

Agreement for Public Works Services

THIS AGREEMENT FOR PUBLIC WORKS SERVICES (this “*Agreement*”) is entered into effective __ September 2013 between the city of **COTTONWOOD HEIGHTS**, a Utah municipality whose address is 1265 East Fort Union Blvd., Suite 250, Cottonwood Heights, UT 84047 (“*City*”), and **TERRACARE ASSOCIATES, LLC**, a Colorado limited liability company whose address is 9742 Titan Park Circle, Littleton, CO 80125 (“*Contractor*”). City and Contractor are each referred to herein as a “*Party*” and are collectively referred to as the “*Parties.*”

RECITALS:

A. City incorporated in January 2005 within a geographical area which previously was part of unincorporated Salt Lake County (the “*County*”).

B. City is authorized to contract for the provision of municipal services within City’s boundaries (“*City Limits*”), including, without limitation, public works, traffic engineering and street department services (collectively in these Recitals, “*public works services*”) such as repair and maintenance of City’s roadways; maintaining City’s roadways reasonably clear of snow, ice and debris; pavement striping and painting of crosswalks and symbols; traffic sign installation; and repairs to City’s sidewalks, curbs and gutters.

C. Since its incorporation, the majority of the public works services provided within City Limits have been performed for City by the County pursuant to an interlocal agreement (the “*County Interlocal*”) between City and the County.

D. On or about 2 December 2012, City issued a request for proposals (the “*RFP*”) to seek a contractor to provide public works services to City commencing upon termination of the County Interlocal. On or about 27 December 2012, Contractor submitted to City a written proposal (the “*Proposal*”) in response to the RFP.

E. Through a competitive process conducted under supervision of City’s city manager (the “*City Manager*”), City’s governing body (the “*Council*”) selected Contractor as the responsive proposer with the requisite resources, experience and expertise to provide the public works services identified in this Agreement at a service level at least comparable to similar sized cities in the County.

F. Consequently, City desires to retain Contractor to provide, and Contractor desires to provide to City, the public works services required by this Agreement.

G. The Parties intend to identify herein the public works services to be performed for City by Contractor, the basis of compensation for such services, and to otherwise set forth their entire agreement concerning the subject public works services. Consequently, except as otherwise expressly set forth herein, this Agreement shall supersede any and all prior negotiations and/or agreements, oral and/or written, between the Parties concerning the public works services to be provided under this Agreement. Terms of the RFP or the Proposal referenced as being part of this Agreement are incorporated herein by such reference.

A G R E E M E N T:

NOW THEREFORE, in consideration of the premises, the Parties' mutual covenants and undertakings, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

Section 1. Definitions.

1.1. "*Base Services*" means those services as fully described in Exhibit "A" to be provided by Contractor within the City Limits, including Start-Up Activities.

1.2. "*CDL Hours*" means commercial drivers license (CDL) hours associated with the operation, inspection and essential maintenance of a CDL snow management vehicle. Essential maintenance include the CDL operator's hours associated with the replacement of cutting edges, miscellaneous small mechanical repairs (flat tire, bulb replacement), fueling and recharging with granular or liquid materials. CDL hours will be assessed for pre-storm, storm and post-storm activities. Supervision and roadway inspection hours are not included in CDL hours.

1.3. "*Contractor Employee(s)*" shall mean person(s) under Contractor's direct supervision and/or control, whether employees, contract employees, independent contractors or volunteers.

1.4. "*Designated Employees*" means the following Contractor Employees: The Program Director and the persons/positions responsible for management of the following services as more clearly defined in Exhibit "A:" Transportation Planning Services; Traffic Engineering Services; Field Services; and Street Rehabilitation Capital Improvement Program Management Services.

1.5. "*Enhanced Services*" means optional services, described on Exhibit "C," to be provided to City by Contractor upon City's request, the compensation for which shall be separate from Total Annual Fees, as described in Subsection 8.2, below.

1.6. "*Exhibits*" to this Agreement include the following:

Exhibit "A" – Base Services and Related Performance Measurements

Exhibit "B" – Start-Up Activities

Exhibit "C" – Enhanced Services and Related Schedule of Costs

Exhibit "D" – Initial Technical Standards

Exhibit "E" – Initial Period Base Services / Performance Measurements

1.7. "*Initial Period*" means the time period between termination of the County Interlocal (assumed to be 31 October 2013) and 1 July 2014.

1.8. "*Performance Measurements*" means those standards of Service or measurements of Service delivery required under Section 4 of this Agreement and fully described in attached Exhibit "A."

1.9. “*Program Director*” means the Contractor Employee who serves as the primary point of contact between Contractor and City with oversight and administration of the Services to be provided hereunder, including performing the duties set forth in Subsection 3.3, below.

1.10. “*Public Works Director*” means City’s public work director or another senior City representative assigned the responsibility of overseeing the administration of this Agreement for City and the provision of Services by Contractor along with other City-assigned responsibilities.

1.11. “*Services*” means the Base Services and any Enhanced Services provided by Contractor from time to time, collectively.

1.12. “*Services Commencement Date*” shall be 12:00:01 a.m. on 1 November 2013, except that Start-Up Activities shall commence on the Effective Date of this Agreement, as set forth in Subsection 9.1, below.

1.13. “*Start-Up Activities*” are those Services fully described in attached Exhibit “B.”

1.14. “*Subcontractor*” means any individual or entity retained, affiliated, or engaged by or under contract with Contractor to undertake any Services to be performed hereunder.

1.15. “*Technical Standards*” means those standards and processes related to Service delivery as mutually agreed by the Program Director and the Public Works Director. The initial Technical Standards are set forth in attached Exhibit “D.” The Technical Standards are incorporated into this Agreement and may be modified from time to time by mutual agreement of the Program Director and the Public Works Director without formal amendment of this Agreement. Approval of any amendment to the Technical Standards shall be evidenced affixing their dated signatures thereto.

1.16. “*Term*” shall be as defined in Section 9.

1.17. “*Total Annual Fees*” shall be the total of the amounts set forth in Subsection 8.1, below, for each year or partial year of this Agreement, and shall be the total maximum amount to be paid for Base Services for the applicable period. The Total Annual Fees shall not include compensation payable for Enhanced Services, which shall be compensated as set forth in Subsection 8.2, below.

Section 2. **Services and Performance.**

2.1. *Background.* During the Term of this Agreement, Contractor shall furnish to City, within City Limits, the Services as specified in this Agreement and its exhibits. The Services include Base Services and any City-requested Enhanced Services. An essential Base Service is snow management/removal (“*snow management*”), which will require Contractor to maintain in readiness a fleet of vehicles and trained operators necessary to effect snow management during snow season. Because snowfall is unpredictable, however, the Parties

recognize that snow management costs may materially vary from year to year. City's annual budgets are set, however, before snow season, and are not elastic enough to allow for wide variances in snow management costs.

Consequently, a premise of this Agreement is that the Parties annually will agree on a dollar amount to be allocated to Base Services in City's budget for the upcoming (July 1st through June 30th) fiscal year. Such Total Annual Fees shall not be less than \$ _____. Use and allocation of the Total Annual Fees shall be flexible, however, to the extent that the Total Annual Fees are not entirely consumed for snow management, thereby allowing City to use the remaining portion of the Total Annual Fees (not spent for snow management) for such other Services as City may designate from time to time in consultation with Contractor. Such allocation may be for the following fiscal year as reasonably directed by City. In no event shall City fail to receive full value (in terms of provided Services) for City's payments hereunder.

Based on City's experience since 2005, the Parties anticipate that an average of approximately \$ _____ will be used for snow management (based on _____ CDL Hours at \$__ per hour), and the balance of the Total Annual Fees will be available for other Services, principally road maintenance of various types. Therefore, the quantities of materials and activities listed on attached Exhibit "A," or any future amendment thereof, are estimates only, and the actual quantities may vary based on factors such as snowfall and Service requests. Quantities of materials and activities may be adjusted, increased, decreased or traded for other materials and activities so long as there is no net decrease in the Total Annual Fees due for that fiscal year.

2.2. *Services.* As directed by and under the supervision of the Public Works Director, Contractor shall provide the Services within City Limits from time to time. The Services generally include public works and street department services of the types coming within the jurisdiction of and customarily rendered by municipal public works departments (other than those provided by other contract providers or special districts), along with the Start-Up Activities listed on attached Exhibit "B." All Services provided hereunder shall be performed in a careful, diligent and expeditious manner that is at a level of quality and service that is at least equal to such services being performed in similar sized cities in the County.

The Parties acknowledge that, although City has requested certain Services be performed or certain work product be produced, Contractor has offered to City the process, procedures, terms and conditions under which Contractor plans and proposes to complete the Services and/or work product(s), and that City, through this Agreement, has accepted such process, procedures, terms and conditions.

2.3. *Qualification.* Contractor represents to City that Contractor, the Contractor Employees and any Subcontractor performing Services hereunder possess the skills, knowledge, and abilities to timely, professionally and fully perform the Services in accordance with this Agreement.

2.4. *Boundary Change.* If the City Limits hereafter are modified (due to annexations, disconnections and other official boundary adjustments of City) in such a way as to materially increase or decrease the Base Services obligations of Contractor hereunder, the Parties shall mutually agree to a proportionate, equitable change in the Base Services and Total Annual Fees to be paid hereunder.

2.5. Work Planning.

(a) Start-Up. Upon full execution and delivery of this Agreement, a representative of Contractor and the Public Works Director shall meet weekly (or more frequently) to discuss the progress of the Start-Up Activities and the projected completion date for each service or milestone to be provided thereunder.

(b) Work Plan. On or before each April 1st, the Parties shall cooperatively produce a written plan (the “*Work Plan*”) designating and estimating the scope and quantities of Services to be performed by Contractor for the upcoming fiscal year. Although the Work Plan shall be the Parties’ best estimate of the Services to be performed during the upcoming fiscal year, it necessarily shall be subject to adjustment as provided in Subsection 2.1, above. In preparing each annual Work Plan, the Parties shall notify and/or involve in the planning process any utility providers (such as sewer, water and electrical providers) whose facilities may be impacted by the Work Plan. The initial Work Plan attached hereto as Exhibit “A” is subject to amendment for future fiscal years, which shall occur through written amendment to this Agreement signed by both Parties.

2.6. Changes to Services. From time to time, either Party may identify new Base Services not included in Exhibit “A,” or events may warrant modification to the Base Services. Within a reasonable period of time, the identifying Party will notify the other Party of the Base Services modification opportunity. If City either proposes or tentatively approves such modification, then Contractor promptly will provide for City’s consideration a written, detailed description and price (the “*Estimate*”) of the proposed modification to the Base Services. Any changes to the Base Services that are mutually agreed upon between the Parties shall be effective only through a written amendment to this Agreement signed by Contractor and by City’s mayor (the “*Mayor*”) and recorder (the “*Recorder*”). Unless otherwise stated in the Estimate, Contractor will appropriately adjust the Annual Fee and will pro rate the billing in accordance with Section 8 of this Agreement. An amendment to the Base Services under this Subsection is not required for the City exercise the flexibility concerning the Services described in Subsection 2.1 during a fiscal year. Instead, such an amendment typically will occur only when the Parties mutually agree to prospectively add a new Base Service for the balance of the Term.

2.7. Enhanced Services. In addition to the Base Services to be provided hereunder, Contractor shall provide Enhanced Services as, if and when requested by City, as such services and costs are outlined on attached Exhibit “C;” provided, however, that in order to assure continuity and uninterrupted provision of snow management services, CDL Hours described as Enhanced Services in Exhibit “C” shall be provided by Contractor for snow management services without requiring City’s additional prior written or verbal authorization so long as the Parties have approved CDL Hours associated with previous snow storms as required by Section ___ of Exhibit “A.”

When Enhanced Services are requested by City under this Agreement, the provisions of this Agreement shall apply as though such Enhanced Services are regular “Services” hereunder, except that the compensation for such Enhanced Services shall be in addition to the Total Annual Fees for the Base Services. Exhibit “C” contains pricing for the Enhanced Services, and the Parties shall meet at least annually (on or before April 1st) and mutually agree to any changes to

the schedule of costs in Exhibit “C” for the next fiscal year. Any such modifications to Exhibit “C” shall require an amendment to this Agreement to be effective.

With the exception of snow management-related Enhanced Services, which City shall obtain exclusively from Contractor, nothing in this Agreement limits City from using the County or any other provider to provide Enhanced Services.

2.8. Allocation of Resources. The Parties recognize that this Agreement is intended to provide flexibility to City in order to meet its evolving challenges in the delivery of public works services within City Limits. Contractor may reasonably allocate its available resources for performance of the various Base Services in accordance with the priorities that have been agreed to by the Public Works Director, so long as such allocations do not either (a) increase the Total Annual Fees under this Agreement; or (b) adversely affect the quality of the Base Services delivered.

2.9. Permits and Licenses. Contractor shall, at its expense, obtain and maintain in valid effect all licenses and permits required by governmental entities other than City, by certifying organizations necessary to perform the Services as required by law, by the Performance Measurements under this Agreement, or by the Technical Standards. Such licensure shall include, without limitation, (a) any contractor’s license required by the state of Utah under the Construction Trades Licensing Act, UTAH CODE ANN. 58-55-101 et seq., or otherwise, and (b) qualification to conduct business in Utah as a foreign limited liability company under UTAH CODE ANN. 48-2c-1602, as amended. For permits required by City other than right of way permits, Contractor shall obtain and maintain such permits, but City shall waive any cost associated with issuance of such permits.

City shall timely provide to Contractor copies of all City-obtained permits and/or required compliance information from third parties. If City fails to so act, then Contractor shall not be obligated to comply with the new permit requirement until the permit and/or compliance information is provided to Contractor.

City waives any requirement for Contractor to obtain a right of way permit from City for Services performed hereunder; provided, however, that Contractor shall comply with all conditions and standards otherwise applicable to such work or permit unless a written waiver is obtained in advance from the Public Works Director.

All persons engaged in providing Services to City shall be duly licensed and certified by all applicable jurisdictions, associations and authorities for performance of such Services. This requirement shall extend to, without limitation, Contractor Employees, Subcontractors and Subcontractor employees in the following classifications: engineers, truck drivers, mechanics, steel signs and markings, electricians, traffic control, construction inspectors, material testing, laboratory testing and those applying herbicides or other regulated chemicals. Contractor represents, warrants and certifies to City that Contractor and each person or entity performing Services hereunder are and shall remain during the entire Term properly licensed and/or registered within the state of Utah (the “State”) for the performance of the Services to the extent that such licensure and/or registration is required by applicable law or the Performance Measurements.

2.10. Implementation of Innovations. The Parties mutually desire for the Services to be delivered in a manner that is highly efficient and effective and utilizes innovative processes and technology. To that end, Contractor will stay abreast of new technologies and processes related to delivery of Services to City. Before implementation, the Parties shall mutually determine, through good faith negotiations, whether implementation is mutually beneficial and, if so, shall negotiate appropriate changes to the Technical Standards and, if applicable, to the compensation payable hereunder. Under no circumstance may Contractor require City to invest, fund or incur costs associated in the exploration, development or testing of new innovative processes or technologies that are the subject of this provision.

2.11. Obligation to Acquire Necessary Information. Before commencing the Services, Contractor shall become fully acquainted with the available information, laws, and regulations related to the Services. Contractor is obligated to affirmatively request from City and other available resources such information that Contractor should reasonably expect is available and relevant to the performance of the Services, although Contractor is not responsible for the accuracy of the information obtained. Upon Contractor's request, City will use its best efforts to facilitate Contractor's efforts to obtain relevant information requested by Contractor from the State or the County.

2.12. Ambiguities. Contractor shall perform the Services in accordance with this Agreement and shall promptly inform City concerning ambiguities and uncertainties related to Contractor's performance that are not addressed by the Agreement. In interpreting the Services and level of service required hereunder, the Parties shall apply the principles that (a) City desires the Base Services to be provided within City Limits at a service level at least comparable to similar sized cities in the County; and (b) the level and quality of Base Services, and any Enhanced Services requested by City, that are provided under this Agreement shall be at least equal to the level and quality of such Services provided under the County Interlocal.

2.13. Compliance with Laws.

(a) By Contractor. Contractor shall comply with all applicable federal, state and local laws, ordinances, regulations, and resolutions. Without limiting the foregoing, Contractor shall comply with all wage and hour laws and all OSHA and other applicable federal and state statutes, regulations and standards for work place safety. Contractor also shall comply with all applicable laws regarding hazardous materials, and shall maintain all required Manufacturer's Safety Data Sheets (MSDS) forms on site in City.

(b) By City. City shall comply with all applicable federal, state and local laws, ordinances, regulations and resolutions.

(c) Change in Laws. Any change in applicable law (by regulation, rule, requirement, interpretation, statute, permit requirement, or ordinance adopted, promulgated, issued or otherwise modified by any local, State, federal or other governmental body) which impacts the delivery of Services may necessitate a change in compensation hereunder. If such change affects Contractor's cost of or time required for performance of the Services, the parties agree to meet and negotiate an equitable adjustment to the compensation due under this Agreement.

Section 3. **City and Contractor Coordination.**

3.1. *City Representatives.* The Public Works Director shall be City's primary representative and point of contact with Contractor for all regular reports, work orders and proposed amendments to Services allowable under this Agreement. The Public Works Director has the authority to monitor Contractor's performance; respond to Contractor's questions; assist Contractor in understanding City policies, procedures and practices; and supervise the performance of any City obligations under this Agreement. City's finance director (the "*Finance Director*") shall serve as City's representative for the processing of all invoices.

3.2. *Program Director.* Contractor will assign a Program Director who shall be Contractor's primary representative and the point of contact with City for all Service matters and proposed amendments to Services allowable under this Agreement.

3.3. *Program Director Duties.* The Program Director shall:

(a) Act as liaison between City staff and Contractor;

(b) Attend City staff meetings, Council meetings, Council district meetings, and any agenda, board, commission, committee or other meetings involving City officers or employees at which attendance by the Program Director is deemed necessary or appropriate by the Public Works Director or by City's city manager (the "*City Manager*") regarding the Services under this Agreement.

(c) Attend meetings of State or County agencies or forums as directed by the Public Works Director or City Manager regarding the Services under this Agreement.

(d) Provide information to the Public Works Director, the City Manager and the Council on all issues relevant and applicable to City, its officials, its constituents or to its status as a municipality regarding the Services under this Agreement;

(e) Assist City in all relations with other City departments, other contractors, subcontractors and external organizations, including other governmental entities and relevant professional organizations regarding the Services under this Agreement; and

(f) When so requested by the City Manager or the Public Works Director, carry out such additional duties and responsibilities as are necessary to fulfill the Services, as long as such duties are not in conflict with Contractor's obligations under this Agreement and do not unreasonably expand Contractor's obligations under this Agreement.

3.4. *Vacancy in Designated Employee Position.* In the event of a vacancy in the position of any Designated Employee, Contractor promptly shall select a qualified replacement, whereupon the City Manager and the Public Works Director shall have the opportunity to meet with each of the candidates and give Contractor their thoughts and recommendations.

3.5. *Dissatisfaction with Job Performance of Designated Employees.* If City reasonably becomes dissatisfied with the job performance of a Designated Employee, the City

Manager may provide timely notification to Contractor of such dissatisfaction. Thereafter, representatives of Contractor and City shall meet to discuss possible remedies of the problems experienced by City.

3.6. *Representatives Meeting.* The Public Works Director and the Program Director shall meet together at least once a week to review the Services rendered, future Service plans and performance compliance under this Agreement. The frequency of such meetings may be increased at the request of either Party or decreased by mutual agreement of the two representatives and the City Manager.

3.7. *Relationships and Representation.* Contractor and all Contractor Employees, Subcontractors and others providing Services hereunder shall, at all times, foster and maintain professional and harmonious relationships with the members of the Council, all City employees, all employees of City's other contract services providers and City's residents, and shall represent City in the best light possible to members of the public, staff, elected and appointed officers and the media.

3.8. *City Manager Review.* Unless otherwise authorized by the City Manager, all communications to the Mayor, Council and the media concerning Contractor's provision of Services to City under this Agreement shall be through the City Manager. Any mass communications to City residents shall be reviewed and approved by the City Manager prior to printing and dissemination. The foregoing does not affect Contractor's right to advertise to relatively narrowly targeted third parties (such as other governmental entities) the fact that Contractor provides Services to City under this Agreement.

Section 4. **Contractor Performance Measurements.**

4.1. *Measurements of Performance.* Contractor shall provide all of the Services in a timely and professional manner and shall use that degree of care, skill and professionalism ordinarily exercised under similar circumstances by members of the same profession practicing in the state of Utah. Without limiting the generality of the foregoing sentence, Contractor also shall comply with the Performance Measurements shown on attached Exhibit "A" and the Technical Standards in effect at the time of performance.

4.2. *Reporting.* In addition to any reporting requirements contained in Exhibit "A," Contractor will report regularly to and at the request of the Public Works Director concerning the Services rendered under this Agreement, as follows:

(a) Weekly, no later than Tuesday of each week, Contractor shall provide the Public Works Director with a written report detailing the activities of Contractor in providing Services hereunder during the preceding week.

(b) Oral reports to the Public Works Director shall be made more frequently than written reports, as needed or as determined by the Public Works Director. Contractor shall fulfill any additional reasonable reporting requests made to the Program Director by the City Manager or the Council. The Parties intend for the Program Director and the Public Works Director to remain in close, daily communication throughout the Term for the purpose of discussing Services goals, Services delivery, Performance Measurements, Technical

Standards and any other issues that may arise under this Agreement or be related to the provision of Services. If either the Program Director or the Public Works Director is unavailable due to illness, vacation or other reason, a designee shall be named who shall be responsible for compliance with this Agreement.

(c) Before the end of the first week of each month, Contractor shall provide the Public Works Director with a report showing Services rendered in the prior month, plans for Services delivery in the current month, and such other metrics as the Public Works Director reasonably may request. Comparative data shall be provided in a format mutually approved by the Parties.

(d) The format and method of delivery for any reports required hereunder shall be as reasonably approved by the Public Works Director. The Public Works Director may request that such reports address issues necessary for preparing monthly Council reports, budgets and comprehensive annual financial reports

4.3. *Force Majeure.* Neither Party shall be liable for damages, delays or failure to perform its obligations under this Agreement if performance is made impractical or impossible, or unpredictably and abnormally difficult or costly, as a result of any unforeseen occurrence outside the reasonable control of such Party, including, without limitation, fire, flood, acts of God, civil unrest, failure of a third party to cooperate in providing services other than Contractor's Subcontractors, or other occurrences beyond the reasonable control of the Party invoking this force majeure clause. The Party invoking this force majeure clause shall notify the other Party immediately by verbal communication and in writing of the nature and extent of the contingency within five business days after its occurrence or discovery, and shall take reasonable measures to mitigate any impact of the event that triggered the invoking of this force majeure clause. If the force majeure event impacts schedules or increase costs incurred by Contractor, such items shall be handled in accordance with Subsection 2.6, above.

Section 5. **Independent Contractor.**

5.1. *Independent Contractor.* Contractor and any Subcontractors each shall perform the Services as an independent contractor and shall not be deemed by virtue of this Agreement or otherwise to have entered into any partnership, joint venture, employer/employee or other relationship with City other than as an independent contractor. Subject to the Performance Measurements and other requirements of this Agreement (intended to specify an acceptable level of customer service and delivery of Services to City consistent with comparable municipal practices in the County), Contractor shall have and maintain the responsibility for and control of means and method of the delivery of the Services, the discipline of the Contractor Employees and all other matters incident to the performance of the Services.

This Agreement does not require Contractor or any Subcontractor providing Services hereunder to work exclusively for City, nor shall this Agreement be interpreted as City dictating or directing Contractor's or any Subcontractor's performance or time of performance beyond the requirements for Services, including the Performance Measurements and the Technical Standards. Neither Contractor's nor any Subcontractor's business operations shall be deemed combined with City by virtue of this Agreement, and City will not provide any training to Contractor, its Subcontractors, or their respective employees or agents. Although the Parties

acknowledge that Contractor may require some assistance or direction from City in order for the Services to meet City's contractual expectations, any provisions in this Agreement that may appear to give City the right to direct or control the provision of Services by Contractor or any Subcontractor shall be construed as City plans or specifications regarding the Services.

Subject to conformance with City adopted policies and procedures and full conformance with Contractor's representations and obligations under this Agreement, Contractor shall have and maintain the requisite judgment, discretion and responsibility for, and control of, the performance of the Services, the discipline of Contractor Employees and other matters incidental to the performance of the Services and Contractor's obligations under this Agreement. Unless specifically stated otherwise herein, (a) Contractor shall provide, at its cost, all labor (including wages, salaries and employment benefits such as insurance coverage and retirement plans), vehicles, equipment, tools, and other items required in the performance of the Services, and (b) City shall not provide any assistance or benefits to Contractor, any Subcontractor, or their respective employees or agents under this Agreement.

Although the Parties recognize that some level of direction and supervision by City is necessary in successfully implementing City policies and procedures and in administering this Agreement, Contractor shall bear the burden and shall advise City in writing of any conflict or inconsistency between City's direction or supervision and Contractor's status as an independent contractor.

Contractor represents, warrants and certifies to City, with the intent to induce City to enter into this Agreement, that this Agreement does not create a partnership, joint venture, employer/employee or other relationship with City other than that of an independent contractor. Contractor acknowledges that City is relying on such representation and warranty in entering into this Agreement, and shall indemnify, defend and hold City and its officers, employees, agents, representatives, insurers and other related parties harmless from any and all claims, damages, liabilities, actions, costs, fees (including attorneys fees) causes of actions and proceedings (in law or equity) asserting any relationship besides independent contractor between Contractor, its Subcontractors, and/or their respective employees or agents, on the one hand, and City and its related parties named above, on the other hand.

5.2. Liability for Employment-Related Compensation. City shall not be obligated to secure, and shall not provide, any salaries, wages, employment related insurance coverage or employment benefits of any kind or type to or for Contractor or Contractor's Employees, sub-consultants, or Subcontractors, or the agents, volunteers or representatives of such entities or individuals (collectively, "*Contractor's Related Parties*"). Without limiting the generality of the foregoing sentence, City shall not be obligated to provide to Contractor's Related Parties any local, state, or federal income or other tax contributions; insurance contributions (e.g., FICA); workers' compensation coverage; disability, injury, or health insurance coverage; liability insurance coverage; errors and omissions insurance coverage; vacation pay; sick leave; personal time off; or pension or retirement account contributions (collectively, "*Employee Benefits*"). Instead, Contractor and its Subcontractors shall be solely responsible for all compensation, Employee Benefits and other rights of their respective employees, agents and other related parties asserted to have arisen or accrued as a result of any Services provided under this Agreement, together with all legal costs (including attorney's fees) incurred in defending any resulting conflict or legal action.

Contractor and its Subcontractors shall comply with all laws, rules and regulations applicable to their employees, including, without limitation, federal and state laws governing wages and overtime, equal employment, safety and health, employees' citizenship, withholdings, reports and record keeping. City's only financial obligation is to pay the Total Annual Fees for and fees for any Enhanced Services due from time to time under this Agreement, and City shall not be liable for payment of any salaries, wages, contribution to pension funds, insurance premiums or payments, workers compensation benefits or any other perquisites of employment to any employees, agents, volunteers, representatives or other related parties of Contractor or any Subcontractor, or any other liabilities whatsoever to such persons, unless otherwise specifically provided in this Agreement.

5.3. No City-Provided Insurance Coverage. City will not include Contractor, Contractor's Employees or other of Contractor's Related Parties as an insured under any City insurance policy. City shall not be obligated to secure or provide any insurance coverage of any kind to or for Contractor or Contractor's Employees or Contractor's Related Parties such as, for example, worker's compensation coverage; medical insurance; life insurance; liability insurance; or errors and omissions insurance.

Contractor acknowledges that neither it nor its agents or employees, nor any other of Contractor's Related Parties, are entitled to unemployment insurance benefits unless Contractor or some entity other than City provides such benefits. Contractor further acknowledges that neither it nor its agents or employees, nor any other of Contractor's Related Parties are entitled to worker's compensation benefits. Contractor also acknowledges that it is obligated to pay federal and state income tax on any monies earned or paid pursuant to this Agreement.

5.4. Waiver of Claims for Benefits. To the maximum extent permitted by law, Contractor waives all claims against City for any Employee Benefits for itself and all of Contractor's Related Parties. Contractor shall indemnify, defend and hold City harmless from any award, judgment, fine, damages, costs, fees (including attorneys fees), actions or causes of action based on an assertion that Contractor or any of Contractor's Related Parties were or are City employees due to this Agreement or the Services to be provided hereunder.

5.5. Qualified Employees. All persons delivering Services under this Agreement shall be screened and satisfactorily pass drug testing and criminal history background checks prior to being assigned by Contractor or its Subcontractors to perform any Services under this Agreement.

In this Agreement, to "satisfactorily pass" required (a) drug testing, the person shall meet all applicable legal and industry drug testing standards and otherwise shall exhibit the absence of all illegal drugs and controlled substances as well as the absence of legal drugs or alcohol of sufficient quantities to potentially adversely affect the person's job performance or jeopardize the safety of other employees or the public, or to bring discredit on City; and (b) criminal history background check, the person either shall not have a history of felony or misdemeanor convictions, pleas in abeyance, or the like, or, if one or more such convictions, etc., have occurred, Contractor reasonably determines that the behavior evidenced by such conviction(s), etc., will not affect (i) the person's ability to properly perform job functions; (ii) public health, safety and welfare; or (iii) City's reputation, due to, for example, the nature of the crime, the age

of the person when the crime was committed, the length of time since the conviction, and the nature of the job in question. Notwithstanding the foregoing, however, in no event may Contractor permit any person to perform any Services under this Agreement if the criminal background report indicates a conviction, plea in abeyance, etc. to any felony within the prior ten years.

5.6. Transfer of Employees. City shall notify Contractor if City becomes aware of any problem concerning any employee, agent or representative of Contractor or a Subcontractor performing Services under this Agreement. The notification shall include the known facts concerning the problem, and may include City's request for such person to be transferred out of service to City.

Section 6. Subcontractors. Although Subcontractors may be utilized by Contractor for the performance of certain Services hereunder, Contractor's engagement or use of Subcontractors will not relieve or excuse Contractor from performance of any of Contractor's obligations under this Agreement, and Contractor shall remain solely responsible for ensuring that any Subcontractors engaged to perform Services hereunder shall perform such Services in strict accordance with this Agreement. City shall notify Contractor if City becomes aware of any problem concerning any employee, agent or representative of a Subcontractor performing Services under this Agreement. Such notification shall include the known facts concerning the problem, and may include City's request for such person to be transferred out of service to City.

Section 7. Equipment, Labor, Facilities, Materials and Support.

7.1. Contractor to Furnish. Contractor, at its cost, shall furnish all necessary labor, supervision, equipment (including motor vehicles), facilities (including, without limitation, storage and staging facilities and office space with related office equipment), and such resources, materials (except as expressly provided herein), overhead, administrative and other support as necessary to properly provide the Services hereunder in accordance with the Performance Measurements and the Technical Standards. Contractor shall also provide fleet management, risk management, legal, information management, finance, human resources, and community relations services so as to allow Contractor to provide the Services under this Agreement in a professional and workmanlike manner and in compliance with all applicable laws. Any facility provided under this Agreement shall meet all applicable standards. Any equipment and materials provided under this Agreement shall meet any and all relevant Performance Measurements and otherwise shall be of sufficient quality and quantity to ensure that the Services rendered hereunder are provided at equivalent levels of quality and service as comparable cities in the County.

7.2. Facilities. City will provide for use by Contractor on mutually agreeable terms a portion of City's outside storage yard (the "Yard") within City Limits for Contractor's store of road salt or other ice melt, as selected by City from time to time ("Ice Melt"). With City's consent and upon appropriate arrangements with City, Contractor may store other supplies and equipment contemplated by this Agreement at the Yard. Contractor will equitably participate in the general upkeep of the Yard, based on Contractor's level of use of the Yard. City also may provide, on mutually agreeable terms, space to Contractor in City's offices for a workspace for Contractor's Program Director. Any use of the Yard or workspace in City's offices shall be

subject to a standard form lease agreement between the Parties or another mutually acceptable methodology for compensating City for the use of such facilities.

7.3. Identification of Equipment. All equipment and vehicles regularly used in providing Services hereunder shall contain some form of recognition that the equipment is used in service to City. Contractor shall propose a means by which such recognition shall be accomplished acceptable to the City Manager. Any use of City's logo shall be subject to City's prior written approval and otherwise shall conform to City's ordinances and trademark rights.

7.4. Compatibility of Technology. All computers and software used by Contractor in performance of the Services shall be compatible with software in use by City.

7.5. City May Directly Pay Costs for Certain Materials. City may directly pay to the providers the cost of Ice Melt associated with the performance of the Services hereunder. Ice Melt so obtained directly by City may be stored at the Yard without cost to Contractor. In its discretion, City may choose to augment the list of materials that City may purchase directly if City can achieve material cost savings, with an equitable adjustment of the associated fee hereunder. Any materials paid for by City shall be used only in the provision of Services under this Agreement. Except for storage of Ice Melt at the Yard as provided above, provision of storage facilities, transport and management of such fuels and materials, including distribution and inventory management, shall be considered Services provided by Contractor under this Agreement. The Public Works Director and the Program Director shall agree to a materials management program prior to the Services Commencement Date.

7.6. Insurance. Contractor shall, at its cost, acquire and maintain during the entire Term of this Agreement, including any extensions or renewals, the insurance coverage described in Section 15, below.

7.7. City Equipment. City may make available for lease by Contractor in connection with the Services certain City-owned equipment, such as City's lift truck. Any City-owned equipment so leased to Contractor shall be used only for City purposes in performance of this Agreement, and shall not be used for any other purposes by Contractor. City shall maintain, at its cost, all required insurance for City-owned equipment.

7.8. Lease Obligations. Contractor shall be solely responsible on any lease agreement for any vehicle or other asset leased by Contractor and used in the performance of Services hereunder, and City shall not be included as a party to any such agreement. Contractor shall be solely responsible for maintaining any required insurance or meeting any other obligations under any such agreement for leased assets.

7.9. Equipment Transfer. If City terminates or fails to renew this Agreement so that the Term is less than five years after the Services Commencement Date for any reason other than Contractor's default, Contractor may require City to purchase Contractor's vehicles (the "Vehicles") used for providing the Services on the following terms and conditions:

(a) Notice. Within ten days after the effective date of such termination (i.e.—the date that Contractor ceases performing the Services under this Agreement), Contractor shall give written notice (the "Purchase Notice") to City of the exercise of Contractor's option to

require City to purchase the Vehicles. The Purchase Notice shall specifically list the Vehicles to be purchased, including year, make, model, odometer mileage, condition, VIN, etc., and shall propose a purchase price for each vehicle. City shall then have 30 days to perform due diligence concerning the Vehicles, including the right to inspect and test the Vehicles, whether by City employees or by qualified agents designated by City.

(b) Purchase Price. The purchase price (the “*Purchase Price*”) for the Vehicles shall be their fair market value at the time of sale, as determined by the Parties’ agreement or, failing that, by authoritative sources or experts. The Parties shall reasonably, promptly cooperate with each other concerning the valuation of the Vehicles, and shall equally share the cost of any expert valuation(s) that are performed at the Parties’ joint request.

(c) Closing. The closing of City’s purchase of the Vehicles shall occur on a date reasonably specified by City within 60 days after the Purchase Notice is given to City. At closing, City shall pay the Purchase Price in cash or cash-equivalent, immediately available funds, and Contractor shall convey to City legal title to the Vehicles, free and clear of all liens and encumbrances.

Section 8. Compensation.

8.1. Compensation for Services. During the Initial Period, the Base Services to be provided, and the cost thereof, shall be as shown on Exhibit “E.” Thereafter, the Total Annual Fees for all of the Base Services to be provided by Contractor under this Agreement shall not exceed \$_____ per fiscal year, prorated for any partial year during which this Agreement commences or terminates; provided, however, that as of and after 1 July 2015, such Total Annual Fees shall be increased annually (effective each July 1st) in accordance with any intervening increase in the Consumer Price Index between the effective date of this Agreement and such July 1st.

In determining such annual increase, \$_____ shall be multiplied by a fraction, the numerator of which is the Consumer Price Index as of the June 30th immediately prior to the July 1st adjustment date, and the denominator of which is the Consumer Price Index as of the effective date of this Agreement. If, for example, (a) the Consumer Price Index for the effective date of this Agreement is 100, and (b) the Consumer Price Index for 30 June 2015 is 103, then the CPI-adjusted Total Annual Fees payable to Contractor hereunder for the period of 1 July 2015 through 30 June 2016 would be \$_____ x 103/100 = \$_____. If the Consumer Price Index for the June 30th immediately preceding any July 1st adjustment date is not then available, then the Parties shall use the then most recent Consumer Price Index until the Consumer Price Index for such June 30th becomes available, at which time any under- or over-payment shall be reconciled. The Parties will cooperatively determine the Total Annual Fees due hereunder for the upcoming fiscal year in connection with their preparation of the annual Work Plan.

As used herein, the “*Consumer Price Index*” means the “Consumer Price Index - U.S. City Average for All Items for All Urban Consumers (1982-84 = 100)” as published by the United States Department of Labor, Bureau of Labor Statistics. Should the Bureau of Labor Statistics discontinue the publication of said index, or publish the same less frequently, or alter the same in some other manner, then the Parties shall adopt a substitute index or substitute procedure which reasonably reflects and monitors consumer prices. Further, if the base year “1982-1984 = 100” or

other base year used in computing the Consumer Price Index is changed, the figures used in computing the increase shall be changed accordingly so that all increases in the Consumer Price Index are taken into account in computing the increase notwithstanding any such change in the base year.

The Parties acknowledge there are support and other undefined, unscheduled tasks and other costs required by this Agreement that relate to the Base Services (such as, by example and without limiting this provision, annual budget preparations, Council meetings, report preparations, coordination, community meetings attendance, minor maintenance or emergency callouts), and the Parties agree that adequate compensation for such tasks has been included in the Total Annual Fees to be paid hereunder. Contractor shall perform the Base Services for the allotted Total Annual Fees, which shall constitute full compensation and consideration under this Agreement for the Base Services.

8.2. Compensation for Enhanced Services. When City exercises its option to have Contractor provide any Enhanced Services, City shall pay the amount for such Enhanced Services according to the schedule of costs for such Enhanced Service(s) set forth on Exhibit D, which shall be modified annually in accordance with Subsection 2.7 or as agreed to by the Parties in advance, in writing. Unless otherwise agreed by the Parties, the cost of such Enhanced Services shall be added to the monthly Contractor invoice submitted in the next month following the month in which the Enhanced Services are actually provided and shall be paid pursuant to the payment processing terms set forth in Section 8.4.

8.3. Compensation for Snow Management Services. The Total Annual Fees are full compensation for the Base Services described in Exhibit "A," which includes, without limitation, \$ _____ for _____ CDL Hours for snow management activities annually. Such activities include, without limitation, de-icing, pre-wetting, plowing, minor snow hauling and other miscellaneous winter roadway maintenance and monitoring of conditions on "Priority 1" (arterial) and "Priority 2" (collector) roadways. Each CDL Hour for snow management activities in excess of _____ annually shall be an Enhanced Service as set forth in Exhibit "C" and will be paid on a per CDL Hour basis, invoiced in the month following service delivery to City, at the rate established in Exhibit "C." Similarly (and as explained in Subsection 2.1 above), each CDL Hour for snow management activities that is less than _____ annually shall be credited to City at the rate established in Exhibit "C," and available for application against City's cost of other Services during that fiscal year or carried forward as a credit for the next fiscal year.

8.4. Payment Processing.

(a) Invoices. Total Annual Fees shall be allocated over the number of months of Base Services in the relevant fiscal year (or portion thereof) and invoiced to City in equal installments over the number of months in such period. The cost of Enhanced Services shall be invoiced to City as they are incurred, as provided in Subsection 8.2. Contractor will submit monthly invoices to City's Finance Director on or about the first business day of the month after the month in which the Services were rendered. Invoices shall be in a form and detail reasonably acceptable to City, and shall include an itemized description of the Services performed and any materials or other direct expenses that are eligible for reimbursement. Following receipt of Contractor's invoice, City shall promptly review the invoice.

(b) Remittance. City shall pay Contractor the invoiced amount within 30 days after receipt of Contractor's invoice; provided, however, that City may dispute any charges in an invoice and may request additional information from Contractor substantiating any compensation sought by Contractor before paying the invoice. City may dispute an invoice if, for example, Contractor repeatedly fails to perform the Services to City's reasonable satisfaction; if Contractor's performance of its work hereunder causes loss or damage for which City may be liable; if Contractor fails to pay any Subcontractors that furnish labor, materials or equipment in connection with performance of such services; or if Contractor fails to correct defective work in an expeditious manner.

When additional information is desired by City, City shall advise Contractor in writing, identifying the specific item(s) that are in dispute and giving specific reasons for such requested information. City shall pay for any disputed items within 30 days after the dispute is resolved by the Parties. To the extent possible, undisputed charges within the same invoice as disputed charges shall be timely paid within 30 days after City's receipt of the invoice.

Payment by City shall be deemed made upon hand delivery to Contractor or Contractor's designee; upon deposit of such payment in the U.S. Mail, postage pre-paid and addressed to Contractor; or upon electronic deposit via ACH to Contractor's account.

(c) Late Payment. Subject to City's right to dispute an invoice as described in Subparagraph 8.4(b), if City fails to pay a valid invoice within 60 days from the date of receipt, City shall pay interest thereafter on the outstanding balance at the rate of 12% per annum.

(d) Annual Review. At the end of each of City's fiscal years, the Parties shall perform an annual review of the Services actually delivered and the total costs actually incurred in order to verify compliance with this Agreement.

8.5. Non-reimbursable Costs, Charges, Fees, or Other Expenses. Any fee, cost, charge, or expense incurred by Contractor not otherwise specifically authorized by this Agreement shall be deemed a non-reimbursable cost; shall be borne by Contractor; shall not be billed or invoiced to City; and shall not be paid by City, unless otherwise agreed to by the Parties.

8.6. Increases in Compensation or Reimbursable Expenses. Any increases or modification of compensation or reimbursable expenses shall be subject to City's approval and shall be made only by written amendment of this Agreement executed by both Parties.

8.7. Use of City Facilities. If City provides work space within City's business offices, the Yard or another City location as agreed upon by the Parties for Contractor's use while performing Services for City, the Parties shall agree to and execute a separate standard form lease agreement or other mutually acceptable methodology for compensating City for the use of such facilities.

8.8. Fees. Any and all fees collected by Contractor as part of the provision of Services, including, without limitation, permit fees, shall be City funds and shall be accounted for and delivered to City's Finance Director in accordance with City policies.

Section 9. **Term.**

9.1. *Term.* The initial term of this Agreement (the “*Initial Term*”) shall be effective upon its full execution and delivery (the “*Effective Date*”) and shall terminate at 11:59:59 p.m. on 30 June 2017, or on a prior date of termination as may be permitted by this Agreement; provided, however, that this Agreement is subject to extension as provided in Subsection 9.2. Services to be provided hereunder, except for Start-Up Activities, shall begin at 12:00:01 a.m. on 1 November 2014 (the “*Services Commencement Date*”), conditioned on prior termination of the County Interlocal. Start-Up Activities shall begin on the Effective Date.

9.2. *Options to Renew.* Upon natural expiration of the Initial Term on 30 June 2017, this Agreement shall be deemed automatically renewed for two additional one-year renewal periods (each, a “*Renewal Term*”) (the Initial Term and any Renewal Term(s) are, collectively, the “*Term*”) unless a Party informs the other Party in writing, at least six months prior to expiration of the Initial Term or the first Renewal Term, as applicable, that such Party desires to terminate this Agreement as of the end of the Initial Term or the first Renewal Term, as applicable.

9.3. *Continuing Services Required.* Contractor shall perform the Services in accordance with this Agreement commencing on the Services Commencement Date for the Term or until such Services are terminated in accordance with this Agreement. Contractor shall not temporarily delay, postpone, or suspend the performance of the Services without the prior written consent of the Council or the City Manager, unless otherwise allowed by this Agreement.

Section 10. **Default and Termination.**

10.1. *Termination Without Cause.* Each Party may terminate this Agreement without cause as provided in this Subsection 10.1 and without any obligation to comply with Section 20, as follows:

(a) *By City.* City may terminate this Agreement without cause or for City’s convenience (“*without cause*”) at any time after 30 June 2014 upon at least one year’s prior written notice to Contractor. City also may effectively terminate this Agreement without cause by notifying Contractor at least six months before expiration of the Initial Term or the first Renewal Term, as applicable, of City’s refusal to extend the Term for a Renewal Term, as provided in Subsection 9.2, above. Notwithstanding anything in this Agreement to the contrary, City may also terminate this Agreement with no advance notice if (i) a Bankruptcy Act (defined below) occurs with respect to Contractor; or (ii) any transfer of a controlling interest in Contractor (meaning over a 50% members interest, either singly or cumulatively in a series of related transactions) to any individual or entity that is not a member of Contractor (a “*Current Member*”) as of the Effective Date, any transfer of a controlling interest in any Current Member, or any other reorganization or change of controlling ownership of Contractor such that the Current Members no longer control Contractor. Contractor promptly shall notify the City Manager in writing if such a change in ownership or control occurs at any time during the Term.

Notwithstanding the foregoing, however, City acknowledges that a controlling interest in Contractor currently is owned by an equity investment firm (the “*Current Owner*”) which may

elect to sell and convey most or all of such controlling interest to another equity investment firm during the term of this Agreement. City hereby consents to such transfer so long as it does not result in any material changes to the day-to-day management and operations of Contractor.

(b) By Contractor. Contractor may terminate this Agreement without cause at any time after 30 June 2014 upon at least one year's prior written notice to City. Contractor also may effectively terminate this Agreement without cause by notifying City at least six months before expiration of the Initial Term or the first Renewal Term, as applicable, of Contractor's refusal to extend the Term for a Renewal Term, as provided in Subsection 9.2, above.

10.2. Events of Default. An event of default ("*Default*") means a material breach of this Agreement. Without limiting the generality of the foregoing and in addition to those instances referred to as a breach, a Default shall include the following:

(a) Contractor being adjudged as bankrupt, or Contractor at its own instance or at the instance of a third party or creditor making a general assignment for the benefit of their creditors, appointing a receiver on account of their insolvency, filing a petition to take advantage of any debtor's act, or failing to achieve dismissal of an involuntary bankruptcy filing against Contractor within 60 days after filing (collectively, a "*Bankruptcy Act*"); or

(b) Contractor not performing Services in compliance with the Performance Measurements or repeatedly failing to comply with the Technical Standards; or

(c) Contractor refusing or failing, except in the case for which an extension of time is provided, to supply properly skilled personnel to perform the Services; or

(d) Contractor failing to obtain the approval of City where and as required by this Agreement; or

(e) Contractor refusing or failing, except in the case for which an extension of time is provided, to provide the Service; or

(f) City defaulting in its duty: (i) to pay any amount required to be paid to Contractor on the due date for such payment; or (ii) to perform any other material obligation under this Agreement (unless such Default is excused by any Force Majeure and to the extent provided herein); or

(g) Either Party making a representation or warranty hereunder or herein that was false or inaccurate in any material respect when made, and which materially and adversely affects the legality of this Agreement or the ability of either Party to carry out its obligations hereunder.

10.4. Termination for Failure to Cure an Event of Default. In the event of a Default, this Agreement may be terminated by the aggrieved party only after following the dispute resolution procedure set forth in Section 20, below, unless this Agreement otherwise provides that this Agreement is immediately terminable without compliance with Section 20. Following that dispute resolution procedure, if the aggrieved party finds that a Default continues

to exist, the aggrieved party may issue a notice of termination (a “*Termination Notice*”) specifying an effective date for termination of this Agreement.

10.5. *Final Invoice*. Upon the effective date of a termination following a Termination Notice, Contractor shall prepare a final accounting and final invoice (“*Final Invoice*”) of charges for all performed but unpaid Services, allowable charges under this Agreement and authorized reimbursable expenses. The Final Invoice shall be delivered to City within 45 calendar days after the date of termination. Thereafter, no other invoice, bill, or other form of statement of charges owing to Contractor shall be submitted to or accepted by City. The Final Invoice shall be paid in conformity with the times allowed for paying monthly invoices under this Agreement minus any damages assessed pursuant to Subsection 10.6. If payment has been made for Services not completed, Contractor shall return these sums to City within ten business days after receipt of notice that those sums are due.

10.6. *Default Liability*. Any Party in Default shall be liable for all damages resulting from the Default, subject to the results of any dispute resolution procedure required by Section 20, below. The Party assessing such damages shall itemize them on the Final Invoice or with the final payment.

10.7. *No Limitation on Actions*. Subject to any dispute resolution procedure required under Section 20, nothing contained herein shall prevent, preclude, or limit any claim or action for Default or breach of contract resulting from non-performance by a Party. Either Party may take advantage of each and every remedy specifically existing at law or in equity. Each and every remedy shall be in addition to every other remedy specifically given or otherwise existing and may be exercised from time to time as often and in such order as may be deemed expedient by the aggrieved Party. The exercise or the beginning of the exercise of one remedy shall not be deemed to be a waiver of the right to exercise any other remedy. The Parties’ rights and remedies as set forth in this Agreement are not exclusive, but are in addition to any other rights and remedies available to either Party in law or in equity.

Section 11. **Transition Upon Termination**.

11.1. *Transition Upon Termination*. Upon or prior to expiration of the Term, City shall begin transition efforts and Contractor shall fully assist such transition. The Parties shall cooperate in good faith to effectuate a smooth and harmonious transition of performance of the Services from Contractor to City or to any other person or entity City may designate, and to assure that the quality and delivery of Services does not diminish during such transition period.

11.2. *Extension of Services*. Notwithstanding anything in this Agreement to the contrary, upon expiration of the Term or earlier termination of this Agreement, and provided that City is not then in Default and is unable to provide or procure the same level of Base Services at the time of such expiration or termination, then upon written notice to Contractor (given prior to the actual effective date of such termination) this Agreement may be extended by City for up to an additional six months to provide time for City to undertake the Base Services itself or to find another qualified provider. The remuneration paid to Contractor during such extension shall be a pro-rated portion of the then Total Annual Fees amount, such that Contractor will receive the same compensation for performing the Base Services during such extension period as Contractor would have received if this Agreement had not so expired or terminated.

11.3. *Delivery of Records.* During any transition period under this Section 11, Contractor shall timely share with City and deliver to City all records in Contractor's possession (or otherwise available to Contractor without material effort or cost) concerning the Services that are not "Data" under Subsection 17.1.

Section 12. **Emergencies.**

12.1. *Availability of Certified Personnel.* As needed to maintain City's National Incident Management System ("NIMS") certification, Contractor shall maintain on staff an adequate number of NIMS-certified personnel to immediately respond to City's needs in the event of a declared emergency or disaster. Contractor shall provide to City the names and contact information for such personnel, including home phone number, mobile phone number, email address and home address, and shall provide updated lists to City promptly upon any changes to such personnel or their contact information.

12.2. *Emergency Reimbursement Funds.* In the event of a declared emergency or disaster for which reimbursement funds are made available by a third party funding source, Contractor will be entitled to reimbursement for all work performed and/or material losses incurred on a pro rata basis with City, determined by the proportion for which the reimbursement was for Services rendered by Contractor in remedying or responding to such emergency or disaster over the total reimbursement amount received, so that City receives its pro rata share of such reimbursement for City losses or materials expenses paid as a result of the disaster or emergency. Any reimbursement provided for administrative costs directly related to any declared emergency or disaster shall be proportionally shared between the Parties. Contractor shall not make claims for extra costs associated with responding to any such disaster or emergency beyond the reimbursement set forth in this Section.

Section 13. **Audit and Inspection Rights.**

13.1. *Audits.* For three years following the date of final performance of Services by Contractor under this Agreement, City may audit, or cause to be audited, Contractor's books and records related to Contractor's performance under this Agreement, excluding all financial records unless related to direct cost reimbursable expenses or other matters contemplated herein, including buyout provisions, unless a court of competent jurisdiction orders disclosure of such information. Contractor shall maintain all such books and records at its principal place of business for a period of at least 37 months after final payment is made under this Agreement, and shall make all such books and records available for audit in Salt Lake County, Utah promptly upon City's written request. If Contractor is required to file an annual 10-K report with the U.S. Securities and Exchange Commission, then Contractor will provide a copy of each such report to City as soon as it becomes available.

13.2. *Inspection of Facilities and Materials.* At reasonable times and upon reasonable notice during the Term, City may inspect Contractor's facilities and materials stored therein, and perform such inspections and process reviews, and sample such materials, as City deems reasonably necessary, to: (a) determine whether the Services required to be provided under this Agreement conform to the terms of this Agreement; (b) determine whether the materials to be provided hereunder meet the quality standards required hereunder; (c) verify

inventory; (d) balance load sheets; and/or (e) ensure that materials purchased by City are used only for Services under this Agreement. Contractor promptly shall make available to City all reasonable facilities and assistance to facilitate the performance of inspections by City or its representatives.

Section 14. **Indemnification.**

14.1. *Definitions.* For purposes of this Section 14, an “affiliate” of Contractor shall mean and include Contractor’s officers, employees, agents, representatives and Subcontractors, and an “affiliate” of City shall mean and include City’s elected officials, officers, employees and agents.

14.2. *Contractor Indemnification.* Contractor shall indemnify, defend and hold harmless City and its affiliates from and against any and all liability, claims, demands, actions, causes of action, damages, adjudications, awards, judgments, costs and fees (including attorneys’ fees and expenses) of whatsoever kind or nature (a “Claim”) arising out of or resulting from, or alleged to have arisen or resulted from, any errors, omissions, willful misconduct or negligent acts of Contractor or its affiliates in providing the Services contemplated by this Agreement. Contractor shall investigate, handle, respond to, and defend against any such Claim and shall bear all other costs and expenses related thereto, including judgments, court costs and attorneys’ fees, to the extent that Contractor is deemed liable under this Agreement. Contractor’s indemnification obligations hereunder shall not apply to the extent any damages have been caused by the act, omission, or other fault of City or its affiliates, nor shall such obligations apply to any claim contesting the validity or constitutionality of City’s ordinances or resolutions relating to the Services contemplated by this Agreement.

14.3. *City Defense.* City shall defend against any and all liability, claims, demands, actions, causes of action and, adjudications and judgments (including attorneys’ fees and expenses) of whatsoever kind or nature arising out of or resulting from, or alleged to arise out of or result from, (a) an invalid or unconstitutional ordinance or resolution, or (b) any errors, omissions, willful misconduct or negligent acts of City, its affiliates, or its other contractors or agents providing services similar to the Services contemplated by this Agreement, or (c) the ownership of any City asset upon which Services are provided under the Agreement if the liability, claim, judgment or demand relates to such ownership and not to the provision of Services hereunder.

14.4. *Special Damages.* In disputes between City (or its affiliates) and Contractor (or its affiliates), in no event shall either Party or its affiliates be liable to the other Party or its affiliates for any special, indirect or consequential damages, whether such liability arises in breach of contract or warranty, tort (including negligence), strict or statutory liability, or any other cause of action: provided, however, such limitation does not include any liability for which Contractor is obligated to indemnify City based upon special, indirect or consequential damages suffered by any third parties.

14.5. *Notice of Third Party Claims.* If either Party receives any form of notice that a third party asserts against City (or its City affiliates) or Contractor (or its affiliates) any claim, liability, suit, action, damage, cost, loss or expense for personal injury, bodily injury, sickness, diseases or death, or damage or destruction of tangible property, arising out of the

performance of the Services under this Agreement (collectively, a “Third Party Claim”), the Party receiving notice of such Third Party Claim shall immediately notify the other Party in writing of such Third Party Claim and transmit any written documents received by such Party to the other Party.

14.6. Limitations. Nothing in this Section 14 or elsewhere in this Agreement shall:

(a) Limit or prevent City or Contractor from determining positions and actions relative to settlement or defense on any matter for which City or Contractor are responsible;

(b) Limit or prevent either Party from joining the other Party or any affiliate of a Party in any claim, suit, action, or proceeding involving a Third Party Claim through interpleading, third-party claim, cross-claim, or otherwise limit or prevent a Party from voluntarily joining any claim, suit, action, or proceeding through intervening or as may otherwise be permitted by law or rule; or

(c) Constitute a waiver of any defenses or limits of liability available to City under the Governmental Immunity Act of Utah, UTAH CODE ANN. §63G-7-101 *et seq* (the “Immunity Act”). In that regard, the Parties acknowledge that City is responsible only for its own wrongful or negligent acts, and that City’s liability may be otherwise limited as provided in the Immunity Act.

Section 15. Insurance.

15.1. Insurance Generally. Contractor shall obtain and continuously maintain in effect during the entire Term of this Agreement insurance of the kinds and in the minimum amounts specified as follows:

(a) Workers Compensation. Worker’s compensation insurance in the minimum amount required by applicable law for all employees and other persons as may be required by law. The policy shall require the insurer to waive all rights of subrogation against City and its officers, officials, employees, agents and volunteers from losses arising from work performed by the contracting party for City.

(b) Comprehensive General Liability. Comprehensive general liability insurance with minimum combined single limits of Five Million Dollars (\$5,000,000) per occurrence and in the aggregate. Broad form commercial general liability coverage (ISO 1993 or better) is required. The policy shall be applicable to all premises and all operations of Contractor and all levels of its Subcontractors, and shall include, without limitation, coverage for bodily injury/death (including coverage for contractual and employee acts), property damage (including completed operations), blanket contractual, independent contractors (including the Subcontractors), products and completed operations. The policy also shall contain a severability of interests provision. Coverage shall be provided on an “occurrence” basis as opposed to a “claims made” basis. Such insurance shall be endorsed to name City and its elected officials, officers, employees and agents as additional insureds.

(c) Comprehensive Automobile Liability. Comprehensive automobile liability insurance with minimum combined single limits for bodily injury and property damage of not less than Five Million Dollars (\$5,000,000) per occurrence with respect to each of Contractor's owned, hired and non-owned vehicles assigned to or used in performance of the Services. The policy shall contain a severability of interests provision. Such insurance coverage (i) must extend to all levels of Subcontractors; (ii) must include all automotive equipment used in the performance of this Agreement, both on and off any work site, and (iii) shall include non-ownership and hired cars (vehicles and equipment) coverage. Such insurance shall be endorsed to name City and its elected officials, officers, employees and agents as additional insureds.

(d) Professional Liability. Professional liability (errors and omissions) insurance with a minimum coverage limit of Three Million Dollars (\$3,000,000) per claim and annual aggregate. Such insurance coverage shall be obtained and maintained during the entire Term and for one year following completion of all Services under this Agreement.

(e) Excess Liability. Excess liability insurance with limits of Ten Million Dollars (\$10,000,000).

15.2. Requirements of Insurance.

(a) Status of Insurer. Insurance shall be procured and maintained with insurers licensed in the state of Utah with an A- or better rating as determined by Best's Key Rating Guide. All insurance shall be continuously maintained to cover all liability, claims, demands, and other obligations assumed by Contractor.

(b) Primary Coverage. All policies of insurance shall be primary insurance, and any insurance carried by City or its officers, employees or agents shall be excess and not contributory insurance to that provided by Contractor. Contractor shall not be an insured party under any City-obtained insurance policy or coverage. By naming City and its affiliates as an additional insureds on Contractor's insurance policies, City is only securing protection from liabilities arising out of Contractor's negligence as per the applicable policy.

(c) Deductibles. Any deductibles (5% limit), self-insured programs or retentions must be declared in writing to, and specifically approved in writing by, the Council in advance. Contractor shall be solely responsible for any deductible losses.

(d) Completed Operations. No policy of insurance shall contain any exclusion for bodily injury or property damage arising from completed operations.

(e) Notice. Every policy of insurance shall provide that City will receive written notice by certified U.S. mail, return receipt requested, at least 30 calendar days prior to any cancellation, termination, or a material change in such policy.

(f) Proof. Proof of required insurance shall be maintained in all equipment and motor vehicles insured in accordance with the provisions of this Agreement.

(g) No Special Limitations. The coverage shall contain no special limitations on the scope of protection afforded to City and its officers, officials, employees or

agents, and any failure to comply with reporting provisions of the policies shall not affect coverage to be provided to City and such affiliates.

15.3 Failure to Obtain or Maintain Insurance. Contractor's failure to obtain and continuously maintain policies of insurance in accordance with this Section 15 shall not limit, prevent, preclude, excuse, or modify any liability, claims, demands, or other obligations of Contractor arising from performance or non-performance of this Agreement. Notwithstanding anything in this Agreement to the contrary, Contractor's failure to obtain and to continuously maintain policies providing the required coverage, conditions, restrictions, notices, and minimum limits shall constitute a material breach of this Agreement upon which City may immediately terminate this Agreement without any requirement to comply with Section 20.

15.4 Insurance Certificates. Prior to commencement of the Services, and promptly following City's written request from time to time during the Term, Contractor shall submit to City certificates of insurance and with original endorsements effecting coverage required by this Section 15. Insurance limits, term of insurance, insured parties, and other information sufficient to demonstrate conformance with this Section 15 shall be clearly specified on each certificate or endorsement. The certificates and endorsements shall be signed by a person authorized by that insurer to bind coverage on its behalf.

15.5. Compliance with Insurance Requirements. Contractor warrants and certifies to City that none of Contractor's obligations hereunder violate or contravene any policy of insurance or bond required under this Agreement or pursuant to Utah law.

Section 16. **Records and Ownership of Documents.**

16.1. Retention and GRAMA Compliance. All records of Contractor related to the provision of Services hereunder, including public records as defined in the Utah Government Records Access and Management Act, UTAH CODE ANN. §63G-2-101 *et seq.* ("GRAMA"), and records produced or maintained in accordance with this Agreement, are to be retained and stored in accordance with City's records retention and disposal policies. In no event may such records be destroyed or disposed of by Contractor during the term or within six years thereafter without City's prior written consent. Those records which constitute "public records" under GRAMA are to be maintained at City's offices or accessible and opened for public inspection in accordance with GRAMA and City policies. Contractor shall allow access by City and the public to all documents subject to disclosure under applicable law. Notwithstanding anything in this Agreement to the contrary, Contractor's willful failure or refusal to comply with the provisions of this Section 16 may, at City's option, result in the immediate termination of this Agreement by City without any obligation to comply with Section 20. For purposes of GRAMA, City's Recorder is the custodian of all records produced or created as a result of this Agreement. Nothing contained herein shall limit Contractor's right to defend against disclosure of records alleged to be public.

16.2 Ownership. As provided in Section 17, below, any work product, materials and documents produced by Contractor pursuant to this Agreement shall become City's property upon its delivery to City and shall not be subject to any copyright or confidentiality claim unless authorized in writing by City. Other materials, methodology and proprietary work used or provided by Contractor to City not specifically created and delivered pursuant to the Services

under this Agreement may be protected by a copyright held by Contractor, in which event Contractor reserves all rights accruing such copyright. City shall not reproduce, sell or otherwise make copies of any copyrighted material, subject to the following exceptions: (a) for exclusive use internally by City officers, staff and/or employees; (b) pursuant to a valid request under GRAMA; or (c) pursuant to court order or any applicable law, rule or regulation. Contractor waives any right to prevent its name from being disclosed or used by City in connection with the Services or this Agreement.

Section 17. **Intellectual Property Rights; Confidentiality.**

17.1 *Definitions.* In this Agreement, the following terms shall be defined as follows:

(a) “*Data*” means and includes commercial proprietary written reports, studies, drawings, trademarks, specifications, designs, models, processes, systems, photographs, computer CADD discs, reports, surveys, software, or other graphic, electronic, chemical or mechanical representations of Contractor. “*Data*” does not include public records information compiled on City’s behalf for the purpose of delivery of Services under this Agreement; and

(b) “*Commercial proprietary*” shall not include any written reports, studies, drawings, trademarks, specifications, designs, models, processes, systems, photographs, computer CADD discs, reports, surveys, software, or other graphic, electronic, chemical or mechanical representations of Contractor that have been or are required to be provided to City pursuant to this Agreement.

17.2 *Rights in Data.* All Data shall be the property of Contractor. The licensed software code copyrights and licensed software documentation are licensed to Contractor for use by City for the Term of this Agreement. No title, ownership or any intellectual property or proprietary rights to the Data are transferred to City under this Agreement. City shall, however, have the full right to use the Data for any official purpose required under Utah law, and such use shall be without any additional payment to or approval by Contractor. The purpose of the Data under this Agreement shall be limited to provision of the Services. Contractor shall not be responsible for use of the Data for any other purpose, and City or any third party users do so at their own risk.

17.3 *Copyrights.* No Data developed or prepared in whole or in part under this Agreement shall be subject to copyright protection owned by a third party in the United States of America or other country, except to the extent that such copyright protection is available for City. Contractor shall not include in the Data any copyrighted matter owned by a third party unless Contractor obtains the written approval of the City Manager and provides the City Manager with written permission of the copyright owner for Contractor to use such copyrighted matter in the manner provided in this Agreement.

17.4 *Right to Data Upon Early Termination.* If this Agreement is terminated for any reason prior to completion of the Term, Contractor shall provide to City the right of use for any Data prepared hereunder which is reasonably required for City to sustain operation, conditioned only upon City’s payment of a reasonable fee for such use. City’s right to continue to use the Data shall not be transferable to third parties without Contractor’s written approval.

17.5 Non-Disclosure of Data. City will treat Data received under or through this Agreement in strictest confidence and will not disclose it to third parties except where such information: (a) was part of the public domain when received, or becomes a part of the public domain through no action or lack of action by City; (b) prior to disclosure was already in City's possession and not subject to an obligation of confidence imposed in another relationship; or (c) subsequent to disclosure is obtained from a third party who is lawfully in possession of the Data and not subject to a contractual relationship with Contractor concerning the Data. Within six months after the Effective Date, City will work with Contractor to develop and implement a policy and procedure designed to protect confidentiality of the Data. City agrees that access to and dissemination of Data shall be limited to its employees having a need to know, and City will prohibit any City employee receiving Data from its unauthorized publication and disclosure. City shall maintain in effect appropriate internal policies and procedures which in its judgment are reasonably sufficient to protect the confidential nature of the Data.

Section 18. **Conflicts of Interest**

18.1. Refraining from Creating Conflicts. Contractor shall not knowingly provide services to other persons or entities that would create a conflict of interest for Contractor with regard to providing the Services pursuant to this Agreement. If Contractor becomes aware of a potential, perceived or real conflict of interest under this Section 20, then Contractor shall immediately inform City of such conflict. If the first notification to City is verbal, then Contractor shall provide written notification within one day after the verbal notification. Such conflict notification shall include Contractor's recommended approach to mitigating the conflict (the "*Proposed Resolution*"). If City concurs with the Proposed Resolution, then Contractor immediately shall implement it and thereafter shall regularly update City regarding the status of the Proposed Resolution. If City determines that the Proposed Resolution is inadequate, then City may suggest modifications, and the Parties shall attempt to work out a mutually-agreeable resolution to the conflict. City shall not approve a resolution that permits a Designated Employee to be involved in a third party project or contract which could give rise to a potential or actual conflict with City. If the Parties are unable to reach agreement as to resolution of the conflict, then the matter shall proceed to resolution pursuant to Section 20.

18.2. Ethics Act. Contractor shall not offer or provide anything of benefit to any City official or employee, or otherwise act in a manner, that would violate the Municipal Officers and Employees Ethics Act, UTAH CODE ANN. §10-3-1301 *et seq.*, or any City-adopted code of conduct or ethical principles.

18.3. Participation in Other City RFPs. Nothing in this Agreement shall prohibit Contractor from being eligible to participate in any additional requests for proposals, statements of qualifications, or any other bids City may request. If Contractor is awarded any of these additional bids, Contractor shall enter into a separate agreement for those services to be provided.

18.4. Costs for Conflict Resolutions. If a conflict or ethical violation under this Section 18 occurs due to actions or omissions of Contractor, then any reasonable costs incurred by City related to resolution of any conflict or other matter under this Section 18 shall be

reimbursed to City by Contractor or off-set against compensation otherwise owing to Contractor under this Agreement.

Section 19. **Mutual Non-Solicitation.**

19.1. *By Contractor.* Unless mutually agreed, during the Term and for a period of one year following the termination or non-renewal of this Agreement, Contractor shall not either directly or indirectly solicit, induce, recruit or encourage any of City's employees to leave their employment, or take away such employees, or attempt to solicit, induce, recruit, encourage, take away or hire employees of City, either for Contractor or any other person or entity. The foregoing shall not, however, prohibit the hiring of any City employee if such hire was not induced; the employee independently and without notice of opportunity by Contractor applied for the position; the position was open to the public for application; and the employee was subject to a legitimate competitive process.

19.2. *By City.* Unless mutually agreed, during the Term and for a period of one year following the termination or non-renewal of this Agreement, City shall not either directly or indirectly solicit, induce, recruit or encourage any of Contractor's employees to leave their employment, or take away such employees, or attempt to solicit, induce, recruit, encourage, take away or hire employees of Contractor, either for City or any other person or entity. The foregoing shall not, however, prohibit the hiring of any Contractor employee if such hire was not induced; the employee independently and without notice of opportunity by City applied for the position; the position was open to the public for application; and the employee was subject to a legitimate competitive process.

Section 20. **Disputes.**

20.1. *Key Personnel Resolution Meeting.* If a Party believes there is a controversy or dispute regarding this Agreement or any of its terms, conditions or obligations, the Program Director and Public Works Director shall within a reasonable time meet and attempt to resolve such dispute within the timeframe requested by the aggrieved Party.

20.2. *Optional Remedial Actions for Non-Performance by Contractor.* If City is the aggrieved Party, then, following the Key Personnel Resolution Meeting under Subsection 20.1, City may, at its sole option upon written notice to Contractor, elect to pursue the following remedial actions under this Subsection 20.2 in lieu of continuing to pursue the dispute resolution procedures outlined in Subsections 20.3, *et seq.*, of this Section 20:

(a) Withhold Payment. Withhold payment to Contractor until the necessary Services or corrections in performance are satisfactorily completed; and/or

(b) Reduce Payment. Deny payment for Services which have not been satisfactorily performed, and which, due to circumstances caused by Contractor, cannot be performed, or if performed would be of no value to City; and/or

(c) Penalty for Untimely Performance in Emergency Situations. If Contractor fails to timely respond or perform any Services in emergency situations under Subsections 7.11 ("Traffic Engineering Services Emergency Response") or 8.10 ("Field Services Emergency Response") of Exhibit "A," which require prompt response within a set time or when

and as requested by the City Manager, Public Works Director, City's police department, fire official with jurisdiction within City, or other emergency authority exercising jurisdiction, Contractor may be assessed the amount of \$500 per hour for each hour of delay beyond the required response time and Contractor shall be assessed all costs incurred by City as a result of such delay, including, without limitation, the cost of hiring one or more substitute contractors to obtain alternative resources City reasonably deems necessary to stabilize the situation or remove any threat to public health, safety and welfare; and/or

(d) Penalty for Other Untimely Performance. If Contractor fails to perform in accordance with any Performance Measurement or Technical Standard, then the following penalties may be imposed as a set-off against compensation otherwise owing by City to Contractor:

(i) For Services other than those identified in Subection 20.2(c) that otherwise are identified as Priority 1 in the then-effective Technical Standards, Contractor may be assessed the amount of \$500 for each Priority 1 work request whose response time is delayed beyond the required reasonable response time if Contractor has failed to resolve such requests within 24 hours at least 90% of the time, as measured annually (with average monthly deficiencies off-set by months in which the 90% average is exceeded);

(ii) For Services identified as Priority 2 in the then-effective Technical Standards, Contractor may be assessed the amount of \$250 for each Priority 2 work request whose response time is delayed beyond the required reasonable response time if Contractor has failed to resolve such requests within three business days at least 90% of the time, as measured annually (with average monthly deficiencies off-set by months in which the 90% average is exceeded);

(iii) For Services identified as Priority 3 in the then-effective Technical Standards, Contractor may be assessed the amount of \$100 for each Priority 3 work request whose response time is delayed beyond the required reasonable response time if Contractor has failed to resolve such requests within no more than ten business days at least 90% of the time, as measured annually (with average monthly deficiencies off-set by months in which the 90% average is exceeded);

20.3. Upper Management Resolution Meeting. If (a) City is the aggrieved Party, and fails to pursue its optional remedial actions under Subsection 20.2, and remains aggrieved following the Key Personnel Resolution Meeting, or (b) Contractor is the aggrieved Party and remains aggrieved following the Key Personnel Resolution Meeting, then the aggrieved Party may request a meeting between the City Manager and the president of Contractor, who shall jointly convene to discuss such dispute and shall make a good faith effort to fully resolve any issues within a reasonable period. For purpose of this subsection, "*reasonable period*" shall normally be 20 days except when the failure to perform Services affects the public's ability to travel the streets or affects the public health, safety or welfare, in which case a reasonable period may be less than 20 days.

20.4. Mediation. If resolution is not reached as provided in Subsection 20.3, then the Parties shall refer the matter to non-binding mediation. The mediator shall be selected by joint agreement of the Parties within 30 calendar days from the date of the Upper Management

Resolution Meeting, and such mediation shall be scheduled to occur as soon as reasonably possible, depending on the nature of the dispute. Each Party shall pay 50% of the third party costs of mediation.

20.5. Litigation. If the dispute is not resolved as provided in Subsection 20.4, then either Party may (a) declare a Default and terminate this Agreement as provided in Section 10 with no further need to comply with this Section 20, and/or (b) file for litigation under Subsection 21.7.

20.5. Continuation of Services. Unless otherwise agreed in writing, Contractor shall continue to provide the Services during the pendency of any dispute, and if Contractor continues to so perform, then City shall continue to make payments in accordance with this Agreement.

20.6. Emergency Action Not a Waiver. Under certain emergency circumstances related to the Services hereunder, either Party may from time to time take immediate action to remedy a problem. Such action shall not be deemed a waiver of such Party's right to seek reimbursement or exercise any other remedy available to such Party hereunder.

Section 21. Miscellaneous Provisions

21.1. No Waiver of Rights. A waiver by either Party of the breach of any term or provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach by either Party. City's approval or acceptance of, or payment for, Services shall not be construed to operate as a waiver of any rights or benefits to be provided under this Agreement. No covenant or term of this Agreement shall be deemed to be waived by City except in writing signed by or on behalf of the Council, and any written waiver of a right shall not be construed to be a waiver of any other right or to be a continuing waiver unless specifically stated.

21.2. No Waiver of Governmental Immunity. Nothing in this Agreement shall be construed to waive, limit, or otherwise modify any governmental immunity that may be available by law to City, its officials, employees, contractors, or agents, or any other person acting on behalf of City, under the Immunity Act or otherwise.

21.3. Affirmative Action. Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. Contractor shall take affirmative action to ensure applicants are employed, and employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, without limitation, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

21.4. Binding Effect. This Agreement is binding upon the Parties and their respective successors, heirs, legal representatives, and permitted assigns; provided that this Section does not authorize assignment.

21.5. No Third Party Beneficiaries. Nothing contained in this Agreement is intended to or shall create a contractual relationship with, a cause of action in favor of, or a claim for relief for, any third party, including any agent, sub-consultant or Subcontractor of Contractor.

Absolutely no third party beneficiaries are intended by this Agreement. Any third-party receiving a benefit from this Agreement is an incidental and unintended beneficiary only.

21.6. *Non-Funding.* The Parties acknowledge that although City currently anticipates that this Agreement will remain in effect until at least 30 June 2017, funds are not presently available for performance of this Agreement by City beyond 30 June 2014. Consequently, City's obligation for performance of this Agreement beyond that date is contingent upon renewal of this Agreement as provided above and funds being appropriated for payments due under this Agreement. If no funds or insufficient funds are appropriated and budgeted in any fiscal year, or if there is a reduction in appropriations of City, due to insufficient revenue, resulting in insufficient funds for payments due or about to become due under this Agreement, then this Agreement shall create no obligation on City as to such fiscal year (or any succeeding fiscal year), but instead shall terminate and become null and void on the first day of the fiscal year for which funds were not budgeted and appropriated, or, in the event of a reduction in appropriations, on the last day before the reduction becomes effective (except as to those portions of payments herein then agreed upon for which funds are appropriated and budgeted). Said termination shall not be construed as a breach of or default under this Agreement and said termination shall be without penalty, additional payments, or other charges of any kind whatsoever to City, and no right of action for damages or other relief shall accrue to the benefit of Contractor or its successors or assigns as to this Agreement, or any portion thereof, which may so terminate and become null and void.

21.7. *Governing Law, Venue and Enforcement.* This Agreement shall be governed by and interpreted according to the law of the state of Utah. Venue for any action arising under this Agreement shall be in the Third District Court of Salt Lake County, Utah. To reduce the cost of dispute resolution and to expedite the resolution of disputes under this Agreement, **the Parties hereby waive any and all right either may have to request a jury trial in any civil action relating primarily to the interpretation or enforcement of this Agreement.**

21.8. *Survival of Terms and Conditions.* All terms and conditions of the Agreement that require continued performance, compliance, or effect beyond the termination date of the Agreement shall survive such termination date and shall be enforceable in the event of a failure to perform or comply.

21.9. *Assignment and Release.* All or part of the rights, duties, obligations, responsibilities, or benefits set forth in this Agreement shall not be assigned by Contractor without the Council's prior express written consent. Any written assignment shall expressly refer to this Agreement, specify the particular rights, duties, obligations, responsibilities, or benefits so assigned, and shall not be effective unless approved by resolution or motion of the Council. No assignment shall release Contractor from performance of any duty, obligation, or responsibility unless such release is clearly expressed in such written assignment document.

21.10. *Captions.* The captions of the Sections and subsections are set forth only for the convenience and reference of the Parties and are not intended in any way to define, limit or describe the scope or intent of this Agreement.

21.11. *Integration*. This Agreement represents the entire and integrated agreement between City and Contractor and supersedes all prior negotiations, representations, or agreements, either written or oral between the Parties.

21.12. *Amendment*. Any amendments to this Agreement (including any exhibits hereto) must be in writing and be signed by both City and Contractor.

21.13. *Severability*. Invalidation of any part of this Agreement (including any paragraph, sentence, clause, phrase, or word herein) or the application thereof in any given circumstance shall not affect the validity of any other part of this Agreement.

21.14. *Exhibits*. Unless otherwise stated in this Agreement, exhibits, applications or documents referenced in this Agreement are incorporated into this Agreement for all purposes. In the event of a conflict between any incorporated exhibits and this Agreement, the provisions of this Agreement shall govern and control.

21.15. *Employment of or Contracts with Illegal Aliens*. Contractor shall not knowingly employ or contract with an illegal alien to perform work under this Agreement. Contractor shall not contract with a Subcontractor that fails to certify that the Subcontractor does not knowingly employ or contract with any illegal aliens. Contractor certifies that it has verified, or attempted to verify, through participation in the basic pilot program that Contractor does not employ any illegal aliens. If Contractor is not accepted into the basic pilot program, Contractor shall apply to participate in the basic pilot program every three months until Contractor is accepted, or this Agreement had been completed, whichever is earlier. Contractor is prohibited from using the basic pilot program procedures to undertake pre-employment screening of job applicants while this Agreement is being performed. If Contractor obtains actual knowledge that a Subcontractor performing work under this Agreement knowingly employs or contracts with an illegal alien, Contractor shall be required to notify the Subcontractor and City within three business days that Contractor has actual knowledge that such Subcontractor is employing or contracting with an illegal alien. Contractor shall terminate the subcontract if the Subcontractor does not stop employing or contracting with the illegal alien within three business days of receiving the notice regarding Contractor's actual knowledge. Contractor shall not terminate the subcontract if, during such three business days, the Subcontractor provides information to establish that the Subcontractor has not knowingly employed or contracted with an illegal alien. Contractor is required to comply with any reasonable request made by the Department of Labor and Employment made in the course of any investigation undertaken to determine compliance with this provision and applicable federal and state law. Notwithstanding anything in this Agreement to the contrary, if Contractor violates this provision, City may terminate this Agreement, and Contractor shall be liable for actual and/or consequential damages incurred by City notwithstanding any limitation on such damages provided by this Agreement.

21.16. *Notices*. Unless otherwise specifically required by a provision of this Agreement, any notice required or permitted by this Agreement shall be in writing and shall be deemed to have been sufficiently given for all purposes if (a) hand-delivered to the Program Director or Public Works Director, with a copy contemporaneously mailed (by first class U.S. mail, postage prepaid), to the copied recipient set forth below; or (2) sent by certified or registered U.S. mail, postage and fees prepaid, return receipt requested, addressed to the Party to whom such notice is to be given at the address set forth below or at such other address as that

Party has been previously furnished in writing to the other Party. Such notice shall be deemed to have been given when deposited in the U.S. mail, postage prepaid and properly addressed to the intended recipient.

If to City:

If to Contractor:

City Manager COTTONWOOD HEIGHTS 1265 East Fort Union Blvd., Suite 250 Cottonwood Heights, UT 84047	TERRACARE ASSOCIATES, LLC 9742 Titan Park Circle Littleton, CO 80125
<p><u>With a copy to:</u></p> Public Works Director COTTONWOOD HEIGHTS 1265 East Fort Union Blvd., Suite 250 Cottonwood Heights, UT 84047	
<p><u>With a copy to:</u></p> Wm. Shane Topham CALLISTER NEBEKER & MCCULLOUGH 10 East South Temple, Suite 900 Salt Lake City, UT 84133	

21.17. *Negotiation.* This Agreement was jointly negotiated between the Parties and their counsel. Both Parties have had substantive input into this Agreement, such that this Agreement is the result of collaborative drafting by the Parties and their respective legal counsel. Consequently, this Agreement shall be interpreted in an absolutely neutral fashion, without regard to either Party as the “drafter.”

21.18. *Authority.* The person executing this Agreement on behalf of Contractor, by his execution and delivery of this Agreement, hereby represents to City that such person has full power and authority to enter into this Agreement on behalf of Contractor and to thereby legally obligate Contractor to the terms and provisions of this Agreement. Similarly, the Mayor, by his execution and delivery of this Agreement on behalf of City, hereby represents to Contractor that the Mayor has full power and authority to enter into this Agreement on behalf of City pursuant to a resolution of the Council, and that the Mayor’s execution and delivery of this Agreement will legally obligated City to the terms and provisions of this Agreement.

21.19. *Time of Essence.* Time is the essence of this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement effective as of the date first above written. By the signature of its representative below, each Party affirms that it has taken all necessary action to authorize said representative to execute this Agreement.

CONTRACTOR:

TERRACARE ASSOCIATES, LLC, a Colorado corporation qualified to do business in Utah

By: _____

Name: _____

Title: _____

CITY:

COTTONWOOD HEIGHTS, a Utah municipality

ATTEST:

By: _____

Kory Solorio, Recorder

By: _____

Kelvyn H. Cullimore, Jr., Mayor

603016.4