

RESOLUTION NO. R032321

RESOLUTION APPROVING TENT RENTAL AND SERVICE AGREEMENT

WHEREAS, the City of Fishers Department of Parks & Recreation hosts firework shows throughout the year;

WHEREAS, MIAND, INC., d/b/a Mad Bomber Fireworks Productions has successfully, safely and cost-effectively provided firework performances to the City; and

WHEREAS, Mad Bomber and the City desire to enter into the City Of Fishers Professional Services & Performance Agreement attached hereto and incorporated herein as Exhibit A (the "Agreement") for Mad Bomber to provide fireworks shows for the 2021 season.

NOW, THEREFORE, BE IT RESOLVED by the City of Fishers Board of Public Works & Safety meeting in a duly noticed and regularly scheduled meeting as follows:

Section 1. The Agreement is hereby approved.

Section 2. This Resolution shall be in full force and effect from and upon its adoption and in accordance with Indiana law.

Section 3. The Mayor is authorized to execute the Agreement.

ALL OF WHICH IS RESOLVED by the City of Fishers Board of Public Works & Safety this 23rd day of March, 2021.

**BOARD OF PUBLIC WORKS & SAFETY, CITY OF FISHERS
HAMILTON COUNTY, INDIANA**

YAY**NAY****ABSTAIN**

	Scott Fadness, Chairman		
DocuSigned by: <i>Jeff Lantz</i> E5E7E871F2B8417...	Jeff Lantz, Member		
DocuSigned by: <i>Jason Meyer</i> EA138AD7F544409...	Jason Meyer, Member		

ATTEST: *Lindsay Downing*
Lindsay Downing, Board Clerk

DATE: 03/23/2021

This instrument prepared by: Christopher P. Greisl, City Attorney, City of Fishers, Hamilton County, Indiana, One Municipal Drive, Fishers, Indiana, 46038

CITY OF FISHERS PROFESSIONAL SERVICES & PERFORMANCE AGREEMENT

This City of Fishers Professional Services & Performance Agreement ("Agreement") is dated this 10th day of March, 2021 (the "Effective Date") by and between MIAND, INC., d/b/a Mad Bomber Fireworks Productions, 3999 East Hupp Road, Bldg. R-3-1, La Porte, Indiana 46350 ("Company") and the City of Fishers, Hamilton County, Indiana ("City" and together with the Company, the "Parties") on the following terms and conditions:

Section 1. General Event Information. Each of the following capitalized terms shall be defined as follows:

Singularly Event and one or more, Events:	Any occasion(s) on which Company provides Services.
Singularly Event Date and one or more, Event Dates:	The date(s) of the Event(s), which Event Date(s) shall be requested by City, and Company shall make reasonable effort to accommodate City's request.
Event Duration:	The scheduled amount of time for each Event.
Singularly Venue and one or more, Venues:	The location(s) of the Event(s). City shall determine the Venue(s); provided, however, Company shall have the right to reject the Venue(s) selected by City, if Company reasonably determines that the Services cannot be safely provided such Venue(s).
Time of Load-In:	City shall determine the Time of Load-In for each Event and provide such time in writing to Company and advise Company in writing.
Doors Open Time:	City shall determine the Doors Open Time for each Event and provide such time in writing to Company and advise Company in writing.
Compensation:	City and Company shall mutually determine, in writing, the amount of Compensation that City shall pay to Company for each Event; provided, however, the (a) aggregate amount paid to Company for all Events pursuant to this Contract shall not exceed One Hundred Thousand and no/100 Dollars (\$100,000.00), and (b) Company shall not be compensated until the City utilizes the Credit. <u>For the avoidance of doubt, the Compensation is in addition to the Credit, shall be paid after the Credit is used, and the total Compensation shall not exceed One Hundred Thousand and no/100 Dollars (\$100,000.00). Accordingly, pursuant to this Agreement, the City may acquire Services totaling One Hundred Thirty-Five Thousand and no/100 Dollars (\$135,000.00) (\$35,000 Credit and \$100,000.00 Compensation).</u>

Credit: A credit in the amount of Thirty-Five Thousand and no/100 Dollars (\$35,000.00) to be applied, prior to the payment of any Compensation, -to the cost of the Event(s).

Notice Address: "City"
City of Fishers
Attn: Sarah Sandquist
(sandquists@fishers.in.us)
and
Chris Greisl, City Attorney
(greisl@fishers.in.us)
1 Municipal Drive
Fishers, Indiana 46038

"Company"
MIAND, INC.
Attn: Marty Miller
() Marty@MADBOMBFIREFWORKS.COM
3999 East Hupp Road, Bldg. R-3-1
La Porte, Indiana 46350.

Term: Beginning on the Effective Date and continuing until completion of the Events, unless earlier terminated as provided herein.

Section 2. Payment Terms. No additional Compensation shall be paid to Company until the City has used the Credit. Subject to the City's right to utilize the Credit, on After the Credit has been used, -or before each of the Event Dates, City shall pay to Company the Compensation for the specific Event. All Compensation shall be paid to Company at the following:
July 5th 2021, September 12th 2021, January 1st 2022 Other than the Compensation, Company shall not be entitled to additional payment, except as specifically provided herein.

Section 3. Company Services. On each of the Event Dates, Company shall provide a live firework show and display for the Event Duration for such Event, together with all production elements required for such fireworks display (collectively, the "Services"). By executing this Agreement, Company hereby acknowledges and agrees that Company has thoroughly investigated and considered the Services to be performed, (b) has carefully considered how the Services should be performed, and (c) fully understands the facilities, difficulties, and restrictions related to the Services provided pursuant to this Agreement. Company warrants that Company has or will investigate the Venue of each Event and will become familiar with the physical conditions that exist prior to commencement of Services hereunder. It is agreed that City makes no warranty as to the physical conditions that may exist with respect to any Venue or with conditions that may affect Services provided by Company, including, without limitation weather and nearby facilities, structures and property. City is relying on Company to determine whether (a) each of the Venues is safe for the Event; and (b) the weather and other conditions are suitable for Company to provide the Services. Moreover, Company shall provide the Services in

strict compliance with the Laws. For purposes of this Agreement, "Laws" shall mean all local, state and federal laws, ordinances, regulations and rules, as applicable.

Section 4. Production. Subject to **Section 8** and except as otherwise stated herein, the Parties acknowledge and agree that production of the Event is the sole, exclusive responsibility of Company, and Company shall be likewise responsible for checking all equipment and materials used to provide the Services for defects to ensure proper functioning on each of the Event Dates.

Section 5. Tickets. At its sole cost and expense, City may market and sell tickets to the Event. City shall retain all money received from ticket sales, if any.

Section 6. City Cancellation.

A. Immediate Termination. City may immediately cancel any of the Events and terminate this Agreement upon written notice if Company (a) engages in gross misconduct (notwithstanding whether such conduct concerns the subject of this Agreement); or (b) if it becomes generally known that Company is insolvent, plans to make a general assignment for the benefit of creditors, is expected to file a voluntary petition of bankruptcy, suffers or permits the appointment of the receiver for its business or assets, or becomes subject to any proceeding under any bankruptcy or insolvency law, whether domestic or foreign, dissolved or liquidated, voluntarily or otherwise.

B. Default. Subject to the right to Cure and upon written notice, City may terminate this Agreement and cancel any of the Events as a result of Company's breach of any of the terms of this Agreement, and Company shall, within fifteen (15) business days, reimburse City for any portion of the Compensation previously paid; provided, however, City shall be responsible for payment for any Event completed by Company to City's commercially reasonable satisfaction.

C. Without Cause. By providing written notice not less than thirty (30) days prior to any Event, City shall be entitled to cancel such Event and/or terminate this Agreement.

Section 7. Force Majeure. If an Event is cancelled as a result of Force Majeure, either Party shall notify the other Party in writing as soon as is practicable following such Force Majeure event, and the Parties shall not have any obligation regarding such Event cancellation. For purposes of this Agreement, "Force Majeure" shall mean any cause that is not within the reasonable control of City or Company, including, without limitation: (a) unusually inclement weather; (b) the unusual unavailability of materials, equipment, services, or labor; (c) utility or energy shortages; (d) disaster, strikes, civil disorder; or (e) epidemic, pandemic and other acts of God.

Section 8. Security. City shall provide emergency personnel at each of the Venues immediately prior to, during and following each of the Events. Company shall have no duty to provide security personnel, security equipment or emergency equipment or to monitor or control the actions or behavior of persons or the movement of spectators during the Events.

Section 9. Insurance. Company shall maintain a commercial, general liability policy of insurance throughout the Term of this Agreement, which policy shall not be modified or canceled without written notice to City at least fifteen (15) days in advance of such cancellation. The policy of general liability insurance required by this Section 9 shall be maintained in the following minimum amounts: \$1,000,000.00 per claim; \$3,000,000, aggregate. As a condition subsequent to the effectiveness of this Agreement, Company shall provide City a certificate of insurance that meets the minimum requirements of this Section 9 provision.

Section 10. Default, Notice and Cure. Except as otherwise set forth herein, neither Party shall be deemed to be in breach of any of its obligations hereunder unless the Party not in breach serves specific written notice of such alleged breach, and the Party in breach shall have failed to cure such breach, if any, within five (5) business days following receipt of such written notice (but in no event later than 5:00 p.m. EST on the date that is three (3) business days prior to the Event Date) (the "Cure").

Notices to be given to either Party hereto shall be in writing and shall be delivered to the at the addresses included in Section 1 of this Agreement by (i) mail (registered, or certified, return receipt requested, postage pre-paid); (ii) overnight courier with proof of receipt; (iii) telefax (with a copy by express courier service); or (iv) e-mail (provided recipient has responded by email or otherwise in writing to confirm receipt). Notices shall conclusively be deemed to have been given seventy-two (72) hours after the date of mailing or twenty-four hours (24) after the date of transmission by telefax or e-mail.

Section 11. Assignment. The experience, knowledge, capability, and reputation of the Company was a substantial inducement for the City to enter into the Agreement. Therefore, Company shall not contract with or assign this Agreement or any portion hereof to any other entity to perform in whole or in part the Services, without the express written approval of the City.

Section 12. Outstanding Amounts Owed. Any amount owed hereunder that is not paid within five (5) days of the date due shall bear interest at the prime rate as published in *The Wall Street Journal* plus five percent (5%) per annum, until paid in full.

Section 13. Indemnity. Company covenants and agrees at its sole cost and expense to indemnify and save harmless City and its respective officers and agents (the "Indemnitees") harmless of, from and against, any and all Claims resulting directly or indirectly from the Event. For purposes of this Agreement, "Claims" shall mean liabilities, damages, injuries, losses, liens, costs, and/or expenses whether related to Company or any third Party's bodily injury, real property or personal property (including, without limitation, reasonable attorneys' fees).

Section 14. No Remedy Exclusive; Limitation. No right or remedy herein conferred upon, or reserved to, a non-defaulting Party is intended to be exclusive of any other available right or remedy, unless otherwise expressly stated; instead, each and every such right or remedy shall be cumulative and in addition to every other right or remedy given under this Agreement or now or hereafter existing at law or in equity.

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Section 15. Merger.

All prior agreements, understandings, and commitments are hereby superseded, terminated, and merged herein, and shall be of no further force or effect.

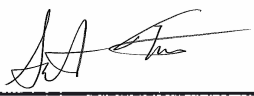
Section 16. Non-Discrimination. Company shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, age or national origin. Company shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. Company agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause; and Company will state, in all solicitations or advertisements for employees placed by or on behalf of Company that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

Section 17. Miscellaneous. This Agreement shall inure to the benefit of, and be binding upon, City and Company. This Agreement shall be governed by, and construed in accordance with, the laws of the State of Indiana. All proceedings arising in connection with this Agreement shall be tried and litigated only in the state courts in Hamilton County, Indiana, or the federal courts with venue that includes Hamilton County, Indiana. Company waives, to the extent permitted under applicable law the right to assert the doctrine of "forum non conveniens" or (B) object to venue. In the event either Party hereto employs an attorney in connection with Claims by one Party against the other arising from the operation of this Agreement, the non-prevailing party shall pay the prevailing party all reasonable fees and expenses, including attorneys' fees, incurred in connection with such Claims. The term "prevailing party" as used in this Agreement shall include, but not be limited to, a party who obtains legal counsel or brings an action against the other by reason of the other's breach or default and obtains substantially the relief sought whether by compromise, mediation, settlement, judgment or otherwise. This Agreement is for an independent contractor relationship, and Company is not and shall not be deemed an employee of City. This Agreement may be modified only by a written agreement signed by City and Company. The invalidity, illegality, or unenforceability of any one or more of the terms and conditions of this Agreement shall not affect the validity, legality, or enforceability of the remaining terms and conditions hereof. The Addendum to this Agreement is attached hereto and incorporated herein by reference. Time is of the essence in this Agreement. If any provision of this Agreement or application to any party or circumstances shall be determined by any court of competent jurisdiction to be invalid and unenforceable to any extent, the remainder of this Agreement or the application of such provision to such person or circumstances, other than those as to which it is so determined invalid or unenforceable, shall not be affected thereby, and each provision hereof shall be valid and shall be enforced to the fullest extent permitted by law; provided that, in lieu of such invalid or unenforceable provision, there will be added to this Agreement a provision as similar to the invalid or unenforceable provision as is possible to reflect the intent of the Parties and still be valid and enforceable.

[signatures on following page]


IN WITNESS WHEREOF, City and Company have executed this Agreement as of the day and year first written above.

"CITY"
CITY OF FISHERS



Scott Fadness, Mayor

"COMPANY"
MIAND, INC.,



ITS: MARY MILLER

MM



Board Action Form

MEETING DATE	03/23/21			
TITLE	Request to approve Professional Services Agreement with Madbomber Fireworks			
SUBMITTED BY	Name & Title: Sarah Sandquist, Director of Parks and Recreation Department:			
MEETING TYPE	<input type="checkbox"/> Work Session <input type="checkbox"/> Executive	<input checked="" type="checkbox"/> Regular	<input type="checkbox"/> Special	<input type="checkbox"/> Retreat
AGENDA CLASSIFICATION	<input type="checkbox"/> Consent	<input type="checkbox"/> Ordinance	<input checked="" type="checkbox"/> Resolution	<input type="checkbox"/> Regular
ORDINANCE/RESOLUTION (New ordinances or resolutions are assigned a new number)	<input type="checkbox"/> 1 st Reading	<input type="checkbox"/> 2 nd Reading	<input type="checkbox"/> Public Hearing	<input type="checkbox"/> 3 rd Reading
	Ordinance #:		Resolution #: R032321	
CONTRACTS (Contracts include other similar documents such as agreements and memorandum of understandings. <u>Check all applicable boxes pertaining to contracts</u>)	<input checked="" type="checkbox"/> Contract required for this item		<input checked="" type="checkbox"/> Signed copy of contract attached	
	<input type="checkbox"/> Seeking award or other scenario & will provide contract at a later date		<input type="checkbox"/> No contract for this item	
	<input checked="" type="checkbox"/> Contract over \$50,000 Please mark the box in the other column that pertains to this contract.		<input checked="" type="checkbox"/> Services <input type="checkbox"/> Capital Outlay <input type="checkbox"/> Debt Services	
HAMILTON COUNTY (Some documents need recorded by the City Clerk)	<input type="checkbox"/> Document must be recorded with the County Recorder's Office <input type="checkbox"/> Wait 31 days prior to filing with the County Recorders' Office		<input checked="" type="checkbox"/> Document does not need recorded with the County Recorder's Office	

APPROVALS/REVIEWS	<input type="checkbox"/> Assistant/Deputy Department Head	<input type="checkbox"/> Controller's Office
	<input checked="" type="checkbox"/> Department Head	<input type="checkbox"/> Finance Committee
	<input type="checkbox"/> Deputy Mayor	<input type="checkbox"/> Technical Advisory Committee
	<input type="checkbox"/> Mayor	<input type="checkbox"/> Other:
	<input checked="" type="checkbox"/> Legal Counsel – <i>Name of Reviewer: Jennifer Messer</i>	
BACKGROUND (Includes description, background, and justification)	Madbomber Fireworks plans to conduct several fireworks displays in 2021. This agreement includes the dates of 6/15 for High School Graduation ceremony, 7/4 for 4 th of July, 8/28 for Spark!Fishers, and 9/11 for Blast on the Bridge	
BUDGETING AND FINANCIAL IMPACT (Includes project costs and funding sources)	Budgeted \$:	Not to exceed \$135,000
	Expenditure \$:	Not to exceed \$135,000
	Source of Funds:	General Fund- Parks- Professional Services
	Additional Appropriation #:	N/A
	Narrative:	N/A
OPTIONS (Include <i>Deny Approval</i> Option)	1.	Approve this request
	2.	Deny this request
	3.	Provide Alternative Direction
	4.	
PROJECT TIMELINE	Upon approval of this agreement, the first show will take place on 6/15/21	
STAFF RECOMMENDATION (Board reserves the right to accept or deny recommendations)	Staff recommends approval of this request.	
SUPPLEMENTAL INFORMATION (List all attached documents)	1. Agreement	