

## **COST SHARE AGREEMENT FOR ELEMENTARY SCHOOL GYMNASIUM IMPROVEMENTS**

This **COST SHARE AGREEMENT** (“**Agreement**”) is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2020 (“**Effective Date**”), by and between ADAMS COUNTY SCHOOL DISTRICT 14 (“**ACSD 14**”), and the CITY OF COMMERCE CITY (“**City**”) (collectively, “**Parties**”).

### **RECITALS**

A. WHEREAS, ACSD14 and the City have a reciprocal agreement with for use of city facilities and district facilities, including gymnasiums for youth programs;

B. WHEREAS, ACSD14, with the financial support of the City, desires to construct improvements to four elementary school gymnasiums (Central Elementary, Dupont Elementary, Kemp Elementary, and Rosehill Elementary), including wood floor resurfacing (Kemp & Rosehill), installation of rubber flooring (Central & Dupont) including striping & school logos on floors at all four sites; and installation of electrical & structural supports in the ceiling necessary for new basketball backboards at all four sites (“**Project**”);

C. WHEREAS, the Project will improve ACSD14’s facilities and benefit the City’s recreation-based basketball leagues for children;

D. WHEREAS, ACSD14 will contract for and manage the Project and contribute \$22,000, and the City will contribute up to \$203,500;

E. WHEREAS, the parties to this agreement desire to establish terms for the payment of costs related to the project.

### **AGREEMENT**

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth in this Agreement, the sufficiency of which is expressly acknowledged, the Parties agree as follows:

1. Procurement and Contracting; Ownership.

a. ACSD14 will be responsible for all design, permitting, construction and construction management to complete the Project and compliance with all contracting and procurement requirements. ACSD14 will control the design, elements, methods, and timing of the Project. ACSD14 will be responsible for enforcement and interpretation of its construction contracts. ACSD14 will own and be responsible for the maintenance of the Project.

b. Any change orders increasing the City’s portion of the overall cost of the Project will require the consent of the City.

c. ACSD14 shall include the following in its contracts for construction:

(i) Insurance requirements as are standard to ACSD14 contracts, specifically naming the City and its elected and appointed officials, employees, and agents as an “additional insured” (with the exception of workers’ compensation and employer’s liability insurance policies, if any).

(ii) Indemnity provisions protecting the City and its elected and appointed officials, employees, and agents to the same extent as the ACSD14 and its directors, officers, agents and employees;

(iii) To expressly name the City as a third-party beneficiary of the contract with respect to payment and performance bonds, the insurance, indemnity and defense, warranty, and standard of care provisions.

## 2. Contributions and Payment.

a. ACSD14 will provide \$22,000 for the Project and will pay such funds directly to its contractors.

b. The City, on behalf of ACSD14, will make payments directly to ACSD14’s construction contractors for eligible costs not to exceed \$203,500, within 30 days of the presentation of an request for payment, in the form required by ACSD14, by ACSD14’s designated construction contractors, provided the City’s obligation to make payments shall be conditioned upon: (i) ACSD14’s authorization to issue the requested payment or part thereof; and (ii) the City’s verification of work identified in an invoice. No payment by the City or any verification of completion of work shall be deemed to constitute the City’s approval or acceptance of any work.

c. The City’s funding is derived from Colorado lottery funds and the City’s payment obligations shall be subject to all conditions and obligations of that funding source.

d. At any time, the City shall have the right to audit the ACSD14’s records concerning the design and construction of the Project. The right to request an audit of such records shall be made within three (3) years from the date upon the Certification is provided and shall be in writing. The audit request shall include a reasonably detailed description of the scope of documents requested for audit by the City.

3. **Binding Effect; Assignment.** This Agreement shall be binding on the parties hereto and their respective successors and assigns, without regard to the method or manner of succession or assignment. Neither Party shall assign its obligations or rights under this Agreement without the other Party’s prior written consent and any attempted assignment in violation hereof shall be null and void. Any successor or assign of the whole, or of any part, of this Agreement will be jointly and severally liable for performance of such portion succeeded to or assigned.

4. **Term.** This Agreement will be effective from the Effective Date until the date the Reimbursement Amount and any Interest has been paid. The termination of this Agreement shall not affect any warranty, indemnity, insurance, or bond obligations of the District or any District contractor or any related right accruing to the City’s benefit. Either party may terminate this Agreement before ACSD14 has entered into a contract for construction. Any termination after ACSD14 has entered into a contract for construction shall only be for a material breach of this

Agreement or for non-appropriation as provided below, and both parties shall be responsible for their respective shares of the Project costs then incurred and payable to ACSD14's construction contractor, subject to Section 6(f).

5. **Notice.** Any notice given pursuant to this Agreement will be sent by certified mail, return receipt requested, overnight delivery service, or hand delivery to the address given above or to any other address given in writing by an addressee to the other party. Notice to the City shall be given to the City Manager and copied to the City Attorney. Such notice, if given by mail, shall be deemed received three (3) days after mailing in accordance with this Section. Reports on the progress of the Work and notifications of significant changes in the Work may be sent by e-mail to addresses designated by the City.

## 6. **General Provisions.**

a. **Incorporation by Reference.** The recitals to this Agreement and all exhibits to this Agreement are incorporated by reference.

b. **No Third-Party Beneficiaries.** The parties expressly intend that any person other than the City and ACSD14 will be deemed to be only an incidental beneficiary under this Agreement. Without limitation, no contractor or subcontractor of ACSD14 will be deemed to be an intended third-party beneficiary of this Agreement or to have any privity of contract with the City with respect to the Project.

c. **No Waiver.** No waiver of any provision of this Agreement shall constitute a waiver of any other provision of this Agreement, nor shall any such waiver be a continuing waiver. A party's failure to insist upon strict performance of any of the terms, covenants, conditions or agreements contained in this Agreement shall not be deemed a waiver of any rights or remedies that said party may have and shall not be deemed a waiver of any subsequent breach or default in the performance of any of the terms, covenants, conditions or agreements contained in this Agreement by the same party. Except as expressly provided in this Agreement, no waiver shall be binding on any party unless executed in writing by the party making such waiver.

d. **Governmental Immunity.** No term or condition of this Agreement will 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.

e. **Non-liability of Officials and Employees.** No elected or appointed official, employee, agent, consultant or contractor of the City or ACSD14 shall be personally liable to the other Party or any successors or assign for any breach of this Agreement.

f. **Non-Appropriation.** Notwithstanding any other term or condition of this Agreement, all obligations of the City or ACSD14 under this Agreement, including all or any part of any payment or reimbursement obligations, whether direct or contingent, will only extend to payment of monies duly and lawfully appropriated and encumbered for the purpose of this Agreement through the City's or ACSD14's legally required budgeting, authorization, and appropriation process, as applicable. Further, the City and ACSD14, by this Agreement, do not

create a multiple fiscal year obligation or debt either within or without this Agreement. The City and ACSD14, by this Agreement, do not bind future legislatures to make such appropriations.

g. Governing Law; Jurisdiction and Venue; Attorneys' Fees. This Agreement will be governed by the laws of the State of Colorado. Venue for any litigation arising out of or relating to this Agreement will be in the 17th Judicial District in Adams County, Colorado. In the event that it becomes necessary for either party to enforce the provisions of this Agreement or to obtain redress for the breach or violation of any of its provisions, whether by litigation, arbitration or other proceedings, the prevailing party shall recover from the other party all costs and expenses associated with such proceedings, including reasonable attorney's fees. For purposes of this Agreement, "prevailing party" shall mean the party in whose favor a judgment, decree, or final order is rendered, either by an arbitrator or the court, after appeal, if any. In the event both Parties prevail on one or more claims, the prevailing party shall mean the net winner of a dispute, taking into account the claims pursued, the claims on which the pursuing party was successful, the amount of money sought, the amount of money awarded, and offsets or counterclaims pursued (successfully or unsuccessfully) by the other party.

h. No Partnership or Agency – Independent Contractor Relationship. Notwithstanding any language in this Agreement or any representation or warranty to the contrary herein, the relationship between ACSD14 and the City will be as independent contractors, and neither the City nor ACSD14 will be deemed or constitute an employee, servant, agent, partner or joint venture of the other.

i. Counterparts. This Agreement may be executed in several counterparts, each of which may be deemed an original, but all of which together shall constitute one and the same instrument. Executed copies hereof may be delivered by facsimile or email of a PDF document, and, upon receipt, shall be deemed originals and binding upon the signatories hereto.

j. Severability. If any portion of this Agreement is declared by any court of competent jurisdiction to be void or unenforceable, such decision shall not affect the validity of any remaining portion of this Agreement, which shall remain in full force and effect. In addition, in lieu of such void or unenforceable provision, there shall automatically be added as part of this Agreement a provision similar in terms to such illegal, invalid or unenforceable provision so that the resulting reformed provision is legal, valid and enforceable.

k. Rules of Construction. Neither party will be deemed to have drafted this Agreement. This Agreement has been reviewed by all parties and will be construed and interpreted according to the ordinary meaning of the words used so as to fairly accomplish the purposes and intentions of all parties. No term of this Agreement will be construed or resolved in favor of or against the City or ACSD14 on the basis of which party drafted the uncertain or ambiguous language. Where appropriate, the singular includes the plural and neutral words and words of any gender will include the neutral and other gender. Section headings used in this Agreement are for convenience of reference only.

l. 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.

m. Acknowledgement of Open Records Act – Public Document. The Parties hereby acknowledges that the City and ACSD14 are public entities 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.

*(Signature page follows)*

IN WITNESS WHEREOF, the City and ACSD14 execute this Agreement as of the Effective Date.

**CITY OF COMMERCE CITY**

\_\_\_\_\_  
Benjamin A. Huseman, Mayor

ATTEST:

\_\_\_\_\_  
Dylan A. Gibson, City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
Robert D. Sheesley, City Attorney

**ADAMS COUNTY SCHOOL DISTRICT 14**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

\_\_\_\_\_  
Title

ATTEST:

\_\_\_\_\_  
Title:\_\_\_\_\_