



**CUBIC** | Transportation Systems

The Cubic|NextBus Solution for Real-Time  
Passenger Information

**Standard Terms & Conditions**

**August 2018**

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## Appendices

A: Service Level Agreement

**1 Definitions.**

- a. "Agreement" means this Agreement for the Provision of NextBus Equipment and Services.
- b. "Content" or "Customer Content" means information, data, text, photographs, software, scripts, graphics, and interactive features generated, provided, or otherwise made accessible by the Customer on or through the Services.
- c. "Cubic" means Cubic Transportation Systems, Inc.
- d. "Customer" means the party entering into this Agreement with Cubic.
- e. "Equipment" means any piece of hardware fielded by Cubic in performance of this Agreement that is necessary for Cubic's performance of the Services for the benefit of a specific customer.
- f. "Mobile Application" means the mobile application developed and operated by Cubic as part of the Service.
- g. "Service" or "Services" means Cubic's operation of its software on behalf of its Customers as manifested in the reports or displays resulting from the use of that software.
- h. "Service Level" or "Service Levels" means the levels at which Cubic agrees to maintain and operate the Service as further detailed in Appendix A, Service Levels.

**2 Term of the Agreement.** The term of this Agreement shall be outlined in the Cubic NextBus Solution Quote document. This Agreement will automatically be renewed for a one-year period unless either Party provides the other Party with a written notification of termination ninety (90) days prior to the effective date of termination, and shall continue to renew for one-year terms, include a price increase for each additional one-year term renewal in the amount of the lesser of 3% or the annual increase in the Consumer Price Index – All Urban Consumers, payable in full at time of each renewal, until terminated by either party with a ninety (90) day notification.

**3 Services.**

- a. Cubic shall provide the Services in a professional and effective manner as contemplated in this Agreement. Customer's sole remedy for Cubic's failing to provide the Services as contemplated herein shall be a payment deduction. CUBIC EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES WITH RESPECT TO THE SERVICES, EXPRESS OR IMPLIED OR STATUTORY, INCLUDING THOSE RELATED TO MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, SATISFACTORY QUALITY, ACCURACY OR COMPLETENESS OF RESULTS, CONFORMANCE WITH DESCRIPTION, NON-INFRINGEMENT, COURSE OF DEALING, OR USAGE OF TRADE.
- b. Cubic shall provide the Services at the Service Levels contemplated in Exhibit A, Service Levels. Should the Services not meet the Service Levels, Customer may deduct amounts from any payment due Cubic. Cubic is not liable for any failures of underlying communication carrier services including, but not limited to, wireless services and the internet. From time to time, Cubic may schedule intentional downtime for system maintenance or upgrades. Cubic will strive to minimize downtime for maximum availability of the Services.

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- 4 **Customer Content.** All Content created through or submitted to the Services by Customer (collectively “Customer Content”) is the sole responsibility of Customer. Customer acknowledges and agrees that Cubic will not assume any, and hereby disclaims all, responsibility and liability for Customer Content and any modifications thereto. Customer hereby grants Cubic a worldwide, non-exclusive, royalty-free, fully paid-up license to use, reproduce, perform, display, modify, and distribute the Customer Content in connection with providing the Services to Customer.”
- 5 **Equipment.**
- a. As part of this Agreement, Customer may purchase Equipment from Cubic. Cubic maintains pricing for the Equipment as outlined in the Customer Quote.
  - b. Customer will pay all shipping costs related to shipping the Equipment to the Customer’s facility. All risk of loss and damage to the Equipment will pass to the Customer upon the Equipment leaving Cubic’s facility. Title to the Equipment will pass to Customer when Cubic has received payment from the Customer for the Equipment.
  - c. Cubic will use commercially reasonable efforts to meet any stated delivery date(s).
  - d. Cubic will warrant the Equipment against defects in the material on a return-to-factory basis for a period of one (1) year from the date on which Customer receives the Equipment. Customer shall return the defective Equipment in accordance with Cubic’s shipping instructions. Cubic’s sole responsibility under this warranty shall be, at Cubic’s option, to either repair or replace, during Cubic’s normal working hours, any component which fails during the warranty period because of a defect in the material. If Cubic determines that the Equipment is not defective within the terms of the warranty, Customer shall pay Cubic all costs of handling, transportation, and repairs at Cubic’s then-prevailing rates. CUBIC EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES WITH RESPECT TO THE EQUIPMENT, EXPRESS OR IMPLIED OR STATUTORY, INCLUDING THOSE RELATED TO MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, SATISFACTORY QUALITY, ACCURACY OR COMPLETENESS OF RESULTS, CONFORMANCE WITH DESCRIPTION, NON-INFRINGEMENT, COURSE OF DEALING, OR USAGE OF TRADE.
- 6 **Intellectual Property.**
- a. Cubic retains for itself all intellectual property rights in and to all Equipment and Services, including but not limited to any patents (pending or otherwise), copyrights, trademarks and trade secrets.
  - b. To the extent Customer has purchased Equipment from Cubic, Cubic hereby grants to Customer a perpetual, royalty free, non-exclusive non-transferable license to use the Equipment for its intended purpose as contemplated under this Agreement. Customer may not assign, sublicense, or otherwise transfer this license. Customer shall not, without the express written consent of Cubic, provide, disclose, transfer, or otherwise make available any Equipment to any third party. Customer shall take appropriate action by instruction, agreement, or otherwise, with those of its employees and third party agents having access to any Equipment, to restrict and control the use, copying, modification, disclosure, transfer, protection, and security of such Equipment in accordance with these Terms and Conditions. Customer agrees to protect any Equipment with the same standard of care which it uses to protect its own like products, services or proprietary information. Customer

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shall not reverse engineer or decompile the Equipment or any associated firmware within the Equipment.

- 7 **Publicity and Marketing Materials.** Customer hereby consents to inclusion of its name and logo in client lists and marketing materials that may be published as part of Cubic's marketing and promotional efforts. From time to time upon Cubic's request, Customer agrees it will provide reasonable cooperation and assistance in connection with such efforts (such as, for example, by acting as a reference, issuing press releases and writing testimonials and case studies with statements attributed to a named employee of Customer).
- 8 **Confidentiality.**
- a. Each party agrees that the business, technical and financial information, including without limitation, the Services, Mobile Application, the Platform, and all software, source code, inventions, algorithms, know-how and ideas and the terms and conditions of this Agreement, designated in writing as confidential or disclosed in a manner that a reasonable person would understand the confidentiality of the information disclosed, shall be the confidential property of the disclosing party and its licensors ("Confidential Information"). For the avoidance of doubt, any and all data provided to Customer through the Services (other than Customer Content) shall be considered Cubic's Confidential Information. Confidential Information does not include information that (a) is previously rightfully known to the receiving party without restriction on disclosure, (b) is or becomes known to the general public, through no act or omission on the part of the receiving party, (c) is disclosed to the receiving party by a third party without breach of any separate nondisclosure obligation, or (d) is independently developed by the receiving party.
  - b. Except for the specific rights granted by this Agreement, the receiving party shall not access, use or disclose any of the disclosing party's Confidential Information without its written consent, and shall use at least the standard of care used to protect its own Confidential Information, but not less than reasonable care to protect the disclosing party's Confidential Information, including ensuring that its employees and contractors with access to such Confidential Information (a) have a need to know for the purposes of this Agreement and (b) have been apprised of and agree to restrictions at least as protective of the disclosing party's Confidential Information as this Agreement. Each party shall be responsible for any breach of confidentiality by its employees and contractors. Each party may disclose only the general nature, but not the specific terms, of this Agreement without the prior consent of the other party; provided that either party may provide a copy of this Agreement or otherwise disclose its terms in connection with any legal or regulatory requirement, financing transaction or due diligence inquiry.
  - c. Nothing herein shall prevent a receiving party from disclosing any Confidential Information as necessary pursuant to any applicable court order, law, rule or regulation; provided that prior to any such disclosure, the receiving party shall use reasonable efforts to (a) promptly notify the disclosing party (to the extent legally permitted) in writing of such requirement to disclose and (b) cooperate with the disclosing party in protecting against or minimizing any such disclosure or obtaining a protective order.
- 9 **Indemnification.**

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- a. Cubic agrees to defend, or at its option settle, indemnify and hold Licensee harmless from any and all third party intellectual property infringement suits, claims, or proceedings brought against Customer as a result of Customer's stand-alone use of the Equipment or Software where Customer has (i) given Cubic prompt notice of such suit, claim, or proceeding; (ii) allowed Cubic to have sole control of the defense or settlement of such suit, claim or proceeding; and (iii) given Cubic all necessary assistance to defend the same.
- b. Notwithstanding subparagraph (a) above, Cubic shall not be bound to defend, indemnify, or hold Customer harmless where (i) such claim or action would have been avoided but for modifications of the Equipment or Services, or portions thereof, made after delivery to Customer; (ii) such claim or action would have been avoided but for the combination or use of the Equipment or Services, or portions thereof, with other products, processes or materials not supplied or specified in writing by Cubic; (iii) Customer continues such allegedly infringing activity after being notified thereof or after being informed of modifications that would have avoided the alleged infringement; or (iv) Customer's use of the Equipment and Services is not strictly in accordance with the terms of this Agreement.
- c. If a third party's claim endangers or disrupts Customer's use of the Equipment or Services, Cubic shall, at its option and at no charge to Customer, (i) obtain a license so Customer may continue use of the Equipment or Services; (ii) modify the Equipment or Services to avoid the infringement; or (iii) replace the Equipment or Services with a compatible, functionally equivalent and non-infringing product.
- d. THE FOREGOING PROVISIONS OF THIS SECTION STATE THE ENTIRE LIABILITY AND OBLIGATIONS OF CUBIC, AND THE EXCLUSIVE REMEDY OF CUSTOMER, WITH RESPECT TO ANY ACTUAL OR ALLEGED INFRINGEMENT OF ANY INTELLECTUAL PROPERTY RIGHTS BY THE EQUIPMENT OR SERVICES.

### 10 *Limitation of Liability.*

- a. Except as expressly stated in Section 6, Indemnification, Cubic's entire liability under this Agreement shall not exceed the amounts it has been paid by Customer during the twelve (12) months immediately preceding the event which gave rise to such liability.
- b. IN NO EVENT WILL CUBIC BE LIABLE FOR COSTS OF PROCUREMENT OF SUBSTITUTE EQUIPMENT OR SERVICES BY CUSTOMER. IN NO EVENT SHALL CUBIC HAVE ANY LIABILITY TO THE OTHER PARTY FOR ANY LOST PROFITS OR REVENUES OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES HOWEVER CAUSED, WHETHER IN CONTRACT OR TORT OR UNDER ANY OTHER THEORY OF LIABILITY, AND WHETHER OR NOT CUBIC HAS BEEN ADVISED ON THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING DISCLAIMER SHALL NOT APPLY TO THE EXTENT PROHIBITED BY APPLICABLE LAW.

### 11 *Expiration/Termination.*

- a. Either party may terminate this Agreement for breach of this Agreement by the other party where such breach has not been cured after having received proper notice of the breach and at least thirty (30) days to cure.

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- b. Cubic may terminate this Agreement for convenience upon ninety (90) days' prior written notice to customer.
- c. Upon expiration or termination each party shall pay the other party all monies due and owing.

**12 Disputes.**

- a. Any controversy, dispute, or claim (collectively, "Disputes") arising out of or under this Agreement which is not timely settled by informal negotiations by the Parties shall be resolved through arbitration to take place in San Diego, California, utilizing the American Arbitration Association ("AAA") and its Commercial Rules then in effect. Any judgment or order rendered by the arbitrator may be entered in any court of competent jurisdiction. Each Party shall be responsible for its respective costs and attorneys' fees incurred in arbitration, except that costs and fees invoiced by the AAA for the services of the arbitrator(s) and its own fees and expenses shall be borne equally by the Parties.
- b. Customer acknowledges that, due to the unique nature of the Equipment and Services, there may be no adequate remedy at law for Customer's unauthorized use or disclosure of the Equipment or Services in breach of this Agreement and that such breach may cause immediate and irreparable harm to Cubic. Accordingly, notwithstanding the provisions of the paragraph above, upon any such breach or any threat thereof by the Customer, Cubic shall be entitled to pursue appropriate equitable or injunctive relief from any court of competent jurisdiction.

**13 Assignment.** This Agreement and the rights and obligations hereunder may not be assigned, in whole or in part, by Customer without Cubic's written consent. This Agreement shall be binding upon, and inure to the benefit of, the successors, representatives and permitted assigns of the parties hereto.

**14 Independent Contractors.** The parties shall be independent contractors under this Agreement, and nothing herein will constitute either party as the employer, employee, agent or representative of the other party, or both parties as joint venturers or partners for any purpose.

**15 Force Majeure.** Neither party will be responsible for any failure or delay in its performance under this Agreement (except for any payment obligations) due to causes beyond its reasonable control, including, but not limited to, labor disputes, strikes, lockouts, shortages of or inability to obtain labor, energy, raw materials or supplies, war, terrorism, riot, natural disasters or governmental action.

**16 Governing Law.** This Agreement shall be governed by California law, without regard to its conflict of laws provisions. The Parties waive California Civil Code Section 1654, which states "in cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."

**17 Notice.** Any notice under or in connection with this Agreement shall be in writing and delivered by reputable overnight mail equivalent carrier, facsimile, or first class mail. Such notice shall be deemed to have been given when received by the party to which the communication is directed at its address set forth in the signature block of this Agreement.

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- 18 **Waiver.** The failure to exercise any right under this Agreement shall not be deemed to be a waiver of such right, and shall not affect the right to enforce each and every right hereof. The waiver of any breach of any term, provision, covenant, or condition herein contained shall not be deemed to be a waiver of any (a) subsequent breach of such term, provision, covenant, or condition or (b) other term, provision, covenant, or condition.
- 19 **Severability.** If any material condition or provision contained herein is held to be invalid, void, or unenforceable by a final judgment of any court of competent jurisdiction, then the remaining provisions of this Agreement shall remain in full force and effect and the unenforceable provision shall be deemed modified to the limited extent required to permit its enforcement in a manner most closely representing the intention of the Parties as expressed herein.
- 20 **Complete Agreement.** This Agreement contains the complete understanding between the parties and supersedes all prior and contemporaneous communications, agreements, proposals or representations, written or oral, concerning its subject matter. No modification, amendment, or waiver of any provision of this Agreement will be effective unless in writing and signed by the party against whom the modification, amendment or waiver is to be asserted. Notwithstanding any language to the contrary therein, no terms or conditions stated in in the Cubic NextBus Solution Quote document or in any other of your order documentation will be incorporated into or form any part of this Agreement, and all such terms or conditions will be void. In the event of any conflict or inconsistency among the following documents the order of precedence shall be (1) the Cubic NextBus Solution Quote document, (2) any exhibit, schedule or addendum to this Agreement and (3) the body of this Agreement.