

PROFESSIONAL SERVICES AGREEMENT

City-wide Intersection and Pedestrian Analysis

This Professional Services Agreement ("Agreement") is made by and between the **City of Farmers Branch, Texas** ("City"), and **Cobb, Fendley, & Associates, Inc.** ("Professional") (each a "party" and collectively the "parties"), acting by and through their respective authorized representatives.

RECITALS

WHEREAS, the City desires to engage the Professional to perform certain work and services, hereinafter referred to only as "services", as further specified in the Scope of Services defined in Section 1 of this Agreement; and

WHEREAS, the Professional has expressed a willingness to perform said services in conformance with this Agreement.

NOW, THEREFORE, for and in consideration of the covenants and promises made one to the other herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

Section 1. Scope of Services

Upon written notice to proceed by the City, the Professional agrees to **the City-wide Intersection and Pedestrian Analysis** ("Project"), as set forth in the Scope of Services attached as Exhibit A hereto (the "Scope of Services"). The Professional shall not be entitled to any claim for extra services, additional services or changes in the services without a written agreement with the City prior to the performance of such services.

Section 2. Term of Agreement

The term of this Agreement shall begin on the last date of execution hereof (the "Effective Date") and shall continue until the Professional completes the services required herein and the City has accepted the same, unless sooner terminated as provided in this Agreement.

Section 3. Professional's Obligations

(a) Performance of Services. The Professional shall furnish and pay for all labor, tools, software, materials, equipment, supplies, transportation, and management necessary to perform the services. To the extent reasonably necessary, Professional may engage the services of any agents, assistants, or other persons that Professional may deem proper to assist in the performance of the services under this Agreement; provided, that Professional shall be responsible for all costs related thereto, except as expressly authorized in writing in advance by the City.

(b) Site Access. The City will endeavor to provide such rights of access on any project site as may be reasonably necessary for the Professional to perform any necessary studies, surveys, tests, or other required investigations in relation to the services; provided, that the City shall have no obligation to (i) provide off-site access, (ii) provide access to private property for which the City

does not have an existing right to access, nor (ii) incur any costs associated with the access to be provided under this Agreement.

(c) Standard of Care. Professional shall perform the services with the skill and care ordinarily provided by competent professionals practicing in the same or similar locality and under the same or similar circumstances and professional licenses. Professional shall be responsible for the professional quality, technical accuracy, and coordination of all services, including all Project Documents, designs, drawings, specifications, plans, reports, presentations, and all other services furnished by Professional under this Agreement. Professional shall, without additional compensation, correct or revise any service errors or deficiencies. Professional shall further make, without expense to the City, such revisions to the Project Documents as may be required to meet the needs of the City and which are within the Professional's Scope of Services.

(d) Additional Services. Should the City require additional services not included under this Agreement, the Professional shall make a reasonable effort to provide such additional services in accordance with the fee schedule (Exhibit A) and within the time schedule prescribed by the City, without decreasing the effectiveness of the performance of services required under this Agreement.

(e) No Waiver of City's Rights. Neither the City's review, approval, acceptance of, nor payment for any of the services required under this Agreement shall be construed to operate as a waiver of any rights under this Agreement or of any cause of action arising out of the performance of this Agreement, and Professional shall be and remain liable to the City in accordance with applicable law for all damages to the City caused by Professional's negligent performance of any of the services furnished under this Agreement.

(f) Independent Contractor. It is understood and agreed by and between the parties that the Professional, while performing under this Agreement, is acting independently and that the City assumes no responsibility or liabilities to any third party in connection with the Professional's actions. All services to be performed by the Professional pursuant to this Agreement shall be in the capacity of an independent contractor and not as an agent or employee of the City. The Professional shall supervise the performance of its services and shall be entitled to control the manner and means by which its services are to be performed, subject to the terms of this Agreement. There is no intended third-party beneficiary to this Agreement.

(g) Inspection of Records. Professional grants the City and its designees the right to audit, examine, or inspect, at the City's election, all of Professional's Records (defined below) relating to the performance of services under this Agreement, during the term of the Agreement and any retention period herein. The City's audit, examination, or inspection of the Professional's Records may be performed by a City designee, which may include its internal auditors or an outside representative engaged by the City. The Professional agrees to retain Professional's Records for a minimum of four (4) years following termination of the Agreement, unless there is an ongoing dispute under the contract; then, such retention period shall extend until final resolution of the dispute. "Professional's Records" shall include any and all information, materials, and data of every kind and character generated in connection with the services under this Agreement. The City agrees that it will exercise its right to audit, examine, or inspect the Professional's Records during regular business hours unless the City has provided advance written notice of an alternate time. Professional agrees to allow the City and its designees access to all of Professional's Records, Professional's

facilities, and the current or former employees of the Professional, to the extent deemed reasonably necessary by the City or its designee(s), to perform such audit, inspection, or examination.

(h) Certification of No Conflicts. The Professional hereby warrants to the City that the Professional has made full disclosure in writing of any existing or potential conflicts of interest related to the Professional's services under this Agreement. In the event that any conflicts of interest arise after the Effective Date of this Agreement, the Professional hereby agrees immediately to make full disclosure to the City in writing.

(i) Hazardous Materials. The Professional shall report the presence and location of any hazardous materials it notices or which a professional of similar skill and experience should have noticed to the City.

Section 4. Performance Schedule

(a) Time for Performance. The Professional shall perform all services as provided for under this Agreement in a proper, efficient, timely, and professional manner in accordance with the City's requirements. In the event Professional's performance of this Agreement is delayed or interfered with by acts of the City or others, the Professional may request an extension of time in conformance with this Section 4 for the performance of same as hereinafter provided but shall not be entitled to any increase in fee or price, or to damages or additional compensation as a consequence of such delays.

(b) Extensions; Written Request Required. No allowance of any extension of time, for any cause whatever (including an event of Force Majeure as defined herein below), shall be claimed or made to the Professional, unless the Professional shall have made a written request upon the City for such extension within forty-eight (48) hours after the cause for such extension occurred, and unless City and Professional have agreed in writing upon the allowance of additional time to be made.

Section 5. Documents

(a) Project Documents. All proposals, reports, studies, surveys, applications, drawings, plans, specifications, data, and other documents, whether in draft form or final form (including any electronic format) prepared by the Professional and its employees, consultants, subcontractors, agents, or representatives (collectively referred to in this section as "Professional) for the use and/or benefit of City in connection with this Agreement ("Project Documents"). The Professional shall be deemed the author of their respective component of the Project Documents. Notwithstanding, upon payment by the City as required by this Agreement, the City shall own, have, keep and retain all rights, title, and interest in and to all Project Documents, including all ownership, common law, statutory, and other reserved rights, including copyrights (except copyrights held by the Professional) in and to all Project Documents, whether in draft form or final form, which are produced at City's request and in furtherance of this Agreement. The City shall have full authority to authorize any contractor(s), subcontractors, consultants, and material or equipment suppliers to reproduce applicable portions of the Project Documents to and for use in their execution of the services or for any other purpose. Acceptance and approval of the Project Documents by the City shall not constitute nor be deemed a release of the responsibility and liability of the Professional for the accuracy or competency of its designs, working drawings, specifications, or other documents;

nor shall such approval be deemed to be an assumption of such responsibility by the City for any defect in the designs, working drawings, and specifications, or any other documents prepared by Professional.

(b) Professional's Documents. All previously owned intellectual property of the Professional, including but not limited to any computer software (object code and source code), tools, systems, equipment or other information used by the Professional or its suppliers in the course of delivering the Services hereunder, and any know-how, methodologies or processes used by Professional to provide the services or protect deliverables to the City, including without limitation, all copyrights, trademarks, patents, trade secrets and any other proprietary rights inherent therein and appurtenant thereto ("Professional's Documents"), shall remain the sole and exclusive property of Professional. Notwithstanding, the Professional agrees that the City shall have the right to access to all such information and is granted the right to make and retain copies of the Professional's Documents. The City acknowledges that any reuse of the Professional's Documents without specific written verification or adaptation by the Professional will be at the City's sole risk and without liability or legal exposure to the Professional.

(c) Confidential Information. The Professional agrees it will notify the City in writing if it considers specific information to be confidential or proprietary trade secrets and will use its best efforts to clearly mark all such information as "Confidential" and/or "Proprietary – Trade Secret" at the time it is delivered or made accessible to City. The City acknowledges that all such designated information is considered by the Professional to be confidential and the exclusive property of the Professional. Notwithstanding the foregoing, Professional acknowledges that this Agreement and all services performed hereunder are subject to the legal requirements of the Texas Public Information Act and that City will have no obligation to protect or otherwise limit disclosure of any confidential or proprietary information if Professional has not notified City of such designation in conformance with this section. Professional agrees and covenants to protect any and all proprietary rights of City (or other persons) in any materials provided to Professional by City. Additionally, any materials provided to the Professional by the City shall not be released to any third party without the consent of the City and shall be returned intact to the City upon termination or completion of this Agreement if instructed to do so by the City. In the event City delivers to Professional any information that has been expressly marked "Confidential" or has notified Professional is confidential or is the proprietary information of a third party, Professional agrees it shall not disclose to anyone directly or indirectly during the term of this Agreement or at any time thereafter, any such information, nor shall it use any such information for any purpose other than as reasonably necessary in connection with Professional's performance of the services under this Agreement. Professional shall further, at its own expense, defend all suits or proceedings instituted against City and pay any award of damages or loss resulting from an injunction against City, insofar as the same is based on any claim that materials or services provided under this Agreement constitute an infringement of any patent, trade secret, trademark, copyright, or other intellectual property rights. Notwithstanding, the foregoing confidentiality obligations shall not extend to, and nothing herein shall limit either party's right to disclose any information provided hereunder which: (i) was or becomes generally available to the public, other than as a result of a disclosure by the receiving party or its personnel; (ii) was or becomes available to the receiving party or its representatives on a non-confidential basis, provided that the source of the information is not bound by a confidentiality agreement or otherwise prohibited from transmitting such information by a contractual, legal, or fiduciary duty; (iii) was independently developed by the receiving party without the use of any confidential information of the disclosing party; or (iv) is required to be disclosed by applicable law or court order.

Section 6. Payment

- (a) Compensation. Professional's compensation shall be as specified in the payment schedule in Exhibit A; provided that the total compensation under this Agreement shall not exceed **\$334,865**.
- (b) Payment Terms. The City agrees to pay the Professional for all services authorized in writing and properly performed by the Professional in general conformance with the fee schedule, subject to changes in the Scope of Services or additional services agreed upon in writing. Unless otherwise agreed in writing, all payments to Professional by City shall be based on detailed monthly invoices submitted by Professional for work performed and accepted by City, less any previous payments. Payment will be due within thirty (30) days of the City's receipt and acceptance of an approved invoice. Notwithstanding the foregoing, the City reserves the right to delay, without penalty, any payment to the Professional when, in the opinion of the City, the Professional has not made satisfactory progress on the Project as described in the Scope of Services.
- (c) Deductions. The City may deduct from any amounts due or to become due to the Professional any sum or sums owing by the Professional to the City. In the event of any breach by Professional of any provision or obligation of this Agreement, or in the event of the assertion by other parties of any claim or lien against the City, or the City's premises, arising out of Professional's performance of this Agreement, the City shall have the right to retain out of any payments due or to become due to Professional an amount sufficient to completely protect City from any and all reasonably anticipated loss, damage or expense therefrom, until the breach, claim or lien has been satisfactorily remedied or adjusted by Professional.

Section 7. Default; Force Majeure

- (a) Default; Notice to Cure. A party shall be deemed in default under this Agreement if the party is in breach of a material provision of this Agreement and said breach is not cured within fifteen (15) days after written notice of default by the other party. In the event the breaching party has notified the other party in writing that it is diligently working to cure the breach and has provided reasonable written evidence in support of the same, the breaching party shall not be deemed in default until the thirtieth (30th) day following the non-breaching party's notice of default.
- (b) Default by Professional. In addition to default under Section 7(a) above, the Professional shall be in default under this Agreement if the Professional fails to comply or becomes disabled and unable to comply with the provisions of this Agreement related to the Professional's performance of the services, including the quality or character of the services or time of performance for any material component of the services. If such default is not corrected within ten (10) days from the date of the City's written notice to the Professional regarding the same, the City may, at its sole discretion, without prejudice to any other right or remedy:
- (i) Terminate this Agreement and be relieved of the payment of any further consideration to Professional except for all services determined by City to be satisfactorily completed prior to termination. Payment for work satisfactorily completed shall be for actual costs, including reasonable salaries and travel expenses of the Professional to and from meetings called by the City at which the Professional is required to attend, but shall not include any loss of profit of the Professional. In the event of such termination, City may proceed to complete the services

in any manner deemed proper by City, either by the use of its own forces or by resubletting to others; or

(ii) The City may, without terminating this Agreement or taking over the services, furnish the necessary labor, materials, equipment, supplies and/or assistance necessary to remedy the situation, at the expense of the Professional.

(c) Force Majeure. To the extent either party of this Agreement shall be wholly or partially prevented from the performance of any obligation or duty placed on such party by reason of or through stoppage of labor, riot, fire, flood, acts of war, insurrection, court judgment, or a government restriction, quarantine or mandatory closure order enacted in response to a pandemic or other public health crises, or other specific cause reasonably beyond the party's control and not attributable to its malfeasance, neglect or nonfeasance (each an event of "Force Majeure"), the time for performance of such obligation (other than a payment obligation) may be extended for a period equal to the time lost by reason such event, provided, that the party complies with the provisions of this section. Specifically, the party asserting Force Majeure (i) shall give prompt notice to the other party of the prevention of performance as soon as the asserting party is reasonably aware of such prevention, and (ii) has the burden of demonstrating: (1) how and why their performance was so prevented, (2) the period of time during which they were so prevented from performing (which under the facts may be equal to, or shorter or longer than, the duration of the Force Majeure event itself), and (3) that the party used commercially reasonable efforts to mitigate and/or eliminate such prevention and resumed performance under this Agreement as soon as reasonably practicable.

Section 8. Termination; Suspension

(a) Termination Upon Default. Either party may terminate this Agreement upon written notice if the other party is in default of this Agreement, subject to the defaulting party's right to cure in conformance with the terms of this Agreement.

(b) Termination by City. The City shall be entitled to terminate this Agreement, with or without cause, by providing thirty (30) days' prior written notice to Professional.

(c) Termination Following Request for Modification. Should the City require a modification of this Agreement with Professional, and in the event the City and Professional fail to agree upon a modification to this Agreement, the City shall have the option of terminating this Agreement and Professional's services hereunder at no additional cost other than the payment to the Professional, in accordance with the terms of this Agreement, for the services reasonably determined by City to be properly performed by Professional prior to such termination date.

(d) Suspension. The City reserves the right to suspend this Agreement for the convenience of the City by issuing a written notice of suspension that describes the City's reason(s) for the suspension and the expected duration of the suspension. Such expected duration shall, in no way, guarantee the total number of days of suspension. Such suspension shall take effect immediately upon the Professional's receipt of said notice. Should such suspension extend past the expected duration identified by City in its latest notice of suspension, Professional shall have the right to terminate this Agreement if (i) Professional provides not less than thirty (30) days prior written notice to City requesting to recommence the services, and (ii) City does not recommence the services within the time requested.

Section 9. Insurance

The Professional shall during the term hereof maintain in full force and effect all policies of insurance reasonably required by City. Professional's obligation to provide acceptable certificates of insurance is a material condition precedent to this Agreement, and services under this Agreement shall not commence until certificates of insurance have been received, reviewed, and accepted by City. The minimum coverages and limits of liability for the policies of insurance required for the specific services under this Agreement are maintained by and accessible through the City's purchasing department.

Section 10. Indemnification; Notice.

THE CITY SHALL NOT BE LIABLE FOR ANY LOSS, DAMAGE, OR INJURY OF ANY KIND OR CHARACTER TO ANY PERSON OR PROPERTY ARISING FROM THE SERVICES OF PROFESSIONAL PURSUANT TO THIS AGREEMENT. PROFESSIONAL HEREBY WAIVES ALL CLAIMS AGAINST THE CITY, ITS OFFICERS, AGENTS, AND EMPLOYEES (COLLECTIVELY REFERRED TO IN THIS SECTION AS "CITY INDEMNITEES") FOR DAMAGE TO ANY PROPERTY OR INJURY TO, OR DEATH OF, ANY PERSON ARISING AT ANY TIME AND FROM ANY CAUSE OTHER THAN THE NEGLIGENCE OR WILLFUL MISCONDUCT OF THE CITY INDEMNITEES. PROFESSIONAL AGREES TO INDEMNIFY AND SAVE HARMLESS THE CITY INDEMNITEES FROM AND AGAINST ANY AND ALL LIABILITIES, DAMAGES, CLAIMS, SUITS, COSTS (INCLUDING COURT COSTS, REASONABLE ATTORNEYS' FEES AND COSTS OF INVESTIGATION) AND ACTIONS OF ANY KIND BY REASON OF INJURY TO OR DEATH OF ANY PERSON OR DAMAGE TO OR LOSS OF PROPERTY TO THE EXTENT CAUSED BY THE NEGLIGENT PERFORMANCE OF SERVICES UNDER THIS AGREEMENT OR BY REASON OF ANY NEGLIGENT ACT OR OMISSION ON THE PART OF PROFESSIONAL, ITS OFFICERS, DIRECTORS, MANAGERS, EMPLOYEES, CONTRACTORS, SERVANTS, REPRESENTATIVES, CONSULTANTS, LICENSEES, SUCCESSORS, OR PERMITTED ASSIGNS (EXCEPT WHEN SUCH LIABILITY, CLAIMS, SUITS, COSTS, INJURIES, DEATHS, OR DAMAGES ARISE FROM OR ARE ATTRIBUTED TO THE NEGLIGENCE OR WILFUL MISCONDUCT OF A CITY INDEMNITEE, IN WHOLE OR IN PART, IN WHICH CASE PROFESSIONAL SHALL INDEMNIFY THE CITY INDEMNITEES TO THE EXTENT OR PROPORTION OF NEGLIGENCE ATTRIBUTED TO PROFESSIONAL, ITS OFFICERS, AGENTS, OR EMPLOYEES AS DETERMINED BY A COURT OR OTHER FORUM OF COMPETENT JURISDICTION).

Notices of Claim. The Professional shall promptly advise the City in writing of any claim or demand against the City, related to or arising out of the Professional's acts or omissions under this Agreement and shall see to the investigation of such claims or demand at the Professional's sole cost and expense; provided, that City, at its option and at its own expense, may participate in such investigation without relieving the Professional of any of its obligations hereunder. Professional's obligations under this section shall not be limited to the limits of coverage of insurance maintained or required to be maintained under this Agreement.

THE PROVISIONS OF THIS SECTION SHALL SURVIVE EXPIRATION OR TERMINATION OF THIS AGREEMENT FOR A PERIOD OF FOUR (4) YEARS.

Section 11. Notice.

All notices required by this Agreement shall be in writing and addressed to the parties at the addresses set forth on the signature page(s) of this Agreement (or to such other address that may be designated by the receiving party from time to time in accordance with this section). All notices shall be delivered by (a) personal delivery, (b) certified or registered mail (in each case, return receipt requested, postage prepaid), (c) nationally recognized overnight courier (with all fees pre-paid), or (d) email of a pdf document containing the required notice. Such notice or document shall be deemed to be delivered or given, whether actually received or not, (i) when received if delivered or given in person, (ii) if sent by United States mail, three (3) business days after being deposited in the United States mail as set forth above, (iii) on the next business day after the day the notice or document is provided to a nationally recognized carrier to be delivered as set forth above, or (iv) if sent by email, the next business day. A confirmation of delivery report that reflects the time that the email was delivered to the recipient's last notified email address is prima facie evidence of its receipt by the recipient, unless the sender receives a delivery failure notification indicating that the email has not been delivered to the recipient.

Section 12. Verifications by Professional

The Professional's execution of this Agreement shall serve as its formal acknowledgment and written verification that:

- (a) if the requirements of Subchapter J, Chapter 552, Government Code, apply to this Agreement and Professional agrees that the Agreement can be terminated if Professional knowingly or intentionally fails to comply with a requirement of that subchapter;
- (b) pursuant to Texas Government Code Chapter 2270, that Professional's organization does not presently boycott Israel and will not boycott Israel during the term of this Agreement; and
- (c) pursuant to Texas Government Code Chapter 2251, that Professional's organization does not currently discriminate against firearm and ammunition industries and will not for the term of the contract. Discriminating means refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations, specifically with the firearm or ammunition industry or with a person or entity doing business in the firearm or ammunition industry, but does not include an action made for ordinary business purposes.

Section 13. Miscellaneous

(a) The Professional shall not assign or sublet this Agreement, in whole or in part, without the prior written consent of the City. (b) Professional shall comply with all federal, state, county, and municipal laws, ordinances, resolutions, regulations, rules, and orders applicable to the services under this Agreement. (c) The laws of the State of Texas shall govern this Agreement; and the venue for any action concerning this Agreement shall be in the state district courts of Dallas County, Texas. The parties agree to submit to the personal and subject matter jurisdiction of said courts. (d) This Agreement contains the entire understanding of the parties with respect to the subject matter hereof, and there are no oral understandings, statements, or stipulations bearing upon the meaning or effect of this Agreement that have not been incorporated herein. (e) The exhibits attached hereto, if any, are incorporated herein and made a part hereof for all purposes. (f) Unless expressly provided otherwise herein, this Agreement may only be modified, amended, supplemented,

or waived by a mutual written agreement of the parties. (g) In the event any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provisions, and the Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained in it. (h) Any of the representations and obligations of the parties, as well as any rights and benefits of the parties pertaining to a period of time following the termination of this Agreement, shall survive termination. (i) This Agreement may be executed by the parties in separate counterparts, each of which, when so executed and delivered, shall be an original, but all such counterparts shall together constitute one and the same instrument. Each counterpart may consist of any number of copies hereof, each signed by less than all but together signed by all of the parties. (j) Each party represents that it has full capacity and authority to grant all rights and assume all obligations granted and assumed under this Agreement. (k) Subject to the provisions regarding assignment, this Agreement shall be binding on and inure to the benefit of the parties to it and their respective heirs, executors, administrators, legal representatives, successors, and assigns.

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

IN WITNESS WHEREOF, the parties have executed and delivered this Agreement as of the Effective Date.

For City:

CITY OF FARMERS BRANCH, TEXAS

By: _____
Benjamin Williamson
City Manager

Date: _____

Notice Address:

City of Farmers Branch
Attn: City Manager
1300 William Dodson Pkwy
Farmers Branch, Texas 75234
E: Benjamin.williamson@farmersbranchtx.gov

For Professional:

COBB, FENDLEY, & ASSOCIATES, INC.

By: _____

Name: _____

Title: _____

Date: _____

Notice Address:

Cobb, Fendley, & Associates, Inc.
Attn: _____
13430 Northwest Freeway
STE 1100
Houston, TX 77040
E: _____

Approved as to Form:

Whitt L. Wyatt, City Attorney

