

AGREEMENT FOR PROFESSIONAL SERVICES BETWEEN DUDE SOLUTIONS, INC., AND THE CITY OF DULUTH

THIS AGREEMENT (“Agreement”) is made by and between the CITY OF DULUTH, a municipal corporation under the laws of the State of Minnesota (“the City”), and Dude Solutions, Inc., of Cary, North Carolina (“DSI”) (referred to collectively hereinafter as “the parties”). The effective date of this Agreement shall be that date on which all parties have executed this Agreement, as set forth on the latest date of the signatures below.

WHEREAS, the City desires to use DSI’s professional and internet-based services or applications (hereinafter, the “Energy Manager”) to enhance its ability to review, track, process and understand its energy, electricity and other utility usage across the City, and thus identify ways to reduce or eliminate unnecessary power consumption, improve operational efficiencies, and aid the City in achieving its long-term energy conservation and sustainability goals; and

WHEREAS, DSI has represented that it is qualified to assist and provide the City with enhancements to its energy, electricity, and general utility usage review, tracking and processing capabilities via its internet-based Energy Manager system, and is further willing to perform these services under the terms and conditions set forth herein;

NOW THEREFORE, in consideration of the mutual covenants and conditions contained herein, the parties hereto agree as follows:

ARTICLE I

Scope of Professional Services

DSI will perform the services set forth below, including other professional services generally or necessarily related thereto, as City staff may, from time to time, request:

- A. With the assistance of the City and its electricity provider, DSI will gather and import into Energy Manager the past 24 months of City energy, electricity, and other general utility

billing and usage data, as agreed upon by and between the parties, prior to the effective date of this Agreement;

- B. After the effective date of this Agreement (and continuing throughout the Term of the Agreement, as defined herein), DSI shall obtain and import the City's periodic and continuing energy, electricity and other agreed-upon utility billing and usage data into Energy Manager;
- C. DSI shall provide the City with internet access to its own designated Energy Manager account containing all identified energy, electricity, and other utility billing and usage data obtained and imported pursuant to this Agreement;
- D. DSI will provide City staff with training, as may be recommended by DSI or requested by the City, on the proper use of Energy Manager;
- E. DSI will provide the City with commercially reasonable levels of Energy Manager product support and customer service including, without limitation, telephone, e-mail and internet-based "live chat" support during the hours of 8:00 a.m. and 4:30 p.m. (Central Standard Time) Monday through Friday, excluding government holidays. For purposes of this provision, "commercially reasonable levels of customer service" means that DSI shall respond to City telephone calls, messages or emails within 24 hours of receipt of the call, message or email, and shall make best efforts to resolve any product or customer service issues within one week of receipt of the initial call, message or email;
- F. DSI shall use commercially reasonable efforts to make Energy Manager available (i) 99.9% of the time during the hours of 6:00 a.m. and 10:00 p.m. (Eastern Time), Monday through Friday, excluding government holidays ("Business Hours"), and (ii) 99.5% of the time, determined on a twenty-four (24) hours a day, seven (7) days a week basis. Availability shall be calculated on a monthly basis. For purposes of calculating availability, Energy Manager shall not be deemed unavailable during any period arising from: (i) routine system maintenance that is performed weekly during non-Business

Hours; (ii) scheduled downtime for extended system maintenance (of which DSI shall give at least 8 hours prior notice and which DSI shall schedule to the extent reasonably practicable outside of Business Hours); and (iii) any unavailability caused by circumstances beyond DSI's reasonable control, including, for example, an act of God, act of government, flood, fire, earthquake, civil unrest, act of terror, strike or other labor problem (other than one involving DSI employees), Internet service provider failure or delay, non-DSI software or hardware, or denial of service attack.

G. DSI will provide the City with any updates, corrections, or enhancements to Energy Manager during the Term of this Agreement at no cost to the City;

H. All travel or travel costs necessary for DSI to provide professional services to the City in accordance with this Agreement are included in the scope of services stated herein.

ARTICLE II

Professional Fees

During the first nine (9) months following the effective date of this Agreement, DSI agrees to provide the City with Energy Manager and the related professional services set forth herein in accordance with the following professional fees, payable within sixty (60) days following the effective date of this Agreement:

| <u>Item</u> | <u>Term</u> | <u>Pricing Based On</u> | <u>Cost</u> |
|---|-------------|-------------------------|--------------------|
| Energy Manager | 9 months | 500 Accounts | \$7,875.00 |
| Energy Manager Quickstart | One-Time | 500 Accounts | \$6,075.00 |
| Energy Manager – 2yr Hist Bill Entry Import | One-Time | 500 Accounts | \$14,000.00 |
| Energy Manager – Utility Bill Processing | 9 months | 500 Accounts | \$7,000.00 |
| | | | |
| | | Total Cost: | \$34,950.00 |

Pricing for any first renewal of this Agreement at the end of the initial 9-month term shall be \$25,500.00, payable within sixty (60) days following the effective date of the first renewal of this Agreement.

ARTICLE III

City Responsibilities

- A. On a monthly basis, the City shall make best efforts to provide DSI with all historic, present and continuing energy, electricity, and other agreed-upon utility billing and usage data subject to this Agreement – whether in hardcopy or electronic format – either directly, by provision of any necessary authorizations, permissions or access for DSI to obtain the data from the City’s utility providers directly, or both.
- B. It is the City’s responsibility to direct its utility provider[s] to provide DSI with any missing, incomplete or inaccurate utility billing or usage data; it is DSI’s responsibility to receive and process the utility billing or usage data and enter it into the corresponding City Energy Manager account.
- C. The parties recognize that the usefulness and success of Energy Manager depends on DSI’s ability to regularly obtain the City’s utility billing and usage data on a monthly basis, and that it is in the best interests of the parties to this Agreement to cooperate to ensure that DSI obtains the data contemplated by this Agreement on a regular and timely basis.

ARTICLE IV

Assignability

DSI shall not in any way assign or transfer any of its rights or interests under this Agreement without the prior written consent of the City. Notwithstanding the foregoing, either party may assign this Agreement without the prior written consent of the other party to the surviving entity

in a merger or consolidation or to a purchaser of all or substantially all of the assets of that party.

ARTICLE V

Term

This Agreement shall be effective upon the date on which all parties have executed the Agreement, as set forth on the latest date of the signatures below (“the Effective Date”), and shall remain in effect for a term of nine (9) months following the Effective Date, unless terminated earlier as provided for herein.

ARTICLE VI

Termination & Refunds

The City may, by provision of thirty (30) days written notice, specifying the effective date thereof, terminate this Agreement in whole or in part, with or without cause.

If, within sixty (60) days of the effective date of this Agreement, the City is not satisfied with the performance or utility of Energy Manager, the City may terminate this Agreement and receive a full refund of any and all professional fees paid in accordance with this Agreement.

If, pursuant to written thirty (30) day notice, the City terminates this Agreement on or after sixty (60) days following the effective Date of this agreement, DSI shall refund a percentage of the professional fees paid pursuant to this Agreement in proportion to the number of days remaining under the Term of the Agreement.

ARTICLE VII

Standard of Performance

DSI agrees that all services provided to the City under this Agreement shall be in accordance with the generally accepted standards of the profession for provision of services of this type.

ARTICLE VIII

DSI Warranty – Intellectual Property

DSI represents and warrants to the City that it holds all rights necessary in and to any patent, copyright, trademark, service mark or other intellectual property right used in, or associated with Energy Manager, and that DSI is duly authorized to enter into this Agreement and provide Energy Manager to the City pursuant to this Agreement. DSI agrees to defend and indemnify the City, its executives, officers, directors, employees, and from any and all patent, copyright, trademark, service mark or other intellectual property claims arising out of, or relating to, the City's authorized use of Energy Manager.

Disclaimer of Warranties

OTHER THAN THE IMMEDIATELY PRECEDING WARRANTY, DSI AND ITS LICENSORS MAKE NO REPRESENTATION, WARRANTY, OR GUARANTY AS TO THE RELIABILITY, TIMELINESS, QUALITY, SUITABILITY, TRUTH, AVAILABILITY, ACCURACY OR COMPLETENESS OF THE SERVICES OR ANY CONTENT. DSI AND ITS LICENSORS DO NOT REPRESENT OR WARRANT THAT: (I) THE USE OF THE SERVICES WILL BE SECURE, TIMELY, UNINTERRUPTED OR ERROR-FREE OR OPERATE IN COMBINATION WITH ANY OTHER HARDWARE, SOFTWARE, SYSTEM OR DATA; (II) THE SERVICES WILL MEET YOUR REQUIREMENTS OR EXPECTATIONS; (III) ANY STORED DATA WILL BE ACCURATE OR RELIABLE; (IV) THE QUALITY OF ANY PRODUCTS, SERVICES, INFORMATION, OR OTHER MATERIAL PURCHASED OR OBTAINED BY YOU THROUGH THE SERVICES WILL MEET YOUR REQUIREMENTS OR EXPECTATIONS; (V) ERRORS OR DEFECTS WILL BE CORRECTED; (VI) THE SERVICES OR THE SERVER(S) THAT MAKE THE SERVICES AVAILABLE ARE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS. THE SERVICES AND ALL CONTENT IS PROVIDED TO YOU STRICTLY ON AN "AS-IS" BASIS. ALL CONDITIONS, REPRESENTATIONS AND WARRANTIES, WHETHER EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR

PURPOSE, OR NON-INFRINGEMENT OF THIRD PARTY RIGHTS, ARE HEREBY
DISCLAIMED TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW BY DSI AND
ITS LICENSORS.

ARTICLE IX

Proprietary Rights

The City acknowledges and agrees that, as between the City and DSI, DSI retains all ownership right, title, and interest in and to Energy Manager and any and all related applications, software, documentation or content, including, without limitation, all corrections, enhancements, improvements to, or derivative works thereof (collectively, "Derivative Works"), and in all Intellectual Property Rights therein or thereto. To the extent any Derivative Work is developed by DSI based upon ideas or suggestions submitted by the City to DSI, the City hereby irrevocably assigns all rights to modify or enhance the Applications and the Services using such ideas or suggestions or joint contributions to DSI, together with all Intellectual Property Rights related to such Derivative Works. Nothing contained in this Agreement shall be construed to convey to the City (or to any party claiming through the City) any Intellectual Property Rights in or to Energy Manager, and any and all related applications, software, documentation or content, as previously described, other than the rights expressly set forth in this Agreement.

ARTICLE X

Government Data

A. Data Practices Act

All government data collected, created, received, maintained or disseminated for any purpose by the parties pursuant to this Agreement shall be governed by the provisions of the Minnesota Government Data Practices Act, Minn. Stat. §§ 13.01 et seq. ("the Data

Practices Act”). DSI agrees to comply with the Data Practices Act as it applies to any data provided to it by the City or third parties, and further agrees to cooperate and assist City staff in complying with any data practices requests arising out of, or related to, information generated or submitted via Energy Manager.

B. Trade Secret Information

“Trade secret information” means all data defined under Minn. Stat. § 13.37 (General Nonpublic Data), as may be amended. It shall be the responsibility of DSI to clearly mark any trade secret materials supplied to the City in performance of this Agreement, including a statement with the submission of such information justifying the trade secret designation for each item. DSI agrees to defend any action seeking release of materials it believes to be trade secret, and indemnify and hold harmless the City, its agents and employees, from any judgments or damages awarded against the City in favor of the party requesting the materials, and any and all costs connected with such defense. DSI agrees that this indemnification survives as long as the trade secret materials are in the possession of the City.

C. Ownership, Security and Retention of City Data

For purposes of this Agreement, “City data” means “government data” as defined by the Data Practices Act, Minn. Stat. § 13.02, subd. 7, as may be amended. The City retains ownership of all City data generated, disseminated or received via Energy Manager. DSI shall maintain industry-appropriate administrative, physical and technical safeguards for the protection of the security, confidentiality and integrity of City data. DSI agrees to backup and retain City data for not less than five (5) years from the date of receipt or submission, except as may otherwise be required by law.

ARTICLE XI

Independent Contractor

It is agreed that nothing herein contained is intended or shall be construed in any manner as creating or establishing a relationship of co-partners between the parties hereto or of constituting DSI as an agent, representative or employee of the City for any purpose or in any manner whatsoever. DSI and any officers or employees thereof shall not be considered an employee of the City, and any and all claims that may or might arise under the Worker's Compensation Act of the State of Minnesota on behalf of DSI arising out of employment or alleged employment, including without limitation, claims of discrimination against the City, its officers, agents, contractors and employees, shall in no way be the responsibility of the City. DSI and its officers, agents, contractors and employees shall not be entitled to any compensation or rights or benefits of any hospital care, sick leave and vacation pay, Worker's Compensation, Unemployment Insurance, disability pay or severance pay. Furthermore, the City shall not, in any way, be responsible to defend, indemnify or save harmless DSI from liability or judgments arising out of the intentional or negligent acts or omissions of DSI or any of its officers, agents, contractors and employees while performing the services specified in this Agreement.

ARTICLE XII

Indemnity, Insurance, and Liability

A. Indemnity

DSI agrees that it shall defend and indemnify the City and its officers, agents, servants and employees from and against any and all claims, demands, suits, judgments, costs and expenses asserted by any person or persons, including agents or employees of the City or of DSI, by reason of death of or injury to person or persons or the loss of or damage to property arising out of DSI's negligent acts or omissions or willful misconduct during its performance under this Agreement, except to the extent any such claims are attributable to the negligent acts or omissions or willful misconduct of the City. On ten

(10) business days written notice issued by the City, DSI will appear and defend all lawsuits against the City arising out of such injuries or damage.

B. Insurance

During the term of this Agreement, DSI shall provide General Liability and Automobile Liability Insurance with limits not less than \$1,500,000 Single Limit, and shall be with a company approved by the City; and shall provide for the following: Liability for Premises, Operations, Completed Operations, Independent Contractors, and Contractual Liability.

City of Duluth shall be named as Additional Insured under the General Liability, Excess Umbrella Liability (an Umbrella policy with a “following form” provision is acceptable if written verification is provided that the underlying policy names the City of Duluth as an additional insured) and Automobile Liability, or as an alternate, DSI may provide Owners-Contractors Protective policy, naming itself and the City of Duluth. DSI shall also provide evidence of Statutory Minnesota Worker’s Compensation Insurance. DSI is to provide certificate of insurance evidencing such coverage with 30-days notice of cancellation, non-renewal or material change provocations included. The City of Duluth does not represent or guarantee that these types or limits of coverage are adequate to protect DSI’s interests and liabilities.

If a certificate of insurance is provided, the form of the certificate shall contain an unconditional requirement that the insurer must notify the City without fail not less than 30 days prior to any cancellation, non-renewal or modification of the policy or coverages evidenced by said certificate and shall further provide that failure to give such notice to the City will render any such change or changes in said policy or coverages ineffective as against the City.

The use of an “Accord” form as a certificate of insurance shall be accompanied by two forms – 1) ISO Additional Insured Endorsement (CG 2010 pre 2004); and 2) Notice of Cancellation Endorsement (IL 7002) or equivalent, as approved by the Duluth City Attorney’s Office.

C. Limitation of Liability

IN NO EVENT SHALL DSI, IN THE AGGREGATE, BE LIABLE FOR DAMAGES IN EXCESS OF ONE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$1,500,000) WHICH ARE THE RESULT OF DSI'S NEGLIGENCE OR WILLFUL MISCONDUCT RESULTING IN PERSONAL INJURY OR PROPERTY DAMAGE DURING THE PERFORMANCE OR NON-PERFORMANCE OF THIS AGREEMENT. FOR DAMAGES ARISING OUT OF OR RELATED TO THOSE CLAIMS FOR ANYTHING BUT DSI'S NEGLIGENCE OR WILLFUL MISCONDUCT RESULTING IN PERSONAL INJURY OR PROPERTY DAMAGE, AS EXPRESSLY STATED ABOVE, IN NO EVENT SHALL DSI, IN THE AGGREGATE, BE LIABLE FOR DAMAGES TO SUBSCRIBER IN EXCESS OF THE AMOUNT OF 2X (TWO TIMES) THE SUBSCRIPTION FEES PAID BY SUBSCRIBER TO DSI PURSUANT TO THIS AGREEMENT DURING THE TWELVE MONTHS PRIOR TO THE LAST ACT OR OMISSION GIVING RISE TO THE LIABILITY. UNDER NO CIRCUMSTANCES SHALL EITHER PARTY HAVE ANY LIABILITY TO THE OTHER PARTY WITH RESPECT TO ITS OBLIGATIONS UNDER THIS AGREEMENT OR OTHERWISE FOR LOSS OF PROFITS, OR CONSEQUENTIAL, OR PUNITIVE DAMAGES, EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES OCCURRING, AND WHETHER SUCH LIABILITY IS BASED ON BREACH OF CONTRACT, TORT, STRICT LIABILITY, PRODUCTS LIABILITY OR OTHERWISE.

ARTICLE XIII

Taxes and Fees

DSI shall pay all licenses, fees, taxes, and assessments of any kind whatsoever that arise because of, out of, or in the course of DSI's operations under this Agreement, including but not limited to any applicable sales, income or real estate taxes. DSI shall further be obligated to pay any sales and use taxes imposed by any governmental entity entitled to impose such taxes on or before the date they are due and to file all required reports and forms in proper form related thereto on or before their due date. It is further agreed that the City may pay the same on behalf of DSI and immediately collect the same from DSI to avoid any fees, fines or penalties any governmental entity may be imposing or seeking to impose upon the City.

ARTICLE XIV

Civil Rights Assurances

DSI, for itself and its officers, agents, servants and employees, as part of the consideration of this Agreement, does hereby covenant and agree that:

- A. No person on the grounds of race, color, creed, religion, national origin, ancestry, age, sex, marital status, status with respect to public assistance, sexual orientation and/or disability shall be excluded from any participation in, denied any benefits of or otherwise subjected to discrimination with regard to the services to be performed pursuant to this Agreement.
- B. All activities to be conducted pursuant to this Agreement shall be conducted in accordance with the Minnesota Human Rights Act of 1974, as amended (Chapter 363), Title 7 of the United States Code, and any regulations and executive orders which may be affected with regard thereto.

ARTICLE XV

Rules and Regulations

DSI agrees to observe and comply with all laws, ordinances, rules and regulations of the United States of America, the State of Minnesota, the City, and their respective agencies which are applicable to its activities under this Agreement.

ARTICLE XVI

Notices

Notice to the City or DSI provided for herein shall be sufficient if sent by regular United States mail, postage prepaid, addressed to the parties at the addresses hereinafter set forth or to such other respective persons or addresses as the parties may designate to each other in writing from time to time.

| | |
|-----------------|--|
| City of Duluth: | City of Duluth Energy Coordinator Property & Facilities Management 1532 W. Michigan Street |
|-----------------|--|

Duluth, MN 55806

DSI:

Dude Solutions, Inc.
c/o Contract Manager
11000 Regency Parkway, Suite 110
Cary, NC 27518

ARTICLE XVII

Waiver

Any waiver by either party of any provision of this Agreement shall not imply a subsequent waiver of that or any other provision.

ARTICLE XVIII

Applicable Law, Jurisdiction and Venue

This Agreement, together with all of its paragraphs, terms and provisions is made in the State of Minnesota and shall be construed and interpreted in accordance with the laws of the State of Minnesota. The appropriate venue and jurisdiction for any litigation arising in relation to this Agreement shall be those courts located within the State of Minnesota, County of St. Louis.

ARTICLE XIX

Severability

In the event any provision herein shall be deemed invalid or unenforceable, the remaining provisions shall continue in full force and effect and shall be binding upon the parties to this Agreement.

ARTICLE XX

Entire Agreement

It is understood and agreed that the entire agreement of the parties is contained herein and that this Agreement supersedes all oral agreements and negotiations between the parties relating to the subject matter hereof. Any amendment to this Agreement shall be in writing and shall be executed by the same parties who executed the original agreement or their successors in office.

ARTICLE XXI

Multiple Counterparts

This Agreement may be executed in multiple counterparts, each of which shall be deemed an original instrument, and such counterparts together shall constitute one and the same instrument.

[Remainder of page left intentionally blank, signature page to follow.]

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed intending to be bound thereby.

CITY OF DULUTH

DUDE SOLUTIONS, INC.

By _____
Its Mayor
Dated _____

By _____
Senior Vice President, Sales
Dated _____

Attest _____
City Clerk
Dated _____

Countersigned:

City Auditor
Dated _____

Approved as to form:

City Attorney
Dated _____