

## **CITY OF COMMERCE AGREEMENT FOR A FIREWORKS DISPLAY**

THIS AGREEMENT, made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2018, is between the City of Commerce, a municipal corporation, hereinafter referred to as "CITY," and Pyro Spectaculars, Inc., a California Corporation, hereinafter referred to as "PYRO."

### **ARTICLE 1. TERM OF AGREEMENT**

Section 1.01. This Agreement shall become effective upon being fully executed by both parties, and will continue until the agreed services have been completed, unless sooner terminated pursuant to the terms of this Agreement.

### **ARTICLE 2. SERVICES TO BE PERFORMED BY PYRO**

Section 2.01. PYRO shall furnish CITY, in accordance with the terms and conditions hereinafter set forth, one (1) fireworks display of approximately 20 minutes in duration (the "Display") as per Program A set forth in Exhibit A, which is attached hereto and incorporated herein by reference, including the services of a licensed pyrotechnic operator to take charge of and, along with sufficient assistants, safely discharge the Display.

The Display is scheduled to be performed on July 4, 2018, at the Rosewood Park Parking Lot at a mutually agreed upon time.

#### **Responsible Contractor in Charge**

Section 2.02. Christopher Souza, will serve as principal-in-charge of contract responsibilities (expect at the display). Christopher Souza will serve as the principal responsible for the management of PYRO's obligations under this Agreement.

### **ARTICLE 3. COMPENSATION**

Section 3.01. As sole and complete consideration for the services to be performed by PYRO, as specified in Section 2.01, CITY agrees to pay PYRO \$18,000.00.

#### **Payment of Compensation**

Section 3.02. A deposit of \$7,225.00 is due by May 4, 2018. Full final payment is due the first regular business day after the date set for the Display. A finance charge at a periodic rate of 1.5% per month, 18% annual percentage rate, or the maximum rate permitted by law, whichever is less, will be charged on any unpaid balance after ten (10) days from the date of the Display.

### **ARTICLE 4. OBLIGATIONS OF PYRO**

Section 4.01. PYRO agrees to devote the time and care necessary to perform the services, as described in Section 2.01, in a professional, competent, and safe manner, which include: The service of a licensed pyrotechnic operator, insurance coverage, sales tax and delivery, set-up and breakdown, processing the necessary fire department permit application and music to accompany aerial fireworks display.

## Legal Responsibilities

Section 4.02. PYRO shall secure, pay for and maintain in full force and effect for the duration of this Agreement required Workers' Compensation Insurance. In addition, PYRO shall keep itself informed of, and shall comply with, federal, state and local laws and regulations which affect its performance under this Agreement.

## Assignment

Section 4.03. Neither this Agreement nor any duties or obligations under this Agreement may be assigned by PYRO without the prior written consent of CITY.

## ARTICLE 5. OBLIGATIONS OF CITY

Section 5.01. CITY, at its own expense, shall provide PYRO with the following:

- A) A suitable Display Site in which to stage the Display, including a firing and fallout zone reasonably acceptable to PYRO in which the fireworks and firework debris may be exhibited, rise and fall safely.
- B) Adequate policing, guard protection, roping, fencing and/or other crowd control measures to prevent the access of the public or its property or any other people or property not authorized by PRYO into the Display Site.
- C) Standby firemen and/or any applicable permit fees as required by state and local statutes, ordinances or regulations.
- D) Access by PYRO, at all times, to the Display Site to set up the Display.

If CITY fails to fully comply with requirements A, B, C and/or D, set forth above, PYRO shall have no obligation to perform and CITY agrees to pay PYRO the entire contract price plus any additional reasonable expenses incurred because of said failure. PYRO must provide CITY with adequate proof of any additional expenses it alleges to have incurred. From there, CITY will evaluate whether it is obligated to pay for said expenses.

Section 5.02. If, in its sole discretion, CITY designates an area for members of the public to view the Display ("Spectator Area") and/or an area for vehicular parking ("Parking Area"), the CITY shall:

- A) Ensure that the Spectator Area does not infringe on the Display Site;
- B) Be solely responsible for ensuring that the terrain of the Spectator Area and any structures thereon, including, but not limited to, grandstands and bleachers are safe for use by spectators;
- C) Be solely responsible for ensuring that the Parking Area is safe for use; and
- D) Be solely responsible for policing, monitoring, and appropriately controlling spectator access to the Spectator Area and the Parking Area and for policing, monitoring and appropriately controlling the behavior of persons in these areas.

Section 5.03. It is expressly agreed that PYRO shall not be responsible for policing, monitoring, or otherwise supervising any Spectator Area, Parking Area, or the Display Site. Notwithstanding

the foregoing, PYRO shall ensure that (1) any designated Spectator Area or Parking Area is a safe distance from the Display Site and (2) the Display Site is cleared of any live firework debris originating from the program.

## ARTICLE 6. TERMINATION OF AGREEMENT

### Termination upon Notice

Section 6.01. CITY shall have the option to unilaterally cancel this Agreement prior to the date of the Display. If CITY exercises this option, CITY agrees to pay to PYRO, as liquidated damages, the following percentages of the agreed contract price: 1) 25% if cancellation occurs three (3) or more days prior to the date set for the Display, 2) 50% if cancellation occurs within two (2) days of the date set for the Display, 3) 75% if cancellation occurs on the date set for the Display, but prior to the time physical set-up of the Display actually begins, 4) 100% thereafter. If cancellation occurs prior to the date set for the Display, CITY agrees to pay PYRO in addition to the above percentages, the value associated with any custom work performed by PRYO or its agents including, but not limited, to music/narration tape production and/or sponsors logos. PYRO shall provide CITY adequate proof of any costs incurred in connection with any custom work performed by PYRO, before CITY authorizes payment for said costs.

In the event CITY cancels the Display, it would be impractical or extremely difficult to establish the actual amount of PYRO's damages. The foregoing represents a reasonable estimate of the damages PYRO will suffer if CITY cancels the Display.

### Termination upon Assignment

Section 6.02. Notwithstanding any other provision of this Agreement, the Agreement shall terminate automatically without prior notice upon any assignment in violation of Section 4.03, herein.

Section 6.03. CITY assumes the risk of weather, or other causes beyond PYRO's reasonable control, which may prevent the Display from being safely discharged on the scheduled date, or which may cause cancellation of the event for which CITY purchased the Display, or which may affect or damage such portion of the exhibits as must be placed and exposed a necessary time before the Display. It shall be within PYRO's sole discretion to determine whether or not the Display may be safely discharged on the scheduled date and the scheduled time. If, for any reason, beyond PYRO's reasonable control, including without limitation, inclement weather, PYRO cannot safely discharge the Display on the scheduled date or should any event for which CITY has purchased the Display be canceled, the parties shall make a good faith effort to negotiate a new Display date, which shall be within 60 days of the original Display date. CITY further agrees to pay PYRO for any additional expenses made necessary by the postponement, provided that PYRO provides CITY with adequate documentation demonstrating the purpose of the additional expenses. If after a good faith effort to agree to a new Display date, the parties are unable to do so, PYRO shall be entitled to liquidated damages pursuant to Section 6.01 herein.

## ARTICLE 7. GENERAL PROVISIONS

### Breach

Section 7.01. In the event PYRO breaches this Agreement, or is otherwise negligent in performing the Display provided for herein, CITY shall, under no circumstances, be entitled to recover monetary damages from PYRO beyond the amount CITY agreed to pay PYRO under this Agreement. CITY shall not, under any circumstances, be entitled to recover any consequential damages from PYRO including, without limitation, for loss of income, business or profits. Nothing in this paragraph shall be construed as a modification or limitation on the indemnity obligations of PYRO set forth in Section 7.06 and the insurance coverage set forth in Section 7.07, herein.

Section 7.02. CITY recognizes that because of the nature of fireworks, an industry accepted level of 3% of the product used in any display may not function as designed and this level of nonperformance is acceptable as full performance.

### Ownership Rights and Trade Names

Section 7.03. PYRO reserves the ownership rights and trade names that are used in or are a product of the Display. Any reproduction by sound, video or other duplication or recording process without the express written permission of PYRO is prohibited.

### Independent Contractor

Section 7.04. PYRO is and at all times shall remain as to CITY a wholly independent contractor. PYRO shall not, at any time or in any manner, represent that it or any of its principals or employees are officers, employees or agents of the CITY. PYRO shall comply with all applicable provisions of the Workers' Compensation Act and Labor Code of the State of California. PYRO shall not have any claim or right to any benefits or privileges available to an employee of the CITY such as health insurance and other similar benefits and shall be responsible for all such benefits, at its own cost and expense.

### Waiver of Breach

Section 7.05. No waiver of the breach of any of the covenants, agreements, restrictions, or conditions of this Agreement by either party to this Agreement shall be construed to be a waiver of any succeeding breach of the same or other covenants, agreements, restrictions or conditions of this Agreement. No delay or omission of either party to this Agreement in exercising any right, power or remedy herein provided in the event of default shall be construed as a waiver thereof, or acquiescence therein, or be construed as a waiver of a variation of any of the terms of this Agreement.

### Indemnity

Section 7.06. CITY shall indemnify and hold PYRO harmless from all claims and suits made against PYRO for bodily injury or property damage arising from (a) CITY's failure, including through or by its employees, agents and/or independent contractors, to perform its obligations

under this Agreement, including, without limitation, those contained in Section 5.01 and (b) CITY's failure to provide discretionary Spectator and Parking Areas referred to in Section 5.02 herein.

PYRO and CITY agree that CITY, its employees, agents, and officials should, to the extent permitted by law, be fully protected from any loss, injury, damage, claim, lawsuit, cost, expense, attorneys' fees, litigation costs, court costs or any other cost arising out of PYRO's performance under this Agreement. PYRO shall defend, indemnify, and hold harmless CITY, its employees, agents, and officials from any liability, claims, suits, actions, proceedings, losses, expenses or costs (including attorneys' fees) arising out of PYRO's performance under this Agreement. However, PYRO's duty to defend, indemnify, and hold CITY harmless shall not extend to any liability, loss, injury, damage, claim, lawsuit, cost, expense, attorneys' fees, litigation costs, court costs, or any other cost arising out of the negligence or willful misconduct of CITY, its employees, agents and officials.

### Insurance

Section 7.07. PYRO shall maintain the following insurance coverage in connection with the Display only: bodily injury and property damage, including products liability, with limits of not less than Two Million Dollars (\$2,000,000) per occurrence. Such insurance shall include CITY as an additional insured regarding claims made against CITY for bodily injury or property damage arising from the operations of PYRO in performing the Display provided for in this Agreement. Such insurance afforded by PYRO shall not cover claims made against CITY for bodily injury or property damage arising from (a) CITY's failure, including through or by its employees, agents and/or independent contractors, to perform its obligations under this Agreement, including, without limitation, those contained in Section 5.01 of this Agreement, or (b) CITY's failure to provide discretionary Spectator and Parking Areas referred to in Section 5.02 of this Agreement. PYRO shall provide CITY evidence of the insurance required herein, consisting of certificates of insurance which will state the City of Commerce, its officers, employees, and agents as additional insureds. Coverage shall apply on a primary noncontributing basis in relation to any other insurance or self-insurance, primary or excess, available to CITY or any employee or agent of CITY. Certificates of insurance are to reflect that such coverage: allows for the application of all coverage available, and requires 30 days' notice to CITY by certified mail of any cancellation or reduction in available limits or changes in the terms of coverage.

### Notices

Section 7.08. Any notice to be given hereunder by either party to the other shall be affected either by personal delivery in writing, or by certified mail, postage prepaid, return receipt requested. Mailed notices shall be addressed to the CITY in care of City Administrator, City of Commerce, 2535 Commerce Way, Commerce, California 90040, and to PYRO, in care of James R. Souza, President, PYRO-Pyro Spectaculars, Inc., P.O. Box 2329, Rialto, California 92377; however, each party may change the address by written notice in accordance with this section. Notices delivered personally will be deemed served as of actual receipt; mailed notices

will be deemed served as of the third (3rd) day after mailing or when received, whichever is sooner.

#### Entire Agreement of the Parties

Section 7.09. This Agreement supersedes any and all Agreements, either oral or written, between the parties hereto with respect to the rendering of services by PYRO to CITY and contains all of the covenants and agreements between the parties with respect to the rendering of such services in any manner whatsoever. Each party to this Agreement acknowledges that no representations, inducements, promises, or agreements, oral or otherwise, have been made by any party or anyone acting on behalf of any party, which are not embodied herein, and that no other agreement, statement, or promise not contained in this Agreement shall be valid or binding. Any modification of this Agreement will be effective only if it is in writing executed by the parties hereto.

Section 7.10. The covenants and agreements contained herein are binding on the parties hereto, their legal representatives, heirs, successors and assigns.

#### Governing Law

Section 7.11. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

#### Attorneys' Fees

Section 7.12. In the event that either of the parties to this Agreement institutes any action or proceeding against the other relating to enforcement or interpretation of the provisions of this Agreement, then and in that event, the unsuccessful party in such action or proceeding shall reimburse the prevailing party for the reasonable attorneys' fees and costs incurred therein by the prevailing party.

#### Venue

Section 7.13. This Agreement is made, entered into, executed and is to be performed in Commerce, Los Angeles County, California, and any action filed in any court or for arbitration for the interpretation, enforcement and/or otherwise of the terms, covenants and conditions referred to herein shall be filed in the applicable court in Los Angeles County, California.

#### City's Agent

Section 7.14. Robert Lipton, the Director of Parks and Recreation, shall act as the CITY's Project Manager regarding the subject matter of this Agreement. The Project Manager, or his designee, shall have the right to review, coordinate, and reasonably approve all work to be performed by PYRO pursuant to the terms of this Agreement and shall be the CITY's agent with respect to review, coordination and reasonable approval of the services to be performed by the PYRO.

EXECUTED in duplicate at Commerce, California, on the date and year first hereinabove written.

CITY OF COMMERCE

DATED: \_\_\_\_\_

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

Oralia Rebollo, Mayor

PYRO SPECTACULARS, INC.

DATED: \_\_\_\_\_

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

James R. Souza, President

APPROVED AS TO FORM:

DATED: \_\_\_\_\_

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

Noel Tapia, City Attorney

ATTEST:

DATED: \_\_\_\_\_

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

Lena Shumway, City Clerk