



# FRUITA COLORADO

## PROFESSIONAL SERVICES AGREEMENT

**THIS PROFESSIONAL SERVICES AGREEMENT** ("Agreement") is made and entered into this 31<sup>st</sup> day of October, 2024, by and between the City of Fruita, Colorado, a government entity in the County of Mesa, of Colorado State, located at 325 E. Aspen Avenue, Fruita, CO 81521 (herein after referred to as "City"); and Barnhart Communications (herein after referred to as "Contractor"), located at 1616 17<sup>th</sup> Street, Suite 569, Denver, CO 80202. The City and the Contractor may be collectively referred to as the "Parties."

### RECITALS AND REPRESENTATIONS

**WHEREAS**, the City desires to have performed certain professional services as described in this Agreement; and

**WHEREAS**, the Contractor represents that the Contractor has the skill, ability, and expertise to perform the services described in this Agreement and within the deadlines provided by the Agreement; and

**WHEREAS**, the City desires to engage the Contractor to provide the services described in this Agreement subject to the terms and conditions of the Agreement.

**NOW, THEREFORE**, in consideration of the benefits and obligations of this Agreement, the Parties mutually agree as follows:

#### 1.0 SERVICES AND CONTRACTOR PERFORMANCE

**1.1 Services and Work Product.** As directed by and under the supervision of the City Representative, as defined in Section 1.3, for the City of Fruita, the Contractor shall provide the City with the services defined in the RFP Scope of Services, included as Exhibit A, and the Contractor's Proposal received via electronic Submission on Rocky Mountain E-Purchasing System on September 20, 2024, included herein as Exhibit B ("**Services**"). "**Work Product**" shall consist of deliverables and/or product to be created, provided or otherwise tendered to the City as described in the Services.

**1.2 Changes to Services.** The City may request a change or changes in the Services. Any changes that are mutually agreed upon between the City and the Contractor shall be made in writing and upon execution by both Parties shall become an amendment to the

Services described in this Agreement. To be effective, any written change must be signed by the Contractor and by the City Council.

**1.3 City Representative.** The City hereby designates the Communications and Engagement Manager as its representative and authorizes him to make all necessary and proper decisions with reference to this Agreement. All requests for contract interpretations, changes, clarifications, or instructions shall be directed to the City Representative.

**1.4 INDEPENDENT CONTRACTOR STATUS.** Contractor and any persons employed or retained by Contractor for the performance of work hereunder shall be independent contractors and not agents or employees of the City. Any provisions in this Agreement that may appear to give the City the right to direct Contractor as to details of doing work or to exercise a measure of control over the work mean that Professional shall follow the direction of the City as to end results of the work only.

- A. Contractor is providing services independently and, therefore, is not an employee, partner, or joint venturer with City, and neither party has the authority to bind the other in any respect. Contractor warrants to City that Contractor understands the difference in status between an independent contractor and an employee, and Contractor acknowledges and stipulates that Contractor is neither eligible nor entitled to statutory or legal benefits or provisions of labor codes or other such similar statutes. The parties further agree that City shall not withhold from Contractor unemployment insurance, social security, taxes or any other withholdings. Contractor agrees to be responsible for all such payments required by law.
- B. Taxes. Contractor acknowledges and agrees to report all payments received from City on its federal and state income tax returns and is obligated to pay any and all resulting federal and state income tax obligations. Contractor will indemnify City for any such payments required but not paid.
- C. No Insurance or Benefits. Contractor acknowledges and agrees that it is not covered by any of City's insurance, including City's workers' compensation coverage, and is not entitled to any benefits otherwise provided to City's employees, including vacation pay, sick leave, retirement benefits, social security, disability benefits, employee health benefits of any kind, and workers' compensation benefits. During the Term of this Agreement, Contractor will carry any insurance required by law, including, without limitation, professional liability insurance and general liability insurance.

- 1.5 Standard of Performance.** In performing the Services, the Contractor 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 Colorado. Contractor represents to the City that the Contractor is, and its employees performing such Services are, properly licensed and/or registered within the State of Colorado for the performance of the Services (if licensure and/or registration is required by applicable law) and that the Contractor and employees possess the skills, knowledge, and abilities to competently, timely, and professionally perform the Services in accordance with this Agreement.
- 1.6 Patent Indemnification.** Contractor shall indemnify, defend and hold City harmless from any and all claims, demands, and causes of action (including reasonable attorneys' fees and costs of suit) for actual or asserted infringement or actual or asserted appropriation or use by City of trade secrets, proprietary information, know-how, copyright rights, or patented inventions included in any design or specification furnished by Contractor or arising from the use or sale of materials, equipment, methods, processes, designs and information, furnished by Contractor in connection with the Services. Contractor shall include the foregoing indemnification provision as a term of each agreement utilized by it in the performance of its work which shall extend expressly from the vendor or subcontractor to City.
- 1.7 Safety.** When and to the extent that Contractor or any of its employees, agents or subcontractors are working under the terms of this Agreement, Contractor will comply, and cause all of its employees, agents and subcontractors to comply, with applicable safety rules and security requirements.
- 1.8 Qualified Personnel.** Contractor will make available all qualified Contractors, drafters, technical and clerical personnel necessary to fulfill its obligations under this Agreement. Prior to commencement of work, Contractor will provide City with the names of all Contractor personnel and their then current hourly rates, if applicable, whose services are to be employed in performance of the Services. Removal or re-assignment of personnel by Contractor will only be done with prior written approval of City.
- 1.9 Removal of Personnel by City.** City may, in its discretion, require Contractor to dismiss from performance of the Services any personnel of Contractor or any subcontractor for any reason, effective upon written notice from City of such dismissal. City will not be required to pay salary, or any other costs associated with dismissed personnel effective upon Contractor's receipt of notice to dismiss from City.
- 1.10 Representations and Warranties.** Contractor represents and warrants that the Services will be performed in a manner consistent with other reasonable professionals providing similar services under similar circumstances. Contractor will complete the Services in accordance with the Agreement and applicable United States laws, regulations, ordinances, and codes in existence at the time the Agreement is executed.

- 1.11 Maintenance of and Access to Records.** Contractor will maintain detailed records of all matters relating to the Services during the term of the Agreement and for a period after its cancellation or termination of not less than five (5) years. City will have the right to copy and audit during regular business hours all records of any kind which in any way relate to the Services, whether created before, during or after the termination of this Agreement. Access to such records will be provided to City at no cost.
- 1.12 Disclosure of Adverse Information.** Contractor will promptly disclose to City any and all information which Contractor may learn or which may have a material adverse impact on the Services or the Work Product or City's ability to utilize the Work Product in the manner and for the purpose for which the Work Product is intended.
- 1.13 Quality of Service.** Contractor shall perform the Services in a diligent, professional, and timely manner. Contractor may immediately suspend all work on projects for Client in the event that any payment owed by Client to Contractor is not made within five (5) days after it becomes due, unless there are extenuating circumstances excusing the delay in payment, as determined by Contractor in its sole discretion.
- 1.14 Nonexclusive Relationship.** The relationship between Contractor and the City is nonexclusive. Contractor may represent, perform services for, and be employed by such additional clients, persons, or companies as Contractor, in Contractor's sole discretion, sees fit. It is understood that Contractor services are available to the general public and not to the City exclusively.
- 1.15 Confidentiality.** Contractor shall not disclose to anyone any confidential information relating to the City or any financial information, trade secrets, business secrets, or other information marked "confidential" and not otherwise publicly available concerning the business or operations of the City. This provision shall survive the termination of this Agreement.

## **2.0 COMPENSATION**

- 2.1 Commencement of and Compensation for Services.** Following execution of this Agreement by the City, the Contractor shall be authorized to commence performance of the Services as described in **Exhibit A** and **Exhibit B** subject to the requirements and limitations on compensation as provided by this **Section**. Total compensation (including all reimbursable expenses) shall not exceed Eighty-Five Thousand Dollars (\$85,000) for the first year for all Services and Paid Media requested by the City, and an amount to be determined for any subsequent years. Additional Services or modifications of Services, and associated compensation, shall be agreed to via a formal written Change Order by the Contractor through the City Representative, prior to the provision of the Additional Services.

### **2.2 COMPENSATION and its Sub-Sections.**



- A. **Time and Materials Contract.** The Contractor shall perform the Services and shall invoice the City for work performed based on the rates and/or compensation methodology described in **Exhibit B.**
- B. **Non-reimbursable Costs, Charges, Fees, or Other Expenses.** Any fee, cost, charge, fee, or expense incurred by the Contractor not otherwise specifically authorized by this Agreement shall be deemed a non-reimbursable cost and shall be borne by the Contractor and shall not be billed or invoiced to the City and shall not be paid by the City.

**2.3 Payment Processing.** The Contractor shall submit invoices and requests for payment in a form acceptable to the City. Invoices shall not be submitted more often than once each month unless otherwise approved by this Agreement or in writing by the City. Unless otherwise directed or accepted by the City, all invoices shall contain sufficient information to account for all Contractor time (or other appropriate measure(s) of work effort) and all authorized reimbursable expenses for the Services during the stated period of the invoice. Following receipt of a Contractor's invoice, the City shall promptly review the Contractor's invoice to approve payment of the same. Payment under this section by the City shall be due thirty (30) days from the date of receipt of invoice from the Contractor for Services. All Paid Media invoices shall be due fifteen (15) days from the date of receipt of the invoice.

**2.4 City Dispute of Invoice or Invoiced Item(s).** The City may dispute any Contractor time, reimbursable expense, and/or compensation requested by the Contractor described in any invoice and may request additional information from the Contractor substantiating any and all compensation sought by the Contractor before accepting the invoice. When additional information is requested by the City, the City shall advise the Contractor in writing, identifying the specific item(s) that are in dispute and giving specific reasons for any request for information. The City shall pay the Contractor within forty-five (45) days of the receipt of an invoice for any undisputed charges or, if the City disputes an item or invoice and additional information is requested, within thirty (30) days of acceptance of the item or invoice by the City following receipt of the information requested and resolution of the dispute. To the extent possible, undisputed charges within the same invoice as disputed charges shall be timely paid in accordance with this Agreement. Payment by the City shall be deemed made and completed upon hand delivery to the Contractor or designee of the Contractor or upon deposit of such payment or notice in the U.S. Mail, postage pre-paid, addressed to the Contractor.

### **3.0 CONTRACTOR'S GENERAL RESPONSIBILITIES**

- 3.1** The Contractor shall become fully acquainted with the available information related to the Services. The Contractor is obligated to affirmatively request from the City such information that the Contractor, based on the Contractor's professional experience, should reasonably expect is available and which would be relevant to the performance of the Services.

- 3.2 The Contractor shall perform the Services in accordance with this Agreement and shall promptly inform the City concerning ambiguities and uncertainties related to the Contractor's performance that are not addressed by the Agreement.
- 3.3 The Contractor shall provide all of the Services in a timely and professional manner.
- 3.4 The Contractor shall promptly comply with any written City request for the City or any of its duly authorized representatives to reasonably access and review any books, documents, papers, and records of the Contractor that are pertinent to the Contractor's performance under this Agreement for the purpose of the City performing an audit, examination, or other review of the Services.
- 3.5 The Contractor shall comply with all applicable federal, state and local laws, ordinances, regulations, and resolutions.
- 3.6 The Contractor shall be responsible at the Contractor's expense for obtaining, and maintaining in a valid and effective status, all licenses and permits necessary to perform the Services unless specifically stated otherwise in this Agreement.

#### 4.0 TERM AND TERMINATION

- 4.1 **Term.** This Agreement shall be effective on the **January 1, 2025, at 12:01 a.m.**, ("Effective Date") and shall terminate at **11:59 p.m. on December 31, 2026**, or on a prior date of completion of the Services or termination as may be permitted by this Agreement; provided, however, that the Parties may mutually agree in writing to the monthly extension of this Agreement an twelve (12) consecutive calendar months if such extension is approved by the City Council and the Contractor at least 90 days prior to the expiration of the Term and such extension does not alter or amend any of the terms or provisions of this Agreement.
- 4.2 **Continuing Services Required.** The Contractor shall perform the Services in accordance with this Agreement commencing on the Effective Date until such Services are terminated or suspended in accordance with this Agreement. The Contractor shall not temporarily delay, postpone, or suspend the performance of the Services without the written consent of the City Council.
- 4.3 **Termination.** This Agreement may be terminated by the City or the Contractor for any or no reason upon written notice delivered to the either party at least ten (10) days prior to termination. In the event of the City's exercise of the right of termination as provided by this paragraph:
  - A. Unless otherwise provided in any notice of termination, the Contractor shall provide no further services in connection with this Agreement after receipt of a notice of termination; and

- B. All finished or unfinished documents, data, studies and reports prepared by the Contractor pursuant to this Agreement shall be delivered by the Contractor to the City and shall become the property of the City; and
- C. The Contractor shall submit to the City a final accounting and final invoice of charges for all outstanding and unpaid Services and reimbursable expenses performed prior to the Contractor's receipt of notice of termination and for any services authorized to be performed by the notice of termination as provided by **Sub-Section 4.3(A)** above. Such final accounting and final invoice shall be delivered to the City within thirty (30) days of the date of termination; thereafter, no other invoice, bill, or other form of statement of charges owing to the Contractor shall be submitted to or accepted by the City.

**4.4 Delivery of Notice of Termination.** Any notice of termination permitted by this **Section 4.0 TERM AND TERMINATION** and its subsections shall be addressed to the person signing this Agreement on behalf of either City or Contractor at the address shown below or such other address as either party may notify the other of and shall be deemed given upon delivery if personally delivered, or forty-eight (48) hours after deposited in the United States mail, postage prepaid, registered or certified mail, return receipt requested.

## **5.0 INSURANCE**

**5.1 Insurance Generally.** The Contractor shall obtain and shall continuously maintain during the term of this Agreement insurance of the kind and in the minimum amounts specified in this **Sub-Section 5.1 and the Colorado Governmental Immunity Act (CGIA) as may be amended from time to time, whichever is greater.** The Required Insurance shall be procured and maintained with insurers with an A- or better rating as determined by Best's Key Rating Guide. All Required Insurance shall be continuously maintained to cover all liability, claims, demands, and other obligations assumed by the Contractor.

The Contractor shall secure and maintain the following ("**Required Insurance**"):

- A. Workers Compensation insurance to cover obligations imposed by the Workers' Compensation Act of Colorado and any other applicable laws for any employee engaged in the performance of Project work under this Contract, and Employers' Liability insurance with minimum limits of FIVE HUNDRED THOUSAND DOLLARS (\$500,000) each accident, FIVE HUNDRED THOUSAND DOLLARS (\$500,000) disease - policy limit, and FIVE HUNDRED THOUSAND DOLLARS (\$500,000) disease - each employee.

- B. Comprehensive General Liability insurance with minimum combined single limits of One Million Dollars (\$1,000,000.00) Dollars each occurrence and of One Million Dollars (\$1,000,000.00) aggregate. The policy shall be applicable to all premises and all operations of the Contractor. The policy shall include coverage for bodily injury, broad form property damage (including completed operations), personal injury (including coverage for contractual and employee acts), blanket contractual, independent contractors, products, and completed operations. The policy 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 the City as Certificate Holder and name the City, and its elected officials, officers, employees and agents as additional insured parties.
- C. Comprehensive Automobile Liability insurance with minimum combined single limits for bodily injury of not less than of One Hundred Thousand Dollars (\$100,000.00) each person and each accident and for property damage of not less than Fifty Thousand Dollars (\$50,000.00) each accident with respect to each of the 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 must extend to all levels of subcontractors. Such coverage must include all automotive equipment used in the performance of the Agreement, both on the work site and off the work site, and such coverage shall include non-ownership and hired cars coverage. Such insurance shall be endorsed to name the City as Certificate Holder and name the City, and its elected officials, officers, employees and agents as additional insured parties.
- D. Professional Liability (errors and omissions) Insurance with a minimum limit of coverage of One Million Dollars (\$1,000,000.00) per claim and annual aggregate. Such policy of insurance shall be obtained and maintained for one (1) year following completion of all Services under this Agreement. Such policy of insurance shall be endorsed to include the City as a Certificate Holder.

**5.2 Additional Requirements for All Policies.** In addition to specific requirements imposed on insurance by this **Section 5.0 INSURANCE** and its subsections, insurance shall conform to all of the following:

- A. For both Contractor Insurance and Required Insurance, all policies of insurance shall be primary insurance, and any insurance carried by the City, its officers, or its employees shall be excess and not contributory insurance to that provided by the Contractor; provided, however, that the City shall

not be obligated to obtain or maintain any insurance whatsoever for any claim, damage, or purpose arising from or related to this Agreement and the Services. The Contractor shall not be an insured party for any City-obtained insurance policy or coverage.

- B. For both Contractor Insurance and Required Insurance, the Contractor shall be solely responsible for any deductible losses.
- C. For Required Insurance, no policy of insurance shall contain any exclusion for bodily injury or property damage arising from completed operations.
- D. For Required Insurance, every policy of insurance shall provide that the City will receive notice no less than thirty (30) days prior to any cancellation, termination, or a material change in such policy.

**5.3 Failure to Obtain or Maintain Insurance.** The Contractor's failure to obtain and continuously maintain policies of insurance in accordance with this **Section 5.0 INSURANCE** and its subsections shall not limit, prevent, preclude, excuse, or modify any liability, claims, demands, or other obligations of the Contractor arising from performance or non-performance of this Agreement. Failure on the part of the Contractor 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 the City may immediately terminate this Agreement, or, at its discretion, the City may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection therewith, and all monies so paid by the City shall be repaid by Contractor to the City immediately upon demand by the City, or at the City's sole discretion, the City may offset the cost of the premiums against any monies due to the Contractor from the City pursuant to this Agreement.

**5.4 Insurance Certificates.** Prior to commencement of the Services, the Contractor shall submit to the City certificates of insurance for all Required Insurance. Insurance limits, term of insurance, insured parties, and other information sufficient to demonstrate conformance with this **Section 5.0 INSURANCE** and its subsections shall be indicated on each certificate of insurance. Certificates of insurance shall reference the Project Name as identified on the first page of this Agreement. The City may request and the Contractor shall provide within three (3) business days of such request a current certified copy of any policy of Required Insurance and any endorsement of such policy. The City may, at its election, withhold payment for Services until the requested insurance policies are received and found to be in accordance with the Agreement.

## **6.0 OWNERSHIP OF DOCUMENTS**

**6.1 Work Product is Property of City.** Upon complete payment for services rendered, the Work Product, as defined in **Sub-Section 1.1**, shall be deemed work made for hire and made in the course of Services performed under this Agreement and will be the exclusive

property of City. City will have unlimited right to make, have made, use, reconstruct, repair, modify, reproduce, publish, distribute and sell the Work Product, in whole or in part, or combine the Work Product with other matter, or not use the Work Product at all, as it sees fit. Any reuse of the Work Product produced under this Agreement for any purpose not directly related to this Agreement will be at the sole risk of City.

**6.2 Obligations of Contractor's Personnel and Subcontractors.** Contractor warrants it has enforceable written agreements with all of its personnel and subcontractors to be involved in performing the Services that:

- A. assign to Contractor ownership of all patents, copyrights and other proprietary rights created in the course of their employment or engagement; and
- B. obligate such personnel or subcontractors, as the case may be, upon terms and conditions no less restrictive than are contained in this **Section 6.0 OWNERSHIP OF DOCUMENTS**, not to use or disclose any proprietary rights or information learned or acquired during the course of such employment or engagement including, without limitation, any Work Product, all Contractor property and any other information pursuant to this **Section 6.0 OWNERSHIP OF DOCUMENTS**.

**6.3 Assignment of Proprietary Rights.** To the extent that any title to any Work Product may not, by operation of law, vest in City, or such Work Product may not be considered to be work made for hire, Contractor hereby irrevocably transfers and assigns to City in perpetuity all worldwide right, title and interest in and to the patent rights, copyrights, trade secrets and other proprietary rights in and ownership of, the Work Product.

**6.4 City Furnished Information.** Title to all materials and all documentation furnished by City to Contractor will remain in City. Contractor will deliver to City and any all Work Product and property, including copies thereof on whatever media rendered, upon the first to occur of:

- A. City's written request; or
- B. completion of the Services under this Agreement; or
- C. termination of this Agreement.

**6.5** The Contractor waives any right to prevent its name from being used in connection with the Services.

## **7.0 CONFLICT OF INTEREST**

The Contractor shall refrain from providing services to other persons, firms, or entities that would create a conflict of interest for the Contractor with regard to providing the Services pursuant to this Agreement. No conflict of interest is created in the event that Contractor provides similar services to another municipality or public entity. The Contractor shall not offer or provide



anything of benefit to any City official or employee that would place the official or employee in a position of violating the public trust as provided by C.R.S. §24-18-109, as amended, or any City-adopted Code of Conduct or ethical principles.

## **8.0 REMEDIES**

In addition to any other remedies provided for in this Agreement, and without limiting its remedies available at law, the City may exercise the following remedial actions if the Contractor substantially fails to perform the duties and obligations of this Agreement. Substantial failure to perform the duties and obligations of this Agreement shall mean a significant, insufficient, incorrect, or improper performance, activities or inactions by the Contractor. The remedial actions include:

- 8.1** Suspend the Contractor's performance pending necessary corrective action as specified by the City without the Contractor's entitlement to an adjustment in any charge, fee, rate, price, cost, or schedule; and/or
- 8.2** Withhold payment to the Contractor until the necessary services or corrections in performance are satisfactorily completed; and/or
- 8.3** Deny payment for those services which have not been satisfactorily performed, and which, due to circumstances caused by the Contractor, cannot be performed, or if performed would be of no value to the City; and/or
- 8.4** Terminate this Agreement in accordance with this Agreement.

The foregoing remedies are cumulative and the City, in its sole discretion, may exercise any or all of the remedies individually or simultaneously.

## **9.0 MISCELLANEOUS PROVISIONS**

- 9.1 No Waiver of Rights.** A waiver by any Party to this Agreement 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. The 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 the City except in writing signed by the City Council or by a person expressly authorized to sign such waiver by resolution of the City Council of the City of Fruita, 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.
- 9.2 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 the City, its officials, employees, contractors, or agents, or any other person acting on behalf of the City and, in particular, governmental immunity afforded or available

pursuant to the Colorado Governmental Immunity Act, Title 24, Article 10, Part 1 of the Colorado Revised Statutes.

- 9.3 Equal Opportunity Employer.** Consultant shall not discriminate against any employee or applicant for employment because of race, color, religion, age, sex, disability, or national origin. Consultant shall take affirmative action to ensure that applicants are employed and that employees are treated during employment by Consultant without regard to race, color, religion, age, sex, disability, or national origin. Such action shall include but not be limited to 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. At all times during the term of this Agreement, Consultant shall comply with the applicable provisions of the American with Disabilities Act of 1990, as enacted and amended from time to time (the "ADA"), and all other applicable federal, state, or local laws and regulations. City may request a signed, written certification from Consultant stating compliance with the ADA at any time during the term of this Agreement.
- 9.4 Binding Effect.** The Parties agree that this Agreement, by its terms, shall be binding upon the successors, heirs, legal representatives, and assigns; provided that this Section 9.4 shall not authorize assignment.
- 9.5 No Third Party Beneficiaries.** Nothing contained in this Agreement is intended to or shall create a contractual relationship with, cause of action in favor of, or claim for relief for, any third party, including any agent, sub-consultant or sub-contractor 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.
- 9.6 Article X, Section 20/TABOR.** The Parties understand and acknowledge that the City is subject to Article X, § 20 of the Colorado Constitution ("**TABOR**"). The Parties do not intend to violate the terms and requirements of TABOR by the execution of this Agreement. It is understood and agreed that this Agreement does not create a multi-fiscal year direct or indirect debt or obligation within the meaning of TABOR and, therefore, notwithstanding anything in this Agreement to the contrary, all payment obligations of the City are expressly dependent and conditioned upon the continuing availability of funds beyond the term of the City's current fiscal period ending upon the next succeeding December 31. Financial obligations of the City payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available in accordance with the rules, regulations, and resolutions of City of Fruita, and other applicable law. Upon the failure to appropriate such funds, this Agreement shall be terminated.
- 9.7 Governing Law, Venue, and Enforcement.** This Agreement shall be governed by and interpreted according to the law of the State of Colorado. Venue for any action arising under this Agreement shall be in the appropriate court for Mesa County, Colorado. 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 enforcement of this Agreement. The Parties agree that the rule that ambiguities in a contract are to be construed against the drafting party shall not apply to the interpretation of this Agreement. If there is any conflict between the language of this Agreement and any exhibit or attachment, the language of this Agreement shall govern.

- 9.8 Survival of Terms and Conditions.** The Parties understand and agree that 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.
- 9.9 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 express written consent of the City Council for City of Fruita. 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 City Council for the City of Fruita. No assignment shall release the Applicant from performance of any duty, obligation, or responsibility unless such release is clearly expressed in such written document of assignment.
- 9.10 Paragraph Captions.** The captions of the paragraphs 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.
- 9.11 Integration and Amendment.** This Agreement represents the entire and integrated agreement between the City and the Contractor and supersedes all prior negotiations, representations, or agreements, either written or oral. Any amendments to this must be in writing and be signed by both the City and the Contractor.
- 9.12 Severability.** If any provision of this Agreement is held to be illegal, invalid, or unenforceable by a court of competent jurisdiction, such provision shall be fully severable. In such circumstance, this Agreement shall be construed and enforced as if the illegal, invalid, or unenforceable provision had never comprised a part of this Agreement and the remaining provisions of this Agreement shall remain in full force and effect and shall not be affected by the illegal or unenforceable provision or its severance from this Agreement. Furthermore, in lieu of each such illegal, invalid, or unenforceable provision, there shall be added automatically as part of this Agreement a provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible and still be legal, valid, and enforceable.
- 9.13 Incorporation of Exhibits.** Unless otherwise stated in this Agreement, exhibits, applications, or documents referenced in this Agreement shall be incorporated into this

Agreement for all purposes. In the event of a conflict between any incorporated exhibit and this Agreement, the provisions of this Agreement shall govern and control.

**9.14 Non-Liability of City for Indirect or Consequential Damages or Lost Profits.** Parties agree that the City shall not be liable for indirect or consequential damages, including lost profits that result from the City's declaration that the Contractor is in default of the Agreement, so long as the City acts in good faith.

**9.15 Indemnity.** To the fullest extent permitted by law, Contractor shall indemnify, defend and hold harmless City, its members, affiliates, officers, directors, partners, employees, and agents from and against all claims, damages, losses and expenses, including but not limited to reasonable attorney's fees, arising out of the performance of the Services, provided that any such claim, damage, loss or expense is caused by any negligent act or omission of Contractor, anyone directly or indirectly employed by Contractor or anyone for whose acts Contractor may be liable, except to the extent any portion is caused in part by a party indemnified hereunder.

**9.16 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 sent by certified mail or registered mail, postage and fees prepaid, addressed to the Party to whom such notice is to be given at the address set forth below or at such other address as has been previously furnished in writing, to the other Party. Such notice shall be deemed to have been given when deposited in the United States Mail properly addressed to the intended recipient. Written notice may also be provided by electronic mail which shall be deemed delivered when receipt is acknowledged by reply of the recipient.

**If to the City:**

**If to the Contractor:**

Ciara Amann, Communications and Engagement Manager City of Fruita 325 E. Aspen Avenue Fruita, Colorado 81521 camann@fruita.org	Bill Schumacher Barnhart Communications 1616 17 <sup>th</sup> Street, Suite 569 Denver, Colorado 80202 bschumacher@barnhartusa.com
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**10.0 AUTHORITY**

The individuals executing this Agreement represent that they are expressly authorized to enter into this Agreement on behalf of City of Fruita and the Contractor and bind their respective entities.

**[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK-SIGNATURE PAGE FOLLOWS]**

THIS AGREEMENT is executed and made effective as provided above.

**CITY OF FRUITA, COLORADO**

By: \_\_\_\_\_

ATTEST: \_\_\_\_\_

Debra Woods, Interim City Clerk

Name \_\_\_\_\_

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

**CONTRACTOR:**

By: Bill Schumacher

Name: Bill Schumacher

Title: President