

COTTONWOOD HEIGHTS

RESOLUTION NO. 2014-48

A RESOLUTION APPROVING ENTRY INTO AN AMENDMENT  
TO AGREEMENT FOR PUBLIC WORKS SERVICES  
WITH TERRACARE ASSOCIATES, LLC

**WHEREAS**, in or about October 2013, the city of Cottonwood Heights (“City”) entered into an “Agreement for Public Works Services” (the “*Agreement*”) with TerraCare Associates, LLC (“*Contractor*”) whereunder Contractor agreed to provide public works services to City on the terms and conditions specified in the Agreement; and

**WHEREAS**, the parties subsequently have agreed to amend the Agreement as specified in that certain “First Amendment to Agreement for Public Works Services” (the “*Amendment*”); and

**WHEREAS**, City’s city council (the “*Council*”) met in regular session on 8 July 2014 to consider, among other things, approving City’s entry into the Amendment; and

**WHEREAS**, the Council has reviewed the form of the Amendment, a photocopy of which is annexed hereto; and

**WHEREAS**, after careful consideration, the Council has determined that it is in the best interests of the health, safety and welfare of City’s residents to approve City’s entry into the Amendment as proposed;

**NOW, THEREFORE, BE IT RESOLVED** by the city council of Cottonwood Heights that the attached Amendment with Contractor is hereby approved, and that City’s mayor and recorder are authorized and directed to execute and deliver the Amendment on behalf of City.

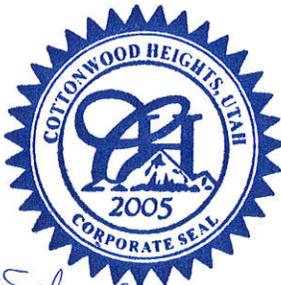
This Resolution, assigned no. 2014-48, shall take effect immediately upon passage.

**PASSED AND APPROVED** this 8<sup>th</sup> day of July 2014.

COTTONWOOD HEIGHTS CITY COUNCIL

By   
\_\_\_\_\_  
Kelvyn H. Cullimore, Jr., Mayor

ATTEST:



  
\_\_\_\_\_  
Kory Solorio, Recorder

**VOTING:**

Evyn H. Cullimore, Jr.	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
Michael L. Shelton	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
J. Scott Bracken	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
Michael J. Peterson	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
Tee W. Tyler	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>

**DEPOSITED** in the office of the City Recorder this 8<sup>th</sup> day of July 2014.

**RECORDED** this 9 day of July 2014.

# First Amendment to Agreement for Public Works Services

**THIS FIRST AMENDMENT TO AGREEMENT FOR PUBLIC WORKS SERVICES** (this "*Amendment*") is made and entered into effective 30 June 2014 between the city of **COTTONWOOD HEIGHTS**, a Utah municipality whose address is 1265 East Fort Union Blvd., Suite 250, Cottonwood Heights, UT 84047 ("*City*"), and **TERRACARE ASSOCIATES, LLC**, a Colorado limited liability company whose address is 9742 Titan Park Circle, Littleton, CO 80125 ("*Contractor*"). City and Contractor are each referred to herein as a "*Party*" and are collectively referred to as the "*Parties*."

## **RECITALS:**

A. Effective \_\_ October 2013, the Parties entered into an "Agreement for Public Works Services" (the "*Agreement*") whereunder Contractor agreed to provide, and City agreed to purchase, snow management and other public works services on the terms and conditions specified in the Agreement.

B. The Parties now desire to amend the Agreement as provided herein.

## **AGREEMENT:**

**NOW, THEREFORE**, in consideration of the premises, the mutual covenants and agreements herein contained, and for other good and valuable consideration, the receipt and legal sufficiency of which is hereby acknowledged, the Parties hereto agree as follows:

Section 1. **Defined Terms.** Except as otherwise specified in this Amendment, all capitalized "defined terms" in this Amendment shall have the same meanings as in the Agreement.

Section 2. **Amendment to Total Annual Fees.** The Agreement (specifically including, without limitation, Subsections 2.1 and 8.1 of the Agreement) specifies the Total Annual Fees to be paid by City to Contractor during any July 1<sup>st</sup> through June 30<sup>th</sup> fiscal year. The Parties hereby amend the Agreement to:

(a) Reduce the Total Annual Fees to be paid by City to Provider during the Initial Period from \$1,450,000 to \$1,400,000, which is a reduction of \$50,000; and

(b) Reduce the Total Annual Fees to be paid by City to Provider during any fiscal year (a "*Subsequent Year*") following the Initial Period from \$2,292,279 to \$1,492,279, which is a reduction of \$800,000 per year; provided, however, that such reduced Total Annual Fees during any Subsequent Year shall remain subject to increase in accordance with any intervening changes in the Consumer Price Index as generally explained in Section 8.1 of the Agreement. For example, if (a) the Consumer Price Index for the effective date of the Agreement is 100, and (b) the Consumer Price Index for 30 June 2015 is 103, then the CPI-adjusted Total Annual Fees payable to Contractor under the Agreement for the period of 1 July 2015 through 30 June 2016 would be  $\$1,492,279 \times 103/100 = \$1,537,047$ .

Consequently, all references in the Agreement (including its exhibits) to \$1,450,000 shall be deemed modified and amended to instead be references to \$1,400,000, and all references in the

Agreement to \$2,292,279 shall be deemed modified and amended to instead be references to \$1,492,279.

The Parties also shall cooperate to make any modifications to the Exhibits to the Agreement that are reasonably appropriate in view of the reduction of the Total Annual Fees hereunder.

Section 3. **Amendment to Subsection 2.6.** Subsection 2.6 of the Agreement is hereby amended to add a new second paragraph following the end of current Subsection 2.6, reading in its entirety as follows:

The Parties acknowledge that Contractor intends to enhance its technical and logistical capability to perform certain Services (including, without limitation, certain Base Services) which City needs. (Examples include concrete flatwork and some aspects of asphalt work). If Contractor's technical and logistical capabilities and expertise hereafter increase, then the Parties shall negotiate in good faith to include such newly-available Services in the annual Work Plan, and to correspondingly increase the compensation to be paid to Contractor hereunder; provided, however, that Contractor first establishes to City's reasonable satisfaction that Contractor is, indeed, ready, willing and capable of providing such Services in a good, workmanlike, finished and efficient manner that is equivalent (in cost and results) to provision of such Services by the Salt Lake County Public Works Department (or its successor).

Section 4. **Amendment to Exclusivity Provisions.** The Agreement (specifically including, without limitation, Subsection 2.7 and Exhibit "A") is hereby amended to omit, delete and discharge any responsibility of City to obtain any specific Services from or through Contractor, subject to City's duty to continue to utilize Contractor to perform Services of a type and quantity sufficient to justify continued payment of the required Total Annual Fees to Contractor.

Section 5. **Amendment to Subsection 10.1.** Subsection 10.1 of the Agreement, which currently reads in its entirety as follows:

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

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

of the Effective Date, any transfer of a controlling interest in any Current Member, or any other reorganization or change of controlling ownership of Contractor such that the Current Members no longer control Contractor. Contractor promptly shall notify the City Manager in writing if such a change in ownership or control occurs at any time during the Term.

Notwithstanding the foregoing, however, City acknowledges that a controlling interest in Contractor currently is owned by an equity investment firm (the "*Current Owner*") which may elect to sell and convey most or all of such controlling interest to another equity investment firm during the term of this Agreement. City hereby consents to such transfer so long as it does not result in any material changes to the day-to-day management and operations of Contractor.

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

Is hereby amended to read in its entirety as follows:

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

(a) By City. City may terminate this Agreement without cause or for City's convenience ("*without cause*") at any time after 30 June 2014 upon at least 90 days' prior written notice to Contractor; provided, however, that if Contractor disagrees with the effective date of such termination, such effective date shall instead be up to 180 days after such termination notice, as reasonably, mutually agreed by the Parties. City also may effectively terminate this Agreement without cause by notifying Contractor at least six months before expiration of the Initial Term or the first Renewal Term, as applicable, of City's refusal to extend the Term for a Renewal Term, as provided in Subsection 9.2, above. Notwithstanding anything in this Agreement to the contrary, City may also terminate this Agreement with no advance notice if (i) a Bankruptcy Act (defined below) occurs with respect to Contractor; or (ii) any transfer of a controlling interest in Contractor (meaning over a 50% members interest, either singly or cumulatively in a series of related transactions) to any individual or entity that is not a member of Contractor (a "*Current Member*") as of the Effective Date, any transfer of a controlling interest in any Current Member, or any other reorganization or change of controlling ownership of Contractor such that the Current Members no longer control Contractor. Contractor promptly shall notify the City Manager in writing if such a change in ownership or control occurs at any time during the Term.

Notwithstanding the foregoing, however, City acknowledges that a controlling interest in Contractor currently is owned by an equity investment firm (the "Current Owner") which may elect to sell and convey most or all of such controlling interest to another equity investment firm during the term of this Agreement. City hereby consents to such transfer so long as it does not result in any material changes to the day-to-day management and operations of Contractor.

(b) By Contractor. Contractor may terminate this Agreement without cause at any time after 30 June 2014 upon at least 90 days' prior written notice to City; provided, however, that if City disagrees with the effective date of such termination, such effective date shall instead be up to 180 days after such termination notice, as reasonably, mutually agreed by the Parties. Contractor also may effectively terminate this Agreement without cause by notifying City at least six months before expiration of the Initial Term or the first Renewal Term, as applicable, of Contractor's refusal to extend the Term for a Renewal Term, as provided in Subsection 9.2, above.

Section 6. No Other Modification. Except as specifically amended by this Amendment, the Agreement is unmodified and remains in full force and effect between the parties.

**DATED** effective the day, month and year first above written.

**CONTRACTOR:**

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

By:   
Name: DEAN MURPHY  
Title: PRESIDENT

**CITY:**

**COTTONWOOD HEIGHTS**, a Utah municipality

**ATTEST:**

By: \_\_\_\_\_  
**Kory Solorio**, Recorder

By: \_\_\_\_\_  
**Kelvyn H. Cullimore, Jr.**, Mayor