

AGREEMENT FOR PROFESSIONAL SERVICES

THIS AGREEMENT FOR PROFESSIONAL SERVICES (the "Agreement") is made and entered into effective this _____ day of _____, 2014 (the "Effective Date"), by and between the CITY OF COMMERCE CITY, a Colorado home rule municipality whose address is 7887 East 60th Avenue, Commerce City, Colorado (the "City"), and WEMBER, INC, a Colorado corporation whose principal business address is 7525 S. Jasmine Court, Centennial, CO 80112 ("Contractor").

WHEREAS, the City desires to retain the services of Contractor; and

WHEREAS, Contractor desires to provide services to the City.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, the sufficiency of which is hereby acknowledged, the parties agree as follows:

1. SERVICES; DELIVERABLES.

- a. **Services.** The City agrees to retain Contractor to provide the services set forth in **Exhibit A**, attached hereto and incorporated herein by this reference (the "Services"), and Contractor agrees to so serve.
- b. **Controlling Terms.** In the event of any conflict between the terms and conditions contained in this Agreement and those contained in any Exhibit or Attachment hereto, the terms and conditions of this Agreement shall prevail and as such shall supersede the conflicting terms and/or conditions of such Exhibit or Attachment.
- c. **Deliverables.** In the event any deliverables required under this Agreement consist of reports, surveys, maps, plans, drawings or photographs, or any other materials that lend themselves to production in electronic format, as determined by the City, Contractor shall provide such deliverables to the City in both hard copy and one or more electronic formats acceptable to the City, unless otherwise directed by the City in writing, and Contractor's failure to do so shall constitute a material breach of this Agreement. Acceptable electronic formats may include, but are not necessarily limited to, editable Word document, editable PDF document, AutoCAD and specified GPS/GIS format(s). Prior to beginning the Services, Contractor shall consult with the City to determine which electronic formats are acceptable. Any and all deliverables and other tangible materials produced by Contractor pursuant to this Agreement shall at all times be considered the property of the City.
- d. **Contractor Representations.** Contractor warrants and represents that it has the requisite authority, capacity, experience and expertise to perform the Services in compliance with the provisions of this Agreement and all applicable laws and agrees to perform the Services on the terms and conditions set forth herein. The City reserves the right to omit any of the Services identified in Exhibit A upon written notice to Contractor.

2. COMPENSATION; PAYMENT.

- a. **Amount.** As compensation for performance of the Services, the City agrees to pay Contractor a sum not to exceed **Seven Hundred Thirty-five Thousand dollars (\$735,000.00)** in accordance with Exhibit A; provided, however, that if the actual cost of the Services is less than the foregoing, the City shall compensate Contractor only up to the amount of such actual cost.

- b. Changed Conditions. Contractor specifically waives any claim for additional compensation for any changed condition arising out of any one or more of the following, unless such changed condition is caused in whole or in part by acts or omissions within the control of the City or persons acting on behalf thereof:
 - i. A physical condition of the site of an unusual nature;
 - ii. A condition differing materially from those ordinarily encountered and generally recognized as inherent in work of the character and at the location provided for in this Agreement; or
 - iii. Any force majeure.
- c. Invoices and Payment. The City shall make payment within thirty (30) days after receipt and approval of invoices submitted by Contractor. Invoices shall be submitted to the City not more frequently than monthly and shall identify the specific Services performed for which payment is requested.
- d. IRS Form W-9. If not already on file with the City, Contractor shall provide to the City a current, completed Internal Revenue Service Form W-9 not later than the date upon which Contractor submits its first invoice to the City for payment. Failure to provide a completed Form W-9 may result in delay or cancellation of payment under this Agreement.

3. PERFORMANCE.

- a. Prosecution of the Services. Contractor shall, at its own expense, perform all work in a professional and workmanlike manner and shall furnish all labor, materials, tools, supplies, machinery, utilities and other equipment that may be necessary for the completion of the Services unless otherwise expressly provided in Exhibit A or attachments thereto.
- b. Rate of Progress. Contractor acknowledges and understands that it is an essential term of this Agreement that Contractor maintain a rate of progress in the Services that will result in completion of the Services in accordance with this Agreement, and to that end, Contractor agrees to proceed with all due diligence to complete the Services in a timely manner in accordance with this Agreement.
- c. Monitoring and Evaluation. The City reserves the right to monitor and evaluate the progress and performance of Contractor to ensure that the terms of this Agreement are being satisfactorily met in accordance with the City's and other applicable monitoring and evaluating criteria and standards. Contractor shall cooperate with the City relating to such monitoring and evaluation.
- d. Drugs, Alcohol and Workplace Violence; Compliance with Applicable Law. Contractor and its employees, agents and subcontractors, while performing the Services or while on City property for any reason during the term of this Agreement, shall adhere to the City's policies applicable to City employees regarding drugs, alcohol and workplace violence. A copy of such policies will be made available to Contractor upon request. Contractor further covenants and agrees that in performing the Services hereunder, it shall comply with all applicable federal, state and local laws, ordinances and regulations.

e. Specific Performance. In the event of a breach of this Agreement by Contractor, the City shall have the right, but not the obligation, to obtain specific performance of the Services in addition to any other remedy available under applicable law.

4. TERM AND TERMINATION.

a. Term. The Term of this Agreement shall be from the Effective Date until _____, 20____, upon which date all Services shall be completed to the City's satisfaction, unless the Term is extended in writing by the parties.

b. Termination.

i. Generally. The City may terminate this Agreement without cause if it determines that such termination is in the City's best interest. The City shall effect such termination by giving written notice of termination to Contractor, specifying the effective date of termination, at least fourteen (14) calendar days prior to the effective date of termination. In the event of such termination by the City, the City shall be liable to pay Contractor for Services performed as of the effective date of termination, but shall not be liable to Contractor for anticipated profits. Contractor shall not perform any additional Services following receipt of the notice of termination unless otherwise instructed in writing by the City.

ii. For Cause. If, through any cause, Contractor fails to fulfill its obligations under this Agreement in a timely and proper manner, violates any provision of this Agreement or violates any applicable law (each, a "Breach"), the City shall have the right to terminate this Agreement for cause immediately upon written notice of termination to Contractor. In the event of such termination by the City, the City shall be liable to pay Contractor for Services performed as of the effective date of termination, but shall not be liable to Contractor for anticipated profits. Contractor shall not perform any additional Services following receipt of the notice of termination. Notwithstanding the foregoing, Contractor shall not be relieved of liability to the City for any damages sustained by the City by virtue of any Breach, and the City may withhold payment to Contractor for the purposes of setoff until such time as the exact amount of damages due to the City from Contractor is determined.

5. INDEMNIFICATION. Contractor shall be liable and responsible for any and all damages to persons or property caused by or arising out of the actions, obligations or omissions of Contractor or its employees, agents, representatives or other persons acting under Contractor's direction or control in performing or failing to perform the Services under this Agreement. Contractor shall indemnify and hold harmless the City, its elected and appointed officials and its employees, agents and representatives (the "Indemnified Parties"), from any and all liability, claims, demands, actions, damages, losses, judgments, costs or expenses, including, but not limited to, attorney fees, which may be made or brought or which may result against any of the Indemnified Parties as a result or on account of the negligent, grossly negligent, willful and wanton, or intentional actions or omissions of Contractor and/or its employees, agents or representatives or other persons acting under Contractor's direction or control. If Contractor engages subcontractors to perform any part of the Services other than for the supply of goods, materials or supplies, Contractor shall include the provisions of this Section in any such subcontracts. The provisions set forth in this Section shall survive the completion of the Services and the satisfaction, expiration or termination of this Agreement.

6. INSURANCE.

- a. Commercial General Liability Insurance. Contractor shall procure and keep in force during the duration of this Agreement a policy of comprehensive general liability insurance insuring Contractor, and naming the City as an additional insured, against any liability for personal injury, bodily injury or death arising out of the performance of the Services with at least One Million Dollars (\$1,000,000) each occurrence. The limits of such insurance shall not, however, limit the liability of Contractor hereunder.
- b. Comprehensive Automobile Liability Insurance. Contractor shall procure and keep in force during the duration of this Agreement a policy of comprehensive automobile liability insurance insuring Contractor, and naming the City as an additional insured, against any liability for personal injury, bodily injury or death arising out of the use of motor vehicles and covering operations on or off the site of all motor vehicles controlled by Contractor that are used in connection with performance of the Services, whether the motor vehicles are owned, non-owned or hired, with a combined single limit of at least One Million Dollars (\$1,000,000). The limits of such insurance shall not, however, limit the liability of Contractor hereunder.
- c. Professional Liability Insurance. If Contractor is an architect, engineer, surveyor, appraiser, physician, attorney, accountant or other licensed professional, or if it is customary in the trade or business in which Contractor is engaged to carry professional liability insurance, or if the City otherwise deems it necessary, Contractor shall procure and keep in force during the duration of this Agreement a policy of errors and omissions professional liability insurance insuring Contractor against any professional liability with a limit of at least One Million Dollars (\$1,000,000.00) per claim and annual aggregate. The limits of such insurance shall not, however, limit the liability of Contractor hereunder.
- d. Terms of Insurance.
 - i. Insurance required by this Section shall be with companies qualified to do business in the State of Colorado and may provide for deductible amounts as Contractor deems reasonable for the Services, but in no event greater than Ten Thousand Dollars (\$10,000.00), and Contractor shall be responsible for the payment of any such deductible. No such policies shall be cancelable or subject to reduction in coverage limits or other modification unless previously approved by the City in writing. Contractor shall identify whether the type of coverage is "occurrence" or "claims made." If the type of coverage is "claims made," which at renewal Contractor changes to "occurrence," Contractor shall carry a twelve (12) month tail. Contractor shall not do or permit to be done anything that shall invalidate the policies.
 - ii. The insurance policies described in herein shall be for the mutual and joint benefit and protection of Contractor and the City. Except for the professional liability policy, all insurance policies required herein shall provide that the City, although named as an additional insured, shall nevertheless be entitled to recovery under said policies for any loss occasioned to the City or its officers, employees or agents by reason of the negligence of Contractor or its officers, employees, agents, subcontractors or business invitees. Such policies shall be written as primary policies not contributing to and not in excess of coverages the City may carry.

- e. Other Insurance. During the term of this Agreement, Contractor shall procure and keep in force workers' compensation insurance, or provide a completed Declaration of Independent Contractor Status Form, and all other insurance required by any applicable law.
- f. Evidence of Coverage. Before commencing work under this Agreement, Contractor shall furnish to the City certificates of insurance policies and all necessary endorsements evidencing insurance coverage required by this Agreement. Contractor understands and agrees that the City shall not be obligated under this Agreement until Contractor furnishes such certificates of insurance and endorsements. In the event the Term of this Agreement extends beyond the period of coverage for any insurance required herein, Contractor shall, not less than ten (10) days prior to the expiration of any such insurance coverage, provide the City with new certificates of insurance and endorsements evidencing either new or continuing coverage in accordance with the requirements of this Agreement.
- g. Subcontracts. Contractor shall include the insurance requirements set forth in this Agreement in all subcontracts. The City shall hold Contractor responsible in the event any subcontractor fails to procure and maintain, for the duration of this Agreement, insurance meeting the requirements set forth herein. The City reserves the right to approve variations in the insurance requirements applicable to subcontractors upon joint written request of subcontractor and Contractor if, in the City's sole discretion, such variations do not substantially affect the City's interests.

8. UNDOCUMENTED WORKERS – COMPLIANCE WITH C.R.S. § 8-17.5-102; VERIFICATION OF LAWFUL PRESENCE.

- a. Certification. Contractor hereby certifies that, as of the date of this Agreement, it does not knowingly employ or contract with an illegal alien who will perform work under this Agreement and that Contractor will participate in the E-verify Program or Department Program as defined in C.R.S. § 8-17.5-101 in order to confirm the eligibility of all employees who are newly hired to perform work under this Agreement.
- b. Pre-Employment Screening. Contractor is prohibited from using either the E-verify Program or Department Program procedures to undertake pre-employment screening of job applicants while this Agreement is being performed.
- c. Contractor Obligations.
 - i. Contractor shall not knowingly employ or contract with an illegal alien to perform work under this Agreement or enter into a contract with a subcontractor that fails to certify to Contractor that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this Agreement.
 - ii. If Contractor obtains actual knowledge that a subcontractor performing work under this Agreement knowingly employs or contracts with an illegal alien, Contractor shall:
 - (a) Notify the subcontractor and the City within three (3) days that Contractor has actual knowledge that the subcontractor is employing or contracting with an illegal alien; and
 - (b) Terminate the subcontract with the subcontractor if within three (3) days of receiving the notice required pursuant to this subparagraph d the subcontractor

does not stop employing or contracting with the illegal alien; provided, however, that Contractor shall not terminate the contract with the subcontractor if during such three (3) days the subcontractor provides information to establish that the subcontractor has not knowingly employed or contracted with an illegal alien.

- d. **Compliance with Investigation.** Contractor shall comply with any reasonable request by the Colorado Department of Labor and Employment (the “Department”) made in the course of an investigation that the Department is undertaking pursuant to the authority established in Article 17.5 of Title 8, C.R.S.
- e. **Violation – Termination.** If Contractor violates this Section, the City may terminate this Agreement for breach of contract. If this Agreement is so terminated, Contractor shall be liable for actual and consequential damages to the City.

9. **CONTRACTOR’S REMEDIES FOR BREACH.**

- a. Contractor may terminate this Agreement in the event of non-payment of sums due only as provided in this Section, except where non-payment is the result of Contractor’s failure to provide the City with a completed IRS Form W-9 as required herein. In the event Contractor elects to terminate this Agreement for non-payment of sums due, Contractor shall first provide the City notice of Contractor’s intent to terminate and allow the City ten (10) days within which to make payment. Contractor’s termination shall become effective immediately upon the City’s failure to make payment within such ten-day period.
- b. Pending resolution of any material breach by the City, Contractor may, in addition to any other remedies provided by law, discontinue performance of the Services without being in breach of this Agreement.

10. **NOTICES.** Written notices required under this Agreement and all other correspondence between the parties shall be directed to the following and shall be deemed received when hand-delivered or three (3) days after being sent by certified mail, return receipt requested:

If to the City:

[Name, Title]
Department of _____
[Address]
Commerce City, CO 80022

If to Contractor:

[Name, Title]
[Company name]
[Address]
[Address]

11. **GENERAL PROVISIONS.**

- a. **Independent Contractor; No Partnership or Agency.** Notwithstanding any language in this Agreement or any representation or warranty to the contrary, the relationship between Contractor and the City shall be as independent contractors, and neither the City nor Contractor shall be deemed or constitute an employee, servant, agent, partner or joint venturer of the other. **Contractor is obligated to pay federal and state income tax on any money earned pursuant to this Agreement, and neither Contractor nor Contractor’s employees, agents or representatives are entitled to workers’ compensation benefits from the City.**

- b. **No Third-Party Beneficiaries.** It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement and all rights of action relating to such enforcement shall be strictly reserved to the parties. It is the express intention of the parties that any person other than the City and Contractor shall be deemed to be only an incidental beneficiary under this Agreement.
- c. **No Assignment.** Contractor shall not assign this Agreement without the City's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed.
- d. **No Waiver.** The waiver of any breach of a term, provision or requirement of this Agreement shall not be construed as or deemed a waiver of any subsequent breach of such term, provision or requirement or of any other term, provision or requirement of this Agreement.
- e. **Governing Law and Venue; Recovery of Costs.** This Agreement shall be governed by the laws of the State of Colorado. Venue for state court actions shall be in the 17th Judicial District in Adams County, Colorado, and venue for federal court actions shall be in the United States District Court for the District of Colorado. In the event legal action is brought to resolve any dispute among the parties related to this Agreement, the prevailing party in such action shall be entitled to recover court costs and reasonable attorney fees from the non-prevailing party.
- f. **Governmental Immunity.** No term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections or other provisions of the Colorado Governmental Immunity Act, C.R.S. §§ 24-10-101, *et seq.*
- g. **Entire Agreement; Binding Effect.** This Agreement contains the entire agreement of the parties relating to the subject matter hereof and, except as provided herein, may not be modified or amended except by written agreement of the parties. This Agreement shall be binding upon, and shall inure to the benefit of, the parties and their respective heirs, personal representatives, successors and assigns.
- h. **Time of the Essence.** Contractor acknowledges that time is of the essence in the performance of this Agreement. Contractor's failure to complete any of the Services contemplated herein during the Term of this Agreement, or as may be more specifically set forth in an Exhibit hereto, shall be deemed a breach of this Agreement.
- i. **Authority.** The parties represent and warrant that they have taken all actions necessary to legally authorize the undersigned signatories to execute this Agreement on behalf of the parties and to bind the parties to its terms.
- j. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all such counterparts taken together shall be deemed to constitute one and the same instrument.
- k. **Headings.** Paragraph headings used in this Agreement are for convenience of reference and shall in no way control or affect the meaning or interpretation of any provision of this Agreement.

1. Severability. In the event a court of competent jurisdiction holds any provision of this Agreement invalid or unenforceable, such holding shall not invalidate or render unenforceable any other provision of this Agreement.
- m. Acknowledgement of Open Records Act – Public Document. Contractor hereby acknowledges that the City is a public entity subject to the Colorado Open Records Act, C.R.S. § 24-72-201, *et seq.*, and as such, this Agreement may be subject to public disclosure thereunder.

[Remainder of this page intentionally left blank – signature page(s) follow(s).]

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

CITY OF COMMERCE CITY

Brian K. McBroom, City Manager

ATTEST:

Laura J. Bauer, CMC, City Clerk

Approved as to form:

Gregory D. Graham, Assistant City Attorney

WEMBER, INC.

Signature **[must be notarized]**

Printed Name & Title

STATE OF COLORADO

)

) ss.

COUNTY OF _____

)

The foregoing Agreement was acknowledged before me this _____ day of _____, 2014,
by _____, president of Wember, Inc.

Witness my hand and official seal.

My Commission Expires _____.

Notary Public

EXHIBIT A – SERVICES

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