

EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT

by and between

CITY OF SAN LEANDRO

and

OSI SOFT, INC.

THIS EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT (this "Agreement") is entered into effective as of _____, 2010 ("Effective Date") by and between the City of San Leandro, a municipal corporation ("City") and OSIsoft, Inc., a privately held corporation ("OSIsoft"). City and OSIsoft are hereinafter collectively referred to as the "Parties."

RECITALS

A. OSIsoft proposes to install fiber optic facilities throughout a defined area (the "Project") by utilizing available space within City owned and managed rights of way, vaults and conduit (the "Conduit" or "Property"), as depicted in the attached map and related diagrams incorporated herein and made a part hereof, as Exhibit A.

B. Staff desires to pursue negotiations with OSIsoft regarding OSIsoft's proposed development of the Project such that the City Manager will execute an agreement granting OSIsoft exclusive rights to negotiate with City for the purpose of reaching agreement on a license or other agreement ("the License") whose terms and conditions would govern the development of the Project.

NOW THEREFORE, in consideration of the mutual covenants and agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Good Faith Efforts to Negotiate. The Parties shall use their best efforts to successfully negotiate a License or other agreement which shall describe the terms and conditions governing the development and management of the Project. The Parties shall diligently and in good faith pursue such negotiations. This Agreement does not impose a binding obligation on City to convey or license City Property to OSIsoft, nor does it obligate the City to grant any approvals or authorizations required for the Project. Without limiting the generality of the foregoing, OSIsoft expressly acknowledges that a license resulting from negotiations contemplated herein shall become effective only if the license is approved by the City Council as required by applicable law and compliance with all other requirements of law, including without limitation the California Environmental Quality Act.

1.1 License Agreement. The Parties agree that the License or other agreement shall include the following terms:

1.1.1 Price. The price for a revocable, un-assignable and non-exclusive use of the Property shall be the fair market value, determined by a method mutually acceptable to City and OSIsoft.

1.1.2 AS-IS Conveyance. The City will have no responsibility for environmental remediation of any kind. The City makes no representations or warranties regarding the physical condition of the Property or its suitability for OSIsoft's use, but the City

will disclose to OSIsoft any conditions now known or later discovered that could affect the suitability of the Property for OSIsoft's use.

1.1.3 Project. The Project will consist of installation of OSIsoft's fiber optic facilities within existing City Conduit, which is currently occupied by City owned and managed fiber optic wiring and related facilities. The particular sections and area of Conduit, as well as the exact configuration and location of OSIsoft's proposed facilities within the Conduit will be the subject of the License or other agreement.

1.1.4 Development Costs; Design Review. OSIsoft will be responsible for all Project costs, including without limitation all design, development, and construction costs and the cost of all improvements, if any. The License will specify the schedule for OSIsoft's submission and City review of design and construction drawings and plans.

1.1.5 Development Schedule. The License will include a schedule describing the anticipated dates by which OSIsoft shall obtain entitlements, commence construction, and complete the Project.

1.1.6 Business Development Plan and Schedule. The License will include a section or Exhibit that describes how the Project will benefit the City's Economic Development Plan, and/or General Plan. The License will also describe how OSIsoft proposes to allow businesses or other entities access to the Project.

2. OSIsoft's Exclusive Right to Negotiate With City. City agrees that it will not, during the term of this Agreement (the "**Term**") directly or indirectly, through any officer, employee, agent, or otherwise, solicit, initiate or encourage the submission of bids, offers or proposals by any person or entity with respect to the acquisition of any interest in City owned conduit or the development of the conduit, and City shall not engage any broker, financial adviser or consultant to initiate or encourage proposals or offers from other parties with respect to the disposition or development of the conduit or any portion thereof. Furthermore, City shall not, directly or indirectly, through any officer, employee, agent or otherwise, engage in negotiations concerning any such transaction with, or provide information to, any person other than OSIsoft and its representatives with a view to engaging, or preparing to engage, that person with respect to the development of the Project or any portion thereof.

3. Term. The Term of this Agreement shall commence on the Effective Date, and shall terminate twelve (12) months thereafter, unless extended or earlier terminated as provided herein. The City Manager is authorized to extend the Term by any additional number of days or months upon the mutual written agreement of the Parties.

4. Relationship of Parties. The Parties agree that nothing in this Agreement shall be deemed or interpreted to create between them the relationship of lessor and lessee, of buyer and seller, or of partners or joint venturers.

5. OSIsoft's Studies; Right of Entry. During the Term, OSIsoft shall use its best efforts to prepare, at OSIsoft's expense, any studies, surveys, plans, specifications and reports ("OSIsoft Studies") OSIsoft deems necessary or desirable in OSIsoft's sole discretion, to determine the viability of the Project. Such studies may include, without limitation, marketing, feasibility, seismic and environmental studies, financial feasibility analyses and design studies. OSIsoft shall be responsible for obtaining City's advance written permission for access to the Property as may be necessary to prepare the OSIsoft Studies. In connection with entry to the Property, OSIsoft shall and hereby agrees to indemnify, defend (with counsel approved by City) and hold harmless the Indemnitees (defined in Section 14) from and against all Claims (defined in Section 14) resulting from or arising in connection with entry to the Property by OSIsoft or OSIsoft's agents, employees, consultants, contractors or subcontractors.

City may require OSIsoft to execute a right of entry agreement satisfactory to City prior to entry into the conduit. OSIsoft's inspection, examination, survey and review of the Property shall be at OSIsoft's sole expense, but OSIsoft shall not be required to pay for, or reimburse the City, for time spent on such activities. OSIsoft shall provide City with copies of all OSIsoft Studies, including without limitation reports and test results within ten (10) days following completion of such reports and testing, whether or not such reports and test results are completed prior to or after the expiration or earlier termination of this Agreement. The City agrees to keep all such reports and testing confidential. After any necessary inspection, examination, survey or review OSIsoft shall repair, restore and return the Property to its condition immediately preceding OSIsoft's entry therein at OSIsoft's sole expense, unless otherwise directed by City. OSIsoft shall at all times keep the Property free and clear of all liens and encumbrances affecting title to the Property. OSIsoft's indemnification obligations, obligations to the OSIsoft Studies, and obligations to discharge liens that attach to the Property as set forth in this Section 5 shall survive the expiration or earlier termination of this Agreement.

6. City Responsible for its Own Expenses. City will be responsible for its costs (staff, attorney and consultant time) and expenses to assist OSIsoft with access to or surveys of the Property, and to conduct any studies including without limitation any marketing, financial feasibility, and design studies it deems necessary to assist it with the analysis of OSIsoft's proposal and the Project. However, OSIsoft shall be responsible for any environmental studies required by the California Environmental Quality Act (CEQA), including an Environmental Impact Report should one become necessary, that is required for the approval of the License or other agreement.

7. OSIsoft's Pro Forma. Prior to execution of the License contemplated by this Agreement, OSIsoft shall provide City with a pro forma that confirms the financial feasibility of the proposed Project.

8. Expenses. Except as otherwise expressly provided herein, OSIsoft shall pay all of its own costs and expenses incurred in connection with this Agreement and the activities contemplated hereby.

9. Confidentiality; Dissemination of Information. During the Term, each Party shall obtain the consent of the other Party prior to issuing or permitting any of its officers, employees or agents to issue any press release or other information to the press with respect to this Agreement; provided however, no Party shall be prohibited from supplying any information to its representatives, agents, attorneys, advisors, financing sources and others to the extent necessary to accomplish the activities contemplated hereby so long as such representatives, agents, attorneys, advisors, financing sources and others are made aware of the terms of this Section. Further, the Parties shall not release or disclose the contents of any study or report prepared for the Project without the written consent of the other Party. Nothing contained in this Agreement shall prevent either Party at any time from furnishing any required information to any governmental entity or authority pursuant to a legal requirement or from complying with its legal or contractual obligations.

10. Execution of Disposition and Development Agreement. If the Parties successfully negotiate a License, City Manager shall promptly recommend approval of the License to the City Council. The City shall have no legal obligation to grant any approvals or authorizations for the Project until the License has been approved by the City Council.

11. Termination. This Agreement may be terminated at any time by mutual consent of the Parties. City shall have the right to terminate this Agreement upon its good faith determination that OSIsoft is not proceeding diligently and in good faith to carry out its obligations pursuant to this Agreement. City shall exercise such right by providing at least ten (10) days' advance written notice to OSIsoft which notice shall describe the nature of OSIsoft's default hereunder. Notwithstanding the foregoing, if OSIsoft commences to cure such default within such 10-day period and diligently prosecutes such cure to completion within the earliest feasible time but not later than thirty (30) days following the date of the notice, this Agreement shall remain in effect. OSIsoft shall have the right to terminate this Agreement, effective upon 10 days' written notice to City, if the results of its investigation into the feasibility of the Project are unsatisfactory or if OSIsoft is unable to obtain other necessary approvals, rights or interests. Neither Party shall have the right to seek an award of damages as a result of the termination of this Agreement pursuant to this Section.

12. Effect of Termination. Upon termination as provided herein, or upon the expiration of the Term and any extensions thereof without the Parties having successfully negotiated a License, this Agreement shall forthwith be void, and there shall be no further liability or obligation on the part of either of the Parties or their respective officers, employees, agents or other representatives; provided however, the provisions of Section 8 (Expenses), Section 9 (Confidentiality), Section 14 (Hold Harmless) and Section 18 (No Brokers) shall survive such termination. Provided further, that upon termination or expiration of this Agreement OSIsoft shall deliver to City, within 15 days of termination or expiration, copies of all of OSIsoft's Studies not previously provided to City.

13. Notices. Except as otherwise specified in this Agreement, all notices to be sent pursuant to this Agreement shall be made in writing, and sent to the Parties at their respective addresses specified below or to such other address as a Party may designate by

written notice delivered to the other parties in accordance with this Section. All such notices shall be sent by:

- (i) personal delivery, in which case notice is effective upon delivery;
- (ii) certified or registered mail, return receipt requested, in which case notice shall be deemed delivered on receipt if delivery is confirmed by a return receipt;
- (iii) nationally recognized overnight courier, with charges prepaid or charged to the sender's account, in which case notice is effective on delivery if delivery is confirmed by the delivery service;
- (iv) facsimile transmission, in which case notice shall be deemed delivered upon transmittal, provided that (a) a duplicate copy of the notice is promptly delivered by first-class or certified mail or by overnight delivery, or (b) a transmission report is generated reflecting the accurate transmission thereof. Any notice given by facsimile shall be considered to have been received on the next business day if it is received after 5:00 p.m. recipient's time or on a nonbusiness day.

City: City of San Leandro
City Hall
835 E. 14th Street
San Leandro, CA 94577
Telephone: 510.577.3354
Facsimile: 510.577.3340
Attn: City Manager

OSIsoft: OSI Soft, Inc.

Facsimile: ()
Attn:

14. Indemnification. OSIsoft hereby covenants, on behalf of itself and its permitted successors and assigns, to indemnify, hold harmless and defend the City and its respective elected and appointed officials, officers, agents, representatives and employees (all of the foregoing, "**Indemnitees**") from and against all liability, loss, cost, claim, demand, action, suit, legal or administrative proceeding, penalty, deficiency, fine, damage and expense (including, without limitation, reasonable attorney's fees and costs of litigation) (all of the foregoing, collectively hereinafter "**Claims**") arising out of or in connection with this Agreement; provided however, OSIsoft shall have no indemnification obligation with respect to the gross negligence or willful misconduct of any Indemnitee. OSIsoft's indemnification obligations set forth in this Section 14 shall survive the expiration or earlier termination of this Agreement.

15. Severability. If any term or provision of this Agreement or the application thereof shall, to any extent, be held to be invalid or unenforceable, such term or provision shall be ineffective to the extent of such invalidity or unenforceability without invalidating or rendering unenforceable the remaining terms and provisions of this Agreement or the application of such terms and provisions to circumstances other than those as to which it is held invalid or unenforceable unless an essential purpose of this Agreement would be defeated by loss of the invalid or unenforceable provision.

16. Entire Agreement; Amendments In Writing; Counterparts. This Agreement contains the entire understanding of the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings, oral and written, between the Parties with respect to such subject matter. This Agreement may be amended only by a written instrument executed by the Parties or their successors in interest. This Agreement may be executed in multiple counterparts, each of which shall be an original and all of which together shall constitute one agreement.

17. Successors and Assigns; No Third-Party Beneficiaries. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns; provided however, that neither Party shall transfer or assign any of such Party's rights hereunder by operation of law or otherwise without the prior written consent of the other Party, and any such transfer or assignment without such consent shall be void. Subject to the immediately preceding sentence, this Agreement is not intended to benefit, and shall not run to the benefit of or be enforceable by, any other person or entity other than the Parties and their permitted successors and assigns.

18. Brokers. Each Party warrants and represents to the other that no brokers have been retained or consulted in connection with this transaction other than as disclosed in writing to the other Party. Each Party agrees to defend, indemnify and hold harmless the other Party from any claims, expenses, costs or liabilities arising in connection with a breach of this warranty and representation. The terms of this Section shall survive the expiration or earlier termination of this Agreement.

19. Captions. The captions of the sections and articles of this Agreement are for convenience only and are not intended to affect the interpretation or construction of the provisions hereof.

20. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

SIGNATURES ON FOLLOWING PAGE.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first written above.

City of San Leandro

By: _____

Name: _____
City Manager

APPROVED AS TO FORM:

By: _____
City Attorney

ATTEST:

By: _____
City Clerk .

OSI Soft, Inc.

a _____

By: _____

Name: _____

Its: [Managing Member]

EXHIBIT A

