Agreement, the Applicant has entered into a contract with the Contractor (“**Sub-contract**”) for the Contractor to develop, implement and maintain the Kiosk(s), as more particularly described in the Sub-contract (“**Sub-contract Work**”).
- (C) It is a term of the Agreement that the Applicant shall procure the Contractor to execute this undertaking (“**Undertaking**”) in favour of the Government.

Unless otherwise stated, terms used in this undertaking shall have the same meaning as defined in the Agreement. In consideration of the Government allowing the Applicant to appoint the Contractor for the purpose of the Agreement, it is hereby undertaken by the Contractor as follows:

- (1) The Contractor warrants and undertakes to the Government that:
  - (a) it has the full capacity power and authority to enter into this undertaking;
  - (b) it will execute and complete the Sub-contract Work, and will carry out each and all of the obligations, duties and undertakings of the Contractor under the Sub-contract when and if such obligations, duties and undertakings shall become due and performable, in

accordance with the terms of the Sub-contract (as the same may from time to time be varied or amended with the consent of the Government); and

- (c) it will supply the Government with all information as the Government may reasonably require from time to time in relation to the progress of the Sub-contract Work.

- (2) The Contractor undertakes to indemnify the Government on the same terms and conditions set out in clause 19 of the Agreement provided that the Contractor shall have no greater liability to the Government by virtue of this Undertaking than the liability of the Applicant to the Government under the Agreement (which liability shall be joint and several) and provided further that so far as and to the extent that the relevant indemnity is triggered by reason of (a) any breach by the Contractor of its obligations under the Sub-contract or of this Undertaking; or (b) any negligence recklessness or willful default on the part of the Contractor, its officers, employees, agents, and sub-contractors (of whatever tier); or (c) (whether or not involving any element of fault or negligence on the part of the Contractor) any act or omission of the Contractor or of its officers, employees, agents, and sub-contractors (of whatever tier), in the discharge of the Sub-contract Work. The Contractor further warrants to the Government that for any materials used by the Contractor in the performance of the Sub-contract Work and in respect of which any Intellectual Property Right is vested in a third party, prior to the use of the said materials, the Contractor shall have obtained the grant of all necessary clearances for itself and (where required) for the Government, its authorized users, assigns and successors-in-title authorizing the use of such materials for any of the purposes contemplated by the Agreement and the Sub-contract. The provisions of this clause (2) shall survive the expiry or termination of the Agreement (howsoever occasioned) and shall continue in full force and effect notwithstanding such expiry or termination.
- (3) No allowance of time by the Government hereunder or by the Applicant under the Sub-contract nor any forbearance or forgiveness in or in respect of any matter or thing concerning this Undertaking or the Sub-contract on the part of the Government or the Applicant, nor anything that the Government or the Applicant may do or omit or neglect to do, shall in any way release the Contractor from any liability under this Undertaking.
- (4) The Contractor agrees that it will not without first giving the Government not less than seven days' prior notice in writing exercise any right it may have to terminate the Sub-contract or treat the same as having been repudiated by the Applicant or withhold performance of its obligations under the Sub-contract.
- (5) (a) In the event that the Applicant or the employment of the Applicant under the Agreement is terminated for any reason whatsoever and if so requested by the Government in writing within seven days of such termination, the Contractor shall carry out and complete its obligations under this Undertaking and shall enter into a novation agreement with the Government and the Applicant in which the Contractor will

undertake, inter alia, to perform the Sub-contract and be bound by its terms and conditions as if the Government had originally been named as a contracting party in place of the Applicant. The said novation agreement will be in such form as the Government may reasonably require.

- (b) Regardless of whether the Government requires the Contractor to enter into a novation agreement under clause (5)(a) above, the Contractor shall have no claim whatsoever against the Government for any damage, loss or expense howsoever arising out of or in connection with the termination mentioned in clause 5(a) above.
- (6) The provisions of this Undertaking shall be without prejudice to and shall not be deemed or construed so as to limit or exclude any rights or remedies which the Government may have against the Contractor, whether in tort or otherwise.
- (7) In the event of any ambiguity or conflict between the terms of Sub-contract and this Undertaking, the terms of this Undertaking shall prevail.
- (8) The Government shall be entitled to assign the benefit of this Undertaking at any time without the consent of the Contractor being required.
- (9) The address for service of all documents arising out of or in connection with this Undertaking shall be:  
To the Contractor at \_\_\_\_\_ (fax Number)  
To the Government, at the address and fax number as specified in clause 23.1 of the Agreement.
- (10) The Government and the Contractor may change their respective nominated addresses to another address in Hong Kong but only by prior written notice to each other. All notices must be in writing. Clause 23 of the Agreement shall apply hereto, mutatis mutandis.
- (11) This Undertaking shall be governed by, construed and enforced according to the laws for the time being in force in Hong Kong, and each of the parties hereto submits to the jurisdiction of the courts of Hong Kong in relation to any dispute arising from this Undertaking.
- (12) Clauses 20 to 23 of the Agreement shall be deemed incorporated herein, mutatis mutandis.

Signed by the authorized representative for and on behalf of [Full English and Chinese name of the Contractor]:

Signature \_\_\_\_\_ Date \_\_\_\_\_

Company chop (if applicable) \_\_\_\_\_

Surname (Mr./Ms.) \_\_\_\_\_ Given name \_\_\_\_\_ Job title \_\_\_\_\_

Tel. no. \_\_\_\_\_ Fax no. \_\_\_\_\_ Email address: \_\_\_\_\_

Signed by [Full English and Chinese name of the Applicant] in acknowledgement of the above undertaking by the Contractor in favor of the Government:

Signature \_\_\_\_\_ Date \_\_\_\_\_

Company chop (if applicable) \_\_\_\_\_

Surname (Mr./Ms.) \_\_\_\_\_ Given name \_\_\_\_\_ Job title \_\_\_\_\_

Tel. no. \_\_\_\_\_ Fax no. \_\_\_\_\_ Email address: \_\_\_\_\_