

## **PROFESSIONAL SERVICES AGREEMENT**

**THIS AGREEMENT** ("Agreement") entered into this 6th day of September, 2016, ("Effective Date") is by and between Avocette Technologies. ("CONSULTANT") located at STE.#202-610 Sixth Street, New Westminster, British Columbia, V3L 3C2 and the City of Commerce, a Municipal Corporation ("CITY") located at 2535 Commerce Way, Commerce CA 90040;

### **RECITALS**

WHEREAS, the City is in need of a professional that can assist the City with staff augmentation and consultant services; (the "Project"); and

WHEREAS, Consultant represents that it is specially trained, experienced and competent to perform the special services that will be required by this Agreement; and

WHEREAS, Consultant is willing to render such Services, as hereinafter defined, on the terms and conditions below.

### **AGREEMENT**

#### **1. Scope of Services and Schedule of Performance.**

CONSULTANT shall provide City with such professional services as are set forth in Exhibit A, "Scope of Services," which is attached hereto and incorporated herein by this reference.

#### **2. Term.**

Except as otherwise provided by Section 20 hereof, the term of this Agreement shall be for a period of 12 months from the Effective Date. The City shall have the option to extend the Agreement at its discretion.

#### **3. Compensation.**

So long as CONSULTANT is discharging CONSULTANT's obligations in conformance with the terms of this Agreement, CONSULTANT shall be paid such compensation rates as are set forth in CONSULTANT's Proposal dated July 25, 2016 attached hereto as Exhibit A and incorporated herein by this reference. CONSULTANT will not be eligible for any paid benefits for federal, social security, state workers' compensation, unemployment insurance, professional insurance, medical/dental, or fringe benefits offered by City.

Such fees shall be payable following receipt of an itemized invoice for services rendered. Consultant shall send and address its bill for fees, expenses, and costs to the City to the attention of the City Administrator. The City shall pay the full amount of such invoice; provided, however, that if the City or its City Administrator object to any portion of an invoice, the City shall notify Consultant of the City's objection and the grounds therefore within thirty (30) days of the date of

receipt of the invoice; the parties shall immediately make every effort to settle the disputed portion of the invoice.

4. Financial Records.

Consultant shall maintain complete and accurate records with respect to fees and costs incurred under this Agreement. All such records shall be maintained on a generally accepted accounting basis and be clearly identified and readily accessible. Consultant shall keep, maintain and provide free access to such books and records to examine and audit the same, and to make transcripts thereof as necessary, and to allow inspection of all work data, documents, proceedings and activities related to this Agreement for a period of three years from the date of final payments under this Agreement. All accounting records shall readily provide a breakdown of fees and costs charged to this Agreement.

5. Independent Contractor.

Consultant is and shall perform its services under this Agreement as a wholly independent contractor. Consultant shall not act nor be deemed an agent, employee, officer or legal representative of the City. Consultant shall not at any time or in any manner represent that it or any of its agents, employees, officers or legal representatives are in any manner agents, employees, officers or legal representatives of the City. Consultant has no authority to assume or create any commitment or obligations on behalf of the City or bind the City in any respect. This Agreement is not intended to and does not create the relationship of partnership, joint venture or association between the City and Consultant. None of the foregoing shall affect any privilege or protection against disclosure which applies to the services Consultant undertakes under this Agreement.

6. Consultant to Provide Required Personnel; Subcontracting

CONSULTANT shall provide and direct the necessary qualified personnel to perform the services required of and from it pursuant to the express and implied terms hereof, with the degree of skill and judgment normally exercised by recognized professional firms performing services of a similar nature at the time the services are rendered, and to the reasonable satisfaction of City. CONSULTANT may not have a subconsultant perform any services required under this Agreement unless the subconsultant is first approved and authorized to perform such work by the City.

7. Responsible Principal and Project Manager.

Consultant shall have a Responsible Principal and a Project Manager who shall be principally responsible for Consultant obligations under this Agreement and who shall serve as principal liaison between the City and Consultant. Designation of another Responsible Principal or Project Manager by Consultant shall not be made without the prior written consent of the City.

8. City Liaison.

Consultant shall direct all communications to the Director of Public Works and Development Services or his/her designee. All communications, instructions and directions on the part of the City shall be communicated exclusively through the Director of Public Works and Development Services or the City Administrator or their designee.

9. Licenses.

Consultant warrants that it and its employees have obtained all valid licenses and/or certifications generally required of professionals providing services such as the Services, by all applicable regulating governmental agencies, and are in good standing with such applicable regulating governmental agencies.

10. Compliance with Laws.

Consultant and its employees shall comply with all applicable city, county, state, and federal laws and regulations (including occupational safety and environmental laws and regulations) in performing the Services and shall comply with any directions of governmental agencies and the City relating to safety, security, and the like.

11. Insurance.

Consultant shall maintain insurance and provide evidence thereof as required by Exhibit B hereto (the "Required Insurance") which is attached hereto and incorporated herein by this reference, for the term provided herein.

12. Warranty and Liability.

Consultant Services provided under this Agreement will be performed with the degree of skill and judgment normally exercised by recognized professionals performing services of a similar nature at the time the services were rendered. Consultant shall be liable for injury or loss to the extent caused by the negligence of, or breach of this warranty by Consultant, its employees and/or its agents hereunder. This Section 12 survives the completion and/or termination of this Agreement.

13. Indemnification.

Consultant shall indemnify and hold the City and their respective officials, officers, agents and employees harmless from and against any and all liabilities, losses, damages, costs and expenses the City and their respective officials, officers, agents and employees hereafter may suffer in connection with any claim, action, or right of action (at law or in equity) because of any injury (including death) or damage to person or property proximately caused by any negligent acts, errors, or omissions by Consultant, its employees or its agents in the performance of the Services hereunder. Consultant shall not be liable to the extent that any liability, loss, damage, cost, and expense is caused from an act of negligence or willful misconduct by the City or its respective officials, officers, employees or agents. Upon demand, Consultant shall promptly

provide a defense to such claims or actions and shall promptly pay for all associated and resulting costs, damages, settlements, penalties, judgments, fees and expenses, including attorneys' fees and costs to the extent such damages are caused by Consultant's negligent acts, errors or omissions.

14. Confidentiality.

Consultant shall maintain as confidential and not disclose to others, either before or after the termination of this Agreement, any data, documents, reports, or other information provided to Consultant by the City, or employees or agents of the City, or any data, documents, reports, or other information produced by Consultant during its performance hereunder, except as expressly authorized in writing by the City, or to the extent required for: (1) compliance with professional standards of conduct for the preservation of the public safety, health, and welfare, but only after Consultant notifies the City of such need for disclosure; and (2) compliance with any court order or other government directive or requirement, but only after Consultant notifies the City of such an order, directive, or requirement. Consultant shall keep all "Confidential" materials received or generated under this Agreement in separate files marked "Confidential." Any non-compliance by Consultant with this part of the Agreement shall be deemed a material breach of this Agreement. The obligations of this paragraph shall survive the termination of this Agreement.

Notwithstanding the foregoing, Consultant shall not be restricted from disclosing confidential information that is reasonably necessary for Consultant to disclose to Consultant's employees, subconsultants and the general contractor and subcontractors, if appropriate, or information in whatever form that is in the public domain. Nor shall Consultant be restricted from giving notices required by law or complying with an order to provide information or data when such an order is issued by a court, administrative agency or other legitimate authority, or if disclosure is reasonably necessary for Consultant to defend itself from any legal action or claim.

15. Ownership of Documents.

All original documents, designs, drawings, methodological explanations, computer programs, reports, notes, data, materials, services and other products prepared in the course of providing the Services (collectively, "Products") shall become the sole property of the City and the City shall have authority to publish, disclose, distribute, use, reuse or disposed of the Products in whole or in part, without the permission of Consultant. In the event that this Agreement is terminated by the City, Consultant shall provide the City with any finished or unfinished Products. No documents, designs, drawings, methodological explanations, computer programs, reports, notes, data, materials, services and other products prepared in whole or in part under this Agreement shall be the subject of an application for copyright or submitted for publication by or on behalf of Consultant. Notwithstanding such ownership, Consultant shall be entitled to make and obtain copies or reproductions of such Products for its own files or internal reference.

16. Data and Services to be Furnished by the City.

All information, data, records, reports and maps as are in possession of the City, and necessary for the carrying out of this work, shall be made available to Consultant without charge. The City shall make available to Consultant, members of the City's staff for consultation with Consultant in the performance of this Agreement. The City does not warrant that the information data, records, reports and maps heretofore to be provided to Consultant are complete or accurate. The City and Consultant agree that the City shall have no liability should any of the information, data, records, reports, and maps be inaccurate, incomplete or misleading.

17. Covenant against Contingent Fees.

Consultant warrants that it has not employed or retained any company or person to solicit or secure this Agreement and that it has not paid or agreed to pay any company or person any fee, City or percentage from the award or making of this Agreement. For breach or violation of this warranty, the City shall have the right, among other available legal remedies, to terminate this Agreement without liability, or in its discretion, to deduct from the consideration payable to Consultant, or otherwise recover, the full amount of such fee, commission, percentage, brokerage fee, gift or contingent fee.

18. Conflict of Interest.

Consultant covenants that neither it nor any officer or principal of its firm have any interests, nor shall they acquire any interest, directly or indirectly which will conflict in any Consultant notifies the City of such need for disclosure; and (2) compliance with any court order or other government directive or requirement, but only after Consultant notifies the City of such an order, directive, or requirement. Consultant shall keep all "Confidential" materials received or generated under this Agreement in separate files marked "Confidential." Any non-compliance by Consultant with this part of the Agreement shall be deemed a material breach of this Agreement. The obligations of this paragraph shall survive the termination of this Agreement.

19. Other Agreements.

Consultant warrants that it is not a party to any other existing agreement that would prevent Consultant from entering into this Agreement or that would adversely affect Consultant's ability to perform the Services under this Agreement. During the term of this Agreement, Consultant shall not, without City's prior written consent, perform services for any person, firm, or corporation other than City if such services could lead to a conflict with Consultant's obligations under this Agreement.

20. Termination.

This Agreement may be terminated, prior to the expiration of its term, only in the following manner:

- a. by the written mutual agreement of the parties hereto; or
- b. by the City, with or without cause, upon 30 days written notice to Consultant pursuant to Section 24 of this Agreement.
- c. by Consultant for cause upon thirty (30) days written notice to City for the following reasons: (1) breach by City of any material term of this Agreement including; (2) material changes in the conditions under which this Agreement was entered into or the failure of the parties to reach agreement on the adjustments necessitated by such changes.

Upon receipt of a notice of termination, Consultant shall immediately cease all work and promptly deliver to the City the work product or other results obtained by Consultant up to that time. In the event of termination without cause by the City, the City shall pay Consultant for work completed prior to the date of such termination (based on the percentage of the overall work satisfactorily completed by Consultant in relation to the work required by the entire Agreement or the hours worked by Consultant, as applicable), provided such work is in a form usable by the City.

21. Waiver of Breach.

No waiver of any term, condition or covenant of this Agreement by the City shall occur unless signed by the City Administrator and such writing identifies the provision which is waived and the circumstances or period of time for which it is waived. Such waiver shall be for the specified period of time only and shall not apply to any subsequent breach. In addition, such waiver shall not constitute a waiver of any other term, condition or covenant of this Agreement nor shall it eliminate any remedies available to the City for any breaches of this Agreement which are not excused by such waiver. A delay in communicating a failure of Consultant to satisfy a term, condition or covenant in no way waives that term or any remedies available for its breach.

22. Assignment.

Neither this Agreement nor any rights or obligations hereunder may be assigned or otherwise transferred by Consultant, nor shall this Agreement inure to the benefit of any trustee in bankruptcy, receiver, or creditor or Consultant, whether by operation of law or otherwise, without the prior written consent of the City which may be withheld in its sole discretion. Any attempt to so assign or transfer this Agreement or any rights or obligations hereunder without such consent shall be void and of no effect.

23. Attorneys' Fees.

In the event an arbitration or a judicial proceeding is brought to enforce the terms of this Agreement, the prevailing party shall be entitled to recover from the other party its reasonable costs and attorneys' fees incurred in connection therewith.

24. Notices.

Notices provided hereunder shall be delivered by certified First Class U.S. Mail, postage prepaid, or by personal service as required in judicial proceedings, directed to the address provided below:

For the City:

City of Commerce  
2535 Commerce Way  
Commerce, California 90040  
Attn: Maryam Babaki  
Director of Public Works and Development Services

For Consultant:

Avocette Technologies  
Ste. #202-610 Sixth Street  
New Westminster, British Columbia V3L 3C2  
Attn: Gerard McMahon, Business Development

Notice shall be deemed received three days after its mailing to the above address or upon actual receipt as indicated by return receipt, whichever is earlier. Personal service shall be deemed received the same day personal delivery is effected.

25. Governing Law.

The validity, performance and construction of this Agreement shall be governed by and interpreted in accordance with the laws of the State of California applicable to contracts made to be performed therein. Any litigation commenced by either party to this Agreement shall be venued in Los Angeles County, California.

26. Severability.

Should any part of this Agreement be declared by a final decision by a court or tribunal of competent jurisdiction to be unconstitutional, invalid, or beyond the authority of either party to enter into or carry out, such decision shall not affect the validity of the remainder of this Agreement, which shall continue in full force and effect, provided that the remainder of this Agreement, absent the unexercised portion, can be reasonably interpreted to give effect to the intentions of the parties.

27. No Construction of Agreement against any Party.

Each party has cooperated in the drafting and preparation of this Agreement. Hence, in any construction to be made of this Agreement, it shall not be construed against any party on the basis such party drafted this Agreement or any provision thereof.

28. Entire Agreement and Amendments to Agreement.

This Agreement contains the entire understanding and agreement between the parties hereto with respect to the subject matter hereof and supersedes all previous communications, negotiations, and agreements, whether oral or written, between the parties with respect to such subject matter, and no addition to or modification of this Agreement or waiver of any provisions of this Agreement shall be binding on either party unless made in writing and executed by Consultant and the City.

29. No Representations Except as Expressly Stated in this Agreement.

Except as expressly stated in this Agreement, no party, nor its employees, agents or attorneys have made any statement or representation to any other party or its employees, agents or attorneys regarding any fact relied upon in entering into this Agreement, and each party does not rely upon any statement, representation and/or promise of any other party, its respective employees, agents or attorneys in executing this Agreement.

30. Counterpart Signatures.

This Agreement may be executed in one or more counterparts. When this Agreement has been properly signed by an authorized representative of each of the parties hereto, it shall constitute a valid Agreement, though each of the signatories may have executed separate counterparts hereof.

**IN WITNESS WHEREOF**, the parties hereto have each executed or caused to be executed this Agreement as of the Effective Date.

**CITY OF COMMERCE**

DATED: \_\_\_\_\_, 2016

By: \_\_\_\_\_  
Ivan Altamirano, Mayor

ATTEST:

\_\_\_\_\_  
Lena Shumway, City Clerk

**CONSULTANT**

DATED: September \_\_\_, 2016

By: \_\_\_\_\_  
Stewart Jack, Executive Vice President  
Avocette Technologies

**APPROVED AS TO FORM**

\_\_\_\_\_  
By: Eduardo Olivo, City Attorney

**EXHIBIT A**  
**SCOPE OF SERVICES**

## **EXHIBIT B**

### **REQUIRED INSURANCE**

On or before beginning any of the Services called for by any term of this Agreement, Consultant, at its own cost and expense, shall carry, maintain for the duration of this Agreement, and provide proof thereof that is acceptable to the City of its procurement of the insurance specified below from insurers and under forms of insurance satisfactory in all respects to the City. Consultant shall not commence work under this Agreement until all insurance required of Consultant have been obtained. Such insurance shall not be in derogation of Consultant's obligations to provide indemnity under Section 13 of this Agreement.

1. Comprehensive General Liability And Automobile Liability Insurance Coverage

Consultant shall carry and maintain Comprehensive General Liability and Automobile Liability Insurance which provides the following:

Minimum coverage: Bodily injury limits of \$1,000,000 for each person and \$1,000,000 for each occurrence; property damage limits of \$1,000,000 for each occurrence, \$2,000,000 aggregate.

If a Commercial General Liability Insurance form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this Agreement, including the use of owned and non-owned real property and automobiles. Insurance coverage shall not be subject to any type of pollution exclusion or owned property exclusions.

2. Errors And Omissions Insurance Coverage

Consultant shall carry and maintain Errors and Omissions Coverage Insurance which provides a minimum coverage of at least \$1,000,000 for each occurrence, \$2,000,000 aggregate.

3. Worker's Compensation

Before execution of the Agreement, Consultant shall file with the City the following signed certification:

“I am aware of the provisions of Section 3700 Labor Code which require every employer to be insured against liability for workers’ compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of this Service Agreement”.

Consultant shall carry and maintain worker's compensation as required by the California Labor Code for all persons employed directly or indirectly in connection with this Agreement by Consultant.

4. Additional Insureds

The City of Commerce, their officers, agents and employees must be named as additional insureds or as additional loss payees in all insurance policies required by this Agreement, except for workers compensation and professional liability. An endorsement to this effect shall be delivered to City prior to the commencement of any work. Satisfaction of any deductible requirement shall be the responsibility of Consultant. Such insurance shall be primary, and noncontributory with any other insurance by the City of Commerce.

5. Cancellation Clause

Each of the policies of insurance shall contain a clause substantially as follows:

It is hereby understood and agreed that this policy may not be canceled until 30 days after receipt by the City Administrator of the City of Commerce of the written notice of such cancellation or reduction of coverage, as evidenced by receipt of the certified letter. A ten (10) day written notice to City shall apply to non-payment of premium. Consultant shall provide thirty (30) days written notice to City prior to implementation of a reduction of limits or material change of insurance coverage as specified herein

6. Severability Clause

Each of the policies of insurance shall contain a clause substantially as follows:

The insurance afforded by this policy applies separately to each insured against whom a claim or suit is made or suit is brought, except with respect to the limit of the insurer's liability.

7. Qualifications of Insurer

All policies of insurance shall be issued by an insurance company acceptable to City and authorized to issue said policy in the State of California.

8. Approval of Insurer

The insurance carrier providing the insurance shall be chosen by Consultant subject to approval by City, provided that such approval shall not be unreasonably withheld.

9. Payment of Premiums

All premiums on insurance policies shall be paid by Consultant making payment, when due, directly to the insurance carrier, or in a manner agreed to by City.

10. Evidence of Insurance and Claims

Consultant shall promptly furnish the City all renewal notices and all receipts of paid premiums. In the event of loss, Consultant shall give prompt notice to the insurance carrier and City. City may make proof of loss if not made promptly by Consultant.

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